COST DRIVER

April 2, 2025

The Honorable Aisha Wahab
California State Senate
1021 O Street, Suite 8530
Sacramento, CA 95814

SUBJECT: SB 384 (WAHAB) PREVENTING ALGORITHMIC PRICE FIXING ACT: PROHIBITION ON PRICE-FIXING ALGORITHM USE
OPPOSE/COST DRIVER– AS INTRODUCED FEBRUARY 14, 2025

Dear Senator Wahab:

The California Chamber of Commerce and the undersigned are **OPPOSED** to your S**B 384** (Wahab) as introduced on February 14, 2025, as a **COST DRIVER** because it effectively prohibits a business from using any information related to pricing or supply to make pricing or production decisions with pricing algorithms under the guise of prohibiting price fixing. At its core, **SB 384** prohibits businesses from using any software, systems, or processes that create pricing models to set a price or supply level of a good or service – banning the use of the technology in competitive pricing. In other words, this bill does precisely what the business community has cautioned against over the last two years when it comes to AI legislation: it regulates the technology itself rather than its misuse, which will in no uncertain terms stifle innovation and cause significant damage to California's economy, hurting small businesses the most, and Californians along the way. Moreover, the ability to analyze public pricing data has long been a lawful and essential business practice. To now prohibit the use of technology to perform the same function as humans appears rather arbitrary and will only create less competition as opposed to more.

Like several other pricing algorithm bills moving through the Legislature, **SB 384** appears rooted in an assumption that pricing algorithms are inherently problematic or unlawful, as opposed to a surgical response to demonstrable anti-competitive behaviors or *price-fixing* practices. Pricing algorithms are, in fact, extremely common tools that enable businesses reduce costs, improve efficiency by avoiding manual pricing, dynamically adjust prices in response to market conditions and changes in supply and demand (including to decrease prices), and ultimately reduce costs to consumers as well – and they can do so without involving any anticompetitive 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 pricing 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.

Thus, legislation such as **SB 384** will merely remove a valuable tool for setting dynamic pricing and impose significant costs on all businesses who use price algorithms – especially smaller businesses – thereby reducing competition, rather than promoting it. In the end, this bill hurts not only businesses, taking them back to pre-technological times, but it will hurt consumers, effectively doing away with price-comparison shopping and competitive/dynamic pricing by businesses.

SB 384 sets forth a blanket prohibition against using information related to pricing or supply to set competitive pricing with technology

SB 384 expressly states that a person shall not use a price-fixing algorithm to set a price or supply level of a good or service. The bill then defines "price-fixing algorithm" as a software, system, or process that[1]: (1) collects historical or contemporaneous information on a price, price change, or supply level of a good or service either from two or more persons or from public databases; (2) analyses and processes this information; and (3), creates pricing models based on this analysis/processing.

First, this is tantamount to prohibiting any business from using pricing models of any sort to set a price or supply level of a good or service based on any information related to pricing or supply – whether publicly available or nonpublic/confidential – under the guise of prohibiting price fixing. It is difficult to see how this could be seen as or operate as anything *other than* a ban against the use of technology in competitive pricing.

Second, as drafted, in the bill targets activities that humans have always been permitted to do – observe, analyze, and respond to market conditions; collect information on prices, price changes, and supply levels; analyze/process that information; and create pricing models to inform decision making.

We also note that the bill's definition of "price-fixing algorithm" treats the collection and use of public data[2] the same as it does the collection of nonpublic data[3] which is a false equivalency. While improper use of proprietary or unlawfully obtained nonpublic data can raise legitimate concerns, gathering and analyzing public market data has long been recognized as lawful and beneficial to competition. Gathering historical or contemporaneous information on a price, price change, or supply level of a good or service from public databases for use with an algorithm should be treated no differently. And that is nothing to say of a business's First Amendment right to use information that is in the public domain, which is also infringed upon when restricting the use of public data.

As noted above, businesses have long observed their competition's public prices in making their pricing decisions and they have done so legally, as there are many legitimate grounds for setting different prices for the same goods or services, such as dynamic pricing where prices fluctuate based on real-time demand, availability and market conditions (e.g., peak hours or bad weather can drive up demand for rides); local demand or operational/regional costs; returning customers or those enrolled in loyalty programs may receive lower prices; or lower prices may get set to attract first time customers; online ticket prices may increase as the date of an event gets closer; inventory goes down; etc.). Restricting the ability of businesses to use this type of technology to help them in these same activities will greatly impair the ability of some businesses to understand market conditions and respond efficiently in changes to the competitive landscape, not to mention take away information that would otherwise guide pricing decision and lend to less competitive pricing overall.

Prohibiting otherwise lawful activity simply because an algorithm is being used to help set the price, while still allowing it for human decision-making creates an arbitrary and inconsistent distinction between lawful and unlawful pricing setting practices that simply disfavors businesses that rely on automated tools without

[1]There is a drafting error in the bill, stating "both", but then itemizing three elements.
[2] Under the paragraph (1) of the definition, "information …from public data bases".
[3] Under the paragraph (1) of the definition "information…from two or more persons" – which can presumably include either private or public.

adequate justification. In fact, removing this tool would disproportionately harm smaller businesses, which rely on automation to compete with larger firms that have greater resources and market intelligence.

Liability provisions are vague, potentially devastating and likely to have chilling effect on the use of this technology

Lastly, we note that **SB 384** permits the AG, city attorney, or county counsel to file a civil action for a violation of this section for any or all of the following: damages, injunctive relief, restitution, or civil penalties of up to $1,000 per violation – without defining what constitutes a single violation. The bill also mandates courts to award reasonable attorney's fees and costs to the AG, city attorney, or county counsel, to the government plaintiff if they prevail.

Not only are the varying damages and fines cumulative, but the bill is also vague and fails to specify the type(s) of damages that can be assessed. As drafted, it is unclear if the intent is to capture actual damages only, general damages, punitive, or some other variation(s). Such an open-ended and unclear liability structure combined with severe penalties creates significant legal uncertainty for businesses, and the cumulative financial liability could be particularly devastating for smaller businesses. The chilling effect on price competition would be widespread, ultimately harming consumers by reducing pricing transparency and flexibility and potentially raising prices.

In sum, by banning a widely used pricing tool, **SB 384** will hinder innovation, disadvantage small businesses, and increase costs for consumers, unfairly penalizing businesses for using technology to engage in the same lawful pricing strategies that businesses have long observed. Because the bill will undoubtedly have a sweeping, chilling effect on price competition among businesses across all industries as a result, reinforcing, instead of preventing, anticompetitive behaviors in the market, we must strongly **OPPOSE** your **SB 384 (Wahab)** 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
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Software Information Industry Association, Abigail Wilson
TechNet, Robert Boykin

cc: Legislative Affairs, Office of the Governor

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