



# Why the 21st Century Antitrust Act Is Critical for New York Small Businesses

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**Small businesses are the lifeblood of the New York economy and its communities.** These enterprises – making up nearly all firms incorporated in the state and employing half of its workforce<sup>1</sup> – help foster economic resilience at every scale, from walkable, vibrant neighborhoods to healthy industries. New York’s small businesses create jobs and apply upward pressure on wages, build a healthy tax base, and circulate the wealth they generate within their communities – both urban and rural alike. They offer a clear pathway to the middle class, especially for immigrants and entrepreneurs of color.<sup>2</sup> They help drive innovation and offer distinct benefits to their customers, including competitive products, services, and prices. Small businesses are essential for New York’s economic equality, vitality, and well-being.

Yet, across many industries, small businesses are imperiled by highly concentrated markets and rampant market power abuse by dominant corporations. Every step of running a small business – from accessing the capital needed to start a business, to contracting with suppliers, to reaching customers, to processing payments – pits entrepreneurs and start-ups against the most powerful and predatory firms in the country, which are not competing fairly. This is disastrous for small business owners, working people, communities, and for the New York economy more broadly.

## Table of Contents

### PAGE 2

How Dominant Corporations Harm New York Small Businesses

### PAGE 3

How Policymakers Promoted Bigness at the Expense Of Small Business

### PAGE 4

How The 21st Century Antitrust Act Will Level the Playing Field for New York Small Businesses

### PAGE 5

Why We Need This Law Now

Decades of policy choices at the federal and local level have favored corporate bigness over local, economically diverse communities, handcuffing the ability of small businesses to compete in a fair and open market. New York is no exception.

This report shows how dominant corporations and their abusive tactics impact New York's small and independent businesses' ability to compete, despite their often superior performance. It explains how New York lawmakers can help protect independent businesses by passing the 21st Century Antitrust Act (S933A/A1812A). Finally, it outlines why the stakes are high and the time is now to pass this bill. This groundbreaking, first-in-the-nation legislation will create clear, bright line standards to hold monopolists accountable for the harms they inflict on small shops and entrepreneurs.

*“Our local small independent businesses are the backbone of our communities. They provide character and individuality while keeping jobs and money in the local community. The Big Box stores and dominant online retailers do none of those things. That’s why the Westchester Independent Business Alliance is supporting the 21st Century Antitrust Act. We need this legislation to give small, independent businesses a fair shot at competing.”*

Bob Giordano, President/Founder of the Westchester Independent Business Alliance

## How Dominant Corporations Harm New York Small Businesses

Small businesses are essential for healthy, competitive markets. In sectors across the economy, they deliver distinct benefits to their customers and their industries, and outperform larger rivals in many ways. Independent toy stores help small domestic manufacturers access new customers. Independent community banks provide the vast majority of small business loans.<sup>3</sup> Independent pharmacies often provide better health care and cheaper prescriptions to the communities they serve compared to the big chain pharmacies, and they have been on the front lines for those communities during the Covid crisis.<sup>4</sup> Independent grocers and bodegas offer fresh food in neighborhoods and towns abandoned by larger food and retail chains.<sup>5</sup>

A growing body of research underscores the important role small firms play in driving innovation. Research has shown that industries populated by small businesses generate new products and processes at a faster clip than those consisting of a few large companies.<sup>6</sup> Small firms, for example, produce 13 times more patents per employee than do large companies, and those patents tend to have more industry impact and growth.<sup>7</sup> In the tech sector, Amazon, Facebook, and Google have slowed the once-brisk pace of technological innovation by buying and burying smaller competitors before they become true threats.<sup>8</sup>

Despite the productivity and innovation of small businesses, it has become increasingly harder to compete because dominant rivals abuse their outsized market power. Those tactics raise costs for small businesses, cut off their access to crucial supplies and credit, and unfairly lure customers away with predatory, below-cost prices.

New York independent businesses in particular are under the thumb of some of the most predatory corporate giants in America. Visa and Mastercard are increasing the transaction fees they charge New York's neighborhood bodegas and retailers.<sup>9</sup> The state's independent pharmacies are being pushed out by pharmacy benefit managers – powerful middlemen that the Pharmacists Society of the State of New York called “parasites of the healthcare system.”<sup>10</sup>



*“Amazon makes it nearly impossible for small business owners like myself to make a profit selling on their Marketplace. They ask for documentation they know you can’t provide. They stock a product you’re selling when they see it is popular and profitable, and then undercut your price. They pull your products off the site for no legitimate reason. Because Amazon controls so much of the online selling market share, we don’t have a choice and need to be there. Small business owners need this kind of legislation so that our government has better tools to stand up to monopoly bullies like Amazon. They treat small business owners poorly because they know we don’t have the power it takes to stand up to them.”*

Bill Stewart, owner of  
LI Toy & Game in Kings Park, New York

Wall Street megabanks doled out crucial Covid relief to their largest and most powerful clients, while many small businesses struggled to access funding.<sup>11</sup>

In fact, a recent survey of more than 900 independent businesses found that top challenges facing small businesses came from the unchecked exercise of market power by dominant corporations – 65% of respondents rated as a major challenge the fact that their big competitors receive special discounts and terms from suppliers.<sup>12</sup> By strong-arming suppliers, dominant corporations can tilt the playing field and compel suppliers to raise prices for smaller competitors. Sixty two percent of businesses said Amazon’s control over the online market was a “very or extremely significant challenge” and 58% of businesses reported that a major challenge is that big competitors sell goods and services below cost, which is a predatory tactic oversized corporations use to take market share from small rivals without having to compete for it.<sup>13</sup>

Many of the core tactics monopolists use to stamp out their smaller rivals have become commonplace over the past four decades, as policymakers and judges defanged our core federal antitrust laws – undermining Congress’ intentions when drafting and passing those laws.<sup>14</sup>

## How Policymakers Promoted Bigness at the Expense of Small Business

The ways big, dominant corporations today abuse smaller rivals and suppliers were what U.S. antitrust laws – the Sherman Act, the Clayton Act and the Federal Trade Commission Act, among others – were intended to, and for many years did, prevent. For most of the 20th century, Congress passed strong antimonopoly laws, and amended them as needed to keep up with new manifestations of monopoly power.<sup>15</sup> Law enforcers and judges relied on them to stop the worst monopoly abuses.

But in the 1980s, influenced by the theories of scholars associated with the University of Chicago, policymakers decided that antitrust would no longer be “concerned with fairness to smaller competitors,” as William Baxter, Ronald Reagan’s choice to run the Antitrust Division at the Department of Justice, said in 1981.<sup>16</sup> The new goal



of antitrust would be “an exclusive concern with economic efficiency.” Armed with this narrow philosophy of what antitrust should do, enforcers and judges undid bright-line rules against harmful conduct and big mergers that made specific conduct outright illegal, instead deciding cases under the subjective, opaque “rule of reason.” As a result, the government routinely greenlights mergers that directly harm small businesses.

States have long stepped in when federal antitrust enforcement failed to stop abuses of monopoly power or harmful mergers. Indeed, it was state lawmakers who enacted the country’s first antitrust laws in the late 19th century to address the abuses of the oil, agriculture, and money trusts. Those first state laws were largely successful – the state of Ohio took on Standard Oil years before the federal government sued to dissolve the trust. More recently, when federal antitrust enforcement froze during the Reagan administration, state enforcers tried diligently to take on monopoly power in the federal government’s absence. But the damage courts have done to the federal antitrust laws has infected states’ ability to take on monopoly power. Passing new, clear laws is one way states can overcome the toxic, pro-monopoly policies of the past 40 years and make their economies open and fair for all.



*“New Yorkers love how local businesses contribute to the uniqueness of their neighborhoods and to the vitality of the entire city, but monopolies like Amazon continue to threaten independent businesses. We urgently need this legislation to curb monopolistic behavior in the retail market in order to give local businesses a chance to compete.”*

Natasha Amott, owner of Whisk kitchen store in New York City

## How The 21st Century Antitrust Act Will Level the Playing Field for New York Small Businesses

The 21st Century Antitrust Act would usher in much needed reforms to New York’s existing antitrust laws. It would also place New York at the forefront of a resurgent local movement to rein in corporate power and create a fair, open marketplace for independent businesses. Given the lax state of antitrust enforcement at the federal level over the past four decades, and the hostility to antitrust cases in the federal courts, this bill would allow the state and private parties to sue abusive, dominant corporations in New York courts as a means of reining in their harmful conduct.

Small and independent businesses in New York would enjoy significant new protections from the abusive, often anticompetitive behavior of monopolistic corporations, including:

- ➔ **Allowing antitrust enforcement against corporations that act unilaterally to stifle competition.** Anticompetitive conduct is often perpetrated by a single corporation, as we have seen in cases with Amazon, Walmart and other dominant corporations. But under the current law, the state can only punish conspiracies between multiple companies. With the passage of this bill, New York’s antitrust laws will also cover unilateral conduct by powerful corporations that abuse their dominance or attempt to monopolize markets.
- ➔ **Allowing the New York State Attorney General and small, independent businesses to use evidence of harm to prove a corporation’s dominance.** The proposed law gives the New York Attorney General new authority to go after monopoly conduct and ensure fair markets for small businesses. Businesses and other plaintiffs will not need to rely on expensive economists and lawyers to prove that a company dominates a market. Instead, evidence of a dominant firm’s wrongful conduct – such as the ability to set prices, and to dictate terms to workers or suppliers – will be enough to prove that they wield power in an industry and expose them to punishment for their illegal monopolization.

Furthermore, the bill establishes bright-line rules for determining which companies are considered dominant – exposing corporations that control more than 40 percent of a market for products they sell, and more than 30 percent of a product they buy, to more assertive monopoly enforcement. The thresholds defining dominance are a key feature of the bill, aiming to hold the largest corporations accountable for their anti-competitive behaviors, not small or medium-sized firms. For example, Amazon’s share of e-commerce has risen to over 50%.<sup>17</sup> Walmart alone captures one-quarter of grocery spending nationally. In over 200 metropolitan and micropolitan regions, it has a market share greater than 50 percent.<sup>18</sup> Visa, the largest credit card company, controls 60% of the credit and debit card market, with Mastercard controlling 25% of the market.<sup>19</sup>

➔ **Ensuring small businesses have an opportunity to be heard in court.** Under this law, independent businesses can band together in class action lawsuits to sue abusive monopolists for their abusive conduct. Class actions are only allowed in New York if the law explicitly allows them. The current antitrust law, known as the Donnelly Act, makes no mention of class actions. The new law would allow those harmed by anticompetitive conduct to sue as a class and, if successful, collect triple the amount of damages.

## Why We Need This Law Now

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For far too long, New York’s small business owners have been competing on an uneven playing field. Without this legislation, the problem will only get worse. The problem is not that small businesses can’t compete. It’s that dominant corporations, empowered by policies that tilt the playing field, are muscling them out and, in the process, destroying the economic vitality of many communities. The stakes are high, and passing the 21st Century Antitrust Act is a critical step toward ensuring New York’s small businesses can thrive and compete. ■

*“Independent businesses in New York are under the thumb of some of the most predatory corporate giants in America.”*







## About New Yorkers for a Fair Economy

New Yorkers for a Fair Economy (NYFE) is a coalition of labor organizations, small businesses, and immigrant and community organizations uniting to safeguard our communities from abusive practices of big corporations and achieve an economy that works for all New Yorkers. This coalition includes the frontline workers who care and provide for our communities, the small businesses that provide essential services that we need, the community organizations that protect the environment and the dignity of Black, brown, immigrant and gender-oppressed communities that make up our diverse state. NYFE is led by ALIGN (Alliance for a Greater New York) and joined by labor unions Teamsters Joint Council 16, Retail Wholesale, and Department Store Union, UAW Region 9A; community groups New York Communities for Change, Make the Road New York, and Restaurant Opportunities Center New York; and national research and advocacy organizations Institute for Local Self Reliance, American Economic Liberties Project, and Strategic Organizing Center.



## Notes

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4. Lisa L. Gill, "Consumers Still Prefer Independent Pharmacies, CR's Ratings Show," *Consumer Reports*, December 2018; Zach Freed, "Fighting Monopoly Power: Pharmacy," Institute for Local Self-Reliance, 2020.
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6. Wilfred Dolfsma & Gerben van der Velde, "Industry Innovativeness, Firm Size, and Entrepreneurship: Schumpeter Mark III?" *Journal of Evolutionary Economics*, 2014.
7. Anthony Breitzman and Diana Hicks, "An Analysis of Small Business Patents By Industry and Firm Size," U.S. Small Business Administration Office of Advocacy, November 2008, (finding that "Small businesses develop more patents per employee than larger businesses, with the smallest firms, those with fewer than 25 employees, producing the greatest number of patents per employee," and that "small firm patents tend to be more significant than large firm patents, outperforming them in a number of categories including growth, citation impact, and originality.")
8. "Investigation of Competition In Digital Markets," Subcommittee on Antitrust, Commercial and Administrative Law of the Committee on the Judiciary, U.S. House of Representatives, October 2020, (finding that, "In some cases, a dominant firm evidently acquired nascent or potential competitors to neutralize a competitive threat or to maintain and expand the firm's dominance. In other cases, a dominant firm acquired smaller companies to shut them down or discontinue underlying products entirely—transactions aptly described as 'killer acquisitions.'")
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