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Standing Committee on Consumer Protection

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Introduction

Senator Thomas and members of the Committee, I want to thank you for the opportunity to submit my views on S8700A, the "Twenty-First Century Antitrust Act," introduced by Senator Gianaris on July 8, 2020. By way of background, I have been teaching and writing about antitrust law for my entire professional career, now more than forty years. I started my career as an attorney in the Antitrust Division of the U.S. Department of Justice and headed the Antitrust Bureau of the Office of the New York Attorney General from 1999-2001.

S8700A is a truly historic piece of legislation, one that will provide real benefits to New York consumers and businesses. Not only is it a long-overdue revision of the Donnelly Act. Most importantly, it will put New York in the vanguard of leadership in the United States in dealing with the dangers that powerful companies pose to our system of competition.

The bill contains three important provisions—expanding coverage of the Act to single-firm behavior, allowing for class actions in Donnelly Act cases, and increasing criminal penalties for Donnelly Act violations. In my testimony, however, I want to concentrate on the first, which I think is the most important.

I divide my remarks into three parts: 1) Do we need to cover single-firm conduct in the Donnelly Act? 2) Why is "abuse of dominance" the correct legal standard to adopt for single-firm conduct? 3) How can the Legislature improve the chances that New York courts will interpret this standard in a thoughtful and effective way?

I. A Prohibition On Single-firm Conduct Should Be Added to the Donnelly Act

As presently written, the Donnelly Act covers concerted behavior—"every contract, agreement, arrangement, or combination" that restrains trade or creates or maintains a monopoly. Prohibiting anticompetitive collusion is, of course, an important part of antitrust enforcement, but it does not reach the acts that a single firm takes to obtain or maintain a monopoly.

State enforcers have been able to reach anticompetitive single-firm behavior by suing in federal court under federal law, Section 2 of the Sherman Act. State enforcers are allowed to bring such suits generally under their parens patriae power, as the Supreme

Court recognized in 1945 in Georgia v. Pennsylvania Railroad.[1] In fact, the suit that New York filed against Microsoft in 1998, for monopolization of the PC operating system market, was brought in federal court under Section 2.

Nevertheless, the outer limits of the state's power to use the Sherman Act may be uncertain. In the *Microsoft* case itself, Microsoft made a late-stage motion arguing that the states lacked the power to seek certain kinds of equitable relief.[2] Microsoft argued that a state is not technically a government enforcer of Section 2, a federal statute, and that only the federal government should be allowed to seek the relief the states were requesting. The judge denied Microsoft's motion, mainly because it was not made until the very end of the litigation, but the court also cast a bit of doubt on the state's role. I think the court's concerns were misplaced, but the issue is there for a monopolist to raise in the future. This makes reliance on federal law more risky than it should be.

II. An Abuse of Dominance Standard is the Appropriate Standard to Adopt

The second question is what standard New York should apply to controlling anticompetitive conduct when done by a single firm. Antitrust law does not try to control every act of every firm; markets are expected to discipline firms and lead them to act in a way that ultimately benefits consumers. Sometimes, of course, markets do not work effectively, particularly when firms have too much power–market power, in antitrust terms. Antitrust intervention is necessary.

Under the Sherman Act, the threshold issue for examining the conduct of single firms is whether the firm is a monopoly, or attempting to become one. "Monopoly" is a high bar. As a general matter, what is required is proof of a large share of the market (approximately 70 percent or more) plus proof of market characteristics that make it difficult for other firms to challenge the monopolist (generally referred to as entry barriers). In the area of high tech platforms, for example, this could lead to serious disputes over whether a particular defendant such as Google is a monopolist in digital advertising in light of Facebook's share of that market; or whether Apple is a monopolist in online distribution of applications when Google's Android app store also has a large share of that market.

Once courts get past the screen of monopoly, they must face the more difficult question whether the monopolist's behavior should be considered anticompetitive. Under current views of Section 2, courts condemn only exclusionary behavior, generally defined as conduct that excludes competitors on some basis other than efficiency. The problem today is that courts in recent years have given monopoly firms great latitude when they decide what actions will be considered "efficient" and what "exclusionary." For example, the Supreme Court has given monopoly firms near-complete freedom to cut competitors off from access to markets,[3] to lower price in an effort to push competitors

[1] Georgia v. Pennsylvania R.R. Co., 324 U.S. 439 (1945).
[2] See New York v. Microsoft Corp., 209 F. Supp. 2d 132 (D.D.C. 2002).
[3] Verizon Commu'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

out of the market,[4] or to raise price on necessary inputs so as to squeeze downstream competitors' margins and make it hard or impossible for them to compete.[5] In so doing, the Supreme Court has shown more faith in markets rectifying things than in court intervention. Indeed, the Supreme Court has even expressed the view that monopoly profits are a good thing "at least for a short period,"[6] but it has given no indication of when it might lose its patience and decide that the short period had lasted too long.

Were New York simply to take the language of Section 2 of the Sherman Act and insert that language into the Donnelly Act, it would do nothing to deal with the problems that we face today with regard to the exercise of power by firms with market power. Absent a legislative direction to ignore U.S. Supreme Court decisions, New York courts would inevitably draw on those decisions to shut plaintiffs out of court. In fact, it would be worse to bring such cases in New York state courts than in federal court. At least in federal court a plaintiff might have a shot at getting a district court or a court of appeals to find space to disagree with the direction of Supreme Court precedent. I doubt that New York state courts would feel even this degree of freedom.

The better approach is the one that S8700A takes. Instead of copying federal law, the Act uses a standard that numerous countries around the world use, forbidding a firm with a "dominant position" from "abuse" of that position. This standard achieves two important results: 1) it lowers the threshold for intervention from "monopoly" to "dominance"; and 2) it expands the type of conduct that the law condemns.

With regard to the threshold, countries have somewhat varying approaches to defining dominance. Where dominance is referenced in market shares, 45 percent (as in South Africa) or 50 percent (as in the European Union) may be enough. In some countries, lower market shares may be enough if the plaintiff can show that the defendant has "market power."[7] The critical point is that "dominance" allows earlier intervention than "monopoly." We do not have to wait until a firm has actually achieved full control of a market (or nearly so, for attempts). We can stop anticompetitive behavior before that point is reached.

More important, however, is the prohibition on abuse of that dominance. As interpreted in jurisdictions that use this standard, a prohibition on abuse of dominance can reach conduct that adversely affects competition, and makes improper use of the dominant firm's power, in ways that the U.S. cannot. Thus, European courts have condemned low prices that are intended to exclude competitors even if not below the level of cost the U.S. requires,[8] the refusal by a dominant firm to share interoperability information with a rival that make it difficult for the rival to compete effectively,[9] and price squeezes that exclude a competitor even though the high price to the competitor is

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[4] Brooke Group v. Brown & Williamson, 509 U.S. 209 (1993)
[5] Pacific Bell Tel. Co. v. linkLine Communs, Inc. 555 U.S. 438 (2009)
[6] Trinko, 540 U.S. at 407.
[7] See Competition Act of 1998, Sec. 7(c) (South Africa).
[8] See Akso Chemie BV v. Commission, Case C-62/86, EU:C:1991:286 (European Court of Justice 1991).
[9] See Microsoft Corp. v. Commission, Case T-201/04, EU:T:2007:289 (European General Court 2007).

not "excessive" and the lower price to consumers is not "predatory."[10] Using this standard the European Commission was able to reach Google's self-preferencing of its product shopping service under EU law, and fine Google nearly $3 billion.[11] I doubt that the U.S. could do the same under Section 2.

The abuse of dominance standard also reaches beyond conduct that is exclusionary to reach conduct that is abusive. U.S. courts no longer consider the unfairness of a monopolist's business conduct, but jurisdictions applying an abuse standard can consider the imposition of "unfair trading conditions" or excessive prices. Using this power, for example, jurisdictions outside the United States have been able to examine exorbitant license fees imposed by holders of standard essential patents, unjustified large increases in the price of pharmaceutical drugs, and even the high pricing of face masks during the coronavirus pandemic.[12] None of this is possible under U.S. monopoly law as currently interpreted.

The idea of bringing abuse of dominance into U.S. law is bold but not new. In an article published a decade ago, Hovenkamp suggested that the prohibition on "unfair methods of competition" in Section 5 of the Federal Trade Commission Act should be read to include some conduct "akin to 'abuse of dominance' under European law."[13] Nothing came of his suggestion, but the intervening decade has shown that Hovenkamp was on the right track.

III. Some Amendments Are Necessary to Ensure the Act's Effectiveness

I think there is a compelling case to be made for adding an abuse of dominance standard to the Donnelly Act. I am more concerned about making sure that the provision will be effective.

New York state courts have no experience with an antitrust law that prohibits single-firm behavior. Obviously, they have no experience with applying an abuse of dominance standard either (no court in the United States has). Litigants involved in these cases will, no doubt, try to draw on decisions in other jurisdictions related to "dominance" and "abuse," but these decisions will not be uniform and courts may have difficulty deciding what decisions from other jurisdictions are best applied in New York.

Lawyers for defendants, and counselors to business firms, are also likely to complain about the lack of certainty in what these two terms cover. This may lead to Due Process challenges to the statute in court or, at least, a judicial determination to construe this statute narrowly to avoid constitutional decisions.

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[10] See Deutsche Telekom AG v. Commission, Case C-280/08 P, EU:C:2010:603 (European Court of Justice 2010).
[11] Google Search (Shopping), Case AT.39740 (European Commission 2017), https://ec.europa.eu/competition/antitrust/cases/dec_docs/39740/39740_14996_3.pdf.
[12] I explore issues related to excessive pricing in Harry First, Excessive Drug Pricing as an Antitrust Violation, 82 Antitrust L. J. 701 (2019)
[13] See Herbert Hovenkamp, The Federal Trade Commission and the Sherman Act, 62 Fla. L. Rev. 871, 884 (2010).

I have four relatively simple changes to the Act that I think would deal with this problem:

1. Require Guidelines or Formal Regulations. One way to deal with broad statutory language, of course, is to write more specific language into the Act. Many abuse of dominance statutes around the world make some effort to define dominance and provide some examples of what should be considered an abuse. As a practical matter, however, these more specific provisions often include vague terms in themselves (like "unfair trading conditions") that still need interpretation by enforcers and courts.

Specific provisions may also end up binding courts in unintended ways, but legislative change is often slow to come. This may be particularly true for antitrust law if popular interest in competition law wanes in the future. A more supple approach would be preferable.

I would suggest that the Legislature give the Antitrust Bureau of the Office of the Attorney General the duty to provide further detail on dominance and abuse. This could take two possible forms.

One is the issuance of enforcement guidelines. This approach is one familiar to antitrust enforcement agencies around the world, including the Department of Justice, the Federal Trade Commission, and the states acting collectively through the National Association of Attorneys General.

The other approach is to give the Bureau authority to issue formal regulations that would be binding on the parties that are the subject of the regulations. This is a more unusual approach for antitrust authorities, but it would be an analogous to the antitrust rulemaking approach that my colleague Eleanor Fox and I recently proposed to the Antitrust Subcommittee of the House Judiciary Committee that the U.S. Federal Trade Commission adopt.

Guidelines are a form of "soft law"; regulations are more "hard law." Technically, Guidelines don't bind courts or the parties (including the enforcement agency itself), but practically courts often pay close attention to them, particularly if the courts believe they are the result of careful thought and agency expertise. Regulations, on the other hand, gain the force of law, so long as they are justified under the statute and adopted appropriately.

In whatever form this takes, I would envision that the Bureau would devote substantial time and resources to this effort. For example, I would expect the Bureau to solicit the views of outside groups and to get comments on the drafts the Bureau produces. As the Justice Department and FTC did with their Horizontal Merger Guidelines, hearings could be held to allow interested parties to present their views. The goal would be to produce guidance that would incorporate best world practices in this

area, help the courts make informed decisions, and provide guidance to business firms and lawyers as to what practices are clearly covered by the statute and what are not.

2. Eliminate criminal liability for abuse of dominance. The Act appropriately increases the penalty for criminal violations of the Donnelly Act but it also sweeps in the new provision on abuse of dominance. I urge you to confine criminal liability to collusive agreements in restraint of trade and not extend criminal liability to single-firm behavior.

Although Section 2 of the Sherman Act is written to provide both civil and criminal remedies, the last major criminal case that the Justice Department brought for a Section 2 violation was against the American Tobacco Company in 1940. The current consensus, reinforced in various guidelines statements, is that criminal enforcement is mostly confined to price fixing and bid rigging, although some other types of concerted behavior might be covered. Monopolization is not thought to be an appropriate offense for the criminal law.

I urge the elimination of criminal liability not just because of the current consensus, but because I worry that having the possibility of criminal liability might make the statute more vulnerable to constitutional attack. Arguments about Due Process and clear notice have much more weight if criminal liability might attach, even if raised in the civil context. Such arguments might lead a court to strike down the statute as unconstitutional or, more likely, to read it narrowly to confine the statute to "well-accepted" abusive conduct. This might turn out to be conduct that would be condemned under Section 2, thereby negating the legislative effort to introduce a broader concept.

3. Remove the provision on monopolization. The current draft of the Act condemns both monopolization and abuse of dominance. If abuse of dominance catches more conduct by more firms than "monopolization," I am not sure what purpose the monopolization provision serves. Any conduct that would qualify as "monopolization" would qualify as abuse of dominance (but not vice-versa, of course).

My suggestion that this provision be removed goes beyond clarity in legislative drafting, however. As with the criminal provision, I am concerned that including monopolization will end up undercutting the provision on abuse of dominance. This could come in several ways. A court faced with a challenge to an abuse of dominance charge might more readily reject the charge if it feels that the conduct might still be caught under monopolization. Indeed, a court might be more amenable to a constitutional challenge to an abuse of dominance charge if a monopolization charge remains possible. Enforcers, knowing that these results might be the case, will likely plead a monopolization charge as well as an abuse of dominance charge in any case they bring. This may very well lead all parties to focus on the "safer" charge and ignore the more unusual one, thereby ultimately making abuse of dominance legally irrelevant.

This undercutting of an abuse of dominance charge is not a hypothetical possibility. In the recent litigation against Qualcomm, the FTC charged a violation of

Section 5 of the FTC Act based on a Sherman Act theory and a more controversial "standalone" Section 5 unfairness theory. FTC trial counsel thought they had a good enough Section 2 theory so they focused on that. The trial judge decided the case in the FTC's favor on Sherman Act grounds and avoided deciding the standalone theory claim. When the Ninth Circuit reversed on the Sherman Act grounds, the standalone theory was no longer in the case and the FTC lost.[14]

Lawyers and judges are inherently conservative in litigation and try not to take unnecessary risks. My concern is that this impulse will lead to results similar to what has happened to the FTC in litigation. In my view, there is no gain to New York State enforcement in running that risk.

4. Delay implementation of the private action for abuse of dominance. I think it will necessarily take some time for the Antitrust Bureau to craft guidelines or regulations that courts will recognize as expertly done. While this is taking place, however, private parties will be free to pursue their claims in New York courts without the views of the Bureau.

For better or worse, judges often view private antitrust claimants skeptically. I note, for example, that the narrow cases I cited earlier were all decided in the context of private actions seeking damages. Government cases have generally fared better because courts have more confidence that the litigation is in the public interest. I cite the governments' victory in the *Microsoft* litigation as a prime example.

I do not expect New York courts to react any differently. Still, private enforcement is a necessary component of the antitrust laws, necessary both to compensate victims for losses and to deter future violations. I would not abandon such litigation, but I think a delay in allowing it would be appropriate. Three years might be optimal, giving the Bureau time to prepare necessary guidance and, perhaps, bring necessary litigation.

IV. Conclusion

New York State has a huge economy, ranking by GDP in 2019 roughly between the economies of South Korea and Spain.[15] Both countries forbid dominant firms from abusing their economic power. So should New York.

It is trite, but true, to point to Justice Brandeis' famous statement that "[i]t 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."[16] The experiment of forbidding abuse by

[14] See FTC v. Qualcomm, 969 F.3d 974, _ n.11 (9th Cir. 2020).
[15] See https://www.investopedia.com/insights/worlds-top-economies/; https://markets.businessinsider.com/news/stocks/11-mind-blowing-facts-about-new-yorks-economy-2019-4-1028134328?op=1# .
[16] New State Ice Co. v. Liebmann, 285 U.S. 262, 280, 311 (1932) (dissenting opinion).

dominant firms, although perhaps not so novel given its use throughout the world, will benefit New York and, perhaps, lead other states to follow—perhaps even the U.S. Congress.

I urge you to adopt this Act and to consider the suggestions that I have made for its improvement.

Thank you again for the opportunity to present my views.