PLAYING NICELY WITH OTHERS: HOW AND WHY ANTITRUST ENFORCERS SHOULD WORK TOGETHER

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INTRODUCTION

With the Clayton Act, Congress intended a synergistic relationship among public and private antitrust enforcers[1] that would maximize the consumer pro-

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[1] *See, e.g.*, United States v. Borden Co., 347 U.S. 514, 518 (1954) (discussing how antitrust enforcers, both private and public, "were designed to be cumulative, not mutually exclusive").

tection goals underlying the Sherman Act.[2] Commonly, private enforcement follows governmental investigations by federal and/or state agencies. However, as public enforcement has declined, private enforcement has shouldered a greater enforcement load.[3] Antitrust class actions frequently expand nascent government cases: they can reach additional wrongdoers or wrongdoing,[4] revive investigations that government enforcers dropped,[5] and even lead the charge in some actions.[6]

Yet lately, the relationship between antitrust enforcers is often acrimonious. This article focuses on one source of this rift: namely, conduct by the Antitrust Division of the Department of Justice that leaves other enforcers battling more than just defendants. This conflict jeopardizes the very goals Congress intended.

To be clear, in raising these claims, the point of this article is not to malign attorneys at the DOJ. Quite the contrary, the Antitrust Division is staffed with highly skilled attorneys devoted to combating the dangers of anticompetitive conduct. Examining enforcement flaws, however, is a necessary precursor to progress. As a former commissioner of the Federal Trade Commission has expressed, the "[s]tudy of enforcement successes and failures" guides "the healthy development of the antitrust laws."[7]

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[2] *See* Blue Shield of Va. v. McCready, 457 U.S. 465, 472 (1982) (noting that Congress created private enforcement to "deter violators and deprive them of the fruits of their illegal actions, and would provide ample compensation to the victims of antitrust violations"); Apple Inc. v. Pepper, 139 S. Ct. 1514, 1518, 1524 (2019) (speaking on "the longstanding goal of effective private enforcement and consumer protection in antitrust cases").

[3] Government oversight by the DOJ, the FTC, and state enforcers often depends on political whim and financial backing—which change by administration. *See* Spencer Weber Waller, *The Incoherence of Punishment in Antitrust*, 78 CHI.-KENT L. REV. 207, 230 (2003) ("[E]nforcement priorities change from administration to administration, or with appointment of a new Assistant Attorney General or FTC chair.").

[4] *See, e.g.*, Order Granting Plaintiffs' Motion for Attorneys' Fees, Reimbursement of Expenses, and Incentive Award, *In re* Anadarko Basin Oil & Gas Lease Antitrust Litig., No. 16-cv-00209 (W.D. Okla. Apr. 25, 2019), ECF No. 244; Corrected Memorandum in Support of Class Plaintiffs' Motion for Final Settlement Approval and Award of Attorneys' Fees, Reimbursement of Expenses, and Incentive Payments, Schagringas Co. v. BP Prods., No. 06-cv-3621 (E.D. Ill. Mar. 10, 2009), ECF No. 152.

[5] *See, e.g.*, Memorandum of Law in Support of Class Counsel's Motion for an Award of Attorneys' Fees & the Reimbursement of Expenses at 15, *In re* Carbon Black Antitrust Litig., No. 03-cv-10191 (D. Mass. Sept. 11, 2007), ECF No. 326 (discussing how DOJ "had closed their investigations of the defendants"); Memorandum in Support of Plaintiffs' Motion for Final Approval of Settlement with all Defendants, *In re* Credit Default Swaps Antitrust Litig., No. 13-md-02476 (S.D.N.Y. Apr. 1, 2016), ECF No. 503.

[6] *See, e.g.*, Memorandum in Support of Approval of Attorneys' Fees as Reasonable, Hemphill v. San Diego Ass'n of Realtors, Inc., No. 04-cv-01495 (S.D. Cal. Jan. 25, 2005), ECF No. 100; Direct Purchaser Plaintiffs' Motion for Attorneys' Fees, Expenses, and Service Award, *In re* Resistors Antitrust Litig., No. 15-cv-03820 (N.D. Cal. June 10, 2019), ECF No. 543.

[7] Joshua D. Wright et al., *Requiem for a Paradox: The Dubious Rise and Inevitable Fall of Hipster Antitrust*, 51 ARIZ. ST. L.J. 293, 295 n.6 (2019).

This article explores this lurking risk to U.S. antitrust enforcement. When private and public enforcers clash, regulatory oversight suffers. Part I details the multiple U.S. antitrust enforcers and their complementary functions. Part II explores the DOJ's conduct in overlapping parallel litigation and gives examples where the DOJ compromised other enforcers' regulatory efforts. These examples expose an operational flaw in the U.S. antitrust enforcement design that contributes to underenforcement. Finally, Part III paves a path forward. It articulates a set of best practices to realign private and public antitrust enforcement efforts. It then urges the adoption of an all-enforcer working group unified toward this end.

I. THE NONHIERARCHICAL U.S. ANTITRUST ENFORCEMENT SYSTEM

The United States adopts a belt and suspenders approach to antitrust enforcement. Federal, state, and private enforcers share overlapping authority to regulate anticompetitive conduct.[8] This Part details the function of each player and identifies where both complimentary and concurrent regulatory oversight exist. It then discusses the benefits of this intentional structure.

A. SHARED ENFORCEMENT AUTHORITY

Federal and state public enforcers, alongside private actors, provide oversight to U.S. antitrust. Federal enforcement by the DOJ and the FTC stems from different legislative authority. The DOJ enforces the Sherman Act, while the FTC enforces the FTC Act.[9] Though the substantive violations for both agencies overlap (a violation of the Sherman Act generally fulfills the requirements for a claim under Section 5 of the FTC Act),[10] the remedies each can pursue differ. Aside from proprietary claims, the DOJ can recover injunctions and monetary penalties limited to a statutory maximum of twice the gross gain or twice the actual loss (meaning affected sales).[11] In its standalone antitrust cases (those it brings under § 13(b) of the FTC Act), the FTC may only seek

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[8] *See* Zachary D. Clopton, *Redundant Public-Private Enforcement*, 69 VAND. L. REV. 285, 296, 300–01 (2016).

[9] 15 U.S.C. §§ 41–58; 28 C.F.R. § 0.40.

[10] Justin Hurwitz, Chevron *and the Limits of Administrative Antitrust*, 76 U. PITT. L. REV. 212, 216–17, 254 (2014).

[11] Bruce H. Kobayashi, *Antitrust, Agency and Amnesty: An Economic Analysis of the Criminal Enforcement of the Antitrust Laws Against Corporations*, 69 GEO. WASH. L. REV. 715, 724 (2001); *see* Robert H. Lande & Joshua P. Davis, *Comparative Deterrence from Private Enforcement and Criminal Enforcement of the U.S. Antitrust Laws*, 2011 B.Y.U. L. REV. 315, 326 (2011); *see also* Einer Elhauge, *Disgorgement as an Antitrust Remedy*, 76 ANTITRUST L.J. 79, 80 (2009) ("The recent Bush administration Department of Justice took the position that it had the authority to seek disgorgement for antitrust violations, and both the Bush and Clinton Departments of Justice actually obtained disgorgement in contempt actions for violations of consent decrees.").

injunctive or administrative relief.[12] More significantly, only the DOJ may bring criminal charges.[13]

There are few formalized divisions of responsibility between the DOJ and the FTC.[14] Generally, the two agencies allocate cases according to their respective strengths.[15] This has meant that the DOJ focuses on, e.g., financial, telecommunications, and agricultural industries,[16] while the FTC focuses on, e.g., pharmaceutical, defense, and retail industries.[17]

Stateside, attorneys general can bring claims under both state and federal antitrust laws. State antitrust agencies, often housed within the state attorney general's office,[18] handle antitrust oversight and can recover for direct damages. Some state antitrust laws predate the Sherman Act,[19] and many create their own rights of action. In addition, the Clayton Act affords states the ability to sue on behalf of their citizens as *parens patriae*, as well as recover for injury the states themselves suffered to their own business or property.[20] While state attorneys general have played a larger role in antitrust enforcement in recent years,[21] historically, they have been less dominant.[22] Consequently, most recovery for individual citizens has occurred via private, not public, enforcement.

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[12] *See* 15 U.S.C. §§ 41–58; AMG Cap. Mgmt. v. FTC, 141 S. Ct. 1341, 1348–89 (2021) (holding that the FTC may recover injunctive but not monetary relief for antitrust violations).

[13] Darren Bush, *Out of the DOJ Ashes Rises the FTC Phoenix: How to Enhance Antitrust Enforcement by Eliminating an Antitrust Enforcement Agency*, 53 WILLAMETTE L. REV. 33, 37 (2016).

[14] *Id.* at 45–46.

[15] *See* FED. TRADE COMM'N & U.S. DEP'T OF JUSTICE, MEMORANDUM OF AGREEMENT BETWEEN THE FEDERAL TRADE COMMISSION AND THE ANTITRUST DIVISION OF THE UNITED STATES DEPARTMENT OF JUSTICE CONCERNING CLEARANCE PROCEDURES FOR INVESTIGATIONS 8–11 (2007), www.justice.gov/sites/default/files/atr/legacy/2007/07/17/10170.pdf.

[16] *See id.* at 10–11.

[17] *See id.* at 8–9.

[18] *See, e.g.*, *Antitrust Enforcement*, N.Y. ATT'Y GEN., ag.ny.gov/antitrust/antitrust-enforcement; *see also Antitrust*, NAT'L ASS'N OF ATT'YS GEN., www.naag.org/issues/antitrust.

[19] *See* Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 GEO. WASH. L. REV. 1004, 1005 (2001).

[20] 5 U.S.C. §§ 15(a), 15c(a); *see also* Bush, *supra* note 13, at 39.

[21] *See, e.g.*, Letter from 32 State Attorneys General to Congress (Sept. 20, 2021), ag.ny.gov/sites/default/files/antitrust_package_support_letter_.pdf; George Hay & Thomas Turgeon, *Genius or Chaos: The "Big Tech" Antitrust Cases as a Window into the Complex Procedural Aspects of U.S. Antitrust Law*, *infra* this issue, 85 ANTITRUST L.J. 375, 400–02 (2023) (addressing recent state enforcement efforts).

[22] *See* Kathleen E. Foote, *State Antitrust Enforcement Distribution Restraints*, SW041 ALI-CLE 205, at 3 (June 2015) (discussing how state attorney general actions were "less prominent in antitrust enforcement" before "Congress reinvigorated state antitrust enforcement in 1976"); *see also* Jacob P. Grosso, *The Preemption of Collective State Antitrust Enforcement in Telecommunications*, 55 U. RICH. L. REV. 615, 652 (2021) ("The antitrust sections in state attorneys general offices were not designed for enforcement in national markets; they are best suited to deal with state and local violations of antitrust law.").

Both competitors and purchasers can pursue private antitrust litigation, though competitor suits are less common. Competitors frequently have limited motivation to file suit; for instance, today's competitor may be tomorrow's joint venture partner, making it risky to undertake litigation that could risk future business dealings.[23] Aside from this limited-incentive impediment, competitors also often face court-erected barriers to competitor suits.[24] As a result, private enforcement is often left to consumers (individuals and businesses as purchasers).

Consumer enforcement is usually pursued via class actions. In enacting Section 4 of the Clayton Act, Congress sought to increase the volume of enforcement through private actors, whereby "the business public [would become] an ally of government and the private antitrust suit [would become] a substantial weapon of national antitrust policy."[25] Private enforcement "was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition," as the Supreme Court has noted.[26] Congress recognized the benefits of private enforcement—as did Senator Sherman, who hoped that individuals would act as "private attorneys general."[27] In fact, "Congress had hoped that these private antitrust suits would supplement government actions and perhaps in some cases make them *unnecessary*."[28]

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[23] *See* AM. ANTITRUST INST., THE NEXT ANTITRUST AGENDA: THE AMERICAN ANTITRUST INSTITUTE'S TRANSITION REPORT ON COMPETITION POLICY TO THE 44TH PRESIDENT OF THE UNITED STATES 243 (Albert A. Foer ed., 2008). Rivals frequently have business-reasons to avoid suing a competitor. Christine P. Bartholomew, *Death by* Daubert*: The Continued Attack on Private Antitrust*, 35 CARDOZO L. REV. 2147, 2198 (2014) (explaining how competitors may want to enter joint ventures or merge); *see also* Clare Deffense, *A Farewell to Arms: The Implementation of a Policy-Based Standing Analysis in Antitrust Treble Damages Actions*, 72 CAL. L. REV. 437, 464 (1984).

[24] *See, e.g.*, Sterling Merch., Inc. v. Nestlé, 656 F.3d 112 (1st Cir. 2011). Pharmaceutical antitrust cases are a notable exception where competitors are more willing to take up antitrust claims. *See, e.g.*, Amphastar Pharms. Inc. v. Momenta Pharms., Inc., 850 F.3d 52, 54 (1st Cir. 2017); Ethypharm S.A. France v. Abbott Labs, 707 F.3d 223, 226 (3d Cir. 2013); Takeda Pharm. Co. Ltd. v. Zydus Pharms. (USA) Inc., 358 F. Supp. 3d 389, 391 (D.N.J. 2018). Yet even in the pharmaceutical industry, consumer class actions are prevalent, particularly when prior competitor disputes are resolved on potentially uncompetitive terms. *See, e.g.*, *In re* Loestrin 24 Fe Antitrust Litig., 433 F. Supp. 3d 274, 298 (D.R.I. 2019); *In re* Effexor Antitrust Litig., 337 F. Supp. 3d 435, 443 (D.N.J. 2018); *In re* Niaspan Antitrust Litig., 42 F. Supp. 3d 735, 740 (E.D. Pa. 2014).

[25] N.J. Wood Finishing Co. v. Minn. Mining & Mfg. Co., 332 F.2d 346, 350 (3d Cir. 1964), *aff'd*, 381 U.S. 311 (1965).

[26] California v. Am. Stores Co., 495 U.S. 271, 284 (1990).

[27] ANTITRUST MODERNIZATION COMM'N, REPORT AND RECOMMENDATIONS 243 (2007) [hereinafter AMC R&R], govinfo.library.unt.edu/amc/report_recommendation/amc_final_report.pdf; *e.g.*, Hawaii v. Standard Oil Co., 405 U.S. 251, 262 (1972) ("By offering potential litigants the prospect of a recovery in three times the amount of their damages, Congress encouraged these persons to serve as private attorneys general.") (cleaned up).

[28] *N.J. Wood Finishing*, 332 F.2d at 350 (emphasis added); *see* Kent Roach & Michael J. Trebilcock, *Private Enforcement of Competition Laws*, 34 OSGOODE HALL L.J. 461, 465 (1996) ("Lack of any initial budgetary appropriation by Congress for *Sherman Act* enforcement provides

Since class actions tend to dominate the private enforcement landscape, this article uses the phrase "private enforcement" as shorthand for antitrust class actions by direct or indirect purchasers in the impacted markets.[29] Class actions drive private enforcement because individual consumer recovery frequently is too de minimis to rationalize expensive antitrust litigation. To incentivize aggregate litigation, Congress granted consumers the right to recover injunctive relief, treble damages, and fee shifting in antitrust class actions.[30]

The Supreme Court's 1977 decision in *Illinois Brick*, however, greatly restricted private enforcement's potential by limiting standing for monetary damages under the Sherman Act to direct purchasers, i.e., those individuals or businesses who purchased a product directly from the alleged wrongdoer.[31] The decision cited concerns over the potential for duplicative recovery and administrative challenges in allocating economic harm to multiple players in a distribution chain.[32]

Despite its critics,[33] the *Illinois Brick* rule continues to bar indirect purchasers, i.e., those who purchased from a direct purchaser or further down the

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some support for the [view that Congress intended private actions to be the primary tool for deterring anticompetitive activity], although during the first fifty years of *Sherman Act* enforcement only 175 private suits were filed and, of these, the plaintiffs were successful in only thirteen.").

[29] Such suits are frequently called consumer antitrust class actions, though the term "consumer" is somewhat of a misnomer. *See, e.g.*, Bruce H. Kobayashi & Larry E. Ribstein, *Class Action Lawyers as Lawmakers*, 46 ARIZ. L. REV. 733, 776 (2004) (discussing lead counsel appointments in "consumer antitrust class actions, mass torts, or consumer fraud cases"). While the plaintiffs in such cases are purchasers, they might also be resellers or businesses. *See, e.g.*, Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 231 (2013) (discussing putative antitrust class action brought by merchants who accept American Express cards, thereby making them "purchasers"—within in the meaning of antitrust laws—of American Express's card services).

[30] *See* 15 U.S.C. §§ 15, 26; 28 U.S.C. §§ 1331, 1332(d), 1337, 1453, 1711–15. As Judge Cogan of the Eastern District of New York explains:

> It would make little sense for a law firm like plaintiffs' to bring a massive antitrust class-action on a pro-bono basis. By the same token, individual class members are unlikely to have sufficient resources—let alone fluency with federal antitrust law—to institute a lawsuit such as this. A primary objective of Rule 23 [which governs class actions] is to allow lawsuits to be brought that would not have otherwise been brought; whether the idea for a class action first arose in the mind of a lawyer, rather than a class member, is of no moment in a class certification analysis.

In re Vitamin C Antitrust Litig., 279 F.R.D. 90, 107 (E.D.N.Y. 2012).

[31] Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977).

[32] *Id.* at 730–32; *see* Edward D. Cavanagh, *Illinois Brick: A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 9–12 (2004).

[33] For a particular well-done dismantling of the indirect purchaser rule, see Spencer Smith, *The Indirect Purchaser Rule and Private Enforcement of Antitrust Law: A Reassessment*, 17 J. COMPETITION L. & ECON. 642 (2021), and Brief for Texas, Iowa, and 29 Other States as Amici Curiae, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204) [hereinafter Apple Texas Amicus Brief] (urging the Court to overrule *Illinois Brick*).

distribution chain, from seeking monetary damages under the Sherman Act.[34] Federal antitrust law thereby limits indirect purchasers to injunctive relief. To the extent indirect purchasers can recover monetary damages, it is under state antitrust laws,[35] colloquially known as "little Sherman Act" statutes. The majority of states—at least 35— permit damages suits by or on behalf of indirect purchasers.[36]

Before 2005, direct purchasers would often file putative class actions in federal court, and indirect purchasers would pursue claims in state courts. The 2005 Class Action Fairness Act altered this dual trajectory by expanding federal diversity jurisdiction for class actions.[37] In doing so, it hauled most claims by indirect purchaser classes into federal court. Now, federal courts commonly consolidate those class actions with direct purchaser class actions.[38] Further, such cases may proceed at the same time a criminal investigation is underway or while federal and state agencies bring their own civil suits.

Unlike other areas of law with overlapping enforcement, Congress opted against prioritizing a particular enforcer. Rather, it designed concurrent private and public enforcement "to be cumulative, not mutually exclusive."[39] The Sherman and Clayton Acts place public and private enforcement on equal footing. No one enforcer sits atop the enforcement structure, nor can a single enforcer delineate the scope of enforcement for others.[40] Private enforcers do not need blessing or pre-approval from the DOJ, the FTC, or state agencies before filing a putative class action. U.S. antitrust law invites multiple antitrust enforcement actions to realize the benefits of overlapping enforcement.

B. BENEFITS OF OVERLAPPING ENFORCEMENT

This system of overlapping enforcement is essential to U.S. antitrust enforcement. What at first glance may look like wasteful redundancy[41] is more accurately understood as vital strength in numbers.

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[34] Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019).

[35] *See, e.g.*, CAL. BUS & PROF. CODE § 16750(a); N.Y. GEN. BUS. LAW § 340(6).

[36] AMC R&R, *supra* note 27, at 269; *see also* AM. BAR. ASS'N, INDIRECT PURCHASER LITIGATION HANDBOOK 397-441 (2d ed. 2016).

[37] *See* 28 U.S.C. §§ 1711–15.

[38] *See, e.g.*, *In re* Flash Memory Antitrust Litig., 643 F. Supp. 2d 1133 (N.D. Cal. 2009); *In re* Polyurethane Foam Antitrust Litig., 314 F.R.D. 226 (N.D. Ohio 2014); *In re* Capacitors Antitrust Litig., 106 F. Supp. 3d 1051 (N.D. Cal. 2015).

[39] United States v. Borden Co., 347 U.S. 514, 518 (1954).

[40] *See* Cinnamon v. Abner A. Wolf, Inc., 215 F. Supp. 833, 834 (E.D. Mich. 1963) (citing REPORT OF THE ATTORNEY GENERAL'S NATIONAL COMMITTEE TO STUDY THE ANTITRUST LAWS 378 (1955)); First, *supra* note 19, at 1029.

[41] *See generally* Clopton, *supra* note 8 (explaining the benefits of redundant authority).

The diffusion of oversight authority in the United States provides fertile ground for legal experimentation. Each regulator brings their own varying viewpoints,[42] new ideas, and hopefully, different economic theories to enforcement.[43] These differences allow for experimentation, which allows antitrust policy to morph in response to new markets and changing technologies.[44]

This multiple-enforcer regime generates other benefits as well. Having more than one regulator watching markets can lead to a more optimal antitrust system than centralized authority.[45] Overlap has the potential to "respond to errors, resource constraints, information problems, or agency costs at the level of case selection."[46] It also drives individual enforcers to compete against each other,[47] resulting in a boon to enforcement as a whole.

More fundamentally, in the United States, overlapping enforcement ensures the health of economic markets.[48] Antitrust laws safeguard a functioning, fair economy. They lead to competitive prices and encourage new product growth by promoting startups and follow-on innovation.[49] In the absence of reliable antitrust enforcement, these benefits may go unrealized.[50] The risk of under-

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[42] *See* Jean Wegmans Burns, *Embracing Both Faces of Antitrust Federalism:* Parker *and* Arc America Corp., 68 ANTITRUST L.J. 29, 43 (2000) ("The essence of law is finding ways to accommodate the public's various and conflicting desires.")

[43] *See, e.g.*, *id.* at 44 ("Federalism allows for the experimentation, the successes, and the failures needed to find the best approach for a given time and a given market.") (footnote omitted).

[44] *See* Inge Graef, *Future-Proofing Plural Antitrust Enforcement Models: Lessons from the United States and the European Union*, *infra* this issue, 85 ANTITRUST L.J. 340, 340, 343, 352–54, 358, 364–65 (2023).

[45] *See, e.g.*, David Besanko & Daniel F. Spulber, *Are Treble Damages Neutral? Sequential Equilibrium and Private Antitrust Enforcement*, 80 AM. ECON. REV. 870, 870 (1990) (discussing how coupling public and "private antitrust enforcement can increase social welfare if the probability of conviction is sufficiently large").

[46] Clopton, *supra* note 8, at 290.

[47] *See, e.g.*, Leon B. Greenfield & William J. Kolasky, *Antitrust Modernization: Picking Up the European Gauntlet?*, ANTITRUST, Summer 2008, at 58 ("[O]ur unique system can foster competition and efficient specialization among federal antitrust enforcers; it also empowers state enforcers to focus on localized antitrust concerns that might not receive sufficient attention at the national level or step in if federal enforcement becomes unduly lax.").

[48] *See* Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the* Microsoft *Case*, 11 GEO. MASON L. REV. 37, 63 (2002) ("Multiple enforcers stimulate not only antitrust enforcement, but also innovation *in* antitrust enforcement. Equally important, multiple enforcers provide checks against any single enforcer moving the law rapidly in sharply different directions, and buffer changes in enforcement philosophy.") (footnote omitted); *see also* George A. Hay, *Innovations in Antitrust Enforcement*, 64 ANTITRUST L.J. 7, 7 (1995) ("[N]ew people with new ideas come into a new job.").

[49] *See, e.g.*, Martin Watzinger et al., *How Antitrust Enforcement Can Spur Innovation: Bell Labs and the 1956 Consent Decree*, 12 AM. ECON. J.: ECON. POL'Y 328, 348 (2020) (examining patents and free licensing after the 1956 consent decree that settled an antitrust lawsuit against Bell); *see generally* C. Scott Hemphill & Tim Wu, *Nascent Competitors*, 168 U. PA. L. REV. 1879 (2020).

[50] *See* JOHN KWOKA, MERGERS, MERGER CONTROL, AND REMEDIES: A RETROSPECTIVE ANALYSIS OF U.S. POLICY 103 (2015).

enforcement—and its destabilizing economic impact—is too great,[51] especially now when market concentration is rampant.[52]

Though critics contend that decentralized oversight invites duplicative recovery or overenforcement,[53] that risk is more illusory than real.[54] Enforcers do not duplicate relief.[55] Even in cases of parallel enforcement, each enforcer recovers only a subset of the total relief.[56] The reality is that no single enforcer can, or does, shoulder the country's full antitrust enforcement responsibility. Instead, overlapping, complementary enforcement maximizes market oversight.[57]

On the federal side, the DOJ and the FTC have different limitations, which further drives the need for supplemental oversight. Relying solely on the DOJ would leave many antitrust claims without redress. Though the DOJ has both criminal and civil enforcement authority, its criminal investigations focus primarily on hardcore antitrust violations such as price-fixing cartels, at the exclusion of other wrongdoing. When the DOJ does seek monetary penalties, recovery is not adjusted to present value and is often negotiated down, leaving a fair bit of disgorgement and recovery to other enforcers, and potentially, leaving money in the hands of the violator as well.[58]

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[51] Evidence of underenforcement already exists. *See, e.g.*, Christine P. Bartholomew, *Antitrust Class Actions in the Wake of Procedural Reform*, 97 IND. L. REV. 1315, 1355–56 (2022) (detailing the death of enforcement for rule of reason violations); KWOKA, *supra* note 50 (analyzing post-merger product prices and finding "substantial price increases").

[52] *See* William A. Galston & Clara Hendrickson, *A Policy at Peace with Itself: Antitrust Remedies for Our Concentrated, Uncompetitive Economy*, BROOKINGS INST. (Jan. 5, 2018), www.brookings.edu/research/a-policy-at-peace-with-itself-antitrust-remedies-for-our-concentrated-uncompetitive-economy.

[53] *See, e.g.*, Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001).

[54] *See, e.g.*, Richard M. Brunell, *In Regulators We Trust: The Supreme Court's New Approach to Implied Antitrust Immunity*, 78 ANTITRUST L.J. 279, 301 (2012) ("[T]here is a consensus that the benefits of overlapping antitrust responsibilities outweigh the costs.").

[55] *See* Robert H. Lande, *Five Myths About Antitrust Damages*, 40 U.S.F. L. REV. 651, 658 (2006) ("The 'duplication' or 'duplicative recovery' specter, however, is only a theoretical possibility that has never occurred in the real world.").

[56] *See id.*

[57] *See, e.g.*, Arthur M. Kaplan, *Antitrust as a Public-Private Partnership: A Case Study of the* Nasdaq *Litigation*, 52 CASE W. RSRV. L. REV. 111, 111 (2001) ("[F]rom the perspective of public policy, the *Nasdaq* litigation epitomizes the complementary roles, and synergy, of private and public enforcement as envisioned by the Clayton Act.").

[58] *See* Joseph F. Brodley, *Antitrust Standing in Private Merger Cases: Reconciling Private Incentives and Public Enforcement Goals*, 94 MICH. L. REV. 1, 23 n.91 (1995); Robert H. Lande, *New Options for State Indirect Purchaser Legislation: Protecting the Real Victims of Antitrust Violations*, 61 ALA. L. REV. 447, 500 (2010); *see also* Robert Pitofsky, *Antitrust at the Turn of the Twenty-First Century: The Matter of Remedies*, 91 GEO. L.J. 169, 171 (2002) ("Studies show that treble damages really amount approximately to single damages in most circumstances.").

The risk of regulatory capture at the DOJ is also significant.[59] The shuffle from one administration to the next can alter enforcement paths, be it to the detriment—or the benefit—of antitrust enforcement.[60] For example, during the Trump administration, cartel and merger enforcement declined despite some of the highest levels of public concern over concentrated economic power in over a century.[61] Because the executive branch oversees the Antitrust Division, the administration's policy may influence the DOJ's enforcement decisions.[62]

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[59] *See* Filippo Lancieri, Eric A. Posner & Luigi Zingales, *The Political Economy of the Decline of Antitrust Enforcement in the United States*, *infra* this issue, 85 ANTITRUST L.J. 441, 518 (2023); J. Gregory Sidak, The Antitrust Division's Devaluation of Standard-Essential Patents, 104 GEO. L.J. ONLINE 48, 72 (2015) (discussing the DOJ and regulatory capture concerns).

[60] *See* Joseph P. Bauer, *Reflections on the Manifold Means of Enforcing the Antitrust Laws: Too Much, Too Little, or Just Right?*, 16 LOY. CONSUMER L. REV. 303, 320–21 (2004) ("It is undoubtedly not a complete coincidence that the resolution by the DOJ of three of the most important antitrust actions in the past quarter-century . . . occurred after the election of a new president of a different political party than the one under whom the action was originally brought."); Katherine Mason Jones, *Federalism and Concurrent Jurisdiction in Global Markets: Why a Combination of National and State Antitrust Enforcement is a Model for Effective Economic Regulation*, 30 Nw. J. INT'L L. & BUS. 285, 336 (2010) ("[T]he Executive Branch may seek to curtail antitrust significantly, or more commonly, to sit on the sidelines while cases are not brought. In any given case, the federal enforcement agencies may elect not to proceed, but injured parties and the states have the ability to fill the gap.") (quoting *Separate Statement of Commissioner Jacobson*, *in* AMC R&R, *supra* note 27, at 412, 415); First, *supra* note 19, at 1037 ("[E]ven incremental change in federal enforcement policy can lead federal and state enforcers on different paths in critical cases.").

[61] *See* AM. ANTITRUST INST., THE STATE OF ANTITRUST ENFORCEMENT AND COMPETITION POLICY IN THE U.S. 3 (2020), www.antitrustinstitute.org/wp-content/uploads/2020/04/AAI_StateofAntitrust2019_FINAL3.pdf ("[T]he Trump administration receives a low grade by failing to protect competition at a time when markets are highly concentrated and evidence of competitive abuse surfaces with increasing regularity."); Christopher R. Leslie, *The DOJ's Defense of Deception: Antitrust Law's Role in Protecting the Standard-Setting Process*, 98 OR. L. REV. 379, 380 (2020) (criticizing the Trump DOJ's antitrust tactics in patent law, arguing that the Division has afforded "antitrust immunity to patent owners who acquire monopoly power by lying to standard-setting organizations"); Joshua Wright & Aurelien Portuese, *Antitrust Populism: Towards a Taxonomy*, 25 STAN. J.L. BUS. & FIN. 131, 157–59 (2020) (critiquing President Trump's antitrust stances and noting his threats to take antitrust action against Amazon, presumably because his "antitrust view of Amazon is much more motivated by the political power of Jeff Bezos through the Washington Post than by economically sound analysis"); W. Bradley Wendel, *The Problem of the Faithless Principal: Fiduciary Theory and the Capacities of Clients*, 124 PENN ST. L. REV. 107, 134 (2019) (discussing how Makan Delrahim, head of the Trump DOJ Antitrust Division, did not oppose the AT&T and Time Warner merger until assuming his position and, significantly, that Time Warner's ownership of CNN may have played a role: "it's hard to believe that President Trump's longstanding feud with CNN did not play some role in his administration's decision to oppose the merger"); *see also Oversight of the Department of Justice Political Interference and Threats to Prosecutorial Independence: Hearing Before the H. Comm. on the Judiciary*, 116th Cong. 2 (2020) (statement of John W. Elias, Attorney, Department of Justice) [hereinafter Elias Statement] (describing 2019 DOJ antitrust investigations triggered by "[p]ersonal dislike of an industry" and presidential tweets rather than on an antitrust analysis).

[62] *See* Bauer, *supra* note 60, at 320–21.

While the existence of the FTC protects against one government body controlling federal antitrust enforcement, it cannot fully redress gaps in enforcement.[63] The FTC is less influenced by changes in the executive branch. Rather, as an administrative agency, it responds more to congressional desires.[64] Nonetheless, occasional discord with the DOJ can further limit the FTC's enforcement. Turf wars (often referenced as "clearance fights") have long plagued the agencies, contributing to stagnant enforcement.[65] And now, the FTC cannot recover monetary damages under § 13(b) of the FTC Act,[66] which limits its deterrent and compensatory potential. Public enforcement, even split between two federal enforcers, is wanting.[67]

Adding state enforcers to the mix remedies some of these concerns and addresses federalism concerns. One state's desired remedy does not necessarily "fit" all.[68] States can be better situated to determine how to best protect their consumers.[69] For instance, in the *Microsoft* case, nine states and the District of Columbia did not join the DOJ and other states in the proposed settlement, electing to instead seek their own remedy.[70]

States are also well situated to attack local antitrust violations.[71] Indeed, state enforcement activity "has involved areas in which states enforcers may

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[63] For instance, the Supreme Court recently held that the FTC may not seek equitable monetary remedies such as restitution or disgorgement under Section 13(b) of the FTC Act. AMG Cap. Mgmt., LLC v. FTC, 141 S. Ct. 1341, 1344 (2021).

[64] *See* William E. Kovacic, *The Modern Evolution of U.S. Competition Policy Enforcement Norms*, 71 ANTITRUST L.J. 377, 396 (2003).

[65] Bush, *supra* note 13, at 45–47.

[66] *AMG*, 141 S. Ct. at 1346, 1349 (limiting the FTC to injunctive relief for antitrust violations it pursues under § 13(b) of the FTC Act, 15 U.S.C. § 53(B), but noting that § 5(*l*) of the FTC Act, 15 U.S.C. § 45(*l*), "authorize[s] district courts to award civil penalties against respondents who violate [the FTC's administrative] final cease and desist orders").

[67] *See, e.g.*, Sandeep Vaheesan, *Killing Antitrust Softly (Through Procedure)*, L. & POL. ECON. PROJECT, June 11, 2019, lpeproject.org/blog/killing-antitrust-softly-through-procedure ("Consumers and businesses injured by antitrust violations have long been the lead enforcers of the antitrust laws. Their role is only accentuated by the [DOJ] and [FTC]'s unwillingness to enforce multiple areas of antitrust law. This combination of judicial hostility to private cases and bureaucratic lethargy has turned much of the substantive law into a dead letter.").

[68] *See, e.g.*, Bauer, *supra* note 60, at 322 ("Individual states will often have different competitive interests that they seek to vindicate, as illustrated by the refusal of some states to join the federal government and their sister states in the *Microsoft* settlement. State interests would not be adequately protected by reposing enforcement powers solely at the federal level.").

[69] *See id.*

[70] Himes, *supra* note 48, at 37; *see generally* J. Douglas Richards, *What Makes an Antitrust Class Action Remedy Successful?: A Tale of Two Settlements*, 80 TUL. L. REV. 621, 627–30 (2005).

[71] *See The Enforcers*, FED. TRADE COMM'N, www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers; First, *supra* note 19, at 1034 ("Local restraints (or those with lesser economic impact) are likely to be overlooked by federal enforcers who, after all, have their own resource constraints.").

have a comparative advantage in terms of knowledge—that is, with respect to local markets, local competitive effects, and local government purchasers."[72]

Unfortunately, even combined, federal and state public enforcement cannot comprehensively monitor competition. Budget constraints hinder public enforcers as money ebbs and flows depending on an administration's priorities.[73] Further, state agencies can lack the expertise or resources to regularly undertake independent enforcement action.[74] Politics also are a limiting force. States can and often do enter coalitions to handle larger investigations and litigation, but political divisions among elected state attorneys general can hinder such collaboration. The existence of multiple enforcers is necessary to address "concerns that harmful conduct will go unchallenged because certain potential enforcers have desisted from suing because of political concerns, conflicts of interest, or the expenses of litigation."[75]

Given the deficiencies with public enforcement, modern antitrust enforcement relies heavily on private enforcement.[76] Private enforcement shores up limited federal and state efforts, avoiding underenforcement.[77] In recent history, private enforcement has provided greater economic protection—outnumbering public actions by a ratio of ten to one[78] and recovering billions of

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[72] AMC R&R, *supra* note 27, at 186.

[73] *See* Jason Rathod & Sandeep Vaheesan, *The Arc and Architecture of Private Enforcement Regimes in the United States and Europe: A View Across the Atlantic*, 14 U.N.H. L. REV. 303, 309–10 (2016) (noting that Congress can starve an agency of funding); Daniel A. Crane, *Optimizing Private Antitrust Enforcement*, 63 VAND. L. REV. 675, 678 n.7 (2010) ("[P]rivate suits provide a significant supplement to the limited resources available to the Department of Justice . . . .") (quoting Am. Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp., 456 U.S. 556, 572 n. 10 (1982)).

[74] *See, e.g.*, Robert W. Hahn & Anne Layne-Farrar, *Federalism in Antitrust*, 26 HARV. J.L. & PUB. POL'Y 877, 887–88 (2003).

[75] Bauer, *supra* note 60, at 321–22.

[76] *See* D. Daniel Sokol, *The Strategic Use of Public and Private Litigation in Antitrust as Business Strategy*, 85 S. CAL. L. REV. 689, 689 (2012) (discussing how "contemporary antitrust" relies heavily on private enforcement, unlike "one hundred years ago [when] government cases constituted nearly all antitrust cases").

[77] *See, e.g.*, AM. ANTITRUST INST., THE CRITICAL ROLE OF PRIVATE ANTITRUST ENFORCEMENT IN THE UNITED STATES 4 (2021), www.antitrustinstitute.org/wp-content/uploads/2021/08/Huntington-Report-FINAL-1.pdf (denoting the rapid increase in private federal consolidated antitrust filings as federal enforcement waned); *see also* J.C. Coffee Jr., *Rescuing the Private Attorney General: Why the Model of the Lawyer as Bounty Hunter is Not Working*, 42 MD. L. REV. 215, 227 (1983) ("Absent private enforcement, potential defendants would have a considerably stronger incentive to lobby against public enforcement efforts or to seek to curtail funds to public enforcement agencies. Ultimately, private enforcement helps ensure the stability of legal norms by preventing abrupt transitions in enforcement policy that have not been sanctioned by the legislature.")

[78] Daniel A. Crane, *Toward a Realistic Comparative Assessment of Private Antitrust Enforcement*, *in* RECONCILING EFFICIENCY AND EQUITY: A GLOBAL CHALLENGE FOR COMPETITION POLICY 341, 343 (Damien Gerard & Ioannis Lianos eds., 2019).

dollars for antitrust victims.[79] And arguably, private enforcement serves as a stronger deterrent because the damages from such suits are significantly higher than criminal antitrust fines.[80]

But private enforcement alone would also be incomplete. As the volume of antitrust class actions grew, so did the criticism. Lumped in with other types of class actions, antitrust class actions were quickly maligned by more generalized tort reform efforts. Critics voiced concerns that private enforcement overdeters and overreaches. These criticisms led to increased procedural gatekeeping by the courts.[81] Private class actions now face judicial hostility and ever more challenging procedural barriers.[82] Compared to a decade ago, such cases are now harder to file, harder to certify, and harder to eventually settle.[83] As this gatekeeping has increased, private enforcement has decreased—particularly for vertical restraints and Section 2 violations.

Thus, overlapping enforcers are critical to modern and future U.S. antitrust enforcement efforts. No single enforcer is perfectly situated to shoulder the entirety of the enforcement load. Instead, each antitrust actor plays a role—where one cannot bring suit, another hopefully will. As professors Max Huffman and Daniel Heidtke explain: "Where government enforcers are blind to something, consumers and competitors may see them. Where consumers and competitors know too little, government enforcers have enhanced fact-finding powers. So [collectively] it is less likely something slips by."[84]

As the next Part illustrates, the interaction between these enforcers sometimes loses sight of how imperative the combined effort is. In particular, the DOJ has taken action to limit the authority and reach of its co-enforcers. In

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[79] *See* AM. ANTITRUST INST., *supra* note 77, at 1 (determining that from 2009 to 2020, antitrust victims in class actions recovered over $27 billion).

[80] Bartholomew, *supra* note 23, at 2151–52.

[81] *See* DANIEL A. CRANE, THE INSTITUTIONAL STRUCTURES OF ANTITRUST ENFORCEMENT 50–60 (2011); *see also* William E. Kovacic, *The Institutions of Antitrust Law: How Structure Shapes Substance*, 110 MICH. L. REV. 1019, 1041 (2012) (discussing how the judiciary "imposed stronger substantive demands on plaintiffs, strengthened pleading requirements, toughened standing rules, and expanded the availability of measures, such as motions to dismiss and motions for summary judgment, to see that claims never reached, or even approached, resolution by a jury."). In fact, it was in antitrust cases that the Supreme Court articled the new pleadings standard and upheld forced arbitration provisions. *See* Bell Atl. Corp. v. Twombly, 550 U.S. 554 (2007); Am. Express Co. v. Italian Colors Rest., 570 U.S. 228 (2013); *see also* Christine P. Bartholomew, *Twiqbal in Context*, 65 J. LEGAL EDUC. 744, 748–50 (2016) (explaining *Twombly* and the plausibility standard it ushered in); Bartholomew, *supra* note 51, at 1322, 1324 (discussing the impact of altered pleading requirements and forced arbitration provisions in private antitrust enforcement).

[82] *See, e.g.*, Bartholomew, *supra* note 51, at 1316–33.

[83] *See, e.g.*, *id.* at 1333–56.

[84] Max Huffman & Daniel B. Heidtke, *Behavioral Exploitation Antitrust in Consumer Subprime Mortgage Lending*, 4 WM. & MARY POL'Y REV. 77, 98 (2012) (cleaned up).

doing so, the DOJ undermines the benefits of a/the multi-enforcer structure and risks underenforcement.

II. ANTITRUST INFIGHTING

As Part I explains, U.S. antitrust enforcement relies on the complimentary participation of every enforcer. No single entity has the time, ability, or resources to undertake all necessary oversight. No single enforcer realistically can fulfill the compensatory and deterrence goals of antitrust laws.[85]

The need for each antitrust regulator to play its part is particularly urgent. Market concentration is on the rise, but enforcement is on the decline. Since peaking in 2008, antitrust filings have flagged. "Filings dropped 30% from 2005 to 2019."[86] Federal public enforcement "dropped precipitously in 2015" and has "decreased each year since."[87] Yet, "evidence of competitive abuse surfaces with increasing regularity."[88]

Multiple variables account for underenforcement, from a pro-corporate judiciary[89] to heightened procedural hurdles.[90] One facet, though, is rarely discussed: harmful interplay between enforcers. Congress designed a structure that would provide a multi-front assault on competitive malfeasance. Instead, this battle strategy staggers, beset by infighting.

Because of overlapping authority, antitrust enforcers interact in a multitude of combinations. A private enforcement action can precede or follow a criminal investigation by the DOJ. The FTC and state attorneys general can both weigh in on a proposed merger. Private and public federal enforcers can pursue claims concurrently with state attorneys general. Thus, it makes little sense to analyze enforcers' interplay by legal theory or by who files first. Doing so would lose sight of the forest for the trees. Instead, a more compre-

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[85] *See* Nader v. Air Transp. Ass'n, 426 F. Supp. 1035, 1040 (D.D.C. 1977) ("The antitrust laws clearly reflect the national policy of encouraging private parties (including consumers) to help enforce the antitrust laws in order to protect competition through compensation of antitrust victims, through punishment of antitrust violators, and through deterrence of antitrust violations.") (quoting H.R. REP. NO. 94-499, pt. 2, at 19–20 (1975)).

[86] *See, e.g.*, Bartholomew, *supra* note 51, at 1341.

[87] *Id.* at 1342.

[88] *New Study from AAI Explores Troubling Falloff in Federal Antitrust Enforcement in Face of Declining Competition*, AM. ANTITRUST INST. (Apr. 14, 2020), www.antitrustinstitute.org/new-study-from-aai-explores-troubling-falloff-in-federal-antitrust-enforcement-in-face-of-declining-competition.

[89] *See* Elizabeth Warren, *The Corporate Capture of the Federal Courts*, 17 U.D.C. L. REV. 4, 8 (2014) (discussing the "increasingly brazen and ideological pro-corporate tilt of the Supreme Court").

[90] *See* Bartholomew, *supra* note 51, at 1341–42 (detailing the impact of increased procedural hurdles in antitrust litigation).

hensive dissection of the problem starts by looking at a single enforcer and identifying the behaviors that undercut the benefits of overlapping enforcers.

This Part begins this essential work, focusing squarely on the DOJ. A close examination of recent litigation shows instances where the DOJ perceived its function as the proprietor of antitrust policy and acted as if it were the sole arbiter of antitrust liability. Other times, the DOJ pushed to lead antitrust actions or delineated a prioritization of which an enforcer can (and should) pursue different types of antitrust suits. This Part explores three categories of behavior exhibited by the DOJ in its interactions with other enforcers: espousing damaging policy positions, antipathy toward private enforcement, and handicapping other enforcers. This Part also explains how this behavior risks pushing out other enforcers—at a significant cost to competition oversight.

A. DEFINING ANTICOMPETITIVE CONDUCT

During the Trump administration, advocacy by the DOJ rose by 80%.[91] At the same time, government cartel enforcement dropped by the very same percentage: from 2017–2018, the average number of cartel investigations was 80% lower than it had been during the prior three administrations.[92] To understand these figures, this Part analyzes the nature of the DOJ's advocacy. It shows how rather than focusing its might on greater enforcement, the DOJ has used its finite resources to limit others' regulatory oversight.

In multiple areas, ranging from mergers to refusals to deal to no-poach agreements,[93] the DOJ assumed a self-appointed lead role in defining antitrust policy. Even when the DOJ opted against pursuing enforcement action, it injected its views through statements of position and motions to intervene in suits by others. When others' suits have aligned with its own construction of

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[91] AM. ANTITRUST INST., *supra* note 61, at 19. This "advocacy" includes comments in matters, rulemakings, and inquiries started by federal agencies, independent commissions, state legislative proposal, and regulatory proceedings, as well as acting as amicus curiae and in filing statements of interest in both public and private antitrust suits. *Id.*

[92] AM. ANTITRUST INST., *supra* note 77, at 4.

[93] *See, e.g.*, Statement of Interest of the United States of America, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 19-cv-05434), ECF No. 348, 2019 WL 8403069 (opposing a merger challenge brought by a group of states); Brief for the United States as Amicus Curiae in Support of Neither Party at 6, Viamedia, Inc. v. Comcast Corp., 951 F.3d 429 (7th Cir. 2018) (No. 18-2852), ECF No. 33, 2018 WL 5919386 (urging a restrictive view of antitrust liability for Section 2 refusals to deal); *No-Poach Approach: Division Update Spring 2019*, U.S. DEP'T OF JUST. (Sept. 30, 2019), web.archive.org/web/20230523022205/https://www.justice.gov/atr/division-operations/division-update-spring-2019/no-poach-approach ("As part of the Division's expanded amicus program, the United States filed the statements of interest in order to provide a more fulsome exposition of how Section 1 of the Sherman Act applies to agreements between employers not to compete for employees.").

the Sherman Act, the DOJ has offered support.[94] But when there is a mismatch, the DOJ has, instead of refraining from advocacy, affirmatively supported the defendant over its fellow co-enforcer.

The DOJ's recent spats with the FTC illustrate this behavior. Consider *FTC v. Qualcomm Inc.*, in which the FTC challenged Qualcomm's licensing practices.[95] The FTC contended that these practices were exclusionary and helped the company unlawfully maintain a monopoly over two types of modem chips.[96] After a bench trial, the DOJ filed a Statement of Interest requesting a hearing on potential remedies (in the event of a liability finding), but the court ultimately ruled for the FTC and issued an injunction.[97] Qualcomm moved the Ninth Circuit for a stay pending appeal, and the DOJ filed another Statement of Interest, this time directly in support of Qualcomm's argument that it cannot be required to renegotiate its licensing agreements on fair, reasonable, and nondiscriminatory (FRAND) terms.[98] The Ninth Circuit then issued a partial stay of the injunction pending appeal.[99]

The DOJ again attempted to impose its views by filing an amicus brief supporting Qualcomm's position on appeal. The DOJ maintained that it was duty bound not just to enforce antitrust laws—the authority afforded the agency under the Sherman Act—but to ensure the "correct application" of federal antitrust law.[100] From this starting point, its brief contradicted the FTC's argument that Qualcomm is obliged to deal with its competitors under the facts of the case.[101] With the DOJ's support, Qualcomm avoided liability.

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[94] *See, e.g.*, Statement of Interest on Behalf of the United States of America, Sitts v. Dairy Farmers of Am., Inc., No. 16-cv-00287 (D. Vt. July 27, 2020), ECF No. 285 (supporting plaintiffs' contention that monopsonies are not insulated from antitrust laws).

[95] 411 F. Supp. 3d 658, 669 (N.D. Cal. 2019), *rev'd and vacated*, 969 F.3d 974 (9th Cir. 2020).

[96] *See id.*

[97] *See id.* at 812, 818, 820–24; Statement of Interest of the United States, *Qualcomm*, 411 F. Supp. 3d 658 (No. 17-cv-00220), ECF No. 1487. The FTC's frustration with this filing is evident; it responded "to clarify that the FTC did not participate in or request [the DOJ's] filing" and to note its "disagree[ment] with a number of [the DOJ's] contentions." Plaintiff FTC's Response to Statement of Interest Filed by United States Department of Justice Antirust Division at 1–2, *Qualcomm*, 411 F. Supp. 3d 658 (No. 17-cv-00220).

[98] *See* United States' Statement of Interest Concerning Qualcomm's Motion for Partial Stay of Injunction Pending Appeal at 9, FTC v. Qualcomm Inc., 969 F.3d 974 (9th Cir. 2020) (No. 19-16122), ECF No. 25-1.

[99] *Qualcomm*, 969 F.3d at 982.

[100] Brief of the United States of America as Amicus Curiae in Support of Appellant and Vacatur at 1, *Qualcomm*, 969 F.3d 974 (No. 19-16122), ECF No. 86.

[101] *See id.* at 18–28 (arguing that Qualcomm could wholly refuse to sell modem chips to original equipment manufacturers who refused to sign a patent licensing agreement that prohibited reselling of Qualcomm's chips); *Qualcomm*, 969 F.3d at 982.

The Ninth Circuit accepted the DOJ's position, labeling Qualcomm's conduct hypercompetitive rather than anticompetitive.[102]

Reasonable minds can debate the correctness of the *Qualcomm* decision.[103] But what is concerning is the DOJ's decision to introduce its views in the first place by, quite publicly, stepping on the toes of the FTC. This conduct carries with it no small degree of irony. The FTC actively policed single-firm conduct while the DOJ adopted a hands-off approach to all Section 2 conduct.[104] Rather than stepping up its own Section 2 enforcement efforts, the DOJ has spent its limited resources chiding the FTC.

This is not the first conflict between the DOJ and the FTC.[105] The DOJ tried to impose its own antitrust policy in other actions undertaken by the FTC. For example, in *Schering-Plough Corp. v. FTC*, the FTC challenged Schering-Plough's reverse-settlement agreements with two generic manufacturers. In 2003, the FTC issued an administration decision finding that the agreements wrongfully permitted Schering-Plough to extend its monopoly power, but the Eleventh Circuit reversed.[106] The FTC appealed to the Supreme Court, at which point the DOJ, who had no prior involvement in the litigation, filed an amicus brief urging the high court to deny review.[107]

The Supreme Court accepted the DOJ's request and denied review.[108] In the years that followed, other circuits adopted the Eleventh Circuit's position, essentially insulating reverse-payment settlements from antitrust review. It was not until 2013, in *FTC v. Actavis, Inc.*, that the Supreme Court held that reverse-payment agreements are subject to antitrust scrutiny.[109] In doing so, the Court adopted the very same analysis the FTC urged in *Schering-Plough*.[110]

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[102] *Qualcomm*, 969 F.3d at 1005.

[103] *Compare, e.g.*, Erik Hovenkamp & Timothy Simcoe, *Tying and Exclusion in FRAND Licensing: Evaluating* Qualcomm, ANTITRUST SOURCE, Feb. 2020, at 1, 4 (2020), *and* Richard A. Epstein, *Judge Koh's Monopolization Mania: Her Novel Antitrust Assault Against Qualcomm Is an Abuse of Antitrust Theory*, 98 NEB. L. REV. 241, 242 (2019), *with* Brief for the American Antitrust Institute and Public Knowledge as Amici Curiae in Support of Plaintiff-Appelle, FTC v. Qualcomm Inc., 411 F. Supp. 3d 658 (N.D. Cal. 2019) (No. 17-cv-00220).

[104] AM. ANTITRUST INST., *supra* note 61, at 15 ("[T]he DOJ in particular has indicated through its inaction that it has no real interest in Section 2 enforcement.").

[105] *See, e.g.*, Daniel A. Crane, linkLine*'s Institutional Suspicions*, 2008–2009 CATO SUP. CT. REV. 111, 129 (2009) (analyzing FTC and DOJ "squabbles").

[106] Schering-Plough Corp. v. FTC, 402 F.3d 1056, 1065–66 (11th Cir. 2005).

[107] Brief for the United States as Amicus Curiae, FTC v. Schering-Plough Corp., 548 U.S. 919 (2006) (No. 05-273), 2006 WL 1358441.

[108] *Schering-Plough*, 548 U.S. 919.

[109] 570 U.S. 136 (2013).

[110] *The Standard Merger and Acquisition Reviews Through Equal Rules Act of 2015: Hearing on S. 2102 Before the Subcomm. on Antitrust, Competition Pol'y and Consumer Rts. of the S. Comm. on the Judiciary*, 114th Cong. 9–10 (2015) (prepared statement of the FTC), www.ftc.gov/system/files/documents/public_statements/810871/151007smarteracttestimony.pdf.

But the DOJ's interference contributed to almost a decade of underenforcement for such deals.

The DOJ continued to use others' pending suits to narrow the Sherman Act's reach in *linkLine*, which involved the market for digital subscriber lines (DSL) services.[111] Plaintiffs, affiliates of a regional telephone company, alleged that defendant Pacific Bell violated Section 2 of the Sherman Act by engaging in a price squeeze. Plaintiffs theorized the defendant raised its wholesale price, but lowered its retail price, to "squeeze" competitors' profit margins and drive them from the market.[112]

The defendant moved to dismiss, arguing that the price-squeeze claim was akin to a refusal to deal in a regulated market and thus not actionable after the Supreme Court's 2004 decision in *Trinko*.[113] The district court denied the motion, and the Ninth Circuit affirmed.[114] The defendant appealed to the Supreme Court.

The Court invited the solicitor general (SG) to weigh in on the appeal.[115] This invitation led to a subsequent public spat between enforcers. Though the SG represents both the FTC and the DOJ, only the DOJ joined the brief. The SG's amicus brief urged the Court to grant review and use the appeal as an opportunity to narrow the reach of Section 2 liability.[116]

The day after the amicus filing, the FTC issued a rare public statement explaining why it declined to join the brief.[117] To the FTC, the amicus brief was wrong on the procedure and wrong on the law.[118] Not only did the FTC

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[111] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 442 (2009).

[112] *Id.* at 449.

[113] Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004).

[114] linkLine Commc'ns, Inc. v. SBC Cal., Inc., 503 F.3d 876, 877 (9th Cir. 2007) (explaining that Section 2 includes a price squeeze claim even after *Trinko*, although AT&T was both a supplier and competitor who had no duty to deal), *rev'd sub nom. linkLine*, 555 U.S. 438.

[115] *See* Brief for the United States as Amicus Curiae at 1, *linkLine*, 555 U.S. 438 (No. 07-512), 2008 WL 2155265 ("This brief is submitted in response to the order of this Court inviting the Solicitor General to express the views of the United States.").

[116] In urging the Court to grant interlocutory review, the brief argued that the Ninth Circuit's opinion "threatens to chill retail price-cutting . . . and encourage litigation designed to protect competitors at the expense of competition, thereby undermining the procompetitive purposes of the antitrust laws and harming consumers." *Id.* According to the DOJ, "an inadequate margin" between wholesale and retail prices is not itself sufficient as a price-squeeze theory because it "involv[es] no allegations of predatory pricing, no breach of an antitrust duty to deal, and no conduct that harms competition in a way the antitrust laws forbid." *Id.*

[117] *Statement of the Federal Trade Commission: Petition for a Writ of Certiorari in* Pacific Tel. Co. d/b/a AT&T California v. linkLine Comms., Inc. *(No. 07-512)*, FED. TRADE COMM'N, web.archive.org/web/20130513010820/http:/www.ftc.gov/os/2008/05/P072104stmt.pdf.

[118] *Id.* at 6 ("There is *no* apparent justification, based on only a partial record of the plaintiffs' pleadings in this case, for turning back 60 years of case law that embraces price-squeeze claims under Section 2 of the Sherman Act.") (emphasis added).

perceive the appeal as premature,[119] it viewed the Ninth Circuit's decision as "unquestionably correct."[120] The FTC urged that price-squeeze claims fit within long-standing Section 2 precedent[121] and that *Trinko* "took great care" to preserve "claims that satisfy established antitrust standards."[122]

Ultimately, the Supreme Court granted review[123] and accepted the DOJ's limit on Section 2 claims, holding that linkLine owed its rivals no duty to deal.[124] Further, addressing the plaintiffs' assertion that the defendant's retail prices were too low, the Court applied the *Brooke Group* predatory pricing test, thereby holding that a price squeeze does not provide an independent theory of liability under Section 2.[125] Once again, the DOJ successfully pushed its own interpretation of the Sherman Act, despite fully knowing its views conflicted with a fellow, coequal enforcer.

The DOJ's insistence that only it can legitimately define anticompetitive conduct is concerning. This behavior undermines the very benefits of multiple regulators. Rather than allowing one enforcer to shore up oversight gaps, the DOJ's recent conduct creates cracks in enforcement. This is not just an issue of federal inaction; this is interference with federal action.

This assertion of primacy extends beyond interagency bickering. The DOJ also used pending private enforcement actions to push for less competition oversight. Consider the DOJ's efforts to loosen scrutiny for no-poach agreements.[126]

In the early 2010s, antitrust class actions successfully started seeking recovery for employees impacted by these unlawful restraints.[127] Then in 2016, the DOJ and the FTC issued joint guidance, warning that "going forward, the DOJ intends to proceed criminally against naked wage-fixing or no-poaching

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[119] *Id.* at 5.

[120] *See id.* at 3–4.

[121] *Id.*

[122] *Id.* at 3.

[123] Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 449 (2009).

[124] *Id.* at 450 (relying on the Court's conclusion in *Trinko* that "'insufficient assistance in the provision of service to rivals' did not violate the Sherman Act") (quoting Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398, 410 (2004)).

[125] *Id.* at 451 ("[A] plaintiff must demonstrate that: (1) 'the prices complained of are below an appropriate measure of its rival's costs'; and (2) there is a 'dangerous probability' that the defendant will be able to recoup its 'investment' in below-cost prices.") (quoting Brooke Grp. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 222–24 (1993)); *id.* at 452 ("If there is no duty to deal at the wholesale level and no predatory pricing at the retail level, then a firm is certainly not required to price *both* of these services in a manner that preserves its rivals' profit margins.").

[126] No-poach agreements are agreements between competitors to not hire away each other's employees, which restricts labor competition.

[127] *See, e.g.*, Seaman v. Duke Univ., No. 15-cv-462, 2019 WL 4674758 (M.D.N.C. Sept. 25, 2019).

agreements."[128] In 2019, the then-assistant attorney general doubled down on policing no-poach agreements, stating that combating such agreements "remains a high priority for the Antitrust Division."[129]

Notwithstanding these proclamations, state attorneys general and private enforcers—not the DOJ—took the laboring oar and filed suits challenging no-poach agreements.[130] In many cases, plaintiffs cited the guidelines to support per se treatment for naked agreements and quick look treatment for ancillary no-poach provisions.[131]

The DOJ then changed course, retreating from its all-out fight against no-poach agreements. It effectively created a liability carve-out for franchise agreements, claiming that such arrangements have potential efficiency gains—despite contrary conclusions by economists and policy think tanks.[132] This newfound tolerance overlooked the very significant horizontal effects of no-poach agreements.

While the DOJ certainly has the authority to define the scope of its own enforcement, it went a step further. The DOJ jumped into the fray by interfering with pending private enforcement litigation. It affirmatively sought to shield franchise agreements from rigorous antitrust scrutiny in three related no-poach cases involving fast food franchises.[133] All three cases involved em-

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[128] U.S. DEP'T OF JUST. & FED. TRADE COMM'N, ANTITRUST GUIDANCE FOR HUMAN RESOURCE PROFESSIONALS 4 (2016), www.justice.gov/atr/file/903511/download.

[129] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at the Public Workshop on Competition in Labor Markets (Sept. 23, 2019), www.justice.gov/d9/speeches/attachments/2019/09/23/delrahim_-_labor_workshop_opening_remarks_final_w_md_delivery_edits_formatted.pdf.

[130] *See, e.g.*, Jonathan Stempel, *Big Title Insurer Settles with New York Over 'No-Poaching' Agreements*, REUTERS (Sept. 9, 2021), www.reuters.com/business/big-title-insurer-settles-with-new-york-over-no-poaching-agreements-2021-09-09; Press Release, Pa. Off. of Att'y Gen., AG Shapiro Secures Win for Workers as Four Fast Food Chains Agree to End Use of No-Poach Agreements (Mar. 12, 2019), www.attorneygeneral.gov/taking-action/press-releases/ag-shapiro-secures-win-for-workers-as-four-fast-food-chains-agree-to-end-use-of-no-poach-agreements; Press Release, N.C. Dep't of Just., Attorney General Josh Stein Reaches Settlement with Fast Food Chains to End No-Poach Agreements (Mar. 2, 2020), ncdoj.gov/attorney-general-josh-stein-reaches-settlement-with-fast-food-chains-to-end-no-poach-agreements; *Seaman*, 2019 WL 4674758, at *1 (approving private enforcement no-poach antitrust settlement wherein the DOJ waited until after a settlement to join the suit).

[131] *See, e.g.*, Pittsburgh Logistics Sys. v. Beemac Trucking, LLC, 249 A.3d 918 (Pa. 2021); *see also* Nicole L. Castle & Matt Evola, *Insight: DOJ Distinguishes 'No-Poach' Franchise Agreements*, BLOOMBERG (Mar. 21, 2019), news.bloomberglaw.com/antitrust/insight-doj-distinguishes-no-poach-franchise-agreements.

[132] *See, e.g.*, Letter from Am. Antitrust Inst. to the U.S. Dep't of Justice (May 2, 2019), www.antitrustinstitute.org/wp-content/uploads/2019/05/AAI-No-Poach-Letter-w-Abstract.pdf (critiquing vertical no poach agreements).

[133] *See* Corrected Statement of Interest of the United States of America, Stigar v. Dough Dough, Inc., No. 18-cv-00244 (E.D. Wash. Mar. 8, 2019); *see also DOJ Weighs in on More Antitrust Cases, with Mixed Success*, MLEX (Oct. 1, 2019), mlexmarketinsight.com/insights-center/editors-picks/area-of-expertise/antitrust/doj-weighs-in-on-more-antitrust-cases-with-

ployee challenges to the restaurants' efforts to limit their ability to change stores or positions while working for the same franchise.[134]

The DOJ filed statements of support agreeing with the defendants' characterization of the provisions as ancillary to vertical restraints. Once viewed as ancillary, courts would apply the far more generous rule of reason analysis to such provisions. The DOJ's statements in these cases rippled through pending no-poach litigation nationwide, with additional courts beginning to apply the rule of reason to such cases—all but guaranteeing no liability for the defendant.[135]

The underbelly of this conduct exposes a presumption of primacy. Rather than a co-enforcer, the DOJ has posited itself as the "primary" authority. The DOJ's evolving diction in motions to intervene confirms that it views itself as the controlling source of antitrust policy. In earlier statements, the DOJ mentioned its "strong interest" in enforcing antitrust laws. More recent statements see the DOJ claiming the same "strong interest" in not just enforcing antitrust laws, but in interpreting procedural or constitutional concepts[136] that arise in antitrust cases, as well as at the intersection of antitrust and other areas of law.[137]

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mixed-success (explaining that the filings' purpose is to "address developments in the case law earlier and more frequently, offering [the DOJ] the opportunity to have an outsized impact with [the DOJ's] resources").

[134] Complaint, Stigar v. Dough Dough, Inc., No. 18-cv-00244 (E.D. Wash. Aug. 3, 2018); Complaint, Richmond v. Bergey Pullman Inc., No. 18-cv-00246 (E.D. Wash. Mar. 8, 2019); Complaint, Harris v. CJ Star, LLC, No. 18-cv-00247 (E.D. Wash. Mar. 8, 2019).

[135] *See, e.g.*, Deslandes v. McDonald's USA, No. 17-cv-4857, 2021 WL 3187668 (N.D. Ill. July 28, 2021) (denying class certification and stating that a rule of reason analysis would apply to the franchise no-poach agreement), *rev'd*, 81 F.4th 699, 703 (7th Cir. 2023) (holding that "the district judge jettisoned the *per se* rule too early"); Conrad v. Jimmy John's Franchise, No. 18-cv-00133, 2021 WL 3268339 (S.D. Ill. July 23, 2021) (same). Courts apply the more liberal rule of reason standard to ancillary agreements. *See* HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 255 (3d ed. 2005) ("Justice Brandeis' statement of the rule of reason . . . has been one of the most damaging in the annals of antitrust[,] [as it] has suggested to many courts that . . . nearly everything is relevant."); *see also* Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U. CAL. DAVIS L. REV. 1375 (2009) (discussing the deficiencies with rule of reason treatment).

[136] *See, e.g.*, Statement of Interest of the United States at 1, *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. 07-cv-05944 (N.D. Cal. Apr. 23, 2019), EFC No. 5457 ("The United States enforces the federal antitrust laws and has a strong interest in the proper interpretation of the jurisdictional limitations in cases involving foreign states set forth in the Foreign Sovereign Immunities Act, 28 U.S.C. § 1602 *et seq.* (FSIA)."); Brief of the United States as Amicus Curiae in Support of Neither Party, Mountain Crest SRL, LLC v. Anheuser-Busch InBev SA/NV, 937 F.3d 1067 (7th Cir. 2019) (No. 18-2327), 2019 WL 2144995 (stating a strong interest in state action doctrine).

[137] *See, e.g.*, Statement of Interest of the United States at 1, Cont'l Auto. Sys. v. Avanci, LLC, No. 19-cv-02933 (N.D. Tex. Feb. 27, 2020), ECF No. 278 ("The United States has a particular interest in this case because it involves the intersection of antitrust law and intellectual property rights, a topic which the United States has long studied and with which it has considerable enforcement experience.").

The DOJ's repeated challenges to others' enforcement efforts spoil the allowance of private and public shared oversight authority. Proclaiming conduct competitive, when others are denouncing the very same conduct, limits antitrust enforcement. It provides powerful anti-regulatory fodder to restrict competition oversight.

B. ANTIPATHY TOWARD PRIVATE ENFORCEMENT: UNDERMINING INDIRECT PURCHASERS

In addition to pronouncing narrowed antitrust policy, the DOJ has sought to control *when* and *who* can enforce antitrust laws. It has urged courts to limit indirect and direct purchaser suits. In doing so, the DOJ has risked essential private enforcement efforts.

As detailed in Part I, both indirect and direct purchasers play a role in antitrust enforcement. Indirect purchasers can seek monetary damages under state antitrust laws, whereas direct purchasers can recover under both federal and state law. Historically, the DOJ advocated for indirect purchaser standing. In urging the Supreme Court to permit this standing in *Illinois Brick*, the DOJ emphasized the indispensable nature of indirect purchaser suits:

> A suit by indirect purchasers . . . may be an important instrument in fulfilling [the goals of compensation and deterrence]. In many circumstances the indirect purchasers bear the brunt of the injury caused by violations of the antitrust laws; unless they may maintain a suit for damages, these injuries will go unredressed. In many cases the direct purchasers may elect not to sue, or not all will sue; when this happens the deterrence Congress sought to bring about through treble damages actions will not be achieved unless indirect purchasers are allowed to prove and collect their own damages.[138]

In its own words, indirect purchaser actions "permit achievement of the goals of compensating the victims of unlawful conduct and deterring other violations of the antitrust laws."[139] Without them, the DOJ feared that "the violator of the antitrust laws [would] retain the spoils of his misdeeds."[140]

The DOJ has since transformed from champion to challenger. Rather than recognizing indirect purchasers' value, the DOJ now asks courts to restrain this form of private enforcement. Take, for example, *Stromberg v.*

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[138] Brief for the United States as Amicus Curiae, Ill. Brick Co. v. Illinois, 431 U.S. 720 (1977) (No. 76-404), 1977 WL 205087, at *5.

[139] *Id.*

[140] *Id.* at *6.

Qualcomm,[141] the private enforcement suit filed after the FTC's action discussed in Part II.A.

Indirect purchasers sued Qualcomm for abusing its power in the phone modem chip market, seeking monetary relief unavailable in the earlier FTC suit. In relevant part, plaintiffs brought state law claims on behalf of a putative, nationwide indirect purchaser class.[142] In certifying the class, the district court also ruled on a horizontal choice of law question, holding that it could apply state substantive law, namely the Cartwright Act, to the class claims because the alleged wrongdoing took place in California, where Qualcomm was domiciled.[143]

Qualcomm appealed. The DOJ filed an amicus brief, siding with Qualcomm.[144] The DOJ argued against certification and the application of the Cartwright Act, slipping in slights about the propriety of certifying any multistate class.[145] The brief went beyond articulating antitrust policy to opining on procedural questions. In doing so, the DOJ subverted the potential reach of U.S. antitrust laws by undermining a fellow arm of enforcement.

At least as reflected in the amicus brief, according to the DOJ, indirect purchasers no longer serve as a crucial bastion of antitrust oversight. Instead, they are but excessive litigation that risk duplicative damages.[146] More troubling, though, is the DOJ's stated rationale for opposing certification. A nationwide class would include members from states that have not yet afforded indirect purchasers standing. The DOJ declared that such "costly indirect

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[141] Brief of the United States of America and the States of Louisiana, Ohio, and Texas as Amici Curiae in Support of Appellant at 1, Stromberg v. Qualcomm Inc., 14 F.4th 1059 (9th Cir. 2021) (No. 19-15159) [hereinafter Stromberg U.S. Amicus Brief]. Both the DOJ and FTC have made similar efforts to curtail private enforcement by foreign consumers. *See, e.g.*, Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Defendants-Appellees at 4, Empagran S.A. v. F. Hoffmann-LaRoche, Ltd., 417 F.3d 1267 (D.C. Cir. 2005) (No. 01-7115) (arguing that private enforcement suit brought by foreign plaintiffs for price-fixing would "diminish the deterrence of cartels by weakening the Department of Justice's antitrust amnesty program . . . [and] disrupt coordinated international anti-cartel enforcement").

[142] The district court previously dismissed the federal claims, leaving only state antitrust claims. *See In re* Qualcomm Antitrust Litig., 328 F.R.D. 280, 292 (N.D. Cal. 2018).

[143] *Id.* at 313–15.

[144] Stromberg U.S. Amicus Brief, *supra* note 141.

[145] *See generally id.*

[146] *See id.* at 10 (suggesting that certification would raise "risks of excessive litigation, duplicative damages, federal-state harmony, or other matters"). Many of these arguments mirror those raised by the DOJ in *Apple v. Pepper*, a consumer class action challenging Apple's use of its App Store as the exclusive means for the sale of iPhone apps. There, the DOJ sided with Apple, arguing that the plaintiffs could not pursue their claims because they were not direct purchasers. Brief for the United States as Amicus Curiae, Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019) (No. 17-204), 2018 WL 2131602 [hereinafter Apple DOJ Brief]. The Supreme Court ultimately rejected the DOJ's argument. *Apple*, 139 S. Ct. at 1525.

purchase class actions"[147] would run "contrary" to federal governmental policies because they undermine a state interest in not pursuing antitrust recovery.[148]

Unpacking this argument's faulty premises reveals an existential threat to both state and private enforcers. First, there is no federal policy that gives the DOJ the right to shape state antitrust laws.[149] But the DOJ argued that a protectable state interest limits antitrust recovery, and further, that the DOJ must advocate to protect this illusory interest. Building on this unsound foundation, the DOJ insisted that this protectable state interest in non-enforcement overrides other states' interests in regulating antitrust misconduct that occurs primarily within their own borders. Said bluntly, the DOJ prioritized the non-enforcement of antitrust laws over enforcement.

This chain of argument wholly ignores the role state law plays in U.S. competition oversight. As Part I notes, state antitrust law predates the Sherman Act and serves as an additional source to combat anticompetitive conduct. The Supreme Court has expressly rejected any argument that federal law "occup[ies]" the "field of antitrust law" and thereby preempts state law.[150] Thus, to claim that certifying a state class undermines federal governmental policy is nonsensical. In fact, the DOJ previously conceded the imperative role that state-law indirect-purchaser cases play in the "dual system of government" that "co-exist with federal remedies" for antitrust enforcement.[151]

More fundamentally, the DOJ's attack on private enforcement doubles down on debunked fears. Since *Illinois Brick*, more and more states have authorized indirect purchaser suits.[152] In actions under these *Illinois Brick* repealers, litigants and the judiciary have learned to manage the complexity of calculating damages in these cases.[153] Similarly, the worries of double recov-

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[147] Stromberg U.S. Amicus Brief, *supra* note 141, at 24. Yet, even states that turn to federal law to interpret state antitrust laws permit indirect purchaser suits. *See, e.g.*, Bunker's Glass Co. v. Pilkington PLC, 75 P.3d 99, 102–10 (Ariz. 2003) (holding that *Illinois Brick* is not binding on Arizona courts).

[148] Stromberg U.S. Amicus Brief, *supra* note 141, at 16.

[149] Three states—Texas, Louisiana, and Ohio—joined the DOJ in arguing there was a protectable state interest in *not* permitting antitrust enforcement. *Id.* at 1 (emphasis added).

[150] California v. ARC Am. Corp., 490 U.S. 93, 100–02 (1989).

[151] Brief for the United States as Amicus Curiae Supporting Appellants, *ARC Am.*, 490 U.S. 93 (No. 87-1862), 1988 WL 1026158, at *11–12.

[152] *See supra* notes 35–36 and accompanying text.

[153] *See, e.g.*, Mark A. Lemley & Christopher R. Leslie, *Antitrust Arbitration and* Illinois Brick, 100 IOWA L. REV. 2115, 2119–20 (2015) ("As a result, judges and scholars have developed a sophisticated body of law and economic thought on the problem of computing downstream overcharges, though that law has developed primarily in state, rather than federal, antitrust cases."); Apple Texas Amicus Brief, *supra* note 33, at 12–23 (arguing that, in the wake of *Illinois Brick*, many states have "allowed indirect purchasers to sue under state antitrust law, leading

ery proved illusory.[154] Even with most states permitting indirect purchaser claims, there is no evidence of duplicative damages.[155]

By attacking class actions, the DOJ jeopardizes the aggregation necessary for effective private enforcement.[156] As the DOJ itself acknowledged, "undercutting the incentives" for class actions risks competition oversight. Without class certification, the likelihood of any indirect purchaser recovery effectively disappears.[157]

The timing of the DOJ's newfound skepticism is particularly unfortunate: indirect purchasers are already under siege. A recent study of antitrust settlements uncovered that few indirect purchaser suits survive long enough to settle. As the study explains:

> [I]ndirect purchaser case[s] [are already] getting ensnared in procedural hurdles. Indirect purchaser complaints require more detailed allegations of harm, beyond alleging a conspiracy. Indirect purchasers also must allege that the defendants' wrongdoing harmed the direct purchasers. From there, they need plausible allegations that these direct purchasers passed on some of this supracompetitive pricing.[158] Post *Twiqbal*, a court can dismiss a complaint that fails

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to decades of experience that contradict the predictions and policy judgments underlying *Illinois Brick*").

154 As one court explained, "the district courts are fully capable of ensuring antitrust defendants are not forced to pay more in damages than amounts to which the injured parties are entitled." Comes v. Microsoft Corp., 646 N.W.2d 440, 449–50 (Iowa 2002) (citing *In re* W. Liquid Asphalt Cases, 487 F.2d 191, 201 (9th Cir. 1973) ("The day is long past when courts . . . will deny relief to a deserving plaintiff merely because of procedural difficulties or problems of apportioning damages.")); *see also* Apple Texas Amicus Brief, *supra* note 33, at 17–21 ("[T]he decades since *Illinois Brick* have been fertile ground for testing the seriousness of the risk that multiple victims' competing claims cannot be reconciled and result in duplicative liability. Experience has revealed that risk to be profoundly less serious than *Illinois Brick* speculated.").

155 "[T]here are few, if any, reported instances of a defendant paying treble damages to two different classes of purchasers based on a single antitrust violation." Hyde v. Abbott Lab'ys, Inc., 473 S.E.2d 680, 687 (N.C. Ct. App. 1996) (citing Thomas Greene, Should Congress Preempt State Indirect Purchaser Laws? Counterpoint: State Indirect Purchaser Remedies Should be Preserved, ANTITRUST, Fall/Winter 1990, at 25, 26–27); *see also* Apple Texas Amicus Brief, *supra* note 33, at 18–19 (citing additional sources).

156 *Cf. In re* Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig., 55 F.3d 768, 817 (3d Cir. 1995) ("The value of a class action depends largely on the certification of the class because, not only does the aggregation of the claims enlarge the value of the suit, but often the combination of the individual cases also pools litigation resources and may facilitate proof on the merits. Thus, the prospects for obtaining certification have a great impact on the range of recovery one can expect to reap from the action.").

157 *See* Christine P. Bartholomew, *Redefining Prey and Predator in Class Actions*, 80 BROOK. L. REV. 743, 777 (2015) ("The exceptional expense and time associated with pursuing complex litigation creates barriers few individuals choose to overcome—even if they can.").

158 *See, e.g.*, *In re* Lithium Ion Batteries Antitrust Litig., No. 13-md-2420, 2014 WL 4955377, at *13 (N.D. Cal. Oct. 2, 2014) ("[Indirect purchasers] allegedly paid the overcharge because it was 'passed on to them by direct purchaser manufacturers, distributors and retailers.'"); *In re* Pool Prods. Distrib. Mkt. Antitrust Litig., 946 F. Supp. 2d 554, 567–68 (E.D. La. 2013) (denying

> to sufficiently and plausibly allege either of these tracing requirements.[159] Those complaints that survive must then satisfy the more rigorous certification requirements now at play.[160] For multistate cases, these standards can be insurmountable.[161] On average, direct purchaser claims face 7.7 motions per case. Once an indirect purchaser claim is added, that number jumps to 20.13 motions per case.[162]

The DOJ's attack on private enforcement is not limited to *Stromberg* or indirect purchasers more generally.[163] It is, instead, a part of a dual challenge: the DOJ also urged the Supreme Court to adopt a more restrictive definition of direct purchasers. Coupled, this strategy threatens all private enforcement. Fewer consumers would qualify as direct purchasers, and those remaining would be swept into the tarnished label of indirect purchasers.

The DOJ's amicus brief In *Apple v. Pepper* were a part of this strategy.[164] The putative consumer class action alleged that Apple both monopolized and attempted to monopolize the market for iPhone apps. Apple successfully moved to dismiss federal claims, contending the plaintiffs were indirect pur-

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motion to dismiss because indirect purchasers sufficiently "alleged a distinct injury in the amount of an overcharge that was passed on to IPPs as a result of defendants' anticompetitive conduct").

[159] *See, e.g.*, *In re* Cast Iron Soil Pipe & Fittings Antitrust Litig., No. 14-md-2508, 2015 WL 5166014, at *22 (E.D. Tenn. June 24, 2015); *In re* Dairy Farmers, Inc., No. 2031, 2014 WL 553332, at *3 (N.D. Ill. Feb. 10, 2014); *In re* Photochromic Lens Antitrust Litig., No. 10-md-2173, 2011 WL 13141933, at *1 (M.D. Fla. Oct. 26, 2011); *In re* Ditropan XL Antitrust Litig., 529 F. Supp. 2d 1098, 1100 (N.D. Cal. 2007).

[160] *See* Bartholomew, *supra* note 51, at 1320–28 (detailing choice of law challenges for indirect purchaser cases).

[161] *See, e.g.*, *In re* Skelaxin (Metaxalone) Antitrust Litig., 299 F.R.D. 555, 588 (E.D. Tenn. 2014) (denying class certification to multi-state indirect purchaser claim because "[t]he antitrust laws of many states differ markedly"); *In re* Processed Egg Prods. Antitrust Litig., 312 F.R.D. 124, 165 (E.D. Pa. 2015) ("Because of the significant variability in the state laws Plaintiffs seek to apply, a more detailed plan for managing this proposed 'all-in-one' litigation would be necessary to meet the burden of showing this proposed class action is manageable.").

[162] Bartholomew, *supra* note 51, at 1353–54 (footnotes in original). "*Twiqbal*" is a colloquial term that refers collectively to *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

[163] The DOJ has repeatedly taken aim at class certification decisions. *See, e.g.*, Statement of Interest of the United States of America Regarding Proposed Amended Settlement Agreement, Authors Guild, Inc. v. Google Inc., 954 F. Supp. 2d 282 (S.D.N.Y. 2013) (No. 05-cv-8136), ECF No. 922 (challenging the adequacy of representation and the changes made to the proposed settlement). This is part of a larger attack by the DOJ on class certification more generally, not just in antitrust cases. *See, e.g.*, Brief for the United States as Amicus Curiae Supporting Neither Party, Goldman Sachs Grp., Inc. v. Ark. Tchr. Ret. Sys., 141 S. Ct. 1951 (2021) (No. 20-222) (opposing certification of shareholder class action).

[164] Apple DOJ Brief, *supra* note 146.

chasers.[165] After the Ninth Circuit reversed,[166] Apple appealed to the Supreme Court.[167]

The critical issue on appeal asked whether these consumers were direct purchasers. The plaintiffs maintained they were, urging a definition that focused specifically on the consumers' relationship vis-à-vis the alleged wrongdoer. They purchased apps directly from Apple, not from a middleman.[168] They were not "two or more steps removed [from the alleged monopolist] in a distribution chain."[169] Hence, the plaintiffs argued, they were sufficiently direct to have standing.

Apple, with the support of the DOJ, pushed the Court to adopt a restrictive definition of a direct purchaser. They asked the Court to consider whether the consumers' monetary claim implicates pass-on concerns, not whether the consumer purchased directly from a monopolist.[170] Under this restricted definition, only app developers are direct purchasers,[171] though they are unlikely to bite the hand that feeds by filing suit. Consumers, according to the DOJ's definition, would be indirect purchasers without standing since their purchases trigger pass-on concerns.

By the DOJ's own acknowledgment, this new definition of a direct purchaser would have significantly restricted private enforcement in the high-tech industry,[172] an area abounding with unresolved antitrust issues.[173] A putative defendant could safeguard against private antitrust exposure simply by taking a commission, rather than setting the retail price for a product.[174] The DOJ's briefing notably omitted any discussion of private enforcers' value. It also failed to justify how leaving private enforcement to app developers, i.e., direct purchasers with little economic incentive to sue, advances U.S. antitrust

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[165] *In re* Apple iPhone Antitrust Litig., No. 11-cv-06714, 2013 WL 6253147, at *1 (N.D. Cal. Dec. 2, 2013) (subsequent history omitted).

[166] *In re* Apple iPhone Antitrust Litig., 846 F.3d 313, 315 (9th Cir. 2017), *aff'd sub nom.* Apple Inc. v. Pepper, 139 S. Ct. 1514 (2019).

[167] Apple Inc. v. Pepper, 139 S. Ct. 1514, 1520 (2019).

[168] *Id.* at 1521.

[169] *Id.* at 1520.

[170] Apple DOJ Brief, *supra* note 146, at 18.

[171] As Apple and the DOJ framed the facts, the harm suffered by these plaintiffs "depends on an allegation that an unlawful overcharge imposed on a third party [the app developers] was passed on to them." *Id.* at 21.

[172] As the DOJ stated, "other existing and emerging e-commerce platforms use similar [distribution] models," and such business models were "increasingly common." *Id.* at 21.

[173] *See, e.g.*, Thomas B. Leary, Comm'r, Fed. Trade Comm., Antitrust in a Technology Economy: What's New and What's Not, Remarks at the Stanford Conference on Antitrust in the Technology Economy (June 6, 2003) (describing the "serious unresolved antitrust issues" in the high-tech industry).

[174] *Cf.* Apple Inc. v. Pepper, 139 S. Ct. 1514, 1522–23 (2019) ("Apple's line-drawing does not make a lot of sense, other than as a way to gerrymander Apple out of this and similar lawsuits.").

enforcement goals. Instead, the DOJ cited worries "rooted in . . . [issues] specific to monetary relief."[175]

The Supreme Court eventually rejected the DOJ's characterization.[176] But the fact that the DOJ would urge such a definition highlights a serious fissure in U.S. antitrust enforcement. Had the DOJ succeeded, it would have blocked a large swath of private enforcement.[177]

Only by coupling *Apple* and *Stromberg* does the true danger of the DOJ's behavior come into focus. Read together, the DOJ has used pending co-enforcer litigation to push an anti-class-action agenda. The DOJ would restrict who is a direct purchaser, pushing more consumers into the indirect purchaser category, then limit when and how this larger category of indirect purchasers can aggregate their claims. The combined effect would mean less private antitrust enforcement, thereby undermining the gains of this key component of competitive market oversight.

C. HANDICAPPING OTHER ENFORCERS

The DOJ adopts a third behavior that constricts the potential of overlapping enforcement. Beyond restricting what is enforceable and by whom, the DOJ prioritizes its own investigations without regard to the impact on other regulators. To sequence parallel enforcement to its will, the DOJ has requested or supported stays of class actions while it undertakes criminal investigations. This Part explains this type of interference and the danger from the resulting stays.

Historically, when a class action overlapped with a pending criminal investigation, the DOJ walked a middle ground. The DOJ opposed subpoenas seeking grand jury documents,[178] but it rarely weighed in on defendants' requests to stay or delay discovery in civil cases.[179] The DOJ effectively respected private enforcers' work while still safeguarding its own investigations.

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[175] Apple DOJ Brief, *supra* note 146, at 12.

[176] *Apple*, 139 S. Ct. at 1519.

[177] The DOJ has offered support for other exceptions to *Illinois Brick*, including the co-conspirator exception. Under this exception, a consumer can recover damages arising out of an agreement that is part of an antitrust conspiracy. *See* Brief for the United States of America as Amicus Curiae in Support of Appellants and Vacatur at 8, Marion Healthcare, LLC v. Becton Dickinson & Co., No. 18-3735 (7th Cir. Apr. 25, 2019). But support for this exception would not negate the harm to enforcement that would result from the DOJ's restrictive definition of a direct purchaser in *Apple v. Pepper*.

[178] *See, e.g.*, Brief for the United States, *In re* Flat Glass Antitrust Litig., No. 90-3498 (3rd Cir. Dec. 7, 1998).

[179] *See, e.g.*, *In re* Blood Reagents Antitrust Litig., 756 F. Supp. 2d 623 (E.D. Penn. 2010); Golden Quality Ice Cream Co. v. Deerfield Specialty Papers, Inc., 87 F.R.D. 53 (E.D. Pa. 1980).

Starting in 2000, and led by the San Francisco office,[180] the DOJ began pushing to stay parallel civil cases.[181] These requests initially asked for short-term stays of six to eight months and reserved the right to renew.[182] The reach of the requests varied from delaying discovery of grand-jury-related materials,[183] to pausing discovery from any party (leaving only third-party discovery available),[184] to halting all merits discovery.[185] While most of its stay requests pertained to private enforcement actions, the DOJ has also sought to stay state attorneys general actions.[186]

Certainly, legitimate reasons exist for a particular criminal investigation to precede a civil action.[187] But what was once the exception soon became the DOJ's default position.[188] And in making these requests, the DOJ overlooks the danger that its push to lead poses to enforcement as a whole. Further, the

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[180] *See* Bradley S. Liu et al., *Increased DOJ Intervention to Stay Discovery in Civil Antitrust Litigation*, ANTITRUST LITIGATOR, Spring 2009, at 1 (discussing "[t]he San Francisco Field Office's pattern of intervention in private lawsuits").

[181] For example, in *Scrap Metal*, both the defendants and the DOJ sought to stay all discovery other than discovery related to class certification for an eight-month period—even though it had yet to issue any indictment. *See In re* Scrap Metal Antitrust Litig., No. 02-cv-0844, 2002 WL 31988168, at *7 (N.D. Ohio Nov. 7, 2002) (denying the request after noting that "[t]he [c]ourt has an obligation to move its docket, and not to let cases languish before it").

[182] *See, e.g.*, United States' Motion for a Limited Stay of Discovery, *In re* Optical Disk Drive Prods. Antitrust Litig., No. 10-md-02143 (N.D. Cal. May 20, 2010), ECF No. 68 [hereinafter Optical Disk Motion for Stay]; *see also* Order, SEC v. LeCroy, No. 09-cv-02238, 2011 WL 13233788, at *1 n.1 (N.D. Ala. Mar. 23, 2011) ("DOJ reserved its right to request further stay of discovery in this case.").

[183] *See, e.g.*, Order Re Stay of Discovery at 3–4, *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 07-md-01827 (N.D. Cal. May 27, 2008) ("The Stay Order shall continue to prohibit all discovery . . . that refer[s], reflect[s] or relate[s] to any party's or witness' communications with the United States or with the grand jury."); Stipulation and Order Limiting Scope of Discovery, *In re* Dynamic Random Access Memory (DRAM) Antitrust Litig., No. 02-md-01486 (N.D. Cal. Apr. 16, 2003).

[184] *See, e.g.*, The United States' Motion to Intervene and Stay Discovery, *I*n re Broiler Chicken Antitrust Litig., No. 16-cv-08637 (N.D. Ill. June 21, 2019).

[185] *See, e.g.*, Order Granting in Part Motions to Amend the Scheduling Order to Add New Parties, *In re* Packaged Seafood Prods. Antitrust Litig., No. 15-md-2670, 2018 WL 1726571, at *3 n.4 (S.D. Cal. Apr. 10, 2018) (discussing DOJ's stay); Report and Recommendation of Special Master, *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. 07-cv-5944, 2016 WL 721680, at *6 (N.D. Cal. Jan. 28, 2016) (subsequent history omitted) (same).

[186] *See, e.g.*, Intervenor United States' Motion to Stay Discovery, In re Generic Pharms. Pricing Antitrust Litig., No. 16-md-02724 (E.D. Pa. May 1, 2017).

[187] *See, e.g.*, Note, *Using Equitable Powers to Coordinate Parallel Civil and Criminal Actions*, 98 HARV. L. REV. 1023, 1038–44 (1985) (discussing "the benefits and costs of stays").

[188] *See, e.g.*, Order on Motion by DOJ to Intervene and Stay Discovery, *In re* Rambus Inc., FTC Docket No. 9302 (Dec. 18, 2002); Stipulation and Order Limiting the Scope of Discovery, *In re* DRAM Antitrust Litig., No. 02-md-01486 (N.D. Cal. Apr. 16, 2003), ECF No. 89; Stipulation and Order to Stay All Deposition and Interrogatory Discovery, *In re* Static Random Access Memory (SRAM) Antitrust Litig., No. 07-md-01819 (N.D. Cal. June 12, 2007), ECF No. 208 [hereinafter SRAM Stay Order]; Order Granting United States' Motion to Stay Discovery, *In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 07-md-01827 (N.D. Cal. Sept. 25, 2007), ECF No. 300 [hereinafter TFT-LCD Stay Order].

DOJ's stay motions read as more concerned with shielding defendants than with protecting antitrust enforcement.

A civil stay is an "extraordinary remedy appropriate for extraordinary circumstances."[189] As the Sixth Circuit explains, "nothing in the Constitution requires a civil action to be stayed . . . pending the outcome of criminal proceedings."[190] Timing also matters: "the case for a stay is strongest where the defendant has already been indicted, whereas pre-indictment requests for a stay . . . are usually denied."[191]

Defendants usually seek a post-indictment stay by making two claims. First, a stay is necessary to protect the defendant's Fifth Amendment right against self-incrimination.[192] Second, a stay protects against the prosecution using the broader scope of civil discovery to gather evidence otherwise unavailable, given the more restrictive scope of criminal discovery.[193]

Prejudice to the defendant, though, is not the only consideration. Courts must also consider: (1) prejudice to the plaintiff, (2) judicial efficiency, (3) the interests of non-parties, and (4) the public interest.[194] Rather than considering all five factors, the DOJ focuses its efforts on two: prejudice to the defendant and a narrow definition of public interest.[195]

In its stay motions, the DOJ flips the traditional arguments. It is the DOJ who raises the defendant's Fifth Amendment rights—sometimes even in cases involving a corporate defendant with no such cognizable right.[196] As for pub-

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[189] Weil v. Markowitz, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987).

[190] FTC v. E.M.A. Nationwide, Inc., 767 F.3d 611, 627 (6th Cir. 2014).

[191] Chao v. Fleming, 498 F. Supp. 2d 1034, 1037 (W.D. Mich. 2007) (collecting cases); *see also* Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc., 175 F. Supp. 2d 573, 577 (S.D.N.Y. 2001) (recognizing that "a party seeking a stay bears a heavier burden when he has not yet been indicted").

[192] *See, e.g.*, Ticor Title Ins. Co. v. Brezinski, No. 08-cv-333, 2009 WL 305810, at *1 (N.D. Ind. Feb. 9, 2009).

[193] *See, e.g.*, Curry v. Gonzales, No. 20-cv-00116, 2021 WL 1060770, at *1 (D.N.M. Mar. 18, 2021) (discussing defendant's argument that a stay is necessary "to prevent the exposure of [his] criminal defense strategy to the prosecution"); *In re* Adelphia Commc'ns Sec. Litig., No. 02-cv-1781, 2003 WL 22358819, at *3 (E.D. Pa. May 13, 2003) ("[T]he indicted defendants risk exposing their criminal defense strategy during civil discovery.").

[194] *See, e.g.*, SEC v. Glob. Express Cap. Real Est. Inv. Fund, 289 F. App'x. 183, 191 (9th Cir. 2008); Fed. Sav. & Loan Ins. Corp. v. Molinaro, 889 F.2d 889, 902–03 (9th Cir. 1989).

[195] Another common refrain in these requests for stays is that prior courts have allowed them. *See, e.g.*, Optical Disk Motion for Stay, *supra* note 182, at 3–4 (listing prior stay orders, including stipulated stays). This argument fails to recognize that the presumption is against such stays. *See, e.g.*, Gordon v. FDIC, 427 F.2d 578 (D.C. Cir. 1970).

[196] This argument is asserted even when it is not applicable to the given case, such as when the defendant is a corporation and therefore does not have Fifth Amendment rights. *See, e.g.*, Direct Purchaser Plaintiffs' Memorandum of Points and Authorities in Opposition to the United States' Motion for a Stay at 4, *In re* Optical Disk Drive Prods. Antitrust Litig., No. 10-md-02143 (N.D. Cal. June 3, 2010) (pointing out none of the corporate defendants involved have Fifth Amend-

lic interest, the DOJ inverts the second standard argument for a stay. It contends that stays are necessary to ensure that a criminal defendant would not use discovery from a private enforcement case to undermine a criminal investigation—whether by gleaming grand jury information or attempting witness intimidation.[197]

The legitimacy of these concerns is difficult to discern because the stay motions rely heavily on boilerplate provisions. Take, for example, In re *Optical Disk*, where direct purchasers alleged a cartel among optical disk drive manufacturers.[198] These private enforcers sued after the DOJ served grand jury subpoenas on some defendants, but prior to any indictments.[199] The DOJ moved to stay merits discovery for a minimum of 12 months, with the option to later renew the request.[200] In addition to broadly asserting a public interest in shielding criminal investigations,[201] the DOJ argued that a stay was essential to protect against the defendants testifying in the class action before resolution of the criminal investigation.[202]

The district court eventually denied the request, but the DOJ's argument in *Optical Disk* is troubling. It overlooks how halting private enforcers compromises victim compensation—a key goal of antitrust.[203] Long-term stays hinder class counsel's ability to prove their claims. Before the resolution of a criminal investigation, key cartel members are more likely to assert Fifth Amendment protection during civil depositions.[204] This assertion triggers a vital boon: it allows private enforcers to request that the factor finder draw a negative inference,[205] easing the uphill battle of proving complex antitrust

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ment rights) (citing Bellis v. United States, 417 U.S. 85, 90 (1974) ("[N]o artificial organization may utilize the personal privilege against compulsory self-incrimination.")).

[197] *See, e.g.*, Optical Disk Motion for Stay, *supra* note 182 (arguing that a stay was necessary to protect the secrecy of the grand jury investigation); *see also* Kellie Lerner & Elizabeth Friedman, *DOJ Stays are Often Unfair to Private Antitrust Plaintiffs*, LAW360 (Mar. 3, 2014) (describing the DOJ's arguments for staying parallel antitrust proceedings).

[198] *In re* Optical Disk Drive Antitrust Litig., No. 10-md-2143, 2011 WL 3894376, at *1 (N.D. Cal. Aug. 3, 2011).

[199] *Id.* at *5.

[200] Optical Disk Motion for Stay, *supra* note 182.

[201] *See id.* at 10.

[202] *Id.* at 5–6.

[203] *See, e.g.*, Pfizer, Inc. v. India, 434 U.S. 308, 314 (1978); Steven B. Pet, *Preserving Antitrust Class Actions: Rule 23(b)(3) Predominance and the Goals of Private Antitrust Enforcement*, 12 VA. L. & BUS. REV. 149, 152 (2017).

[204] *See, e.g.*, Mark D. Hunter, *SEC/DOJ Parallel Proceedings: Contemplating the Propriety of Recent Judicial Trends*, 68 MO. L. REV. 149, 162 (2003) (discussing privilege and parallel proceedings).

[205] *See, e.g.*, SEC v. Rehtorik, 755 F. Supp. 1018, 1020 (S.D. Fla. 1990) (permitting the drawing of adverse inferences in civil securities fraud suit).

claims.[206] But by pushing for stays, the DOJ would remove this leverage from private enforcers.[207]

Judicial response to the DOJ's requests has been mixed. Some courts find the DOJ's stay requests specious, grounded more in fearmongering than evidence.[208] Many other courts, though, grant the stay motions in part or in whole with little analysis.[209]

As courts defer to the DOJ's blanket requests, the risk to parallel enforcement grows. Lengthy stays risk antitrust's compensatory goals by weakening the integrity of evidence.[210] Criminal antitrust investigations can take years[211] and frequently result in no restitution for victims.[212] Instead, restitution is left

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[206] *See, e.g.*, *In re* Auto. Parts Antitrust Litig., No. 12-cv-00103, 2018 WL 11373135, at *6 (E.D. Mich. Nov. 8, 2018) (discussing how large scale antitrust class actions are "among the most difficult and complex actions to prosecute"); *In re* Chicken Antitrust Litig., 560 F. Supp. 957, 960 (N.D. Ga. 1980) ("While securities and antitrust lawyers might disagree over which kind of case is most difficult, generally all would agree that antitrust litigation presents a trying task for even the most accomplished trial attorney.").

[207] *See* Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc., 175 F. Supp. 2d 573, 578 (S.D.N.Y. 2001) ("Forcing a defendant to choose between waiving his Fifth Amendment privilege or suffering the adverse inference which results in the civil case from invoking his privilege does not violate due process.") (cleaned up) (citing United States v. Kordel, 397 U.S. 1, 9–10 (1970)); *see also In re* CFS-Related Sec. Fraud Litig., 256 F. Supp. 2d 1227, 1239 (N.D. Okla. 2003) ("Plaintiffs correctly argue that the stay should be denied to require [the defendant] to assert his Fifth Amendment privilege so that Plaintiffs can preserve any right to a negative inference in the civil proceeding. A stay would preclude or delay Plaintiffs' right to such negative inferences.").

[208] *See In re* Blood Reagents Antitrust Litig., 756 F. Supp. 2d 623, 636 (E.D. Pa. 2010) ("[T]he potential prejudice to defendants and third-parties is, at this pre-indictment period of time, speculative.").

[209] *See, e.g.*, SRAM Stay Order, *supra* note 188; TFT-LCD Stay Order, *supra* note 188. It is unsurprising that plaintiffs' counsel stipulated to these stays. Given the power dynamic involved, private enforcers must tread lightly with the DOJ Antitrust Division. Antitrust class action attorneys are repeat players and rely on a viable working relationship with the DOJ in pending and future litigation. As the issues raised in Parts I.A and B highlight, plaintiffs' counsel may have reasons to worry that upsetting the DOJ could hinder success of the private enforcement effort.

[210] *See, e.g.*, Blue Cross & Blue Shield of Ala. v. Unity Outpatient Surgery Ctr., 490 F.3d 718, 724 (9th Cir. 2007) (discussing how stays trigger the "danger of denying justice by delay") (quoting Am. Mfrs. Mut. Ins. Co. v. Edward D. Stone, Jr. & Assocs., 743 F.2d 1519, 1524 (11th Cir. 1984)); *cf.* SEC v. Dresser Indus., 628 F.2d 1368, 1377 (D.C. Cir. 1980) ("If [the DOJ] moves too slowly the statute of limitations may run, witnesses may die or move away, memories may fade, or enforcement resources may be diverted.").

[211] *See, e.g.*, Howard W. Fogt, *What's Next for the Auto Industry in 2015? On the Antitrust Horizon*, WESTLAW J. AUTO., Apr. 7, 2015, 2015 WL 1539785, at *1 (discussing the DOJ's ten-year criminal antitrust investigation of the auto parts industry).

[212] *See* In re Plastics Additives Antitrust Litig., No. 03-2038, 2004 WL 2743591, at *1, 7 (E.D. Pa. Nov. 29, 2004) (noting that DOJ's investigation began nearly two years prior and that, although two grand juries were "currently proceeding in secret," "no indictment [had been] handed down in either of the grand jury proceedings"); In re Plastics Additives Antitrust Litig., No. 03-2038, 2006 WL 6172035 (E.D. Pa. Aug. 31, 2006) (approving settlement following DOJ investigation that resulted in no indictment).

to private enforcement.[213] But with time, memories fade.[214] Witnesses move. Coffers dry up.[215] Document preservation orders can offset some of these realities, but few cartel agreements are written out.[216]

Beyond compromising evidence, the DOJ's push for early, frequent stays jeopardizes indirect purchasers' ability to recover.[217] For instance, 15 U.S.C. § 16(i) tolls the statute of limitations for antitrust claims against any conspirator the DOJ sues as well as those it "alleges and proves during trial . . . were co-conspirators."[218] But currently, it is unclear whether this tolling applies to state antitrust claims.[219]

Given these windfalls and others,[220] the DOJ's overprotection hands antitrust defendants a boon. Defendants almost certainly prefer a stay. It saves them money from having to pay for attorneys simultaneously on two fronts.[221] It also affords an opportunity to try out different litigation strategies. Offensive collateral estoppel only comes into play after a final judgment in a prior

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[213] *See* U.S. DEP'T OF JUSTICE, ANTITRUST DIVISION WORKLOAD STATISTICS FY 2010–2019, 12 n.24, www.justice.gov/atr/file/788426/download ("Frequently restitution is not sought in criminal antitrust cases, as damages are obtained through separate treble damage actions filed by the victims.").

[214] Edward/Ellis v. New United Motors Mfg. Inc., No. 07-cv-05452, 2008 WL 4712602, at *1 (N.D. Cal. Oct. 22, 2008) (denying a stay because of "the risk of witnesses' memories fading or witnesses becoming unavailable in the course of the requested six-month stay").

[215] *See, e.g.*, eBay Inc., v. Digit. Point Sols., Inc., No. 08-cv-04052, 2010 WL 702463, at *5; *In re* CFS-Related Sec. Fraud Litig., 256 F. Supp. 2d 1227, 1239 (N.D. Okla. 2003) ("Delay could impact the Plaintiffs' ability to collect on a judgment and be made whole."); Sterling Nat'l Bank v. A-1 Hotels Int'l, Inc., 175 F. Supp. 2d 573, 579 (S.D.N.Y. 2001) ("Permitting a further delay during which assets can be dispersed or hidden—or called upon for the expensive business of defending a grand jury investigation and potential criminal litigation—will increase the risks that plaintiff could succeed in the litigation, without being able to collect on any judgment.").

[216] Christopher R. Leslie, *How to Hide a Price-Fixing Conspiracy: Denial, Deception, and Destruction of Evidence*, 2021 U. ILL. L. REV. 1199, 1219–21 (2021).

[217] *Cf. In re* Scrap Metal Antitrust Litig., No. 02-cv-0844, 2002 WL 31988168, at *5 (N.D. Ohio Nov. 7, 2002) ("Plaintiffs, as class representatives, have an obligation to the class to attempt to maximize the possible recovery against all potential Defendants.").

[218] Zenith Radio Corp. v. Hazeltine Rsch., Inc., 401 U.S. 321, 335 (1971); Hinds Cnty. v. Wachovia Bank N.A., 885 F. Supp. 2d 617, 629 (S.D.N.Y. 2012).

[219] *Compare In re* Reformulated Gasoline (RFG) Antitrust & Patent Litig., No. 05-ml-01671, 2006 WL 7123690, at *15–16 (C.D. Cal. June 21, 2006) (holding that an FTC action tolled the Cartwright Act claims), *with In re* TFT-LCD (Flat Panel) Antitrust Litig., No. 07-md-01827, 2013 WL 1164897, at *4 n.3 (N.D. Cal. Mar. 20, 2013) (dismissing claims where "Plaintiffs concede that . . . 15 U.S.C. § 16(i) does not toll state law claims" under the Cartwright Act).

[220] Such stays reduce the potential for settlement and negate the benefits of cooperation in the private enforcement by those defendants who seek leniency under the Antitrust Criminal Penalty Enhancement and Reform Act (ACPERA). *See, e.g.*, Kevin J. Lynch, *When Staying Discovery Stays Justice: Analyzing Motions to Stay Discovery When a Motion to Dismiss is Pending*, 47 WAKE FOREST L. REV. 71 (2012).

[221] *See, e.g.*, 8 KEITH MILLER, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS § 92:18 (Robert L. Haig ed., 5th ed. 2021) (discussing "the financial burden of the dual litigations").

proceeding.[222] The doctrine does not apply to arguments a defendant makes in a prior government action that settles. This means, for example, that a defendant can experiment with contrary positions in private and government litigation as to whether its conduct was anticompetitive.[223]

Unlike the speculative risks to criminal investigations feared by the DOJ, the negative impact of a stay is all too real. Consider In re *Cathode Ray*, an antitrust class action alleging a worldwide conspiracy to fix prices for cathode ray tubes, a key component in televisions and computer monitors.[224] Purchaser plaintiffs filed suit following the DOJ's announcement of a criminal investigation. The DOJ moved to intervene and stay the action[225]—before issuing any indictments or convening a grand jury.

What started as a six-month stay expanded to two years. The DOJ had assured the trial court that the stay would not prolong or delay civil litigation.[226] It even contended that a stay would assist private enforcers.[227] None of these promises came to pass. The DOJ eventually settled with one of the defendants and indicted three executives—notably fewer than what other international governmental agencies eventually charged.[228] Moreover, the settlement only addressed a sliver of the product market, compared to the market targeted by the pending class actions. As the special master noted, the stay "ultimately increased the challenges of obtaining documents and finding witnesses who could remember anything."[229]

To the extent the DOJ worries about the sanctity of its investigations, it has options other than stays.[230] It already benefits from special protection of its

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[222] *See, e.g.*, Montana v. United States, 440 U.S. 147, 153–55 (1979) (spelling out the requirements for offensive collateral estoppel); GAF Corp. v. Eastman Kodak Co., 519 F. Supp. 1203, 1211–12 (S.D.N.Y. 1981) (same).

[223] *See, e.g.*, *In re* High-Tech Emp. Antitrust Litig., 856 F. Supp. 2d 1103, 1110 (N.D. Cal. 2012) (refusing to apply issue preclusion as to the defendant's prior concession of anticompetitive conduct to the DOJ in a subsequent private enforcement action).

[224] *In re* Cathode Ray Tube (CRT) Antitrust Litig., 738 F. Supp. 2d 1011, 1016 (N.D. Cal. 2010).

[225] *See* United States' Motion for a Limited Stay of Discovery, *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. 07-cv-05944 (N.D. Cal. July 7, 2008), 2008 WL 2843763.

[226] *Id.* at *6.

[227] *Id.* at *4–5.

[228] *See, e.g.*, Report and Recommendation Regarding Indirect Purchaser Plaintiffs' Motion for Class Certification, *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. 07-cv-05944, (N.D. Cal. June 20, 2013), 2013 WL 5429718, at *4 (detailing findings by other international antitrust authorities), *adopted*, No. 07-cv-05944, 2013 WL 5391159 (N.D. Cal. Sept. 24, 2013).

[229] Report and Recommendation of Special Master, *In re* Cathode Ray Tube (CRT) Antitrust Litig., No. 07-cv-5944, 2016 WL 721680, at *45 (N.D. Cal. Jan. 28, 2016) (subsequent history omitted).

[230] *See In re* Scrap Metal Antitrust Litig., No. 02-cv-0844, 2002 WL 31988168, at *7 (N.D. Ohio Nov. 7, 2002) (denying stay request because the DOJ "can take measures other than imposing a complete stay of discovery that would minimize the Government's concerns while, at the

grand jury investigations: Federal Criminal Procedure Rule 6(e) protects "matter[s] occurring before the grand jury."[231] Such matters include transcripts, witness lists, and internal investigative reports.[232] This protection extends beyond the grand jury empanelment and exists regardless of whether the grand jury issues an indictment.[233] The DOJ can also seek protective orders to avoid additional disclosures.[234]

Given these safeguards, the DOJ's motivation for changing course and interfering with parallel enforcement is unclear. The DOJ cites no evidence backing its notion that parallel antitrust litigation ever actually undermined criminal investigations. Without such proof, this push for stays raises the specter that the DOJ protects its conviction success rate at a cost to greater overall enforcement—particularly when coupled with the DOJ's other efforts to solely define the perimeters of antitrust enforcement.

III. MITIGATING CONFLICT BETWEEN ENFORCERS

Overlapping antitrust enforcement should mean greater economic oversight. It ensures that more eyes surveil for corporate malfeasance and stand ready to protect competition. But as Part II demonstrates, current enforcement does not live up to its potential because of strife and interference among enforcers.

This Part urges regulators to mitigate conflict and its aftermath. It proposes simple guiding principles, or a set of practices, to guide the workings between public and private antitrust enforcement. It then proposes the creation of an

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same time, allowing discovery to proceed"); *cf.* SEC v. Balwani, No. 18-cv-01603, 2019 WL 2491963, at *4 (N.D. Cal. June 14, 2019) (denying a DOJ request to stay a parallel SEC proceeding, stating that "[t]he Court is not unsympathetic to DOJ's concerns that [defendant] may attempt to overreach in civil discovery, but the Court is capable of addressing such concerns with a scalpel instead of a saw").

[231] FED. R. CRIM. P. 6(e).

[232] *See* Andrea M. Nervi, *FRCrP 6(e) and the Disclosure of Documents Reviewed by a Grand Jury*, 57 U. CHI. L. REV. 221, 226 (1990) ("Certain classes of materials, such as transcripts of grand jury proceedings and the names of witnesses testifying before the grand jury, are clearly 'matters occurring before the grand jury.' But once we move beyond these areas of universal agreement, the phrase 'matters occurring before the grand jury' poses problems.") (footnote omitted); *id.* at 244 (addressing the secrecy of reports "prepared specifically for the investigation").

[233] *Id.* at 230.

[234] *See e.g.*, In re High Fructose Corn Syrup Antitrust Litig., 216 F.3d 621, 624 (7th Cir. 2000) (noting the district court's "power under the Federal Rules of Civil Procedure to limit, by protective order or otherwise, . . . disclosure of the contents of the recordings [that] may infringe the privacy of parties to the recorded conversations beyond what the plaintiffs require to prosecute their antitrust case effectively"); *In re* Packaged Ice Antitrust Litig., No. 08-md-01952, 2011 WL 1790189, at *6 (E.D. Mich. May 10, 2011) ("The DOJ's concern with the incidental disclosure of private information can be addressed through this Court's *in camera* review of the recordings, which will precede any public disclosure.").

Antitrust Working Group to operationalize these principles. Of late, discussion about antitrust coordination mostly focuses on the DOJ and FTC.[235] These dialogues need a wider scope to include state attorneys general and private enforcers.

A. PRINCIPLES OF OVERLAPPING ENFORCEMENT

Rigid rules are an ill-fit for institutional relations. They can hamstring enforcers' ability to respond to changing political agendas and judicial attitudes.[236] Instead, guiding principles construct a more responsible, responsive, and flexible structure. This Part offers three such principles: (1) maximize the benefits of having multiple enforcers; (2) avoid "mission drift"; and (3) ensure that agencies stay in their own enforcement lane. These broad strokes trade exacting specificity for a starting point to revitalize U.S. antitrust enforcement.

1. *Maximize the Benefits of Multiple Enforcers*

First, regulators should strive to ensure that collective antitrust enforcement is greater than the sum of its parts. This principle starts with acknowledging the pernicious effects of existing discord.[237] Once recognized, enforcers can realign litigation strategies to maximize overlapping enforcement.

Some degree of conflict is inherent as the number of potential of enforcers increases.[238] Reasonable minds will differ on, e.g., which claims to pursue and the precise demarcation between competitive and anticompetitive conduct. And to be clear, not all strife between enforcers is inherently bad. Conflict is sometimes the byproduct of healthy disagreement. It can reflect a functional

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[235] *See* Huffman & Heidtke, *supra* note 84, at 98 ("Antitrust does not rely on neutral or foresighted regulators. The competitive, belts and suspenders form of antitrust enforcement mitigates both of these concerns."); *see also* Kevin J. O'Conner, *Federalist Lessons for International Antitrust Convergence*, 70 ANTITRUST L.J. 413, 424 (2002) ("This diversity of potential enforcers motivated by varying incentives has resulted in an active antitrust litigation environment in the United States.").

[236] *See* Christopher T. Wonnell, *Market Causes of Constitutional Values*, 45 CASE W. RSRV. L. REV. 399, 453 (1995) ("As institutions regulating private behavior have evolved, the trend has been to see wisdom in legal 'flexibility' and discretion, opposing arbitrary and 'rigid' rules that would preclude adaptation to circumstances."); *cf.* Craig Anthony (Tony) Arnold, *Adaptive Water Law*, 62 KAN. L. REV. 1043, 1075 (2014) ("Institutions cannot adapt to disturbances or changes if their decision makers lack discretion and flexibility, because they are bound by rigid, narrow rules.").

[237] *See supra* Parts I.A–C.

[238] *See* Deborah Platt Majoras, *Recognizing the Significance of Prosecutorial Discretion in a Multi-Layered Antitrust Enforcement World*, 11 GEO. MASON L. REV. 121, 124 (2002) ("Multi-layered enforcement systems also present the potential for conflict and interference within the multiple-layer scheme. With various enforcers pursuing different—and often conflicting—goals, the potential for conflicting or inconsistent results is always present.").

system of checks and balances among equal co-enforcers.[239] Disagreement shows enforcement is not artificially constrained by groupthink.[240] It can even evidence functional competition among overlapping enforcers, competition that ensures each enforcer "work[s] harder and more creatively . . . to correct mistakes made by another entity."[241]

But the acrimony detailed in Part II crosses from healthy to destructive conflict.[242] In doing so, it poses an existential hazard to overall competition oversight. Disagreement among multiple enforcers may be inherent; interference—undertaking conduct that undermines another enforcer based on disagreements—is not. As enforcers interfere with each other, they forgo the positive externalities of coordination, such as information sharing or expertise.[243] With infighting exhausting limited time and monetary resources, antitrust oversight falls secondary to overseeing other enforcers. Rather than conflict that could spur antitrust enforcement to new heights, this strife drives down enforcement.

Further, Part II details the type of interference between enforcers that breeds institutional mistrust. Public spats between antitrust enforcers risk policy makers, either Congress or the judiciary, affording less value to the positions asserted by any single enforcer.[244] Professor Daniel Crane best explains this fallout:

> Agency antitrust information already has to compete with other modules of information—i.e. other agencies, private litigants, state attorneys general, bodies of scholarship. When the two agencies dis-

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[239] The psychologist Irving Jannis first coined the term groupthink. *See* Anna Schmidt, *Groupthink*, BRITANNICA, www.britannica.com/science/groupthink ("[Groupthink is a] mode of thinking in which individual members of small cohesive groups tend to accept a viewpoint or conclusion that represents a perceived group consensus, whether or not the group members believe it to be valid, correct, or optimal. Groupthink reduces the efficiency of collective problem solving within such groups."). Jannis conducted studies to understand the flawed decision-making behind Pearl Harbor, the Vietnam War, and the Bay of Pigs invasion. *Id.*

[240] *See* Cass R. Sunstein, *Deliberative Trouble? Why Groups Go to Extremes*, 110 YALE L.J. 71, 105 (2000).

[241] *See* Anne Joseph O'Connell, *The Architecture of Smart Intelligence: Structuring and Overseeing Agencies in the Post-9/11 World*, 94 CAL. L. REV. 1655, 1677 (2006).

[242] *See* CRANE, *supra* note 81, at 45 (explaining how interagency fights are not "merely 'healthy dissent'").

[243] *Cf.* O'Connell, *supra* note 241, at 1681 ("[C]ompetition among agencies or committees may prevent critical cooperation among entities.").

[244] In one article, scholars advocate for the collapsing of the two federal agencies into one in the wake of friction, but they also discuss the Senate's reaction to the friction between federal agencies. *See, e.g.*, John O. McGinnis & Linda Sun, *Unifying Antitrust Enforcement for the Digital Age*, 78 WASH. & LEE L. REV. 305, 331–32 (2021) (noting a "new high" in the "turf wars" between the FTC and the DOJ in pursuing antitrust violations against "Big Tech": "lawmakers criticized the agencies for not challenging mergers involving the Big Four, with one representative calling the agencies 'paralyzed.' Congress did not hold back in noting the severe inefficiencies of the current dual system.").

> agree, their cumulative influence falls more than their cumulative influence rises when they agree. It is easy to dismiss entirely the competing positions advanced by the agencies on the theory that "if the antitrust agencies can't agree among themselves, why should we listen to them at all."[245]

Nonetheless, the judiciary and policy makers still need to make decisions about difficult competition policy questions. As enforcers collide, antitrust decision-making occurs in the absence of a true adversarial system. There is no one left to advocate for competition oversight against those seeking to avoid the reach of antitrust laws. With agencies in conflict, their voices drown each other out. Public fighting between antitrust enforcers risks courts looking elsewhere for answers—answers that those who oppose greater enforcement are happy to provide.

Unfortunately, private enforcers cannot fill the information void that results from agency-to-agency fights. Anti-class-action backlash has already discredited this arm of enforcement.[246] Class action critics have waged successful campaigns in both the legal courts and the courts of public opinion.[247] For every judicial decision commending the quality, skill, and aptitude of private enforcers,[248] there are opinions laden with judicial skepticism toward class

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[245] CRANE, *supra* note 81, at 45–46.

[246] Perhaps the best example of how private enforcers are already nominalized is the Antitrust Modernization Commission. In 2005, Congress created the first commission since World War II, authorizing review of U.S. antitrust laws. The members were bipartisan, but hardly representative of those actually engaged with day-to-day enforcement of antitrust laws. There were individuals with ties to the FTC and DOJ. There were multiple members with ties to antitrust defense firms. And there was even one panel member with at least some tangential relationship to state enforcement. But notably absent from the group were any individuals who could represent private enforcers or the consumers they represent. *See* Douglas C. Nelson, *Antitrust Modernization Commission Goes to Work*, 17 LOY. CONSUMER L. REV. 121, 121–22 (2014) (detailing the composition of the AMC).

[247] *See, e.g.*, Bartholomew, *supra* note 157, at 758–69 (detailing the attack on class actions and its impact on private enforcement).

[248] *See e.g.*, *In re* LTL Shipping Servs. Antitrust Litig., No. 08-md-01895, 2009 WL 323219, at *18 n.10 (N.D. Ga. Jan. 28, 2009) (commending counsel for doing "a remarkable job in distilling complex and important issues into concise briefing," and stating that "[t]he fairness and effectiveness of the advocacy is appreciated by the Court and is an increasingly rare commodity"); *In re* Folding Carton Antitrust Litig., 84 F.R.D. 245, 268 (N.D. Ill. 1979) (recognizing "high degree of skill employed by the attorneys for the plaintiff class"); *see also In re* Tampico Fiber Antitrust Litig., No. 94-1692, 1995 WL 20418, at *2 (E.D. Pa. Jan. 13, 1995) (commending counsel's efficiency); *In re* High Fructose Corn Syrup Antitrust Litig., 261 F. Supp. 2d 1017, 1026 (C.D. Ill. 2003) ("The Court takes this opportunity to commend all counsel who have worked on this case for their civility and professionalism.").

actions.[249] Hence, the public quarreling of the nature detailed in Part II weakens antitrust oversight at a point in history when the need is critical.[250]

Rather than recognizing the danger of inter-enforcer conflict, some may dismiss the DOJ's recent behavior as an aberration—the conduct of a particular DOJ administration during a peculiar period of political dissonance. And admittedly, the current DOJ has charted a different path. But such a dismissal is counterfactual. Certainly, the DOJ's conduct during the Trump administration exemplifies the apex of potential interference with other enforcers. Not surprisingly, then, many of this article's examples stem from that time period.

The examples discussed herein, however, do not exist in isolation. This article details intra-enforcer interference spanning twenty years and three administrations.[251] The root of the problem lies in the relationships among the enforcers—relationships long plagued by conflict. A particular administration might just be more or less willing to exploit that weakness.

The DOJ under the Trump administration was more likely to weaponize this weakness; it seems the current DOJ is not. Nonetheless, the DOJ under the Biden administration has not undertaken enough action to repair its damaged relationships. It has signaled some interest in collaboration,[252] but even under this potentially more antitrust-friendly administration, collaboration dis-

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[249] *See, e.g.*, Rutstein v. Avis Rent-A-Car Sys., Inc., 211 F.3d 1228, 1241 n.21 (11th Cir. 2000) (describing the putative class as nothing more than blackmail); Perez v. Metabolife Int'l, Inc., 218 F.R.D. 262, 276 (S.D. Fla. 2003) (same); *see also In re* Prempro, 230 F.R.D. 555, 573 (E.D. Ark. 2005) ("Some judges and courts cast a rather jaundiced eye upon class actions, and use strong language in doing so.").

[250] *See, e.g.*, *Proposals to Strengthen the Antitrust Laws and Restore Competition Online: Hearing Before the Subcomm. on Antitrust, Com., & Admin. L. of the H. Comm. on the Judiciary*, 116th Cong. 5 (2020) (testimony of Bill Baer, Visiting Fellow, Governance Stud., The Brookings Inst.) (discussing the need to "tak[e] a hard look at changes to current law that will encourage the courts and empower the antitrust enforcers to be more assertive in challenging conduct and consolidation that risks creating or enhancing market power").

[251] *See, e.g.*, *supra* Part II.A (referencing DOJ interference with FTC litigation).

[252] For instance, the head of Biden's Antitrust Division speaks of greater collaboration efforts pursued by the DOJ. But when working with groups outside the realm of the federal government, this is purely in a consultative state, not a necessarily collaborative one. *See* Jonathan Kanter, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Just., Remarks Before the New York State Bar Association Antitrust Section (Jan. 24, 2022) [hereinafter Kantor N.Y. Bar Remarks], www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-delivers-remarks-new-york ("[T]ogether with the FTC, we have requested public comment on the existing Horizontal and Vertical Merger Guidelines. This marks the beginning of a process of *consultations* with state enforcers, other government agencies, businesses, trade and labor groups, scholars and the American people.") (emphasis added); Jonathan Kanter, Assistant Att'y Gen., Antitrust Division, U.S. Dep't of Just., Opening Remarks at 2022 Spring Enforcers Summit (Apr. 4, 2020) [hereinafter Kantor Summit Remarks], www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-delivers-opening-remarks-2022-spring-enforcers (speaking about the collaboration initiatives through other federal agencies).

cussions focus on linking public enforcers.[253] Such discussions still leave out private enforcers, failing to build the much-needed bridges that link public and private enforcement. Said simply, such action is still too little, too late. It fails to remediate the institutional weaknesses that allowed the examples of interference set out in this article to occur. Hence, there remains very real reason for concern that the DOJ under next administration, or the one that after that, could retread the path widened by the DOJ under the Trump administration.

The inter-enforcer disagreements described in Part II differ from fights between other agencies, where attempting to fulfill one agency's charge conflicts with another agency's responsibility.[254] Antitrust enforcers, on the other hand, share a dual mission: to encourage procompetitiveness and discourage anticompetitive conduct. Each antitrust enforcer can fulfill its mission without actively interfering with the efforts of others. Each can and should simply agree to disagree.

But ideally, enforcers would go further in adjusting their behavior. To fully maximize the intentional, overlapping design features of the Clayton Act, enforcers should adopt litigation strategies that anticipate future enforcement. As part of plea deals, for example, the DOJ should push not only for meaningful restitution, but should also anticipate private enforcement. Any leniency agreement should hinge on defendants' full cooperation with both government and private enforcers.[255]

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[253] For example, the DOJ and eight state attorneys general recently joined forces to take on Google. *See* Complaint, United States et al. v. Google, LLC, No. 23-cv-00108 (E.D. Va. Jan. 24, 2023). The agencies still appear to leave out private enforcers, even in a consultative role, while expanding coordination to other federal agencies outside simply the FTC and the DOJ, such as the Department of Labor. *See* Kantor N.Y. Bar Remarks, *supra* note 252 ("[T]he department is eager to help other federal departments and agencies win cases targeting anticompetitive conduct that violates industry-specific statutes."); Kantor Summit Remarks, *supra* note 252 ("We also have greatly expanded partnerships in support of competition with numerous other agencies, including DOL, DOD, DOT and the CFPB.").

[254] For example, the Federal Bureau of Investigation and the Department of Defense adopted differing stances regarding judicial authority to hack a defendant's iPhone. These stances reflected the agencies' competing charges. *See generally* Daniel A. Farber & Anne Joseph O'Connell, *Agencies as Adversaries*, 105 CAL. L. REV. 1375 (2017) (providing a thorough analysis of inter-agency conflict).

[255] The DOJ has entered plea deals that only require cooperation with the government investigation. *See, e.g.*, Plea Agreement, United States v. BNP Paribas USA, Inc., No. 18-cr-00061 (S.D.N.Y. Feb. 2, 2018); Guilty Plea and Plea Agreement, United States v. Johnston, No. 09-cr-00014 (N.D. Ga. Jan. 15, 2009). This broader cooperation requirement should apply to the underlying allegations, not a particular product market or limited legal theory pursued by a public enforcer. Private enforcement often reaches greater wrongdoing. *See* Bartholomew, *supra* note 51, at 1339 & nn.146–48 (detailing class action settlements that expanded the scope of wrongdoing, amount recovered, or number of defendants from prior government suits). Such cooperation is consistent with what ACPERA's benefits mandate. As explained by Senator Orrin Hatch, the sponsor of ACPERA, this law helps incentivize reporting, but in exchange, "corporations and their executives [must] provide adequate and timely cooperation to both the Government investi-

Similarly, this same awareness of future parallel litigation should guide forum selection. The DOJ recently issued updated guidance on its arbitration case selection criteria.[256] Like other methods of alternative dispute resolution, arbitration has the potential to streamline and reduce litigation expenses for the DOJ.[257] But it comes at a cost to overall enforcement efforts. A successful arbitration decision is unlikely to have preclusive effect or provide *stare decisis* for subsequent follow-on cases.[258] With government arbitration, private enforcers must duplicate the same litigation in any follow-on suit, resulting in wasteful duplication. Once the DOJ considers the impact on enforcement, the calculus for arbitration changes. Arbitration becomes best reserved for experimenting with different enforcement efforts or pursuing novel economic theories.[259]

In a similar vein, while criminal and civil enforcement cases cannot be consolidated,[260] more robust coordination and information sharing should be the norm because "[c]o-operation among antitrust authorities facilitates the effective and efficient enforcement of antitrust laws and thus the maintenance of competition in markets."[261] At a minimum, the government should share information a defendant produces with others spearheading supplemental en-

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gators as well as any subsequent private plaintiffs bringing a civil suit based on the covered criminal conduct." 150 Cong. Rec. S3614 (daily ed. Apr. 2, 2004) (statement of Sen. Orrin Hatch).

[256] Press Release, U.S. Dep't of Just., Justice Department Issues Guidance on the Use of Arbitration and Launches Small Business Help Center (Nov. 12, 2020), www.justice.gov/opa/pr/justice-department-issues-guidance-use-arbitration-and-launches-small-business-help-center. For most private enforcement actions, there is rarely a true choice in whether to proceed with arbitration. Arbitration provisions are enforceable even in contracts of adhesion. *See* Am. Express Co. v. Italian Colors Rest., 570 U.S. 228, 235 (2013) (upholding application of a forced arbitration provision that foreclosed even antitrust class actions).

[257] *See* Thomas A. Manakides, *Arbitration of "Public Injunctions": Clash Between State Statutory Remedies and the Federal Arbitration Act*, 76 S. CAL. L. REV. 433, 479 (2003) ("The hallmark of arbitration is that it can streamline the process and allow for a more efficient resolution of the conflict.").

[258] *See* Jack Boeglin & Julius Taranto, *Stare Decisis and Secret Law: On Precedent and Publication in the Foreign Intelligence Surveillance Court*, 124 YALE L.J. 2189, 2190 (2015) (discussing how arbitrations "generally lack stare decisis norms altogether").

[259] Such experimentation is not new. *See, e.g.*, Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 DUKE L.J. 673, 709 (2003) (detailing federal agency experimentation for enforcing differing economic restraints). But that experimentation, coupled with concepts of preclusion and stare decisis, can be risky. *See* Jonathan B. Baker, *The Problem with* Baker Hughes *and* Syufy*: On the Role of Entry in Merger Analysis*, 65 ANTITRUST L.J. 353, 365–71 (1997) (describing the harm caused by some key defeats).

[260] United States v. Dentsply Int'l, Inc., 190 F.R.D. 140, 144 (D. Del. 1999) ("Congress has articulated a strong public policy against combining antitrust complaints brought by the Government with private antitrust damages suits.").

[261] John J. Parisi, *Cooperation Among Competition Authorities in Merger Regulation*, 43 CORNELL INT'L L.J. 55, 55 (2010) (discussing coordination in the context of international agencies).

forcement.[262] This includes disclosing the identity of amnesty applications, as well as actual discovery.[263]

Greater coordination can minimize duplicative litigation efforts and cost. It can also maximize gains, particularly when coordination is bilateral.[264] When private enforcers file suit prior to a criminal investigation, the government can benefit from the broader scope of civil discovery. Such access could expand an existing investigation to new markets and additional wrongdoers, or it could revive previously set aside investigations.

Similarly, the federal government can benefit from coordination with state enforcement. While both federal agencies have staff acting as liaison with state attorneys general, more synchronization is needed. State public enforcers have more agility than their federal counterparts.[265] This advantage is particularly true for localized anticompetitive conduct.[266] State attorneys general often face fewer bureaucratic hurdles before taking action. This, coupled with a broad investigatory authority, affords them an advantage they can share with others.[267]

When the federal government undertakes its investigation first, coordination with subsequent private and state enforcement actions also has gains. Sharing information with private enforcers can help victims recover faster and with lower attorney fees and costs.

Enforcers can only reap these gains by functioning as part of a whole. As the Supreme Court has recognized, there is a strong "public interest in vigilant enforcement of the antitrust laws."[268] To serve this interest, each enforcer should pursue greater antitrust results than possible by any single actor. Ad-

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[262] To the extent there are concerns with confidentiality, parties can rely on gag orders or protective orders as necessary.

[263] *See, e.g.*, Michael D. Hausfeld et al., *Observations from the Field: ACPERA's First Five Years*, 10 SEDONA CONF. J. 95, 105 (2009) (detailing incidents when early disclosure of the applicant has benefited enforcement efforts).

[264] To be clear, the argument here is not for allocation of enforcement obligations. The DOJ and the FTC have tried such allocation in reviewing proposed mergers. The result has been less than optimal. *See* Mengmeng Shi, *Merger Divestitures Under the Dual Enforcement Mechanism: Whether a Convergence Exists Between the FTC and the DOJ*, 37 WHITTIER L. REV. 267, 267–68 (2015) ("The FTC and DOJ's close collaboration of merger control seems to have satisfying results. However, less satisfactory results are those concerning the two competition agencies' different merger divestiture policies, which may result in less transparency, certainty and predictability of the merger control system."); *see also* Jessica C. Strock, Note, *Setting the Terms of a Break-Up: The Convergence of Federal Merger Remedy Policies*, 53 WM. & MARY L. REV. 2147, 2157 (2012) (discussing how such coordination has resulted in delay).

[265] *See* Mark Totten, *The Enforcers & the Great Recession*, 36 CARDOZO L. REV. 1611, 1655 (2015).

[266] *See* Calkins, *supra* note 259, at 680.

[267] *See* Totten, *supra* note 265, at 1653–54.

[268] Lawlor v. Nat'l Screen Serv. Corp., 349 U.S. 322, 329 (1955).

mittedly, reoriented arbitration decisions and greater coordination efforts are minor adjustments. But small moves matter. Even minor adjustments start to repair fractured enforcer interactions.

2. *Avoid Mission Drift*

A second guiding principle urges a return to basics. When deciding whether to act, private and public enforcers should evaluate whether the action achieves the twin goals of the Clayton Act: maximizing deterrence and compensation. At first read, this recommendation reads as clichéd. But the DOJ's conduct since the early 2000s uncovers a worrisome degree of what this article calls "mission drift," whereby an enforcer strays too far from its enforcement duty. As this Part explains, mission drift undermines the system of multiple enforcers—a pivotal, defining feature of the nation's antitrust design.[269] Furthermore, losing sight of deterrence and compensation goals wastes finite resources and chances enforcers becoming pawns of larger political machinations.

Mission drift takes different forms and "prompt[s] concerns that [an enforcer] is prioritizing side projects over its main job: vigorous enforcement of the antitrust laws."[270] First, an enforcer diverges from its mission when it shifts from enforcer to deregulator. This happens when its policy work swings from preventing or eliminating "practices that interfere with free competition,"[271] to restricting the reach of antitrust laws.[272] This Part focuses on a secondary form of mission drift. This form occurs when an enforcer squanders its limited funding and manpower to regulate other enforcers, and it includes pushing deregulator policies on other enforcement authorities through statements of interest or motions to intervene.

To be sure, not all policy work undermines antitrust enforcement. And certainly, all antitrust enforcers set policy. Private enforcers set policy by pursuing claims ignored by government regulators[273] and by expanding previous investigations.[274] The FTC and the DOJ share the authority and responsibility for articulating national merger policies. Each agency also issues guidance to

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[269] *See supra* Part I.B.

[270] Letter from David N. Cicilline, Chairman, Subcomm. on Antitrust, Com., and Admin. L. of the H. Comm. On the Judiciary, to Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just. 1 (May 22, 2019), web.archive.org/web/20220104055320/https://cicilline.house.gov/sites/cicilline.house.gov/files/documents/DOJ_05222019.pdf.

[271] Howard Feller & Robert F. Leibenluft, *Antitrust in the Healthcare Field: Antitrust Issues Involving Allied Health Providers*, AHLA-PAPERS P02259920, at 2 (Feb. 25, 1999).

[272] *See supra* Part II.A (discussing the DOJ's statements of interest and amicus briefs arguing for restrictions on the reach of antitrust laws).

[273] *See supra* note 6 and accompanying text.

[274] *See supra* note 4 and accompanying text.

businesses that request an enforcer's interpretation of anticompetitive conduct.[275]

But when a single regulator forces its own "interpretations of the antitrust laws – which apply in both private and government cases,"[276] it floats adrift from its central mission. Nor should any potential enforcer thrust its definition of "what conditions will make the market most dynamic, innovative and competitive"[277] onto the nation as a whole. Doing so exceeds any single enforcer's authority and risks U.S. competition oversight overall. Each antitrust enforcer's interpretation is equally valid; no single regulator controls.[278]

Rather, the judicial, legislative, and executive branches collectively define antitrust policy gradually, over time, with influence from all enforcers.[279] Antitrust policies evolve through "bringing sound, limited enforcement actions, attempting to clarify the law to facilitate the ability of firms to compete, and focusing on real world results rather than ideological battles."[280] Multiple voices have particular value in a field like antitrust, where changing economic theory can radically alter enforcement policy.[281] That one agency views a par-

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[275] *See, e.g.*, 28 C.F.R. § 50.6 ("[T]he [DOJ] Antitrust Division has been willing in certain circumstances to review proposed business conduct and state its enforcement intentions."); 16 C.F.R. § 1.1 ("Any person, partnership, or corporation may request advice from the [FTC] with respect to a course of action which the requesting party proposes to pursue.").

[276] *Oversight of the Enforcement of the Antitrust Laws: Hearing Before the Subcomm. on Antitrust, Competition Pol'y & Consumer Rights of the S. Comm. on the Judiciary*, 116th Cong. 13 (2019) (statement of Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just.).

[277] Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Keynote Address at the LeadershIP Conference on IP, Antitrust, and Innovation Policy (Apr. 10, 2018), www.justice.gov/opa/speech/assistant-attorney-general-makan-delrahim-delivers-keynote-address-leadership-conference.

[278] To the extent any enforcer has a historical claim to justify a policymaker role, it would be the FTC, not the DOJ. *See* Bush, *supra* note 13. Even when one agency seeks clearance from another, it does not preclude dual action with each agency applying its own understanding of liability. See, e.g., Oversight of Antitrust Enforcement: Hearings Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary, 95th Cong. 357 (1977) (testimony of Owen M. Johnson, Jr., Dir., Bureau of Competition, Fed. Trade Comm'n) ("It is important to note that the so-called 'clearance' process does not constitute in any way an abdication of either agency's enforcement responsibilities, and both agencies are free under the agreement to proceed in the same matter.").

[279] *See* Kovacic, *supra* note 64, at 397.

[280] David A. Balto, *Antitrust Enforcement in the Clinton Administration*, 9 CORNELL J.L. & PUB. POL'Y 61, 132 (1999).

[281] *See generally* William E. Kovacic & Carl Shapiro, *Antitrust Policy: A Century of Economic & Legal Thinking*, 14 J. ECON. PERSPS. 43 (2000) (detailing the interplay between evolving economic theory and antitrust policy); Luke M. Froeb, Bruce H. Kobayashi & John M. Yun, *Organizational Form and Enforcement Innovation*, *infra* this issue, 85 ANTITRUST L.J. 297, 310–28 (2023).

ticular restraint as more or less competitive is not decisive, nor should the judiciary defer to the judgment of a single agency.[282]

Avoiding mission drift has equal importance in overlapping public and private enforcement. Congress explicitly permits states and private parties to recover for antitrust damages and injunctive relief.[283] These cases also play a role in defining competition policy and rest on equal footing with public enforcement efforts.[284] But an enforcer drifts from its assigned mission when it intervenes in pending litigation, only to undermine the legal theory asserted by a fellow enforcer. And in doing so, it reduces, rather than promotes, compensation and deterrence.

Additionally, avoiding mission drift protects against politics manipulating antitrust enforcement. Agency capture is a particular concern for the DOJ. This concern includes the potential that agencies pursue or avoid antitrust probes because of political reasons, rather than competition-related grounds.[285] Changing political heads can radically alter competition philosophy.[286] When mission drift occurs, it risks these ideological shifts seeping across all enforcement efforts. Though the judiciary is not obligated to defer to the DOJ's policy decisions,[287] such statements are still dangerous. They instantly become a weapon in an alleged wrongdoers' arsenal.[288]

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[282] *Cf.* Himes, *supra* note 48, at 95 ("The marketplace impact of anticompetitive conduct does not depend on the identity of the plaintiff who exposes the unlawful activity.").

[283] *See, e.g.*, 15 U.S.C. §§ 4, 15, 15c, 25, 26.

[284] *See, e.g.*, California v. Am. Stores Co., 495 U.S. 271, 284 (1990) ("Private enforcement of the [Clayton] Act was in no sense an afterthought; it was an integral part of the congressional plan for protecting competition.").

[285] *See, e.g.*, Elias Statement, *supra* note 61 (detailing politically motivated antitrust investigations launched under Attorney General William Barr); *see generally* Lancieri, Posner & Zingales, *supra* note 59.

[286] *See* J. Thomas Rosch, Comm'r, Fed. Trade Comm'n, Remarks Before the ABA Antitrust Section, Rewriting History: Antitrust Not as We Know It . . . Yet 4 (Apr. 23, 2010), www.ftc.gov/sites/default/files/documents/public_statements/rewriting-history-antitrust-not-we-know-it. . .yet/100423rewritinghistory.pdf ("[A]nyone who has ever complained that the government's antitrust enforcement efforts are too unpredictable should not only point a finger at the divergence between the agencies, but should blame the ying yang that goes on every four or eight years when there is a changing of the guard in the White House and at the DOJ.").

[287] The judiciary can assist in avoiding mission drift by applying a more rigorous review of motions to intervene. *See* FED. R. CIV. P. 24(a)(2) (requiring intervention only when the applicant "claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest"). The judiciary should scrutinize an enforcer's request to intervene when that enforcer opted against filing its own investigation or litigation. At that point, the applicant lacks a protectable property interest sufficient to justify intervention—just because one enforcer sues for wrongdoing that also falls within the realm of another enforcer's authority does not automatically satisfy the showing required.

[288] *See, e.g.*, Conrad v. Jimmy John's Franchise, LLC, No. 18-cv-00133, 2019 WL 2754864, at *2 (S.D. Ill. May 21, 2019) (discussing defendant's reliance on a DOJ statement of interest to

Further, submitting advocacy briefs supporting alleged antitrust wrongdoers does little to advance enforcement. As the Supreme Court stated, "the purposes of the antitrust laws are best served by insuring that the private action will be an ever-present threat to deter anyone contemplating business behavior in violation of the antitrust laws."[289] The Clayton and Sherman Acts authorize private and public enforcers to file lawsuits to combat anticompetitive conduct—not to fight other enforcers. Nor do defendants necessarily need aid; antitrust defendants are often well funded and represented by some of the biggest names in law.[290] It is fair to assume that their counsel will make the arguments necessary to protect their clients.[291]

In short, by mitigating mission drift, each enforcer can focus more squarely on its own active investigations. If an enforcer intercedes in another's action, its mission should focus on strengthening compensation and deterrence. This can include expanding the allegations of wrongdoing or broadening the recovery sought. In undertaking policy work, enforcers can minimize mission drift through transparency. Wherever possible, agency policy statements should reflect the positions of all enforcers. Speeches, white papers, and policy statements encapsulated in amicus briefs or statements of interest should spell out how the policy position advances antitrust enforcement as a whole—not just a single enforcer's definition of appropriate competition policy. Authored materials should identify and explain any disagreement among enforcers. Further, policy positions seeking to narrow the reach of enforcement need greater justification, particularly when the policy statement scales back a prior regulatory policy. These safeguards are far from exhaustive. But without them, it is far too easy for a public enforcer to turn quasi-legislator, at the detriment to antitrust enforcement efforts.

3. *Share the Enforcement Lane*

Once reoriented toward enforcement, enforcers should then avoid procedural mechanisms that block fellow enforcers. A corollary to fending off mission drift, this third principle aims squarely at managing parallel litigation. Each

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justify more lenient antitrust scrutiny); Molly Edgar, Note, *The DOJ's Role in the Franchise No-Poach Problem*, 72 HASTINGS L.J. 1573, 1593 (2021) ("The shift in the DOJ's position on no-poach agreements has left courts reluctant to determine which standard is appropriate when reviewing no-poach agreements and has provided support to defendants in these actions.").

[289] Perma Life Mufflers, Inc. v. Int'l Parts Corp., 392 U.S. 134, 139 (1968).

[290] *See* Joshua P. Davis & Eric L. Cramer, *A Questionable New Standard for Class Certification in Antitrust Cases*, ANTITRUST, Fall 2011, at 31, 35 ("The reality is that defendants in antitrust class actions generally are large, well-funded corporations. They have a high tolerance for risk, the capital to fund protracted litigation and to pay for high-quality counsel, and the benefit of the interest-free use of money until they ultimately pay to resolve a legal action.").

[291] *See* Bruce D. Greenberg, *Keeping the Flies Out of the Ointment: Restricting Objectors to Class Action Settlements*, 84 ST. JOHN'S L. REV. 949, 959 (2010) (explaining how in class actions, defendants are regularly "represented by top-flight counsel").

enforcer needs room to decide when and how to fulfill their procompetitive function. Public and private enforcers should take steps to stay in their proverbial own lane. This starts by respecting the role of overlapping enforcement and refraining from action that undermines this defining feature of U.S. antitrust enforcement.

To mitigate unhealthy strife, enforcers should refrain from openly undermining pending litigation by a fellow coequal enforcer.[292] As detailed in Part II, such public spats risk undermining enforcement and dilute the value of overlapping enforcers. Exercising restraint means foregoing filings that challenge another enforcer's legal theory through amicus briefs or public statements.

Restraint should extend not just to antitrust enforcement agencies and class counsel, but also to the solicitor general (SG). The Supreme Court frequently asks the SG to weigh in on pending antitrust litigation.[293] As the SG has increasingly accepted the Court's invitation,[294] it has only fueled the conflict between enforcers. The SG has filed briefs in cases in which the DOJ did not pursue its own claims and the United States was not a party.[295] Such briefs have emerged as another avenue for one antitrust enforcer to undercut enforcement by another. To protect antitrust enforcement, the SG should avoid stoking the fire of intra-enforcer disagreements.[296] This may even mean foregoing comment from time to time. A more restrained approach—one that avoids undercutting fellow enforcers—better respects the individual role each

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[292] This includes avoiding more subtle blocking behavior, which occurs when an agency or class counsel tries to regulate the judiciary rather than competition. It is here where mission drift and this blocking behavior intersect. By injecting its opinions on procedural questions, for example, an agency risks blocking another enforcer. *See, e.g.*, Stromberg U.S. Amicus Brief, *supra* note 141. Weighing in on, e.g., whether a putative class is certifiable under Rule 23 or the applicable choice of law, an enforcer can both hinder other enforcers and exceed their authority.

[293] *Cf.* Darcy Covert & Annie J. Wang, *The Loudest Voice at the Supreme Court: The Solicitor General's Dominance of Amicus Oral Argument*, 74 VAND. L. REV. 681, 684 (2021) (discussing the increased role of the SG in Supreme Court appeals).

[294] *See id.*

[295] *See, e.g.*, Brief for the United States and the Federal Trade Commission as Amici Curiae, Verizon Commc'ns, Inc. v. Law Offs. of Curtis V. Trinko, LLP, 540 U.S. 398 (2004) (No. 02-682), 2002 WL 32354606; Brief for the United States as Amicus Curiae Supporting Petitioners, Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc., 555 U.S. 438, 442 (2009) (No. 07-512), 2008 WL 2155265; *supra* notes 115–18 and accompanying text.

[296] The SG may decline a Supreme Court request for an amicus brief in cases where the United States is not a named or direct party. *See* 28 C.F.R. § 0.20(c).

enforcer plays[297] and is particularly appropriate when the DOJ and FTC are at odds.[298]

Further, to avoid blocking other enforcers, the government should pursue stays strategically and only with a clearly demonstrated cause. Unlike some areas of law, in antitrust, there is no congressionally mandated sequencing.[299] Private antitrust enforcers need not first exhaust administrative remedies before filing suit or obtain agency consent to pursue their claims.

Given this reality, in many instances an antitrust defendant could and should face simultaneous action by private and public enforcers.[300] Such parallel enforcement ensures more complete compensation and deterrence. To the extent specific, substantiated concerns exist about parallel action, enforcers can turn to protective orders, gag orders, or narrowly tailored stays on a case-by-case basis.[301] A pending criminal investigation is not *ipso facto* justification to stay parallel enforcement.

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[297] This more restrained position also inures to the benefit of the SG's office. The SG is charged to represent the best interest of the United States. Over the last few decades, the SG has increased its Supreme Court amicus filings, raising concerns of overreach. *See* Michael E. Solimine, *The Solicitor General Unbound: Amicus Curiae Activism and Deference in the Supreme Court*, 45 ARIZ. ST. L.J. 1183, 1186 (2013). This article's suggestion for a more restrained approach to when the SG interjects in pending antitrust cases is consistent with existing scholarly proposals. *Id.* at 1186 (arguing that "the SG should only file amicus briefs in cases where the interests of the United States, and particularly of the executive branch, are directly affected, as opposed to cases concerning the broader policy agenda of the administration"); *see also* Covert & Wang, *supra* note 293, at 686 (urging a more limited role for amicus advocacy by the SG.).

[298] *See* Solimine, *supra* note 297, at 1206 ("If the federal interest is not clear or pulls in different directions, then the general (albeit rebuttable) presumption should be *against* the filing of such briefs.").

[299] *Cf.* False Claims Act, 31 U.S.C. §§ 3729–33 (requiring that a qui tam complaint first be given to the DOJ for consideration); Contracts Disputes Act of 1978, 41 U.S.C. §§ 601–13 (requiring exhaustion of administrative remedies prior to filing litigation resolving contract disputes between government contractors and executive branch agencies).

[300] That said, when a private enforcement case is already pending, there is less need for parallel government enforcement. As former heads of the DOJ and the National Association of Attorneys General (NAAG) both acknowledge, a key factor public enforcers should consider before undertaking action is whether a competitor or consumer class action is already pending. *See* Majoras, *supra* note 238, at 127 (citing the deputy attorney general for the DOJ and quoting the chair of the NAAG Antitrust Task Force for criteria to consider in pursuing public enforcement). If such an action is already pending, it weighs against pursuing recourse because Congress expressly designed the Sherman Act to "encourage private litigants to bear a considerable amount of the burden and expense of enforcement and thus save the Government time and money." Hawaii v. Standard Oil Co., 405 U.S. 251, 275 (1972). Bringing suit for the exact same scope, wrongdoing, and potential recovery invites unnecessary conflict. *Cf.* Majoras, *supra* note 238, at 124 ("Multi-layered enforcement systems also present the potential for conflict and interference within the multiple-layer scheme."). Instead, enforcers ideally would pursue enforcement with an eye toward complimenting, not duplicating, existing litigation.

[301] *See* Lee F. Berger & Sophia A. Vandergrift, *The Antitrust Division's Stay Practice in Civil Litigation Paralleling Criminal Investigations Is Good Policy*, ANTITRUST, Fall 2013, at 86, 89 (discussing the use of gag orders and tailoring stays to avoid undermining ACPERA).

It may take time for antitrust enforcers to adopt this more respectful stance toward each other,[302] but the judiciary can assist in realizing this change. First, courts should cabin stays to "extraordinary circumstances."[303] A pending indictment is not, on its own, sufficient rationale to grant a stay. Instead, courts should require specific, tangible proof of any benefits or harms alleged in stay requests.[304]

Second, courts should be particularly wary of stay requests when the DOJ has yet to impanel a grand jury. That a criminal investigation *might* someday lead to a grand jury is insufficient.[305] Private and public enforcers can still negotiate stays, but judges should only give their blessings to such arrangements after ensuring that the stay is in the public's best interest. To aid this judicial evaluation, enforcers should disclose the scope of their investigations, including the affected market, the relevant market players, and the impacted time period—*in camera* or otherwise.

Third, even with stay motions backed by concrete proof, courts should require the movant to articulate why lesser alternatives to a stay would not suffice.[306] This detail would strengthen judicial decision-making. It ensures more complete information for the judge to weigh the risks of a stay against any gains from the criminal investigation proceeding first.[307]

By adopting a more conservative approach to filing amicus briefs, motions to intervene, and requests for stays in pending litigation, antitrust enforcers can avoid blocking each other's enforcement efforts. Combined with a greater

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[302] The recent changes to the leadership at both the DOJ and FTC could well alter relations between antitrust enforcers. *See* Lauren Feiner, *Senate Confirms Big Tech Critic Jonathan Kanter to Lead DOJ Antitrust Division*, CNBC (Nov. 16, 2021), www.cnbc.com/2021/11/16/senate-confirms-jonathan-kanter-to-lead-doj-antitrust-division.html (detailing the new "trifecta of antitrust reformers" nominated by the Biden administration).

[303] Weil v. Markowitz, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987) ("A total stay of civil discovery pending the outcome of related criminal matters is an extraordinary remedy appropriate for extraordinary circumstances."). This is similar to the role the judiciary could and should take with motions to intervene. *See supra* note 287.

[304] *Cf.* United States v. $3,592.00 U.S. Currency, No. 15-cv-6511, 2016 WL 5402703, at *1 (W.D.N.Y. Sept. 28, 2016) ("[T]he government's burden is not simply to show that civil discovery *could* adversely affect the criminal case, but to show that civil discovery *will* adversely affect the criminal case.") (emphasis in original); United States v. Leasehold Ints. 118 Ave. D, Apartment 2A, 754 F. Supp. 282, 287 (E.D.N.Y. 1990) ("Mere conclusory allegations of potential abuse or simply the opportunity by the claimant to improperly exploit civil discovery . . . will not avail on a motion for a stay.") (emphasis in original).

[305] *See* Berger & Vandergrift, *supra* note 301, at 91 n. 37 (discussing why the benefits of a stay do not apply to "civil enforcement proceedings, where there is no grand jury").

[306] *Cf. $3,592.00 U.S. Currency*, 2016 WL 5402703, at *2 (criticizing the grant of stays when the record lacks "any specific showing and when no lesser alternatives (such as a protective order, or preliminarily limiting discovery to certain areas or types) have even been attempted").

[307] *See* Samuel N. Fraidin, *Duty of Care Jurisprudence: Comparing Judicial Intuition and Social Psychology Research*, 38 U.C. DAVIS L. REV. 1, 46 (2004) (discussing how "[g]roups make better decisions when they have more information").

attention to maximizing the benefits of shared enforcement and avoiding mission drift, these three principles provide a foundation to extrapolate other paths for private and public enforcers to share their overlapping competition oversight. Admittedly though, these principles require enforcers to reconceptualize their own roles as but one among multiple, complementary antitrust enforcers. As the next Part explains, further collaboration between enforcers is a necessary component of that transformation.

B. Strengthening Antitrust Enforcement Through Collaboration

Greater collaboration can secure the redefined guiding principles for antitrust enforcement.[308] The friction set out in Part II cries out for regular communication between each branch of antitrust enforcement. To help realize this collaboration, this Part makes the case and spells out the initial work for a U.S. Antitrust Enforcement Working Group, composed of an equal number of representatives from the FTC, the DOJ, state attorneys general, and the private enforcers' bar.[309]

Proposing formalized collaboration is hardly earth shattering—it is a frequent suggestion to mitigate interagency strife.[310] When siloed, each enforcer may push for a course of action that advantages a single agency or a single enforcer without sufficient consideration for others.[311] In doing so, an enforcer can end up at cross purposes with fellow enforcers. Greater collaboration assuages this adversarial mindset, where one enforcer is convinced of its "rightness" and insulates itself from other perspectives.[312] It also helps build respect and trust between participants,[313] as well as rebuild confidence in the judiciary

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[308] *See, e.g.*, Stergios Tsai Roussos & Stephen B. Fawcett, *A Review of Collaborative Partnership as a Strategy for Improving Community Health*, 21 ANN. REV. PUB. HEALTH 369 (2000) (noting that "working together to achieve a common purpose" is a defining feature of a collaboration); *see also* Isao Fujimoto & Gerardo Sandoval, *Central Valley Partnership: A Collaborative Multiethnic Approach to Organizing Immigrant Communities*, 38 U.C. DAVIS L. REV. 1021, 1039 (2005) (discussing how conceptual frameworks of collaboration encourage "involving diverse interests in the collaboration and encouraging those interests to see a common good and gain a common ground, even while working for their individual self-interests").

[309] *Cf.* Philip J. Harter, *Collaboration: The Future of Governance*, 2009 J. DISP. RESOL. 411, 423 (2009) ("The quest in putting together the committee that will negotiate the rule or policy is to assemble a group of individuals who together represent the interests that will be significantly affected by it.").

[310] *See, e.g.*, Fujimoto & Sandoval, *supra* note 308, at 1029 (discussing successful collaboration for addressing issues for immigrant and foreign-born workers in California's Central Valley).

[311] David G. Delaney, *Behavioral Public Choice, U.S. National Security Interests, and Transnational Security Decision Making*, 24 IND. J. GLOB. L. STUD. 429, 443 (observing that a "bias blind spot may also undermine effective multiagency decision making").

[312] Daniel L. Shapiro, *Relationship Identity Theory: A Systematic Approach for Transforming the Emotional Dimension of Conflict*, 65 AM. PSYCH. 634, 639 (2010).

[313] *See* Cameron Holley, *Removing the Thorn from New Governance's Side: Examining the Emergence of Collaboration in Practice and the Roles for Law, Nested Institutions, and Trust*, 40

or lawmakers reliant on the antitrust enforcers' expertise. Rather than creating dissonance, collaboration can identify areas of accord, whereby these co-enforcers can work together to influence courts and legislatures to strengthen antitrust laws through a cohesive voice.

But at its core, the proposed Working Group aims to develop interdependence.[314] Currently enforcers do collaborate, but only with selected others. State attorneys general work together via an antitrust task force; meanwhile, plaintiff class counsel are linked through the working relationships necessary to jointly prosecute the typical antitrust case, as well as through common ABA committees and policy institutions.[315] State attorneys general and private enforcers also pursue claims jointly.[316] Federally, the FTC and the DOJ have worked together, particularly on merger issues. But these litigation- and policy-specific alliances have failed to maximize enforcement, and routine, all-enforcer coordination remains a rarity.

To date, the multiple arms of U.S. antitrust enforcement have not tried this relatively obvious, benign proposal. Perhaps the closest analog was the 2002 Antitrust Modernization Committee (AMC).[317] However, the twelve members of the AMC did not represent all branches of enforcement. People with a defense-oriented background dominated the AMC's makeup, whereas the plaintiffs' bar lacked any representation.[318]

Yet, formalized collaborations are common in the global antitrust enforcement sphere, demonstrating the potential utility of this proposal.[319] Consider,

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ENV'T. L. REP. 10656, 10671 (2010) (discussing the use of environmental collaborations "to show respect, . . . ultimately 'build trust' and assist in 'resolving conflict' among stakeholders").

[314] Fujimoto & Sandoval, *supra* note 308, at 1040 ("Working together on issues brings into sharper focus mutual interests and develops their interdependence, allowing groups to better serve their communities.")

[315] *See, e.g.*, *Antitrust Law Section*, AM. BAR ASS'N, www.americanbar.org/groups/anti trust _law; *Antitrust Committees*, AM. BAR ASS'N, www.americanbar.org/groups/antitrust_law/committees; AM. ANTITRUST INST., www.antitrustinstitute.org.

[316] *See, e.g.*, *In re* Cardizem CD Antitrust Litig., 218 F.R.D. 508, 511 (E.D. Mich. 2003); *In re* Lorazepam & Clorazepate Antitrust Litig., 289 F.3d 98, 100 (D.C. Cir. 2002); UFCW & Emps. Benefit Tr. v. Sutter Health, CGC-14-538451, 2021 WL 5027178 (Cal. Super. Ct. Aug. 27, 2021).

[317] The Antitrust Modernization Commission Act of 2002, Pub. L. No. 107-273, §§ 11051–60, 116 Stat. 1856 (codified at 15 U.S.C. § 1 note), is subtitle D of the 21st Century Department of Justice Appropriations Authorization Act, Pub. L. No. 107-273, 116 Stat. 1758.

[318] Albert A. Foer, *Half-Time at the Antitrust Modernization Commission*, 40 U.S.F. L. REV. 601, 602–03 (2006) ("While some of the Commissioners, or the firms that employ them, occasionally represent plaintiffs, and some of the Commissioners served in enforcement posts earlier in their careers, the Commission as a whole—while made up of esteemed and experienced antitrust experts—is dominated by people whose recent backgrounds strongly suggest a defense orientation.").

[319] The FTC has participated in some of these global coordination efforts. For example, the FTC recently joined in a global working group to discuss best practices and approaches to pharmaceutical mergers. *See FTC Announces Multilateral Working Group to Build a New Approach*

for example, the EU Merger Working Group, comprised of European Commission representatives and national authorities of the European nations.[320] Though limited to merger policy, it provides a means to facilitate cooperation among joint enforcers with competing views.[321] Similarly, coordination between a national competition authority and the European Commission is expanding.[322]

One might hope enforcers would opt to widen communication themselves. Interest in reinvigorating antitrust enforcement is at a decades-long high. The question is how, not whether, to strengthen antitrust oversight. Recent leadership changes at the DOJ and FTC opened avenues for collaboration.[323] If, however, enforcers do not move ahead, Congress could and should require action.[324] The creation of a working group is low-hanging fruit.[325] Such a group would provide a starting point to analyze why wealth continues to concentrate and whether antitrust tools can respond. An appropriation bill produced the AMC as a last-minute addition.[326] That same mechanism could also create the working group proposed here.

To form this Working Group, each enforcement arm needs equal representation, but without growing the group too large to function. Both the FTC and DOJ are natural sources from which to identify federal enforcer representation. Identifying state attorneys general and private enforcer representatives is

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to Pharmaceutical Mergers, FED. TRADE COMM'N (Mar. 16, 2021), www.ftc.gov/news-events/news/press-releases/2021/03/ftc-announces-multilateral-working-group-build-new-approach-pharmaceutical-mergers.

[320] *See Competition Policy: The EU Merger Working Group*, EUR. COMM'N., competition-policy.ec.europa.eu/mergers/national-competition-authorities/eu-merger-working-group_en.

[321] *See* EU MERGER WORKING GROUP, BEST PRACTICES ON COOPERATION BETWEEN EU NATIONAL COMPETITION AUTHORITIES IN MERGER REVIEW (2011), ec.europa.eu/competition-policy/system/files/2021-06/national-competition-authorities_best_practices_merger_review_en.pdf.

[322] *See* Graef, *supra* note 44, at 365–67 (discussing examples of enforcement coordination among EU and national competition authorities).

[323] The current leadership of the FTC and DOJ have expressly stated an interest in greater collaboration to strengthen enforcement. *See, e.g.*, Fed. Trade Comm'n, U.S. Dep't of Just. & Eur. Union, *Inaugural Joint Statement: EU-U.S. Joint Technology Competition Policy Dialogue*, FED. TRADE COMM'N (Dec. 7, 2021), www.ftc.gov/system/files/documents/public_statements/1598739/eu-us_joint_dialogue_statement_12721.pdf; Fed. Trade Comm'n & U.S. Dep't of Just., *FTC Virtual Press Conference for Merger Guidelines RFI Joint Announcement*, FED. TRADE COMM'N (Jan. 18, 2022), www.ftc.gov/media/80865.

[324] *See, e.g.*, Jody Freeman & Jim Rossi, *Agency Coordination in Shared Regulatory Space*, 125 HARV. L. REV. 1131, 1158 (2012) (discussing congressionally mandated interagency communication and consultation).

[325] In fact, pending federal proposals to strengthen antitrust laws include efforts to strengthen collaboration, though only for federal regulators. *See, e.g.*, Competition and Antitrust Law Enforcement Reform Act of 2021, S. 225, 117th Cong. § 6 (2021) (proposing collaboration between the FTC and SEC to study of institutional investor ownership in concentrated markets).

[326] *See supra* note 317.

more cumbersome but achievable. Plaintiff antitrust class action attorneys are not a unified group. Nonetheless, these attorneys have extensive experience with private ordering (i.e., "work[ing] out among themselves a voluntary plan to allocate responsibility") to staff large, nationwide class actions.[327] Selecting representative class counsel can piggyback on this existing private ordering. The Working Group can look to recommendations from the American Antitrust Institute or identify the top five firms appointed as lead counsel in the prior calendar year as potential sources of representatives.[328] Similarly, having representatives from all 50 states would hinder the agility of such a collaboration. Instead, state attorneys general can look to key leaders from NAAG to either serve or appoint a representative.

However, merely convening a working group will do little without more. The recognition of common ground acts as a precursor to meaningful collaboration. Given the principles set out in Part III.A, the first action item is for enforcers to identify shared goals.[329] For example, enforcers could share these goals: dismantling employment-based monopsony and limiting the reach of big tech. Such goals would serve as a compass for subsequent action.

The next steps include identifying means by which enforcers, individually and collectively, can realize their common enforcement goals. The AMC had four specific duties: (1) examining whether to modernize antitrust laws (and identifying and studying related issues); (2) soliciting views of those concerned with antitrust laws; (3) generating proposals; and (4) preparing a report for Congress and the president.[330] This Working Group could assume similar duties, but with an eye toward strengthening enforcement.

Take the first duty, examining whether to modernize antitrust laws. The Working Group could identify potential enforcement obstacles, then generate joint recommendations for tackling those threats—from generating strategies for fellow enforcers, to helping overcome these stumbling points, to identifying means by which congressional action could aid competition oversight. For example, private enforcement currently faces significant challenges in certify-

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[327] *See* Stephen A. Saltzburg et al., *Third Circuit Task Force Report on Selection of Class Counsel*, 74 TEMP. L. REV. 689, 693 (2001) (discussing and approving of class action attorneys' reliance on private ordering to designate lead counsel).

[328] These firms can either self-appoint a representative or nominate an attorney from another firm. If they opt to self-appoint, representation from any one firm should be capped to a two-year term. Otherwise, there is too great a risk of squeezing out high-quality antitrust attorneys from boutique law firms.

[329] *See* Simon I. Singer, *Criminal and Teen Courts as Loosely Coupled Systems of Juvenile Justice*, 33 WAKE FOREST L. REV. 509, 514 (1998) ("A certain degree of consensus is required to make organizational behavior possible.").

[330] *See* 21st Century Department of Justice Appropriations Authorization Act § 11053; *see also* Albert A. Foer, *Putting the Antitrust Modernization Commission into Perspective*, 51 BUFF. L. REV. 1029, 1030–31 (2003) (describing the AMC and its responsibilities).

ing damages classes.[331] Pending state and federal bills propose reforms aimed to strengthen competition oversight.[332] But those proposals do little address this challenge.[333] The Working Group could work collectively to identify judicially created barriers, both substantive and procedural, including specific judicial decisions that complicate certification of classes under Federal Rule of Civil Procedure 23(b)(3). Such information could assist in ensuring that any antitrust proposals squarely address the true barriers to meaningful enforcement.

This is but one instance where the Working Group could pinpoint areas that threaten enforcement oversight and construct means for overcoming those threats. Such a group would generate other gains as well. For instance, it would be a mechanism for enforcers to produce joint policymaking initiatives.[334] It would allow for more transparent interagency monitoring.[335] It also would afford room for enforcers to learn best practices from other experts. This broad information sharing exceeds the gains from enforcers just collaborating on particular cases or issues.

But perhaps the greatest benefit of this Working Group is that it would provide a more appropriate forum to discuss disagreements. These conflicts currently play out in front of the judiciary, with one enforcer openly challenging another.[336] These public clashes undermine the gains of overlapping enforcement and have no cognizable benefit. As the Working Group explores modernizing antitrust, members will certainly have topics of discord. The Working Group should aim to dissect the source of the disagreement. Take vertical no-poach agreements, for example. Enforcers' disagreements stem from different presumptions about the potential dangers of such agreements. By boiling down the disagreement, the Working Group can then move toward solutions. Where necessary, it can create specific task forces to gather any additional information or data necessary for consensus building. For no-poach agreements, this could include additional analysis of the consequences of hor-

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[331] *See* Bartholomew, *supra* note 51 (discussing judicial interpretations heightening Rule 23(b)(3)'s requirements).

[332] *See, e.g.*, S. 933C, 57th Leg. (N.Y. 2021); Competition and Antitrust Law Reform Act of 2021, S. 225, 117th Cong. § 4(b)(1) (2021).

[333] *See* Christine P. Bartholomew, *Antitrust Reform & the Class Action Attorney* (forthcoming) (analyzing federal and state reform proposals) (on file with author).

[334] *See* Freeman & Rossi, *supra* note 324, at 1194–95.

[335] *See id.* at 1191.

[336] On the other hand, when consensus between enforcers occurs, it is usually not through judicial spats. *See* Farber & O'Connell, *supra* note 254, at 1409 ("When agency conflict is ironed out, the forum is generally not judicial.").

izontal versus vertical forms of these restraints. Even if enforcers do not reach unanimity, all enforcement still benefits from the dissemination of this data.[337]

As for the nitty-gritty of the Working Group's operation, the participants can best establish those details. But as a baseline, the Working Group should publish a schedule for regular reports updating the public on the status of the group's work and collaborative challenges. This schedule will keep the Working Group accountable while letting external forces monitor and determine needed adjustments to the group's operation.[338]

This proposed Working Group is not the product of Pollyanna optimism. Just meeting with each other does not guarantee accord. Disagreement and dissent are natural among coequal enforcers. To be clear, the goal of the proposed Working Group is not to divide or narrow enforcement by any antitrust enforcer. Nor is this a forum where a two-third or majority vote should squeeze out or foreclose a fellow enforcer from undertaking a different course of action. But any step toward stronger antitrust enforcement begins with addressing existing conflict. The proposed Working Group allows for these much-needed conversations. Otherwise, the infighting between the FTC, the DOJ, class action counsel, and state attorneys general will only continue to weaken competition oversight.

CONCLUSION

Antitrust enforcement is a tricky business. Despite overlapping enforcers monitoring market players, underenforcement remains a concern. As it stands, the DOJ and the FTC are underfunded for the antitrust enforcement challenges ahead. Antitrust fights looming on the horizon will likely be costly and complicated. Even for high tech, where there is bipartisan interest in stronger competition oversight, insiders have lamented that the agencies do not have the means to take on those battles.[339] This is an all-hands-on-deck moment for antitrust enforcers.

As this article exposes, U.S. antitrust enforcement does not live up to the potential of its overlapping-enforcer structure. This article focuses a spotlight

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[337] To further ensure the productivity of such a working group, any represented enforcer will need the ability to invoke a dispute resolution option. For such a collaboration, one option is to use a neutral party to facilitate communication—be it an academic or experienced antitrust mediator. *See* Harter, *supra* note 309, at 425 (discussing the value of a neutral convener in resolving collaboration conflicts).

[338] Natural external monitors of this Working Group could include the House's Subcommittee on Antitrust, Commercial, and Administrative Law and the Senate's Subcommittee on Competition Policy, Antitrust, and Consumer Rights.

[339] *E.g.*, Alex Kantrowitz, *'It's Ridiculous.' Underfunded FTC and DOJ Can't Keep Fighting the Tech Giants Like This*, BIG TECH. (Sept. 17, 2020), bigtechnology.substack.com/p/its-ridiculous-underfunded-us-regulators.

on the DOJ and specific instances where it undertook conduct that undermined the utility of multiple enforcers. In doing so, the goal is not to malign or criticize the DOJ. Many attorneys working there are deeply committed and dedicated to upholding a competitive, functional marketplace. And surely, a close examination of suits by private enforcers and state attorneys general could uncover similar missteps that limited or hamstrung federal enforcement.

Rather, this article sets out justification to solidify the working relations between public and private antitrust enforcers. It does not attempt a master plan for managing the relationships among the motley crew of antitrust enforcers. Rather, it offers a preliminary examination of one dimension of the inner workings of these much-needed, complimentary actors. And with that examination, it adds some proposed starting points to strengthen the interworking among private and public enforcers.

In exploring overlapping enforcement, one truth is readily apparent: there is an imperative need for the DOJ, the FTC, state attorneys general, and antitrust class counsel to each undertake their oversight efforts with respect and regard for one another. Said more simply, antitrust enforcement efforts would benefit from enforcers playing nicely with each other.