NOTE

ESCAPING THE *PARENS* TRAP

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*State enforcement of federal antitrust law is a rich combination of questions about federalism, civil procedure, and remedies. Bedrock principles support a robust role for States as "*parens patriae,*" a relationship that positions them as protectors of consumers. Courts are puzzling through how to effectuate this role amidst centuries of common law history and evolving modern understandings of economic harms. This Note argues that allowing states to pursue nominal damages in* parens patriae *cases would better protect consumers, force clarification of the ill-defined limits to* parens patriae *actions, and allow for more efficient restitution in certain cases. This Note first describes the relationship between States and the federal government in antitrust enforcement and the implications that arise from the relationship in our federal structure. The Note then discusses the background of nominal damage awards generally and in the specific antitrust context. Finally, the Note argues for an application of nominal damages in* parens patriae *cases and discusses the implications for antitrust enforcement generally.*

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I. INTRODUCTION

States have a role to play in antitrust enforcement, one that, as the Supreme Court noted, "was in no sense an afterthought; it [is] an integral part of the congressional plan for protecting competition."[1] And yet, key questions about how States are authorized to advocate for their residents as *parens patriae*[2] remain in contention. In some ways, federal courts embrace States bringing claims to protect citizens; in other ways, antitrust law is confused about how to handle these actions. This is the "*parens* trap" in which States are caught. A

1 California v. Am. Stores Co., 495 U.S. 271, 284 (1990).

2 "*Parens patriae*" is a legal doctrine, literally translating to "parent of the country," which allows States to bring antitrust suits on behalf of their citizens. See Section II.B for additional discussion.

more robust embrace of nominal damages as an automatic award in antitrust cases, particularly one which reflects the number of people represented by plaintiff States, would help States protect consumers, vindicate the goals of antitrust law, and affirm the important place of *parens patriae* actions in antitrust enforcement.

This Note is focused on the remedies which State Attorneys General ("State AGs")[3] can pursue in antitrust suits to protect their citizens. Specifically, this Note argues that nominal damages should be automatically awarded in antitrust cases where an anticompetitive violation is demonstrated.[4] This Note further argues that this award of nominal damages should reflect the number of consumers that these State AGs are working on behalf of in *parens* actions, which would almost always lead to an overall award of greater than $1 against a defendant.

[3] The term "State Attorney General," for purposes of this Note, is identical to that used in the Hart-Scott-Rodino Act (hereinafter "HSR"), 15 U.S.C. § 15(g)(1): "the chief legal officer of a State, or any other person authorized by State law to bring actions under [*parens patriae* authority], and includes the Corporation Counsel of the District of Columbia." The term "State" for purposes of this Note is the same definition from HSR, 15 U.S.C. § 15(g)(2): "a State, the District of Columbia, the Commonwealth of Puerto Rico, and any other territory or possession of the United States." This Note prefers to capitalize "State" when used as a noun, in line with the stylistic choice of HSR. Articles, legislative materials, and commentary vary in capitalization, and those choices are reflected in quotations unless otherwise indicated.

[4] "Anticompetitive" for purposes of this Note describes a violation of antitrust laws. The Department of Justice (hereinafter "DOJ") Antitrust Division conceives of the antitrust laws as "prohibit[ing] anticompetitive conduct and mergers that deprive American consumers, taxpayers, and workers of the benefits of competition." *The Antitrust Laws*, U.S. DEP'T OF JUST., https://www.justice.gov/atr/antitrust-laws-and-you [https://perma.cc/C4LF-HTLH]. The Federal Trade Commission (hereinafter "FTC") describes the antitrust laws as "protect[ing] the process of competition for the benefit of consumers, making sure there are strong incentives for businesses to operate efficiently, keep[ing] prices down, and keep[ing] quality up." *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/R5AD-7U3M].

Part II of this Note provides background context about United States antitrust law and the role that state-level enforcers play in relation to federal and private parties. Part II additionally explores the historical roots and modern evolution of the *parens patriae* doctrine, a source of authority through which States can and do bring antitrust suits in their role as a protector of their citizens. A portion of this Part analyzes the legislative history of the Hart-Scott-Rodino Act ("HSR"), which authorizes States to pursue *parens patriae* actions involving damages awards. This Part concludes by exploring how HSR was meant to give consumers additional opportunity to vindicate their rights, how that goal has been frustrated by federal courts in the past, and how current *parens patriae* suits have responded to evolving doctrine. Overall, Part II highlights the opportunity presented by *parens patriae* antitrust actions and how that potential has not been fully realized.

Part III of this Note describes the history and evolution of nominal damages and explores how they came to be a default remedy in cases involving constitutional rights. Part III also explores how nominal damages have been used in the antitrust context and argues that nominal damages have significant benefits for prevailing antitrust plaintiffs, despite being a potentially smaller monetary award, because of the potential for fee-shifting in costly antitrust litigation.

Part IV of this Note argues that an automatic award of nominal damages in antitrust cases would help realize the full potential of the *parens patriae* doctrine and support the deterrence and efficiency goals of antitrust law. Nominal damages would be most relevant in antitrust cases where the alleged harms cannot be easily quantified or in which the quantifiable harms would be too small to encourage consumers to litigate. This Part argues that the Sherman Act's position as a "superstatute" and its roots in the common law counsel in favor of adopting an automatic nominal damages structure akin to constitutional rights cases. The Note concludes by answering potential objections related to duplicative or multiple liability and preclusion and discusses why this new regime does not infringe upon the rights of defendants.

II. ANTITRUST ENFORCEMENT AND *PARENS PATRIAE* DOCTRINE

The authority, decisions, and limitations of state-level antitrust enforcers all derive from the structural characteristics of the U.S. antitrust landscape. Government enforcers have broad authorization to pursue antitrust cases, but this authorization inevitably runs up against resource constraints. In order to fulfill their "integral" role in antitrust enforcement as designed by Congress, States wield *parens patriae* authority on behalf of their citizens. But the exact nature of this authority is a source of mild disagreement among the courts, commentators, and litigants. At its core, *parens patriae* gives additional support to plaintiffs' actions in ways that go beyond other procedural vehicles like class actions or mass actions.

A. Understanding How States Operate in U.S. Antitrust Enforcement

State enforcers work as part of an interlocking and frequently overlapping system of antitrust enforcement in the United States. Three types of actors can bring antitrust suits in this system: the federal government, States, and private parties.[5] Different actors can and do seek the same types of remedies, such as injunctions or damages.[6] But government actors pursue these cases differently, which reflects each actor's idiosyncratic incentives and disparate authority to operate.[7] The role of State AGs must be understood in the broader context of federal enforcement efforts.

Federal and state enforcers both ostensibly have the same mandate: to protect consumers from anticompetitive business

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5 *The Enforcers*, FED. TRADE COMM'N, https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers [https://perma.cc/543C-DAF4].

6 *Id.*

7 Robert L. Hubbard & James Yoon, *How the Antitrust Modernization Commission Should View State Antitrust Enforcement*, 17 LOY. CONSUMER L. REV. 497, 502 (2005) ("Like federal enforcers and private counsel, state attorneys general act in accord with specific authority and pursue specific types of antitrust claims.").

practices.[8] The federal government fulfills this mandate through the Federal Trade Commission ("FTC") and the Department of Justice ("DOJ") Antitrust Division.[9] Both enforcers litigate to stop similar types of conduct and are responsible for the process of "merger review" as required by the Hart-Scott-Rodino Act of 1976 ("HSR").[10] These agencies use a document called the Merger Guidelines as a framework to evaluate mergers, regardless of which entity is taking the lead.[11] Either agency can sue to stop a merger during the merger review process. Both also may bring suits for injunctive relief relating to anticompetitive practices and may sue for damages under the Sherman and Clayton Acts.[12]

The enforcement remits of the FTC and the DOJ also differ due to their structure and practice. The Sherman Act authorizes the federal government, through the DOJ, to pursue criminal sanctions, including fines and imprisonment.[13] The FTC, by contrast, may only seek civil penalties or equitable relief

[8] The Sherman Act was meant "to arm the Federal courts within the limits of their constitutional power that they may cooperate with the State courts in checking, curbing, and controlling the most dangerous combinations that now threaten the business, property, and trade of the people of the United States." 21 CONG. REC. 2457 (1890) (Statement of Sen. Sherman).

[9] *The Enforcers*, *supra* note 5.

[10] *See* FED. TRADE COMM'N & U.S. DEP'T OF JUST., HART-SCOTT-RODINO ANNUAL REPORT FISCAL YEAR 2020 (2020) [hereinafter HSR ANNUAL REPORT 2020], https://www.ftc.gov/system/files/documents/reports/hart-scott-rodino-annual-report-fiscal-year-2020/fy2020_-_hsr_annual_report_-_final.pdf [https://perma.cc/VE4B-L2VG].

[11] *See* FED. TRADE COMM'N & U.S. DEP'T OF JUST., MERGER GUIDELINES (Dec. 18, 2023), https://www.justice.gov/d9/2023-12/2023%20Merger%20Guidelines.pdf [https://perma.cc/2SMJ-EWYF].

[12] *The Antitrust Laws*, FED. TRADE COMM'N, https://www.ftc.gov/advice-guidance/competition-guidance/guide-antitrust-laws/antitrust-laws [https://perma.cc/R5AD-7U3M].

[13] FEDERAL ANTITRUST CRIME: A PRIMER FOR LAW ENFORCEMENT, U.S. DEP'T OF JUST. 1 (2023), https://www.justice.gov/atr/page/file/1091651/dl [https://perma.cc/S4FC-M9LY]. Criminal antitrust offenses are constrained to a limited set of per se illegal acts including price-fixing and related activities. *See* Daniel C. Richman, *Antitrust Standing, Antitrust Injury, and the Per Se Standard*, 93 YALE L.J. 1309, 1311 (1984) ("The Supreme Court has classified certain practices as per se illegal, conclusively presuming them unreasonable.").

and is the only enforcer to bring cases under its specific authorizing act, the Federal Trade Commission Act of 1914.[14]

In other cases, the agency differences do not derive from statute, but from variance in operating procedures and established norms. For example, there is no clear statutory structure to determine which agency receives priority when handling merger review; instead, the agencies allocate responsibilities through an ongoing informal agreement.[15] Together, through either structural delineation of authority or informal practices, these agencies oversaw 1,637 reported mergers in the 2020 fiscal year.[16]

Aside from the specific statutory authorizations of the FTC, State AGs have the ability, and according to some, the responsibility,[17] to do as much as federal enforcers. Dual federalism confers quasi-sovereign authority on State AGs to sue on behalf of their own injuries as "persons" under the antitrust laws and on behalf of their citizens' economic interest as *parens patriae*.[18] States share the federal government's interest in protecting consumers from anticompetitive harms; their pool of consumers just happens to be smaller.

Government enforcers have limited time and resources to enforce this broad mandate, and nearly every antitrust suit requires significant investments in discovery and litigation.

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14 15 U.S.C. §§ 41–58.

15 At a very high level, the FTC is more likely to handle merger review cases in sectors such as healthcare and technology, while the DOJ is more likely to take the lead on mergers in industries such as industrial products. *The Enforcers*, *supra* note 5.

16 *See* HSR ANNUAL REPORT 2020, *supra* note 10, at 1.

17 Hubbard & Yoon, *supra* note 7, at 512–13 (2005) ("The obligation of state attorneys general to protect the interests of the state and its citizens is not limited to competitive concerns or antitrust claims."). States can also sue under state-level antitrust laws, but these laws are not a major focus of this Note. For discussion on when States bring claims under state law in conjunction with federal claims, see Section II.B.3.

18 Georgia v. Penn. R. Co., 324 U.S. 439, 447 (1945) ("Georgia, suing for her own injuries, is a 'person' within the meaning of [section] 16 of the Clayton Act . . . . Suits by a State, parens patriae, have long been recognized. There is no apparent reason why those suits should be excluded from the purview of the anti-trust acts.").

Timing fluctuates from year to year, but one calculation put the average time between initial federal antitrust complaint and settlement in 2006–07 at 1,140 days, with a maximum span of 2,480 days.[19] Antitrust cases are also generally criticized for being expensive to litigate,[20] and all antitrust plaintiffs are cognizant of these costs and have to allocate scarce resources effectively.[21]

Even if federal and state actors agree on the merits of an individual matter, every potential enforcement action has to be evaluated with that opportunity cost in mind. Logically, this means that a matter that may be very important to citizens of a particular State may not beat out countervailing options or priorities for federal agencies which are charged with enforcement authority on a national basis. State enforcers are not bound to agree with federal agency decisions related to antitrust matters and can decide to litigate antitrust violations without prior approval from the federal government.[22]

[19] Brian T. Fitzpatrick, *An Empirical Study of Class Action Settlements and Their Fee Awards*, 7 J. EMPIRICAL LEGAL STUD. 811, 820 tbl.2 (2010).

[20] *See* Jonathan M. Jacobson, *Tackling the Time and Cost of Antitrust Litigation*, 32 ANTITRUST 3 (2017) ("Antitrust cases can take forever and cost a fortune."); *see, e.g.*, Bell Atl. Corp. v. Twombly, 550 U.S. 544, 558–59 (2007) ("[I]t is one thing to be cautious before dismissing an antitrust complaint in advance of discovery, but quite another to forget that proceeding to antitrust discovery can be expensive." (citation omitted)).

[21] Most antitrust cases are either analyzed using a "*per se* illegal" standard or a "rule of reason" standard. Enforcers are also likely weighing the fact that cases which do not fall under the *per se* standard have a vanishingly low success rate in litigation: over 95% of rule of reason cases are dismissed at the first step because the court finds no anticompetitive effect from plaintiff's allegations. Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 GEO. MASON L. REV. 827, 828–29 (2009).

[22] *See, e.g.*, Hubbard & Yoon, *supra* note 7, at 506 ("Antitrust federalism means that the market for antitrust enforcement, like the markets to which antitrust laws apply, is ruled by competition, and that competition among antitrust enforcers and bodies of law fosters alternatives, choice, innovation, and insight.").

1. State and Federal Antitrust Disagreement

In 2018, Sprint and T-Mobile attempted to merge and went through the mandated merger review process.[23] The federal government, through the DOJ and in conjunction with five State AGs, initially sued to block the merger between the two telecom companies.[24] Eventually, the federal government settled the suit, a remedy to which the five plaintiff States also agreed.[25] However, a separate coalition of State AGs (who were not party to the initial lawsuit) disagreed with the federal settlement terms and sued to block the merger several months after the settlement with the federal government.[26] These AGs invoked their *parens patriae*[27] authority to sue "on behalf of and to protect the health and welfare of their residents and the general economy of each of their states."[28] The States eventually lost their bid to block the merger on anticompetitive grounds.[29] Nonetheless, these AGs identified an interest that was not being met by the federal government's

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[23] Michael J. de la Merced & Cecilia Kang, *Sprint and T-Mobile to Merge, in Bid to Remake Wireless Market*, N.Y. TIMES (Apr. 29, 2018), https://www.nytimes.com/2018/04/29/business/dealbook/sprint-tmobile-deal.html [on file with the Columbia Business Law Review].

[24] Complaint at 2, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. July 26, 2019, https://www.justice.gov/atr/case-document/file/1187751/dl1 [https://perma.cc/E3SH-MZ6G].

[25] Proposed Final Judgement at 1, United States v. Deutsche Telekom AG, No. 1:19-cv-02232 (D.D.C. July 26, 2019), https://www.justice.gov/opa/press-release/file/1187706/download [https://perma.cc/2SCD-28J9]. The settlement included a number of mandatory divestitures from Sprint, including selling off a number of assets with the intention of creating a viable fourth competitor, Dish. *Id.* at 6–18.

[26] Redacted Second Amended Complaint at 6, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020) (No. 1:19-cv-02232), https://naagweb.wpenginepowered.com/wp-content/uploads/2020/10/737.civil_.States-v.-T-Mobile-Sprint-Amended-Complaint-3.pdf [https://perma.cc/V7RB-6UZJ].

[27] Discussed *infra* Section II.B.

[28] Redacted Second Amended Complaint at 6, *Deutsche Telekom AG*, 439 F. Supp. 3d 179 (No. 1:19-cv-02232).

[29] *Deutsche Telekom AG*, 439 F. Supp. 3d at 248 ("[T]he Court concludes that the Proposed Merger is not reasonably likely to substantially lessen competition in the [relevant market].").

enforcement and chose to strike their own path forward under *parens* authority.

B. States' Parens Patriae Authority

States can bring antitrust suits through several causes of action outside of a merger context. Like federal antitrust enforcers, States can sue under the Sherman and Clayton Acts for injunctive relief, and they have been bringing this type of suit for decades.[30] In a more recent development, States can sue for treble damages under the Sherman Act.[31]

The Hart-Scott-Rodino Antitrust Improvements Act of 1976 ("HSR") revolutionized American antitrust enforcement. The contentious act[32] contains a title which authorizes States

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[30] *See, e.g.*, Georgia v. Penn. R. Co., 324 U.S. 439, 443–44 (1945) (in which the State of Georgia brought suit alleging that railroads had conspired to fix transportation rates).

[31] 15 U.S.C. § 15c. The final piece of this landscape is actions brought by private actors—generally either a class of consumers or a competitor to the alleged infringer. These actors similarly sue under the Sherman and Clayton Acts, but one difference is that cases litigated by private plaintiffs frequently include a request for compensatory damages of some kind. Private plaintiffs are entitled to seek the same equitable remedies as government plaintiffs as they are "people" under the Sherman and Clayton Acts. Private plaintiffs represent a significant portion of the antitrust cases filed in federal courts, but they are not a focus of this Note. Private litigation tends to be well-funded and active, in no small part because of the possibility of securing treble damages for violations of the Sherman Act. *The Antitrust Treble Damages Remedy*, 9 WM. MITCHELL L. REV. 435, 435–36 (1983).

[32] The Hart-Scott-Rodino Act traces a jumbled history to passage. The seminal account of the Act's history and passage is found in a law review article from the year after passage: Earl W. Kintner, Joseph P. Griffin & David B. Goldston, *Hart-Scott-Rodino Antitrust Improvements Act of 1976: An Analysis*, 46 GEO. WASH. L. REV. 1 (1977). As an overview of the article's thorough analysis: Senators Hart and Scott introduced an antitrust bill codifying *parens patriae* antitrust authority to the Senate in 1975, which received the support of the DOJ and FTC. *The Antitrust Improvements Act of 1975: Hearings on S. 1284 Before the Subcomm. On Antitrust and Monopoly of the Senate Comm. On the Judiciary*, 94th Cong., 1st Sess. 1-1367 (1975). The House of Representatives had also been working on a *parens patriae* antitrust bill during the previous Congress. *Antitrust Parens Patriae Amendments: Hearings on H.R. 12,528 and H.R. 12,921 Before the Subcomm. On Monopolies and Commercial Law of the House Comm. On the*

to sue under the Sherman Act for treble damages when acting in their *parens patriae* authority.[33] However, *parens patriae* authority existed long before HSR.

Parens patriae (or "*parens*") authority, which literally translates to "parent of the country," is a legal principle that started as an English royal prerogative power. This power allowed the King to stand in as legal guardian for those who were mentally unfit to care for themselves, either temporarily or permanently.[34] The power emerged to counter a perception that some subjects were not adequately protected in legal proceedings.[35] Eventually, the *parens* power was expanded,

Judiciary, 93d Cong., 2d Sess. (1974). The Ford administration eventually withdrew its support for the idea of expanded *parens patriae* authority, but House and Senate leaders pushed through with informal negotiations and eventually passed a compromise bill introduced by Robert Byrd. The compromise bill sometimes took portions from the Senate bill, sometimes from the House, and sometimes threaded a compromise. 122 CONG. REC. 29,149–29,153 (1976). The compromise bill chose more of the "major issue" items in the *parens patriae* title (as identified by Senator Byrd) from the Senate version of the bill. *Id.* at 29,151. These informal negotiations did not produce a conference report, but there was a Senate Judiciary Committee Report and House Judiciary Report produced which, in the estimation of Kintner, Griffin, and Goldston, are relevant "to the extent that the enacted provisions were identical to those reported by the committees." Kintner, Griffin & Goldston, *supra* at 3 n.3 (1977). Additionally, some modern commentators, most notably Judge Richard Posner, have also expressed dissatisfaction with HSR. *See* Richard A. Posner, *Antitrust in the New Economy*, 68 ANTITRUST L.J. 925, 940 (2001) ("I would like to see, first, the states stripped of their authority to bring antitrust suits, federal or state, except under circumstances in which a private firm would be able to sue, as where the state is suing firms that are fixing the prices of goods or services that they sell to the state."); *see also* Richard A. Posner, *Federalism and the Enforcement of Antitrust Laws by State Attorneys General*, 2 GEO. J.L. & PUB. POL'Y 5, 13 (2004) ("I am even more convinced that Congress should repeal the provision of the Hart-Scott-Rodino Act that authorizes parens patriae antitrust suits by the states").

[33] 15 U.S.C. § 15c.

[34] Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 600 (1982).

[35] *See* Jack Ratliff, *Parens Patriae: An Overview*, 74 TUL. L. REV. 1847, 1850 (2000) ("The crown undertook to protect and act for minors and incompetents—those who could not fend for themselves.").

allowing the King to advocate on behalf of infants and others who did not have a guardian.[36]

Parens authority came to the United States in the form of a legislative, rather than executive, prerogative.[37] In the modern legal context, the term *parens patriae* more frequently refers to how States bring suits on behalf of natural persons residing within their boundaries. States have brought claims under a modern form of *parens* authority since the turn of the 20th century.[38] Early modern doctrine was focused on States broadly representing the interests of their citizens, frequently seeking injunctive relief related to sanitation or land issues.[39]

In the mid-20th century, a new legal strategy emerged: States began to bring antitrust cases as *parens patriae*, alleging causes of action such as "harm to the general economy." For example, in the 1972 case *Hawaii v. Standard Oil*, Plaintiff Hawaii claimed three bases for recovery: first, as a purchaser of allegedly price-fixed oil itself; second, "acting herein as *parens patriae*, trustee, guardian and representative of its citizens" who may have purchased that oil; and third, as representative of other purchasers in a class action.[40] Hawaii sought injunctive relief and damages associated with all three claims.[41] The Supreme Court held that while Hawaii could

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[36] *Id.* ("In *Eyre* [*v. Countess of Shaftsbury*, 24 Eng. Rep. 659 (Ch. 1722)], the court extended the king's protection to minors, citing as authority *Beverley's Case*, decided over a hundred years earlier.").

[37] *Snapp*, 458 U.S. at 600.

[38] *See* Louisiana v. Texas, 176 U.S. 1 (1900). Louisiana attempted to end a Texas quarantining practice which was harming New Orleans merchants. The Supreme Court ruled that this was not a proper use of *parens* authority because the suit through the state was on behalf of merchants, not the State and its citizens. *Id.*

[39] *See id.*; *see also* New York. v. New Jersey, 256 U.S. 296, 301–02 (1921) (New York alleging that "[t]he health, comfort and prosperity of the people of the state and the value of their property [were] being gravely menaced" by New Jersey sewage disposal practices); Georgia v. Tenn. Copper Co., 206 U.S. 230, 237 ("This is a suit by a state for an injury to it in its capacity of quasi-sovereign. In that capacity the state has an interest independent of and behind the titles of its citizens, in all the earth and air within its domain.").

[40] Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 254–55 (1972).

[41] *Id.* at 254.

sue for damages relating to the alleged overcharges that it suffered itself, its *parens* claim for damages failed because of a lack of authorization to bring suits in that capacity under the terms of the Clayton Act.[42]

The outcome of the case turned on the difference in language found in §§ 4 and 16 of the Clayton Act.[43] Section 4 allows "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws" to bring a treble damages lawsuit.[44] In contrast, § 16 provides that "[a]ny person, firm, corporation, or association shall be entitled to sue for and have injunctive relief . . . against threatened loss or damage by a violation of the antitrust laws."[45] The Court analyzed the difference in language between eligibility for treble damages and eligibility for injunctive relief and concluded that the standard in § 4, requiring that a plaintiff be "injured in his business or property," is a higher standard than what is required to sue for injunctive relief under § 16.[46] The more specific § 4 requirement did not permit a State to sue for damage to its general economy, like Hawaii did in this case before the Court; as such, the Court upheld the lower court's dismissal of the *parens patriae* damages claim.[47] The claim for injunctive relief was allowed to proceed.[48]

Undeterred by the judgement against Hawaii, California pursued a similar cause of action against Frito-Lay the following year, alleging that the company was fixing prices in the State.[49] California argued that "[i]t is impractical or

[42] *Id.* at 262–64.

[43] *Id.* at 260.

[44] 15 U.S.C. § 15.

[45] 15 U.S.C. § 26. The Court held that a State is a "person" in either case without much discussion for purposes of suing under the Clayton Act. *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. at 261 ("Hawaii plainly qualifies as a person under both sections of the statute, whether it sues in its proprietary capacity or as parens patriae.").

[46] *Id.* at 260.

[47] *Id.* at 265–66.

[48] *Id.* at 266.

[49] California v. Frito-Lay, Inc., 474 F.2d 774, 775 (9th Cir. 1973), *cert. denied*.

impossible for the citizens represented herein to bring individual suits to recover damages and the duty to protect their interests and to enforce the policy of the antitrust laws rests with their sovereign, the State of California."[50] A panel in the Ninth Circuit expressed sympathy that there may be policy justification to allow States to bring antitrust damages suits pursuant to *parens* authority, but concluded that doctrine at the time did not support sustaining the suit.[51]

These cases were decided at the same time developments in class action doctrine made it more difficult for plaintiffs to successfully form a class and bring antitrust damages suits.[52] This is not to say that courts necessarily were hostile to antitrust plaintiffs at this time. During the late 60s and early 70s, American antitrust doctrine was more focused on structuralism, which was generally seen as more favorable to plaintiffs.[53] But the decisions in *Standard Oil of California* and *Frito-Lay* fit within an overall trend of federal courts in that era to adopt a more defendant-friendly antitrust goal of the

[50] *Id.*

[51] *Id.* at 777 ("This may be a worthy state aim, but in our judgment it is not the type of state action taken to afford the sort of benefit that the common-law concept of *parens patriae* contemplates").

[52] H.R. Rep. No. 94-499, at 7 (1975) (majority views) ("At a minimum, the new emphasis on the intricacies of class certifications has simply added another round of expensive and delaying litigation on the very propriety of the validity, and therefore certification, of the class."). This comment follows 1975 testimony from James Halverson, Director of the FTC's Bureau of Economics at the time, which stated that "The practical effect of Eisen [v. Carlisle and Jacqueline, 416 U.S. 979 (1974)] is to eliminate the Rule 23 class action as a feasible means for recovery by a large class of individuals each of whom has sustained relatively minor damages. In situations where the costs of giving notice to the class are much greater than any individual class member's stake in the outcome of the action, it is unlikely that any suit will be brought." *Id.*

[53] Lina M. Khan, *Amazon's Antitrust Paradox*, 126 YALE L. J. 710, 717 (2017). Structuralism boils down to the idea that concentrated markets are more likely to suffer from anticompetitive effects by their nature. *See also* Daniel A. Crane, *Antitrust Antifederalism*, 96 CALIF. L. REV. 1, 25 (2008) ("[A] structuralist school of thought often called the Harvard School asserted that a market's structure almost always dictated the competitive conduct of its participants, whose conduct invariably determined the performance of the market.").

"consumer welfare standard" and an embrace of Chicago School-style thinking related to antitrust.[54]

1. Increased Antitrust *Parens Patriae* Authority Under Hart-Scott-Rodino (HSR)

Congress passed the Hart-Scott-Rodino Antitrust Improvement Act of 1976 ("HSR") shortly after the *Standard Oil of California* and *Frito-Lay* decisions. HSR built on the courts' recognition that allowing these suits may yield policy benefits.

HSR has three titles.[55] Title I relates to investigation powers and procedures for challenging mergers.[56] Title II establishes the process today known as "merger review," the system of review that federal agencies must undertake.[57] Title II does not create any new cause of action—the federal government could and did sue to block mergers for decades.[58] The merger review process establishes additional filing requirements for companies and mandates the federal government to proactively review combinations of a certain size before they are

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54 *See, e.g.*, Sandeep Vaheesan, *The Profound Nonsense of Consumer Welfare Antitrust*, 64 ANTITRUST BULL. 479 (2019); Khan, *supra* note 53, at 720–21. The consumer welfare standard and Chicago School thinking related to antitrust rejects the idea that market structure alone is enough to support a judgement ordering a corporate breakup or damages award. Additionally, some business practices which were previously considered *per se* illegal were now evaluated under the more lenient rule of reason framework. *See, e.g.,* Cont'l. T. V., Inc. v. GTE Sylvania Inc., 433 U.S. 36 (1977) (evaluating exclusive territorial agreements, which had previously been *per se* illegal, under the rule of reason). For additional discussion about the uphill battle plaintiffs face in rule of reason cases, see *supra* note 21 and accompanying text.

55 Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. no. 94-435, 90 Stat. 1383 (1976) (codified as amended at 15 U.S.C. §§ 15c, 18c).

56 *Id.* at tit. I.

57 *Id.* at tit. II; discussed *supra* Section II.A.

58 *See* United States v. E. I. du Pont de Nemours & Co., 353 U.S. 586 (1957) (United States suing to prevent du Pont from acquiring a portion of General Motors' outstanding stock); Brown Shoe Co. v. United States, 370 U.S. 294 (1962) (United States successfully suing to block a merger which would only have led to a modest increase in market concentration).

consummated.[59] These titles were the less controversial portion of the Act.

Title III, about which much ink was spilled in congressional reports, was enacted in response to *Frito Lay* and *Standard Oil of California*.[60] Title III provides that

> [a]ny attorney general of a State may bring a civil action in the name of such State, as *parens patriae* on behalf of natural persons residing in such State, in any district court of the United States having jurisdiction of the defendant, to secure monetary relief as provided in this section for injury sustained by such natural persons to their property by reason of any violation of the Sherman Act.[61]

HSR additionally permits States to prove violation of the Sherman Act and damages in the aggregate rather than requiring a showing of harm to each individual.[62] This provision

[59] As of February 2023, this amount is $111.4 million. Premerger Notification Off. Staff, *HSR Threshold Adjustments and Reportability for 2023*, FED. TRADE COMM'N (Feb. 16, 2023), https://www.ftc.gov/enforcement/competition-matters/2023/02/hsr-threshold-adjustments-reportability-2023 [https://perma.cc/9VEL-P4NF].

[60] S. Rep No. 94-803 at 40–41 (1976) (majority views) ("Title IV [which would become Title III in the final Act after Title I, 'Declaration of Policy' was removed] is the legislative response to the restrictive judicial interpretations of the notice and manageability provisions of Rule 23 of the Federal Rules of Civil Procedure and of the rights of consumers and States to recover damages under section 4 of the Clayton Act, and to the Ninth Circuit's invitation for legislative action [in Frito-Lay]."). *See also* S. Rep No. 94-803 at 173 (1976) (minority views) ("The purpose of title IV (parens patriae) is to overturn these landmark court decisions [Hawaii v. Standard Oil and California v. Frito-Lay]."); H.R. Rep 94-499 at 8 (1976) (majority views) ("H.R. 8532 [the House bill which would eventually become the Hart-Scott-Rodino Act] is a response to the judicial invitation extended in *Frito-Lay*. The thrust of the bill is to overturn *Frito-Lay* by allowing State attorneys general to act as consumer advocates in the enforcement process, while at the same time avoiding the problems of manageability which some courts have found under Rule 23.").

[61] Hart-Scott-Rodino Antitrust Improvements Act, Pub. L. no. 94-435, tit. III, 90 Stat. 1394 (1976) (codified as amended at 15 U.S.C. §§ 15c, 18c).

[62] 15 U.S.C. § 15d ("[D]amages may be proved and assessed in the aggregate by statistical or sampling methods, by the computation of illegal overcharges, or by such other reasonable system of estimating aggregate

makes it significantly more efficient to bundle multiple claims under one umbrella action. Title III elicited a scathing critique from the Senate Judiciary Committee Minority Report, which argued, among other things, that the title was a solution without a problem and that the public would suffer as a result of its passage.[63] Other commentators highlighted the positive effects that Title III may have on enforcement, specifically helping to combat antitrust underenforcement due to the collective action problem.[64]

More recent doctrine, including cases being litigated as of this writing, have clarified the standard for when a State can bring a *parens patriae* action. In *In re: Generic Pharmaceuticals Pricing Antitrust Litigation Multi-District Litigation* (MDL), defendants sought a motion to dismiss, alleging that the plaintiff States had improperly exercised their *parens* authority. Judge Cynthia M. Rufe denied the defendants' motion on the grounds that the States had properly established a quasi-sovereign interest in protecting citizens' access to lower-priced drugs.[65] Judge Rufe's opinion reiterated the core *parens*

damages as the court in its discretion may permit without the necessity of separately proving the individual claim of, or amount of damage to, persons on whose behalf the suit was brought.").

[63] *See* S. Rep. No. 94-803 at 173 (1976) (minority views) ("While thus unnecessary for deterrence or redress to injured parties, title IV's parens patriae proposals open a Pandora's box of evils far outweighing any possible benefits to consumers, for which the public will pay a heavy price.").

[64] *See, e.g.*, Jeffrey C. Joy, *Parens Patriae: An Effective Consumer Remedy in Antitrust*, 16 WASHBURN L.J. 135 (1976). *See also* Eustace A. Olliff III, Comment, *Parens Patriae Antitrust Actions for Treble Damages*, 14 HARV. J. ON LEGIS. 328 (1977).

[65] *In re*: Generic Pharm. Pricing Antitrust Litig., 605 F. Supp. 3d 672, 680–81 (E.D. Pa. 2022) ("[T]he States have a quasi-sovereign interest in ensuring that their citizens are not denied the benefit of lower-priced drugs that would result from market participants' adherence to a fair marketplace regulations and an interest in ensuring that those who sell medication to their citizens abide by the federal antitrust system."). "Plaintiff States" is a shorthand in this litigation, referring to 49 different polities, including Connecticut, Alabama, Alaska, Arizona, Arkansas, California, Colorado, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Louisiana, Maine, Maryland, Michigan, Minnesota, Mississippi, Missouri, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New Mexico, New York,

patriae standard: a State must be "more than a nominal party" to a suit to maintain a cause of action under *parens* authority.[66]

The most commonly-recognized interest in *parens* cases is a State's "'quasi-sovereign' interest . . . in the health and well-being—both physical and economic—of its residents in general."[67] States in the generic pharmaceuticals litigation were seeking disgorgement as an equitable remedy under § 16 of the Clayton Act, which allows for plaintiffs to seek injunctive relief for violations of the antitrust laws.[68]

Proponents of HSR saw it as a natural remedy to the increasingly onerous requirements of Rule 23 class certification.[69] They argued that the Rule 23 standard prevented effective enforcement and that this Act would solve the

North Carolina, North Dakota, Ohio, Oklahoma, Oregon, Rhode Island, South Carolina, Tennessee, Utah, Vermont, Washington, West Virginia, Wisconsin and Wyoming, the Commonwealths of Kentucky, Massachusetts, Pennsylvania, Puerto Rico and Virginia, and the District of Columbia. Puerto Rico has successfully brought suit under its *parens* authority in the past, most notably in the famous case of *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 600 (1982).

[66] *Snapp*, 458 U.S. at 593.

[67] *Id.*

[68] *In re: Generic Pharm. Pricing Antitrust Litig.*, 605 F. Supp. 3d at 675. The allegations in the generic pharmaceuticals case focus on price-fixing by the pharmaceutical company defendants. Plaintiff States advanced a novel argument, requesting disgorgement stemming from their claim of general harm to their economies. *Id.* at 676. Judge Rufe rejected this argument because defendants would be potentially liable for duplicative damages depending on the outcome from other suits brought by private plaintiffs under § 4 of the Clayton Act. *Id.* The distinction here is that while States have *parens* authority to seek an injunction relating to an allegation of harm to their general economy, that cause of action carries no risk of duplicative burden on the defendants. The upshot is that for a State to recover damages under the Sherman or Clayton Acts in a *parens* capacity, it must sue under the correct sections.

[69] *See* S. Rep No. 94-803 at 6 (1976) (majority views) ("[C]onsumers have found little relief under the class action provisions of the Federal Rules because of restrictive judicial interpretations of the notice and manageability provisions of Rule 23 and practical problems in the proof of individual consumers' damages under section 4 of the Clayton Act.").

problem.[70] Logically, then, the *parens* action must have some distinct characteristics from a Rule 23 proceeding. But an affirmative procedural definition of a *parens* antitrust action has yet to be perfectly described.

In *Mississippi ex rel. Hood v. AU Optronics*, a *parens* action, the respondent argued that *parens* cases are more properly understood as mass actions for purposes of removal under the Class Action Fairness Act ("CAFA").[71] Seeking to have a price-fixing lawsuit removed to federal court, the respondent further argued that because the State of Mississippi was acting on behalf of over 100 citizens, the suit was a mass action and thus removable under CAFA.[72] The district court and Fifth Circuit agreed that the suit was a mass action.[73] But in contrast to the Fifth Circuit, the Fourth, Seventh, and Ninth Circuits had held in the other direction on the same issue, concluding that *parens* actions are not removable under CAFA.[74]

In a unanimous opinion, the Supreme Court reversed the Fifth Circuit. The Court ruled that because Mississippi was the only named plaintiff, this action was not a proper "mass action" for CAFA purposes.[75] The Court reasoned that

[70] *See id.* at 7 ("The Committee believes that [the *parens patriae* title] provides a practicable remedy for consumers, and that it is necessary to deter antitrust violations, to take the profit out of white collar crime, and to dispense equal justice to the rich and poor alike.").

[71] Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161, 166 (2014).

[72] *Id.* at 169.

[73] *Id.* at 166–67.

[74] AU Optronics Corp. v. South Carolina, 699 F.3d 385, 394 (4th Cir. 2012), *cert. denied*, 571 U.S. 1163 (2014); LG Display Co. v. Madigan, 665 F.3d 768, 772 (7th Cir. 2011); Nevada v. Bank of Am. Corp., 672 F.3d 661, 676 (9th Cir. 2012).

[75] *Mississippi* ex rel. *Hood*, 571 U.S. at 164 (2014). Mississippi's approach to this suit was very similar to that of Hawaii's in the *Standard Oil* case from nearly 40 years prior. Mississippi brought this cause of action on behalf of itself and additionally in a *parens* capacity on behalf of consumers, exactly as Hawaii had positioned its own lawsuit. *See supra* note 40 and accompanying text. Defendants in *Mississippi* ex rel. *Hood* did not challenge the State's ability to bring this suit in a *parens* capacity, showing the growing acceptance of *parens* cases in the antitrust context.

because Mississippi represented over 100 unnamed consumers, certain removal requirements contained in CAFA would not be administrable.[76] Specifically, removal of a mass action requires approval of a majority of the members of the represented group; without named plaintiffs, this requirement becomes impossible to fulfill.[77] As such, *parens* actions are not treated as class actions or mass actions under CAFA's removal provision.

In a broader view, the *Hood* decision upheld the value of federalized antitrust enforcement against defendant-friendly procedural protections such as CAFA. *Parens* actions allow for aggregation of claims which may otherwise be too small for individual actors to bring,[78] while commentators such as Senator Ed Markey assailed CAFA at the time of its passage as "the final payback to the tobacco industry, to the asbestos industry, to the oil industry, to the chemical industry at the expense of ordinary families who need to be able go to court to protect their loved ones when their health has been compromised."[79] There is additional evidence that the main motivating factor behind CAFA's passage was a distrust of class action lawyers.[80] Despite the fact that CAFA is not strictly part of the core antitrust doctrine, the *Hood* result signaled the unique nature of *parens patriae* actions.

[76] *Id.* at 172–73.

[77] *Id. Mississippi* ex rel. *Hood* resolved a circuit split as to the removability of *parens patriae* actions. The Fifth Circuit had adopted a "claim-by-claim approach" when holding that mass actions were removable, which essentially analyzes how many parties are interested in the outcome of the suit. *Mississippi ex rel. Hood v. AU Optronics Corp.*, 701 F.3d 796 (5th Cir. 2012), *rev'd and remanded*, 571 U.S. 161 (2014) (noting that the relevant precedent's "claim-by-claim" approach contrasts with other circuits that look to a state's complaint "as a whole" and then subjectively determine if the state alone is the real party in interest.").

[78] *See infra* Section IV.A for discussion of claim aggregation.

[79] *Bush Signs Limits on Class Actions*, NBC NEWS (Feb. 17, 2005), https://www.nbcnews.com/id/wbna6988023 [https://perma.cc/4B5P-NSLU].

[80] Howard M. Erichson, *CAFA's Impact on Class Action Lawyers*, 156 U. PA. L. REV. 1593, 1596 (2008).

2. Limitations to States' Ability to Bring Suit

The quasi-sovereign standard and CAFA removability doctrines have developed in ways that do not significantly hinder States' abilities to bring *parens* suits. But almost immediately after the Act's passage, the rising tide of the consumer welfare standard crippled a significant portion of the HSR *parens* goal. Most notably, the Supreme Court's 1977 *Illinois Brick* decision curtailed the number of potential plaintiffs in a pass-through price-fixing scheme.[81] By allowing only direct purchasers who had allegedly been harmed by price fixing to sue, the Court removed a cause of action from purchasers further down in the supply chain, even if they had paid higher prices than they otherwise would have absent the anticompetitive activity.[82]

The antitrust *parens* doctrine remains well-situated to balance against the *Illinois Brick* decision. The common law was broadly unfavorable to *parens* plaintiffs until HSR,[83] and subsequent decisions concerning when States can sue and in what

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[81] *See* Ill. Brick Co. v. Illinois, 431 U.S. 720, 725–26 (1977) (holding that only direct purchasers from price-fixers could sue under antitrust law, and barring consumers (termed "indirect purchasers") who had purchased from that direct purchaser).

[82] *Id.* at 746 ("[I]n elevating direct purchasers to a preferred position as private attorneys general, the [rule at question] denies recovery to those indirect purchasers who may have been actually injured by antitrust violations."). Many commentators, contemporaneous to the decision and modern, criticized the *Illinois Brick* decision as crippling the ability for antitrust laws to be enforced effectively. *See, e.g.*, Michael Pertschuk, Chairman, Fed. Trade Comm'n, Remarks Before the National Association of Consumer Agency Administrators Annual Meeting (May 9, 1978), https://www.ftc.gov/system/files/documents/public_statements/688121/19780509_pertschuk_remarks_before_the_national_association_of_consumer_agency_administrators.pdf [https://perma.cc/D2FW-7QBU]. This interpretation of federal antitrust law even spilled into analysis of state statutes: many state legislatures found it worthwhile to pass "*Illinois Brick* repealer" or "*Brick* repealer" statutes that made clear that the decision would not bear on interpretations of state antitrust laws. *See, e.g.*, Edward D. Cavanagh, Illinois Brick: *A Look Back and a Look Ahead*, 17 LOY. CONSUMER L. REV. 1, 2 n.4 (2004).

[83] *See supra* discussion of *Hawaii v. Standard Oil* and *California v. Frito-Lay* in Section II.B.1.

forum they can sue have buttressed the idea that States are efficient entities to lead these actions.[84] After *Illinois Brick*, citizens who may be indirect purchasers of goods with artificially high prices cannot directly sue the offenders for damages as a matter of law;[85] but these citizens can petition their government to punish the offenders for their anticompetitive actions.[86]

3. How States Bring *Parens Patriae* Antitrust Suits in Practice Today

State Attorneys General often bring *parens patriae* suits in conjunction with their counterparts in other States.[87] The reality of a suit against manufacturers of LCD screens, generic pharmaceutical companies, or technology behemoths is that these companies operate in many States. For example, a collection of thirty-eight "States, Commonwealths, and Districts" filed a complaint against Google alleging antitrust violations in 2021.[88] The plaintiff States brought this claim under §§ 1

[84] *See supra* discussion of *Mississippi* ex rel. *Hood*, notes 74–75 and accompanying text.

[85] *Illinois Brick*, 431 U.S. at 746.

[86] Citizens who feel that an upstream company engaged in prohibited price-fixing behavior may be able to petition their State AG to pursue a *parens* suit against the company, seeking damages. The suit would be brought in the State's quasi-sovereign interest in the health of their economy. Then, the State could distribute any damage awards *cy pres*. However, this money may still be most properly distributed to the direct purchasers. Downstream consumers may not receive the damage awards, but offenders could still be punished. Direct purchasers of allegedly price-fixed products may feel pressure not to sue out of fear of jeopardizing an important business relationship.

[87] *See supra* discussion of *Mississippi* ex rel. *Hood*, *New York v. Deutsche Telekom*, and In re: *Generic Pharm*.

[88] The signatories list includes:
Utah, New York, North Carolina, Tennessee, Arizona, Colorado, Iowa, Nebraska, Alaska, Arkansas, California, Connecticut, Delaware, District of Columbia, Florida, Idaho, Indiana, Kentucky, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Jersey, New Mexico, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Virginia, Vermont, Washington, and West Virginia, by and through their respective Attorneys General.

and 2 of the Sherman Act and additionally alleged violations of State-specific antitrust statutes.[89] The statement of jurisdiction in the plaintiff States' complaint provided that "[t]he Attorneys General appear in their respective sovereign or quasi-sovereign capacities and under their respective statutory, common law, and equitable powers, and as *parens patriae* on behalf of natural persons residing in their respective States pursuant to § 4C of the Clayton Act, 15 U.S.C. § 15c."[90]

Some States reiterated their *parens* authority in the State-specific claims of the complaint,[91] while others did not mention the concept.[92] HSR and the amended § 4C of the Clayton Act authorize States to pursue *parens* claims "on behalf of *natural persons residing* in such State."[93] In their specific complaints, the States asserted their actions on behalf of a range of individuals. Most States who asserted their *parens* authority explicitly introduced the "magic words" with something like:

"The State of Delaware seeks all remedies available under federal law or the [Delaware Antitrust Act] including, without limitation, the following:

Damages for natural persons under *parens patriae* authority, pursuant to Del. Code tit. 6, § 2108(b)"[94]

First Amended Complaint at 9, Utah v. Google LLC, No. 3:21-cv-05227 (N.D. Cal. Nov. 1, 2021).

[89] *Id.* at 17.

[90] *Id.* at 16.

[91] States whose specific claims use the words "*parens patriae*": Alaska, California, Colorado, Connecticut, Delaware, District of Columbia, Florida, Idaho, Indiana, Kentucky, Louisiana, Maryland, Massachusetts, Minnesota, Mississippi, Missouri, Nebraska, Nevada, New Hampshire, North Carolina, North Dakota, Oklahoma, Oregon, Rhode Island, South Dakota, Texas, Utah, and West Virginia (twenty-eight jurisdictions). *See id.* at 90–135.

[92] States whose specific claims do not use the words "*parens patriae*": Arizona, Arkansas, Iowa, Montana, New Jersey, New York, Vermont, Virginia, Washington, and Tennessee (ten jurisdictions). *See id.*

[93] 15 U.S.C. § 15c (emphasis added).

[94] First Amended Complaint at 98, Utah v. Google, No. 3:21-cv-05227 (N.D. Cal. Nov. 1, 2021).

Of the twenty-six States that invoked *parens* authority to sue under federal law in conjunction with state law,[95] nineteen sued on behalf of "natural persons," four sued on behalf of "persons," one sued on behalf of "the [State] and the People of the [State]," one sued on behalf of "consumers," and one sued on behalf of "persons doing business or residing in the state," under *parens* authority.[96]

At this point in time, courts have not required a specific definition of on whose behalf States are suing in *parens* actions. State AGs seem to have different conceptions of what authority they wield. The courts may treat *parens* actions as part of States' "special solicitude" in a standing analysis[97] and not feel the need to nitpick these pleadings. Whatever the reason, complaints filed by plaintiff States are often mismatched with the authorizing language of the HSR statute. The plaintiff States settled their suit against Google in 2023, with no judicial development of the *parens* doctrine.[98]

Theoretically, the number of plaintiffs is not a factor in determining whether to grant an injunction against an anticompetitive act. But this gray area would become significantly more important if courts and plaintiffs considered how nominal damages could further the goals of antitrust law.

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[95] California and Massachusetts claimed *parens* authority in their specific claims, but only invoked the authority for state law causes of action. *Id.* at 95, 108.

[96] *See Id.* at 90–135. States can oftentimes pursue antitrust claims under either federal law or state law; state laws are sometimes modeled after the Sherman Act. States are also frequently authorized to pursue *parens* antitrust actions through state laws not necessarily modeled on the Sherman Act. California, for instance, wields its *parens* authority under the Cartwright Act, the Unfair Practices Act (UPA), and the Unfair Competition Act, unique legislation. *See* California *ex rel.* Van de Kamp v. Texaco, Inc., 46 Cal. 3d 1147, 1160–64 (1988) (describing how California's Cartwright Act is not modeled on the Sherman Act).

[97] Massachusetts v. EPA, 549 U.S. 497, 520 (2007).

[98] *See* Settlement Agreement and Release, Utah v. Google, No. 3:21-cv-05227 (N.D. Cal. Dec. 18, 2023).

III. THE OPPORTUNITY PRESENTED BY NOMINAL DAMAGES

The enforcement actions discussed in Part II of this Note focus on States securing either compensatory damages or injunctions. States regularly seek both, even for the same anticompetitive conduct.[99] But States have not specifically asked for nominal damages as a form of relief in any of the *parens patriae* suits reviewed in writing this Note.[100] Nominal damages present an opportunity to fill enforcement gaps related to indirect purchasers. States can embrace nominal damages as an avenue to secure more favorable judgements in complex cases, and courts should be aware of when and how nominal damages may be appropriate remedies in antitrust cases. Automatic nominal damages attach for violations of constitutional rights, and courts could reasonably treat antitrust violations similarly.

A. Nominal Damages Background

The seminal nominal damages rationale was set forth in *Carey v. Piphus*, in which two students were suspended from school. The students alleged that they were denied due process of law in the suspension.[101] The Supreme Court held that the plaintiffs' due process rights were violated, but absent a showing of additional harm, the plaintiffs were not entitled to an award above a nominal amount of $1 for that violation.[102] Today, *Carey* stands for the proposition that constitutional deprivations automatically lead to actionable nominal damages without additional proof of actual injury.[103]

[99] Hawaii v. Standard Oil, 405 U.S. 251, 254 (1972).

[100] States have asked for "all remedies available," however. For example, Indiana "seeks all remedies available under federal law" in its State-specific claims. First Amended Complaint at 102, Utah v. Google, No. 3:21-cv-05227 (N.D. Cal. Nov. 1, 2021).

[101] Carey v. Piphus, 435 U.S. 247 (1978).

[102] *Id.* at 266–67.

[103] Mark T. Morrell, *Who Wants Nominal Damages Anyway? The Impact of an Automatic Entitlement to Nominal Damages under § 1983*, 13 REGENT U. L. REV. 225, 234 (2000).

While the core holding of *Carey* is uncontroversial, Thomas Eaton and Michael Wells have identified differing schools of thought related to whether an award of nominal damages in a § 1983 case supports an award of full attorney's fees under 42 U.S.C. § 1988.[104] Based on the Supreme Court case *Farrar v. Hobby*, some courts have held that a low monetary award should correspond to a low fee award.[105] Eaton and Wells argue that this "low award, low fee" principle is counter to the point of § 1983 litigation and that "Congress recognized that there is a public interest in the vindication of individual constitutional rights. The public, and not just the individual litigant, benefits when constitutional violations are brought to light."[106] Nominal damage awards in constitutional deprivations are important for their own sake, but are also important for follow-on actions like awards of costs and attorney's fees.

B. Nominal Damages as a Default Remedy

The Supreme Court recently described the historical purpose of nominal damages in *Uzuegbunam v. Preczewski*.[107] The Court held that nominal damages were adequate to redress a First Amendment deprivation suffered by a student, thus fulfilling a requirement of Article III standing doctrine.[108] Building on common law tradition stretching back to rules applied by English courts, Justice Thomas' majority opinion held that "every violation imports damage."[109] This theory of nominal damages echoes the *Hawaii v. Standard Oil*

[104] Thomas A. Eaton & Michael L. Wells, *Attorney's Fees, Nominal Damages, and Section 1983 Litigation*, 24 WM. & MARY BILL RTS. J. 829, 831 (2016).

[105] *Id.* at 832 (citing Montanez v. Simon, 755 F.3d 547, 556–57 (7th Cir. 2014); Richardson v. City of Chicago, 740 F.3d 1099 (7th Cir. 2014); McAfee v. Boczar, 738 F.3d 81 (4th Cir. 2013); Aponte v. City of Chicago, 728 F.3d 724 (7th Cir. 2013); Gray *ex rel.* Alexander v. Bostic, 720 F.3d 887 (11th Cir. 2013)).

[106] *Id.* at 867.

[107] 592 U.S. 279 (2021).

[108] *Id.* at 283.

[109] *Id.* at 287 (quoting Justice Story in Webb v. Portland Mfg. Co., 29 F.Cas. 506, 508–09 (C.C.D. Me. 1838)).

Court's pronouncement, made nearly 50 years earlier, that "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by Congress."[110]

While plaintiff Uzuegbunam alleged a violation of his constitutional right to free speech, the tradition that Justice Thomas traced indicates that rights violations ripe for nominal damages remedies extend across different spheres of private and public law.[111] Nominal damages have been awarded for procedural failings; for ineffective assistance of counsel that ultimately did not prejudice a client; and for breach of contract.[112] Justice Thomas acknowledged that this practice was not always followed at common law, "as is true for most common-law doctrines,"[113] but provided that the practice was especially prevalent when there was a violation of an "important right."[114]

The Ninth Circuit applied similar logic to analyze a nominal damages claim brought as part of a class action lawsuit under 42 U.S.C. § 1983.[115] In *Cummings v. Connell*, a group of non-union employees alleged that the State of California improperly withheld a portion of their wages to fund collective bargaining processes without giving adequate notice.[116] The trial court awarded damages of around $3 million in the first instance.[117] On interlocutory appeal, the Ninth Circuit held that the plaintiff class had not suffered any "compensable harm (aside from nominal damages) from the initial defective

[110] Hawaii v. Standard Oil, 405 U.S. 251, 262 (1972).

[111] *See Uzuegbunam*, 592 U.S. at 286–87.

[112] *Id.* (citing Barker v. Green (1824) 130 Eng. Rep. 327, 2 Bing. 317; Hatch v. Lewis (1861) 175 Eng. Rep. 1145, 1150, 1153, 2 F. & F. 467, 479, 485–86; Dods v. Evans (1864) Eng. Rep. 929, 930–31, 15 C. B. N. S. 621, 624, 627, 143).

[113] *Id.* at 288.

[114] *Id.* Chief Justice Roberts, in dissent, argued that this standard will put the Court in the position of issuing "advisory opinions whenever a plaintiff tacks on a request for a dollar." *Id.* at 294 (Roberts, C.J., dissenting).

[115] Cummings v. Connell, (*Cummings II*) 402 F.3d 936 (9th Cir. 2005).

[116] *Id.* at 940–41.

[117] *Id.* at 941.

notice."[118] On remand, the district court awarded a nominal amount of $1 to each of the seven named plaintiffs of the class, providing no award to the other approximately 37,000 class members.[119]

The Ninth Circuit reversed on the breadth of the award, holding that all members of the class were entitled to a nominal award of $1.[120] The court rejected the district court's conclusion that only named plaintiffs should recover, noting that after certification of the class, the members bring similar or identical claims; consequently, the class may seek uniform redress.[121] In other words, "every member of the class suffered the same deprivation of rights. It follows that every member is entitled to nominal damages, just as if each one had brought his or her own lawsuit."[122] The Ninth Circuit specifically held that "when nominal damages are awarded in a civil rights class action, every member of the class whose constitutional rights were violated is entitled to nominal damages."[123]

Despite the common law traditions and the general willingness of the courts to award nominal damages when a right is violated, the access to nominal damages as a default is not universal. In *Brandt v. Cedar Falls,* the Eighth Circuit held that when pursuing claims under the Family and Medical

[118] Cummings v. Connell (*Cummings I*), 316 F.3d 886, 895 (9th Cir. 2003).

[119] *Cummings II* at 941–42. The district court on remand chose to award $1 per named plaintiff and rejected a scaling factor that would have awarded each named plaintiff $1 per "[act] that resulted in a constitutional violation" multiplied by 17 offending acts. *Id.* at 945. Nominal damage awards do not always have to be $1, though. In fact, the district court considered awarding nominal damages of a single cent instead of $1. Ultimately, it was determined that cutting a check for a cent would cost the company the same as cutting a check for $1 due to transaction costs. *Id.* at 942 n. 4. The district court could have also awarded an amount higher than $1 for an alleged constitutional violation. The outer bounds for nominal damages are such that "[a]lthough the amount of damages awarded is not limited to one dollar, the nature of the award compels that the amount be minimal." *Id.* at 943.

[120] *Id.* at 944.

[121] *Id.*

[122] *Id.*

[123] *Id.* at 940.

Leave Act ("FMLA"), a plaintiff cannot recover nominal damages.[124] The court reasoned that nominal damages are not available to FMLA plaintiffs because nominal damages are not included in the list of potential remedies under the FMLA.[125] The court acknowledged that this ruling was in line with decisions from the Fourth, Seventh, and Tenth Circuits.[126]

The Eighth Circuit's reasoning mirrored (and cited to) the Tenth Circuit's reasoning in *Walker v. United Parcel Service*. The *Walker* court refused to allow for a claim of nominal damages because it read the FMLA statute's recovery provisions as "unambiguously limited to actual monetary losses."[127] The *Walker* plaintiff advanced an argument in the alternative that nominal damages should be available by default in an analog to a Title VII case under 42 USC § 1981a.[128] The court elided this argument, concluding that nominal damages were not always recoverable under § 1981a. Instead, this potential remedy came into existence after amendments to § 1981a allowed for "compensatory" damages.[129] The FMLA lacks a similar statutory authorization.[130] The court further stated that "nominal damages are generally considered to be compensatory in nature."[131] But this reasoning fundamentally misunderstands the distinction between compensatory and nominal damages, which serve two different purposes.[132] Nominal

[124] Brandt v. City of Cedar Falls, 37 F.4th 470, 479 (8th Cir. 2022).

[125] *Id.* at 478; Family and Medical Leave Act § 107, 29 U.S.C. § 2617(a)(1)(A)(i) (employers can be held liable for "wages, salary, employment benefits, or other compensation denied or lost" or "in a case in which wages, salary, employment benefits, or other compensation have not been denied or lost to the employee, any actual monetary losses.").

[126] *Brandt*, 37 F.4th at 479.

[127] Walker v. United Parcel Serv., Inc., 240 F.3d 1268, 1277 (10th Cir. 2001).

[128] *Id.*

[129] *Id.* at 1278.

[130] *See* 29 U.S.C. § 2617(a)(1).

[131] *Walker*, 240 F.3d at 1278.

[132] *See, e.g.*, Morrell, *supra* note 103, at 228 (2000) (stating that in a § 1983 case "[t]he automatic award of nominal damages reveals that 'the law recognizes the importance to organized society that [constitutional] rights

damages do not compensate for harm suffered. Rather, they are a form of redress for the violation of a right that are not designed to make plaintiff whole and do not require a separate showing of harm.[133] The *Uzuegbunam* court stated that "[n]ominal damages are not a consolation prize for the plaintiff who pleads, but fails to prove, compensatory damages. They are instead the damages awarded by default until the plaintiff establishes entitlement to some other form of damages, such as compensatory or statutory damages."[134]

C. Nominal Damages in the Antitrust Context

The Second Circuit upheld an award of nominal damages in *United States Football League v. National Football League,* in alignment with the idea that nominal damages may be an appropriate award even in cases where economic harm can be quantified.[135] The jury in the district court proceeding found

be scrupulously observed,' even if insufficient proof exists for compensatory or punitive damages.").

[133] Uzuegbunam v. Preczewski 592 U.S. 279, 291 (2021).

[134] *Id.* at 290.

[135] U.S. Football League v. Nat'l Football League, 842 F.2d 1335 (2d Cir. 1988). Sports are a frequent focus of antitrust concerns. The NFL previously merged with the American Football League (AFL) after years of competition, with the admitted goal of curtailing growing player salaries, which were rising as the two organizations bid against each other in the battle for talent. This would be a classic antitrust violation, except for the fact that Congress chose to exempt the parties from antitrust litigation through legislative action. Richard Sandomir, *Congress's Team: Deal for Merger Included Saints*, N.Y. TIMES (Jan. 26, 2010). https://www.nytimes.com/2010/01/27/sports/football/27sandomir.html [on file with the Columbia Business Law Review]. Baseball is famously exempt from antitrust scrutiny going back to the Supreme Court decision Federal Baseball Club of Baltimore v. National League of Professional Baseball Clubs, 259 U.S. 200 (1922). However, this general attitude that sports deserve some special level of antitrust deference may be changing. The Senate Judiciary Committee requested information from Major League Baseball about conditions that minor league baseball players face. *See* Evan Drellich, *U.S. Senate Requests Information on MLB's Antitrust Exemption from Commissioner Manfred*, THE ATHLETIC (July 18, 2022), https://theathletic.com/news/us-senate-mlb-antitrust-manfred/czCdXJCAAatD/ [https://perma.cc/57F2-CESP]. In other recent sports antitrust developments, LIV Golf sued the PGA Tour in 2022

that the NFL had willfully monopolized the market for professional football in the United States in violation of the Sherman Act.[136] Additionally, the jury found that this monopolization had harmed the United States Football League ("USFL").[137]

The USFL did not request nominal damages in its complaint, but the jury was instructed that it "may decline to award damages under such circumstances, or [it] may award a nominal amount, say $1."[138] The USFL challenged the award of nominal damages and the instruction itself on appeal.[139] The Second Circuit held that the jury instruction was not a clear error and that there was no reason that nominal damages are inherently suspicious or improper in an antitrust context.[140] This analysis aligns with principles of nominal damages advanced by other courts: there is no reason that nominal damages cannot be awarded when causes of action are economic, but they are an unusual form of redress.

Nominal damages may be especially attractive in antitrust suits because they can be the basis for an award of attorney's fees and court costs.[141] Antitrust suits involve significant time and expense in discovery, including the frequent use of economists and other experts whose work underpins core

alleging that the PGA violated sections 1 and 2 of the Sherman Act and maintained both a monopoly and monopsony. *See generally* Complaint, Mickelson et al v. PGA Tour, Inc., No. 3:22-cv-04486 (N.D. Cal. Aug. 3, 2022). The two parties have since agreed to a merger, leading some commentators to speculate how this agreement would impact the competitive dynamics of the marketplace. *See, e.g.*, Peter Coy, *Golf's Antitrust Problem Just Got Bigger*, N.Y. TIMES (June 7, 2023), https://www.nytimes.com/2023/06/07/opinion/pga-liv-golf.html [https://perma.cc/SN8A-HK3L].

136 *U.S. Football League*, 842 F.2d at 1341.

137 *Id.* The USFL made additional claims, including that the NFL had monopolized relevant television markets; the jury found the NFL free from liability for all claims other than the monopolization of major-league professional football in the U.S. *Id.*

138 *Id.* at 1377.

139 *Id.* at 1341.

140 *Id.* at 1376–77.

141 15 U.S.C. § 15.

components of any case.[142] Even if parties do not prevail on the amount of damages initially sought, professional fees may remain substantial sums. An award of nominal damages is enough to support an award of attorney's fees to "a substantially prevailing claimant" under the Sherman Act.[143] Nominal damages may not be a plaintiff's first choice when litigating, but an automatic award may serve as a backstop against fears of entering into expensive litigation with uncertain recovery.

IV. SUPPORTING AN EXPANDED EMBRACE OF NOMINAL DAMAGES IN *PARENS PATRIAE* ANTITRUST CASES

Nominal damages could neatly smooth several doctrinal wrinkles in *parens patriae* antitrust doctrine. Embracing additional use of nominal damages may encourage States to take on cases with more difficult damage calculations; even if these treble damages claims don't achieve the desired result, nominal damages can serve as the basis for cost-shifting. Making this award automatic is in line with common law nominal damages traditions and recognizes the "super-statute" nature of the Sherman Act.

A. When Nominal Damages in Parens Patriae Antitrust Cases May Be Most Relevant

In a pure price-fixing case with perfect data and perfectly efficient discovery, an automatic award of nominal damages would not make much difference. In this case, the plaintiff would be able to prove how much additional cost was incurred as a result of defendant's conduct, and that amount would be the basis for a treble award. More realistically, however, price-fixing cases involve competing experts alleging what the baseline competitive price would have been without the alleged price-fixing, a contest over what products are even relevant to consider, and disputes over what time frame is relevant.

[142] *See supra* Section II.A (discussing antitrust litigation costs).

[143] 15 U.S.C. § 4304(a)(1).

Other antitrust cases focus on less-quantifiable harm, including allegations of attempted monopolization or pay-for-delay schemes in which a dominant competitor buys off an upstart rival.[144] Government enforcers continue to bring these types of cases.

For example, the DOJ and a coalition of plaintiff States sued Google for alleged monopolization of digital advertising technology products in January 2023.[145] The plaintiffs are seeking injunctive relief against Google's monopolization activities, declaratory relief, and divestiture of certain Google products under §§ 1 and 2 of the Sherman Act.[146] The United States also specifically requests damages in its capacity as a direct purchaser of Google products under 15 U.S.C. § 15(a).[147] Plaintiffs do not seek damages in their *parens patriae* capacity.

An automatic award of nominal damages in *parens* actions would be most relevant in one of two situations: first, where a broad class of direct purchasers is injured or at risk of injury for an amount too small to litigate individually;[148] or second, a situation in which it is difficult to quantify the amount of

144 The payoff itself is obviously quantifiable—what is more challenging is proving the harm to competition by estimating how market dynamics would or could have been different assuming that there was entry by the upstart rival.

145 Press Release, U.S. Dep't of Just., Justice Department Sues Google for Monopolizing Digital Advertising Technologies (Jan. 24, 2023), https://www.justice.gov/opa/pr/justice-department-sues-google-monopolizing-digital-advertising-technologies [https://perma.cc/EFT6-B6ZX].

146 Complaint at 139–40, United States v. Google, No. 1:23-cv-00108, (E.D. Va. Jan. 24, 2023).

147 *Id.* at 140.

148 An injunction may seem like a natural remedy in a case of attempted monopolization and could support a cost-shifting award if granted. However, if the actors previously abandoned an alleged attempt to monopolize and had no possibility of doing so again, then there may be no conduct which the court could enjoin. It is unclear whether a court would see fit to grant an injunction in this scenario. *See, e.g.,* Fed. Trade Comm'n v. Credit Bureau Ctr., 937 F.3d 764, 772 (7th Cir. 2019) ("Requiring ongoing or imminent harm matches the forward-facing nature of injunctions.") As such, an award for nominal damages could present an avenue to cost recovery that would otherwise be unavailable.

harm in dollars. Nominal damages may also allow for token recovery in *parens* cases where consumers are indirect purchasers and may be otherwise barred by *Illinois Brick*.[149] These indirect purchaser cases are types which States tend to bring under *parens* authority already, many of which involve dozens of States with a collective population of hundreds of millions of consumers.[150]

These cases appear similar to class actions. In the abstract, they do share some common properties. But as discussed in Section II.B.1, *parens* actions are in many ways a more plaintiff-friendly version of Rule 23 actions. However, if a court were to award nominal damages to a prevailing group of States in a *parens* action—in some sense, a "class analog"—it could also peg that award to a non-arbitrary number as in *Cummings II*. In place of a Rule 23 class certification requirement, the size of the class analog could be determined in several ways.

Most broadly, the States could be entitled to nominal damages for all "natural residents" of the State. "Natural persons residing in the state" is the jurisdictional wording from the HSR text, and States are specifically authorized to pursue these claims "for injury sustained by such natural persons to their property" in the aggregate.[151] This definition of a class analog would be as broad as a state could reasonably seek to obtain in a *parens patriae* suit. Anything broader would push beyond the authorization from HSR and would need to have another basis in law. And in practice, courts have not required States to plead that a specific number of residents are represented by a *parens* action.[152] Instead, States plead that they

[149] *Illinois Brick* holds that only direct purchasers of price-fixed product can sue for damages. Ill. Brick Co. v. Illinois, 431 U.S. 720, 746 (1977).

[150] *See* First Amended Complaint, Utah v. Google, No. 3:21-cv-05227 (N.D. Cal. Nov. 1, 2021); Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U.S. 161 (2014); *In re*: Generic Pharm. Pricing Antitrust Litig., 605 F. Supp. 3d 672 (E.D. Pa. 2022).

[151] 15 U.S.C. § 15c(a)(1); 15 U.S.C. § 15d.

[152] *See, e.g.*, Mississippi *ex rel.* Hood v. AU Optronics Corp., 571 U. S. 161 (2014); Alfred L. Snapp & Son, Inc. v. Puerto Rico, 458 U.S. 592, 601–02 (1982).

have a quasi-sovereign interest in their overall economy and in protecting the economic health of their citizens.[153] Consequently, adopting this HSR jurisdictional method to determine the size of a class analog would require States to change their pleadings in the future.

States have not pursued a strategy of seeking nominal damages in this broad way; it is even possible that defendants may object to the view that a State Attorney General represents all natural citizens of the State in a *parens patriae* antitrust lawsuit. This objection would not necessarily carry the day, though. Antitrust law is very comfortable with assessing treble damages for anticompetitive conduct as a counterweight against the difficulty of bringing these suits at all.[154] Some commentators have speculated that fewer than one in ten antitrust offenses is actually prosecuted.[155] An overbroad definition of a class analog would not be out of step with the overall deterrence goals of antitrust law.

A more moderate approach would be to require some sort of affirmative standard for the plaintiff States to demonstrate the size of the class analog, akin to the class certification process under Rule 23. However, the process for determining the size of the class analog would not necessarily need to follow the strictures of Rule 23.[156] This burden could be placed on

[153] *Snapp*, 458 U.S. at 602.

[154] *See, e.g.*, *The Antitrust Treble Damages Remedy*, 9 WM. MITCHELL L. REV. 435, 450 (1983). ("To the extent that the remedy provides a powerful financial incentive for private action, treble damages enhances deterrence because the private plaintiff is in the best position to effectuate enforcement of antitrust laws. The private plaintiff is usually attuned to competition and monopolistic behavior in his product market, since anticompetitive behavior directly affects his sales and profits.").

[155] *See* Robert H. Lande, *Are Antitrust Treble Damages Really Single Damages?*, 26 J. REPRINTS ANTITRUST L. & ECON. 463, 465 n.1 (1996) ("(Then)[-]Assistant Attorney General Douglas H. Ginsburg, in testimony before the U.S. Sentencing Commission, July 15, 1986, stated his belief that the probability that price fixing would be detected, indicted, and convicted was less than one in ten. Peter G. Bryant and E. Woodrow Eckard estimate that between 13% and 17% of price fixing conspiracies are successfully prosecuted." (citations omitted)).

[156] *See* Fed. R. Civ. P. 23(b). Since HSR was passed in 1976, some commentators have remarked that it is increasingly difficult for plaintiffs to

the State, which may need to make a strategic choice about investing in additional discovery to define a class analog that meets this standard. The class analog could be defined as those consumers who are active in a defined market or those who would suffer future anticompetitive harms in cases of attempted monopolization or other anticompetitive conduct.

The narrowest approach would award a single dollar (or cent, or any other nominal amount) to prevailing State plaintiffs regardless of how many join together or how many consumers they represent. Even $1 would support an award of attorney's fees, but would fall short of optimal deterrence goals.[157] In anything other than this narrowest calculation, defining a class analog would also serve as a forcing mechanism for State AGs and courts to clarify who exactly is represented in *parens* actions.

B. Extending the Logic of Carey, Cummings, and Uzuegbunam to Antitrust Violations

Nominal damages in constitutional rights cases are "actionable . . . without proof of actual injury,"[158] "vindicate rights,"[159] and are "awarded by default until the plaintiff

bring class actions. The landmark decision Wal-Mart Stores v. Dukes, 564 U.S. 338 (2011), which rejected certification of the potential largest class in the history of the United States, has drawn especially sharp criticism. *See* Melissa Hart, *Civil Rights and Systemic Wrongs*, 32 BERKELEY J. EMP. & LAB. L. 455, 461 (2011) ("By rejecting statistical modeling as a permissible remedial approach, the Court reduces the structural and systemic claim to the sum of its individual parts and gives those individual parts the power to destroy the whole."); *see also* Elizabeth Tippett, *Robbing a Barren Vault: The Implications of* Dukes v. Wal-Mart *for Cases Challenging Subjective Employment Practices*, 29 HOFSTRA LAB. & EMP. L. J. 433, 435 (2012) (estimating that about half of previously successful class action claims challenging subjective employment practices would not survive after the *Dukes* decision).

157 Assuming that the harm suffered was greater than $1.

158 Carey v. Piphus, 435 U.S. 247, 266 (1978) (due process violation).

159 Cummings v. Connell, (*Cummings II*) 402 F.3d 936, 942 (9th Cir. 2005) (due process violation).

establishes entitlement to some other form of damages."[160] Antitrust claims under the Sherman Act are not constitutional violations, but the harms suffered by consumers can similarly be expressed as a deprivation of rights. States express a quasi-sovereign right to protect their economies from interference.[161] Separately, modern consumers plead that the Sherman Act delivers a right to not suffer from anticompetitive behavior.[162]

For over 100 years, commentators have argued that the Sherman Act should be interpreted through a purposivist lens and should be seen as a response to "the changes of business and social conditions."[163] This expansive view of the Sherman Act aligns with an argument that the legislation is a "classic super-statute," or a law that 1) substantially alters the regulatory baseline, 2) "sticks" and becomes foundational to our thinking, and 3) is shaped over time by administrators and judges.[164] The Sherman Act codified a restriction on a common law concept, the restraint of trade,[165] akin to Justice Thomas' *Uzuegbunam* analysis that traced nominal damages back through a common law tort history. The Supreme Court has additionally stated that "Congress . . . expected the courts to give shape to the [Sherman Act's] broad mandate by drawing on common-law tradition."[166]

160 Uzuegbunam v. Preczewski 592 U.S. 279, 290 (2021). (free speech violation).

161 First Amended Complaint at 16, Utah v. Google, No. 3:21-cv-05227 (N.D. Cal. Nov. 1, 2021).

162 Complaint at 44, Floyd v. Amazon, No. 2:22-cv-01599 (W.D Wa. Nov. 9, 2022), https://www.hbsslaw.com/sites/default/files/case-downloads/apple-amazon-price-fixing/2022-11-09-class-action-complaint.pdf [https://perma.cc/WR8Q-FM9K] ("Plaintiff and members of the Class are entitled to a permanent injunction that terminates the ongoing violations alleged in this Complaint").

163 William Eskeridge, *Super-Statutes*, 50 DUKE L.J. 1215, 1234 (2001) (quoting WILLIAM HOWARD TAFT, THE ANTI-TRUST ACT AND THE SUPREME COURT 47 (1914)).

164 *Id.* at 1230–31.

165 *Id.* at 1232.

166 National Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 688 (1978).

The recognition of the Sherman Act as a "super-statute" is drawn from the lofty language that federal courts have used to describe the Act's structure and purpose. The core antitrust laws have been called "the Magna Carta of free enterprise."[167] The Supreme Court further described the Act as a "charter of freedom,"[168] with "generality and adaptability comparable to that found to be desirable in constitutional provisions."[169] Even in *Apple v. Pepper*, a recent Supreme Court case which re-emphasized the *Illinois Brick* decision that sharply limited the pool of potential antitrust plaintiffs, there was no question that "the text of § 4 [of the Clayton Act] broadly affords injured parties a right to sue under the antitrust laws."[170] Courts, commentators, and litigants all recognize that the rights protected by antitrust laws go beyond what an ordinary statute grants. In this way, the freedom from anticompetitive conduct is an "important right," of the kind identified in *Uzuegbunam*,[171] which courts should seek to vindicate.

Contemporary changes in business and social conditions have led States to pursue antitrust lawsuits as groups of co-plaintiffs, collectively representing hundreds of millions of consumers.[172] If these consumers were instead litigating a § 1983 class action, each would be entitled to nominal damages automatically if they could prove a deprivation of constitutional rights.[173] At its core, "[e]very violation of the antitrust laws is a blow to the free-enterprise system envisaged by

167 United States v. Topco Assocs., 405 U.S. 596, 610 (1972).

168 Appalachian Coals, Inc. v. United States, 288 U.S. 344, 359 (1933).

169 *Id.* at 360.

170 Apple v. Pepper, 139 S.Ct. 1514, 1522 (2019); 15 U.S.C. § 15(a) (conferring standing on "any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws.").

171 Uzuegbunam v. Preczewski 592 U.S. 279, 288 (2021).

172 *See supra* Section II.B.3.

173 Cummings v. Connell, (*Cummings II*) 402 F.3d 936, 944 (9th Cir. 2005).

Congress,"[174] much the same way that "every violation imports damage"[175] in a constitutional rights case.

C. Affirming the Deterrence Goals of Antitrust Law

Core to antitrust law is the idea of deterrence. Antitrust law embraces the idea of treble damages as a way to change the incentives of anticompetitive actors.[176] Litigation costs can be avoided if anticompetitive action never occurs in the first place, rather than forcing those harmed to vindicate their rights in court. Nominal damages do not accomplish the same deterrence goals as an award of compensatory or treble-compensatory damages would, by virtue of their objectively smaller size. But nominal damages for a group of residents in a *parens* action has potential to be significantly more impactful than a case in which no monetary damages are awarded.

The HSR Senate Judiciary Committee Majority Report quotes a colorful businessman who illustrated the inadequacy of static white collar regulatory fines: "When you're doing $30 million a year and stand to gain $3 million by fixing prices, a $30,000 fine doesn't mean much. Face it, most of us would be willing to spend 30 days in jail to make a few extra million dollars."[177] Indeed, this inadequacy pushes government agencies to litigate antitrust cases for damages in the first place, reflecting the sense that punishment for antitrust violations can go beyond the actual harm done in specific cases.

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[174] Hawaii v. Standard Oil Co. of Cal., 405 U.S. 251, 262 (1972).

[175] *Uzuegbunam*, 592 U.S. 279, 287 (quoting Webb v. Portland Mfg. Co., 29 F.Cas. 506, 508–09 (No. 17, 322) (C.C.D. Me. 1838).

[176] *See* Herbert J. Hovenkamp & Louis B. Schwartz, *Treble Damages and Antitrust Deterrence: A Dialogue*, 18 ANTITRUST L. & ECON. REV. 67, 68–69 (1986) ("[T]reble damages are a form of general deterrence: An intended antitrust violation that appears profitable when the risk of detection, litigation, and single damages is considered may appear unprofitable when the damages will be multiplied by 3. At various times the U.S. Supreme Court has identified *both* compensation and general deterrence as appropriate goals of the private treble-damage action").

[177] S. Rep. No. 94-803 at 1 (1976) (majority views), quoting from *Business Week* (June 2, 1975).

Deterrence would also be insufficiently served by limiting nominal damage awards to $1 per State or $1 per judicial proceeding. Assuming that the optimal level of damages in an antitrust suit is an accurate determination of the harm inflicted by an anticompetitive actor (trebled), then a nominal damage award that takes into account the number of claimants with a valid cause of action would at least be closer to that number than no monetary award.[178] In line with an overall theme in nominal damages doctrine, it would factually be better than nothing.[179] And in modern *parens* cases with multiple State plaintiffs, these individually nominal sums could represent millions of dollars.

D. Serving the Interests of Efficiency

State Attorneys General are also a more efficient vehicle for instances in which a group of consumers seeks to litigate an antitrust case. A group of consumers could bring a class action suit to vindicate their rights, but private attorneys would usually receive a contingency fee drawn from the overall award. Whether a flat rate, a percentage of the overall award, or another method of fee allocation, private attorneys taking any amount leaves less money for plaintiffs than actions led by State AGs, which do not involve contingency fees or other fee arrangements. States frequently recover monetary awards on behalf of citizens and have processes to distribute these funds.[180] If specific purchasers cannot be identified, States have distributed the funds *cy pres* or given the funds to programs designed to benefit those harmed.[181] Even

[178] This is assuming that each plaintiff suffered an alleged harm of greater than $1, otherwise a typical nominal damage award of $1 would actually be an *over*compensation relative to the harm caused by the alleged anticompetitive actor. This is probably a sound assumption, as empirical evidence put the average settlement amount in 2006–07 federal antitrust class actions at $60.00. *See* Fitzpatrick, *supra* note 19, at 828.

[179] *See* Morrell, *supra* note 103.

[180] *See, e.g.*, *In re* Compact Disk Minimum Advertised Price Litigation, MDL 1361 (D. Me. 2003) (in which direct cash payments were sent to consumers).

[181] Hubbard & Yoon, *supra* note 7, at 507.

if, rationally, most individual consumers will not go through the process of submitting a claim for an award of $1, more money is at a State's remedial disposal after a *parens* award than would be after private litigation. The Supreme Court noted its concern for efficiency in antitrust proceedings in *Apple v. Pepper*, in which Justice Kavanaugh stated that the *Illinois Brick* decision "sought to ensure an effective and efficient litigation scheme in antitrust cases."[182] This efficiency is still subject to the "quasi-sovereign interest" standard previously discussed in Section II.B.1. A plaintiff State would still need to identify a quasi-sovereign interest in its pleading to be a proper use of *parens* power. A quasi-sovereign interest does not necessarily conflict with responsiveness to citizens' interests; the State just needs to plead something more.

E. Duplicative Liability and Potential Preclusive Effects

Wider embrace of nominal damages in the antitrust context would not create any additional liability for defendants; actions would simply function as a more efficient way for consumers to act upon an already-existing right to sue.

The drafters of HSR built structures to ensure that actions brought by States would not result in repeated damages payments. State AGs are required to give "notice . . . by publication" "[i]n any action"[183] under the authorizing statute. The United States Attorney General additionally has a notification requirement under which they are directed to inform State AGs that may also be entitled to bring suit for the same violation;[184] this incentivizes state and federal enforcers to cooperate.[185] Finally, akin to a Rule 23 action, those who do not opt out of representation by the State in a *parens* action would

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[182] Apple v. Pepper, 139 S.Ct. 1514, 1522 (2019).

[183] 15 U.S.C. § 15c(b)(1).

[184] 15 U.S.C. § 15(f)(a).

[185] It is true that these parties will not always agree. *See, e.g.*, New York v. Deutsche Telekom AG, 439 F. Supp. 3d 179 (S.D.N.Y. 2020); New York v. Microsoft Corp., 224 F. Supp. 2d 76, 87 (D.D.C. 2002) ("The states which opted not to join the settlement between the United States and Microsoft have proposed a remedy distinct from that presented in the proposed consent decree.").

have their future claims barred under res judicata.[186] It is true, however, that States may sue defendants for the same action under separate federal and state antitrust laws.[187] This is, in some definition, "duplicative liability," but it arises under separate causes of action as a product of a federalized government rather than from authorization under HSR. Courts have not rejected this method of States seeking redress, and an automatic nominal damages award would not create any new substantive liability.

V. CONCLUSION

Common law tradition and statutory authorization envision state antitrust enforcers playing an "integral" role in U.S. antitrust enforcement. *Parens patriae* doctrine provides a broad platform on which State AGs can stand to fulfill this role, but courts and litigants are not totally aligned on the parameters of the doctrine. Adopting automatic nominal damage awards for antitrust violations and tailoring those awards beyond just a flat amount per *parens* case would buttress the goals of HSR, force further development of the *parens* doctrine, and support the overall goals of U.S. antitrust law.

[186] 15 U.S.C. § 15c(b)(3).

[187] *See* Complaint, Utah v. Google (N.D. Cal. Nov. 1, 2021) (No. 3:21-cv-05227).