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Roger P. Alford
Notre Dame School of Law

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Antitrust Accountability Delayed: State Antitrust Enforcement and Multidistrict Litigation

*Roger P. Alford**

ABSTRACT

State Attorneys General play a crucial role in the enforcement of antitrust laws. Defendants have successfully delayed state enforcement proceedings by centralizing them with private lawsuits in multidistrict litigation. A new venue law has foreclosed that delay tactic, placing State Attorneys General on equal footing with federal antitrust enforcers in deciding where, when, and how to prosecute antitrust cases.

INTRODUCTION

The role of states in enforcing antitrust laws to address monopoly abuse has never been more important. States are displaying surprising leadership in a number of critical lawsuits against Big Tech companies.¹ As one commentator noted, “[o]ne of the more important but unnoticed trends in the last ten years has been the emergence of state attorneys general as aggressive antitrust enforcers. . . . State[s] . . . are affecting a revolution in antitrust enforcement.”² Sometimes state leadership is shared by the federal government, but often it is not, with states either standing alone or taking the lead with federal enforcers following years later.³ The decision by state attorneys general to bring these cases is momentous and reflects a shared consensus across the political spectrum that significant time and energy should be deployed to address Big Tech’s monopoly practices.⁴

In almost every instance the response of Big Tech companies has been to deny their abuse and delay the proceedings.⁵ This is understandable given the amount of money at stake. For example, Google and Facebook make

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* Roger P. Alford is a Professor of Law at Notre Dame Law School and Former Deputy Assistant Attorney General in the Antitrust Division for the Department of Justice (2017–2019). Since 2019, he has been an expert consultant for the Texas Office of the Attorney General in its antitrust lawsuit against Google. The author expresses his appreciation to Kendall Crawford for her excellent research assistance.

2. See Matt Stoller, *Too Much Winning: Antitrust Reform to Become Law*, (Dec. 21, 2022), <https://mattstoller.substack.com/p/too-much-winning-antitrust-reform> [<https://perma.cc/Q2ZJ-G6FV>].

3. *Id.*

4. *Id.*

5. Roger P. Alford, *The Bipartisan Consensus on Big Tech*, 71 EMORY L. J. 893, 928 (2022).

\$775 million and \$319 million, respectively, in revenue per day.⁶ Every day that Big Tech companies can delay accountability for their abuse of power is worth hundreds of millions of dollars.⁷ In most instances, the delay tactics are incrementally successful, through refusals to respond to Civil Investigative Demands, fights over privilege logs, obstructing discovery requests, pursuing protracted schedules in case management hearings, or slow walking negotiations regarding protective orders or ESI agreements.⁸ These tactics will lead to weeks and sometimes months of delays.⁹ But there is one tactic that will delay proceedings by years: forcing states to centralize their antitrust lawsuits with private parties pursuant to an order of a multidistrict litigation panel.

This Essay outlines the current efforts by states to enforce antitrust laws against Big Tech abuse of monopoly power. It then provides an overview of the Multidistrict Litigation Act and discusses how defendants have deployed multidistrict litigation proceedings to delay state antitrust enforcement actions. Finally, the Essay concludes by introducing the State Antitrust Enforcement Venue Act of 2022, a new law passed in December 2022 that will put state attorneys general on equal footing with federal antitrust enforcers by exempting them from multidistrict litigation centralization.¹⁰

I. STATE ENFORCEMENT OF ANTITRUST LAWS

State attorneys general play a crucial role in the enforcement of antitrust laws. The history of antitrust law in the United States begins at the state level. As Senator Amy Klobuchar outlines in her book on antitrust, “[l]ike so many other American political movements, the story of this country’s antitrust laws begins not with the mother of all democracies in Washington D.C., but with her sons and daughters in the states.”¹¹ Between 1888 and 1890 more than a dozen states passed general antitrust laws prohibiting the abuse of monopoly power.¹² These state laws were passed in response to congressional failure to act at the federal level.¹³ This was consistent with the general understandings that federalism mandated that regulating economic activity and preserving competition fell to the individual states.¹⁴ Only after these

6. *Id.* at 931.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

11. Alford, *supra* note 4, at 909.

12. Amy Klobuchar, *ANTITRUST: TAKING ON MONOPOLY POWER FROM THE GILDED AGE TO THE DIGITAL AGE* 62 (2020).

13. *Id.* at 63.

14. *Id.*

state antitrust laws passed did Congress finally enact the first federal antitrust law, the Sherman Act of 1890.¹⁵

Today, every state and territory have their own antitrust laws to promote competition.¹⁶ In addition to state attorneys general enforcing state antitrust laws, federal antitrust law empowers the states to enforce federal antitrust laws as well. It does so by enabling states to bring injunctive relief under Section 16 of the Clayton Act,¹⁷ either in their proprietary capacity against loss to itself or as *parens patriae* to protect against loss to its citizens.¹⁸ This empowers states to seek the full range of remedies, including monetary damages, behavioral remedies, and structural relief, including divestiture.¹⁹ Some of those remedies, such as *parens patriae* monetary damages, are available to state but not federal enforcers.²⁰ Congress created this right for states under federal antitrust law and recognized antitrust injuries are often too small to justify complex private antitrust litigation, and therefore, state attorneys general can “fill this gap by providing the consumer an advocate in the enforcement process—his State attorney general.”²¹

The power of *parens patriae* that states enforce is the “quasi-sovereign” interests which . . . are independent of and behind the titles of its citizens.”²² This right of state attorneys general reflects the “quasi-sovereign interest in the health and wellbeing—both physical and economic—of its residents in general” and the “quasi-sovereign interest in not being discriminatorily denied its rightful status within the federal system.”²³

“Federal and state competition law enforcers have similar missions: to protect the public from the harms flowing from anticompetitive conduct.”²⁴ Generally speaking, federal enforcers seek to protect the interests of all con-

15. See Wayne D. Collins, *Trusts and the Origins of Antitrust Legislation*, 81 *FORDHAM L. REV.* 2279, 2335–39 (2013).
16. Klobuchar, *supra* note 11, at 62–64; Collins, *supra* note 14, at 2339–42; See also RUDOLPH PERITZ, *COMPETITION POLICY IN AMERICA, 1888–1992*, 9–26 (1996).
17. Klobuchar, *supra* note 11, at 13–14.
18. 15 U.S.C. § 26 (“Any person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws.”).
19. *Georgia v. Pennsylvania R.R.*, 324 U.S. 439, 445 (1945).
20. *California v. Am. Stores, Co.*, 495 U.S. 271, 282 (1990); *Illinois Brick Co. v. Illinois*, 431 U.S. 720, 735 (1977).
21. 15 U.S.C. § 15(c).
22. H.R. REP. NO. 94-499, at 4 (1975); Letter from Senators Lee and Klobuchar and Representatives Cicilline and Buck in Support of the State Antitrust Enforcement Venue Act of 2021 (July 28, 2021).
23. *Pennsylvania R.R.*, 324 U.S. at 447–48.
24. *Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982).

sumers across the nation, while state enforcers focus their efforts on the consumers in their respective states.²⁵ The relationship between federal and state antitrust enforcement is complex, and occasionally has led to conflict when federal and state enforcers disagree, as was the case with the *Sprint/T-Mobile* merger.²⁶ But the power of states to enforce antitrust laws is particularly pronounced when federal and state enforcers are aligned and pursuing similar anticompetitive concerns. As former Deputy Assistant Attorney General Michael Murray put it, when federal and state enforcers are fully aligned, “the state authority is at its zenith, because it is fully consistent with a determination of the national public interest. The state’s interest in local matters is echoed by a federal determination of the national public interests.”²⁷

Applying these federalism principles to the unfolding antitrust litigation against Big Tech companies, the influence of state attorneys general is undeniable and their alignment with federal enforcers is remarkable.²⁸ This alignment has taken a variety of forms. In the first major Big Tech complaint filed on October 20, 2020, at the end of the Trump Administration, the Department of Justice and fourteen states jointly sued Google for abusing its monopoly power over search and search advertising.²⁹ Next came two lawsuits against Facebook filed on the same day, December 9, 2020, in the waning days of the Trump Administration, one by the Federal Trade Commission³⁰ and the other by a forty-eight-state bipartisan coalition led by New York.³¹ Then came the lawsuit filed on December 16, 2020 by Texas and a bipartisan coalition of fifteen other states against Google for abusing its monopoly power over online display advertising.³² The United States and a bipartisan coalition of eight states filed a similar lawsuit against Google on January 24, 2023, raising the same anticompetitive concerns and seeking similar reme-

25. Bill Baer, *Public and Private Antitrust Enforcement in the United States*, 1 (Feb. 11, 2014), <https://www.justice.gov/atr/file/517756/download> [<https://perma.cc/BUS4-PLP5>].

26. *Id.*

27. Compare Phillip J. Weiser, *The Enduring Promise of Antitrust*, 52 LOY. U. CHI. L. J. 1 (2020), with Makan Delrahim, “Getting Better”: Progress and Remaining Challenges in Merger Review, (Feb. 5, 2020), <https://www.justice.gov/opa/speech/file/1245056/download> [<https://perma.cc/2J2X-5BCD>].

28. Michael Murray, Antitrust Federalism, 17 (Aug. 31, 2020), <https://www.justice.gov/opa/speech/file/1351066/download> [<https://perma.cc/BCE9-8RG6>].

29. See Alford, *supra* note 4, at 921–27.

30. Complaint at 2, United States v. Google, LLC, No. 1:20-cv-03010, (Oct. 20, 2020).

31. See Fed. Trade Comm’n v. Facebook, Inc., No. 1:20-CV-03590, (Dec. 9, 2020); Amended Complaint at 1, Fed. Trade Comm’n, No. 1:20-cv-3590 (Aug. 19, 2021).

32. Complaint at 5–6, New York v. Facebook, No. 1:20-CV-03589 (Dec. 9, 2020).

dies.³³ Finally, there are two lawsuits filed by a bipartisan coalition of states against Google, one led by Utah for abusing its monopoly power over the Play Store,³⁴ and another led by Colorado and Nebraska for abusing its monopoly power over vertical search.³⁵

These lawsuits against Big Tech companies indicate that in some instances federal and state enforcers jointly filed or simultaneously filed similar actions, in other instances state enforcers led the way followed by federal and additional state enforcers subsequently filing suit, and in still other instances state enforcers taking sole leadership in filing suit in the absence of any federal enforcement action.

In all of these cases, federal and state enforcers were pursuing the identical mission of protecting the public from the harms flowing from Big Tech's abuse of monopoly power. Similar to other antitrust lawsuits filed by states, such concerns are "a matter of grave public concern" separate and apart from the interests of "particular individuals who may be affected."³⁶ And yet in only one of them, *Texas v. Google*, were these grave public concerns completely ignored by a Multidistrict Litigation Panel that approved Google's motion to centralize the case with private lawsuits, leading to severe litigation delays.³⁷

II. OVERVIEW OF THE MULTIDISTRICT LITIGATION ACT

In 1968 Congress enacted 28 U.S.C. § 1407, the Multidistrict Litigation Act ("MDL"), to help courts manage "massive multidistrict antitrust litigation."³⁸ In 1961, massive antitrust litigation involving the electrical-equip-

33. Complaint, *Texas v. Google*, No. 4:20-CV-957 (N.D. Tex. Dec. 16, 2020); Third Amended Complaint, *Texas v. Google*, No. 1:21-md-03010-PKC (Jan. 14, 2022).

34. Complaint at 8, *United States v. Google, LLC*, No. 1:23-cv-00108, (E.D. Va. Jan. 24, 2023).

35. Complaint at 9–10, *Utah v. Google*, No. 3:21-CV-052227 (N.D. Cal. July 7, 2021).

36. Complaint at 5, *Colorado v. Google*, No. 1:2020-CV-03715, (D.D.C. Jan. 4, 2021), <https://coag.gov/app/uploads/2020/12/Colorado-et-al.-v.-Google-PUBLIC-REDACTED-Complaint.pdf> [<https://perma.cc/8V6Y-N4HL>].

37. *Pennsylvania R.R.*, 324 U.S. at 451 ("Georgia, as a representative of the public, is complaining of a wrong which, if proven, limits the opportunities of her people, shackles her industries, retards her development, and relegates her to an inferior economic position among her sister States. These are matters of grave public concern in which Georgia has an interest apart from that of particular individuals who may be affected. Georgia's interest is not remote—it is immediate.").

38. Alford, *supra* note 24, at 909–10.

ment industry threatened to overwhelm the federal courts.³⁹ Over 1900 antitrust cases were filed with over 25,000 claims in thirty-five different federal districts.⁴⁰ This flood of antitrust conspiracy cases generated significant concern regarding the administration of justice, leading Chief Justice Earl Warren to establish a committee on pretrial procedure “for the purpose of considering the problems arising from discovery procedures in multiple litigation filed in different judicial districts but with common witnesses and exhibits.”⁴¹ The Judicial Conference created a drafting committee, which began in earnest to draft a statute in the summer of 1964.⁴²

The proposed statute envisioned creating a multidistrict litigation panel with authority to transfer and consolidate pretrial proceedings of multiple cases to one transferee judge, “with plenary pre-trial powers, including powers to render summary judgments, . . . and other pre-trial powers ordinarily reposed in the District Court.”⁴³ The Judicial Conference communicated the draft statute to the House and Senate Judiciary Committees on April 12, 1965, which sought the views of the Department of Justice.⁴⁴ The Department of Justice was noncommittal, instead concerned that government cases could become enmeshed in private actions.⁴⁵ The committee chair, Chief Judge Alfred Murrah of the Tenth Circuit, met with Deputy Attorney General Ramsey Clark on December 13, 1964, and Clark agreed to support the proposed legislation provided the government would be exempt from any such consolidation with respect to its antitrust litigation.⁴⁶ The MDL Act passed in 1968 with the exemption providing that “[n]othing in this section shall apply to any action in which the United States is a complainant arising under the antitrust laws.”⁴⁷

The MDL Act is designed to allocate limited judicial resources and limit duplicative discovery.⁴⁸ It allows a group of related lawsuits that raise common questions to be transferred to any federal district court for coordinated or consolidated pretrial proceedings if the multidistrict panel determines that

39. Jay Tidmarsh & Daniela Peinado Welsh, *The Future of Multidistrict Litigation*, 51 CONN. L. REV. 771, 771 (citing 114 CONG. REC. H4925 (daily ed. March 4, 1968) (statement of Rep. Celler)).

40. Andrew D. Bradt, “A Radical Proposal”: *The Multidistrict Litigation Act of 1968*, 165 U. PENN. L. REV. 831, 854 (2017).

41. *Id.* at 855.

42. *Id.* at 855–56.

43. *Id.* at 871.

44. *Id.* at 870, (quoting William H. Becker, Proposal for Legislation and Rules for Multiple Litigation 1 (June 3, 1964)).

45. *Id.* at 883–84.

46. Bradt, *supra* note 39, at 883.

47. *Id.* at 885.

48. 28 U.S.C. § 1407(g).

“transfers for such proceedings will be for the convenience of parties and witnesses and will promote the just and efficient conduct of such actions.”⁴⁹ An MDL panel has full discretion regarding which judge becomes the transferee court, and such a decision can be dispositive.⁵⁰ The transferee court manages all pretrial proceedings, including expert testimony, the discovery process, dispositive motions, and pretrial settlements.⁵¹ Although designed to resolve all pre-trial motions and then return the cases to the transferor court for trial, most cases are resolved in the transferee court.⁵² Once consolidated by an MDL panel to a district court with the power to render dispositive orders and approve global settlements, cases rarely return to the original transferor court for trial.⁵³ As of 2022, the MDL Panel has remanded for trial less than two percent of all multidistrict cases, that is 17,374 remands for trial of 1,117,428 civil actions centralized for pretrial proceedings.⁵⁴

The MDL Panel not only centralizes existing cases, but also has the authority to transfer future “tag along” actions that are related to the consolidated cases.⁵⁵ These cases are often significantly less developed than that cases that prompted the original consolidated action, which may weaken certain pre-trial claims and delay the ultimate resolution of the case.⁵⁶

The exemption for antitrust cases filed by the United States in Section 1407(g) is a significant carve out from the traditional arguments for consolidation.⁵⁷ Part of the concern in crafting the government exemption was that “consolidation might induce private plaintiffs to file actions merely to ride along on the Government’s cases, and that this would almost certainly cause delay in the resolution of the Government’s cases.”⁵⁸ The exemption priori-

49. Bradt, *supra* note 39, at 837.

50. 28 U.S.C. § 1407(a).

51. *Id.*

52. 28 U.S.C. § 1407(b).

53. Bradt, *supra* note 39, at 914.

54. *Id.* at 843.

55. UNITED STATES JUDICIAL PANEL ON MULTIDISTRICT LITIGATION, STATISTICAL ANALYSIS OF MULTIDISTRICT LITIGATION UNDER 28 U.S.C. § 1407 FISCAL YEAR 2022, https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20Fiscal%20Year%202022%20Report-12-9-22_0.pdf [<https://perma.cc/C6KS-27VW>]; see also Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 BOSTON U. L. REV. 109, 128 (2015) (approximately 97% of MDL cases terminate in transferee districts).

56. Paul M. Janicke, *The Judicial Panel on Multidistrict Litigation: Now a Strengthened Traffic Cop for Patent Venue*, 32 THE REV. OF LITIG. 498, 512 (2013).

57. *Id.* at 511.

58. H.R. REP. NO. 90-1130, at 5, 8, reprinted in 1968 U.S.C.C.A.N. 1902, 1905.

tizes antitrust cases for two reasons. First, government suits typically aim to protect the public from competitive harm, while private suits seek to recover damages for past injuries.⁵⁹ As Deputy Attorney General Ramsey Clark noted, “[w]hile exempting the Government from this legislation may occasionally burden defendants because they may have to answer similar questions posed by both the Government and by private parties, this is justified by the importance [to] the public of securing relief in antitrust cases as quickly as possible.”⁶⁰

Second, a judgment in favor of the government can serve as *prima facie* evidence that the defendant injured competitors or customers and is available for use in subsequent private suits.⁶¹ Unlike private parties, the government can engage in pre-complaint discovery through civil investigative demands (CIDs), developing the factual record even before filing suit.⁶² This approach promotes judicial efficiency by expediting private suits or by encouraging parties to settle.⁶³

Notably, there is an exception Section 1407(g) when the United States is pursuing monetary damages.⁶⁴ As Deputy Attorney General Ramsey Clark reasoned, “the Government’s damage suits should be included [in the MDL Act], for the Government’s purpose in bringing such a suit is the same as that of a private party.”⁶⁵

III. STATE ATTORNEYS GENERAL AND MULTIDISTRICT LITIGATION

Under the MDL Act, with the rare exception of instances in which the United States is seeking monetary damages, the United States is free “to select and remain in their preferred venue and pursue relief without undue delay and distractions caused by the particularized interest of private plaintiffs.”⁶⁶ The same cannot be said of actions brought by state attorneys general. In fact, state attorneys general seeking *parens patriae* monetary

59. *Id.* at 1902–03.

60. *Id.* at 1905.

61. *Id.*

62. *United States v. Dentsply Int’l, Inc.*, 190 F.R.D. 140, 145 (D. Del. 1999).

63. *Id.*

64. *Id.*

65. 14 U.S.C. § 1407(g) (“‘Antitrust laws’ as used herein include those acts referred to in the Act of October 15, 1914, as amended (38 Stat. 730; 15 U.S.C. 12), and also include the Act of June 19, 1936 (49 Stat. 1526; 15 U.S.C. 13, 13a, and 13b) and the Act of September 26, 1914, as added March 21, 1938 (52 Stat. 116, 117; 15 U.S.C. 56); but shall not include section 4A of the Act of October 15, 1914, as added July 7, 1955 (69 Stat. 282; 15 U.S.C. 15a).”).

66. H.R. REP. NO. 90-1130, at 5, 8, reprinted in 1968 U.S.C.C.A.N. at 1902, 1905.

damages on behalf of their citizens are in the unenviable position of risking MDL consolidation for both pretrial and trial purposes.⁶⁷

There are numerous instances in which state attorneys general have been forced into MDL proceedings with private actions.⁶⁸ An example of such MDL transfer and consolidation is *In re Generic Pharmaceutical Pricing Antitrust Litigation*, where several private litigants who were direct purchasers and end payers filed antitrust suits in 2012 against six pharmaceutical companies claiming that the companies engaged in unlawful price fixing of generic drugs.⁶⁹ Forty state attorneys general subsequently filed suit and the MDL Panel transferred the state action to MDL action 2724.⁷⁰ The States argued that transfer was inappropriate because the state action is a sovereign enforcement action that alleges different facts and seeks different remedies than the class actions.⁷¹ In a perfunctory transfer order that completely ignored the sovereign nature of the action brought by forty state attorneys general, the MDL Panel in 2017 ordered consolidation of the state action with the private actions because it raised common questions of fact, served the convenience of the parties and witness, and promoted the just and efficient conduct of the litigation.⁷² Ever since, the state action has been languishing in a Pennsylvania federal court while questions unique to private plaintiffs—such as class certification—delay the litigation.⁷³

67. Letter from Nat'l Ass'n of Att'ys Gen., to The Hon. Amy Klobuchar, Chair, The Hon. David N. Cicilline, Chair, The Hon. Michael Lee, Ranking Member, and The Hon. Ken Buck, Ranking Member, Subcommittee on Competition and Subcommittee on Antitrust, Policy, Antitrust, & Consumer Commercial and Administrative Rights, (June 18, 2021), <https://naagweb.wpenginepowered.com/wp-content/uploads/2021/06/Final-State-Antitrust-Enforcement-Venue-Act-Endorsement.pdf> [<https://perma.cc/6FMF-HPMV>].

68. 28 U.S.C. § 1407(h) (“Notwithstanding the provisions of section 1404 or subsection (f) of this section, the judicial panel on multidistrict litigation may consolidate and transfer with or without the consent of the parties, for both pretrial purposes and for trial, any action brought under section 4C of the Clayton Act.”)

69. *See, e.g.*, *In re Suboxone (Buprenorphine Hydrochloride & Nalaxone) Antitrust Litig.*, 64 F. Supp. 3d 665 (E.D. Pa. 2014); *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109 (N.D. Cal. 2008); *In re Lupron® Mktg. Sales Pracs. Litig.*, 295 F.Supp.2d 148 (D. Mass. 2003); *In re Compact Disc Minimum Advertised Price Antitrust Litig.*, 216 F.R.D. 197 (D. Me. 2003).

70. *See* Transfer Order at 1, *In re: Generic Pharm. Pricing Antitrust Litig.*, No. 16-2724, 2017 WL 4582710 (J.P.M.L. Aug. 3, 2017).

71. *Id.*

72. *Id.*

73. *See id.* at 2.

The same motivations that animate special treatment for federal antitrust claims also animate state attorneys general claims.⁷⁴ States, like the federal government, have authority to request pre-complaint discovery in the form of CIDs.⁷⁵ States, like the federal government, seek to protect the public from competitive harms.⁷⁶ And states, like the federal government, can secure judgments early that can serve as *prima facie* evidence in subsequent private suits that the defendant harmed competition.⁷⁷

Nonetheless, in deciding whether to transfer and consolidate state actions with private actions, it is clear from MDL practice that the MDL Panel does not accord deference to state attorneys general as sovereign government enforcers deserving of special consideration.⁷⁸ Rather than recognizing the importance of prioritizing sovereign claims for expeditious proceedings, the MDL Panel consolidates state attorney general claims together with little differentiation from private claims.⁷⁹

The most recent example of the risks attendant with an MDL Panel treating state antitrust claims the same as private claims is evident in the digital advertising antitrust case of *Texas v. Google*.⁸⁰ The state of Texas, joined by a bipartisan coalition of fifteen other states and Puerto Rico filed suit on December 16, 2020, alleging that Google monopolized the online digital advertising market.⁸¹ On May 20, 2021, the federal district court in Plano, Texas refused to grant Google's motion to transfer the case to California under 28 U.S.C. § 1404.⁸² The following day the court issued an aggres-

74. See Osterman et al., *Multidistrict Litigation: What Is It, and What Can You Do About It?*, GOLDBERG SEGALLA (Dec. 2010), https://www.goldbergsegalla.com/app/uploads/2020/05/DSOTJO-JJW_MDL-What-it-is-and-What-you-Can-Do-About-it_FTD-Article_December-2010.pdf [https://perma.cc/3DPM-HPF].

75. See Davis & Gillum, *Government Pre-Suit Investigative Powers: A Survey of Common Issues Arising from Investigations by the Texas Attorney General and the Texas Department of Insurance*, LOCKE LORD (Aug. 31, 2012), https://www.lockelord.com/-/media/files/newsandevents/publications/2012/08/davis-gillum-government-presuit-investigative-p_.pdf [https://perma.cc/UD4V-VBST].

76. See *id.*

77. See *United States v. Dentsply Int'l, Inc.* 190 F.R.D. 140, 145 (D. Del. 1999).

78. See *id.*

79. See Phillips et al., *New Year, New Venue Law: Newly Passed Law Means State Attorneys General Can Avoid Having Their Antitrust Cases Consolidated in Multidistrict Litigation*, WHITE & CASE (Jan. 17, 2023), <https://www.whitecase.com/insight-alert/new-year-new-venue-law-newly-passed-law-means-state-attorneys-general-can-avoid> [https://perma.cc/H28Q-RGUX].

80. See *id.*

81. See generally *Texas v. Google LLC*, Civil No. 4:20-CV-957-SDJ (E.D. Tex. May 21, 2021).

82. *Id.* at 1.

sive scheduling order that would have had fact discovery completed in July 2022, expert discovery completed in November 2022, and a trial scheduled for June 2023.⁸³

Google subsequently filed a motion with the MDL Panel to consolidate and centralize the sovereign claims of fifteen Plaintiff States with nineteen private claims brought by publishers and advertisers.⁸⁴ Most of the private claims were tag-along lawsuits filed months after the Plaintiff States' lawsuit and closely mirrored the Plaintiff States' complaint.⁸⁵ In response, the Plaintiff States argued that the private claims had the benefit of extensive pre-complaint discovery, that their case was significantly more advanced than all other cases, that the federal district court in the Eastern District of Texas had already rejected Google's Section 1404 Transfer Motion, and that the Plaintiff States' lawsuit "is an exercise of sovereign police power by the attorneys general of the Plaintiff States to protect the public welfare and advance the public interest, which makes it particularly inappropriate for centralization."⁸⁶ The Plaintiff States also emphasized that they were seeking only injunctive relief, not monetary damages, so they were not similarly situated with private plaintiffs in terms of relief.⁸⁷

In a brief order dated August 10, 2021, the MDL Panel rejected the Plaintiff States' core argument that as sovereigns their choice of venue to vindicate the rights of their citizens and protect the public welfare should not be disturbed.⁸⁸ The MDL Panel relied on its past practice of ignoring sovereign interests to justify its current decision to ignore sovereign interests.⁸⁹ "The Panel regularly has transferred state enforcement actions to antitrust MDLs . . . based on the traditional Section 1407(a) criteria, rejecting the same kinds of arguments the state plaintiffs are making in this docket."⁹⁰ The MDL Panel also reasoned that the substantial overlap between the private actions and the state actions justified centralizing the claims together.⁹¹ The MDL Panel conceded, but was unbothered by, the fact that its decision would substantially delay the Plaintiff States' actions.⁹²

83. *Id.*

84. Plaintiff States' Opposition to Motion at 25, *In re Digit. Advert. Litig.*, MDL No. 3010 (J.P.M.L. May 26, 2021); Defendant's Reply Brief at 14, *In re Digit. Advert. Litig.*, MDL No. 3010 (J.P.M.L. June 2, 2021).

85. *See* Transfer Order at 1, *In re Digit. Advert. Antitrust Litig.*, MDL No. 3010 (J.P.M.L. Aug. 10, 2021).

86. *See id.*

87. Plaintiff States' Opposition to Motion, *supra* note 82, at 14, 15, 17.

88. *See id.* at 5, 12.

89. Transfer Order, *supra* note 83, at 5.

90. *See id.* at 6.

91. *Id.*

92. *See id.*

That is precisely what has occurred.⁹³ As a result of the MDL Panel's order, the Plaintiff States lawsuit against Google has been severely delayed.⁹⁴ Had the case remained in Texas, fact and expert discovery would have been completed by the end of 2022 and a trial would be held in the summer of 2023.⁹⁵ But now that the case has been transferred by the MDL Panel to the Southern District of New York, discovery will be delayed for years, with fact discovery scheduled to be completed in June 2024, expert discovery completed at the end of 2024, and a trial scheduled sometime in 2025.⁹⁶

On January 24, 2023, the U.S. Department of Justice filed its own anti-trust complaint against Google concerning its monopolization of the digital advertising market.⁹⁷ It did so in the Eastern District of Virginia ("EDVA"), a so-called "rocket docket" that typically brings cases to trial in an unusually expeditious manner.⁹⁸ The EDVA has a median file to trial timeline of approximately 18.1 months, which is the fastest in the country.⁹⁹ By comparison, the Eastern District of Texas has a median file to trial timeline of approximately 24.5 months, while the Southern District of New York ("SDNY") has a median file to trial timeline of 44.4 months.¹⁰⁰ In other words, despite the fact that *Texas v. Google* was filed over two years before *United States v. Google*, as a result of the MDL Panel's decision to centralize the Texas case to SDNY, it will be tried over one year later than the United States case in EDVA.¹⁰¹

Moreover, the centralization of the State Plaintiffs action with the private actions in the Southern District of New York also has direct implications for the United States.¹⁰² Google has provided notice that it will seek to have *United States v. Google* transferred to the Southern District of New York under 28 U.S.C. 1404.¹⁰³ In other words, while the United States is not subject to MDL centralization under Section 1407(g), Google will use the fact

93. *See id.*

94. *See* Plaintiff's Response to Defendant's Motion, *supra* note 33 at 5.

95. *See id.*

96. *See id.* at 6.

97. *See id.* at 6, 25.

98. Press Release, Dep't of Just., Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023).

99. *Id.*; *see Rocket Docket Practice (US District Court for the Eastern District of Virginia)*, HUNTON ANDREWS KURTH, <https://www.huntonak.com/en/practices/litigation/rocket-docket-practice-us-district-court-for-the-eastern-district-of-virginia.html> [<https://perma.cc/4B8N-VXKT>].

100. *See* Plaintiff's Response to Defendant's Motion, *supra* note 33, at 25.

101. *See* Jonas Anderson, *Shopping in the Eastern District of Texas*, 48 LOY. UNIV. CHI. L.J. 539, 542 (2016).

102. *See* Plaintiff's Response to Defendant's Motion, *supra* note 33, at 4, 6, 25.

103. *See id.* at 1–2.

that the State Plaintiffs were centralized there to justify having the United States transferred there under Section 1404.¹⁰⁴ Such a move completely ignores the reasons the United States was exempted from Section 1407 centralization and creates a back door vehicle to force the United States into consolidation as a related case.¹⁰⁵

IV. THE STATE ANTITRUST ENFORCEMENT ACT OF 2022

Congress has recognized the problems with state attorneys general not having the same exemption as the United States from MDL consolidation.¹⁰⁶ On May 21, 2021, Representatives Ken Buck (R-CO), Burgess Owens (R-UT), David Cicilline (D-RI), and Dan Bishop (R-NC) introduced a bipartisan bill entitled the State Antitrust Enforcement Action of 2022.¹⁰⁷ Three days later, Senators Mike Lee (R-UT) and Amy Klobuchar (D-MN) introduced the identical bill in the Senate.¹⁰⁸ The proposed legislation was extraordinarily simple.¹⁰⁹ It would include States within the Section 1407 exemption from MDL consolidation and provided for an effective date of June 1, 2021, a date specifically designed to include *Texas v. Google* within the law's ambit.¹¹⁰

With the filing of *Texas v. Google* state attorneys general recognized the risks attendant with centralization of sovereign cases with private actions.¹¹¹ They strongly supported proposed changes to Section 1407 and expressed that in a National Association of Attorneys General letter dated June 18,

104. *See id.*

105. *See id.* at 2; *see* Letter from Eric Mahr, Couns. for Google, to The Hon. P. Kevin Castel, J., S. Dist. of N.Y. 2 (Feb. 2, 2023) (“We have notified counsel to the DOJ that, for reasons of judicial efficiency and to mitigate the obvious risk of inconsistent judgments, Google intends to file a motion seeking to transfer the case to the Southern District of New York pursuant to 28 U.S.C. § 1404 so that it can be related to this case and that discovery can be coordinated.”).

106. *See* Plaintiff's Response to Defendant's Motion, *supra* note 33, at 2.

107. *See* H.R. 3460, 117th Cong. (2021).

108. *Id.*

109. Reed Smith LLP, *Defending against states' federal antitrust claims: Could a potential change to federal law make things a lot more complicated?*, LEX- OLOGY (Sept. 17, 2021), <https://www.lexology.com/library/detail.aspx?g=5034615b-746f-44a6-98ca-21d04c73da35> [<https://perma.cc/GN53-K5Z9>]; *see* Diane Bartz, *U.S. Senator Seeks Passage of Big Tech Antitrust Bill as Time Runs Short*, REUTERS (July 19, 2022), <https://www.reuters.com/world/us/us-senator-seeks-passage-big-tech-antitrust-bill-time-runs-short-2022-07-19/> [<https://perma.cc/JS2P-BMVH>].

110. *See id.*

111. *See id.*; *see* S. 1787, 117th Cong. (2021).

2021.¹¹² The letter was co-sponsored by the attorneys general of Colorado, Connecticut, Louisiana, and Texas and signed by fifty-two state attorneys general from forty-nine states and three territories.¹¹³ The key language read as follows:

State attorneys general around the country are actively pursuing significant antitrust enforcement actions on behalf of consumers in their respective states. Although these law enforcement actions are brought in the public interest, they may be subject to transfer to a multidistrict litigation at the behest of defendants, where the cases are typically postponed and may be joined with numerous other lawsuits brought by private plaintiffs. Enforcement actions filed by the Department of Justice or the Federal Trade Commission on behalf of the United States, however, cannot be transferred to a multidistrict litigation. 28 U.S.C. § 1407(g). Federal enforcers are entitled to select and remain in their preferred venue and pursue relief without undue delay and distractions caused by the particularized interests of private plaintiffs. State antitrust enforcement actions should be extended the same protections from transfer as those brought on behalf of the United States.

As Congress has recognized, the states play an essential role in the enforcement of competition laws in the United States. States should accordingly be on equal footing with federal enforcers in deciding where, when, and how to prosecute cases. We appreciate your sponsorship of the State Antitrust Enforcement Venue Act of 2021 and advocate for its passage as soon as possible so that our citizens can benefit from more efficient, effective, and timely adjudication of antitrust actions.¹¹⁴

Two days later, on June 23, 2021, the House version of the bill passed a committee vote by 34-7.¹¹⁵ The Committee Report published on September 26, 2022, articulated the need for the legislation as follows: “H.R.3460 ensures that states are afforded deference when selecting an appropriate venue to enforce the antitrust laws and protect the public from antitrust injury. The

112. See Letter from Nat’l Ass’n of Att’ys Gen., to The Hon. Amy Klobuchar, Chair, The Hon. David N. Cicilline, Chair, The Hon. Michael Lee, Ranking Member, and The Hon. Ken Buck, Ranking Member, Subcommittee on Competition and Subcommittee on Antitrust, Policy, Antitrust, & Consumer Commercial and Administrative Right (June 18, 2021).

113. See *id.*

114. See *id.*

115. *Id.*

bill also eliminates delays, inefficiencies, and associated higher costs that states face enforcing the antitrust laws under the current JPML process.”¹¹⁶

The Act also received support from the federal antitrust enforcers.¹¹⁷ The Department of Justice stated that:

It is long past time to ensure that antitrust cases filed by states receive the same treatment and are subject to the same venue rules as those filed by federal enforcers. Congress realized that the purposes of transfer by the Judicial Panel on Multi-District Litigation should not apply to cases brought by sovereigns litigating cases in the public interest, and so exempted actions brought by the United States arising under the antitrust laws. This rationale applies equally to cases brought by state Attorneys General, who also bring cases under the antitrust laws in the public interest.

State attorneys general play a vital role in our nation’s antitrust enforcement regime. States are at the forefront of many of the most pressing antitrust issues. Time and again, states have demonstrated their willingness and commitment to ensure that their citizens benefit from fair and robust competition. This legislation would increase the effectiveness of these efforts and inure to the benefit of all consumers, workers, and small businesses throughout the country.¹¹⁸

Likewise, Lina Khan, the Chair of the Federal Trade Commission wrote in support of the proposed legislation:

State attorneys general have long played a critical and complementary role in enforcing the antitrust laws, and I support this legislative effort to better enable them to prosecute cases and pursue relief without undue delay or distraction. . .

I agree that the rationale for exempting federal enforcers from multi-district transfers applies equally to state enforcers. Both state and federal antitrust enforcement actions serve a public interest, and therefore should not be consolidated—at a defendant’s behest—with private antitrust actions that may serve narrower interests.¹¹⁹

116. *See* H.R. REP. NO. 117-494, at 5 (2022).

117. *Id.* at 1–2.

118. *See* Letter from Peter S. Hyun, Acting Assistant Att’y Gen., to Cong. Leadership (June 2, 2022).

119. *Id.*

The venue bill received remarkable bipartisan support.¹²⁰ In a letter dated July 28, 2021, the antitrust leadership in the Senate and House wrote that the venue bill “reaffirms the importance of state antitrust enforcement. State attorneys general have critical opportunities to protect consumers from the problems that result from monopolies and oligopolies.”¹²¹ They further noted that “[f]rom the inception of the JPML, Congress has been aware of the potential for ‘substantial[] delay[]’ that centralization for multidistrict litigation could entail.”¹²² They expressed concern “about the prejudice caused to state citizens when redress for their injuries is unduly delayed” and stated that, whatever burden defendants face from answering similar questions both by the government and private parties, that burden is “justified when, as now, prompt resolution of state enforcement actions is required to ‘secur[e] relief’ for state citizens ‘as quickly as possible.’”¹²³

The venue bill passed the Senate Judiciary Committee on February 3, 2022.¹²⁴ The bill then passed the full Senate by Unanimous Consent on June 14, 2022 with the retroactivity provision removed.¹²⁵ In September 2022, the full House passed the venue legislation as part of a package of consolidated bills.¹²⁶ The venue bill finally passed by both houses of Congress in December 2022 as part of the Consolidated Appropriations Act, 2023.¹²⁷ Biden signed the year-end omnibus legislation, and the State Antitrust Enforcement Venue Act became law on December 29, 2022.¹²⁸

Significantly, in the final days of negotiation, the venue bill included a provision that would have applied the legislation to “any matter pending on,

120. Letter from Lina Khan, Chair, Fed. Trade Comm’n, to Cong. Leadership (Feb. 7, 2022).

121. *See* Letter from Amy Klobuchar, Chair, Mike Lee, Ranking Member, Ken Buck, Ranking Member, and David N. Cicilline, Chair, to The Hon. Roslynn R. Mauskopf, Dir., Admin. Office of the U.S. Cts. (July 28, 2021).

122. *Id.*

123. *Id.*

124. *Id.*

125. *All Information (Except Text) for S.1787 - State Antitrust Enforcement Venue Act of 2021*, CONGRESS.GOV (June 15, 2022), <https://www.congress.gov/bill/117th-congress/senate-bill/1787> [<https://perma.cc/5DDJ-HDMX>].

126. *Id.*; *See* Haas et al., *New State Antitrust Enforcement Venue Act Gives State Attorneys General Venue Preference in Antitrust Litigation*, FOLEY & LARDNER LLP (Jan. 19, 2023), <https://www.foley.com/en/insights/publications/2023/01/new-state-antitrust-enforcement-venue-act#:~:text=ON%20December%2029%2C%202022%2C%20President,where%20they%20litigate%20anti-trust%20cases> [<https://perma.cc/B8TP-FRFK>].

127. *See id.*

128. *See id.*

or filed on or after, the date of enactment of this Act.”¹²⁹ That would have expressly included the pending case of *Texas v. Google* within the law’s ambit.¹³⁰ After fierce lobbying by Big Tech companies, Senator Schumer (D-NY) proposed deleting the language of “pending on,” which would have made the legislation prospective only.¹³¹

The final version of the legislation deleted all reference to its date of application, leaving the matter of whether the new law applied to *Texas v. Google* unclear.¹³² However, because the venue bill is a change to procedural rather than substantive law, the Supreme Court has stated that new procedural rules apply to pending litigation.¹³³ Moreover, because the venue act modifies the jurisdictional authority of the MDL Panel over the case, it should apply to *Texas v. Google*.¹³⁴ “Statutes merely addressing which court shall have jurisdiction to entertain a particular cause of action . . . affect only where a suit may be brought, not whether it may be brought at all.”¹³⁵ Finally, the MDL no longer vests the MDL Panel or the transferee court with authority over plaintiff states.¹³⁶ The new Venue Act now reads “[n]othing in this section shall apply to any action in which the United States or a State is a complainant arising under the antitrust laws.”¹³⁷ Texas “*is a complainant arising under the antitrust laws.*”¹³⁸ Therefore, continuing centralization in an MDL “shall [not] apply.”¹³⁹

The passage of the law had immediate results. On June 5, 2023, the JPML analyzed the Venue Act and held that “the recent amendment to Section 1407(g) applies to pending state antitrust enforcement actions and, ab-

129. *Id.*

130. See Matt Stoller, *Too Much Winning: Antitrust Reform to Become Law*, SUBSTACK (Dec. 20, 2022), <https://mattstoller.substack.com/p/too-much-winning-antitrust-reform> [<https://perma.cc/M35D-22XW>].

131. *See id.*

132. See Donald Shaw & David Moore, *Schumer Freezes Antitrust Bills After Big Tech Lobbyists Bundled Millions*, MORE PERFECT UNION (Dec. 15, 2022), <https://perfectunion.us/schumer-freezes-antitrust-bills-after-big-tech-lobbyists-bundled-millions> [<https://perma.cc/6W33-AKY8>].

133. *See* State Antitrust Enforcement Venue Act of 2021, 28 U.S.C. § 1407 (2021).

134. *See* Landgraf v. USI Film Products, 511 U.S. 244, 275 (1994) (“Changes in procedural rules may often be applied in suits arising before their enactment without raising concerns about retroactivity.”); *see Ex Parte Collett*, 337 U.S. 55, 71 (1949) (plaintiff allowed to move for a transfer of venue pursuant to a new statute passed after the suit was commenced and silent as to retroactivity).

135. *See* Hughes Aircraft Co. v. U.S. *ex rel.* Schumer, 520 U.S. 939, 951 (1997).

136. *Id.*

137. *See* H.R. REP. NO. 117-494, at 13 (2022).

138. *Id.*

139. *See id.*

sent a state's waiver of its venue rights, the Panel must grant the motion for remand."¹⁴⁰ Consistent with Supreme Court precedent, the Panel concluded that there was no express command in the statute as to its retroactivity and that therefore the central question is whether application of the new statute would have a genuinely retroactive effect. To that question, the Panel concluded that the Venue Act is plainly a procedural rule in the nature of a venue provision for pretrial proceedings that only regulates secondary conduct, and that such changes in procedural rules do not raise concerns about retroactivity.¹⁴¹ As a result of Google's tactics, *Texas v. Google* was delayed by months, losing its lead position in holding Google accountable for its monopoly abuses.

CONCLUSION

With the passage of the State Antitrust Enforcement Venue Act, *Texas v. Google* will now return to the Eastern District of Texas. Had the MDL Panel recognized the sovereign interests at stake, they would never have centralized the case with private party actions in the Southern District of New York. At a minimum, they could have centralized all of the cases in the preferred venue of the Plaintiff States, the Eastern District of Texas. Going forward, thanks to the successful passage of the State Antitrust Enforcement Venue Act of 2022, future antitrust litigation brought by state enforcers will not suffer the same fate as *Texas v. Google*, and similar cases in which the MDL Panel ignored the sovereign concerns of state antitrust litigation filed in the public interest.

140. *See id.*

141. *See* Remand Order, at 2, In re Digital Advert. Litig., MDL No. 3010 (J.P.M.L. June 5, 2023).