

**Congress of the United States**  
**Washington, DC 20515**

July 28, 2021

The Honorable Roslynn R. Mauskopf  
Director  
Administrative Office of the United States Courts  
Washington, D.C. 20544

Dear Judge Mauskopf:

We write in response to your July 19, 2021 letter expressing concerns about H.R. 3460, the “State Antitrust Enforcement Venue Act of 2021,” which was reported out of the House Committee on the Judiciary on June 24, 2021. We would like to take this opportunity to explain the importance of this legislation and its Senate companion, S. 1787, as well as to address the concerns raised in your letter.

Our country faces substantial problems with monopolization. Many industries are highly consolidated, and we need vigorous antitrust enforcement to protect consumers, workers, and competition. Congress and the federal government rely on state attorneys general to address this crisis by aiding in the enforcement of our federal antitrust laws. These bills would make a real difference, permitting state attorneys general to address anticompetitive conduct unencumbered by the need to coordinate—and possibly consolidate—with slower-moving private actions.

Congress is vested with the authority to define the power of the Courts to hear certain cases and determine where those cases should be heard. While the Constitution sets the outer limits of the federal Judiciary’s jurisdiction, it is Congress that decides its exact metes and bounds,<sup>1</sup> including where and whether venue is proper.<sup>2</sup>

The *State Antitrust Enforcement Venue Act* reaffirms the importance of state antitrust enforcement. State attorneys general have critical opportunities to protect consumers from the problems that result from monopolies and oligopolies. The Judicial Panel on Multidistrict Litigation’s (“JPML”) powers should not be used to hinder the efforts of state attorneys general

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<sup>1</sup> *Cary v. Curtis*, 44 U.S. 236, 245 (1845) (“[T]he judicial power of the United States, although it has its origin in the Constitution, is . . . dependent for its distribution and organization, and for the modes of its exercise, entirely upon the action of Congress . . . .”); *Turner v. Bank of N. Am.*, 4 U.S. 8 (1799) (Crane, J.) (“The notion has frequently been entertained, that the federal courts derive their judicial power immediately from the constitution; but the political truth is that the disposal of the judicial power (except in a few specified instances) belongs to congress. If congress has given the power to this court, we possess it, not otherwise.”).

<sup>2</sup> *Atl. Marine. Constr. Co., Inc. v. U.S. Dist. Court for W. Dist. of Tex.*, 571 U.S. 49, 56 (2013) (“The structure of the federal venue provisions confirms that they alone define whether venue exists in a given forum.”); *Byers v. C.I.R.*, 740 F.3d 668, 676 (D.C. Cir. 2014) (“Congress determines the jurisdiction and venue of this court and we have no authority to declare otherwise.”).

to enforce the antitrust statutes passed to protect American consumers. From the inception of the JPML, Congress has been aware of the potential for “substantial[] delay[]” that centralization for multidistrict litigation could entail.<sup>3</sup> That is why, at the behest of the Department of Justice, Congress included Section 1407(g), prohibiting the transfer of actions brought by the United States “under the antitrust laws” for “coordinated or consolidated pretrial proceedings” with similar private actions.<sup>4</sup> Congress did so mindful that keeping federal antitrust actions separate from multidistrict proceedings might “occasionally burden defendants” by requiring them “to answer similar questions posed both by the Government and by private parties.”<sup>5</sup> But permitting federal antitrust actions to remain independent was “justified by the importance to the public of securing relief in antitrust cases as quickly as possible.”<sup>6</sup>

The purpose of exempting federal antitrust enforcement actions from inclusion in multidistrict litigation applies equally to state actions. Like federal antitrust enforcers, state enforcement actions serve interests beyond those served by private actions.<sup>7</sup> H.R. 3460 and S. 1787 aim to give federal and state enforcers relative parity—neither federal nor state governments should be hamstrung in their efforts to halt antitrust violations or protect their citizens from anticompetitive conduct.

Your letter suggests that Congress created the JPML to be a “permanent solution” to the “problem” of too much antitrust enforcement.<sup>8</sup> We disagree. There is no over-enforcement problem. In fact, the statute permitting states to bring *parens patriae* actions for damages was passed as a response to *under*-enforcement of the antitrust laws.<sup>9</sup> In passing the *Hart-Scott-Rodino Act*, Congress noted that antitrust violations often injure “millions of consumers, each in relatively small amounts,”<sup>10</sup> and as a result, the “antitrust violations which ha[d] the broadest and, often, the most direct impact on consumers” were “likely to escape the penalty of the loss of illegally-obtained profits.”<sup>11</sup> Congress specifically recognized the role of state attorneys general in protecting consumers against antitrust violations and noted that it had “fill[ed] this gap by providing the consumer an advocate in the enforcement process—his [or her] State attorney general.”<sup>12</sup>

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<sup>3</sup> H.R. Rep. No. 90-1130, at 7 (1968) (letter from then-Deputy Attorney General Ramsey Clark).

<sup>4</sup> There is, of course, a narrow exception to this prohibition for actions brought by the United States in its proprietary capacity. 28 U.S.C. § 1407(g).

<sup>5</sup> *Id.* at 8.

<sup>6</sup> *Id.*

<sup>7</sup> *See, e.g. Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 450–51 (1945) (explaining that antitrust violations are “matters of grave public concern” in which States have “an interest apart from that of particular individuals who may be affected”).

<sup>8</sup> Letter of July 19, 2021, from Director Mauskopf (“AOUSC Letter”), pg. 1.

<sup>9</sup> *See* Hart-Scott-Rodino Antitrust Improvements Act of 1976, Pub. L. No. 94-435, § 301, 90 Stat. 1383 (amending the Clayton Act to permit “[a]ny attorney general of a State [to] bring a civil action” under the antitrust laws “in the name of such State . . . to secure monetary relief” for its citizens”).

<sup>10</sup> H.R. Rep. No. 94-499 at 4 (1975). Those “injuries [are] too small to” justify “bear[ing] the burden of complex litigation.” *Id.* at 4.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

Your letter further suggests that the Act “could adversely affect the interests of the States.”<sup>13</sup> However, 52 state and territory attorneys general recently called on Congress to enact this law and put states “on equal footing with federal enforcers in deciding where, when, and how to prosecute cases.”<sup>14</sup>

Your letter also raises concerns about the potential inconvenience faced by defendants under the legislation. While we understand these considerations, we are more concerned about the prejudice caused to state citizens when redress for their injuries is unduly delayed. As noted, Congress recognizes that requiring defendants to potentially “answer similar questions posed both by the Government and by private parties” may “occasionally burden” them.<sup>15</sup> But that burden is justified when, as now, prompt resolution of state enforcement actions is required to “secur[e] relief” for state citizens “as quickly as possible.”<sup>16</sup>

Finally, we note that some of the arguments made in your letter closely mirror the arguments made by Google in its response to the antitrust complaints of Texas and other states.<sup>17</sup> In fact, your letter quotes almost verbatim from Google’s response brief without appropriate citation and largely adopts Google’s positions in the Texas case in that both express a primary concern with the potential conflicting rulings on substantive issues, such as market definition;<sup>18</sup> make the same argument that Congress only amended Section 1407 once and that state attorneys general antitrust actions have always been subject to consolidation;<sup>19</sup> state the purposes of centralization in similar terms;<sup>20</sup> express concern about “multiple representation” and address use of outside counsel;<sup>21</sup> and argue that centralization is necessary to coordinate the apportionment of damages.<sup>22</sup>

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<sup>13</sup> AOUSC Letter at pg. 4.

<sup>14</sup> Letter of June 18, 2021, from the National Association of Attorneys General in support of the State Antitrust Enforcement Venue Act of 2021; H.R. 3460, S. 1787.

<sup>15</sup> H.R. Rep. No. 90-1130 at 8.

<sup>16</sup> *Id.*

<sup>17</sup> For example, in its response, Google argued: “To the extent that some cases require specialized proceedings (such as class certification), the transferee court can craft a protocol that ‘1) allows pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues; and 2) ensures that pretrial proceedings will be conducted in a streamlined manner leading to the just and expeditious resolution of all actions to the overall benefit of the parties.’ *In re: Countrywide Fin. Corp. Mortg. Mktg. & Sales Practices Litig.*, 582 F. Supp. 2d at 1375 (internal citation omitted); see also *In re Generic Pharm. Pricing Antitrust Litig.*, MDL Docket No. 2724 at \*2 (‘To the extent the State Action presents unique factual and legal issues, the transferee judge has the discretion to address those issues through the use of appropriate pretrial devices.’). Google Mem. Supp. Mot. To Transfer (“Google Mem.”) at 15-16, *In re Digital Advertising Antitrust Litig.*, MDL No. 3010, ECF No. 1-1 (U.S. J.P.M.L.). Compare with your letter: “To the extent there are actions with different legal issues or concerns, the MDL judge can formulate a pretrial program that allows pretrial proceedings with respect to any non-common issues to proceed concurrently with pretrial proceedings on common issues (for example, by creating a separate discovery or motion track for certain actions). This ensures that pretrial proceedings will be conducted in a streamlined manner leading to a just and expeditious resolution of all actions to the overall benefit of the parties.” AOUSC Letter pg. 3.

<sup>18</sup> AOUSC Letter pg. 3; Google Mem. at 13, Google Reply Supp. Mot. To Transfer (“Google Reply”) at 7, *In re Digital Advertising Antitrust Litig.*, MDL No. 3010, ECF No. 89 (U.S. J.P.M.L.).

<sup>19</sup> AOUSC letter pg. 2; Google Reply at 16.

<sup>20</sup> AOUSC letter pgs. 2-3; Google Mem. at 9.

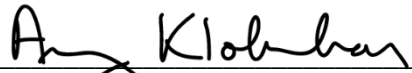
<sup>21</sup> AOUSC letter pg. 4; Google Mem. at 14, 18.

<sup>22</sup> AOUSC letter pg. 4; Google Reply at 12-13.

It strikes us as unusual, if not inappropriate, for the Administrative Office of the United States Courts to adopt the arguments of a party in active litigation before the federal courts in a policy letter to Congress. But whether the arguments in your letter came from Google's court filings or somewhere else, we remain skeptical that those arguments represent the correct public policy balance regarding the rights of state attorneys general in the federal courts and before the JPML.

We thank you for your attention and interest in this matter.

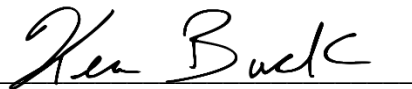
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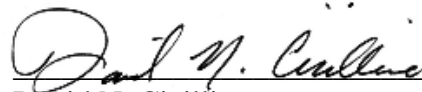
Amy Klobuchar  
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Ranking Member  
House Judiciary Subcommittee on  
Antitrust, Commercial &  
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David N. Cicilline  
Chair  
House Judiciary Subcommittee on  
Antitrust, Commercial &  
Administrative Law

cc: United States Judicial Panel on Multidistrict Litigation  
Honorable Steny Hoyer  
Honorable Kevin McCarthy  
Honorable Jerrold Nadler  
Honorable Richard Durbin