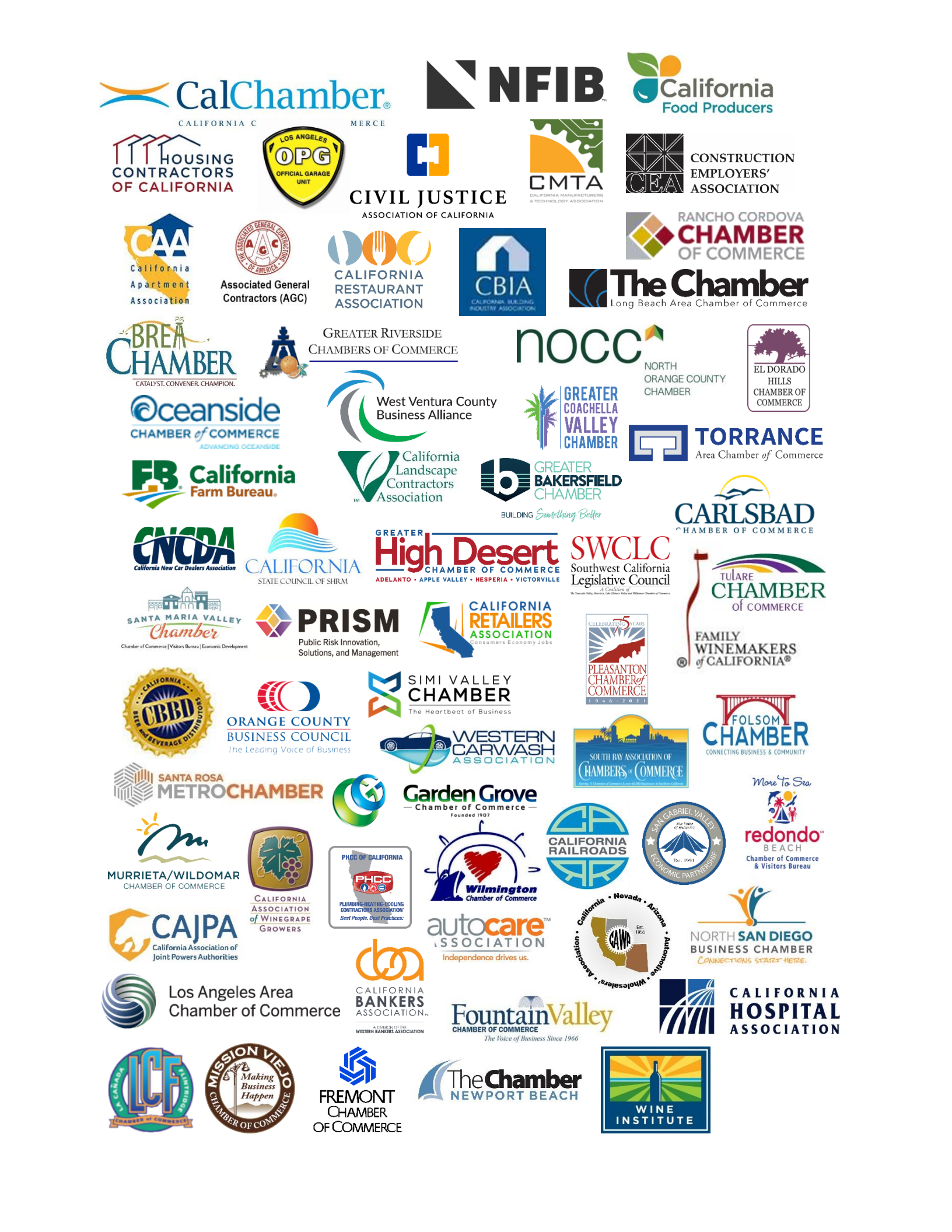
CalChamber
CALIFORNIA CHAMBER OF COMMERCE
NFIB
California Food Producers
Housing Contractors of California
Los Angeles OPG Official Garage Unit
Civil Justice Association of California
CMTA
California Manufacturers & Technology Association
CEA
Construction Employers' Association
California Apartment Association
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California Restaurant Association
CBIA
California Building Industry Association
Rancho Cordova Chamber of Commerce
The Chamber
Long Beach Area Chamber of Commerce
Brea Chamber
Catalyst. Convener. Champion.
Greater Riverside Chambers of Commerce
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North Orange County Chamber
El Dorado Hills Chamber of Commerce
West Ventura County Business Alliance
Greater Coachella Valley Chamber
Oceanside Chamber of Commerce
Advancing Oceanside
Torrance Area Chamber of Commerce
California Farm Bureau
California Landscape Contractors Association
Greater Bakersfield Chamber
Building Something Better
Carlsbad Chamber of Commerce
CNCDA
California New Car Dealers Association
California State Council of SHRM
Greater High Desert Chamber of Commerce
Adelanto • Apple Valley • Hesperia • Victorville
SWCLC
Southwest California Legislative Council
Tulare Chamber of Commerce
Family Winemakers of California
Santa Maria Valley Chamber
Chamber of Commerce | Visitors Bureau | Economic Development
PRISM
Public Risk Innovation, Solutions, and Management
California Retailers Association
Consumers Economy Jobs
Celebrating 75 Years
Pleasanton Chamber of Commerce
1946 - 2021
California Beer and Beverage Distributors
Orange County Business Council
The Leading Voice of Business
Simi Valley Chamber
The Heartbeat of Business
Western Carwash Association
South Bay Association of Chambers of Commerce
Folsom Chamber
Connecting Business & Community
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More To See
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Chamber of Commerce & Visitors Bureau
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California Association of Winegrape Growers
PHCC of California
Plumbing-Heating-Cooling Contractors Association
Best People. Best Practices.
Wilmington Chamber of Commerce
California Railroads
San Gabriel Valley Economic Partnership
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Mission Viejo Chamber of Commerce
Making Business Happen
Fremont Chamber of Commerce
The Chamber Newport Beach
Wine Institute

JOB KILLER

March 23, 2022

The Honorable Buffy Wicks
California State Assembly
1021 O St., Ste. 4240
Sacramento, CA 95814

SUBJECT: AB 2182 (WICKS) EMPLOYMENT DISCRIMINATION AND ACCOMMODATION OPPOSE/JOB KILLER – AS INTRODUCED MARCH 18, 2022

Dear Assembly Member Wicks:

The California Chamber of Commerce and the organizations listed below respectfully **OPPOSE AB 2182 (Wicks)** which has been labeled as a **JOB KILLER. AB 2182** imposes a burdensome new accommodation requirement on small businesses to provide employees with time off any time school or a care center is unavailable. The Fair Employment and Housing Act (FEHA) applies to employers with five or more employees and includes a costly private right of action, exposing small employers to costly litigation. **AB 2182** also creates a new protected class under FEHA: people with "family responsibilities". That term is broadly defined to include anyone with a child under 18 or anyone who provides care to someone in their family or household, including a non-family member. This creates an automatic basis for an individual in that new classification to challenge any adverse employment action.

"Family Responsibilities" Is Broadly Defined and Would Apply to Far More Than 33% of Workers:

AB 2182 proposes to add any individual with "family responsibilities" as a new protected class under FEHA. That term is broadly defined to include any worker who 1) has a child under 18 or 2) provides care for anyone in their family or household, including a non-family member. "Family member" as defined is significantly more broad than any other statute and would include anyone related by blood or anyone the employee considers to be like family. According to the Bureau of Labor Statistics, one third of employees have a child under 18. When you add in the number of employees that may care for someone they live with or a family member, far more than 33% of workers would therefore fall under this new protected class.

Adding a new classification to the list under FEHA limits an employer's ability to enforce employment policies, including attendance policies. Any action taken by the employer could be challenged as discrimination based on "family responsibilities." For example, even if the employee did not request time off as an accommodation and simply took time off, whenever they wanted, scheduled or unscheduled, the employer could not discipline or terminate the employee for the time off without facing potential litigation under FEHA for discrimination based on family responsibilities. This will significantly limit an employer's ability to address discipline issues in the workplace, maintain stability, and eradicate any issues without costly litigation.

AB 2182 Imposes a New, Uncapped Leave Requirement on Small Employers:

AB 2182 amends FEHA to require all employers, including small employers, to provide reasonable accommodations to any employee who has family responsibilities where a school or care center is unavailable. There are already multiple leaves that provide for time off for these exact reasons. Labor Code

Section 230.8 provides 40 hours of leave for situations were a school or childcare center is unavailable. The California Family Rights Act (CFRA) provides up to 12 weeks of leave to care for someone else. The Healthy Workplace Healthy Family Act and related "kin care" statutes also allow sick time to be used to care for someone else. **AB 2182**'s accommodation requirement effectively removes the time caps placed on those already-existing statutes, which would devastate small businesses. If, for example, schools close again due to a COVID-19 surge, all working parents would likely be entitled to unlimited time off or daily schedule changes.

Further, "unforeseen" is a vague term, the bounds of which are surely to be tested in litigation. It is unclear what would qualify as "unforeseen." If an employee's family member was watching their child and suddenly was unable to continue doing so, would that employee be entitled to an accommodation? If so, for how long? Any denial of time off as an accommodation would expose the employer to costly litigation, as set forth below.

Leave Under AB 2182 Would Be Stacked On Top of Other Existing Leave Mandates:

Any time off an employee receives as an accommodation under FEHA would not run concurrently with the other California leaves of absence. An employee who requested a month off under **AB 2182** as a reasonable accommodation would still have 12 weeks of leave under the California Family Rights Act, 12 weeks of leave under the Family and Medical Leave Act, paid sick leave, and all other existing leaves to care for children/family members including:

- School/Childcare leave – Expanded in 2016 so that employees can take up to 40 hours per year to care for a child whose school or childcare provider is unavailable, enroll a child in school or childcare, or participate in school or childcare activities.
- School Appearance leave – Uncapped leave for an employee who needs to take time off to appear at school due to a student disciplinary action.
- Crime /Domestic Abuse/Sexual Assault/Stalking Victim leave – Uncapped leave for victim or victim's family member to attend related proceedings.

This list also does not include the dozens of local ordinances that have broader paid and unpaid leave requirements than those listed above. These leaves add significantly to the cumulative cost of doing business in California. For example, unscheduled absenteeism costs employers roughly $3,600 per year for each hourly employee in this state. (*See* "The Causes and Costs of Absenteeism in The Workplace," a publication of workforce solution company Circadian.) The continued mandates placed on California employers to provide employees with numerous rights to protected leaves of absence and other benefits is simply overwhelming and unmatched by any other state.

Small Employers Cannot Afford Another Costly Mandate:

FEHA applies to all employers with five or more employees. Because of the number of employees that would be entitled to those accommodations by this broad definition, this bill would result in a significant burden for businesses, especially small businesses. Small business revenue was down 25% during the Omicron surge as compared to what it was pre-pandemic, with some sectors being down more than 40%. As Governor Newsom stated in his budget proposal, "Small businesses are job creators, innovators, and are key to the fabric of the state's diverse communities." We have heard from many who had to reduce or close operations over the last two years or reduce staff due to the costs of COVID-19 sick leave and other mandates. Now is the time to invest in our businesses, especially our small businesses, to keep them from closing their doors, laying off more workers, or slowing their recovery and job growth.

AB 2182 Exposes Employers to Costly Litigation Due to Its Private Right of Action:

FEHA includes a separate and independent private right of action for any alleged discrimination against a protected classification, failure to accommodate, or failure to engage in the interactive process to identify an accommodation. Each claim brings a separate opportunity for compensatory damages, injunctive relief, declaratory relief, punitive damages, and attorney's fees. Under **AB 2182,** an employee whose accommodation request was denied could sue for discrimination, failure to engage in the interactive process, retaliation, and failure to provide a reasonable accommodation.

The case law and regulations governing the interactive process and accommodations are voluminous and vague. Because accommodation requests are highly fact-specific, it is easy for an employer to believe they are following the law and then be hit with a lawsuit that is costly to defend. A 2017 study by insurance provider Hiscox regarding the cost of employee lawsuits estimated that the cost for a small to mid-size employer to defend and settle a single plaintiff discrimination claim was approximately $160,000, which was a $35,000 increase from Hiscox's study just two years earlier. This amount, especially for a small employer, reflects the financial risk associated with defending a lawsuit under FEHA. In 2016, Hiscox found that U.S. companies had a 10.5% chance of having an employment charge filed against them. For California, that percentage was **56.5%.** According to the DFEH's annual reports, the number of complaints filed in California continues to grow every year, with more than 75% of those employees choosing to immediately pursue civil litigation instead of having the DFEH investigate their claim.

Even when an employer does grant an accommodation for leave, there is likely to be a lawsuit about whether the employer should have done more. In the disability context, there has been extensive litigation about whether a specific accommodation is sufficient or whether the employee is entitled to more accommodations after the end of a period of leave. *See, e.g., Hanson v. Lucky Stores, Inc.*, 74 Cal. App. 4th 215, 215 (1999) (employee sued for failure to accommodate under FEHA after being on leave for 16 months); *Nadaf-Rahov v. Neiman Marcus Group, Inc.*, 166 Cal. App. 4th 952 (2008) (employee sued for disability discrimination, retaliation, failure to accommodate, and failure to engage in the interactive process after employer provided employee with nine months of leave). If an employee is laid off because the employer cannot accommodate the employee and they are otherwise unable to work, the employer is on the hook for continuing to look for open positions for the employee *even after the employee's employment has ended*. *Nadaf-Rahov*, *supra*, 166 Cal. App. 4th 952 (court reversed summary judgment because several positions became available four months after the employee was terminated - positions that she potentially could have performed).

Instead of Burdening Employers with More Costs, the Legislature Should Provide More Flexible Work Options that Benefit Employers and Employees:

Like many of the bills and regulations that have been introduced over the past year, **AB 2182** again proposes that California's employers subsidize an employee's personal needs outside of work instead of considering alternative solutions that could benefit both employers and employees. Instead of imposing new costs on employers, the Legislature should reform California's unnecessarily rigid wage and hour laws to allow employees flexibility in their weekly schedules that would allow workers more time to care for children and others. Presently, California's inflexible Labor Code, steep penalty system, and convoluted alternative workweek schedule process dissuade employers from allowing employees to have more flexibility during their workday. Added costs such as split shift premiums, daily overtime, meal and rest break premiums, and a broad expense reimbursement requirement make workplace flexibility too expensive for employers to consider. Many employers are hesitant to continue to offer telecommuting after the pandemic because these wage and hour laws were not designed with telecommuting employees in mind. Any failure to adhere to certain rules immediately triggers penalties and attorney's fees under various Labor Code provisions, including PAGA.

Employees want flexibility, whether it be through a more flexible daily schedule, alternative workweek schedule, or the ability to continue to telecommute after the conclusion of the pandemic. Updating these laws to provide more opportunities for flexibility is an important issue that benefits both employees and employers and is very popular among California voters. In a recent survey conducted by the California Chamber of Commerce, 91% of polled voters agree (56% strongly) that the state's labor laws should be changed to allow for more flexibility. As to specific changes:

• 88% support changing overtime requirements to allow alternative workweek schedules.

• 82% support allowing employees to take rest periods at any time of their choosing.

• 80% support allowing employees to forgo their 30-minute meal period to go home earlier.

• 79% support allowing employees to split their shifts to accommodate personal needs.

Providing more flexibility to employees would ease the burdens of care obligations for many employees.

For these and other reasons, we respectfully **OPPOSE AB 2182** as a **JOB KILLER.**

Sincerely,

Ashley Hoffman
Policy Advocate
California Chamber of Commerce

Associated General Contractors
Auto Care Association
Brea Chamber of Commerce
California Apartment Association
California Association of Joint Powers Authorities
California Association of Winegrape Growers
California Bankers Association
California Beer and Beverage Distributors
California Building Industry Association
California Chamber of Commerce
California Farm Bureau
California Food Producers
California Hospital Association
California Landscape Contractors Association
California Manufacturers and Technology Association
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California State Council of the Society for Human Resource Management (CalSHRM)
Carlsbad Chamber of Commerce
CAWA – Representing the Automotive Parts Industry
Civil Justice Association of California
Construction Employers' Association
Corona Chamber of Commerce
El Dorado Hills Chamber of Commerce
Family Business Association of California
Family Winemakers of California
Folsom Chamber of Commerce
Fountain Valley Chamber of Commerce
Fremont Chamber of Commerce
Fresno Chamber of Commerce
Garden Grove Chamber of Commerce
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Greater Bakersfield Chamber of Commerce
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Greater Riverside Chambers of Commerce
Housing Contractors of California
Imperial Valley Regional Chamber of Commerce
Kern County Hispanic Chamber of Commerce
La Cañada Flintridge Chamber of Commerce
Long Beach Area Chamber of Commerce

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Murrieta/Wildomar Chamber of Commerce
National Federation of Independent Business
Newport Beach Chamber of Commerce
North Orange County Chamber
North San Diego Business Chamber
Oceanside Chamber of Commerce
Official Police Garages Los Angeles
Orange County Business Council
Pleasanton Chamber of Commerce
Plumbing-Heating-Cooling Contractors Association
Public Risk Innovation, Solutions and Management
Rancho Cordova Area Chamber of Commerce
Redondo Beach Chamber of Commerce
San Gabriel Valley Economic Partnership
Santa Ana Chamber of Commerce
Santa Maria Valley Chamber of Commerce
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Simi Valley Chamber of Commerce
South Bay Association of Chambers of Commerce
Southwest California Legislative Council
Torrance Area Chamber of Commerce
Tulare Chamber of Commerce
West Ventura County Business Alliance
Western Carwash Association
Wilmington Chamber of Commerce
Wine Institute

cc: Legislative Affairs, Office of the Governor

AH:am