NetChoice

Testimony of
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Hearing Before the New York State Standing Committee on Consumer Protection

The Twenty-First Century Antitrust Act

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Dear Chairman Thomas, Senator Gianaris, and Committee Members:

We ask that you **not advance** the 21st Century Antitrust Act (S8700A). It should not become law because it will:

- Hurt New York consumers and businesses;
- Dampen competition; and
- Stifle innovation.

Antitrust is meant "to protect the public from the failure of the market."[1] As simple as that sounds, it is far from straightforward. For starters, who exactly should be protected? After all, "the public" includes not just consumers but businesses, their workers, their competitors, their competitors' workers, and so on.

For over a century, New York's answer has been clear: consumers.

But the 21st Century Antitrust Law would change that. The bill abandons New York's always-about-consumers approach to antitrust and replaces it with Europe's judges-know-best approach. In doing so, the bill demotes consumer protection from being antitrust's core purpose to being but a mere factor—among many—that judges may consider when applying the law.

Such a change would be a mistake.

1. S8700A Will Hurt New Yorkers

Europe's Approach is a Poor Fit for New York. Today, antitrust law rightly focuses on protecting consumers. But S8700A puts corporations and existing businesses first by adopting Europe's "abuse of dominance" standard.

Europe's antitrust law pursues different goals than American law does. Whereas current federal and state law prevent and remedy harms to consumers, S8700A and the European approach on which it is based protect competitors even at the expense of consumers. To be sure, the E.U. does so in the name of "fairness." But make no mistake: wishy-washy, subjective standards lead to consumer harm *and* marketplace unfairness.

That's not just speculation. Looking to Europe, we see that the abuse of dominance standard has caused:

- higher prices;
- reduced output; and
- less innovation.

And that is exactly what will happen in New York if the State adopts S8700A.

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[1] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993).

America's Tech Companies Benefit New Yorkers. The bill bluntly targets "Big Tech"—companies like Amazon, Apple, Facebook, and Google. But in an effort to punish these companies for supposedly having too much power, the bill actually ends up hurting New Yorkers. And that hurt isn't cabined to digital markets; it extends to every market, every industry, and every business.

Before explaining how, it's worth reviewing just a few easy-to-overlook ways America's tech companies have benefited New Yorkers in recent years:

Facebook

- During Hurricane Sandy and its aftermath, government officials used Facebook to communicate with the public and dispel false rumors. New Yorkers used the platform to check on loved ones and fundraise for relief efforts.
- Small businesses, including local restaurants and boutique stores, use Instagram to showcase their offerings and connect with thousands of consumers across the State, country, and globe.
- School districts, including my own, use the platform to communicate with students and parents, and to share videos and photos that foster community.
- Facebook support groups have sprung up to connect New Yorkers battling cancer and struggling with their sexuality; to provide a forum for parents whose kids have learning differences; to help activists organize their campaigns; and so on.
- Facebook served as a powerful, free platform for marginalized New Yorkers to share their personal stories on everything from sexual harassment and assault to institutional and structural racism. Indeed, whereas the traditional media like NBC News tried to silence the voices of #MeToo, Facebook helped amplify them.

Google

- New York's students and teachers use Google's digital office products and Google Classroom—both of which have proved invaluable during this time of distance learning.
- YouTube houses millions of free educational videos that thousands of New Yorkers use to learn about everything from the quadratic equation to filing taxes for the first time.
- Local artists and musicians including a band from hometown, Shorebreak, use YouTube to get exposure and share their passion and talent—for free—with millions of others.
- Working with the City of New York and Schools Chancellor Richard Carranza, Google launched the "Expeditions Pioneer Program" to bring augmented reality to the City's public schools.

- Just this past April, Google partnered with the State to create an unemployment form to help workers affected by coronavirus after the State's system proved lacking. And along with Apple, Google partnered with the State to develop technology, including a contact tracing app, to stop the spread of COVID-19.

Amazon

- Thanks to Amazon's marketplace, rural New Yorkers have access to the same products as New Yorkers living in the city. No longer are their choices limited by geography or density.
- Small businesses—including Long Island's vineyards—reach millions of consumers all over the country and world.
- New Yorkers with limited mobility can get their groceries delivered to their homes through Amazon.
- All New Yorkers benefit from lower prices, even if they don't shop on Amazon, because Amazon Marketplace and Amazon brands like AmazonBasics put pressure on competitors to cut prices and increase quality.
- SUNY students rent their textbooks from Amazon for significantly less than if they rented from university bookstores.

Apple

- The State's growing app-development market uses Apple's trusted and safe App Store to reach millions of Americans, helping to grow their brand recognition and develop a following.
- Apple Pay has helped locally owned businesses streamline their payment systems and thereby cut costs.
- Apple TV gave thousands of New Yorkers the option to "cut the cord" and escape from the State's expensive and limited cable options (Time Warner Cable in Upstate New York and New York City; Cablevision on Long Island). And it provided entertainment options for residents of Fire Island and Kiryas Joel, which once had no cable options.
- State healthcare providers like Catholic Health Services of Long Island have worked with Apple to develop secure, confidential, and patient-focused portals to help New Yorkers keep access and store their health records. Likewise, the State partnered with Apple App Store to develop a healthcare marketplace app to reach more New Yorkers and ensure they get health insurance.
- Along with Google, Apple partnered with New York State to develop tools, including a contact tracing app, to reduce the spread of COVID-19.

Under an "Abuse of Dominance" Standard, All Industries Will Suffer. Although the bill targets tech, its broad sweep will hurt all industries. Even though America's tech businesses are innovative and different from their pre-digital peers, the standard cares only about a business's relative size. And that subjectivity doesn't stop at tech's doors or with tech's business practices.

Take one example: vertical integration. Under the "abuse of dominance" theory, large digital businesses that have vertically integrated must follow a "neutrality" principle: they are banned from treating their own products any differently than they treat their competitors' products. Even if there is no harm to consumers—indeed, even if consumers benefit—it's considered "abusive" for dominant businesses to operate at multiple stages of the supply chain.

Because vertical integration is common (and almost always) beneficial, tech's critics have rebranded it as "self-preferencing." In other words, when tech vertically integrates, it's thuggish behavior that must be stopped. But once that theory makes it way into law, the harm won't be limited just to tech. Consider:

Stop & Shop

Stop & Shop is the dominant grocery store chain on Long Island.[2] Like its competitors—Costco, Target, BJ's, Walmart, and Trader Joe's—it sells its own products in its stores. Its store-brand products are almost always cheaper than name-brand alternatives. And like its competitors, it often gives its products top billing by displaying them prominently in advertisements and in high-traffic areas.

Consumers benefit from this practice. First, they have more choices at their fingertips. Second, they can choose a cheaper product that is, in all relevant respects, comparable to the name-brand product. And third, because of Stop & Shop offers a cheaper choice, name brands are forced to improve product quality while cutting or maintaining prices.

If S8007A Were the Law

Because the abuse of dominance standard isn't rooted in consumer protection, Stop & Shop's "self-preferencing" would leave it open to legal attack. Indeed, because it worries about corporate competitors, it often isn't analyzed in terms of consumer benefits or harms. Even then, analysis is lacking: the European Commission, for example, assumes that if a dominant business does *anything* to change the status quo for a rival, that practice is inherently suspect.

Consider the implications of that:

- If a name brand sued Stop & Shop for displaying Stop & Shop's brands more prominently than its own, a court could order Stop & Shop to end that practice even if it benefits consumers.
- Under the same neutrality principle, it wouldn't necessarily matter if the product was Stop & Shop's: Pepsi could sue if Stop & Shop featured Coke more prominently.
- And if the Stop & Shop provided a lower-cost alternative that forced other brands to lower their prices, this would harm the

[2] Russell Redman, *Best Market Acquisition Sets Up Pitched Retail Battle on Long Island*, SUPERMARKET NEWS (Apr. 15, 2019), https://www.supermarketnews.com/retail-financial/analysis-lidl-poised-disrupt-metro-new-york-grocery-market.

competing corporations whose profits will decrease by the amount saved by consumers—and because some might fail to adapt and even go out of business, Stop & Shop could be sued.

These possibilities would strike most as absurd—and rightfully so. But because the abuse of dominance standard is rooted in subjective notions of "fairness," and not objective evidence like consumer benefits, absurdity is what we'll get should this bill become law. Even worse, that absurdity will extend to all parts of New York's economy, harming all New Yorkers in the process.

2. S8700A Will Hurt Competition in New York

Competition Goes Hand in Hand With Risk Taking. In passing the Sherman Act in 1890, Congress sought to enshrine national values like free enterprise and economic competition. New York did the same when it passed the Donnelly Act. Those values usually go hand in hand, but sometimes market realities make them seem like the odd couple. On the one hand, the presence of a monopoly signals a lack of competition; on the other hand, striving for monopoly power "is an important element of the free-market system." This apparent tension, however, merely reflects that competition and free enterprise are like a double helix: "[t]he opportunity to charge monopoly prices—at least for a short period—is what attracts 'business acumen' in the first place," and that in turn "induces risk taking that produces innovation and economic growth."

Potentially earning monopoly profits is thus like potentially winning the lottery—remote though it may be, the mere possibility is temptation enough to try. But if that chance all but disappears, so too will the pool of eager risk-takers. And if taking first place means being treated guilty until proven innocent, then there's little sense in even trying. Because that would dampen the competition our antitrust laws are meant to encourage, "[t]he successful competitor, having been urged to compete, must not be turned upon when he wins."

The abuse of dominance standard, however, does exactly that: it turns on successful competitors and singles them out for legal scrutiny and added burdens. Again, one need only look to Europe's focus on "fairness" to see that it is actually unfair in practice.

Punishing Success Stifles Competition. Because market success marks a business as suspicious under the European model, it stifles competition. In other words, it removes the incentive for businesses to grow or even to start in the first place. The United States is home to most of the world's top tech companies; indeed, it's home to most of the world's top companies in general. By contrast, Europe can boast of just one tech company among the world's top 30.

Although New York's market is but one of many in the United States, it's an important market. As one of the most populated states, with the country's largest city, and with industries that span the entire spectrum, New York has always attracted new businesses.

But if this bill becomes law, businesses will think twice about incorporating in or competing in New York.

3. S8700A Will Hurt Innovation in New York

"Competition is a ruthless process." It spares no business, not even big ones. In our own time, it has reduced to ruins former market giants like Blockbuster, Borders, Circuit City, and Radio Shack. Once ever-present, these companies have since closed up shop or filed for bankruptcy. And competition seems poised to shutter shopping mall staples like Victoria's Secret, GameStop, GNC, and JC Penny next.

But the New York stomachs—even cheers—this ruthless competition because "[a]ggressive, competitive conduct by any firm, even one with market power, is beneficial to consumers." Harder to digest, however, is "[a]ggressive, exclusionary conduct [that] is deleterious to consumers." This is the sort of conduct that softens the market's sharp edges and relieves pressure on a company to innovate. This behavior often signals that the offending company is shielded from "competition on the merits."

But procompetitive and exclusionary conduct are often brewed in the same barrel: conduct that benefits consumers also tends to exclude competitors. In Europe, it's enough to show simply that a business's actions hurt its competitors. Here, under current law, a plaintiff must show that a business's actions hurt consumers.

If New York follows the European approach, competition will indeed be less ruthless. But that will come at the cost of innovation. Innovative businesses like Google and Facebook may be forced to withhold innovative services from New Yorkers out of fear of litigation. When Illinois passed a law banning the use of facial recognition technology, businesses ranging from Facebook to Shutterfly had to disable photo-tagging services that Americans in the rest of the country use and love. In fact, even as Google has moved toward an integrated search model that consumers love and appreciate, that model would likely be illegal in New York if this law passes.

Like the New York State Legislature, I support protecting New Yorkers from consumer harms. But the bill's abandonment of the consumer welfare standard in favor of the abuse of dominance standard is just too flawed to accept. In the end, the bill would harm New York consumers, competition, and innovation.

Thank you again for the opportunity to testify.

Sincerely,

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