NOT YET SCHEDULED FOR ORAL ARGUMENT
Case No. 21-7078

UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

STATE OF NEW YORK, et al.,

Plaintiffs-Appellants,

v.

FACEBOOK, INC.,

Defendant-Appellee.

On Appeal from the United States District Court
for the District of Columbia

BRIEF OF FORMER STATE ANTITRUST ENFORCEMENT OFFICIALS AND ANTITRUST LAW PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS AND REVERSAL

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Dated: January 28, 2022

CERTIFICATE AS TO PARTIES, RULINGS, AND RELATED CASES

Pursuant to Circuit Rule 28(a)(1), the undersigned counsel of record certifies as follows:

A. Parties

All parties appearing in this court are listed in the Brief for Appellants-Plaintiffs. *Amici curiae* on this brief are: Lloyd Constantine, Harry First, Aaron Edlin, Andrew Chin, Andrew I. Gavil, Andrew Rossner, Anne Schneider, Barak Richman, Barak Y. Orbach, Charles G. Brown, Christopher L. Sagers, Dan Drachler, Darren Bush, Don Allen Resnikoff, Edward Cavanagh, Eleanor Fox, Ellen Cooper, George Sampson, James Tierney, Jeffrey L Harrison, John B. Kirkwood, Joshua P. Davis, Kevin J. O'Connor, Marina Lao, Maurice Eitel Stucke, Norman W. Hawker, Pamela Jones Harbour, Paul F. Novak, Peter Carstensen, Rebecca Haw Allensworth, Robert Abrams**,** Robert H. Lande**,** Samuel N. Weinstein, Steven M. Rutstein, Susan Beth Farmer, Tam Ormiston, Thomas Greaney, Thomas J. Horton, and Warren Grimes. Their credentials are found in Appendix A. As of the date of this filing, there are no intervenors and the following amici have appeared: American Antitrust Institute, Committee to Support the Antitrust Laws, and Economists.

B. Ruling Under Review

References to the rulings at issue in the appeal are listed in the Brief for Plaintiffs-Appellants.

C. Related Cases

This case has not previously been before this Court or any other court. There is one related case, *FTC v. Facebook, Inc.*, No. 20-cv-3590, pending in the U.S. District Court for the District of Columbia, although the state plaintiffs in this case are not parties to the FTC's case. The FTC's case has not previously been before this Court or any court other than the U.S. District Court for the District of Columbia.

Dated: January 28, 2022

/s/ David Golden
David Golden

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the Federal Rules of Appellate Procedure, *amici curiae* state that no party to this brief is a publicly held corporation, issues stock, or has a parent corporation.

STATEMENT OF *AMICI CURIAE*

In accordance with Federal Rule of Appellate Procedure 29(a)(4)(E), *amici* state that all parties to this appeal have consented to the filing of this brief, that no party's counsel has authored this brief, in whole or in part, or contributed money to fund the preparation or submission of this brief, and that no person other than *amici* and their counsel contributed money to fund the preparation or submission of this brief.

Amici curiae are either former state antitrust enforcement officials from state attorney general offices or professors of antitrust law at leading U.S. universities. The names, titles, former enforcement positions, and academic affiliations of *amici* are listed in Appendix A. *Amici* have an interest in maintaining the important role of state attorneys general in the enforcement of antitrust laws and the protection of consumers from anticompetitive harms. *Amici* have studied and taught antitrust law, and many have worked with state attorney general offices. *Amici* agree this case raises important issues for the effective enforcement of the antitrust laws in the United States.

Dated: January 28, 2022

/s/ David Golden
David Golden

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INTRODUCTION AND SUMMARY OF THE ARGUMENT

Amici curiae are either former state antitrust enforcement officials from state attorney general offices or professors of antitrust law at leading U.S. universities. (See Appendix A)[1]

The district court barred the Plaintiff States[2] from pursuing their antitrust claims by applying the doctrine of laches. Although the district court agreed that the doctrine could not bar the federal government's claim, the court equated states with private persons and applied laches to them. By doing so, the district court's decision denied the Plaintiff States the ability to protect and vindicate public rights and suggested that state enforcement was less important than federal enforcement. That outcome runs counter to the history of antitrust law in the United States where states have played a significant role and have been a constant public enforcement presence with federal agencies.

ARGUMENT

I. Throughout U.S. history, states have assumed a constant public enforcement role to protect against anticompetitive conduct.

A. States were exclusive public enforcers in the antitrust sphere before codification of antitrust laws.

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[1] *Amici* have studied and taught antitrust law, and many have worked with state attorney general offices. *Amici* have an interest in maintaining the important role of state attorneys general as sovereign enforcers of antitrust laws.

[2] "Plaintiff States" refers to the 46 states, the District of Columbia, and the Territory of Guam that have filed this appeal.

States as sovereigns have a long history of protecting their citizens from anticompetitive practices.

Before codification of the Sherman Act, states were the *exclusive* public enforcers in the antitrust sphere. They regulated monopolies to protect the public from extortionate pricing.[3] Many state constitutions prohibited monopolies[4] and states initiated "common law and statutory prosecutions for conspiracies in restraint of trade,"[5] including suits challenging monopolistic acquisitions through corporation law and the common law.[6]

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[3] James May, Antitrust Practice and Procedure in the Formative Era: The Constitutional and Conceptual Reach of State Antitrust Law, 1880-1918, 135 U. Pa. L. Rev. 495, 498-513 (1987) (describing state antitrust measures before and after the passage of the Sherman Act); David K. Millon, The Sherman Act and the Balance of Power, 61 S. Cal. L. Rev. 1219, 1256-57 (1988) (discussing how charters of transportation, banking, and insurance companies included fair and reasonable rate provisions, and how states regulated railroads, grain warehouses, and elevators).

[4] See May at 499, n. 9; for example, N.C. CONST. Dec. of Rights, § 23 (1776); TENN. CONST. art. XI, § 23 (1796); ARK. CONST. art. II, § 19 (1836); FLA. CONST. art. I, § 24 (1838); TEX. CONST. art. I, §18 (1845); MD. CONST. art. I, § 39 (1851).

[5] May at 498.

[6] See David K. Millon, The First Antitrust Statute, 29 Washburn L.J. 141, 145, n.18 (1990) (collecting cases); see, e.g., California v. Am. Sugar Ref. Co., 7 Ry. & Corp. L.J. 83 (Cal. Super Ct. 1890); People ex rel. Peabody v. Chicago Gas Trust Co., 130 Ill. 268, 22 N.E. 798 (1889) (challenging Chicago Gas Trust Company's purchase of majority shares of the four gas companies in the City of Chicago suppressing competition between them); State v. Nebraska Distilling Co., 29 Neb. 700, 46 N.W. 155 (1890) (challenging transfers of stock to trust that suppressed competition).

States recognized their obligation as sovereigns to address the dangers of monopoly power and economic imbalances harming their constituencies.

B. States first codified antitrust laws.

In the 1880s, states took the lead in codifying the first antitrust laws, addressing the problem of monopsony and monopoly power of the trusts. In 1889, Kansas enacted the first general antitrust law[7] and many other states passed various forms of antitrust legislation *before* the Sherman Act.[8] These laws were "natural extension[s] of earlier state law efforts to promote economic opportunity and preserve the balance of economic power" and they were "expressions of the states' traditional police power responsibility to protect the welfare of their citizens."[9]

C. The Sherman Act supplemented states' sovereign powers.

The Sherman Act was codified in 1890 to supplement—not supplant—state antitrust enforcement powers[10] and address attempts by trusts to evade state laws.

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[7] Act of Mar. 9, 1889, ch. 257, 1889 Kan. Sess. Laws 389.

[8] See Millon, The First Antitrust Statute, supra at 141. Those states included Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, Nebraska, North Dakota, South Dakota, Tennessee, and Texas. Nine more states passed antitrust legislation in the decade following the Sherman Act: Illinois (1891), Louisiana (1890), Minnesota (1891), Montana (1895), New Mexico (1891), New York (1899), North Carolina (1899), Oklahoma (1890), and Wisconsin (1893).

[9] Id. at 145. See also Yang Chen, Sherman's Predecessors: Pioneers in State Antitrust Legislation, 18 J. Reprints Antitrust L. & Econ. 93 (1988).

[10] 21 Cong. Rec. S2457 (daily ed. Mar. 21, 1890) (remarks of Senator Sherman) (the proposed legislation was intended to "supplement the enforcement

In the first decades following the new legislation, federal enforcement started slowly, picking up after the creation of a special division of the Department of Justice in 1903 and the passage of the Clayton Act and the Federal Trade Commission Act in 1914.[11] In that time frame, parallel state sovereign enforcement continued to be robust.[12] States challenged unlawful mergers and acquisitions[13] and they sued trusts in parallel with, and sometimes even before,[14] the federal enforcers.[15] State enforcement actions "were not confined to minor traders or purely local concerns" as states attacked combinations in the oil, sugar, beef, and tobacco industries.[16]

D. The Supreme Court affirmed and Congress recognized states' role as public enforcers of federal antitrust laws.

Over time, states also took on a growing role in the enforcement of federal antitrust laws.

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of the established rules of the common and statute law by the courts of the several [s]tates . . . .").

[11] Andrew I. Gavil & Harry First, The Microsoft Antitrust Cases: Competition Policy for the Twenty-First Century, 283-84 (2014).

[12] Id. at 285.

[13] See State v. E. Coal Co., 29 R.I. 254, 70 A. 1 (1908); San Antonio Gas Co. v. State, 54 S.W. 289 (Tex. Civ. App. 1899).

[14] See United States v. Int'l Harvester Co., 214 F. 987 (D. Minn. 1914) (Kentucky and Missouri filed before federal enforcers), appeal dismissed, 248 U.S. 587 (1918).

[15] May, supra, at 500-03 (1987) (providing statistics on statutes and enforcement activity). For example, 24 cases were brought by ten states and the Oklahoma Territory against the Standard Oil Trusts before 1906. See May at 501.

[16] Id. at 501.

In 1945, in State of Georgia. v. Pennsylvania Railroad, Georgia, as a state, invoked the Supreme Court's original jurisdiction and asserted its ability to enjoin a conspiracy to restrain trade among numerous railroad companies. 324 U.S. 439, 443 (1945). The Supreme Court confirmed that states, as *parens patriae*, could act in the public interest and enforce federal antitrust laws including by seeking injunctive relief. Id. at 447. The Court recognized that Georgia was suing in multiple capacities, including (1) "as a quasi-sovereign or as agent and protector of her people against a continuing wrong done to them" and (2) as a private party "owner of a railroad and as the owner and operator of various institutions of the State." Id. at 443. When it was "suing for her own injuries," Georgia was asserting a private right, but in its role as *parens patriae*, Georgia was acting in a public sovereign capacity. Id. at 447 ("Georgia is not confined to suits designed to protect only her proprietary interests. The rights which Georgia asserts, parens patriae, are those arising from an alleged conspiracy of private persons whose price-fixing scheme, it is said, has injured the economy of Georgia. . . . Suits by a State, parens patriae, have long been recognized."). The Court, and the United States in its *amicus* brief in that case, rejected defendants' argument that persons other than the United States were barred from enjoining violations of the antitrust laws under § 16 of the Clayton Act. See id. at 460.

Moreover, with the Hart-Scott-Rodino Antitrust Improvements Act of 1976, state attorneys general were also empowered to maintain statutory *parens patriae* damages actions on behalf of their natural-person residents injured by anticompetitive conduct in violation of federal law.[17] State attorneys general were empowered to recover attorneys' fees in such actions, indicating that Congress sought to encourage state enforcement of federal law. See H.R. Rep. No. 94-499, at 20 (1976), as reprinted in 1976 U.S.C.C.A.N. 2572, 2590.

E. Courts have reaffirmed states' ability to provide broader remedies than those available under federal law.

When the Supreme Court restricted the ability of indirect purchasers to claim damages pursuant to its decision in Illinois Brick Co. v. Illinois, 431 U.S. 720 (1977), many states responded by enacting "repealer" statutes to permit indirect purchaser actions expanding upon federal remedies. The Supreme Court reaffirmed the states' important role when it confirmed that those state laws were not preempted by, and could reach beyond, federal antitrust laws. See California v. ARC Am. Corp., 490 U.S. 93, 103 (1989). It was "plain that [antitrust] is an area

[17] 15 U.S.C. §§ 15c-15h. See Susan Beth Farmer, More Lessons from the Laboratories: Cy Pres Distributions in Parens Patriae Actions Brought by State Attorneys General, 68 Fordham L. Rev. 361, 376-379 (1999) (discussing enactment of statutory *parens patriae* provision and how "Congress justified delegation of this enforcement authority to state Attorneys General 'because a primary duty of the State is to protect the health and welfare of its citizens.'" (internal citations omitted)).

traditionally regulated by the States" and that "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." Id. at 101-02.

The Supreme Court also confirmed the states' right under federal law to seek divestiture in a merger case brought after the FTC settled with the parties through a consent order. See California v. Am. Stores Co., 495 U.S. 271 (1990).

When Microsoft, late in the monopolization litigation that the states brought against it, attacked some states' power to seek more stringent remedies than those to which the Justice Department and other states had agreed, the district court noted that it was "beyond dispute" that states could press their own injunctive relief claims under federal antitrust laws. New York v. Microsoft Corp., 209 F. Supp. 2d 132, 150-151 (D.D.C. 2002). Even though many of the remedies that those states proposed were ultimately rejected after an extensive hearing, neither the district court nor this Court, see Massachusetts v. Microsoft Corp., 373 F.3d 1199 (D.C. Cir. 2004), ever indicated that state enforcers were inferior to federal enforcers when it came to seeking equitable relief under the Sherman Act.[18]

[18] The court below cited to the Justice Department's amicus brief in New York v. Microsoft, in which the Department suggested that the states that challenged the remedy in that case were not on equal footing "with the United States" (Joint Appendix (JA) 265). The district court in Microsoft, however, specifically noted that it did not address the Justice Department's "policy arguments" and had not determined whether "these policy considerations will inform the Court's exercise of its equitable powers in devising a remedy in this case." See New York v. Microsoft Corp., 209 F. Supp. 2d at 155 n.28.

F. States have acted as co-equal public enforcers of *federal* antitrust laws.

In the area of civil enforcement, states have acted as public enforcers of *federal* antitrust laws alongside the federal government. They have initiated cases challenging anticompetitive conduct under federal laws with or without federal enforcers.[19] Cases brought by states became helpful precedents for federal enforcers.[20]

Through the formation of an Executive Working Group on Antitrust in 1989, state and federal enforcers shared information, coordinated investigations and

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[19] See National Association of Attorneys General ("NAAG"), https://www.naag.org/issues/antitrust/antitrust-press-releases/2021-press-releases/. See, e.g., New York v. Actavis PLC, 787 F.3d 638 (2d Cir. 2015) (one state); FTC v. Shkreli, No. 20-CV-0706, 2022 WL 135026 (S.D.N.Y. Jan. 14, 2022) (FTC and seven states); United States v. US Airways Grp., Inc., 38 F. Supp. 3d 69, 72 (D.D.C. 2014) (six states, District of Columbia, and federal government); United States v. Twin Am., LLC, No. 12-cv-8989, 2015 WL 9997203 at *1 (S.D.N.Y. Nov. 17, 2015) (U.S. and one state); United States v. Comcast Corp., 808 F. Supp. 2d 145, 146 (D.D.C. 2011) (five states and federal government); New York v. Feldman, 210 F. Supp. 2d 294, 296-97 (S.DN.Y. 2002) (three states, with related indictment subsequently filed by DOJ, see United States v. Feldman, No. CR 02 708 (S.D.N.Y. filed May 29, 2002)); New York v. Microsoft Corp., No. 98-cv-01233 (D.D.C. filed May 18, 1998) (20 states and District of Columbia) (filed simultaneously with Justice Department complaint); State of New York by Abrams v. Anheuser-Busch, Inc., 673 F. Supp. 664 (E.D.N.Y. 1987) (one state); In re Minolta Camera Prods. Antitrust Litig., 668 F. Supp. 456, 457 (D. Md. 1987) (36 states and District of Columbia); Maryland v. Mitsubishi Elecs. Am., Inc., Civ. A. S–91–815, 1992 WL 88132 at *1 (D. Md. Jan. 15, 1992) (50 states and District of Columbia).

[20] Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) (case brought by 19 states that became a leading precedent on international comity relied upon by federal enforcers in international antitrust cases).

filings, cross-deputized attorneys and conducted joint trainings.[21] Reflecting the special public enforcement role of the states, the United States takes into account states' enforcement efforts in considering whether to authorize an investigation[22] and the U.S. Attorney General must give notice to (15 U.S.C. § 15f(a)) and share "investigative files or other materials" with the state attorneys general (15 U.S.C. § 15f(b)).

In the context of the multi-state challenge to the Sprint/T-Mobile merger, the district court rejected "any notion" that the Department of Justice or the Federal Communications Commission "represent the national public interest more so than any state," adding that "[w]hat deference the Court accords to the federal regulators *should not be taken as a denigration of Plaintiff States' familiarity with the industry or their relative ability to vindicate the public interest they represent more generally.*" New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179, 225 n.21 (S.D.N.Y. 2020) (emphasis added).

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[21] See Barry E. Hawk & Laraine L. Laudati, Antitrust Federalism in the United States and Decentralization of Competition Law Enforcement in the European Union: A Comparison, 20 Fordham Int'l L.J. 18, 30 (1996).

[22] U.S. Dep't of Justice, Antitrust Div., Antitrust Division Manual, at III-7 (5th ed.), https://www.justice.gov/atr/file/761166/download (noting that "the factors considered in authorizing a preliminary investigation by the Division include . . . (c) if the investigation will duplicate or interfere with other efforts of the Division, the FTC, a United States Attorney, or a state attorney general").

II. Antitrust enforcement benefits from multiple public enforcers.

A. Scholars have studied the benefits of state enforcement.

Many scholars have pointed to the benefits of having multiple public enforcers. Professors Gavil and First make the case that a decentralized system "fosters policy diversity and innovation, maximizes enforcement resources, and mirrors some of the essential attributes of our constitutional structure."[23] Competition among law enforcement agencies can "keep enforcement agency discretion in check and produce better antitrust enforcement results"[24] and "[n]o single antitrust agency always gets it right."[25]

The Antitrust Modernization Commission, when it studied problems related to the modernization of the antitrust laws, including the proper role of state attorneys general, concluded that state antitrust enforcement can benefit consumers.[26] State enforcement efforts "targeted most frequently those antitrust violations more likely to cause significant consumer harm,"[27] and to the extent

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[23] Gavil & First, supra, at 282.

[24] Id.

[25] Harry First, Delivering Remedies: The Role of the States in Antitrust Enforcement, 69 Geo. Wash. L. Rev. 1004, 1038 (2001); see also Stephen Calkins, Perspectives on State and Federal Antitrust Enforcement, 53 Duke L.J. 673, 680-84 (2003) (discussing areas where state antitrust enforcers have comparative advantage over the federal government in some aspects of antitrust enforcement).

[26] See Antitrust Modernization Commission, Report and Recommendation (2007), at 186-187, https://govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf.

[27] Id.

there were differences between federal and state enforcers, "federalism suggests the states should continue to have the ability to make their own judgments on how best to seek to protect their consumers."[28]

B. States have stepped in to fill gaps in federal antitrust enforcement.

At critical times in history, states have stepped up to fill the vacuum left by federal enforcement.[29]

In the late 1980s, the Antitrust Division narrowed its focus to criminal cases involving horizontal conspiracies and bid rigging, and the FTC suffered from confirmation delays and staff reductions.[30] Through the Antitrust Committee and the Antitrust Task Force of the NAAG, state sovereigns acted as a "*de facto* third national enforcement agency" to fill the void.[31] They developed uniform guidelines for the analysis of mergers, pre-merger notifications and vertical restraints.[32] For example, when the federal government approved a series of airline

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[28] Id. See also Harry First, Modernizing state antitrust enforcement: Making the best of a good situation, The Antitrust Bulletin, Summer 2009, at 292-93.

[29] See Millon, The First Antitrust Statute, supra, at 149 (discussing federal "noninterventionist policies" and how "states have stepped into the vacuum").

[30] Lloyd Constantine, Antitrust Federalism, 29 Washburn L.J. 163, 169-71 (1990).

[31] Id. at 167-8, 173-5.

[32] NAAG Horizontal Merger Guidelines, reprinted at 4 Trade Reg. Rep. (CCH) ¶ 13,405 (1987); NAAG Pre-Merger Disclosure Compact, 66 BNA Antitrust & Trade Reg. Rep. 337 (Mar. 24, 1994); NAAG Vertical Restraints Guidelines, *Reprinted,* 68 BNA Antitrust & Trade Reg. Rep 1706 (Mar. 30, 1995).

mergers beginning in 1985,[33] leaving the industry more highly concentrated than it had ever been, states responded to the federal policy through their own proceedings challenging mergers.[34] Through these multistate efforts, states maintained a clear vision of their role as public enforcers protecting their citizens.

III. Considering their longstanding role as sovereign public enforcers, states should not be equated with private persons.

The district court assumed that a state bringing a case as *parens patriae* is a "person" under the Sherman Act and Clayton Act that is no different than a private individual protecting a purely private interest.

When it comes to statutory interpretation, the Supreme Court counsels that we must "start where we always do: with the text of the statute." Van Buren v. United States, 141 S.Ct. 1648, 1654 (2021). But the Court has never ended the analysis there when it comes to the antitrust laws. It has treated the Sherman Act as a "common-law statute" which "adapts to modern understanding and greater experience" and evolves "to meet the dynamics of present economic conditions." Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877, 899 (2007). In interpreting antitrust laws, the Supreme Court has considered "the structure of the [law], its legislative history, the practice under it, and past judicial expressions." Georgia v. Evans, 316 U.S. 159, 161 (1942). Interpretation has depended on

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33 Constantine, at 173.

34 Id. at 173-174 (citing states' challenges to airline mergers).

"legislative environment" rather than abstract considerations of words or dictionary definitions. Id.

In Georgia v. Evans, when the Supreme Court held that states could be regarded as "persons" for purposes of bringing a suit for damages under the Sherman Act, it considered that a contrary result would leave states "without any redress" and "[n]othing in the Act, its history or its policy, could justify so restrictive a construction of the word 'person.'" 316 U.S. at 162.

Here, through another type of unduly narrow interpretation, the district court assumes that because a state brings a claim under §16 of the Clayton Act, it is synonymous with a private party for all purposes including the application of the doctrine of laches. In doing so, the district court denies redress to the Plaintiff States without regard to their role as sovereigns and historic public enforcers (*e.g.*, initiating cases under state and federal laws, issuing guidelines, and devoting resources to the enforcement of federal antitrust law) and without regard to the Supreme Court's recognition of the states' ability to pursue actions in multiple capacities: as *parens patriae* in a sovereign capacity or as proprietor for private injury. See State of Georgia. v. Pennsylvania R.R., 324 U.S. at 443.

The court pointed out that there is a "dearth of cases" applying laches to state antitrust enforcement of the federal antitrust laws, but perhaps that is because it has been so clear under state law that laches does not apply to suits brought by

the states when acting in a governmental capacity.[35] The court, however, omitted a case that *did* hold that laches does not apply to a state's *parens patriae* suit brought under federal antitrust law. See Commonwealth of Massachusetts ex rel. Bellotti v. Russell Stover Candies, Inc., 541 F. Supp. 143, 144 (D. Mass. 1982) ("laches is no bar to a suit brought by the government to vindicate a public right, particularly one so important as the enforcement of the antitrust laws") (citations omitted). In contrast, the cases on which the court relied did not directly consider the states' sovereign protection from a laches defense when acting in their public enforcement role, nor did they constitute sufficient authority for the court to abrogate the states' historic role as public sovereign enforcers.[36]

States acting in a *parens patriae* capacity have different incentives than private parties. Private parties are presumed to act on their own behalf, whereas

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[35] See, e.g., State v. LG Elecs., Inc., 375 P.3d 636, 643-44 (Wash. 2016); Capruso v. Vill. of Kings Point, 23 N.Y.3d 631, 641-42 (2014) ("It is settled that the equitable doctrine of laches may not be interposed as a defense against the State when acting in a governmental capacity to enforce a public right or protect a public interest.") (quotation omitted); State ex rel. Miller v. Vertrue, Inc., 834 N.W.2d 12, 33 (Iowa 2013) ("Laches, however, does not apply against the government.").

[36] See California v. Am. Stores, 495 U.S. at 296 ("[E]quitable defenses such as laches . . . *may* protect consummated transactions from belated attacks by private parties when it would not be too late *for the Government to vindicate the public interest*." "Such questions, however, are not presented in this case." (emphasis added); Gov't of Puerto Rico v. Carpenter Co., 442 F. Supp. 3d 464, 475 (D. P.R. 2020) (no mention of Puerto Rico arguing or the court considering whether Puerto Rico, as a sovereign, was immune from laches); New York. v. Kraft Gen. Foods,

state attorneys general, elected officials in most states, can be presumed to act on the public's behalf. As a result, antitrust law treats state actors differently than private ones. See, e.g., Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45 and n.9 (1985) (under state action doctrine, "active supervision" by the state not required where the actor is a municipality, even though such supervision is required for a private party; presumed that governmental entity "acts in the public interest"). There is nothing in the Sherman Act or Clayton Act, their history or policy that would justify equating the states with ordinary persons when they are pursuing rights as sovereigns in the public interest.

CONCLUSION

The judgment of the district court should be reversed.

Dated: January 28, 2022

Respectfully submitted,

By: */s/ David Golden*

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Counsel for Amici Curiae

Inc., 862 F. Supp. 1030,1033 (S.D.N.Y. 1993) (district court relied on American Stores when deciding that states, like private parties, were not entitled to a presumption of irreparable harm when seeking to preliminarily enjoin a merger).

APPENDIX A*

Lloyd Constantine – former Assistant Attorney General in Charge of Antitrust for New York State (1980-1991); former Chair of Antitrust Task Force of the National Association of Attorneys General (1985-1989); former Adjunct Professor (Antitrust Law), Fordham University School of Law; principal author, NAAG Horizontal Merger Guidelines and Vertical Restraints Guidelines, adopted by all 50 states. Biography available at: https://constantinecannon.com/attorney/lloyd-constantine/.

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Andrew I. Gavil – Professor of Law, Howard University School of Law; former Director of the Office of Policy Planning, Federal Trade Commission. Biography available at: http://law.howard.edu/faculty-staff/andrew-i-gavil.

Andrew Rossner – Distinguished Practice Professor of Law, Rutgers School of Law; former Chief of Antitrust, Office of the New Jersey Attorney General (1991-2008). Biography available at: https://law.rutgers.edu/directory/view/rossner.

**The amici are participating in their personal capacities. Any institutional affiliations are listed for informational purposes. The views expressed in this brief may not reflect the views of the institutions, law firms or companies where amici currently work.*

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CERTIFICATE REGARDING SEPARATE BRIEF

Pursuant to D.C. Circuit Rule 29(d), I certify that this separate amicus brief is necessary because it provides unique insights regarding the history of state antitrust enforcement in the federal system of the United States from the unique perspective of law professors and former state enforcement officials. To my knowledge, no other *amici* address the same arguments from the same perspective and with the same expertise. Professors and former antitrust enforcement officials did join in this single amicus brief.

Dated: January 28, 2022

/s/ David Golden
David Golden

CERTIFICATE OF COMPLIANCE

I certify that:

1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 3,877 words, 372 lines (according to the word processing program), and consists of 15 pages, excluding the parts of the brief exempted by the Fed. R. App. P. 32(f).
2. This brief complies with the typeface and type-style requirements of Fed. R. App. P. 32(a)(5) and (a)(6) because it was prepared in Microsoft Office Word, using a 14-point proportionally spaced Times New Roman font.

Dated: January 28, 2022

/s/ David Golden
David Golden

CERTIFICATE OF SERVICE

I hereby certify that I caused a true and correct copy of the foregoing brief to be served on all counsel of record electronically via filing through the appellate CM/ECF system on this 28th day of January 2022.

/s/ David Golden
David Golden