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Before The Senate Standing Committee on Consumer Protection of the Legislature of the State of New York

Re: THE TWENTY-FIRST CENTURY ANTITRUST ACT (S.8700-A)

Chairperson Thomas and Members of the Committee: Thank you for inviting me to appear today on this pressing issue. My name is Shaoul Sussman and I am a legal fellow testifying on behalf of the Institute for Local Self-Reliance (“ILSR”), a research and advocacy organization that works to advance policies that disperse economic power and strengthen local communities.¹

America’s Monopoly Problem and Its Impacts

The pandemic has laid bare the economic concentration crisis our communities are facing. The wealth of the few have reached unparalleled levels and the earnings for the average worker have barely increased, leaving many New Yorkers with no cushion to blunt the force of this downturn.

During these unprecedented times our organization is in regular contact with small business owners who are now struggling because of their inability to negotiate with big businesses that control their industry. In fact, some small businesses have been directly impacted by anticompetitive decisions made by the monopolists to limit their access to consumers and longtime customers.²

Far too many rural communities and urban neighborhoods have been neglected by monopolists and left to get by without basic services like grocery stores and hospitals. And the racial disparities that have long oppressed people of color as a result of market concentration have been compounded by the pandemic.

This Is Not the First Time We Are Facing this Crisis

When concentration has reached extreme levels in the past, and policymakers have stepped in to provide checks and balances, States have played a key role in acting on their own and have helped to guide and spur federal action.

New York has a long and illustrious history of combating monopolies and curbing corporate power. And up until the 20th century, States like New York were at the frontlines of this battle. New York’s first anti-monopoly laws, passed more than two-hundred years ago, were structural and proactive. A leading legal treatise of that time explains that:

¹ <https://ilsr.org/about-the-institute-for-local-self-reliance/>

² Shaoul Sussman, Virus-Enhanced Market Power: American Small Businesses Are Kept Hostages by Amazon, ProMarket, March 20, 2020, <https://promarket.org/2020/03/20/virus-enhanced-market-power-american-small-businesses-are-kept-hostages-by-amazon/>

To prevent monopolies, and to confine the action of these powerful bodies strictly within their proper sphere, the acts incorporating companies passed in this country, almost invariably limit the amount of property they shall hold...and frequently prescribe in what it shall consist, the purposes for which it shall alone be purchased and held, and the mode in which it shall be applied to effect those purposes.³

In New York, as the U.S. Supreme Court observed, “limitations upon the scope of a business corporation’s powers and activity were...long universal.”⁴ Corporations could be formed only for a limited number of purposes and the powers that they were allowed to exercise in carrying out these purposes were also confined.⁵

The subsequent removal of these limitations on the scope and size of corporations during The Gilded Age did not occur because they were deemed ineffective or harmful to local businesses or the State’s economy.⁶ It was merely lobbying muscle. The limitations were removed after the Robber Barons of the day deployed legal schemes to circumvent them.⁷

As a result, the New York legislature had to adopt a different strategy. The old proactive and structural anti-monopoly laws were replaced with the Donnelly Act in 1893. The Act attempted to fill the perceived shortcomings of New York’s long-standing antimonopoly laws as well as gaps in the Federal Sherman Antitrust Act that was passed in 1890.⁸

Today, as in 1893, the legislature of this great State is once again called upon to reinvigorate its anti-monopoly laws in the face of a second Gilded Age and the rise of the Digital Robber Barons.

For decades following the passage of the Sherman Antitrust Act, New Yorkers could rely on our Federal courts and agencies to effectively police and prosecute monopolists. In 1911, a Manhattan judge was the first in the nation to clarify that the “existence” of monopoly power itself was illegal under the Sherman Act.⁹ And in striking down the mighty aluminum monopoly of Alcoa, Learned Hand, a life-long New Yorker, and perhaps the greatest Federal Judge to ever preside over the Second Circuit, clearly articulated the harm monopolies pose to our democracy:

We have been speaking only of the economic reasons which forbid monopoly; but,...there are others, based upon the belief that great industrial consolidations are inherently undesirable, regardless of their economic result...[A]mong the purposes of Congress in 1890 was a desire to put an end to great aggregations of capital because of the helplessness of the individual before

³ Joseph K. Angell and Samuel Ames, *Treatise on the Law of Private Corporations* Aggregate at 80-81 (1832).

⁴ *Louis K. Liggett Co. v. Lee*, 288 U.S. 517, 557-564 (1933) (Brandeis, J., dissenting)

⁵ *Id.*

⁶ House Committee on the District of Columbia, Report of Hearings of January 16, 1905, on H. R. 11811 and 12303 (Gov’t Ptg. Office 1905) pp. 24-28.

⁷ Report of N. Y. Joint Committee on Trusts, March 9, 1897, 120th Sess., Sen. Doc. No. 30, pp. 3-4.

⁸ Jack Greenberg, *New York Antitrust Law and Its Role in the Federal System*, in *Antitrust Law in New York State* (Robert L. Hubbard and Pamela Jones Harbour eds., 2d ed. 2002).

⁹ *United States v. Patten*, 187 F. 664, 672 (C. C. S. D. N. Y. (1911)), *reversed on other grounds*, 226 U.S. 525 (1913)

them... [and] to perpetuate and preserve, for its own sake and in spite of possible cost, an organization of industry in small units which can effectively compete with each other.¹⁰

In fact, in 1968 the Supreme Court cited and fully endorsed Judge Hand's view by holding, in a seven-to-one decision, that the mere possession of monopoly power was illegal.¹¹

The Law Has Gone off Track Again

But over the last four decades, our federal judicial system and enforcement agencies began to reverse course and significant antimonopoly precedent was eroded and overturned. Monopoly power undermines small businesses. It harms working people by foreclosing competition over labor and by forcing tens of thousands of New Yorkers to rely on "gig" jobs.¹²

Monopoly power fuels racial injustice. In his last speech, Martin Luther King argued that in order to sustain the Civil Rights Movement:

we've got to strengthen black institutions. I call upon you to take your money out of the banks downtown and deposit your money in Tri-State Bank. We want a 'bankin' movement in Memphis... You have six or seven black insurance companies here in the city of Memphis. Take out your insurance there. We want to have an 'insurance-in.'¹³

Malcolm X also recognized the importance of small black economic institutions. "Why," he asked, "should white people be running the banks of our community?"¹⁴ Many allies have marched with Dr. King, but it were black proprietors of small businesses that bailed out Dr. King time and again after being arrested for 'civil disobedience.'¹⁵ A powerful movement, largely supported by a grassroots network of small business owners, like that which supported the Civil Rights Movement, would be unthinkable in our times, where giant corporations such as Amazon compete with local businesses in communities of color while surveilling and extracting wealth from them.¹⁶

¹⁰ *United States v. Aluminum Co. of America*, 148 F.2d 416 (1945).

¹¹ *Hanover Shoe v. United Shoe Mach.*, 392 U.S. 481, 497-499 (1968).

¹² Avery Hartmans, 'This is why people are so angry': Tech giants like Google, Facebook, and Uber built their empires on the backs of contractors. A pandemic is showing just how horrifically that model failed American workers, *Business Insider*, Apr 2, 2020, <https://www.businessinsider.com/how-tech-relies-on-contractors-temps-gig-workers-employees-2020-1>.

¹³ Baradaran, *The Color of Money: Black Banks and the Racial Wealth Gap* (Cambridge, MA: Belknap Press, 2017), 159.

¹⁴ *Id.* at 161.

¹⁵ Branch, Taylor. *Parting the Waters: America in the King Years, 1954-63*. New York: Simon & Schuster, 1988; Ferleger, Louis and Lavalée, Matthew, *Lending a Hand: How Small Black Businesses Supported the Civil Rights Movement* (December 1, 2018). Institute for New Economic Thinking Working Paper Series No. 67, Available at SSRN: <https://ssrn.com/abstract=3125212> or <http://dx.doi.org/10.2139/ssrn.3125212/>

¹⁶ *The Color of Money*, Mehrsa Baradaran, 2017. "Research Shows Food Deserts More Abundant in Minority Neighborhoods," Kelly Brooks, *Johns Hopkins Magazine*, Spring 2014.; *The Impact of Dollar Stores and How Communities Can Fight Back* (Fact Sheet)," Marie Donahue, Institute for Local Self-Reliance, December 6, 2018.; "The Racial Digital Divide Persists," Dana Floberg, *Free Press*, December 13, 2018;

Monopoly power fails New Yorkers who are now paying more and getting less. For example, consolidation in pharmacy ownership is now driving up the cost of prescription drugs, while leaving many towns and neighborhoods without a nearby pharmacy.¹⁷

Monopoly power also kills innovation.¹⁸ As the Congressional investigation has demonstrated, Amazon, Facebook, and Google have slowed the once-brisk pace of technological innovation by buying smaller competitors before they become true threats.¹⁹

Monopolies are less efficient. A recent report published by ILSR has demonstrated that the growth of Amazon's logistics business resulted in a per-unit increase in shipping and delivery fees the company charges from sellers who use these services. Between 2013 and 2019, the standard rate for storing inventory in Amazon's warehouses during off-peak months rose 67 percent.²⁰ And storage rates for standard-sized items (those under 20 pounds and within certain dimensions) are now 75 cents per cubic foot per month during the first part of the year and \$2.40 during the peak season.²¹ Most notably, Amazon's storage fees are much higher than those of its competitors, according to several sources. A 2019 survey of 600 warehouses across the US and Canada, for example, found an average rate of only 50 cents per cubic foot.²²

If we assume that Amazon does not charge monopoly rents for these services, which Amazon will argue it doesn't, the increase in fees must demonstrate that Amazon has become less efficient. That is, Amazon's growth rendered it less efficient in storing goods, and at this point the prices it charges the consumers of its storage services are much higher than the national average.

These days, Federal courts focus solely on the low consumer prices. But at the same time hold that charging high prices is a positive thing that tends to allow competition to flourish,²³ and traditional prohibitions on price discrimination are all but a dead letter.²⁴ The Supreme Court created such a high standard for predatory pricing lawsuits that bringing such claims is virtually impossible,²⁵ and price squeeze claims can no longer be brought under the Sherman Act.²⁶ In fact, monopolists can no longer be held liable for charging excessive prices to access goods and services,²⁷ and the ability

Sam Biddle, Amazon "Stands in Solidarity" Against Police Racism While Selling Racist Tech to Police, The Intercept, June 3 2020, <https://theintercept.com/2020/06/03/amazon-police-racism-tech-black-lives-matter/>.

¹⁷ Hal Singer, Why the Justice Department Waved Through the CVS-Aetna Merger, The American Prospect, July 17, 2019, <https://prospect.org/economy/justice-department-waved-cvs-aetna-merger/>.

¹⁸ Senator Elizabeth Warren, Here's how we can break up Big Tech, Medium, March 8, 2019, <https://medium.com/@teamwarren/heres-how-we-can-break-up-big-tech-9ad9e0da324c>.

¹⁹ Ben Lovejoy, Antitrust hearing to accuse Apple and others of 'copy acquire kill' strategy, 9TO5MAC, July 28, 2020, <https://9to5mac.com/2020/07/28/copy-acquire-kill/>.

²⁰ Stacy Mitchell, Ron Knox, Zach Freed, Report: Amazon's Monopoly Tollbooth, Institute for Local Self-Reliance, July 28, 2020, https://ilsr.org/amazons_tollbooth/.

²¹ *Id.*

²² *Id.*

²³ *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407 (2004).

²⁴ *Volvo Trucks N. Am., Inc. v. Reeder-Simco GMC, Inc.*, 546 U.S. 164, 166 (2006)

²⁵ *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993).

²⁶ *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 450-51 (2009).

²⁷ *Id.*

to bring Essential Facilities Doctrine or Refusal to Deal claims was also undermined by various recent Federal court rulings.²⁸

The magnitude of the shift cannot be overstated. For instance, in 1968 the Supreme Court clearly declared that there “was no accepted interpretation of the Sherman Act which conditioned a finding of monopolization under § 2 upon a showing of predatory practices by the monopolist.”²⁹ But by 2004 the same Court reached the opposite conclusion in observing that “The mere possession of monopoly power, and the concomitant charging of monopoly prices, is not only not unlawful; it is an important element of the free-market system.”³⁰ In the last four decades the Supreme Court stealthily overturned existing precedent and unleashed the relentless growth of the corporate goliaths.³¹

Now there is growing concern. Scholars, policymakers, journalists, small business groups, and advocates amassed an anti-monopoly coalition and Congress took notice. For more than a year now Chairman David Cicilline and members of the House Antitrust Subcommittee have been engaged in a comprehensive investigation into the dominance of Big Tech — the first major investigation of monopoly power in over 40 years.³² And we must hope that the fruits of their scrutiny would eventually lead to a much needed reinvigoration of our Federal antitrust laws and regulations.

The Twenty-First Century Antitrust Act Can Help Get Anti-Monopoly Policy Back on Track

The legislative findings of Senate Bill S8700 make clear, monopolies are dangerous and after they are established, “it is typically too late to repair or mitigate the damage which has been done.” New York cannot and must not wait for the Federal Government to act. Monopolies are harming our communities and our small businesses as we speak, and the current Covid crisis only magnifies and intensifies the harm. More than one-fifth of all Black-owned businesses operating at the beginning of the year are now shuttered.³³ As many as one-third of NYC’s local businesses are predicted to close because of the failed federal policy response to Covid. At the same time, the combined market value of Amazon, Google, Facebook and Apple has soared passed \$5tn for the first time over this summer and their total share of the stock market surpassed 20%.³⁴ At this desperate hour, the Digital Robber Barons get rich at the expense of small businesses across this State.

As in 1893, New York should once again lead the fight against monopoly power.

The proposed ‘Abuse of Dominance’ standard can potentially fix critical gaps in today’s antitrust law and jurisprudence. By establishing a new ‘Abuse of Dominance’ standard that is clearly articulated, New York’s laws could capture and prohibit many types of unilateral conduct that firms

²⁸ *Trinko*, 540 U.S. at 407-10; *In re Indep. Serv. Org. Antitrust Litig.*, 203 F.3d 1322, 1327-28 (Fed. Cir. 2000)

²⁹ *Hanover Shoe*, 392 U.S. at 497-499.

³⁰ *Trinko*, 540 U.S. at 407.

³¹ Lina Khan & Sandeep Vaheesan, *Market Power and Inequality, The Antitrust Counterrevolution and its Discontents*, 11 Harv. L. & Pol’y Rev. 235 (2017)

³² Matt Stoller, *The Day Big Tech Stopped Being Untouchable*, August 1, 2020, <https://mattstoller.substack.com/p/the-day-big-tech-stopped-being-untouchable>.

³³ Peter Eavis and Steve Lohr, *Tech’s Domination of Business Reaches New Heights*, New York Times, August 19, 2020, <https://www.nytimes.com/2020/08/19/technology/big-tech-business-domination.html>.

³⁴ Spencer Weber Waller, *The Omega Man or the Isolation of U.S. Antitrust Law*, 52 Conn. L. Rev. 123 (2020).

engage in but are impossible to bring under current Federal standards.³⁵ Firms like Amazon, that might capture less than 70% of online retail but has enough gatekeeper power to engage in anticompetitive behavior- dictating the rules of the game for tens-of-thousands of small business and hundreds of thousands of employees- could potentially be brought to justice. This new legislation could also curtail types of conduct that are harmful to competition but are currently not cognizable under existing Federal precedent if drafted correctly.

The concept of ‘Abuse of Dominance’ has been developed in various foreign jurisdictions to address treatment of unilateral conduct that is harmful to competition.³⁶ In particular, Senate Bill S8700 justified the introduction of this standard on the grounds that “unilateral actions that seek to create a monopoly are just as harmful as contracts or agreements of multiple parties to do the same,” that Big Tech “have engaged in practices such as temporary price reduction with the purpose of forcing competitors to sell their business to them,” and that such actions “should be penalized.”

The ‘Abuse of Dominance’ standard can also potentially broaden the scope of unlawful conduct and the types of prohibited behavior that constitute abuse. New and improved standards for tying, bundling, margin squeezes, predatory pricing, price discrimination, excessive pricing, bundled discounts, Essential Facilities Doctrine and Refusals to Deal cases could be introduced by the legislature and prove vastly more effective in comparison to existing Federal precedent.

Justice Brandies observed that “it is one of the happy incidents of the federal system that a single courageous State may, if its citizens choose, serve as a laboratory; and try novel social and economic experiments without risk to the rest of the country.”³⁷ New York possesses the unique Constitutional power to remold, through experimentation, our economic practices and markets to meet the changing social and economic needs our communities face. And the experience of foreign jurisdictions also can prove as an invaluable resource of legal precedent and should inform New York in drafting its own innovative antimonopoly statutes.

What Can Be Improved in this Bill?

But at the same time, New York should not leave the job of interpreting its new Abuse of Dominance concept to the judicial branch. In fact, the concentration and monopoly crisis we are currently facing is due, in part, to the limitations set by courts upon broad statutes such as the Sherman Act and their adoption of a narrow interpretation of their purpose and scope.

The courts may strike down legislation that is arbitrary, capricious or unreasonable, but we should be wary of allowing the Judiciary to erect their prejudices into legal principles.

Our democratically elected representatives, being familiar with local conditions, are in the best position to formulate and articulate this legal standard. Recent examples such as the *Amex* and *Qualcomm* decisions demonstrated that at times the judiciary is out of touch with market realities.³⁸

³⁵ *Id.*

³⁶ Case AT.39740, Google Search (Shopping), P 331 (2017), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf [hereinafter EU Google Search]; Case C-52/09, Konkurrensverket v. TeliaSonera Sveirge AB, 2011 E.C.R. I-527, 582-83; Case C-202/07, France Télécom SA v. Comm'n, 2009 E.C.R. I-2369, 2391-92.

³⁷ *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932) (Brandeis, J., dissenting).

³⁸ *Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2283-85, 201 L. Ed. 2d 678 (2018); *FTC v. Qualcomm Inc.*, 19-16122, 2020 U.S. App. LEXIS 25347 (9th Cir. 2020).

By setting bright-line rules and clearly articulating what constitutes a violation of the new law, New York could become a leader and an example for future Federal or State legislation. One such rule should be the imposition of a presumption of anticompetitive behavior when a certain market share or market power threshold is met. Another is clearly articulating a lower market share threshold under the Abuse of Dominance standard than that applied under the Sherman Act. By introducing such bright-line rules our elected officials will ensure that this momentous legislative achievement is not squandered by bad precedent and judicial prejudice.

Conclusion

On behalf of the Institute for Local Self-Reliance, I thank you for your focus on this issue and your efforts to pass this legislation. Historically, New York has been at the forefront of the fight against monopoly power. It is now time for New York to reinvigorate its Antitrust laws and lead the antimonopoly movement once again.