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The Honorable Ambassador David Huebner, Chairperson
and Honorable Commissioners
California Law Revision Commission
c/o Legislative Counsel Bureau
925 L Street, Suite 275
Sacramento, California 95814

Re: Antitrust Law – Study B-750 – Comment On Behalf Of The California Chamber Of Commerce

Dear Chairperson Huebner and Commissioners:

We write as counsel for the California Chamber of Commerce ("CalChamber").[1] CalChamber is a non-profit business association with more than 14,000 members, both individual and corporate, representing twenty-five percent of the State's private-sector workforce and virtually every economic interest in California. While CalChamber represents several of the largest corporations in California, seventy percent of its members have 100 or fewer employees. CalChamber acts on behalf of the business community to improve the State's economic and jobs climate by representing business on a broad range of legislative, regulatory, and legal issues.

CalChamber thanks the California Law Revision Commission (the "CLRC") for the opportunity to comment on the important work the CLRC is undertaking with respect to California's antitrust laws, Study B-750. CalChamber looks forward to continuing to work with the CLRC on developing policies that ensure a strong and dynamic business environment that benefits all Californians. This comment is primarily focused on the January 25, 2024 report and legislative proposal (the "Legislative Proposal") of the Single-Firm Conduct Working Group (the "Working Group").

Executive Summary: The Legislative Proposal Is Not Based On Need Or Supported By Economic Analysis, And Its Imprecision Will Chill Competition In California To The Detriment Of Consumers And Workers In The State.

In a free market, competitors increase market share and undercut rivals by slashing prices to consumers and by improving their product offerings. In a free market, start-ups strive to gain a foothold and take market share from incumbents by introducing innovative products aimed at driving outdated and inefficient competitors into ruin. In a free market, manufacturers give discounts and other benefits to resellers seeking to invest in, and promote, that manufacturer's product to the exclusion of its competitors. In a free market, businesses give rebates to loyal customers choosing to forego purchases from competing businesses. In a free market, businesses that obtain market power based on better products or services, first-mover advantage, or an efficient allocation of resources are allowed to enjoy

[1] CalChamber is also being advised on this matter by Dr. Henry Kahwaty and Brad Noffsker, economists with the Berkeley Research Group.

the benefits of their success even when it causes the collapse of competitors. In an efficient free market, there are well-defined guardrails of what is legal competition and what may be anticompetitive, making it easier, less expensive, and less risky to do business. When all of these factors coalesce in a fair, free, and open competitive process, consumers, workers, families, businesses, and economies flourish. There are few better examples of this than the California economy, which has grown to the fifth-largest in the world under the existing California antitrust regime.

But these hallmarks of a free and efficient market and the economic strides made in California are imperiled by the Working Group's Legislative Proposal. The Legislative Proposal seeks to revise California antitrust law to address single-firm conduct and, specifically, ban "anticompetitive exclusionary conduct," which seems benign enough. In doing so, however, the Legislative Proposal rejects over a century of federal and state legal precedent designed to identify truly anticompetitive conduct and fails to distinguish between what is and what is not anticompetitive, thereby threatening the type of aggressive competition that the antitrust laws were designed to promote and that ultimately benefit consumers. Under the Legislative Proposal, price cutting, programs designed to gain loyal customer followings, innovation aimed at taking market share from less-efficient competitors and small and/or temporary gains in market power, regardless of the size of the business or others in the market, would be subject to government and private lawsuits in state and federal courts.

The Legislative Proposal is not narrowly tailored to rein in defined anticompetitive conduct among unlawful monopolies. It is, instead, so broad and far-reaching that it will chill and impinge legitimate competition at every level of the California economy.

Notably, the Working Group's January 25, 2024 report (the "Report") recognizes that "[t]he fundamental challenge is where and how to draw the line between conduct that is welcomed as a legitimate form of competition and conduct that is anticompetitive and significantly enhances market power."[2] The Report also talks about the difficulty in distinguishing between conduct that constitutes legitimate forms of competition and conduct that significantly enhances market power, stating:

> We know from more than a century of experience under the [federal] Sherman Act that courts find it very difficult to distinguish single-firm conduct that harms competition from single-firm conduct that constitutes legitimate competition on the merits … More clarity in the statute will likely result in more protection of competition and consumers. The Legislature may therefore want to include language to help the courts distinguish anticompetitive exclusionary conduct from procompetitive conduct. That language can benefit from economic learning and the development of Sherman Act case law.[3]

Given this, the Legislative Proposal could have used the decades of economic learning around the Sherman Act to craft legislative text that would guide courts as they attempt to distinguish between legitimate, pro-competitive conduct that benefits consumers and conduct that is anticompetitive and significantly enhances market power to the detriment of consumers and competition. That is not what the Legislative Proposal does, however. Indeed, it provides no meaningful guidance on how to distinguish between beneficial and harmful single-firm conduct. This failure will lead to the

[2] Report, p. 1.
[3] Report, p. 1.

indiscriminate outlawing of conduct that may increase market power regardless of whether that increase flows from beneficial or harmful conduct.

An even more fundamental shortcoming of the Legislative Proposal is that it is not based on a demonstrated need, but rather is based on anecdotal and unsupported beliefs that competition in California could be more robust. Nor does the Legislative Proposal provide an economic analysis of the likely impact of these kinds of revisions to California law. Indeed, the Legislative Proposal ignores all its likely costs, which are not insignificant. Chilling pro-competitive single-firm conduct can harm consumers and the overall performance of the economy in the same manner as anticompetitive conduct, and there is no rational economic basis to ignore the detrimental effects of the Legislative Proposal. In addition to chilling competition, the Report's imprecision and lax standards will lead to increased litigation that will result in inconsistent rulings among courts together with rulings restricting pro-competitive conduct, making doing business in California more expensive, riskier, and less desirable, all of which is bad for California consumers and workers.

There is no doubt that punishing and deterring anticompetitive conduct, providing opportunities for small businesses, lessening income inequality, and creating a level playing field for all are important policy goals. They are not, however, all best addressed by the antitrust laws, and they certainly will not all be served by the Legislative Proposal. CalChamber and its coalition members urge the CLRC not to adopt the Legislative Proposal.

There Is No Demonstrated Need For The Legislative Proposal And It Is Not Supported By Economic Analysis.

As a general matter, statutory reforms are appropriate when there is a demonstrable need for reform. Similarly, antitrust policy is most likely to benefit competition and consumers when it is supported by sound economic analysis. The Report, however, fails to demonstrate a need for revising California's antitrust laws and the Report provides no economic analysis of the likely impact of the Legislative Proposal.

For instance, the Report states that "[t]he most glaring deficiency in the Cartwright Act is its failure to reach purely unilateral conduct."[4] Yet the Report does not explain how this "glaring deficiency" has negatively impacted Californians through higher prices, inferior products or services, less competition, or any other measure. In fact, government and private antitrust enforcers have successfully challenged unilateral conduct using Section 2 of the federal Sherman Act for decades. Likewise, the Report envisions a policy change in which "courts should bear in mind that the policy of California is that the risk of under-enforcement of the antitrust laws is greater than the risk of over-enforcement."[5] But the Report employs no economic, or other, analysis of the likely effects of such a policy change. This is even more problematic in that such a policy contradicts federal antitrust teachings that courts should not interpret the antitrust laws in a way that may chill competition.[6] Moreover, the

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[4] Report, p. 13.

[5] Report, p. 15.

[6] When describing why courts should avoid legal rules that may chill competition, Hovenkamp writes, "In a competitive market an aspiring monopolist has a relatively small percentage of the market, and it shares the market with many other firms. As a result, even if it succeeds in driving one firm out of business, it will be unable to reap monopoly profits afterwards. An underdeterrent rule in a competitive market will seldom create a monopoly. On the other hand, an overdeterrent rule may force firms to avoid hard competition, even though the

Working Group does not undertake an economic analysis of how the Legislative Proposal would impact competition in California, California workers, the willingness of businesses to operate in California, or California's tax base. Indeed, the Report provides no economic analysis of adopting the Legislative Proposal, calling directly into question whether the Legislative Proposal is good public policy.

Perhaps to address these shortcomings, two months after the Working Group released its Report, another CLRC working group published a report on "Concentration in California" (the "Concentration Report"). Yet in addition to the fact that the Concentration Report was published ***after*** the Legislative Proposal, the Concentration Report does not provide justification for the Legislative Proposal, for several reasons.

First, the Concentration Report does not empirically study business concentration in California or opine that concentration will be lessened through the Legislative Proposal. Instead, the Concentration Report provides "case studies" in four, national sectors – labor, agriculture, healthcare and pharmaceuticals, and entertainment – of various competitive concerns that have arisen in these industries – in some cases unrelated to concentration – that have been addressed, or are being addressed, under current state and federal antitrust laws. For example, the Concentration Report describes the history of alleged "no-poach" agreements in various labor markets that have been challenged by government and private enforcers under the existing antitrust laws.[7] Likewise, the Concentration Report refers to alleged collusion and related criminal and civil litigation in the poultry and pharmaceutical industries that have been challenged and resolved according to existing federal and state antitrust laws. Similarly, the Concentration Report refers to mergers in the entertainment and grocery industries that are being challenged, were challenged, or could have been challenged under existing competition laws. These case studies do not justify revisions to California's antitrust law. They merely underscore the importance of ongoing and robust enforcement of existing antitrust laws.

Second, claims that some of these industries are concentrated are hotly contested, a fact that the Concentration Report does not address. The Concentration Report suggests, for example, that the music publishing and movie production industries are highly concentrated.[8] Industry data suggest otherwise, however. For example, according to IBISWorld, the combined share of the four largest companies in music publishing and movie production were only 17.9% and 40.7%, respectively.[9]

Passing statutory revisions in a vacuum or based on anecdotal and unsupported beliefs that competition in California is not as robust as it could be is bad for California businesses and ultimately California consumers. The kind of expansive revisions found in the Legislative Proposal should only be considered when there is a demonstrated need for them and there is sound economic evidence suggesting that revisions to existing law are likely to benefit Californians. It is CalChamber's view that

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market is conducive to competition." (Hovenkamp, Herbert, Economics and Federal Antitrust Law, West Publishing Co., 1985, p. 168.)

[7] Notably, the Concentration Report states that "[t]hese so-called 'no-poach' agreements are pervasive throughout the economy, and have appeared in many industries, including those based primarily in California and critical to its future," but there is no quantification of these alleged unlawful agreements or explanation of how they might be related to business concentration in California.

[8] Concentration Report, pp. 40, 42.

[9] Movie & Video Production in the US, IBISWorld, November 2023, 51211A; Music Publishing in the US, IBISWorld, February 2024, 51223.

the CLRC should not consider the Legislative Proposal unless and until this kind of work is completed, and it supports such drastic changes.

The Legislative Proposal Presents An Unworkable Legal Framework With No Meaningful Guidance for Courts, Will Chill Competition In California, And Will Lead to Increased Litigation With Inconsistent Results.

While the Working Group was right to reject the "abuse of dominance" standard proposed in New York as too ambiguous and likely to "prohibit desirable, procompetitive conduct,"[10] the Legislative Proposal's "anticompetitive exclusionary conduct" framework suffers from the same flaws. Indeed, the Legislative Proposal is arguably more imprecise and further reaching than New York's abuse of dominance proposal. This imprecision with chill competition in California and will lead to increased litigation that will result in inconsistent rulings among courts, making doing business in California more expensive, riskier, and less desirable, all of which will work to the detriment of California consumers and workers.

The Legislative Proposal Does Not Distinguish Between Pro-Competitive And Anti-Competitive Single-Firm Conduct.

Although punishing and deterring anticompetitive conduct is certainly sound antitrust policy, it can be difficult to distinguish between pro-competitive and anticompetitive single-firm conduct. This idea is repeatedly recognized in the Report:

> "In practice, identifying single-firm anticompetitive exclusionary conduct is far from straightforward."[11]
>
> "Note that the very definition of "anticompetitive conduct" involves a potentially difficult balancing of benefits and harms."[12]
>
> "When courts find conduct that both weakens the competitive discipline of rivals and is reasonably necessary to provide benefits to trading partners, they have difficulty evaluating it. These issues are inherently complex, in part because there are many forms of anticompetitive and procompetitive conduct and many distinct market settings in which they arise."[13]

The balancing of benefits and harms when evaluating single-firm conduct and the inherent complexity of the issues involved is why courts can have difficulty distinguishing between anticompetitive conduct and beneficial, vigorous competition on the merits. Accordingly, antitrust policy must balance the social and economic gains from beneficial enforcement actions with the social and economic harms from erroneous enforcement actions. Actions and policy that chill legitimate,

[10] Report, p. 14; *see also* Antitrust Section of the American Bar Association critique of New York's proposed "Twenty-First Century Anti-Trust Act."
[11] Report, p. 4.
[12] Report, p. 4.
[13] Report, p. 4.

competitive conduct are not innocuous, but rather can harm consumers through higher prices and/or reduced innovation while also harming the economy overall.

Antitrust reforms that promote improved enforcement decision-making – both in terms of determining the types of conduct to challenge under the antitrust laws and helping the courts to adjudicate these challenges – are beneficial. The Legislative Proposal, however, does the opposite. The Legislative Proposal's goal of preventing "anticompetitive exclusionary conduct" will make antitrust enforcement less precise and less targeted at harmful conduct, and is thereby likely both to ensnarl and chill legitimate, beneficial single-firm conduct. This is to be expected when careful cost-benefit analysis is foregone, and the costs of chilling legitimate conduct are minimized or ignored. The fact that courts have struggled with single-firm conduct cases indicates that these cases can be difficult to evaluate, but such difficulty does not mean that downsides from chilling pro-competitive conduct should be downplayed or ignored.

The central element of the Legislative Proposal is:

> Conduct, whether by one or multiple actors, is deemed to be anticompetitive exclusionary conduct, if the conduct tends to
>
> (1) diminish or create a meaningful risk of diminishing the competitive constraints imposed by the defendant's rivals and thereby increase or create a meaningful risk of increasing the defendant's market power, and
>
> (2) does not provide sufficient benefits to prevent the defendant's trading partners from being harmed by that increased market power.[14]

While this language is relatively simple, it involves the same analytical problems highlighted in the Report with existing Sherman Act law – the difficulty evaluating conduct that "both weakens the competitive discipline of rivals and is reasonably necessary to provide benefits to trading partners."

This difficulty could be lessened by providing guidance to the legislature and courts regarding how to evaluate this trade-off in specific instances. Yet the Legislative Proposal merely lists several types of conduct – not all of which has been treated by courts as single-firm conduct[15] – that "can be anticompetitive, depending on the circumstances," including the following:

- Loyalty rebates;
- Exclusive dealing provisions;
- Most-favored nation clauses;
- Discrimination against rivals;

[14] Report, p. 16.

[15] For instance, loyalty rebates, exclusive dealing arrangements, most-favored nation clauses, and agreements to limit competition can be, and have been, challenged under the existing Cartwright Act as conduct that unreasonably restrains trade.

- Agreements to limit competition; and
- Predatory pricing.[16]

The Legislative Proposal, however, provides no guidance to the courts on the circumstances that convert these types of conduct into "anticompetitive exclusionary conduct." In fact, instead of translating economic learning of specific circumstances into directions to the courts, the Legislative Proposal does precisely the opposite.

Consider the Report's example of predatory pricing. Economic analysis views predatory pricing as pricing below cost to drive rivals from the market, with the losses flowing from below-cost pricing being recouped later, after rivals are driven from the market. The economic learning, therefore, is that pricing below cost to drive out rivals is only rational (or unlawful) if the alleged predator can later recoup its losses through increased prices. These standards are, of course, intended to distinguish between harmful predatory pricing and beneficial, intensively-competitive price decreases that are good for consumers. Even so, the Legislative Proposal states that establishing liability does not require findings that pricing was below some measure of cost or that the defendant is likely to later recoup the losses from below-cost pricing.[17] This rejection of well-founded economic principles could make price cutting to compete with rivals just as unlawful in California as predatory pricing.

Consider also the Report's example of refusals to deal. The Legislative Proposal notes that the Sherman Act approach "may immunize much conduct that could be anticompetitive."[18] It is generally recognized that a firm's refusal to deal with a competitor is not always anticompetitive. This is why these kinds of claims are typically analyzed by asking whether there are legitimate economic reasons for the refusal to deal, apart from attempting to exclude rivals. Despite this entrenched economic approach, the Legislative Proposal removes economic analysis of justifications for refusals to deal by dictating that liability does not require a showing that the refusal "makes no economic sense apart from its tendency to harm competition."[19] This rejection of economic learning of refusals to deal robs courts of direction for distinguishing between anticompetitive conduct and beneficial, pro-competitive or competitively neutral refusals to deal.

Another problem is that, although the Legislative Proposal focuses on curbing increases in market power, it abandons the standard method for measuring increases in market power. In monopolization cases, courts have traditionally required the definition of a relevant antitrust market. A relevant antitrust market is where competition takes place, and it includes the product at issue and those that are good substitutes for that product. Together, these products constitute a collection over which the market power of a particular product or competitor can be measured. In essence, defining a relevant antitrust market ensures that competitive constraints on a firm's conduct are included in the analysis of whether there has been, or will be, a harmful increase in market power:

> In most antitrust cases that require proof of market power the court determines whether some "relevant market" exists in which the legally necessary market power requirement can be inferred. In order to do this, the court usually 1) determines a relevant product market, 2)

[16] Report, p. 15.
[17] Report, p. 17.
[18] Report, p. 7.
[19] Report, p. 17.

> determines a relevant geographic market, and 3) compute the defendant's percentage of the output in the relevant market thus defined.[20]

Nevertheless, the Legislative Proposal removes this discipline via the following language: "Establishing that the defendant has engaged in anticompetitive exclusionary conduct does not require defining a 'relevant market' in which that conduct takes place."[21] This means that evaluating whether an increase in a firm's market power represents "anticompetitive exclusionary conduct" will not require an economic analysis of the competing products, services, or rivals that may chasten any increase in that firm's market power.[22]

Likewise, the Report's definition of "anticompetitive exclusionary conduct" does not rely on any measure of market share, which is traditionally part of the method for assessing market power. Federal monopolization claims usually require a firm to have a share of a well-defined relevant antitrust market in excess of at least 50%, with potentially a somewhat lower share for an attempted monopolization claim.[23] Firms with shares below these levels are generally not expected, as a matter of economics, to have the requisite market power to harm consumers or rivals through exclusionary conduct, and therefore market share criteria are a critical tool in guiding courts regarding how to evaluate single-firm conduct. Not only does the Legislative Proposal fail to sharpen or adjust market share thresholds based on recent economic learning, it does away with these standards altogether:

> A single firm may violate section (a) regardless of whether it has or may achieve a market share above a threshold recognized under Section 2 of the Sherman Act. Furthermore, this statute is [sic] does not require the plaintiff to establish any threshold of market power, as the focus of concern is on increases in market power.[24]

In addition to abandoning the key metric that can answer the question of whether market power is dangerous to consumers and rivals, the Legislative Proposal's myopic focus "on increases in market power" could make small and/or temporary increases in market power unlawful even when the result of legitimate competition. For example, it could be unlawful in California for an independent grocery store to increase market share by placing items on sale for a period of time or for a small start-up to increase market power by introducing a new service that consumers want and benefit from, even if those increases are small or transitory. Both of these types of single-firm conduct are generally beneficial to consumers, but may be unlawful under the Legislative Proposal.

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[20] Hovenkamp, Herbert, Economics and Federal Antitrust Law, West Publishing Co., 1985, p. 59.

[21] Report, p. 18.

[22] The Concentration Report recommends reducing the need to prove market definition in a rule of reason case. (Concentration Report, p. 18.) This recommendation similarly undermines principles of analysis that have been developed over many years to guide and assist courts when they evaluate single-firm or other conduct alleged to harm competition.

[23] See, Monopolization and Dominance Handbook, American Bar Association, 2011, pp. 222-223.

[24] Report, p. 18.

The Limited Guidance Offered By The Legislative Proposal Is Uninformative.

The only guidance offered by the Legislative Proposal for evaluating "anticompetitive exclusionary conduct" is the following:

> The competitive constraints imposed by the defendant's rivals may, without limitation, be diminished if the conduct at issue tends to (i) increase barriers to entry or expansion by those rivals, (ii) cause rivals to lower their quality-adjusted output or raise their quality-adjusted price, or (iii) reduce rivals' incentives to compete against the defendant.[25]

This is not useful, however, because it is too broad to be meaningful. For instance, if a firm were to expand its output supplied to a given market, economists would expect one or more rivals in that market to reduce the amount of their supply. Even if total supply were to expand, which would be beneficial for both competition and customers, the reduction in supply by the firm's rivals may form the basis for a violation of item (ii), above. Similarly, a chain that opens a new store in an area makes it more difficult for other, similar stores to enter or expand in that same area, which could violate item (i), above, despite being good for consumers. Likewise, a firm can be very successful with a product upgrade – so successful indeed that one or more rivals decide that it is too difficult to compete – which could be a violation of item (iii), above. These are not hypothetical examples: firms expand the volume of their output supplied to specific markets all the time; grocery chains compete locally with other grocers and regularly add stores serving individual local geographies; and it is common for the success of a particular product to cause rivals to limit offering competing products. None of these efforts should be unlawful in the abstract, but they may very well be under the Legislative Proposal.

Outlawing conduct that is commonly viewed as pro-competitive, like that described above, is counter-productive. As noted in the Report, "[i]t would be antithetical to the goals of the antitrust laws to punish successful firms that competed on the merits merely because their success harmed their rivals."[26] Similarly, the Report notes that firms can be successful (and even gain a monopoly) by "offering their customers better value than do their rivals"[27] – that is, by competing – and that "[n]either Congress nor the California legislature has ever wanted to discourage such efforts."[28] Indeed, the Report even cites to the Supreme Court's *Alcoa* decision for the bedrock antitrust principle that "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."[29] Even so, the Legislative Proposal is so broad and all-encompassing that it would capture and may make illegal many types of pro-competitive conduct, including conduct that makes a firm more successful and that federal and state competition laws have traditionally embraced.

The Report's Recommendations and Proposed Paradigm Shift Are Bad for California.

The critical question of any statutory revision is whether it is good for the State. The Legislative Proposal is not. The Report suggests that the "California Legislature could instruct the courts to err on the side of enforcement when the effect of the conduct at issue on competition is uncertain."[30] The

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[25] Report, p. 16.
[26] Report, p. 7.
[27] Report, p. 3.
[28] Report, p. 3.
[29] *United States v. Aluminum Company of America*, 148 F.2d 416 (2d Cir. 1945).
[30] Report, p. 4.

Legislative Proposal, however, does not merely tilt the needle in favor of enforcement on cases that are "close calls." Rather, as discussed above, the Legislative Proposal moves to a new paradigm where the tools that have been developed over time to help distinguish among beneficial and detrimental single-firm conduct are set aside. The net result is that conduct that is competitively beneficial, neutral, or damaging could all be considered illegal. There is no reason to suspect that such a dramatic change will be beneficial to consumers, workers, individual markets, or the economy at large. Instead, there is a real possibility that the Legislative Proposal could significantly chill the very competition it is seeking to protect, which will harm all Californians.

Moreover, the Legislative Proposal's rejection of core antitrust standards used to interpret and evaluate the Cartwright and Sherman Acts will, of course, lead to increased litigation in both state and federal courts. Lowering the bar on stating an antitrust claim will only increase costly and protracted litigation. And because the Legislative Proposal provides virtually no guidance for courts to determine what is and what is not "anticompetitive exclusionary conduct,"[31] there will be scores of inconsistent rulings making it more difficult to do business, and increasing the costs of doing business, in California, which harms consumers and workers in the State. The Legislative Proposal fails to take this into account, and, on balance, will be bad for California.

Conclusion.

CalChamber has long supported robust antitrust enforcement and sound competition policy. Yet the Legislative Proposal is not targeted solely at eliminating "anticompetitive exclusionary conduct," but rather targets a range of conduct that is considered to be beneficial, competitive behavior. In addition, the Legislative Proposal rejects over a century of federal and state precedent designed to guide courts in identifying anticompetitive conduct and therefore fails to distinguish between what is and what is not anticompetitive, endangering the type of aggressive competition that the antitrust laws were designed to promote and that ultimately benefit consumers. Moreover, the Legislative Proposal is not based on a demonstrated need for reform, but rather is based on a subjective belief that competition in California could be more robust. Nor does the Legislative Proposal provide an economic analysis of the likely impact of the proposed revisions. The Legislative Proposal's imprecision and lax standards will lead to increased litigation that will result in inconsistent rulings among courts together with rulings restricting pro-competitive conduct, making doing business in California more expensive, riskier, and less desirable, all of which is bad for California consumers and workers. Accordingly, CalChamber and its coalition members urge the CLRC not to adopt the Legislative Proposal.

Sincerely,

Eric P. Enson

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[31] Indeed, if the Legislative Proposal is adopted, courts would have to interpret – for the first time – ambiguous phrases embedded in the statute, such as "tends to diminish or create," a "meaningful risk" of "diminishing the competitive constraints," "thereby increase or create a meaningful risk" of increasing the defendant's market power, and "does not provide sufficient benefits" to "prevent the defendant's trading partners" from being "harmed by that increased market power."