COST DRIVER

April 2, 2025

The Honorable Melissa Hurtado
California State Senate
1021 O Street, Suite 6510
Sacramento, CA 95814

SUBJECT: SB 295 (HURTADO) CALIFORNIA PREVENTING ALGORITHMIC COLLUSION ACT OF 2025
OPPOSE/COST DRIVER– AS INTRODUCED FEBRUARY 6, 2025

Dear Senator Hurtado:

The California Chamber of Commerce and the undersigned are **OPPOSED** to your **SB 295** (Hurtado) as introduced on February 6, 2025, as a **COST DRIVER** enacting the California Preventing Algorithmic Collusion Act of 2025, as it is unnecessary, it creates onerous reporting requirements, it could chill the use of any pricing algorithm technology by exposing businesses to substantial uncertainty, significant costs, and aggressive liability. In the end, this bill in fact will hurt, not help price competition, which will devastate our state's economy and only further widen the gap between small and large businesses, which technologies such as pricing algorithms can currently help close.

First and foremost, this bill appears based on a presumption that pricing algorithms are inherently problematic, if not unlawful. To the contrary, pricing algorithms are, in fact. extremely common tools that enable businesses to save money, improving efficiency by avoiding manual pricing, reducing costs for consumers, and making prices far more responsive to changes in supply and demand - and they can do so without involving any anti-competitive conduct

In contrast, price collusion (or price fixing) *is* problematic and is clearly illegal under current federal and state laws. Indeed, existing antitrust laws prohibit competitors from colluding on price in any manner, whether through using a pricing algorithm or otherwise. **In other words, whether a price fixing conspiracy is hatched by salespeople conspiring or computers running algorithms, collusion is collusion and is already effectively covered by existing law. To be clear, however, the use of a pricing algorithm does not inherently constitute price *fixing*.**

Retailers use pricing algorithms to ensure they are offering the most competitive prices to consumers. Realtors use them to help clients set home prices. Banks use them to set terms (e.g. rates and fees) for services. Hospitality, airlines, transportation network companies, utilities, ticket venues, and many others use them for dynamic pricing. The list goes on.

All this bill does is remove a valuable tool for setting dynamic pricing and impose significant costs on all businesses that use pricing algorithms – but especially small businesses – thereby reducing competition, rather than promoting it.

Comparison to SB 1154 (Hurtado) – last year's Algorithmic Collusion Act and Job Killer

This bill is largely the same as SB 1154 (Hurtado), which was also a Job Killer and held in Senate Judiciary – except **SB 295** is even more problematic. Instead of addressing concerns raised regarding last year's bill, nearly all of the concerns from SB 1154 seem to have been magnified in **SB 295**.

At a high level, the only notable narrowing, compared to SB 1154, relates to the exclusion of a problematic provision that required the Attorney General (AG) to share the mandated report with the National Institute of Standards and Technology. In every other way, **SB 295** seems to have taken steps that have only increased our concerns. For example:

- Whereas SB 1154 prohibited a person from using or distributing any pricing algorithm that uses, incorporates, or was trained with nonpublic competitor data (but, problematically, defined it in such a way that it was actually *not* limited to nonpublic data), **SB 295** drops any pretense of being limited to nonpublic competitor data and instead would prohibit these same activities with respect to *any* competitor data – including that which is publicly available.

- Whereas SB 1154 had extreme significant administrative compliance costs and liability risks, this year's **SB 295** has included additional penalties, including: (1) forfeiture (2) revocation; (3) reasonable attorney's fees and costs; and (4) the ability to go after any director, officer, or agent of any firm or corporation who assists or aids, directly or indirectly, in a violation, equally with person, firm, or corporation for which they act.

- Whereas SB 1154 (Hurtado), last year, relied on overly broad and poorly worded, but critical, terms that would have created significant confusion for businesses, **SB 295** lacks any standards and definitions altogether for equally critical terms. As a result, if enacted, **SB 295** would leave businesses just as, if not more, vulnerable than SB 1154 to ambiguous and elusive standards that will completely muddy the distinction between lawful pricing algorithms and price fixing.

The breadth of competitor data causes significant competitive disadvantages, limiting innovation, and otherwise creating legal ambiguities and inviting litigation

Like SB 1154 from last year, **SB 295** relies on incredibly broad and vague terms which will pose significant compliance challenges. For one thing, the bill's definition of "pricing algorithm" is so overly broad and vague that it captures *any* algorithm that uses a computational process. For another, the bill prohibits the use or distribution of any "pricing algorithm" that uses, incorporates, or was trained on "competitor data." It does not define what "competitor data" is, let alone specify it if it is limited to nonpublic or public forms of it. Indeed, nothing in the bill indicates that **SB 295** is intended to be limited to nonpublic information and the intentional exclusion of the word after SB 1154 expressly included it, suggests an intent to be interpreted more broadly. Meaning, even the use of a competitor's *public* data is presumed to be captured.

This, of course, raises several potential problems. Restricting the use of *nonpublic* competitor data – such as data obtained via unauthorized access (e.g. hacking) or as the result of illegally shared data or other non-competitive activities – can be seen as preventing unfair competitive advantages and potential collusion. In contrast, businesses have long observed their competition's public prices in making their pricing decisions and they have done so *legally*. To now restrict use of such *public* data could greatly impair their ability to understand market conditions and respond efficiently in changes to the competitive landscape, not to mention take away information that has long been considered an acceptable – and legal – data point for businesses and that would otherwise guide pricing decisions, making pricing less competitive overall as a result.

Furthermore, prohibiting the uses of publicly available competitor data now simply because an algorithm is being used to help set the price, while still allowing humans to use the same information for the same purpose would create an arbitrary and inconsistent distinction between lawful and unlawful pricing setting

practices that would simply disfavor businesses that rely on automated tools for no other reason than they are using technological tools.

To the extent that smaller businesses may rely on these tools to become more efficient and competitive with larger ones, this is anti-competitive and unfair, not to mention counterproductive, given the goals of this legislation. Larger businesses with far more extensive proprietary data would likely be less affected, while smaller businesses that rely more heavily on publicly available information to compete would now struggle to keep up, reinforcing instead of preventing anti-competitive behavior.

Furthermore, prohibiting businesses from using publicly available data in favor of less efficient and outdated methods is arguably on questionable legal standing given the First Amendment right of businesses to use data in the public domain. Again, if the concern is price-fixing or collusion, those issues are already covered by existing antitrust laws, and we would once again caution that simply using pricing algorithms does not inherently lead to collusion. As noted above, pricing algorithms simply improve efficiency by quickly analyzing market conditions and adjusting prices dynamically and should not be conflated with price fixing.

SB 295's onerous and broad AG reporting requirements come without any protection for trade secrets or public records act requests—transforming these reports into litigation bait

In addition to the significant legal and administrative compliance costs and liability risks discussed below, **SB 295** also authorizes the AG to demand that any business using pricing algorithms provide a written report with significant detailed information about its algorithms, which could entail turning over potentially sensitive and valuable trade secret and competitive information, all without any required showing of illegal activity or even reasonable cause to believe there has been illegal activity. These reporting requirements are very onerous – and could have the greatest burden on small businesses that lack the infrastructure to respond to such requests – not to mention problematic insofar as they require a business to state if it engages in price discrimination, certified under penalty of perjury by the company chief executive officer, chief economist, chief technology officer or corporate officer of similar authority.

Setting aside concerns that the AG could wield its authority to demand compliance and effectively conduct a fishing expedition, at least in SB 1154, there was a public records act request to avoid turning these reports into general litigation bait and temper concerns around disclosure of proprietary data and trade secrets. Critically, there is no such exemption in this bill, once again demonstrating how **SB 295** has only amplified the issues from last year's Job Killer legislation.

SB 295's liability is aggressive and has only gotten more aggressive since SB 1154

As noted above, the proposed Preventing Algorithmic Collusion Act's liability structure has gone from aggressive in SB 1154 to extremely aggressive in **SB 295**. Whereas SB 1154 imposed a $10,000 per day penalty for violations, plus the sum of the price of each product or service sold using the pricing algorithm, in civil actions brought by the AG for certain violations, and a $5,000 civil penalty, plus injunctive or other appropriate equitable relief for others, this bill provides for all of the above and more.

This year, **SB 295** also permits, in a civil action for violation of the prohibition against using or distributing any pricing algorithm that uses, incorporates, or trains with competitor data, the AG or any district attorney to bring a civil action to recover potentially all of the following, in addition to one of two specified monetary awards: either (1) not less than $10,000 adjusted for CPI for each day during which the violation occurred or continues to occur, or (2) the sum of the price of each product or service sold using the pricing algorithm. The other possible remedies include:

- Forfeiture.
- Revocation. And upon the revocation, the foreign corporation or association shall be prohibited from doing any business in this state.
- Reasonable attorney's fees and costs.

- Other appropriate relief, including an injunction or other equitable relief.

Furthermore, under **SB 295**, any person who, either as a director, officer, or agent of any firm or corporation or as an agent of any person, violating the provisions of this chapter, assists or aids, directly or indirectly, in that violation will be responsible equally with the person, firm, or corporation for which they act. All of this, of course, is in addition to other remedies available under existing antitrust laws.

When combined with the breadth and uncertainty of various provisions, this result will invariably be significant liability exposure. That, in turn, will invariably chill price competition and squelch the continued use of industry-standard pricing algorithms that aid businesses in ensuring accurate pricing as opposed to arbitrary pricing or price gouging.

Again, in chilling the use of a widely used pricing tool that enables businesses to save valuable resources while making prices more responsive to price changes, <u>including price decreases</u> that benefit consumers, this bill will ultimately decrease competition, increase costs for businesses, and hurt small business the most along the way to devastating our economy. Thus, for all the aforementioned reasons, we strongly **OPPOSE** your **SB 295 (Hurtado)** as a **COST DRIVER**.

Sincerely,

Ronak Daylami
Policy Advocate
on behalf of

American Property Casualty Insurance Association, Laura Curtis
California Chamber of Commerce, Ronak Daylami
California Credit Union League, Eileen Ricker
California Hospital Association, Kalyn Dean
California Retailers Association, Ryan Allain
Insights Association, Howard Fienberg
Software Information Industry Association, Abigail Wilson
TechNet, Robert Boykin

cc: Legislative Affairs, Office of the Governor

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