WILL NEW YORK'S 'TWENTY-FIRST CENTURY ANTITRUST ACT' CAUSE A CONSTITUTIONAL CONFLICT UNDER EITHER FEDERAL PREEMPTION OR THE DORMANT COMMERCE CLAUSE?

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ABSTRACT

This note discusses the evident gap between federal enforcement and the federal antitrust statutes, with the potential solution of individual states passing their own legislation. New York's proposed legislation, the 'Twenty-First Century Antitrust Act' (the "Bill") changes the standard for federal Sherman Act §2 cases from monopolization and attempted monopolization to 'abuse of dominance.' The Bill also proposes changes to premerger notification and penalties. This note discusses the constitutionality of the Bill under both federal preemption and the dormant Commerce Clause focusing on the 'undue burden on interstate commerce' test. This note finds the Bill does not violate federal preemption and does not violate the dormant Commerce Clause. Thus, it will likely be held Constitutional.

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I. INTRODUCTION

A. Background

With the surge of "Big Tech" concern, a movement for antitrust reform has finally begun. In September 2021, thirty state Attorneys Generals sent a letter urging Congress to continue making improvements to the outdated federal antitrust laws.[1] The letter notes that "given the changes in technology, decreased competition in important sectors, and undue judicial skepticism toward robust enforcement," they applaud the acts the federal government is trying to push through and wish for them to "remain robust and keep pace with that of modern markets."[2] Congress is now finally considering changes to the federal antitrust laws, yet those efforts have not yet advanced significantly. One of the most prominent Senators in this fight for antitrust reform is Senator Amy Klobuchar.

Senator Klobuchar, the lead Democrat on the Judiciary Subcommittee on Antitrust, Competition Policy and Consumer Rights, is a predominate voice in the government supporting new federal antitrust legislation to deal with dominant online platforms.[3] In February 2021, she introduced "The Competition and Antitrust Law Enforcement Reform Act."[4] In November 2021, she introduced another bill which would make certain acquisitions by dominant online platforms unlawful.[5]

In 2020, the DOJ, alongside eleven state Attorneys Generals, brought a civil antitrust lawsuit against Google in an effort to prevent Google from

[1] *See* Letter from Phil Weiser et al., Colo. Att'y Gen., to Nancy Pelosi et al., Speaker U.S. House of Reps. (Sept. 20, 2021) (available at https://coag.gov/app/uploads/2021/09/Antitrust-Package-Support-Letter-.pdf).
[2] *Id*.
[3] Committee Assignments, Amy Klobuchar Minnesota (last visited Nov. 15, 2022), https://www.klobuchar.senate.gov/public/index.cfm/committee-assignments.
[4] *See* Press Release, Sen. Amy Klobuchar, Sen. Klobuchar Introduces Sweeping Bill to Promote Competition & Improve Antitrust Enf't (Feb. 4, 2021) (on file with author); Competition & Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. (2021).
[5] Platform Competition & Opportunity Act of 2021, S. 3197, 117th Cong. (2021).

"unlawfully maintaining monopolies through anticompetitive and exclusionary practices in the search and search advertising markets and to remedy the competitive harms."[6] More recently, Congress has debated whether the monopoly laws need changes. At a hearing in March 2021, Rep. David Cicilline, (D-RI), said the country needed a "massive overhaul of our antitrust laws and significant updates to our competition system" to police the biggest technology companies.[7] On June 28, 2021, a federal judge threw out a suit brought by the FTC against Facebook.[8] This case renewed questions about whether current legislation is suited to take on "Big Tech." Then, in January 2022, another federal judge allowed the case to move forward, rejecting Facebook's request to dismiss the case and handing the agency a major victory in its quest to curtail the power of the biggest tech companies.[9]

With the evident slow nature of the federal government and the fear of encroaching tech firms, there is an incentive for state legislatures to deal with this issue themselves. Maryland decided to address the problem by enacting a controversial Digital Advertising Gross Revenues Tax.[10] Florida attacked the issue by implementing a bill to stop censorship of Floridians by Big Tech.[11] In 2020, Colorado passed Senate Bill 64,[12] which eliminated a provision of their antitrust law that barred the state's Attorney General from challenging any transaction under the Act that the FTC and the DOJ had investigated and declined to challenge.[13] Notwithstanding the different approaches being taken, states are, at the end of the day, trying to combat the same issue – the threat of tech giants on competition. New York took a different approach, by planning an overhaul of its state's antitrust system, which gives way to more scrutiny, holds more conduct illegal, and is enforcing stricter penalties.[14]

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[6] *See Justice Department Sues Monopolist Google for Violating Antitrust Laws*, U.S. DEP'T OF JUST. (Oct. 20, 2020), https://www.justice.gov/opa/pr/justice-department-sues-monopolist-google-violating-antitrust-laws.
[7] *See* David McCabe & Steve Lohr, *Congress Faces Renewed Pressure to 'Modernize Our Antitrust Laws'*, N.Y. TIMES (Jun. 29, 2021), https://www.nytimes.com/2021/06/29/technology/facebook-google-antitrust-tech.html.
[8] FTC v. Facebook, Inc., 560 F. Supp. 3d 1, 32 (D.D.C. 2021).
[9] Cecilia Kang, *A Facebook Antitrust Suit Can Move Forward, a Judge Says, in a Win for the F.T.C.*, N.Y. TIMES (Jan. 11, 2022), https://www.nytimes.com/2022/01/11/technology/facebook-antitrust-ftc.html.
[10] MD. CODE, TAX–GEN. §7.5-102.
[11] S.B. 7072, Fla. Reg. Sess. (Fla. 2021).
[12] *See* Tyler J. Sewell et al., *Trends in State Antitrust Enforcement: Colorado Expands Attorney General's Authority to Challenge Transactions on Competition Grounds*, MORRISON FOERSTER (Apr. 15, 2020), https://www.mofo.com/resources/insights/200414-colorado-attorney-general-mergers-acquisitions-antitrust; *see also* 2020 Colo. Legis. Serv. 104 (West).
[13] COLO. REV. STAT. §6-4-107(3) (2021).
[14] S.B. 933C, 2021–2022 Reg. Sess. (N.Y. 2021).

B. New York's Twenty-First Century Antitrust Act

New York is fighting against Big Tech by revamping its current state antitrust law, the Donnelly Act.[15] The original purpose of this overhaul was to address the concern that "[p]owerful corporations, particularly in 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 "[u]nilateral actions that seek to create a monopoly that are just as harmful as contracts or agreements of multiple parties to do the same, and thus, such actions must also be banned by [New York] law."[16] The law will only apply within New York borders,[17] however, as New York State Senator Michael Gianaris, the Bill's lead sponsor stated, "there's no industry or market player, especially the big ones, that don't have a footprint in New York."[18] If the Bill becomes law, companies doing business in New York[19] must abide by federal law and a more demanding state law.[20]

The proposed legislation, known as the "Twenty-First Century Anti-Trust Act," (the "Bill") cleared its first major legislative hurdle in June 2021, when the State Senate passed the Bill by a 43-20 vote.[21] If the Bill passes the General Assembly and is signed by the Governor, it will alter the Donnelly Act's premerger notification requirement and implement an abuse of dominance standard for monopolization.[22] However, since the legislative session ended while the Bill was waiting to be passed, it was put on pause until the 2022 legislative session began.[23] The Senate's Consumer Protection committee moved the Bill and it is now waiting to be passed again.[24] In May 2022, the Bill was amended twice and was passed again by

[15] Donnelly Act, N.Y. GEN. BUS. LAW §§ 340-347.
[16] This language has since been excluded from the updated version of the bill, but this language has been quoted by other commentators. S.B. 933A, 2020–2021 Reg. Sess. (N.Y. 2020); *see also*, Craig A. Benson, et al, *New York State Senators Introduce Bill to Expand the Reach of State Antitrust Law,* PAUL, WEISS, RIFKIND, WHARTON & GARRISON (July 20, 2020), https://www.paulweiss.com/practices/litigation/antitrust/publications/new-york-state-senators-introduce-bill-to-expand-the-reach-of-state-antitrust-law?id=37585.
[17] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(a)-(b) (N.Y. 2021).
[18] *See* Ryan Tracy, *New York Senate Passes Antitrust Bill Targeting Tech Giants*, WALL ST. J. (Jun. 7, 2021, 4:37 PM), https://www.wsj.com/amp/articles/new-york-senate-passes-antitrust-bill-targeting-tech-giants-11623098225.
[19] Currently, the Donnelly Act applies to any conduct that restrains "any business, trade or commerce or in the furnishing of any service in [New York] . . ." N.Y. GEN. BUS. LAW § 340.
[20] S.B. 933C, 2021–2022 Reg. Sess. (N.Y. 2021).
[21] *See* Tracy, *supra* note 18.
[22] S.B. 933C, 2021–2022 Reg. Sess. (N.Y. 2021).
[23] *See New York State – Legislative Session Calendar*, N.Y. STATE ASSEMBLY, https://nyassembly.gov/leg/calendar/ (last visited Jan 24, 2022); *see also* S.B. 933C, 2021-2022 Reg. Sess. (N.Y. 2021).
[24] *See* Press Release, Michael Gianaris, Statement from Sen. Deputy Leader Gianaris On 21st Century Antitrust Act Being Moved by Senate Consumer Protection Committee, (Jan 12, 2022) (on file with N.Y. State Senate).

the Senate with a 36 to 25 vote.[25] It was then delivered to the Assembly, where it was referred to Economic Development.[26] While much of the Bill has stayed the same, the most significant change, with respect to this note, is the premerger notification requirements. The previous version of the Bill included a first of its kind state premerger notification requirement that forced parties acquiring assets or voting securities to file a prescribed notification if aspects of the transaction exceeded thresholds that were based on certain percentages of federal Hart-Scott-Rodino Improvements Act (the "HSR Act").[27] This amendment responded to concerns that the prior proposal would have significantly burdened transacting parties.[28] The Bill makes three main changes to the already existing Donnelly Act.

1. Alignment with Section 2 of the Sherman Act

New York's Donnelly Act currently aligns with Sherman Act §1 in prohibiting agreements in restraint of trade.[29] The Bill now extends its alignment to include Sherman Act §2 violations, by prohibiting monopolization or attempted monopolization.[30] The Bill also adds a unilateral conduct provision prohibiting unlawful monopolization, attempted monopolization, conspiracy to monopolize, and monopsonization.[31]

2. Premerger Notification Requirement

The Bill implements a premerger notification requirement that would apply to all industries, making New York the first state to have a generalized state premerger reporting statute.[32] The Bill requires that any person conducting business in New York that is required to file the federal HSR notification and report form would have to provide the same notice and documentation in its entirety to the New York Attorney General at the

[25] Kate Lisa, *NY State Senate-Passed Reform Expected to Die in Assembly*, NY STATE OF POL. (May 25, 2022, 9:16 PM), https://nystateofpolitics.com/state-of-politics/new-york/politics/2022/05/25/senate-passed-anti-trust-bill-expected-to-die-in-assembly.
[26] *See Senate Bill S933C*, N.Y. STATE SENATE, https://www.nysenate.gov/legislation/bills/2021/S933/amendment/C?utm_campaign=subscriptions&utm_content=FLOOR_VOTE&utm_source=ny_state_senate&utm_medium=email (last visited Aug 25, 2022).
[27] *See* Daniel Vitelli, *New York Senate Amends Groundbreaking Antitrust Bill*, CONSTANTINE CANNON (May 19, 2022), https://constantinecannon.com/antitrust-group/new-york-senate-amends-groundbreaking-antitrust-bill/.
[28] *Id*.
[29] *Compare* Donnelly Act, N.Y. GEN. BUS. LAW. § 340(1), *with* Sherman Act, 15 U.S.C. § 1.
[30] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(a) (N.Y. 2021).
[31] *Id*.
[32] S.B. 933C, 2021–2022 Reg. Sess. § 340(10) (N.Y. 2021).

same time that notice is filed with the federal government.[33] The Bill includes exemptions and exceptions provided by HSR regulations.[34]

When considering a mergers' approval, the Bill requires New York's Attorney General to specifically consider the mergers' potential effects on labor markets.[35] Moreover, the Attorney General is empowered to exempt from the requirements of § 340(10), classes of persons, acquisitions, transfers, or transactions which are not likely to violate § 340's provisions;[36] and adopt, amend, promulgate, and rescind other rules and regulations to carry out the purposes of § 340(10).[37]

The Bill also establishes a penalty for any person, officer, director, or partner who fails to comply with any premerger provisions.[38] The penalty may be recovered in a civil action brought by the Attorney General and violators are liable to New York for a civil penalty not to exceed $10,000 for each day they are in violation.[39]

3. Change to "Abuse of Dominance" Standard

a. Abuse of Dominance

The Bill establishes an "abuse of dominance" standard, which makes it "unlawful for any person or persons with a dominant position in the conduct of any business, trade or commerce, in any labor market, or in the furnishing of any service in this state to abuse that dominant position."[40] New York would be the first state to adopt this standard. A fully itemized list of unlawful conduct is not included; however, the Bill provides that:

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[33] S.B. 933C, 2021–2022 Reg. Sess. § 340(10)(a) (N.Y. 2021).
[34] S.B. 933C, 2021–2022 Reg. Sess. § 340(10)(b) (N.Y. 2021). The following classes of transactions are exempt from the requirements of this section:

> (i) acquisitions of goods or realty transferred in the ordinary course of business;
> (ii) the creation, production, and dissemination of a single expressive work that is copyrighted, including but not limited to, a streaming series, television programs and or motion pictures;
> (iii) acquisitions of bonds, mortgages, deeds of trust, or other obligations which are not voting securities;
> (iv) transfers to or from a federal agency or a state or political subdivision thereof;
> (v) transactions specifically exempted from the provisions of this article; and
> (vi) such other acquisitions, transfers, or transactions, as may be exempted under paragraph (f) of this subdivision hereunder.

[35] S.B. 933C, 2021–2022 Reg. Sess. § 340(10)(e) (N.Y. 2021).
[36] S.B. 933C, 2021–2022 Reg. Sess. § 340(10)(f)(ii) (N.Y. 2021).
[37] S.B. 933C, 2021–2022 Reg. Sess. § 340(10)(f)(iii) (N.Y. 2021).
[38] S.B. 933C, 2021–2022 Reg. Sess. § 340(10)(d) (N.Y. 2021).
[39] *Id.*
[40] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(b) (N.Y. 2021).

> [A]buse of a dominant position may include, but is not limited to, conduct that tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete, such as leveraging a dominant position in one market to limit competition in a separate market, or refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors . . .[41]

The standard allows use of direct[42] or indirect evidence to demonstrate a dominant position.[43] Indirect evidence, such as the party's relevant market share is presumed and based on whether they are a buyer or seller.[44] The Bill prohibits evidence of procompetitive effects to be used as a defense to abuse of dominance and shall not offset or cure competitive harm.[45]

If direct evidence sufficiently demonstrates a person has a dominant position or has abused a dominant position, then the court will not require the definition of a relevant market in order to evaluate the evidence, find liability, or find that a claim has been stated.[46] This allows a plaintiff to skip defining a relevant market, which is needed to determine monopoly power and is the first step of a full rule-of-reason analysis under the Sherman Act.[47]

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[41] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(b)(3)(ii) (N.Y. 2021) ("In labor markets, abuse may include, but is not limited to, imposing contracts by which any person is restrained from engaging in a lawful profession, trade, or business of any kind, or restricting the freedom of workers and independent contractors to disclose wage and benefit information").

[42] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(b)(i)(1) (N.Y. 2021) (Examples of direct evidence include, but are not limited to, the unilateral power to set prices, terms, conditions, or standards; the unilateral power to dictate non-price contractual terms without compensation; or other evidence that a person is not constrained by meaningful competitive pressures, such as the ability to degrade quality without suffering reduction in profitability. In labor markets, direct evidence of a dominant position may include, but is not limited to, the use of non-compete clauses or no-poach agreements, or the unilateral power to set wages.").

[43] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(b)(i)(2) (N.Y. 2021).

[44] Sellers with a share of 40% or greater of the relevant market, and buyers with a share of 30% or greater of the relevant market, are presumed to have a dominant position. *Id*.

[45] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(b)(iii) (N.Y. 2021) ("Legally cognizable procompetitive objectives are generally those producing competitive efficiencies, such as 'preventing free riding, lowering transaction costs, and facilitating other output-promoting transactions"). *See* Alex Moyer, *Throwing Out the Playbook: Replacing the NCAA's Anticompetitive Amateurism Regime with the Olympic Model,* 83 GEO. WASH. L. REV, 761, 782 (2015) (citing ANDREW I. GAVIL ET AL., ANTITRUST LAW IN PERSPECTIVE: CASES, CONCEPTS AND PROBLEMS IN COMPETITION POLICY 998 (2d ed. 2008)).

[46] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(b)(i)(3) (N.Y. 2021).

[47] *See* Michael A. Carrier, *The Four-Step Rule of Reason*, 33 ANTITRUST 50, 53 (2019) (citing Cap. Imaging Assocs. v. Mohawk Valley Med. Assocs., 996 F.2d 537, 541 (2d Cir. 1993) ("Employing such [rule of reason], it held that Capital, 'as a preliminary matter, must demonstrate that defendants have significant market power in the relevant market'")).

b. Attorney General's Power

Like with the premerger notification, the Attorney General is empowered to adopt, promulgate, amend, and repeal rules,[48] as such term is defined in § 102(2)(a) of the state administrative procedure act, to carry out the purposes of § 341(2)(b), including those considerations specified in the findings and declarations of the legislature for this act.[49] When the Attorney General is prepared to file notice of adoption pursuant to § 202(5) of the state administrative procedure act, he/she shall send a copy of the final rule to the temporary president of the senate and the speaker of the assembly.[50] Either house is permitted to deny the proposed rule or proposed repeal of a rule. The rule shall not take effect if either house passes a resolution denying such proposed rule within the time prescribed.[51]

The Attorney General shall issue guidance on how he/she will interpret market shares and other relevant market conditions to achieve the purposes of § 341(2)(b) while considering the important role of small and medium-sized businesses in the state's economy.[52]

4. Enhanced Criminal Penalties for Antitrust Violations

The Bill enhances criminal penalties in several ways. Violations of § 340 have been changed from a class E to a class D felony.[53] For individuals, the maximum fine increases from $100,000 to $1million, or a maximum prison sentence of 4 years is allowed.[54] For corporations, the maximum fine increases from $1million to $100 million.[55] For both kinds of defendants, the statute of limitations for criminal proceedings is extended from 3 to 5 years, and no criminal proceedings barred by prior limitation shall be revived by this act.[56]

5. Permission of New York State Antitrust Class Actions and Recovery of Treble Damages

The Bill amends the Donnelly Act to explicitly permit antitrust class actions and the recovery of treble damages.[57] The Bill does not change the

[48] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(c)(i) (N.Y. 2021).
[49] *Id.*
[50] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(c)(ii) (N.Y. 2021).
[51] *Id*.
[52] S.B. 933C, 2021–2022 Reg. Sess. § 340(2)(c)(iii) (N.Y. 2021).
[53] S.B. 933C, 2021–2022 Reg. Sess. § 341 (N.Y. 2021).
[54] *Id*.
[55] *Id*.
[56] *Id.*
[57] S.B. 933C, 2021–2022 Reg. Sess. § 340(8) (N.Y. 2021). There has been some ambiguity on whether plaintiffs could bring a class action under the Donnelly Act. *See generally* Sperry v. Crompton Corp., 8 N.Y.3d 204, 214 (2007). This change is particularly notable because New York is an "Illinois Brick repealer" state and provides for an antitrust cause of action for indirect purchasers, while the Supreme Court has held that indirect purchasers

statute of limitations; like any individual action, it cuts any class-action damages at 4 years prior to filing.[58] To deal with concerns relating to the *Illinois Brick* decision,[59] the Bill directs courts to take all necessary steps to avoid duplicative recovery and allow a pass-on defense.[60] Plaintiffs from different states seeking class certification may encounter difficulties because standing is a matter of state law;[61] however, the Bill authorizes residents to bring suit and the attorney general to bring suit on behalf of the state, residents and entities within New York.[62]

II. ISSUE

Federal antitrust law comes primarily from three significant statutes – The Sherman Act,[63] The Clayton Act,[64] and the FTC Act.[65] These statutes have remained mostly unchanged, except for the Hart-Scott-Rodino (HSR) Act,[66] which adjusts the FTC thresholds annually to reflect changes in the United States gross national product.[67]

Most states have antitrust laws similar to the federal antitrust laws;[68] however, since all three federal statutes are over 100 years old, and

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could not sue for damages suffered because of price fixing or other Sherman Act violations. *Compare* Sperry v. Crompton Corp., 8 N.Y. 3d 204, 214 (2007), *with* Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977).

[58] N.Y. GEN. BUS. LAW § 340(6).

[59] Illinois Brick Co. v. Illinois, 431 U.S. 720, 746-47 (1977). The Court reasoned that allowing both direct and indirect purchasers to bring antitrust damages claims would result in: (1) Exposing defendants to duplicative claims for recovery, (2) Complications in apportioning damages among various plaintiffs at different places in the distribution chain, and (3) Inefficient enforcement of the antitrust laws.

[60] N.Y. GEN. BUS. LAW § 340(6) (Consol. 2012). In many cases, defendants argue that plaintiff does not have standing or any injury because it passed any unlawful charge on to others, thus eliminating any harm. "Passing on" describes the action of an overcharged buyer who passes the extra expense on to those who buy from it. *See* Robert J. Herrington, *Pass-On Defense Still Alive and Well*, 6 NAT'L L. REV. 104, 104 (2016).

[61] *See* Kurtis A. Kemper, *Right of Retail Buyer of Price-Fixed Product to Sue Manufacturer on State Antitrust Claim,* 35 A.L.R. 6th 245, § 3 (2008) (citing *In re* Graphics Processing Units Antitrust Lit., 527 F. Supp. 2d 1011 (N.D. Cal. 2007) (wherein the court refused to make a blanket nationwide determination on the issue of indirect purchaser standing, without prejudice to a later state-by-state analysis)).

[62] S.B. 933C, 2021–2022 Reg. Sess. § 342(b) (N.Y. 2021).

[63] The Sherman Act of 1890, 15 U.S.C. §§ 1-7.

[64] The Clayton Act of 1914, 15 U.S.C. §§ 12-27.

[65] The FTC Act of 1914, 15 U.S.C. § 45.

[66] The Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. §18a.

[67] 15 U.S.C. § 18a (amended by 87 Fed. Reg. 3541 (Jan. 24, 2022)); *see also* Premerger Notification Office Staff*, HSR Threshold Adjustment and Reportability for 2021*, FED. TRADE COMM'N (Feb. 17, 2021, 5:19 PM), https://www.ftc.gov/news-events/blogs/competition-matters/2021/02/hsr-threshold-adjustments-reportability-2021.

[68] *E.g.*, Donnelly Act, N.Y. GEN. BUS. § 340; ARIZ. REV. STAT. ANN. §§ 44-1401-44-1416 (2022) (Uniform State Antitrust Act); N.M. REV. STAT. ANN. §57-1-3 (2019); MINN. STAT. § 325D.54 (2022); MO. REV. STAT. §§ 416.011-416.161 (2021) (Missouri Antitrust Law); ALA. CODE § 6-50-60 (2022); CAL. BUS. & PROF. § 16700 (Cartwright Act); GA. CODE ANN. § 13-8-31(2020). *See generally*, *State Antitrust Laws*, FIND LAW (last visited Jan. 20, 2022), https://www.findlaw.com/state/consumer-laws/antitrust.html.

technology has drastically changed since their codifications, there is now a gap in the current federal enforcement. New initiatives were put in place internationally to combat the fight against Big Tech, but the United States is falling behind.[69] While States wait for movement in Congress, they started to take the issue into their own hands. New York legislature's solution to this 'gap' problem is an overhaul antitrust act known as the "Twenty-First Century Antitrust Act."[70] Opponents to this type of legislation will likely raise constitutional concerns, which is the basis of this note. To determine whether the Bill is constitutional, it must be analyzed under federal preemption and the dormant Commerce Clause. For federal preemption, it must be determined whether the federal antitrust laws displace New York antitrust law as the controlling authority. The Bill will then be analyzed under the dormant Commerce Clause, which includes three tests. This note will focus on the Undue Burden on Interstate Commerce test which balances the state's legitimate purpose for passing the Bill with the undue burden it may cause on interstate commerce.

III. LIMITATIONS ON STATE POWER: PREEMPTION

Preemption is the idea that a higher authority of law will displace the law of the lower authority law when there is a conflict between the authorities.[71] The U.S. Constitution Supremacy Clause establishes federal law as the law of the land.[72] When a federal law and state law conflict, the federal law is superior and displaces, or preempts the state law.[73] Preemption applies regardless of whether the conflicting law comes from legislatures, courts, administrative agencies, or constitutions.[74] State antitrust law may be preempted by the existence of federal or state regulatory systems, if expressly provided for.[75] If no express exemption exists, the potential conflict between the state antitrust law and the regulatory policy in question will be closely examined by the court.[76] The Supreme Court aims to follow Congress' intent and prefers interpretations that avoid preemption.[77]

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[69] *See* Ryan Browne, *Europe Tries to Set the Global Narrative on Regulating Big Tech*, CNBC (Dec. 16, 2020, 10:07 AM), https://www.cnbc.com/2020/12/16/europe-tries-to-set-the-global-narrative-on-regulating-big-tech.html.
[70] S.B. 933C, 2021-2022 Reg. Sess. (N.Y. 2021).
[71] *See Preemption*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/preemption (last visited Jan. 27, 2022).
[72] U.S. CONST. art. VI, § 2.
[73] *Id*.
[74] CORNELL LEGAL INFO. INST., *supra* note 71.
[75] JULIAN VON KALINOWSKI ET AL., ANTITRUST LAWS & TRADE REGULATION § 100.03 (2d ed. 2021).
[76] *Id*.
[77] *See* CORNELL LEGAL INFO. INST., *supra* note 71.

The states' power to regulate anticompetitive behavior predates federal entry into the field, and the Supreme Court has never held that the Sherman or Clayton Acts preempt state antitrust laws.[78] Many, if not most, states have statutory or common law rules directing that their courts be guided by federal precedent in construing state antitrust law.[79] However, in response to the Supreme Court's holding in *Illinois Brick,* which held that indirect purchasers who suffered due to price fixing or other Sherman Act violations could not sue for damages, several states enacted "repealer laws."[80] States without "repealers" follow *Illinois Brick*, while states with "repealer laws" allow such a claim to be brought.[81] The Court later specifically stated that all repealer legislation is not preempted by contrary federal rules.[82]

Even when state regulation affects an area of law prescribed to the federal government, there may not be preemption. If no conflict between the state and federal law exists, then preemption may be unnecessary.[83] The federal government is given the express power "to regulate commerce with foreign nations, and among the several states, and with the Indian tribes."[84] Thus, the federal government has control over any activity that is in connection with interstate commerce. However, the Supreme Court has upheld the application of state antitrust laws to several situations "at least arguably involving interstate commerce."[85] While federal antitrust law does

[78] Tanol Distrib., Inc., v. Panasonic Co., No. CIV.A.86-3355-S, 1987 WL 13319 at *11 (D. Mass. July 2, 1987).
[79] *See* Ronald W. Davis, *Indirect Purchaser Litigation: ARC America's Chickens Come Home to Roost on the Illinois Brick Wall,* 65 A.B.A. ANTITRUST L.J., no. 2, 375, 375–406 (1997).
[80] *See* Illinois Brick Co. v. Illinois, 431 U.S. 720, 746 (1977). *See also*, *Illinois Brick Repealer State Law Survey*, LEXIS (last opened Nov. 28, 2022), https://plus.lexis.com/document/openwebdocview/Illinois-Brick-Repealer-State-Law-Survey/?pddocfullpath=%2Fshared%2Fdocument%2Fanalytical-materials%2Furn%3AcontentItem%3A5SXW-3GN1-JP9P-G005-00000-00&pdcomponentid=500749&pdmfid=1530671&crid=a0164811-1aaa-49f0-8bb6-60dd32d3cff7.
[81] *Id*.
[82] *See* California v. ARC America Corp., 490 U.S. 93 (1989); *see also* Davis, *supra* note 79, at 375–406.
[83] *See* CORNELL LEGAL INFO. INST., *supra* note 71.
[84] U.S. CONST. art. I, § 8, cl. 3.
[85] *See* Tanol Distrib., Inc., v. Panasonic Co., No. CIV.A.86-3355-S, 1987 WL 13319 at *11 (D. Mass. July 2, 1987). *See* Flood v. Kuhn, 443 F.2d 264, 267 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972) (Supreme Court has "clearly held that state antitrust policy is not ousted from the regulation of local matters which may also be affected by federal laws"); *see e.g.* Watson v. Buck, 313 U.S. 387 (1941) (upholding application of state antitrust law to combination of authors, publishers, composers and owners of copyrighted material); Puerto Rico v. Shell Co., 302 U.S. 253 (1910) (grant of legislative authority to territory of Puerto Rico authorized passage of local antitrust statute despite federal adoption of Sherman Act).

not preempt state antitrust laws on its face, state laws are not allowed to place an undue burden on interstate commerce.[86]

IV. LIMITATIONS ON STATE POWER: DORMANT COMMERCE CLAUSE

A power of Congress is "dormant" if the power exists but is not being exercised.[87] The dormant Commerce Clause refers to "[t]he negative or dormant implication of the Commerce Clause that prohibits the states, through taxation or regulation, from discriminating against or unduly burdening interstate commerce."[88] The Supreme Court has developed a two-tiered test for analyzing dormant Commerce Clause cases.[89] Cases are reviewed under either a discrimination test or an undue burden "balancing" standard.[90] However, an exception exists when a state action constitutes "market participation."[91] In that situation, it lies outside the scope of Commerce Clause scrutiny even if it burdens interstate commerce.[92]

A. Discrimination Against Interstate Commerce

Under the discrimination test, a statute is deemed unconstitutional if it (1) discriminates against interstate commerce differently than it does against intrastate commerce, and (2) there is a reasonably nondiscriminatory reasonable alternative to further the state's legitimate interests.[93] Strict scrutiny will be applied to regulation that it is facially discriminatory.[94] Regulation is facially discriminatory when it only burdens interstate commerce and accomplishes the state's goal in the most discriminating way.[95]

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[86] *See Flood v. Kuhn*, 443 F.2d at 267; Robertson v. Nat'l Basketball Ass'n, 389 F. Supp. 867, 880 (S.D.N.Y. 1975); *see also* Partee v. San Diego Chargers, 668 P.2d 674, 677 (Cal. 1983); HMC Mgmt. Corp. v. New Orleans Basketball Club, 375 So.2d 700, 705–06 (La. Ct. App. 1979).

[87] GREGORY E. MAGGS & PETER J. SMITH, CONSTITUTIONAL LAW: A CONTEMPORARY APPROACH 291 (5th ed. 2021).

[88] Gen. Motors Corp. v. Tracy, 519 U.S. 278, 287 (1997).

[89] *See* Jennifer L. Larsen, Note, *Discrimination in the Dormant Commerce Clause*, 49 S.D. L. Rev. 844, 850 (2003-2004).

[90] *Id.*

[91] *See* Richard H. Seamon, *The Market Participant Test in Dormant Commerce Clause Analysis — Protecting Protectionism?*, 1985 DUKE L.J. 697, 697 (1985).

[92] *Id*.

[93] *See* Dean Milk Co. v. City of Madison, 340 U.S. 349, 356–57 (1951). Even with the local interest of ensuring safe pasteurization there were other nondiscriminatory alternatives to accomplish this goal. The health commission and milk sanitarian concluded milk properly inspected in another state would be fine. The law was found discriminatory because it limited inspection to 5 miles of Madison so inspectors would not have to travel far in Wisconsin or go to Illinois.

[94] *See* Hughes v. Oklahoma, 441 U.S. 322, 337 (1979). The regulation advanced important local interest in wildlife conservation but did not overcome the test's high scrutiny because of many reasonably nondiscriminatory alternative options were available.

[95] *Id*.

Constitutional caselaw provides examples of regulation that were found to discriminate against interstate commerce. In *City of Philadelphia v. New Jersey*, the Supreme Court struck down a New Jersey statute that prohibited the importation of waste from outside the state because it effectively erected barriers against movement of interstate commerce.[96] In *Lewis v. BT Investment Managers, Inc.*, the court struck down a local regulation that prevented foreign enterprises from being allowed to compete in local markets.[97] The regulation in *Lewis* discriminated unequally, since only banks, bank holding companies, and trust companies with principal operations outside of Florida were prohibited from operating investment subsidiaries or giving investment advice within Florida.[98]

Unlike the regulation in *Lewis* and *City of Philadelphia*, the Bill does not violate the discrimination test because the "abuse of dominance" standard does not discriminate against out-of-state companies. Out-of-state companies are not completely limited from working within New York. The Bill's standard is the same for companies that do work both in and out of New York, as it is for companies that do work only in New York; it burdens both intrastate and interstate companies the same.[99]

B. Market-Participant Exception

The Supreme Court established the Market-Participant test in *Hughes v. Alexandria Steel Corp*.[100] The market participant test centers on the *form* rather than on the *effect* or *intent* of the state action. Action by the state resembling that of a private trader constitutes market participation.[101] When a state functions as a private company in the buying and selling of goods or services, its business decisions are given the same non-reviewable discretion that a private company would receive.[102] The Market Participant test will not be applied to the Bill because New York state would not act like a private company for the purposes of implementing the Bill.

C. Undue Burden on Interstate Commerce

As stated above in Section III, federal antitrust law does not on its face preempt state antitrust laws, but state laws are not allowed to place an

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[96] *See* City of Philadelphia v. New Jersey, 437 U.S. 617, 618 (1978). *See also* MAGGS, *supra* note 87, at 321–24. The law benefited a legit local interest of environmentalists, but most of the burden is on out of state entities and highly benefits local businesses who no longer must compete for dump demand.
[97] *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 39 (1980).
[98] *Id.* Even with significant local concerns, the resulting discrimination makes the regulation non-justifiable.
[99] S.B. S933C, N.Y. Leg. Sess. § 340 (N.Y. 2021).
[100] *See* Hughes v. Alexandria Steel Corp., 426 U.S. 794, 810 (1976).
[101] *See* Seamon, *supra* note 91, at 705.
[102] *See* MAGGS, *supra* note 87, at 330.

"undue burden on interstate commerce."[103] Local legislation is invalid when it imposes an excessive burden on interstate commerce compared to the legitimate local interests[104] and given less deference when the regulation disproportionately burdens out-of-state residents and businesses.[105] This test will be fully analyzed since the Bill could possibly unduly burden interstate commerce.

The Supreme Court has articulated the test for determining when a state statute unconstitutionally burdens interstate commerce, now known as the *Pike* test:

> Where the statute regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. The extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities through an alternative regulation.[106]

The Bill will likely be constitutional because it promotes an important and legitimate local interest that does not unduly burden interstate commerce.

1. Legitimate Local Purpose

The Bill puts forth a legitimate local purpose – promoting competition while protecting citizens. The Supreme Court has consistently recognized that states' legitimate pursuits in attempting to protect its citizens' interests are compatible with the Commerce Clause.[107] The Commerce Clause was "never intended to cut the States off from legislating on all subjects relating

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[103] *Supra* Section III, *see also* Tanol Distrib., Inc., v. Panasonic Co., No. CIV.A.86-3355-S, 1987 WL 13319 at *11 (D. Mass. July 2, 1987); Flood v. Kuhn, 443 F.2d 264, 267 (2d Cir. 1971), *aff'd*, 407 U.S. 258 (1972) (Supreme Court has "clearly held that state antitrust policy is not ousted from the regulation of local matters which may also be affected by federal laws"); *see e.g.* Watson v. Buck, 313 U.S. 387 (1941) (upholding application of state antitrust law to combination of authors, publishers, composers and owners of copyrighted material); Puerto Rico v. Shell Co., 302 U.S. 253 (1910) (grant of legislative authority to territory of Puerto Rico authorized passage of local antitrust statute despite federal adoption of Sherman Act).

[104] *See generally* South Carolina State Highway Dep't. v. Barnwell Bros., 303 U.S. 177 (1938); S. Pac. Co. v. Arizona, 325 U.S. 761 (1945).

[105] *See* Kassel v. Consol. Freightways Corp. of DE, 450 U.S. 662, 663 (1981).

[106] *See* Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).

[107] United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 337 (2007) (citing Huron Portland Cement Co. v. Detroit, 362 U.S. 440, 443–44 (1960)).

to the health, life, and safety of their citizens, though the legislation might indirectly affect the commerce of the country."[108]

Consumer protection laws that affect the market, economy of the state, and protect the well-being of the state's citizens are legitimate state regulatory objects.[109] Discouraging economic concentration, protecting the citizenry against fraud, and asserting interest in promoting local control over financial institutions are legitimate local purposes because they are related to a state's economy and are "financial practices that are essential to the health of any State's economy and to the well-being of its people."[110]

The Bill has a legitimate local purpose in promoting competition and protecting the citizens of New York from unfair practices and dominant market control. In *Valley Bank of Nevada v. Plus Systems, Inc.*, the court held that Nevada's promotion of their Unfair Trade Practice Act was a legitimate state regulatory object.[111] In *Central Lumber Co. v. South Dakota*, the statute's purpose was to secure competition and preclude combinations which tend to defeat it.[112] Like *Valley Bank of Nevada* and *Central Lumber Co.*, the Bill promotes competition while protecting the citizens.[113] The Bill will update, expand and clarify New York law to ensure that large technological corporations are subject to strict and appropriate oversight by the state, ensure that the labor markets are open and fair, and protect classes of citizens from the harm associated with anticompetitive practices.[114] With a legitimate local interest found, the analysis moves to evaluating what burden, while protecting this interest, is imposed on non-residents or foreign businesses. This leads to part two of the *Pike* analysis – undue burden.

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[108] *Id.*

[109] *See* Valley Bank of Nevada v. Plus Sys., Inc., 914 F.2d 1186, 1196 (9th Cir. 1990) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495 (1949)). *See also* Carroll v. Greenwich Ins. Co., 199 U.S. 401 (1905); Central Lumber Co. v. South Dakota, 226 U.S. 157 (1912). Discussing state antitrust laws, the Court in Int'l Harvester Co. v. Missouri, 234 U.S. 199, 209 (1914) said:

> The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it. And such is explicitly the purpose and policy of the Missouri statutes; and they have been sustained by the Supreme Court. There is nothing in the Constitution of the United States which precludes a State from adopting and enforcing such policy. To so decide would be stepping backwards.

[110] *See* Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 38; *see also* Sears, Roebuck & Co. v. Brown*,* 806 F.2d 399, 409 (2d Cir. 1986).

[111] *See* Valley Bank of Nevada v. Plus Sys., Inc., 914 F.2d 1186, 1196 (9th Cir. 1990) (citing Giboney v. Empire Storage & Ice Co., 336 U.S. 490, 495 (1949)); NEV. REV. STAT. §598A.030 (1989).

[112] *See* Central Lumber Co. v. South Dakota, 226 U.S. 157, 159–61 (1912).

[113] S.B. S933C § 2, N.Y. Leg. Sess. (N.Y. 2021).

[114] *Id.*

2. Undue Burden

If a legitimate local purpose is found, the court will balance the local interest against the degree of the burden and determine whether that burden clearly exceeds the local benefit.[115] A burden restricts the free flow of goods and services between states.[116] Whether a law's putative benefit "actually come into being" has no impact on the *Pike* analysis,[117] but deference to the state legislature is a key component to the analysis.[118] Courts "are not inclined to second-guess the empirical judgments of lawmakers concerning the utility of legislation."[119] Thus, courts should consider whether the state legislature had a rational basis for believing the statute would advance a legitimate purpose.[120] The state's local interest must be of significant importance to justify any burden it might impose on interstate commerce.[121]

There is well-settled reluctance to strike down a state statute using the undue burden test.[122] "When local economic interests are affected, '[n]ondiscriminatory measures ... are generally upheld, in spite of [some burden] on interstate commerce, in part because the existence of major in-state interests adversely affected is a powerful safeguard against legislative abuse.'"[123] This is why states are generally granted freedom in regulating the banking industry since such regulation does not commonly overburden interstate commerce.[124]

In the infamous *Pike v. Bruce Church, Inc.* case, the state attempted to justify their burden on interstate commerce by asserting that the state's interest was to "promote and preserve the reputation of Arizona growers by prohibiting deceptive packaging."[125] The Court recognized the state's

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[115] See Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).
[116] *See Burden*, CORNELL LEGAL INFO. INST., https://www.law.cornell.edu/wex/burden (last visited Feb. 2, 2022).
[117] *See* Perfect Puppy, Inc. v. East Providence, 98 F. Supp. 3d 408, 417 (D.R.I. 2015) (citing Pharm. Care Mgmt. Ass'n. v. Rowe, 429 F.3d 294, 313 (1st Cir. 2005)) (stating only the putative benefits of the ordinance need be considered, not its wisdom or effectiveness in implementing these benefits).
[118] *See* BlueHippo Funding, LLC v. McGraw, 609 F. Supp. 2d 576, 587 (S.D.W. Va. 2009) (citing Yamaha Motor Corp. v. Jim's Motorcycle, Inc., 401 F.3d 560, 569 (4th Cir. 2005)) (quoting Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970)).
[119] *Id*.
[120] *Id*.
[121] *See* Pike v. Bruce Church, Inc., 397 U.S. 137 (1970).
[122] *See* Yamaha Motor Corp. v. Jim's Motorcycle, Inc., 401 F.3d 560, 569 (4th Cir. 2005); SPGGC, LLC v. Blumenthal, 505 F.3d 183, 194 (2nd Cir. 2007) ("And because consumer protection is a field traditionally subject to state regulation, '[w]e should be particularly hesitant to interfere with the [State's] efforts under the guise of the Commerce Clause'").
[123] *See BlueHippo Funding*, 609 F. Supp. 2d at 587.
[124] *See* Valley Bank of Nevada v. Plus Sys., Inc., 914 F.2d 1186, 1197 (9th Cir. 1990) (stating that inconsistent state laws on transaction fees can coexist without conflict if each state regulates only its own banks).
[125] *See Pike,* 397 U.S at 143.

legitimate interest, refused to treat it with much weight,[126] and noted that "[s]uch an incidental consequence of a regulatory scheme could perhaps be tolerated if a more compelling state interest were involved."[127] However, here, the state's interest of food labeling was "minimal at best."[128] In *BlueHippo Funding, LLC v. McGraw*, the court balanced the burdens imposed by registration and security requirements[129] against the need for telemarketing regulation and found the burden to be minimal against the legitimate and substantial consumer protection purposes that underlie them. The court held that the Telemarketing Article passed constitutional muster under *Pike.*[130]

The question that must be determined is whether the local concerns are strong enough to outweigh the burden on interstate commerce. New York legislature explained that the Bill is meant to ensure that "large corporations are subject to strict and appropriate oversight by the state."[131] Although the Bill is yet to be passed, there are clear burdens that would occur. If the Bill passes, it could make companies liable for a wide range of conduct that does not currently violate either federal or state law.[132] This includes requiring an all-industry premerger notification[133] and changing the standard of abuse for single-firm unilateral conduct.[134]

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[126] *Id.* at 145 ("The State's tenuous interest in having the company's cantaloupes identified as originating in Arizona cannot constitutionally justify requiring the company to build and operate an unneeded $200,000 packing plant").
[127] *Id.* at 146.
[128] *Id*.
[129] *See* BlueHippo Funding, LLC v. McGraw, 609 F. Supp. 2d 576, 589-90 (S.D.W. Va. 2009); *see also* W.VA. CODE §46-6F-301(c). The application for registration must include the following information relating to the applicant:

> (1) The true name, addresses, telephone number, and any names under which it intends to telemarket;
> (2) Each occupation or business of the applicant's principal owner for the preceding two years;
> (3) Certain criminal or civil enforcement history relating to any principal or manager;
> (4) Civil or administrative actions for claims relating to certain dishonest business practices;
> (5) Any history in the preceding seven years of bankruptcy or reorganization due to insolvency;
> (6) The name, home address, birth date, social security number and all other names of management personnel,
> (7) The name, address, and account number of institutions used for banking and financial transactions.

[130] *BlueHippo Funding*, 609 F. Supp. 2d at 589–90.
[131] *See* Shira Liu, Juan Arteaga, Andrew Gavil, Oliver Antoine & Jeane Thomas, *While Federal Antitrust Reform Legislation Slowly Moves Along, States May Chart Their Own Course*, CROWELL (June 15, 2021), https://www.crowell.com/NewsEvents/AlertsNewsletters/all/While-Federal-Antitrust-Reform-Legislation-Slowly-Moves-Along-States-May-Chart-Their-Own-Course.
[132] *Id*.
[133] S.B. S933C, N.Y. Leg. Sess. § 340(10) (N.Y. 2021).
[134] S.B. S933C, N.Y. Leg. Sess. § 340 (N.Y. 2021).

a. Premerger Notification

Section 7A of the Clayton Act, as added by the Hart-Scott-Rodino ("HSR") Act, "requires all persons contemplating certain mergers or acquisitions, which meet or exceed the jurisdictional thresholds in the Act, to file notification with the Commission and the Assistant Attorney General and to wait a designated period of time before consummating such transactions."[135]

The Bill requires any person or entity conducting business in New York to submit a premerger notification with the New York Attorney General if they are also federally obligated to submit a premerger notification under the HSR Act.[136]

The Bill's premerger notification could affect businesses internationally, but only those that are conducting business in New York.[137] A state notification requirement is not new. Several states, such as Connecticut[138] and Washington,[139] have statutes more burdensome than the federal notification requirement, and California is in the process of introducing their own.[140] However, so far, those laws have been specific to healthcare and New York's is a general premerger notification law for all industries.[141]

This part of the legislation will not cause an undue-burden issue because it is extremely limited. Since the Bill only requires disclosure for transactions that are already obligated to be disclosed to the federal government, the burden created on parties is low. The Bill only adds one additional place for these documents to be sent; it does not create any

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[135] 15 U.S.C. § 18a. Section 7A(a)(2) requires the FTC to revise those thresholds annually, based on the change in gross national product, in accordance with Section 8(a)(5).
[136] S.B. S933C, N.Y. Leg. Sess. § 340(10)(a) (N.Y. 2021).
[137] *Id*.
[138] An Act Concerning Notice of Acquisitions, Joint Ventures, Affiliations of Group Medical Practices and Hospital Admissions, Medical Foundations, and Certificates of Need, 2014 Conn. Acts 168 §1(a)-(d) (Reg. Sess.). The statute requires certain transactions between physician group practices and hospitals, captive professional entities, medical foundations, or other group practices to be reported to the state's Attorney General with a description of the proposed relationship.
[139] WASH. REV. CODE §§ 19.390.010–19.390.090 (2019). The statute requires provider transactions that constitute a material change (acquisition, merger, or contracting affiliation) to be reported to the state Attorney General no less than 60 days prior to consummation. The requirement applies when (1) both parties are Washington entities or (2) one party is a Washington entity, and the other is an out-of-state entity that generates $10 million or more in revenue from healthcare services for patients residing in Washington.
[140] Health care system consolidation: Attorney General approval and enforcement, S.B. 977 Cal. Reg. Sess. (2020). The proposed bill would require healthcare systems, private equity firms, and hedge funds to provide notice to and receive approval from the state's Attorney General before closing acquisitions or changes of control with other healthcare facilities and providers.
[141] *See* 15 U.S.C. § 18a; WASH. REV. CODE §§ 19.390.010–19.390.090; S.B. 977 Cal. Reg. Sess. (2020)

additional timing concerns or request any additional information. This makes compliance with the Bill extremely feasible. Thus, this part of the legislation will likely be constitutional.

b. Abuse of Dominance Standard

The Bill changes the single-firm unilateral conduct standard from the federal monopolization and attempted monopolization[142] to "abuse of dominance."[143] The Bill lowers the threshold for violation which in turn creates a stricter standard for competition. The burden will be distinct; companies will become liable for a range of conduct, including abusing a dominant power, that does not currently violate either state or federal law but would violate New York's new law.[144]

i. Current Federal Antitrust Standard

Sherman Act §2 guides the federal government on violations relating to single-firm conduct.[145] Sherman Act §2 condemns "every person who shall monopolize, or attempt to monopolize, combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States. . . ."[146] A Sherman Act §2 violation for monopolization requires (1) monopoly power and (2) the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.[147] "This two-part approach has required courts to define what constitutes *monopoly*, or in modern cases, *substantial market power* and to specify behavior that constitutes illegal monopolization."[148] Today, this unlawful

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[142] 15 U.S.C. § 2.
[143] S.B. S933C, N.Y. Leg. Sess. § 340 (N.Y. 2021).
[144] *See* Liu *supra* note 131. *See also* S.B. S933C, N.Y. Leg. Sess. § 340(2)(b)(ii) (N.Y. 2021):

> Abuse of a dominant position may include, but is not limited to, conduct that tends to foreclose or limit the ability or incentive of one or more actual or potential competitors to compete, such as leveraging a dominant position in one market to limit competition in a separate market, or refusing to deal with another person with the effect of unnecessarily excluding or handicapping actual or potential competitors. In labor markets, abuse may include, but is not limited to, imposing contracts by which any person is restrained from engaging in a lawful profession, trade, or business of any kind, or by restricting the freedom of workers and independent contractors to disclose wage and benefit information.

[145] 15 U.S.C. § 2.
[146] *See* United States v. Grinnell Corp., 384 U.S. 563, 570–571 (1966).
[147] *See id.*
[148] GAVIL, *supra* note 45, at 459.

conduct includes unilateral refusals to deal,[149] predatory pricing,[150] and bundling/tying.[151]

Typically, there are two methods of proof to determine monopolization: *direct* evidence and *circumstantial* evidence.[152] The *direct* techniques for identifying substantial market power are to: (a) measure the elasticity of demand for the products of the firm believed to possess a monopoly, or (b) show that the alleged monopolist actually used business methods other than superior performance to exclude its rivals from the market.[153] The importance of circumstantial proof was elevated because of the problems in using direct evidence to identify monopoly power.[154] *Alcoa* illustrated that to use market shares to measure market power, one must first define a relevant market, including product dimension and geographic bounds.[155] "After drawing the relevant market's boundaries, the court calculates the defendant's market share by comparing its activity in the relevant product (measured by sales, units, or capacity) to the activity of all firms in the relevant market."[156] When there is a viable substitute in a market,[157] there is no market power since consumers' needs or wants can met by different providers.[158]

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[149] "The practice of refusing or denying supply of a product to a purchaser, usually a retailer or wholesaler. The practice may be adopted in order to force a retailer to engage in resale price maintenance (RPM), i.e., not to discount the product in question, or to support an *exclusive dealing* arrangement with other purchasers or to sell the product only to a specific class of customers or geographic region." ORG. FOR ECONOMIC CO-OPERATION & DEVELOPMENT, GLOSSARY OF STATISTICAL TERMS 660 (2007).

[150] "Predatory pricing is a deliberate strategy, usually by a dominant firm, of driving competitors out of the market by setting very low prices or selling below the firm's incremental costs of producing the output (often equated for practical purposes with average variable costs). Once the predator has successfully driven out existing competitors and deterred entry of new firms, it can raise prices and earn higher profits." *Id.* at 602.

[151] "Bundling is also referred to as package tie-in and tends to occur when one product is sold in proportion to another as a requirement for the sale," and "Tied selling refers to situations where the sale of one good is conditioned on the purchase of another good." ORG. FOR ECONOMIC CO-OPERATION & DEVELOPMENT, *supra* note 149, at 78. *See also, Eastman Kodak v. Image Tech. Servs*., 504 U.S. 451 (1992) (finding bundling/tying occurred when Kodak would only sell replacement parts to customers who also used Kodak's service to repair their machines); *U.S. v. Microsoft*, 253 F.3d 34 (D.C. Cir. 2001) (holding the improper conduct by Microsoft was bundling/tying their operating system with their desktop browsers).

[152] GAVIL, *supra* note 45, at 489.

[153] *Id.* at 489.

[154] For nearly a century, courts have used the defendant's shares of sales, its 'market share' as the chief circumstantial measurement tool. *Id.*

[155] "Courts typically determine product dimension by identifying the array of products that customers regard as acceptable substitutes for the defendant's product. The relevant market's geographic bounds are set by studying the location of suppliers where a customer might purchase products deemed to be acceptable substitutes for the alleged monopolist's products." *Id*.

[156] *Id.* at 490.

[157] "A substitute is a product whose characteristics are similar to those of another product and that can be used to meet the same kinds of consumer needs or wants." ORG. FOR ECONOMIC CO-OPERATION & DEVELOPMENT, *supra* note 149, at 760.

[158] *See* United States v. EI du Pont De Nemours & Co., 351 U.S. 377, 393–94 (1956).

Historically, there were cases where a monopoly was inferred based on a defendant's market share.[159] It is unlikely that a market share of less than 70% would be sufficient to prove the existence of monopoly power.[160] In *Alcoa*, Judge Hand noted that "it is doubtful whether 60% or 64% would be enough; and certainly 33% is not."[161] Under the Bill, market share percentages that would never result in a finding of monopolization are now able to be found under the abuse of dominance standard. Typically, 70% of a relevant market is needed to find monopoly power, however the Bill presumes a dominant position for sellers at 40% and buyers at 30%.[162] Instead of waiting for a company's conduct to reach the federal threshold, the Bill will allow New York to stop monopolization sooner than the federal standard.

ii. Burden created by New Abuse of Dominance Standard

Essentially, the Bill will set a stricter standard for antitrust cases that makes it easier for plaintiffs to bring suit,[163] and harder for defendants to justify their conduct.[164] Businesses could find that some of their routine practices, such as minimum volume commitments or bundled pricing, have become illegal.[165] The Bill does not allow evidence of procompetitive effects to be used as a defense for abuse of dominance or be used to offset or cure competitive harm.[166] The Bill prohibits monopolization, not previously covered by the Donnelly Act, however, this prohibition is already covered by the federal antitrust statues as well.[167] New York is a major financial hub and due to the age of the internet, large businesses typically have some direct or indirect nexus to New York. Businesses headquartered or incorporated outside of New York must abide by this stricter New York standard, essentially changing their company policy to

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[159] *See generally*, Standard Oil v. United States, 221 U.S. 1 (1911), Int'l Harvester Co. v. Kentucky, 234 U.S. 579 (1914), United States v. U.S. Steel Corp., 251 U.S. 417 (1920), Std. Oil Co. (Indiana) v. United States, 283 U.S. 163 (1931), Am. Tobacco v. United States, 328 U.S. 781 (1946), United States v. United Shoe Mach. Corp., 347 U.S. 521 (1954).

[160] *See* United Shoe Mach. Corp., 347 U.S. at 521 (United Shoe's share of shoe machinery output was 75-85%, a trail court found the company had monopoly power); GAVIL, *supra* note 45, at 472–73 (3d ed. 2017) (Figure 4-5 summarizes the results in cases that probably helped Judge Hand shape his determination of market share percentages).

[161] *See* United States v. Aluminum Co. of Am. (Alcoa), 148 F.2d 416, 424 (2d Cir. 1945).

[162] S.B. S933C, N.Y. Leg. Sess. (N.Y. 2021).

[163] If direct evidence, such as a firm's power to set prices or non-price contractual terms, or, in labor markets, use of non-compete clauses, sufficiently demonstrates a dominant position, plaintiffs may skip the taxing task of defining a relevant market to facilitate market share calculations. Additionally, indirect evidence's presumption of market share helps solve an issue the court faced when they used direct evidence to identify monopoly power. *See* Liu, *supra* note 131; *see generally*, S.B. S933C, N.Y. Leg. Sess. (N.Y. 2021).

[164] S.B. S933C, N.Y. Leg. Sess. §340(2)(b)(iii) (N.Y. 2021).

[165] *See* Leah Brannon, et al., *The 'Twenty-First Century Antitrust Act' Raises the Risks of Doing Business in New York,* CLEARY GOTTLIEB (June 8, 2021), https://www.clearygottlieb.com/news-and-insights/publication-listing/the-twenty-first-century-antitrust-act-raises-the-risks-of-doing-business-in-new-york.

[166] S.B. S933C, N.Y. Leg. Sess. §340(2)(b)(iii) (N.Y. 2021).

[167] *See* Brannon, *supra* note 165.

comply with New York law. To avoid liability, some companies may choose to organize their business, creating new subsidiaries for their business done specifically in New York, to avoid hitting the percentages for a presumed dominant position.

This abuse of dominance standard is a significant burden because businesses that are currently in compliance with federal and state law would suddenly become liable for antitrust claims regarding that same conduct, but only in New York. In addition to a presumption of dominance where a firm has 30% share, the Bill also defines labor market direct evidence to include "the use of non-compete clauses or no-poach agreements."[168] An abuse of dominance in labor markets includes "imposing contracts by which any person is restrained from engaging in a lawful profession, trade, or business of any kind, or by restricting the freedom of workers and independent contractors to disclose wage and benefit information."[169] Non-compete clauses are used widespread throughout the country and are used by companies that do not have special market power in labor markets.[170] These clauses may be used for protection of confidential information, in connection with the sale of a business, and also in industries where firms spend significant sums on training workers, which a competitor could easily free-ride off of by poaching recent hires.[171] These provisions may have the combined effect of making non-competes or confidentiality requirements around wages and benefits *per se* illegal in New York.[172]

For the non-labor market provisions, this standard is not new in the global antitrust industry. The big tech companies that this Bill is trying to contain are already subject to similar abuse of dominance standards across the world.[173] If these companies are already being forced to comply with this standard in other countries, it is feasible that they should be able to comply with it in the United States as well. These companies should have already altered their business practices to comply with this standard in other countries.

The result of the Bill will be New York setting a stricter standard that companies must comply with while still complying with the lower federal standards, in hopes of setting an improved standard for the nation to

[168] S.B. S933C, N.Y. Leg. Sess. § 340(2)(b)(i)(1) (N.Y. 2021).
[169] S.B. S933C, N.Y. Leg. Sess. § 340(2)(b)(ii) (N.Y. 2021).
[170] *See* Brannon, *supra* note 165.
[171] *See id*.
[172] *See id*.
[173] *Infra*, note 193–197.

follow.[174] However, it is not unprecedented for an impactful state to attempt to drive policy with a stricter state standard. California's emission standard is a pristine example of this.[175] As the most populous state with the strictest rules, California generally sets the emissions agenda for automakers and other states.[176] California can essentially set the national standard because Section 177 of the Clean Air Act allows California, and only California, to seek a waiver of the preemption which prohibits states from enacting emission standards for new motor vehicles.[177] Like California, New York's law would be stricter than the federal standard and compliance with the state law would satisfy federal standards.

Another example of stricter state regulation compared to federal standards is the food-labeling industry in the Midwest.[178] Since Missouri's food-labeling statute enactment in 2018,[179] other states, including Oklahoma,[180] Mississippi,[181] Arkansas,[182] Missouri,[183] Louisiana[184], and

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[174] Legislation Committee, *The 21st Century Antitrust Act: New York's Proposed Merger Control Regime*, AM. BAR ASS'N (Mar. 14, 2022), https://www.americanbar.org/groups/antitrust_law/committees/committee_program_audio/march-2022/21st-century-antitrust-act/.

[175] CAL. CODE REGS. tit. 13, §§ 1976, 1978, 2235 (2022).

[176] Under the federal Clean Air Act, California sought and obtained waivers from the EPA for California's Advanced Clean Cars Program, which regulates emissions of greenhouse gases and other pollutants in the state of California. As of 2019, 13 other states and the District of Columbia have elected to adopt California's robust greenhouse gas emissions standards. *See* Rob Bonta, *Protecting Our Environment – Defending National Clean Car Standards*, CAL. DEP'T OF JUST., https://oag.ca.gov/cleancars (last visited Apr. 1, 2022).

[177] Clean Air Act §209, 42 U.S.C. §7543.

[178] *See* Seth Bodine, *A Lawsuit Says Oklahoma Went Too Far in Labeling Requirements for Food like Tofurkey,* NAT'L PUB. RADIO (Dec. 10, 2021), https://www.kcur.org/news/2021-12-10/a-lawsuit-says-oklahoma-went-too-far-in-labeling-requirements-for-food-like-tofurky.

[179] Christina Troitino, *Missouri Becomes First State to Start Regulating Meat Alternative Labels*, FORBES (Aug. 31, 2018, 04:30AM), https://www.forbes.com/sites/christinatroitino/2018/08/31/missouri-now-regulating-meat-alternative-labels-as-regulatory-war-gets-bloody/?sh=1ecdb9506886.

[180] OKLA. STAT. tit. 2, §5-107 (2020).

[181] MISS. CODE ANN. §75-35-15 (2019) ("The law makes it a misdemeanor for plant-based or lab-grown meat providers to label their products 'veggie burger,' 'vegan bacon,' or 'meatless meatballs'"); Rachel Harris, *For State Meat Labeling Laws, Everybody Wants the 'Bacon'*, THOMPSON COBURN, LLP (Sept. 11, 2019), https://www.thompsoncoburn.com/insights/blogs/food-fight/post/2019-09-11/for-state-meat-labeling-laws-everybody-wants-the-%27bacon%27.

[182] ARK. CODE ANN. § 2-1-305 (2019).

[183] MO. REV. STAT. §§ 265.494(7), 265.496 (2018).

[184] On June 11, 2019, the Louisiana Legislature passed S.B. 152, known as the "Truth in Labeling of Food Products Act." The Act prohibits any person that places a label on a food product from intentionally misbranding or misrepresenting the food product as an agricultural product. The Act applies to a range of agricultural products—not just meat—and provides definitions for terms like "meat," "beef," "pork," "poultry," and "rice." Missy Oakley, *Pickin' on Veggies, Louisiana's "Truth in Labeling of Food Products Act",* LA L. REV. (Jan. 22, 2020), https://lawreview.law.lsu.edu/2020/01/22/pickin-on-veggies-louisianas-truth-in-labeling-of-food-products-act/#_edn11. *See* S.B. 152, La. Reg. Sess. (La. 2019); LA. STAT. ANN. §3:4744 (2020).

recently Kansas,[185] have all implemented a food labeling act. Many of these states, require meat alternatives to be clearly labeled as plant-based if they are not derived from an animal.[186] "Because the rising tide of meat labeling laws has a direct impact on the booming meat substitutes industry, stakeholders are fighting the labeling laws in court, often challenging the constitutionality of 'meat' labeling bans."[187] Both the meat-labeling laws and the Bill create a burden on business decisions that affect a companies' bottom line. It is possible that companies doing work in New York would have to decline a lucrative deal because they would become too dominant in the state. New York's strong local concerns regarding promoting competition are crucial to consumer safety and the economy, effectively outweighing the burden it could create.

iii. *Pike* Analysis

The burden is significant – companies will become liable for a range of conduct, mainly abusing a dominant position, that does not currently violate either state or federal law but would violate New York's law. The main conduct is abusing a dominant position. However, New York's local interests, compared to *Pike's,*[188] are extremely profound, and the benefits of the regulation would protect consumers against anticompetitive practices earlier than when the federal government deems them to be of concern.[189] This is crucial to consumer safety because once monopolies or monopsonies are established, it is typically too late to repair or mitigate the damage done.[190] The Bill could be seen as enhancing competition because of the presumption thresholds. The presumption for buyers and sellers would essentially cap firms' market power and allow for new entrants. If challenged, I believe the Bill would pass the *Pike* analysis for undue burden and be found constitutional.

3. Alternative Regulation

The last part of the Supreme Court's test instructs courts to look at any potential alternative regulation that may cause less of a burden on interstate

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[185] S.B. 261 Kan. Leg. Sess. (Kan. 2021). Prohibiting the use of identifiable meat terms on the labels of meat analogs when such labels do not include proper qualifying language to indicate that such products do not contain meat.
[186] *See* Bodine, *supra* note 178.
[187] *See* Rachel Harris, For State Meat Labeling Laws, Everybody Wants the 'Bacon', THOMPSON COBURN, LLP (Sept. 11, 2019), https://www.thompsoncoburn.com/insights/blogs/food-fight/post/2019-09-11/for-state-meat-labeling-laws-everybody-wants-the-%27bacon%27. See also, Bodine, *supra* note 178. In Oklahoma, The Plant Based Foods Association claimed the law is unconstitutional, anticompetitive, and burdensome.
[188] Court found that the regulatory scheme could not be tolerated because the cost of $200,000 was too high for such a minimal local interest related to deceptive packaging. *See* Pike v. Bruce Church, Inc., 397 U.S, 137 (1970).
[189] S.B. S933C § 2, N.Y. Leg. Sess. (N.Y. 2021).
[190] *Id.*

commerce.[191] The Bill passes this part of the test since any alternative New York could implement would most likely not include an abuse of dominance standard, since that is the part of the legislation that affects interstate commerce the most. New York legislature believes that effective enforcement against unilateral anticompetitive conduct has been impeded by courts, for example, applying narrow definitions of monopolies and monopolization, limiting the scope of unilateral conduct covered by the federal antitrust laws, and unreasonably heightening the legal standards that plaintiffs must overcome to establish violations of those laws.[192] Due to this gap, there does not seem to be an effective alternative state regulation that New York could implemented. Any law that could fill these gaps would still be burdensome when compared to the federal laws but would not fight monopolization as much. Any gap bridging regulation would have to be passed by the federal government in order to avoid burdensome interstate commerce issues.

V. CURE THE BILL

If a constitutionality claim is brought against the proposed Bill, a potential solution to the issue would be to implement a waiver similar to California's. California's waiver, allows California – and only California – to set emissions standards that are more stringent than those adopted by the federal government, and it allows states with air quality below federal standards to adopt an emissions standard "identical to the California standards."[193] A waiver would eliminate the problem of multiple state standards while still allowing states to depart from the federal standard if they were to adopt New York's stricter antitrust standard. Then there would only be two definite standards, the federal one and the New York one, followed by any state that ops in. Having additional states adopt New York's abuse of dominance standard would lessen interstate burden since it would be more commonly followed.

VI. CONCLUSION

This Bill would be useful in shrinking the clear gap that exists in the United States federal antitrust laws.[194] The Bill is neither expressly nor impliedly preempted by federal antitrust law and will most likely be held constitutional since the important consumer protection concerns outweigh the burden on interstate commerce and any alternative regulation would not lower that burden.

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[191] *See* Tanol Distrib., Inc., v. Panasonic Co., No. CIV.A.86-3355-S, 1987 WL 13319 at *11 (D. Mass. July 2, 1987).
[192] S.B. S933C § 2, N.Y. Leg. Sess. (N.Y. 2021).
[193] *See* Bonta, *supra* note 176.
[194] *See* Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L.J. 710, 720 (2017).

However, if other states follow New York's lead, the current predominant alignment of federal and state antitrust law could be replaced by a patchwork of differing legal standards that could ensnare companies that operate in multiple states and might put further pressure on Congress to enact additional federal legislation that sets forth a common framework for our national economy.[195] If differing standards start to appear, then the issue becomes one of uniformity. This push has already been made by both Senator Klobuchar and Chairwomen of the FTC, Lina Khan, who agree that single-firm dominance diminishes sound competition by reducing innovation, product quality, and product variety.[196] Chairwomen Khan, has argued that without changes in antitrust law, the options available to enforcers were limited; her proposed alternatives included "restoring traditional [pre-*Trinko*] antitrust and competition policy principles."[197] These arguments for forcefully policing single-firm conduct are not new,[198] and have been implemented in other countries, such as the United Kingdom,[199] Italy,[200] Japan,[201] South Korea,[202] and India.[203] Until the federal government implements new antitrust reform, New York state can fight this issue themselves.

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[195] *See* Liu *supra* note 131.
[196] *See* Khan, *supra* note 194, at 721. *See also* Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 2 (2021).
[197] *See* Khan, *supra* note 194, 758, 792.
[198] What is now advocated for was foreshadowed a few years ago, called the "New Brandeis School" or "Neo-Brandeisian," a movement among younger antitrust scholars that, like Justice Brandeis, was critical of "bigness" and market concentration. *See, e.g.*, Lina Khan, *The New Brandeis Movement: America's Antimonopoly Debate*, 9 J. Eur. Competition L. & Prac. 131, 132 (2018); Robert Levine, *Antitrust law never envisioned massive tech companies like Google*, BOS. GLOBE (June 13, 2018), https://bit.ly/3w9JS27; David Dayen, *This Budding Movement Wants to Smash Monopolies*, THE NATION (April 4, 2017), https://bit.ly/2UcYksW.
[199] U.K.'s Competition & Markets Authority said it's investigating whether Facebook is abusing a dominant position in the social media or digital advertising markets through its collection and use of ad data; *See* Sam Shead, *Facebook hit with new antitrust probes in the UK and* EU, CNBC (Jun. 4, 2021), https://www.cnbc.com/2021/06/04/facebook-hit-with-new-antitrust-probes-in-the-uk-and-eu.html.
[200] Legge 10 ottobre 1990, n. 28, G.U. Aug. 14, 2017, n.124 (It.) (Section 3, Abuse of a dominant position, states: "The abuse by one or more undertakings of a dominant position within the domestic market or in a substantial part of it is prohibited.").
[201] Shiteki-dokusen no Kinshi oyobi Kōseitorihiki no Kakuho ni Kansuru Hōrits [Act on Prohibition of Private Monopolization and Maintenance of Fair Trade], , Law No. 54 of 1947, art. 2, para. 9, as amended (Japan) [hereinafter AMA] ("The term 'unfair trade practices' as used in this Act means an act falling under any of the following items: . . . (v) engaging in any act specified in one of the following by making use of one's superior bargaining position over the counterparty unjustly, in light of normal business practices . . .").
[202] Monopoly Regulation and Fair Trade Act, art. 3-2, (S. Kor.).
[203] The Competition Act, 2002, § 4 (India).

New antitrust reform is finally gaining some traction in the current administration,[204] which may allow for a waiver to be enacted. In June 2021, the House Judiciary Committee approved six bills in a sweeping antitrust package that takes aim at Big Tech and attempts to reel in the giants' power. [205] The White House has generally supported efforts to increase competition and President Biden has installed progressive leaders at the antitrust agencies,[206] including Chairwomen Khan who is a huge supporter of attacking Big Tech. Together, it seems a waiver could be a feasible solution. New York is at the forefront of the fight against Big Tech and an abuse of dominance standard is a successfully documented way of winning this war.

[204] The Senate Judiciary Committee unanimously approved The Merger Filing Fee Modernization Act in May 2021, and in January 2022, the Senate Judiciary Committee voted to advance The American Innovation and Choice Online Act, setting it on a path to potentially be adopted by the full Senate. The committee also scheduled a markup of the Open App Markets Act, another bipartisan competition bill. *See* Sharis A. Pozen, *House Judiciary Committee Passes Six Antitrust Bills Targeting Tech Platforms and Large Transactions, Setting Up Vote Before House of Representatives,* CLIFFORD CHANCE (June 28, 2021), https://www.cliffordchance.com/briefings/2021/06/house-judiciary-committee-passes-six-antitrust-bills-targeting-t.html.; *see also* Lauren Feiner, *Senate committee votes to advance major tech antitrust bill,* CNBC (Jan. 20, 2022), https://www.cnbc.com/2022/01/20/senate-committee-votes-to-advance-major-tech-antitrust-bill.html.

[205] These bills include: The American Innovation and Choice Online Act, The Merger Filing Fee Modernization Act, The State Antitrust Enforcement Venue Act, The Platform Competition and Opportunity Act, The Augmenting Compatibility and Competition by Enabling Service Switching Act (ACCESS Act), and The Ending Platform Monopolies Act. *See*, Rachel Lerman, *Big Tech antitrust bills pass first major hurdle in House even as opposition grows,* WASH. POST (June 24, 2021), https://www.washingtonpost.com/technology/2021/06/24/tech-antitrust-bills-pass-house-committee/; Cat Zakrzewski, *Bipartisan proposals in House would mean major changes for the way tech giants operate,* WASH. POST (June 11, 2021), https://www.washingtonpost.com/technology/2021/06/11/ antitrust-legislation-curbs-silicon-valley/. *See also* Shoshana Wodinsky, *Here's What's in the Six Antitrust Bills That Could Finally Break Up Big Tech,* GIZMODO (June 25, 2021), https://gizmodo.com/heres-whats-in-the-six-antitrust-bills-that-could-final-1847172991.

[206] *See* Feiner, *supra* note 204