[ORAL ARGUMENT NOT YET SCHEDULED]
No. 18-5214

In the United States Court of Appeals
FOR THE DISTRICT OF COLUMBIA CIRCUIT

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT,

v.

AT&T INC., ET AL.,
DEFENDANTS-APPELLEES

On Appeal from the United States District Court
for the District of Columbia,
No. 1:17-cv-2511 (Hon. Richard J. Leon)

FINAL BIPARTISAN BRIEF OF THE STATES OF WISCONSIN, ALABAMA, GEORGIA, LOUISIANA, NEW MEXICO, OKLAHOMA, SOUTH CAROLINA, UTAH, RHODE ISLAND, AND THE COMMONWEALTH OF KENTUCKY AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLEES

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CERTIFICATE AS TO PARTIES, RULINGS, & RELATED CASES

Pursuant to Circuit Rule 28(a)(1), *Amici* States certify as follows:

Parties, Intervenors, and *Amici Curiae*: Except for *Amici* States listed on this brief, all parties, intervenors, and *amici* appearing before the district court and this Court are listed in the Briefs of Plaintiff-Appellant United States of America, and of Defendants-Appellees AT&T, Inc., DirecTV Group Holdings, LLC, and Time Warner, Inc.

Rulings Under Review: The rulings under review are listed in the Briefs of Plaintiff-Appellant United States of America, and of Defendants-Appellees AT&T, Inc., DirecTV Group Holdings, LLC, and Time Warner, Inc.

Related Cases: There are no related cases of which *Amici* States are aware.

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IDENTITY AND INTEREST OF *AMICI CURIAE*

Amici curiae, the States of Wisconsin, Alabama, Georgia, Louisiana, New Mexico, Oklahoma, Rhode Island, South Carolina, Utah, and the Commonwealth of Kentucky, are a bipartisan coalition of sovereign States ("*Amici* States"), who file this brief under Federal Rule of Appellate Procedure 29(a). The *Amici* States have a strong interest in promoting and preserving economic competition. Competition leads to lower prices, higher quality products, and innovative goods and services for consumers. As relevant to the issues here, robust competition in the video programming and distribution realm improves the quality of life and access to technology for millions of citizens in our States.

INTRODUCTION

It is rare for the Federal Government to pursue an antitrust case involving major, national companies without any State joining the effort. When the Federal Government "bring[s] a case," noted commentators have explained, "the states . . . are likely to join the fray," either as joint plaintiffs or *amici curiae*. Richard A. Posner, *Antitrust in the New Economy*, 68 Antitrust L.J. 925, 940 (2001). States have participated in several recent, high-profile antitrust cases involving American Express,

Anthem, Aetna, and Comcast/NBC Universal, to name just a few. Given the historic scope of the $108 billion AT&T/Time Warner merger at issue in this case, it is notable that no State joined the Federal Government's case or filed an *amicus* brief in support. A State's decision to join, or not join, a particular matter can rest on a variety of factors, ranging from the merit (or lack thereof) of the proposed action to precedent, the strength of the particular State's interests, office priorities, resource allocation(s), or even issues involving the motivation for action. Any or all of these factors might have been in play here with regard to some States, and the *Amici* States do not offer a single, unified theory as to why every State declined to support the Federal Government's enforcement effort in this case.

Having said that, it is notable that the district court—after a six-week trial, during which it heard numerous witnesses and reviewed thousands of pages of exhibits—found the Federal Government's case to be without merit. That determination validates the States' decision and is entitled to substantial deference. *See United States v. Microsoft Corp.*, 253 F.3d 34, 117–18 (D.C. Cir. 2001).

Three particular features of the district court's decision regarding the AT&T/Time Warner merger provide important context. First, the district court found that it was *undisputed* at trial that this vertical merger will produce many millions of dollars' worth of benefits for consumers by eliminating an additional layer of price markups. Second, the district court explained that this merger takes place within the context of a changing market, where both AT&T and Time Warner face competition from entities such as Netflix and Amazon, which unify the creation and distribution of content within a single company. The merger between AT&T and Time Warner will allow the merged company to compete better in this changing field, including by meeting the expectations of the growing number of customers that are cutting the cable cord. Finally, as part of this merger, AT&T and Time Warner specifically adopted a mandatory-arbitration procedure similar to one that the Federal Government and several States obtained through litigation as part of the settlement leading to the approval of the Comcast/NBC Universal merger.

ARGUMENT

I. It Is Unusual That No State Supported The Federal Government's Efforts Against This Major Merger

Each State considers numerous factors in deciding whether to join a Federal Government antitrust action. Usually foremost among those considerations are the practical impacts of the merger on the citizens of that particular State and the legal merits of the challenge. Other factors, such as resource constraints or unique, case-specific issues, can also play a role in an appropriate case. As relevant to the present antitrust enforcement action, while it is not necessarily noteworthy that any *particular* State declined to support the Federal Government's challenge here, what *is* truly unusual, especially in a merger of such national scope, is that not a single State decided to join the Federal Government's antitrust action here or file a supporting *amicus* brief.

A. States have longstanding, broad authority to enforce antitrust laws in order to protect their citizens and their economies from the potential abuse of market power. States enforced "restraint of trade laws" and "anti-monopoly provisions" even before Congress enacted the Sherman Act in 1890. Donald L. Flexner & Mark A. Racanelli, *State and Federal Antitrust Enforcement in the United States: Collision or*

Harmony?, 9 Conn. J. Int'l L. 501, 506 (1994); *see also* Stephen Calkins, *Perspectives on State and Federal Antitrust Enforcement*, 53 Duke L.J. 673, 676–77 (2003); Robert H. Lande, *When Should States Challenge Mergers: A Proposed Federal/State Balance*, 35 N.Y.L. Sch. L. Rev. 1047, 1069–70 (1990). Today, "[n]early every state, plus the District of Columbia, Puerto Rico, and the United States Virgin Islands, has antitrust laws." Bahadur S. Khan, Nickolas H. Barber, *Antitrust Violations*, 50 Am. Crim. L. Rev. 639, 674 (2013). States can enforce some federal antitrust laws. *See* 15 U.S.C. § 15c; Michael S. Greve, *Cartel Federalism? Antitrust Enforcement by State Attorneys General*, 72 U. Chi. L. Rev. 99, 110 (2005); Jay L. Himes, *Exploring the Antitrust Operating System: State Enforcement of Federal Antitrust Law in the Remedies Phase of the Microsoft Case*, 11 Geo. Mason L. Rev. 37, 44–45 (2002).

States actively exercise their antitrust-enforcement authority, especially in recent times. Since the 1980s, the States have become "a *de facto* third national antitrust enforcement agency," along with the Department of Justice's Antitrust Division and the Federal Trade Commission (FTC). Robert M. Langer, *60 Minutes with Robert M. Langer*, 60 Antitrust L.J. 197, 198 (1991); Flexner & Racanelli, *supra*, at

509–10. To facilitate this increased involvement, the National Association of Attorneys General (NAAG) created a "Multistate Antitrust Task Force" in 1983 to "improve, enhance, and coordinate state antitrust enforcement." Flexner & Racanelli, *supra*, at 509–10. State Attorneys General now file numerous antitrust cases every year—for example, 36 in 2005 and 28 in 2011. Matthew Perlman, *Antitrust Enforcement by State AGs Continues to Evolve*, Law360 (Mar. 14, 2017), https://www.law360.com/articles/1021895/antitrust-enforcement-by-state-ags-continues-to-evolve (paywall).

States also regularly "work closely" with the Federal Government to bring antitrust cases. *See* Robert L. Haig, 4D N.Y. Prac., Commercial Litigation in New York State Courts § 101:12 (4th ed.). When the Federal Government "bring[s] a case," "the states . . . are likely to join the fray." Posner, *supra*, at 940; Harry First, *Delivering Remedies: The Role of the States in Antitrust Enforcement*, 69 Geo. Wash. L. Rev. 1004, 1014 (2001). This coordination is "entirely voluntary," made possible through "discussion and consensus building." First, *supra*, at 1014. Thus, if a State believes that a merger will decrease competition and harm its citizens, it will often join a Federal Government–led antitrust suit. *See*

Greve, *supra*, at 109; *id.* at 102 (no "rivalry, conflict, and turf protection" between the federal and state governments in antitrust).

The mergers of high-market-capitalization companies with national footprints commonly attract the attention and concern of States. There have been "dramatic and increasingly frequent multistate interventions in high-stakes national antitrust proceedings." *Id.* at 101. Less than a decade ago, several States joined the Federal Government in an antitrust suit challenging a joint venture between Comcast and NBC Universal. *See United States v. Comcast Corp.*, 808 F. Supp. 2d 145, 146 (D.D.C. 2011). Just last year, eleven States, the District of Columbia, and the Federal Government sued to block a $54 billion merger between Anthem and Cigna. *United States v. Anthem, Inc.*, 236 F. Supp. 3d 171, 178 (D.D.C. 2017). Also last year, eight States, the District of Columbia, and the Federal Government brought an action challenging the $37 billion deal between Aetna and Humana. *United States v. Aetna Inc.*, 240 F. Supp. 3d 1, 8 (D.D.C. 2017). Sixteen States joined the Federal Trade Commission to challenge a merger between Dollar Tree and Family Dollar. *See* Gregory Tejeda, *Dollar Tree being required to sell off two Gary properties*, Chicago Tribune (July 6, 2015), https://perma.cc/F5WL-

FNJU. Seven States and the Federal Government sued over the merger of two retail lenders, Springleaf and OneMain. *See United States v. Springleaf Holdings, Inc.*, No. 1:15-CV-1992, 2016 WL 3950740, at *1 (D.D.C. Apr. 15, 2016). Ten States and the District of Columbia joined the FTC's suit to stop the merger of two large foodservice distributors, Sysco and U.S. Foods. *See FTC v. Sysco Corp.*, 113 F. Supp. 3d 1, 12, 15 (D.D.C. 2015); Fed. Trade Comm'n, *FTC v. Sysco, USF Holding Corp., and US Foods, Inc.*, https://perma.cc/66KW-FLDT. Many other examples involving national, high-dollar-value companies abound. *See, e.g.*, *Ohio v. American Express Co.*, 138 S. Ct. 2274, 2283 (2018). And even when States do not join antitrust-enforcement actions as parties, they frequently support the Federal Government as *amici curiae*. *See* Flexner & Racanelli, *supra*, at 513, 520–21; *see, e.g.*, *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

B. Given this history, one would expect at least some States to participate in an action involving a merger of this size and scope. The AT&T/Time Warner merger is one of the largest in the industry's history. AT&T is the nation's largest video distributor, with 25 million subscribers across all 50 States and the District of Columbia. DOJ

Br. 11. Hundreds of millions of consumers participate in AT&T's and Time Warner's relevant markets. David Goldman, *What the AT&T-Time Warner decision means for you*, CNNMoney (June 13, 2018), https://perma.cc/NR5K-S8JF. History suggests that at least some States would not hesitate to get involved if they believed that the merger would decrease competition and harm their citizens. Yet no State joined or filed an *amicus* brief in support of the Federal Government.

II. The Unusual Fact That No State Supported The Federal Government's Efforts Against This Major Merger Is A Reflection, At Least In Part, Of Several Notable Features Of This Merger, Contained In The District Court's Opinion

As explained above, *see supra* p. 4, each State's decision whether to support a particular Federal Government antitrust enforcement action involves a sensitive, State-specific inquiry, taking into account numerous factors. Given the complexity and often State-specific nature of each decision, the *Amici* States here do not purport to offer any single, definitive explanation as to why any particular State declined to support the Federal Government's efforts against this merger. Having said that, after an exhaustive evaluation of fact and expert witnesses, the district court's decision validates the States' decision and is entitled to substantial deference. *See Microsoft*, 253 F.3d at 117–18.

Three features of this merger, which were articulated by the district court, are notable and suggestive.

First, the district court explained that it is undisputed that this merger will eliminate an additional layer of price markups, thereby saving consumers many millions of dollars. JA 113–15 (Op. 66–68). The district court found that the Federal Government *conceded* that the merger here would save AT&T's customers many millions of dollars every year, due to "the elimination of double marginalization." JA 113–15 (Op. 66–68). Put more simply, consumers would pay for one fewer price markup in the supply chain. While the parties disputed (and continue to dispute) whether other aspects of this merger will increase or decrease prices for consumers through other mechanisms or bargaining theories, JA 115–16 (Op. 68–69), the *Amici* States find it notable that all parties agreed at trial that the elimination of an additional layer of price markups, resulting directly from the merger, will save customers substantial funds.

Second, the district court explained that AT&T and Time Warner entered into this transaction in the face of a dynamic, changing market, and this merger will allow them to provide their consumers with

innovative, streamlined offerings that consumers are increasingly demanding. As relevant to the issues in this case, Time Warner creates video content (for example, through Warner Brothers Studios) and aggregates content (for example, through TNT, TBS, and CNN). JA 54–58, 77–81 (Op. 7–11, 30–34). AT&T, in turn, distributes content (for example, through DirectTV, DirectTV Now, and U-verse). JA 58–60, 75–76 (Op. 11–13, 28–29). These firms' playing the separate roles of content-creator/aggregator, on the one hand, and distributor, on the other hand, was once sufficient to serve customers' needs. That is rapidly changing. Now, vertically integrated giants such as Netflix and Amazon are both creators and distributors of content, with a massive, ever-growing, on-demand library of originally created and acquired video programming. JA 61, 65–67 (Op. 14, 18–20); DOJ Br. 13 (acknowledging that the growth of firms like Netflix "threatens AT&T's legacy pay-television model"). The AT&T/Time Warner merger allows the combined firm to create and deliver more innovative, streamlined content to customers, including customers that are cutting the cord by cancelling their cable subscriptions. JA 69, 85 (Op. 22, 38).

Third and finally, the district court noted that AT&T/Time Warner voluntarily adopted an arbitration procedure designed to allow third-party content distributors to obtain Time Warner content on competitive terms, similar to the arbitration procedure that the Federal Government, several States, and a district court found beneficial in the Comcast/NBC Universal merger. JA 58–59 n.3, 88, 151 (Op. 11–12 n.3, 41, 104). Less than a decade ago, the Federal Government and several States challenged the merger between Comcast and NBC Universal. *See supra* p. 7. The parties in the Comcast/NBC Universal case eventually agreed to support the merger, which the district court approved, based in part on arbitration procedures that would allow online video distributors to "acquire Comcast and NBCU content under certain conditions." *Comcast Corp.*, 808 F. Supp. 2d at 148. In particular, the arbitration provisions there contained "standstill provisions, which prevent the blackout of content while the arbitration is pending," and used a "fair market value" standard. JA 151–52 (Op. 104–05). In the merger at issue here, AT&T/Time Warner followed the path marked by Comcast/NBC Universal, the Federal Government, and the States by *voluntarily* sending an "irrevocabl[e]" offer for an arbitration agreement to

approximately "1,000 video distributors" that "provides [them] with the right to continued carriage of the Turner Networks." JA 88 (Op. 41). This arbitration agreement contains "standstill" provisions and also uses a "fair market value" standard, like those that Comcast/NBC Universal agreed to as part of litigation. JA 151–52 (Op. 104–05). The *Amici* States consider it noteworthy that AT&T/Time Warner voluntarily adopted arbitration provisions similar to those developed in the Comcast/NBC Universal merger as part of successful negotiations with the Federal Government and several States.

CONCLUSION

This Court should affirm the judgment of the district court.

Dated: October 15, 2018

Respectfully submitted,

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This brief complies with the type-volume limitation of Federal Rule of Appellate Procedure 29(a)(5) because this brief contains 2,448 words, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f) and Circuit Rule 32(e)(1).

This brief complies with the typeface requirements of Federal Rule of Appellate Procedure 32(a)(5) and the type style requirements of Federal Rule of Appellate Procedure 32(a)(6), because this brief has been prepared in a proportionately spaced typeface using the 2013 version of Microsoft Word in 14-point Century Schoolbook font.

Dated: October 15, 2018

s/ Misha Tseytlin

MISHA TSEYTLIN

CERTIFICATE OF SERVICE

I hereby certify that on October 15, 2018, I filed the foregoing with the Clerk of the Court using the CM/ECF System, which will send notice of such filing to all registered CM/ECF users.

Dated: October 15, 2018

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