Senate Subcommittee on Competition Policy, Antitrust and Consumer Rights
Continuing a Bipartisan Path Forward on Antitrust Enforcement and Reform

Written Testimony of Gwendolyn J. Lindsay Cooley[1]
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For over 100 years, Attorneys General around the country have united to tackle consolidation. From Standard Oil in the 1900s to taking on Big Tech now, Attorneys General have done the seemingly impossible, working with their counterparts from across the aisle, in large and small groups to take on these intractable issues. Through the National Association of Attorneys General Multistate Antitrust Task Force, an organization I had the privilege of leading for the last three years, the Attorneys General faced hurdles, but new laws like SAEVA[2] have greatly improved their bipartisan cooperation.

With my nearly twenty years' experience as a front-line antitrust enforcer, working for both Republican and Democratic Attorneys General, I have seen firsthand, on the ground, how effective antitrust enforcement can be when we embrace our diversity of opinions and tackle consolidation and anticompetitive conduct head on, together. I know what it means to persuade Utah and Minnesota and New Jersey and Missouri to come to consensus. During my career, I have seen things that lead to success, and things that are less successful, and my testimony today will address both, as well as offering some suggestions for the future.

One note before I begin, my testimony is mine alone, and I do not speak for the state Attorneys General, nor the federal antitrust agencies.

State Attorney General Antitrust Enforcement

Often called the third leg of the antitrust enforcement stool, the State Attorneys General enforce the federal Sherman and Clayton Acts, as well as their own state antitrust laws.

State antitrust laws- like Iowa's- predate the Sherman Act, and indeed many state constitutions- like Tennessee's- treated monopolies with contempt from the outset.[3] The

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[1] Former Wisconsin Assistant Attorney General, Former Chair of the National Association of Attorneys General Multistate Antitrust Task Force, Founder Taimet LLC Artificial Intelligence Antitrust Tool

[2] The State Antitrust Enforcement Venue Act of 2021, 28 U.S.C. 1407 (2024).

[3] Cooley, Gwendolyn, "25 Years of State Antitrust Enforcement," George Mason Law Review, Volume 29, Iss. 4 (2022); *See also Assoc. Gnl. Contractors v. Cal. St. Council of Carpenters,* 459 U.S. 519 (1983), fns 22, 23, "Senator Sherman added, "The purpose of this bill is to enable the courts of the United States to apply the same remedies against combinations which injuriously affect the interests of the United States that have been applied in the several states to protect local interests."

earliest challenges to monopolistic practices were brought by State Attorneys General who learned early on the virtues of many hands making light work, and led to the founding of the National Association of Attorneys General (NAAG) in 1907.[4]

My role as Chair of the Multistate Antitrust Task Force within NAAG involved helping states work together in a process very similar to that of this august body, through negotiation and discussion to achieve the best results for the citizens of our states.

We often take for granted how difficult this kind of multistate consensus can be; the Attorneys General have- to put it mildly- widely varying views, and even more importantly are separate sovereigns.

But the States' relationship with each other has remained tremendously strong.

For eight long years, I led the States in a lawsuit against the makers of Suboxone, where 42 states sued to ensure that the market for this important opioid treatment drug was not monopolized by one company. With intensive coordination amongst the states, we were able to keep all 42 Attorneys General working together for eight years, despite changes in Attorneys General- and their corresponding party changes. In Wisconsin, the lead state, I brought the Suboxone case under Wisconsin Attorney General Brad Schimel, a Republican, and continued the case under current Wisconsin Attorney General Josh Kaul, a Democrat. And it was crucial when we ultimately settled that case for $102.5 million in the summer of 2023 that we had such diversity of viewpoints to help ensure that we were jury-trial ready and didn't have to settle for less. This consensus was not easy, but speaks to the general view that bipartisanship is the name of the game in Antitrust.

While bipartisanship may be difficult, it is always worth it. And not for touchy-feely reasons. One of the secretly-genius aspects of having a mixed group of states work together is that we genuinely do NOT agree. When Connecticut, Rhode Island, North Carolina, and Tennessee battle, with Arkansas, Iowa, and Vermont weighing in, by the time consensus is formed the work product has been thoroughly vetted. While it can be clunky and slow (and exhausting for participants), not having a "decider" results in cases that are more provable and more persuasive to judges. Often, folks like to simplify this to "Red States and Blue States" but frankly, this shorthand is essentially meaningless, as these cases go before judges- and I have won and lost before federal judges nominated by presidents of both parties, and have not found "party of appointing president" to be determinative, which is probably the point of an unbiased judiciary.

[4] https://www.naag.org/news-resources/newsroom/#:~:text=Founded%20in%201907%2C%20the%20National,attorneys%20general%20and%20their%20staff.

Our strongly vetted cases and cooperative bipartisanship have benefited States' relationship with the federal government antitrust agencies as well, who very often request both partisan and geographic diversity in cases we bring together, and which States take as a point of pride.

States Working with the Federal Government

When the sovereign states coordinate with the federal government, the record of success is even greater- and particularly where prosecutors from both parties and many regions of the country share their different perspectives to enhance the winnability of a case. An example from the very early days of the Biden administration is a case that started out as a New York Attorney General's office case, and grew to include the FTC and six other bipartisan states, where they took on the Pharma Bro, and won.

Back in August 2015, Martin Shkreli- the "pharma bro" and his company Vyera purchased Daraprim, a drug used for toxoplasmosis that was cheap and had been accessible for decades. Vyera then increased the price 4000% while impeding generic entry. After Vyera settled in December 2021, the States and FTC went to trial only against Shkreli. After trial on the merits, a judge in New York held that Shkreli was the "brainchild" of the operation and held him liable for the $64.6m disgorgement award.[5]

The judge also banned him for life from participating in the pharmaceutical industry in any capacity, as a result of his "flagrant and reckless" conduct.

State Law and the bipartisan approach to pharmaceutical enforcement played a very important role in the case, with precedent-setting rulings on disgorgement, joint and several liability, and injunctions- especially forward-looking injunctions, particularly the lifetime industry ban, which was upheld by the Second Circuit in early 2024.

Strong state laws when working with our federal counterparts mean that some claims benefit the entire country, as the States did to great effect in the *FTC v. Vyera* case, where strong New York law allowed the States to be awarded nationwide disgorgement,[6] an equitable remedy where the violator gives up their "ill-gotten gains," despite the unfortunate ruling by the US Supreme Court in *AMG Capital Management*[7] against the FTC that prohibited the FTC from seeking disgorgement as a remedy.

While this has been a setback for the FTC, the positive *Vyera* ruling helped galvanize state legislatures like those in Tennessee and Indiana to expand the disgorgement authority that their Attorneys General could seek from violators.

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[5] *F.T.C. v. Vyera Pharm.*, 2020CV0706, Dkt. 865 (2022)
[6] *F.T.C. v. Vyera* Pharm., 79 F. Supp. 3d 31, n.6 (S.D.N.Y. 2020).
[7] *AMG Capital Mgmt. v. F.T.C.*, 593 U.S. ___ (2021)

But it is not only in pharmaceuticals where state bipartisanship and our strong relationship with the federal government have played a crucial role in antitrust enforcement.

Agriculture

Agriculture is the quintessence of a bipartisan issue: in my experience working as a very junior staffer in the United States Senate many years ago, it is much more a regional issue, as those of you who are familiar with the old Northeast Dairy Compact might agree.

Nowadays, State Attorneys General, with the help of a grant from the US Department of Agriculture, have been working with their federal counterparts to ensure that we have a safe and redundant food supply.

An important aspect of that safe and redundant food supply is ensuring that producers have access to a variety of inputs: multiple suppliers, multiple dealers, multiple fora to sell their products- and that those companies are competing with each other by being the best, rather than through monopolistic practices.

It is my hope that in the next administration, we will see our antitrust agencies double down on preventing or reducing consolidation in agriculture, from meatpacking to dairy, and from seeds to pesticides.

This is a real opportunity for the new Chair-nominee of the FTC and US Department of Justice Assistant Attorney General for Antitrust-nominee to work together with the states on this extremely important issue.

The State Antitrust Enforcement Venue Act (SAEVA)

It is not only the agencies that have done great, bipartisan work on antitrust. The State Antitrust Enforcement Venue Act (SAEVA, read: Save-A) is a great example of how this committee on Competition Policy, Antitrust and Consumer Rights has made a sea change in the way that states prosecute their cases.

Senator Lee's SAEVA bill was originally promoted by Attorneys General who came together under Texas' leadership to protest the removal of *Texas v. Google* (the "Google Ad Tech Texas" case) from Texas District Court to the Southern District of New York. Justifiably irritated with having to face a New York judge despite a case being led by the Texas Attorney General's office with Texas Attorneys- and none from New York, Attorney General Ken Paxton rallied his colleagues across the political spectrum and across the country, ultimately succeeding in having 52 Attorneys General write a letter to Congress protesting defendants' ability to force State Attorneys General into a more convenient

forum, a feat the defendants would not be able to achieve were the plaintiff the United States. [8]

Ultimately, even federal enforcers including FTC Chair Lina Khan[9] and U.S. Department of Justice Assistant Attorney General Jonathan Kanter[10] joined the chorus of those requesting that Congress pass this legislation. Which you all so kindly did, passing SAEVA as part of the Omnibus Appropriations Bill of 2022.[11]

You should know that your work on this statute has proved invaluable: the Google Ad Tech Texas case moved for a change of Venue, which was granted[12] the DOJ Ad Tech case filed in the Northern District of Virginia, stayed put in Virginia[13] and the long-running states' Generic Drugs price fixing case returned to Connecticut where it was filed.[14] All three were successful in persuading the JPML that the cases should be kept or moved back to their original jurisdiction.[15]

The Attorneys General needed SAEVA for their litigation against Big Tech, which the Attorneys General have focused on for years.

Big Tech

Way back in 2011, then- Attorney General, now- Senator Blumenthal was instrumental in developing a case against Apple for what ultimately became the ebooks case. There, we alleged, publishers conspired with Apple to artificially inflate the prices of ebooks. This hard-fought, successful case, that persisted after the Senator's tenure as Attorney General of Connecticut, was co-led by Texas and was an example of a smooth and effective bipartisan case that held companies accountable for their allegedly anticompetitive conduct.

Another successful case just a few years later started after then- Attorney General, now-Senator Hawley announced the Missouri Attorney General's office's historic investigation

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[8] "NAAG Endorses the State Antitrust Enforcement Venue Act of 2021," June 18, 2021 https://www.naag.org/policy-letter/naag-endorses-state-antitrust-enforcement-venue-act-of-2021/

[9] Letter to Chair Durban et al., Feb. 7, 2022, https://www.ftc.gov/system/files/ftc_gov/pdf/khanlettersenatestateantitrustenforcementvenueact.pdf

[10] *Assistant Attorney General Jonathan Kanter of the Antitrust Division Testifies Before the Senate Judiciary Committee Hearing on Competition Policy, Antitrust, and Consumer Rights*, Sept. 20, 2022, https://www.justice.gov/opa/speech/assistant-attorney-general-jonathan-kanter-antitrust-division-testifies-senate-judiciary .

[11] *NAAG Legislative Victories*, Jan. 19, 2023, https://www.naag.org/attorney-general-journal/2022-naag-legislative-victories/

[12] "Paxton Defeats Google's Efforts to Avoid Transfer of Landmark Antitrust Case Back to Texas," Oct. 4, 2023, https://www.texasattorneygeneral.gov/news/releases/paxton-defeats-googles-efforts-avoid-transfer-landmark-antitrust-case-back-texas

[13] Bartz, Diane "US Judge Rules Against Google and Keeps Advertising Case in Virginia," Reuters, March 10, 2023.

[14] Perlman, Matthew, "State-Led Generic Drug Cases Removed from MDL," Law360, February 1, 2024.

[15] AG press releases, supra footnotes 25, 26, 27.

of Google, that led to the Google Search case, where a DC District Court decided in August of 2024 that "Google is a monopolist."

As past counsel for the State of Wisconsin on both cases, and many more against Big Tech, there is only so much I can say about them, but I can say two things: that there is robust enforcement of the antitrust laws against Big Tech at the state and federal level. Secondly, what is remarkable about these cases and is relevant to today's hearing: these cases were brought by huge groups of Attorneys General and the federal government.

For the last decade the states have been focused on taking on Big Tech in a bipartisan fashion: the two Google Search cases I just mentioned were joined for trial and altogether 52 Attorneys General successfully prosecuted this case with the US Department of Justice, which now awaits a ruling on remedies; there are two sets of Google Ad Tech cases, including one bipartisan case joined by the US DOJ; the Google Play Store cases included more than 50 jurisdictions and recently settled; there was an antitrust case against Facebook, which was bipartisan and coordinated with the FTC; Amazon, is a case brought by a bipartisan group of states and the FTC; and most recently the States brought a bipartisan case against Apple, alongside the US DOJ.

The States and federal enforcers do not just coordinate on cases.

Criminal Enforcement

One of the stars in the crown of the Department of Justice Antitrust Division is the Procurement Collusion Strike Force, which ensures that our hard-earned and reluctantly given taxpayer dollars are not spent on bid rigged projects or wasted through collusive efforts by contractors. Recently joined by the States' Bid Rigging and Criminal Enforcement (BRACE) Committee, these two groups of enforcers are reinvigorating our nation's criminal antitrust enforcement. During the Trump administration, the Procurement Collusion Strike Force and the criminal division filed an average 22 criminal antitrust cases annually, with the Biden administration continuing this fantastic program filing an average of 18 cases annually. This tick downward strikes me as the loss of a handful of staff- and restoration to full strength is something that the returning Trump administration should prioritize.

The Department of Justice's leniency program helps break open cases to ensure that wrongdoers are punished for their wrongdoing. My hope is that this program continues to exploit the incentives that a leniency program creates within a conspiracy.

In my experience, the purpose of a leniency program is to sow fear in the minds of conspirators that one of their number is a rat, thus discouraging conspiracies in the first place. If you can't trust your competitors and are concerned that they might report you to authorities, you might think twice about participating in a conspiracy.

To further the goals of reducing criminal antitrust conduct, the US Senate's bipartisan efforts, led by Senators Klobuchar, Lee, and Grassley to protect antitrust whistleblowers are a welcome step toward ensuring that the musofphobia within conspiracies thrives.

Mergers

Merger enforcement since 2016 has been remarkably consistent. As a percentage of filings, challenge numbers have ticked down slightly in the Biden administration; while the Trump administration averaged 1.21% of HSR filings resulting in a legal complaint filed, the Biden administration averaged .93% (although we only have figures through 2023).

I suspect that this remarkable consistency is due to workload. In my experience working with the federal agencies they are doing the best they can with never enough staff, and a variable volume of mergers, some of which are concerning, some of which are easily cleared to close, all of which need to be reviewed.

It is my hope- and is the focus of my company's business- that the agencies will embrace technology to help with efficiency in this process.

The merger guidelines provided by the agencies help companies and their advisors determine which mergers are likely to be challenged. In 2023 the agencies released new guidelines that essentially reorganized guidelines from 2010, expanding them to include caselaw, which is useful for antitrust lawyers, and including certain kinds of conduct and parties that were not previously addressed, like "platforms" and nascent competitors.

The updated merger guidelines have been cited nine times so far by judges appointed by Democratic and Republican presidents, district courts and courts of appeal, and the citations to these guidelines within those decisions are largely unremarkable and not controversial- which is not surprising, because these guidelines reflect the law and serve as a useful reference for judges and practitioners alike.

HSR Process

The agencies have started to modernize the process for filing Hart Scott Rodino Act filings, (HSR filings) which are the documents merging parties file to request merger review for transactions valued at over $120 million.

In fall 2024, the FTC, who processes the filings, issued new rules for those forms. While some aspects of that form update are controversial, the form update was unanimously approved by the full FTC, including the incoming administration's nominee for Chair of the FTC. Crucially to bipartisan enforcement of merger statutes, this revamp includes a

provision that allows parties to check a box to share information with the State Attorneys General.

This very small detail, one that is certainly beneath the notice of all but the weediest of practitioner, is a game-changing time saver. In mergers, the most important thing to companies is to close their deal quickly. Thus the "shot clock"- the time that the agencies have to review a transaction, starts running from the moment their form is accepted by the FTC. This shot clock does not apply to State Attorneys General, so they are able to take their time to review, but parties are often reluctant to share materials with State Attorneys General, which leads to further delay. Naturally, States can review mergers faster if they have the materials sooner. And this is true regardless of the party of the Attorney General.

With this strong history and an embrace of technology and logistical updates, continued diligence in agriculture and against Big Tech, and a strong working relationship with the State Attorneys General who have long embraced bipartisanship, I believe that the antitrust enforcement efforts of the next administration will be stronger than ever.