COST DRIVER

June 24, 2025

TO: Members, Senate Judiciary Committee

SUBJECT: AB 1018 (BAUER-KAHAN) AUTOMATED DECISION SYSTEMS
OPPOSE/COST DRIVER – AS AMENDED MAY 1, 2025
SCHEDULED FOR HEARING – JULY 1, 2025

The California Chamber of Commerce and the undersigned are **OPPOSED** to **AB 1018 (Bauer-Kahan)** as amended on May 1, 2025, as a **COST DRIVER** because it fails to focus on the stated objective of requirements on high-risk automated decision systems (ADS) to the detriment of every industry in the state of California, and from small business to large. Instead, the bill broadly targets businesses of all sizes, across every industry, and regulates even lower risk applications of ADS, including those that are already in use, and unnecessarily alters what constitutes discrimination under California law. Such overreach not only exposes smaller businesses to significant – if not devastating – liability even for mere errors that caused no harm to consumers, but it would also hinder many beneficial uses of ADS, including but not limited to: enabling faster approvals and expanded access to credit; enhancing real-time fraud detection; fostering job creation and new industries; improving efficiency to help level the playing field between small and large businesses; addressing major societal challenges such as bias and discrimination, economic inequality, climate change, injustices in the criminal system, disaster relief, and humanitarian aid; and advancing new treatments for previously incurable diseases.

To be clear, whether decisions are being made by humans from start to end, or a biproduct of using or incorporating new technologies in the decision-making process, we take our responsibility to not discriminate with the utmost seriousness. We believe that algorithmic discrimination, or discrimination that results from AI-enabled technologies, is already prohibited under our anti-discrimination laws because our laws are rights-based and not technology-specific. We also agree that companies need to take care to reduce bias and discrimination in decisions that have legal impact on the provision or denial of fundamental rights or essential opportunities and services, which is why so many of them already conduct impact assessments.

But it would be incredibly short-sighted for regulation to stifle innovation when alternative (human-decision driven) systems may be equally, if not more, flawed, and when properly developed and deployed ADS can enhance fairness and accountability. While ADS may pose unique challenges in terms of bias, they also

pose unique advantages to combatting it as well: for example, ADS decision-making processes can be more transparent and traceable than the exercise of human discretion. The structured nature of these tools offer opportunities for detection and correction that can be more challenging to come by in human decision-making processes where human bias is often more subtle and harder to detect. Unfortunately, we believe **AB 1018** will have an undesired chilling effect on the development and use of technology and make it that much harder to improve upon the very tools that can help combat bias in decisionmaking.

As introduced, **AB 1018** goes far beyond ensuring developers and deployers of these technologies act responsibly to adhere to existing anti-discrimination protections and veers into an indirect restriction upon the usage of the technology itself, discouraging technological innovation and usage by making it so onerous and risky that businesses are realistically pushed back toward the alternative, human driven process – which we know based on historical evidence will not help eliminate bias and discrimination in any way.

We do not believe that to be the intent of the bill and there are several ways in which this legislation needs to be scaled back to avoid such outcomes, which we outline further below. Above all else, recognizing that this technology has the ability to reduce the instances of bias and discrimination in consequential areas where they have the capacity to cause life-altering harm, we urge a measured, targeted, risk-based approach to regulating ADS as we do with all AI legislation to focus on those use high risk use cases.

Furthermore, we note that the onerous opt-out, pre- and post-use notice requirements, new discrimination standards, and third-party auditor requirements are each unworkable, unnecessary, and unjustified as a matter of public policy, particularly given the underlying premise and objective of the bill. Unless such issues are all addressed, **AB 1018** will severely limit the effectiveness and adoption of ADS and instead of being an equalizer among businesses and potential solution to human biases, it will not protect anyone against bias and discrimination in doing so.

Minimal changes necessary to avoid the most harm caused by AB 1018

Recognizing that the below list is not comprehensive, our primary concerns largely center around the following issues and necessary changes, which our letter will further elaborate on below:

- **The sweeping scope of businesses and industries captured, the inclusion of low-risk ADS applications, and establishment of new standards/grounds for discrimination, all have to be addressed to avoid creating a de-facto restraint on technology under the guise of an impact assessment bill**. To start, businesses of 100 employees or less must be exempted. Fundamentally, both the scope and various key terms (in particular, “consequential decisions”, and “automated decision systems”, and “covered automated decision systems”, but also other terms such as “employment-related decisions”), all require additional clarity and/or narrowing. And insofar as the bill alters what constitutes discrimination, instead of ensuring that developers and deployers conduct evaluation and assessments that will promote responsible use of technologies to avoid violation of existing discrimination laws, the proposed change to the Unruh Civil Rights Act and introduction of new codified standards around “disparate impact” and “disparate treatment” should be fully stricken from the bill.

- **Untenable opt-out and pre-and post-decision notice obligations must be deleted**. All opt out and notice obligations, including the right to appeal which will have drastically different impact depending on context, must be deleted in full to make the bill workable. Such requirements are not only largely unworkable in many contexts, but also wholly unrelated to and unnecessary for there to be a bill that would require evaluations/assessments that to help reduce bias and discriminatory outcomes from the development and deployment of such ADS.

- **Third-party auditor requirements should be deleted in favor of self-assessments, particularly when third-party auditing would effectively grant a monopoly today and creates a costly cottage industry tomorrow, with access to highly sensitive and proprietary information, and no standards of care or liability.** The third-party auditor requirement imposes excessive and unnecessary costs on businesses, increasing IP risks and operational inefficiencies, without providing any added consumer protections. In fact, the requirement will have the opposite effect by driving up costs for consumers. With a limited number of auditors available, a legal mandate would create a surge in demand, allowing existing auditors to charge inflated fees without competition. As businesses absorb

these new compliance costs, they will be forced to raise prices, ultimately burdening consumers, reducing sales, and hindering economic growth in California. Furthermore, this requirement exceeds the scope of other U.S. laws and proposals, making California the most expensive jurisdiction for compliance. Given such impacts, the third-party auditor requirement for both developers and deployers must be removed to make this bill remotely viable.

- **A single enforcer is necessary to promote consistency and economic stability. Statutory penalties are far too heavy handed for a violation that involves no actual harm.** Allowing multiple enforcement entities will invariably create confusion for compliance, whereas the provision of a single enforcement entity (the Attorney General) will promote consistent interpretation and application across the state. Whereas the penalties in AB 2930 were $25,000 per violation for algorithmic discrimination only, the current penalty structure in the bill could feasibly have devastating impacts on businesses, big and most certainly small. Specifically, it allows for courts to grant plaintiffs a civil penalty of up to $25,000 per violation, without adequate clarity as to what constitutes each violation.

- **Preemption protections are needed, and current regulatory activities must be addressed**. Preemption is needed both to prevent conflict with localities and, similarly, to prevent concerns around state departments and agencies over-regulating this technology and getting ahead of the Legislature and Governor. These issues are too important to Californians across the state and our struggling economy to significantly delegate to unelected officials.

Again, additional details are provided in the sections below, to the extent they are helpful.

AB 1018 does not just require evaluations/assessments to ensure ADS are in compliance with existing discrimination laws – it actually alters the landscape of discrimination law in California

We understand the primary goal of **AB 1018** to be to safeguard against algorithmic discrimination and to prevent disparate impact and disparate treatment in the development and deployment of ADS. Once again, we believe that existing anti-discrimination statutes equally apply to scenarios involving the use of technology. In other words, algorithmic discrimination, or discrimination that results from AI, is discrimination because our statutory protections are rights based and not technology specific. While we do not believe there is any need or justification for changing our statutory discrimination protections for each new change in technology, we have discussed on many occasion our willingness to clarify that algorithmic discrimination is discrimination under existing law and even offered to sponsor legislation to that end last year.

What **AB 1018** does, however, is define "disparate impact" and "disparate treatment" for the first time as a matter of California statutory law but we question their accuracy in codifying the standards developed by courts over decades of case law within these brief and vague singular sentences. We are heavily concerned that **AB 1018** is not sufficiently grounded within existing statutes such as the Fair Employment and Housing Act or the Unruh Civil Rights Act and would confuse, if not alter, what constitutes discrimination under the law, instead of ensuring adherence to existing anti-discrimination laws.

Notably, the broad definitions of "disparate impact" and "disparate treatment" do not mirror present use of those terms in evaluating employment cases. For example, CACI No. 2502 is clear that disparate impact occurs when an employment practice or policy has a "disproportionate adverse effect" on a protected group and harms them.

Further, disparate treatment has long been recognized as a basis for discrimination claims against business establishments under the Unruh Civil Rights Act as courts have consistently ruled that intentional discrimination is actionable under Unruh. In contrast, courts have generally been reluctant to apply a disparate impact theory under Unruh, unlike FEHA. Meaning, Unruh typically requires intentional discrimination—as such, policies that disproportionately affect a traditionally-protected group do not automatically violate Unruh without proof of intent. (*See Harris v. Capitol Growth Investors XIV* (1991) 52 Cal.3d 1142 holding that disparate impact is not enough to prove an Unruh violation; intentional discrimination is required; *see also* CACI No. 3060 (2025) Unruh Civil Rights Act – Essential Factual Elements (Civ. Code Secs. 51, 52).) The two narrow exceptions to this are disability discrimination claims under the ADA (which also violate Unruh) and if there is a consistent pattern wherein disparate impact implies intentional discrimination (a rare case).

Furthermore, as drafted, **AB 1018** could be interpreted to expand what constitutes discrimination under the Unruh Civil Rights Act – amending that act (under Section 51 of the Civil Code) to specifically state that in an action alleging an Unruh violation, the extent to which the defendant complied with **AB 1018** is relevant to, but not conclusive of, whether the defendant actually violated Unruh. Meaning, if the defendant did not conduct an assessment, or if they even made so much as an error in conducting an evaluation or assessment, that will be relevant to whether or not they actually committed discrimination—and intentional discrimination. Altering the landscape of discrimination law in California goes far beyond the bounds of a simple assessment requirement, as this proposal was framed when first introduced in AB 331 in 2023.

While the amendments are helpful in limiting the broader impact of the definitions of "disparate impact" and "disparate treatment" such that they are "intended solely for purposes of internal compliance, risk assessment and documentation by this chapter" and that they "shall not be construed to modify and supersede any standard, burden of proof, or element of a claim under [Unruh, FEHA,] or any other applicable civil rights law", they do not address the core concern. Namely, that the definitions functionally arguably still displace the existing standards by which ADS are being evaluated for bias and discrimination under existing law within the context of these assessments. To the extent that these assessments are utilized to provide actual evaluations for businesses as to whether they will discriminate if they deploy the tools, the terms should reflect what they are understood to mean under case law. Stated another way, a tool under an assessment could be ruled to have disparate impact under this bill, when it would not have disparate impact under the law. This is misleading and undermines the purpose and efficacy of the assessments.

AB 1018's inordinately broad and vague scope captures businesses of all sizes, all industries, low risk tools, and decisions of questionable consequence despite what the terminology would suggest

As we have stated with AB 331 and AB 2930, a fundamental flaw with **AB 1018** is that it captures even lower risk applications of the technology. In casting such an overly broad net with vague, if not impossible, requirements, the bill effectively begins to have the same impact as legislation that places direct restraints on the technology. As noted above, it is crucial that **AB 1018** focus on high-risk ADS applications that fully replace human decision-making – where there is no human involvement in the decisionmaking loop to intervene and change or alter the outcome of potential discrimination or nondiscrimination – and that it take on a more limited scope in terms of the size of businesses and types of decision subject to the bill.

As drafted, the definitions of "ADS", "covered ADS" and "consequential decision" are extremely broad and vague, creating significant concerns that the bill reaches beyond high-risk tools, and even beyond truly consequential decisions. Currently, "covered ADS" could effectively capture any tool that simply provides information prior to a consequential decision – decisions that *materially* impact the cost, terms, quality, or accessibility of certain rights or services from ranging from employment, education, health care, family planning, housing, essential utilities, financial services, criminal justice system, legal services, voting, or access to benefits or services or assignment of penalties.

Specifically, the term captures any computational process that makes, "*or facilitates* a consequential decision" and that "*assists* human discretionary decisionmaking[1]". We are concerned that the various elements of these definitions are far too subjective, particularly where it expands to technologies that not only *replace* final human discretionary decisions that have *legal* impact, but also those that *assist* human discretionary decisions that *materially* impact natural persons.

[1] Apart from spam email filters, firewalls, antivirus software, identity and access management tools, calculators, databases, datasets, or other compilation of data, **AB 1018** captures any "computational process" as ADS more generally, as long as it meets the following elements:

- First, the computational process is derived from machine learning, statistical modeling, data analytics, or AI that issues simplified output, including a score, classification, or recommendation.
- Second, it is designed or used to either *assist* human discretionary decision making or replace human discretionary decision making.
- And third, it *materially* impacts natural persons. [*See* Proposed Sec. 22756(b)(1) and (2), emphasis added.]

"Facilitates" and "assist" are extremely vague and could capture simple features, such as company pages for job seeker research, job and resume search queries, and recommendations. Such tools do not create risk to workers/end-users, nor do they have the potential to be used to discriminate against candidates in the hiring process.

It is worth noting that any one of the dozen-plus sectors and use cases listed in the bill could easily warrant standalone legislation, given the varying complexities across industries. Most are left undefined, which makes it even more difficult to ascertain the types of decisions or judgments that would fall within the scope of this legislation. Using a one-size fits all approach wherein all industries are treated the same, and qualifying certain use cases as consequential by default, raises concerns of unintended consequences, particularly when the bill is so broad and vague in so many of the standards that it relies upon.

Compounding each of these problems is the fact that **AB 1018** applies not only to public and private entities, but it also applies to businesses that employ anywhere from one employee and up. It even applies to businesses without employees. It applies to ordinary usages of technology that create business efficiencies, technologies that can have life or societal altering impacts, as well as life-saving technologies.

Consider if a business uses a technology that can evaluate whether the business is ready to expand or needs additional employees to be hired. That presumably would constitute the use of ADS to make a consequential decision. Or consider if a business relies on their calendars or appointment calendaring technology to determine if they can provide an appointment, service, or interview to an individual needing that service or job by a date certain. Have they then used ADS to make a consequential decision? What of technologies that can help route callers to the right departments within a medical center to make an appointment with a doctor? Or an ADS that helps ensure proper randomization in patient trial assignments? How about a technology that improves climate modeling and suggests policies for reducing emissions? All of these are *computational processes* that *assist* human discretionary decisionmaking that have *material* impacts on one of the consequential areas listed in **AB 1018**. In contrast, they would not be considered technologies that replace final human decisions that have legal impact.

As a result, they would now be subject to **AB 1018** and subject to potentially severe fines and litigation costs in actions brought by the AG or other public prosecutors – fines and costs that can be crushing to all businesses, but particularly to small businesses – and also grounds for an Unruh violation moving forward.

Again, the bill must focus on high-risk use cases and decisions – ADS that make (not simply facilitate) consequential decisions that have ***legal or similarly significant impacts*** on consumers, such as on the provision or denial of "employment-related decisions", instead of ***material*** impacts on the accessibility of "employment-related decisions".

Opt-out rights are often infeasible, unnecessary, and at times counterproductive for the underlying objectives of this bill and arguably turn AB 1018 from a simple assessment requirement into a de facto ban on the technology

Under **AB 1018**, before finalizing a consequential decision made ***or facilitated*** by a covered ADS, a deployer must provide any subject of the decision with a reasonable opportunity to opt out of the use of the covered ADS.[2] It is critical to consider the practical impact of this requirement. First, as noted above, the focus should be on situations where human intervention is ***replaced*** and therefore not involved, not just where ADS "facilitates" a consequential decision. Second, there are many circumstances in which providing notice and/or opportunity to opt-out is not practicable and could have significantly negative consequences on the impacted party.

Imagine a scenario wherein a manufacturing facility uses AI-powered cameras to detect workers without proper protective gear (e.g., missing helmets or gloves) in restricted zones. The ADS automatically stops machinery, denies entry to the worker into the facility. How the business is supposed to provide the requisite

[2] Compare this to AB 2930, which while also problematic, was initially more limited insofar as it started with an opt out right if the decision is made solely based on the output of the ADS and is "technically feasible" – albeit, most anything would be technically feasible with sufficient time and money.

prior notice (more on this below) and opt out mandated in this bill before finalizing the decision is unclear. At the very minimum it would halt all business or could clearly otherwise lead to serious injuries or fatalities.

Ultimately, insofar as **AB 1018** seeks to reduce bias and discrimination in the development and deployment of ADS via evaluations/assessments, opt-out requirements are unnecessary and unaligned with those goals, as well as vastly impractical, if not simply impossible.

It is worth noting that one of the major reasons for deploying these tools relates to the efficiencies it creates. An opt out has the opposite effect. It would mean having separate processes available which is not practically feasible in many, if not most, contexts. For smaller businesses, the burden of implementing dual processes could make the use of this technology unfeasible, ultimately forcing them to abandon it altogether. This, in turn, would widen the gap between small and large businesses—the very gap that AI has helped smaller businesses bridge.

Furthermore, opt-outs are counterproductive to the policy objectives of this bill. If a business has fully complied with the elements of this bill, it will have taken the necessary steps to help reduce the chances of biased outcomes from the development and deployment of ADS—and potentially from human decisionmaking. It's unclear why then we would wish to push people back into the human decisionmaking process we know to be historically fraught with bias. Moreover, opt-outs will increase the risk that certain tools will have more bias, not less. Specifically, for any ADS that continuously learn and adapt removing information and data means these systems could have a less representative pool of information or they will simply be less effective, which is precisely the opposite of what is intended. Take for example fraud detection systems that adjust based on new fraudulent patterns in the latter context. As certain groups, such as those more aware of AI risks, those with higher education, or specific demographic groups) opt out more frequently, the data that remains for training and improving the ADMT may become less representative. This skews the system toward those who do not opt out, reinforcing biases in future decisions. Financial service and health care industries frequently use continuous learning ADS for things such as fraud detection and credit scoring, or diagnosis or personalized treatment tools. For such dynamic models that learn and adapt as they receive new data and modify their predictions or outputs overtime based on user interactions, feedback, or evolving patterns, opt outs could inadvertently reinforce biases rather than correct them, or cause the models to become less accurate.

Notice provisions are plainly unworkable

AB 1018 requires deployers to provide specific prior and post-decision notices to subjects affected by a consequential decision. In terms of *prior* notice, the bill requires deployers using ADS to notify subjects of ADS, prior to an ADS making a consequential decision, that ADS is being used in making such decision, along with other information including: the purpose of the ADS, contact information for the deployer, and highly technical information related to the ADS, and more. *After* a consequential decision is finalized, the deployer must provide every subject of the ADS with a detailed statement of the basis for decision, including right to correct personal information and appeal and timeframe for exercising rights. The person receiving notice must also be provide a "reasonable opportunity" to opt-out of the use of ADS.

In the hiring context, for example, this requirement could require employers to send disclosures to every job seeker who might have been considered for a position regardless of experience or interest—even those who never applied or are uninterested in the job. This would be an unworkable and impractical obligation in employment, or credit and lending decision contexts, just to name a few.

Consider how such requirements would work with staffing agencies, which recruit job candidates in three basic ways: searching their existing candidate pools, advertising through job boards or their own websites, or searching the internet. In the first scenario, AI tools are used to select from the database resumes or candidates that match the job description using key words or synonyms in the resume. Such searches can produce hundreds or even thousands of resumes which are sometimes further refined using additional keywords. A staffing agency recruiter will then review and compare those to the open job assignment requirements and client requests to determine the best candidates for the role. In the second scenario of job advertisements, staffing agencies also may post job titles and descriptions to job boards like Monster, LinkedIn, Indeed, and others—or to their own websites. Once potential candidates are identified, the job board may display them in ranked fashion, sometimes with a numerical score. In the last scenario, they may search the internet for so-called "passive candidates". These are individuals who are not looking for a

job, but who might be interested. In each case, AI tools facilitate identifying and quickly placing the best candidates into a variety of quality jobs.

Providing temporary job candidates with prior notice of ADS use in such a scenario is practically impossible. In each of the three search methods described above, staffing agencies already have used ADS to conduct the initial search, whether the resumes come from a job board, their own website or candidate pool, or from an internet search. In each case, it is not possible to provide advance notice because the ADS has already been used. To provide notice of ADS use in the initial stages of any search, agencies would have to provide notice *to the entire universe of potential applicants*—a literal impossibility. Even if such an effort were possible, it would create confusion for the public, many of whom may not be actively looking for new jobs.

There is also no feasible way for any but the smallest employer to comply with the post-consequential decision requirement. As currently drafted, every individual in a staffing agency's candidate pool, or who posted their information on a job board, or somewhere on the internet, to receive a detailed, personalized, notice every time an ADS was used to make a selection that did not include them, including the right to appeal the decision based on the candidate's perception that the decision was based on incorrect data.

In the entire history of employment, no employer has ever been required to provide personalized post-decision-making notices and explanations to the vast majority of applicants who are not selected for a position. This would require thousands of notices to applicants, and potential appeals every day, and it would create confusion for those candidates that were unaware they were in a pool of candidates for a role. In instances where a candidate might not be a match for one job (perhaps they indicated they can't work early shifts) but could be a match for another job (with late shifts), they would assume they were not eligible for any placements with the staffing agency, leaving valuable jobs unfilled.

Most temporary positions must be filled quickly – for instance, the need for a last-minute substitute teacher or emergency room nurse to cover for sick employees. Applicants that opt out of ADS usage may miss out on the opportunity to fill quality, last-minute jobs as agency recruiters will not have time to review individual applications and resumes. Granting candidates mandatory opt out rights after every ADS use presumes that ADS systems are fundamentally flawed. Such a presumption is unwarranted given the requirement that all ADS tools must undergo comprehensive impact assessments prior to deployment and on a regular and continuing basis thereafter.

In the health care space, other than in life threatening emergencies, such requirements would require health care entities to inform patients before using an ADS to facilitate or aid in health care decision-making or treatment and provide an opportunity to opt out. Health care entities would also have to provide patients and insureds the right to appeal decisions made using an ADS. This would be incredibly disruptive and is simply not workable in health care. Take, for example, algorithms built into MRI machines or algorithms used in laboratory testing such as estimating GFR kidney function from a blood test. Many times, there is not a viable clinical alternative, and this could result in patients or members deferring or refusing care Furthermore, health insurers are already required to provide members with the right to appeal adverse coverage decisions.

Generally speaking, the pre- and post-use notice provisions, including the ability to appeal, should simply be removed from this legislation, particularly given that they are not necessary to conducting evaluation/assessments. We note also that existing data privacy laws, particularly the California Consumer Privacy Act, provide significant notices to consumers about the ways in which their data is collected and used, rendering some of the disclosure obligation and consumer rights relative to personal information redundant and unnecessary as well. Furthermore, other measures can be put in place to provide reasonable avenues for consumers to seek appropriate information tailored to a particular tool, as opposed to enforcing a one size fits all approach that has is unrelated to conducting evaluations/assessments to avoid discrimination in the development or deployment of these tools. Many transparency goals can also be achieved with generalized notices (such as pop-up notices in the employment section of a staffing agency's website, or a general notice requirement) as opposed to onerous individualized notices, where such mass individualized notices (regardless of whether an individual requested it or not) will almost certainly undermine the utility of these tools and the purpose for which businesses employ them in the first place.

Third-party auditor provision are costly, unreasonable and unnecessary

Before January 1, 2030, deployers making decisions impacting more than 5,999 people within a three-year period would have to engage an independent third-party auditor to conduct an impact assessment covering things like the accuracy of the system and whether it has disparate impacts. As with the similar requirement for developers to contract with independent third-party auditors to assess the developer's compliance with the bill, requiring third-party audits is disproportionately costly given the scope of the systems that might be considered a covered ADS.

Furthermore, the third-party auditor requirement imposes such excessive and unnecessary costs on businesses without providing any added consumer protections, particularly as there are very few (and potentially only one) companies that provide the services required under **AB 1018**. In fact, it will have the opposite effect by driving up costs for consumers. With a limited number of auditors available, a legal mandate would create a surge in demand, allowing existing auditors to charge inflated fees without competition.

While this may change, it will take time, and the bill requires that developers and deployers conduct evaluations/assessments for all preexisting ADS by January 1, 2027 – within one year of the bill taking effect, if signed. Given the breadth of the definition, and the lack of auditors, that is logistically impossible, setting companies up for extraordinary fines unless they halt all use of ADS. Impact assessment requirements should not be so onerous and complicated that a developer of the technology must outsource them, or that the user of the technology could not run them and check for discriminatory outcomes as they would in the ordinary course of the ADS' deployment.

As businesses absorb these new compliance costs, they will be forced to raise prices, ultimately burdening consumers, reducing sales, and hindering economic growth in California. Notably, this requirement exceeds the scope of other U.S. laws and proposals, making California the most expensive jurisdiction for compliance. Given these impacts, we strongly recommend removing the third-party auditor requirement for both developers and deployers

In the end, both the establishment of specific penalties and state and federal discrimination statutes act as a proper deterrent for bad actors, or incentive for good actors, to take appropriate measures to run thorough assessments to avoid violations of state and federal discrimination laws, given that algorithmic discrimination is still discrimination.

Also, the notion that a third-party auditor could be required in order to comply with the obligations of this bill, but that there that there are no standards that the third-party auditor must meet to provide those services, or liability that they must shoulder for failure to meet them, is confounding at best. Forcing the developers and deployers to use these services but also accept liability for the auditor's failure to meet the requirements of the bill assumes that the deployers and developers have the capability to comply with the bill themselves. Therefore, developers and deployers should be permitted to either conduct the assessment themselves, or they should not be forced to incur the liability of the auditor's negligence. As a matter of public policy, under such circumstances, self-assessments should be allowed.

Impact assessments and other public policy implications of AB 1018

There are a host of other concerns identified with **AB 1018**, including in relation to its impact assessments:

- **AB 1018** not only requires impact assessments of the new ADS developed or deployed on or after the effective date of the bill, but it applies to all technologies already in existence. Developers and deployers will have one year to get evaluation/assessments completed by the January 1, 2027 deadline, which will be impossible, given that there is reportedly one (or very few) auditors available who can conduct the assessments that the bill prevents developers and deployers from conducting for themselves by having an auditor-trigger that is so low it will invariably capture all tools. This will, of course, set businesses up to violate the bill, subject to significant penalties which will now also expose them to a new ground for an Unruh violation under the proposed change to Civil Code Section 51.

- **AB 1018** also requires a new evaluation or assessment not only upon initial deployment, but also upon each substantial modification or upon any fine tuning, regardless of how often they are modified or finely tuned. This effectively discourages regular updating of these tools, making them more vulnerable to cybersecurity risks and less effective.

- **AB 1018** does not provide a definition of "substantially modifies" but the phrase is used in a number of places, including in determining whether a business is a "developer" of an ADS and in describing when a deployer would assume the duties of a developer under the bill. Because of the importance of the phrase, and the potential ambiguity if it is undefined, a recommendation is necessary, for which you may wish to look to Virginia's HB 2094.

- **AB 1018** raises questions about the allocation of responsibilities and liabilities between developers and deployers. To be fair, determining where the responsibilities and liabilities of the developer or deployer should begin and end will undoubtedly yield opposing viewpoints. For example, from a deployer's perspective, determining whether there is risk of discrimination, whether such risks were foreseeable, and whether the employer had developed adequate safeguards to address the risks are fraught with subjectivity, technical complexity, and enforcement uncertainty, all of which would expose them to serious potential liability for matters that they might argue are more within the responsibility of the ADS developers. Developers in turn might argue that they should not be held liable if they are acting at the direction of, or on behalf of a deployer, and have a reasonable belief that the deployer's directions are in compliance with the law. Furthermore, they might create a system that later gets substantially amended or deployed in ways they did not envision or intend, and they also may not feel it is their obligation to explain to deployers the deployers' responsibilities under the law.

- **AB 1018's** 10-year record keeping requirement reasonably conflicts with data minimization principles in California and other US jurisdictions. The California Consumer Privacy Act, as amended by voters in Proposition 24 (the California Privacy Rights Act or CPRA) specifies that businesses cannot retain personal information for longer than necessary to fulfill the stated purpose for which it was collected. Ten years is much longer than standard data retention periods and obligates employers to act in conflict with their obligations under CPRA. It is longer than most statutes of limitations for lawsuits as well, raising a question as to the purpose of maintaining the records for that long. This retention requirement unnecessarily creates additional cybersecurity vulnerabilities, which is also a questionable public policy choice in a state that has made a concerted effort to strengthen its cybersecurity posture over the last 12 to 15 years. We propose reducing this record keeping requirement to 1 year.

- **AB 1018's** protections in the bill for confidentiality and trade secrets, including the Public Records Act exemption are appreciated but require additional strengthening. As introduced, developers must share performance evaluations with deployers and provide documentation on outputs. And although trade secrets are protected, government agencies and auditors will have access to proprietary ADS (and auditors, once again, have no standards of care, or potential liability let alone obligation to protect this information). There is great risk of IP leakage if competitors or regulators gain insight into a company's machine learning models or if an auditor uses nonpublic information that they gain access to via these evaluations. Accordingly, the bill needs additional, strict confidentiality of ADS performance evaluations shared with regulators and the auditor provision must be stricken from the bill, as noted above.

AB 1018 raises significant concerns around allowing enforcement by multiple entities and imposing punitive fines, with little to no opportunity to cure

We appreciate the absence of a private right of action. As you know, because compliance is not easy to achieve in areas where massive changes in public policy are sought and where the state of law and technology are not only complicated but constantly evolving, a private right of action would have been highly problematic and chilling of innovation. That being said, businesses are still subject to civil enforcement by not only the Attorney General (AG) but by all other public attorneys (city prosecutors, district attorneys, city attorneys, and county counsel), in addition to the administrative enforcement of the Civil Rights Department (CRD), and the Labor Commissioner with respect to employment-related decisions. We feel it critical that the law be subject to a single enforcer. While we generally feel enforcement should be limited to a single enforcer, at the very least, civil enforcement should be limited to the Attorney General, particularly given the subjectivity and vagueness involved in many aspects of this bill. Otherwise, businesses can fall subject

to different interpretations of the law and be found noncompliant for the same actions in one jurisdiction that would be compliant in another jurisdiction.

We also have concerns about the punitive nature of the fines imposed by **AB 1018** for each violation, and the lack of clarity around what constitutes a single "violation" for these purposes. Currently, penalties include $25,000 per violation, although it is unclear what exactly is considered a single violation beyond violations for each day that an evaluation/assessment is overdue to the AG[3]. In contrast, we note that AB 2930 was limited to $25,000 violations for cases involving algorithmic discrimination only. Compare this, for example, to California's landmark data privacy law, which includes fines of not more than $2,500 or, in the case of an intentional violation, not more than $7,500.

AB 1018's $25,000 fines are available even without evidence of any actual harm to the consumer. Furthermore, the fines would become even more punitive, depending on what is considered a single violation, as opposed to multiple violations. As currently drafted, an argument could be made that a violation constitutes not only a failure to complete an impact assessment altogether but also any single deficiency within that impact assessment. Even then, it is unknown whether the number of violations is based on that single error, or by any single error multiplied by the number of individuals who were *potentially* impacted by the use of a particular type of ADS for which an assessment was required or who received an inadequate notice.

We are concerned that as drafted, the liability provisions effectively create strict liability for disparate impact, even if the ADS is designed with fairness safeguards. Consider such a scenario where a health care provider could be fined $25,000 per violation if their tool is found to produce statistically different outcomes for protected classes, even in a situation where they clearly did not have discriminatory intent and in fact took steps to place safeguards. This would have a chilling effect and discourage providers and systems from using tools to enhance efficiencies and improve clinical outcomes, especially for smaller and less resourced clinics and providers.

Lastly, we note that this bill does not have any right to cure provisions. We encourage the inclusion of language giving covered entities the ability to cure any violations before receiving penalties, with at least 60 days to cure alleged violations.

AB 1018 requires preemption language to avoid significant implementation problems and disparate protections depending on the city or county a person lives in.

Unlike the earlier iteration of AB 331, **AB 1018** does not include any preemption language ensuring that no city or county can adopt, maintain, enforce, or continue in effect any law, regulation, rule, requirement, or standard related to the performance of an impact assessment or governance program, or the equivalent thereof of an impact assessment.

California has 482 municipalities spread across 58 different counties. When a law is a matter of statewide concern it is critical to include preemption. (*See e.g.* Civ. Code Section 1798.180). AI, including issues around bias and ADS, are decisions that should be made if not at the federal level, at a state one. Imagine if even a quarter of these localities have differing rules for impact assessments. Imagine that the conflicts are so significant that businesses must conduct multiple assessments, in addition to the ones they must conduct pursuant to state laws and even international ones. Worse yet, what if those impact assessments

[3] See Proposed Sec. 22756.4(c) which states: *Each day a covered ADS is used for which a performance evaluation or impact assessment has not been submitted to the Attorney General pursuant to this section is an additional violation of this section."*

But the bill clearly suggests an action may be brought violations of the entire bill, not just for that particular provision under Proposed Sec. 22756.5:

(a) Any of the following public entities may bring a civil action against a developer or deployer who violates this chapter: […]

(b) A court may award a prevailing plaintiff who brings an action pursuant to subdivision (a) all of the following […]

(4) A civil penalty of up to twenty-five thousand dollars ($25,000) per violation."

preclude the development or deployment of certain ADS in one city, but not the next? And what if that impacts the quality of, or even access to, services from one city to the next?

Other active legislative and regulatory efforts on related topics similarly open the door for vast confusion and increase the likelihood of conflicting rules and regulations. **AB 1018,** while specifically focused on ADS, is not the only measure on this topic. There are at least two regulatory bodies actively working on ADS or ADMT (automated decisionmaking tool) regulations already: the Civil Rights Council and the California Privacy Protection Agency (CPPA or Privacy Agency).

We are especially concerned about agencies and departments getting ahead of the Legislature and Governor on matters of such statewide importance. The clearest example of this lies with the Privacy Agency. Proposition 24 of 2020 required the CPPA to issue regulations "governing access and opt-out rights related to businesses' use of automated decision-making technology, including profiling and requiring businesses' response to access requirements to include meaningful information about the logic involved in these decisionmaking processes, as well as a description of the likely outcome of the process with respect to the consumer." (Civ. Code Sec. 1798.185.) Last November, the CPPA Board issued a public notice commencing formal rulemaking including regulations on automated decision-making tools. As we have testified numerous times at their Board meetings, the draft regulations go beyond the authority granted by the voters and in fact veer into broader AI regulation in general, which should be addressed by this Legislature and Governor – not that Agency.

In addition to all of this, the Civil Rights Council within the Civil Rights Department (formerly, the Department of Fair Employment and Housing) has also been working on regulating the use of AI and machine learning in connection with employment decision-making. They just recently sent out a notice clearly indicating their intent to finalize their proposed employment regulations regarding "automated decision systems" in their effort to incorporate such technology into existing rules regulating California employment and hiring practices.

With all these moving parts, it is difficult to foresee how such laws and regulations will layer on top of one another and whether there will be conflicting public policy around the use of such tools and technologies. While we are confident that the Legislature will review legislation for such conflicts, that does nothing to address the situation of agencies and departments doing their own rules—even ones that are arguably not supported in statutory authority. Understandably, our members are alarmed by the likelihood of conflict and confusion at the conclusion of these efforts that are being run in parallel to each other, without sufficient coordination or consideration of the other efforts underway. If **AB 1018** is passed, we hope it will include some protection against agencies and departments stepping on the Legislature and Governor's authority.

That said, because this bill in print fails to focus on high-risk ADS that are making final decisions that have legal impact, without human involvement, judgment, oversight, intervention, or review, contains numerous unworkable provision, and would devastate businesses of every size, across every industry that does business in this state, we must unfortunately **OPPOSE AB 1018 (Bauer-Kahan) as a COST DRIVER**.

Sincerely,

Ronak Daylami
Policy Advocate
on behalf of

American Property Casualty Insurance Association, Laura Curtis
American Staffing Association, Toby Malara
Associated General Contractors, California, Matt Easley
Association of California Life and Health Insurance Companies, Matt Powers
Association of National Advertisers, Christopher Oswald
California Chamber of Commerce, Ronak Daylami
California Fuels + Convenience Alliance, Jack Yanos
California Staffing Professionals, Jay Ramos

Civil Justice Association of California, Kyla Powell
College Board, Ben Williams
Computer & Communications Industry Association (CCIA), Aodhan Downey
Consumer Data Industry Association (CDIA), Kris Quigley
Internet Works, Peter Chandler
National Association of Mutual Insurance Companies, Christian Rataj
Personal Insurance Federation of California, Allison Adey
Public Risk Innovation, Solutions and Management (PRISM), Michael Pott
Security Industry Association, Jake Parker
Society for Human Resource Management (SHRM), Emily Dickens
Software Information Industry Association, Abigail Wilson
TechCA, Courtney Jensen
TechNet, Robert Boykin

cc: Legislative Affairs, Office of the Governor
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Estefani Avila, Office of Assemblymember Bauer-Kahan
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RD:ldl