

May 10, 2023

Submitted Via Electronic Mail

Senate Judiciary Committee
224 Dirksen Senate Office Building
Washington, DC 20510

The Honorable Richard J. Durbin, Chairman
United States Senate Committee on the Judiciary
711 Hart Senate Building
Washington, D.C. 20510

The Honorable Lindsay Graham, Ranking Member
United States Senate Committee on the Judiciary
211 Russell Senate Office Building
Washington, DC 20510

Re: Nomination of Michael A. Delaney to the United States Courts of
Appeals for the First Circuit

Dear Chairman Durbin, Ranking Member Graham, and Members of the Committee:

On behalf of the American Economic Liberties Project (“Economic Liberties”), I write in strong opposition to the nomination of Michael A. Delaney to be a United States Circuit Judge for the U.S. Court of Appeals for the First Circuit. Economic Liberties is an independent nonprofit research and advocacy organization that is dedicated to understanding and addressing the problem of concentrated economic power in the United States. The dangers of economic concentration are well documented, including increased prices, lower quality products and services, underinvestment, restricted access to business ownership, and harm to workers. Unfortunately, this concentration of power has reached extreme proportions in virtually every sector of the U.S. economy, from Big Tech to pharmaceuticals to telecommunications to agriculture. Economic Liberties objects to Mr. Delaney’s nomination based on his record of supporting litigation that only exacerbates this

crisis, as a member of the Board of Directors of the New England Legal Foundation (NELF).

NELF's [stated mission](#) is to “challenge[] actions by governments and private litigants which would unreasonably intrude on the economic freedoms of individuals and business enterprises in New England and the nation.” To advance that mission, NELF submits *amicus* briefs arguing for limited government. In [West Virginia v. EPA](#), NELF “decr[ie]d] EPA’s opportunistic discovery of agency power” before the U.S. Supreme Court. In [Loper Bright Enterprises v. U.S. Secretary of Commerce](#), NELF again argued against the authority of administrative agencies, this time the National Marine Fisheries Service, to fulfill their statutory mandates. In [Liu v. Securities and Exchange Commission](#), NELF argued that the SEC lacked authority to obtain disgorgement of ill-gotten funds acquired through securities violations. In [Brown v. Saint-Gobain Performance Plastics Corp.](#), NELF defended a plastics company accused of exposing people to a toxic chemical. Finally, in [Archer v. Grubhub Holdings](#), NELF allied with the Chamber of Commerce and successfully argued for a broad application of the Federal Arbitration Act to Grubhub delivery drivers seeking compensation for state wage act violations and retaliation.

Mr. Delaney was a member of the NELF committee that vetted these *amicus* briefs, and that work deserves heightened scrutiny. It is fundamentally different from his paid positions at private law firms and his political appointments in the New Hampshire Attorney General’s Office. At NELF, Mr. Delaney was not a paid advocate taking positions on behalf of a client. He was volunteering his time to promote a specific cause. There is no better source for Mr. Delaney’s views of the law and government than uncompensated advocacy. As federal agencies like the Federal Trade Commission and the Consumer Financial Protection Bureau face constitutional challenges to their very existence, it is not difficult to surmise how he would rule from the bench of the First Circuit.

Mr. Delaney’s response to Senator Hawley’s written questions about monopoly power also gives Economic Liberties pause. When asked what the market share necessary to sustain a claim under Section 2 of the Sherman Act, Mr. Delaney stated:

Response: In *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 481 (1992), the Supreme Court stated that “Respondents’ evidence that Kodak controls nearly 100% of the parts market and 80% to 95% of the service market, with no readily available substitutes, is, however, sufficient to survive summary judgment under the more stringent monopoly standard of § 2 of the Sherman Act.” *Id.* (citations omitted).

This murky statement suggests that Mr. Delaney might set a threshold of 80% or more if seated on the First Circuit, a position that is inconsistent with federal jurisprudence where a threshold market share is not even a mandatory element of

monopolization claims.¹ It is also inconsistent with the goals of President Biden's Executive Order on Promoting Competition in the American Economy, [signed on July 21, 2021](#).

As President Biden reminded us,

[O]ver the last several decades, as industries have consolidated, competition has weakened in too many markets, denying Americans the benefits of an open economy and widening racial, income, and wealth inequality. Federal Government inaction has contributed to these problems, with workers, farmers, small businesses, and consumers paying the price.

Granting an advocate for limited government a lifetime appointment to a federal appellate court in this environment does not meet the moment. We have a clear picture of how Mr. Delaney views the federal government, and we urge the Committee to take that picture seriously and block his nomination to one of the most powerful seats in the United States judiciary.

Sincerely,



Katherine Van Dyck, Esq.
Senior Policy Counsel
American Economic Liberties Project

¹ See, e.g., *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (“The existence of such power ordinarily may be inferred from the predominant share of the market.”); *Conwood Co., L.P. v. U.S. Tobacco Co.*, 290 F.3d 768, 783 n.2 (6th Cir. 2002) (finding monopoly power based on 74-77% market share); *Hewlett-Packard Co. v. Bos. Sci. Corp.*, 77 F. Supp. 2d 189, 196 (D. Mass. 1999). (70% market share sufficient to infer market power); *Synthes, Inc. v. Emerge Med., Inc.*, No. 11-1566, 2012 U.S. Dist. LEXIS 140251, at *36 (E.D. Pa. Sep. 28, 2012) (“a small market share is not dispositive in the presence of other factors suggesting market power”).