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Hearing on "The Elite Universities Cartel: A History of Anticompetitive Collusion Inflating the Cost of Higher Education"

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Chair Fitzgerald, Ranking Member Nadler, and distinguished members of the Subcommittee, thank you for extending an invitation to testify today.

My name is Scott Martin, and I am here as an attorney whose work has focused on antitrust litigation for more than 30 years. That includes more than two decades primarily spent on defense work and the past 10 years principally litigating on behalf of plaintiffs. I am also an author and the co-editor of a multi-volume antitrust treatise. I care deeply about the benefits of competition and free markets – a truly bipartisan goal – as well as active but fair enforcement of our nation's antitrust laws.

As the members of the Subcommittee know, the antitrust laws address both unilateral conduct – anticompetitive acts undertaken by a single actor with market power – and concerted conduct, particularly when the latter involves direct, or "horizontal," competitors. Most of my remarks will be directed to the latter as an area of concern regarding higher education historically – including the potential for cartel activity, which the United States Supreme Court has labeled "the supreme evil of antitrust."[1]

In testifying today, I am making no prejudgment about any current conduct, nor has my law firm represented a party in the cases I will discuss. Indeed, the hope of antitrust lawyers is always that free markets are operating properly and that unlawful conduct is not interfering with that. But there are several reasons here for heightened vigilance to protect and encourage robust competition in education.

First, as members of the Subcommittee as well as many American students and parents know, the price of higher education, specifically for private schools, has outpaced the rate of inflation. Since I was in college, the consumer price index has inflated the dollar by a factor of

[1] *Verizon Comm'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004).

three, but tuition prices at the most selective institutions in particular have gone up on the order of seven-fold. Meanwhile, output (in terms of class size) has not kept pace with population growth. And this is true despite increased demand and increasing multi-billion-dollar endowments. Common sense begs the question whether such a market is working properly.

Second, the somewhat cloistered nature of these institutions, their "non-profit" status (not to be confused with their massive endowments) and a belief, of which I am not questioning the sincerity, that they are engaged in noble work of the advancement of knowledge, *may* create an atmosphere suggesting that relaxation of rules of fair competition would be appropriate for this industry. Not so. And most legal scholars will tell you not only that antitrust exemptions are rare, and rightly so, but also that special sectoral rules and regulation have at best a mixed track record in our nation. In a different higher-education context, my firm brought the *O'Bannon* case that challenged NCAA restraints on college athletes. The marketplace has flourished, and the sky has not fallen.

And *third*, there are numerous markers here, familiar to antitrust practitioners, that this is a market ripe for distortion by collusion. Among other things, this is a somewhat concentrated industry with relatively few highly selective institutions as participants. There are numerous opportunities for those entities to collude – whether directly, such as at meetings of university presidents, or facilitated through intermediaries such as the College Board. And there are, of course, exceptionally high barriers to entry into the market.

As I mentioned, by way of context, this industry has been the subject of investigations and litigation raising competition concerns in the past, on issues ranging from no-poach agreements concerning graduate school faculty members to monopolization of markets for college bookstore sales and local housing. The "Common Application" used by over 1,000 colleges and universities throughout the United States also has been the subject of a private antitrust action, which was ultimately settled. The Department of Justice has investigated the National Association for College Admission Counseling concerning provisions that, among other things, prohibited members from offering incentives to students who applied for early admission, an investigation that was resolved in a consent settlement.

And perhaps most pertinent to the Subcommittee here, in 1989, the DOJ filed a civil antitrust case against a group of universities alleged to have employed the same analysis to compute family contributions toward the costs of attendance, for purposes of collectively determining financial assistance offered to commonly admitted students. That case resulted in a 10-year consent decree in 1991, under which those universities committed not to agree on student financial aid – and it subsequently led to Congressional passage of the so-called "568 Exemption" permitting colleges to formulate common *approaches* to awarding financial aid provided they strictly adhered to need-blind admissions.

The 568 Exemption expired on September 30, 2022 and was not renewed by Congress. However, current and former college students allege, in a class action filed in 2022, that members of a "568 Presidents Group" of 17 top private colleges and universities have conspired to eliminate competition among them for financial aid – that is, effectively fixing the price of

college attendance among them.[2] To date, 12 of those 17 schools have resolved the lawsuit in settlements totaling approximately $320 million.

Again, I offer that brief history only for context. I stress, however, that antitrust enforcement in our nation involves both public (on several levels) and private actions because it protects competition that is the backbone of our economy. Accordingly, I thank you for your attention and your vigilance in this regard.

[2] *See Henry v. Brown University*, No. 1:22-cv-00125 (N.D. Ill.).