PUBLIC COMMENTS OF
THE AMERICAN ANTITRUST INSTITUTE (AAI)

United States v. Live Nation Entm't, Inc.,
No. 1:24-cv-03973 (S.D.N.Y., filed May 24, 2024)

*In this comment, AAI briefs the appropriate standard of review in this matter and requests that its briefing be transmitted to and considered by the United States District Court for the Southern District of New York, Subramanian, J., pursuant to the Antitrust Procedures and Penalties Act (APPA), 15 U.S.C. § 16

INTEREST OF THE AMERICAN ANTITRUST INSTITUTE

The American Antitrust Institute ("AAI") is an independent nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. See http://www.antitrustinstitute.org.[1]

STATUTORY AND LEGISLATIVE BACKGROUND

Because antitrust violations by definition create, enhance or maintain market power, they necessarily inflict marketwide harms. When such harms are inflicted in relevant markets that span the entire United States, the scope of damage can be so vast as to undermine the workings of the American economy. *See, e.g.*, *United States v. AT&T*, 552 F. Supp. 131, 151–52 (D.D.C. 1982), *aff'd sub nom. Maryland v. United States*, 460 U.S. 1001 (1983) (noting that AT&T's nationwide telecommunications monopoly affected "the technological development of a vital part of the national economy, national defense, and foreign trade."). The illicit wealth transfers that nationwide antitrust violations generate are especially costly to society

[1] Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

because they are not only large in size but tend be regressive: they often take from the poorest and most powerless American consumers and give to the richest and most powerful domestic or international corporate entities, creating substantial deadweight loss in the process. *See, e.g., Fikes Wholesale, Inc. v. Visa U.S.A., Inc.*, 62 F.4th 704, 712 (2d Cir. 2023) (affirming $5.6 billion recovery from Visa and Mastercard on behalf of more than 12 million merchants nationally, including many small and family-owned businesses); *In re Coll. Athlete NIL Litig.*, 803 F. Supp. 3d 959, 969 (N.D. Cal. 2025) (approving $2.576 billion settlement from multibillion dollar college sports enterprises on behalf of student athletes at NCAA universities across the country); *In re Blue Cross Blue Shield Antitrust Litig.*, 85 F.4th 1070, 1083 (11th Cir. 2023) (affirming $2.67 billion recovery from major national insurance conglomerate on behalf of U.S. health insurance subscribers).

This case involves a nationwide antitrust violation in the live events industry. From 2019 to 2024 alone, consumers spent $82.6 billion purchasing tickets from Ticketmaster, which Live Nation acquired in 2010. Compl. for Permanent Injunction, Monetary Relief, Civil Penalties, And Other Relief at 6, *FTC v. Live Nation Entm't*, No. 2:25-cv-08884 (C.D. Cal. Sept 18, 2025). Live Nation's monopoly power and tactics in booking and ticketing markets since the merger have allowed it to overcharge consumers by at least hundreds of millions of dollars. *Compare* Verdict Form at 6, *New York v. Live Nation Entm't*, No. 1:24-cv-03973-AS

(S.D.N.Y. April 15, 2026), ECF No. 1417 (hereinafter "NY Verdict Form") (finding $1.72 per-ticket overcharge) *with* Trade Regulation Rule on Unfair or Deceptive Fees, 90 Fed. Reg. 2066, 2139 (Jan. 10, 2025) (to be codified at 16 C.F.R pt. 464) (estimating that Ticketmaster sold 192 million combined tickets in U.S. primary and secondary ticketing markets in 2023). And that injury does not account for overcharges in the nationwide market where musical artists purchase access to large amphitheaters, which the jury also found was monopolized and where Live Nation transacted for "nearly $15 billion annually in artists and shows" in 2025 alone. *See* NY Verdict Form at 3–4 (finding Live Nation illegally monopolized "large amphitheaters" market and tied artist promotion to use of large amphitheaters); Live Nation Ent., Inc., Annual Report (Form 10-K) at 3 (Dec. 31, 2025) (describing amphitheater market and artist relationships). Nor does it account for the ripple effects throughout the economy: injury to rivals, diminished quality and choice, barriers to entry, foregone investments in entry and innovation, injury in adjacent markets, and beyond.

A. Good-Faith and Bad-Faith Antitrust Settlements

As *Fikes*, *Coll. Athlete NIL Litig.*, and *Blue Cross Blue Shield* illustrate, settlements are an exceedingly valuable tool for interdicting and redressing the severe harm to consumers caused by nationwide antitrust violations. When a public or a private enforcer can obtain through settlement all of the relief it could reasonably expect to obtain at trial, seizing that opportunity is triply efficient. By restoring competition and compensating victims without trial, settlements can (1) reduce the duration and cost to society of the violation's anticompetitive effects; (2) ensure victims receive appropriate relief promptly and without further injury caused by procedural delay; and (3) conserve the scarce, taxpayer-funded enforcement resources of the judicial branch and, where federal enforcement is concerned, the executive branch as well.

Unhappily for consumers and the American economy, however, both public and private enforcers sometimes must settle for less than the expected value of relief, even in major cases involving nationwide harm. Because the expected value of relief depends on the probability of success at trial, accepting less than full relief becomes necessary when an enforcer discovers that it erred in assessing its likelihood of prevailing at trial, such that the true expected value of relief is in fact lower than its antitrust investigation initially suggested. *See* John P. Gould, *The Economics of Legal Conflicts*, 2 J. Legal Stud. 279, 285–88 (1973) (demonstrating that parties who agree on the probability of the outcome will make an out-of-court settlement); William M. Landes, *An Economic Analysis of the Courts*, 14 J.L. & Econ. 61, 61–107 (1971) (applying economic analysis to explain the prevalence of settlements). To protect against that risk in federal antitrust enforcement, and to prevent a waste of public resources spent litigating cases that could have been resolved outside the courtroom, Congress gave federal enforcers a bevy of special advantages in calculating the expected value of relief and securing it through early-stage settlements.

Under the Antitrust Civil Process Act, the DOJ has broad pre-complaint powers during the investigation stage of an enforcement matter, before it ever invokes the judicial process. 15 U.S.C. §§ 1311–1314. The Act empowers the DOJ to compel production of documentary evidence, written interrogatory answers, and oral testimony from anyone it has reason to believe possesses information relevant to a federal civil antitrust investigation. *Id*. at § 1312. The Act grants the DOJ power to issue Civil Investigative Demands (CIDs) that require, under threat of contempt sanctions, submission to depositions under oath, document production, and data production, not only by third parties but even by the target of the investigation itself. *Id*. at §§ 1312, 1314. Because these unique civil process advantages enable the DOJ to discover facts and determine whether a violation of the antitrust laws has occurred before it files a complaint, it often closes its investigations without ever burdening the courts. In the majority of instances, an investigation is closed because either (1) it reveals that no antitrust violation has occurred, or (2) in the DOJ's judgement the case is weak or poses high litigation risk and has a concomitantly low expected value of relief, such that the case does not merit an investment of scarce enforcement resources. *See* Warren S. Grimes, *Transparency in Federal Antitrust Enforcement*, 51 Buff. L. Rev. 937, 976 (2003) ("Most investigations … are terminated without further enforcement action.")

At the same time, when an investigation reveals a clear antitrust violation, the Civil Process Act encourages early settlements that obtain the expected value of relief without trial. Because of its enormous investigatory advantages and ready access to in-house economic and legal experts in the Antitrust Division, the DOJ can obtain full and complete information revealing both its and the defendant's litigation risks and settlement incentives before ever invoking the judicial process. Its possession of all of the relevant evidence, which enables an unusually accurate assessment of the expected value of relief, routinely leads to pre-complaint settlements, including in major national cases. *See, e.g., United States v. Microsoft Corp*., 56 F.3d 1448, 1451–52 (D.C. Cir. 1995) (noting that "[t]he Department issued 21 Civil Investigative Demands to Microsoft and third parties, reviewed one million pages of documents, and conducted over 100 interviews," and that it "deposed 22 persons, including Microsoft Chairman Bill Gates," before, "[i]n a not uncommon technique," it "filed a proposed consent decree along with its complaint, which embodied the Department's and Microsoft's settlement of the case."). Perhaps unsurprisingly, then, "[t]he consent decree is the primary vehicle by which the Antitrust Division implements its enforcement program." James C. Noonan, *Judicial Review of Antitrust Consent Decrees: Reconciling Judicial Responsibility with*

Executive Discretion, 35 Hastings L.J. 133, 143 (1983) (noting that in 1974 "approximately eighty percent of the judgments obtained by the Antitrust Division were consent decrees"); *see also* U.S. Dep't of Just. & Fed. Trade Comm'n, Annual Reports to Congress Pursuant to the Hart-Scott-Rodino Antitrust Improvements Act of 1976, https://www.ftc.gov/policy/reports/annual-competition-reports (showing that for the ten-year period from FY2011 through FY2020, the Antitrust Division simultaneously filed a complaint and a consent decree in nearly four out of every five merger cases (78 of its 99 court-filed merger challenges, or 78.8%).

In rare circumstances, investigation reveals a clear antitrust violation, but settlement is nonetheless unachievable. In some instances where the expected value of relief is exceedingly high, the relief may be so unpalatable to the defendant that it prefers to take its chances in court, notwithstanding that it knows that it is exceedingly likely to lose. In other instances, the defendant may suspect the government failed to conduct an adequate investigation or misinterpreted its findings, and it opts for trial not as a Hail Mary but because it genuinely believes the government has assessed the expected value of relief incorrectly. Whether it erred in conducting its investigation, or because of unexpected developments in post-complaint discovery, pre-trial motions, or the trial itself, or other developments outside its control, the DOJ sometimes may be forced to reassess the expected value of relief, including to adjust it downward. When that occurs, settling for less may be the government's most responsible course of action. It also may be an admirable choice, especially where the DOJ accepts a new reality in the best interests of competition and consumers notwithstanding the potential for public scorn for wasting precious resources.

Perhaps most unhappily for consumers and the economy, both public and private enforcers have on occasion settled for less than the expected value of relief for unethical reasons, warranting sanctions. Such bad-faith settlements have taken a variety of forms, but perhaps the most common is the "side deal." *See Pearson v. Target Corp.*, 893 F.3d 980, 982 (7th Cir. 2018) (Wood, J.) (describing a bad-faith side deal by a private enforcer representing an individual settlement objector). A side deal trades off a portion of the relief owed to antitrust victims for benefits that are in the dealmaker's self interest rather than the public's interest in competitive markets or the victims' interests in reasonable relief. *Id*. (describing deals in which "[a] potential benefit for [consumers]—a better settlement—is leveraged for a purely personal gain—a side bargain"); *Staton v. Boeing Co.*, 327 F.3d 938, 964 (9th Cir. 2003) (explaining that courts scrutinize class action settlements to ensure there is no side deal promising payments or other side benefits to private counsel in exchange for an "economically beneficial concession with regard to the [settlement's] merits provisions, in the form of lower monetary payments to class members or less injunctive relief for the class than could otherwise have obtained."). The side dealer settles for less than full relief not because the expected value of litigation has changed in light of new evidence or unforeseen litigation developments, but because he is insufficiently accountable to his client and can opportunistically appropriate some of the expected value for himself. *Id.* ("[T]he absence of individual [consumers] controlling the litigation for their own benefit creates opportunities for collusive arrangements . . . .") (quoting *Zucker v. Occidental Petrol. Corp.*, 192 F.3d 1323, 1327 (9th Cir. 1999)).

B. A Public-Confidence Law to Combat DOJ Side Deals and Improper DOJ Settlement Motivations

Numerous statutes and rules require judicial review of settlements by both public and private enforcers to guard against side dealing and other forms of settlement malfeasance. *See, e.g.*, Fed R. Civ. P. 23(e)(2) (courts may approve class action settlements "only after a hearing and only on finding that it is fair, reasonable, and adequate"); False Claims Act, 31 U.S.C. § 3730(c)(2)(B) (The United States, as intervenor in a qi tam action, may settle over the relator's objection only "if the court determines, after a hearing, that the proposed settlement is fair, adequate, and reasonable under all the circumstances."). Even where such laws do not explicitly require courts to inspect the settlement for malfeasance, courts regularly find that such a duty is implied by the requirement of judicial review. *See Protective Comm. For Indep. S'holders of TMT Trailer Ferry v. Anderson*, 390 U.S. 414, 424 (1967) (interpreting Fed. R. Bankr. P. 9019(a), which requires judicial review of bankruptcy settlements, as imposing "fair and equitable" standard); *In re Cuyahoga Equipment Corp.*, 980 F.2d 110, 226, 118 (2d Cir. 1992) (interpreting the Comprehensive Environmental Response, Compensation, and Liability Act (CERCLA), 42 U.S.C. § 9622(a), (d)(1)(A), which requires environmental-remediation settlements between the President and potentially responsible parties to be entered in federal district court as consent decrees, to require "good faith negotiations and fairness to … the public" and that the settlement be "fair, reasonable and consistent with CERCLA's goals"); *Shepherd Park Citizens Ass'n v. Gen. Cinema Beverages, Inc.*, 584 A.2d 20, 23 (DC 1990) (reviewing State Attorney General's settlement of an antitrust case in state court under a "fair, reasonable and adequate" standard, requiring "consideration of . . . [the] extent of investigation, proof problems, strength of defenses, costs of litigation, good faith, possible collusion, the experience of counsel and extent of opposition to the settlement") (alterations in original).

For the first eight decades after the Sherman Act was passed in 1890, Congress perceived the risk of bad-faith side dealing by the Department of Justice—"the only agency in government named after a moral imperative," Makan Delrahim, Assistant Att'y Gen., Antitrust Div., U.S. Dep't of Just., Remarks at the Antitrust Division's Second Roundtable on Competition and Deregulation (Apr. 26, 2018)—as too low to merit legislative attention. But that perception changed after a DOJ side-dealing scandal in the early 1970s. President Nixon instructed the Attorney General to settle an antitrust case against International Telephone & Telegraph Corporation (ITT) and enter a side deal whereby the Antitrust Division would accept less than the expected value of relief and ITT would contribute $400,000 in support of the President's reelection campaign. *See* Ciara Torres-Spelliscy, *The I.T.T. Affair and Why Public Financing Matters for Political Conventions*, Brennan Ctr. for Just. (Mar. 19, 2014), https://perma.cc/XZ2L-W4LC. "[N]o quid pro quo was proven," since all of the relevant evidence was in the hands of the White House, senior Justice Department Officials, and the defendants. John J. Flynn & Darren Bush, *The Misuse and Abuse of the Tunney Act: The Adverse Consequences of the "Microsoft Fallacies"*, 34 Loy. U. Chi. L. J. 749, 756 (2003). What concerned Congress was the "appearance of impropriety" and the threatened loss of "'public confidence in procedures relating to settlements via consent decree.'" *Id.* at 756, 764 (quoting H.R. Rep. No. 93-1463, at 6 (1971).[2] Congress responded in 1974 by passing the Antitrust Procedures and

[2] Evidence of a quid pro quo was later revealed through the Watergate Tapes, which captured President Nixon ordering Deputy Attorney General Richard Kleindienst, who he later nominated to be Attorney General, to overrule the Antitrust Division and enter the side deal. *See* Richard Reeves, President Nixon: Alone in the White House, at 324 (2001) (quoting Nixon as telling Kleindienst, "The I.T.T. thing—stay the hell out of it. Is that clear? That's an order"; H.R. Haldeman asking, "Does I.T.T. have money?"; and President Nixon responding, "Oh God, yes, [t]hat's part of this ballgame."). A syndicated newspaper columnist also published a story in the Washington Post revealing a memo, marked for destruction, showing that the "the antitrust case had been fixed" and that "the fix was a payoff" in exchange for the pledged election contribution. Jack Anderson, *Secret Memo Bares Mitchell-ITT Move*, WASH. POST (Feb. 29, 1972), https://perma.cc/J7XX-JRCQ.

Penalties Act, which was inserted into the Clayton Act's existing settlement provisions and became known as the Tunney Act. 15 U.S.C. §§ 16(b)-(h). In legislative proceedings addressing the bill that became his eponymous law, Senator John Tunney alluded to the ITT side deal in observing that "it is already certain that excessive secrecy in the affairs of Government, and negotiating sessions conducted in total isolation from the public eye, create the potential for grave excesses that undermine the very framework of democratic government." *Senate Debate*, 119 Cong. Rec. 24597 (July 18, 1973), *reprinted in* Earl W. Kintner, The Legislative History Of The Federal Antitrust Laws And Related Statutes, at 6610 (1984), https://perma.cc/A6XX-8STY(statement of Sen. John V. Tunney). The House Report accompanying the bill elaborated:

> Given the high rate of settlement in public antitrust cases, it is imperative that the integrity of and public confidence in procedures relating to settlements via consent decree procedures be assured. The bill seeks precisely to accomplish this objective and focuses on the various stages of consent decree procedures, including that process by which proposed settlements are entered as a court decree by judicial action…. Present law … encourages settlement by consent decrees as part of the national legal policies expressed in the antitrust laws…. The bill preserves these legal and enforcement policies…. Various abuses in consent decree procedures by the Antitrust Division and by district courts are, however, sought to be remedied as a matter of priority since as the Senate Report on the bill aptly observed, "by definition, antitrust violators wield great influence and economic power."

_H.R. 93-1463, at 6 (citation omitted).

The House Report's concern about "the great influence and economic power" of antitrust violators—and the related prospect of powerful defendants applying political pressure to obtain improper DOJ settlements—is the Tunney Act's core motivating principle. *Id.* at 6357. "The problem is particularly critical where the antitrust laws are concerned," Senator Tunney's co-sponsor, Senator Gurney, explained, "because to a considerable extent those laws are viewed as a direct threat by those who exercise the greatest corporate influence. And because the stakes are high the level of lobbying is equally high. For this reason, it is particularly important to assure some measure of public scrutiny of the exercise of that influence." *Remarks of Sen. John V. Tunney & Sen. Edward J. Gurney Introducing S. 782*, 93d Cong., 119 Cong. Rec. 3449 (Feb. 6, 1973), *reprinted in* Kintner, *supra*, at 6561(statement of Sen. Edward J. Gurney); *see also Senate Debate*, 93d Cong., 1st Sess., 119 Cong. Rec. 24597, *reprinted in* Kintner, *supra*, at 6605–6 (statement of Sen. John V. Tunney) ("'[A]ntitrust violators … can often bring significant pressure to bear on Government, and even on the courts, in connection with the handling of consent decrees," and "[b]ecause of the powerful influence of antitrust defendants and the complexity and importance of antitrust litigation, the public reasonably asks in many instances whether, in reaching a settlement, the government gave up more than it need have or should have.'") (quoting *S. Hearings on S. 782 and Related Bills Before the S. Subcomm. on Antitrust and Monopoly of the S. Comm. On the Judiciary*, 93rd

Cong. (April 5, 1973), *reprinted in* Kintner, *supra*, at 6593 (testimony of J. Skelly Wright, Judge, U.S. Court of Appeals for the District of Columbia Circuit)).

The whole text of the Tunney Act reflects this motivating principle throughout. To protect public confidence in the integrity of the consent decree process and discourage improper side deals, the Act is replete with public notice, transparency, and accountability provisions. It requires that a proposed settlement be published in the Federal Register, together with a DOJ Competitive Impact Statement, which is modeled on the Environmental Impact Statement required by the National Environmental Protection Act (NEPA), 42 U.S.C. § 4332(2)(C). *See The Antitrust Procedures and Penalties Act: Hearings on S. 782 & S. 1088 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 93d Cong. 3 (1973) (statement of Sen. John V. Tunney), *reprinted in* Kintner, *supra*, at 6658 ("In providing this mechanism which permits meaningful public comment, we have fashioned our proposed public impact statement upon the already existing environmental impact statement."); *see also* 42 U.S.C. § 4332(2)(C) (describing the "detailed statement" required by NEPA).

In addition to reciting the nature and purpose of the enforcement action, the conduct violating the antitrust laws, the private remedies that remain available to victims injured by the conduct, and procedures for modifying the settlement if necessary, 15 U.S.C. § 16(b)(1)-(3), (5), the competitive impact statement must provide at least four "explanation[s]" to the public: (1) an explanation of the settlement's terms, so the public can understand the parties' entire agreement; (2) an explanation of "any unusual circumstances giving rise to [the settlement] or any provision contained therein," so the public can confirm the absence of any side deals not memorialized in the settlement and assess any appearance of impropriety in either the settlement's formation or its terms; (3) an explanation of the relief provided by the settlement, so the public can assess whether the settlement will interdict any competitive harms they have suffered (and whether they might pursue their own relief); and (4) an explanation of the anticipated effects on competition of the relief, so the public can assess whether the settlement adequately protects the public interest in competitive markets. *Id*. § 16(b)(4).

The competitive impact statement must also be published in the Federal Register—an obligation usually reserved for actions by the executive branch's administrative agencies to ensure they are held publicly accountable. *Id*. § 16(b); *see Toledo, P. & W.R.R. v. Stover*, 60 F. Supp. 587, 596 (S.D. Ill. 1945) ("The purpose of the Federal Register Act was to give notice to industry, to general business, or to the people of the country as a whole, of certain action taken by the President under a power granted to him by the Congress, so that such industry, business or the people might have notice of such action and act accordingly."). The DOJ must also publish a summary of the Competitive Impact Statement "in newspapers of general circulation" for 7 days over a period of 2 weeks, commencing at least 60 days prior to the effective date of the judgment. 15 U.S.C. § 16.

The public is given a 60-day period to submit written comments to the DOJ expressing any concerns about the formation or terms of the settlement, and the DOJ is required to prepare a written response to the comments. *Id*. Both the comments and the response must also be published in the Federal Register. *Id.* In addition, both must be filed with the reviewing court, *id*., and "each defendant" must file with the court "a description of any and all" cognizable lobbying contacts directed to an officer of the United States, "written or oral," which the defendant must certify to the court is a "a true and complete description" of such contacts. *Id*. § 16(g). The lobbying disclosure and certification must be filed almost immediately, within 10 days of the publication of the proposed settlement and Competitive Impact Statement in the Federal Register, 50 days before the public comment period expires, and before the DOJ must respond to public questions or concerns regarding unusual circumstances in the settlement's formation or terms. *Id*.

C. The Efficacies and Inefficacies of the Tunney Act

After the ITT scandal and the enactment of the Tunney Act, there were no credible allegations of improper side deals by the DOJ for decades. A "culture of 'independence' fostered by the Act" had, "as a practical matter, erected a wall between the White House and the [Antitrust] Division that [was] virtually unique in the executive branch." John M. Nannes, *Transparency in Federal Antitrust Enforcement Decisions: A Reaction to Professor Grimes*, 51 Buff. L. Rev. 1017, 1026 (2003). The consensus among leading experts and scholars, including former high ranking DOJ officials, was that the Act had proven highly effective not because judicial scrutiny of settlements had become especially rigorous, but because the leadership and staff of the DOJ cared deeply about preserving public confidence in the integrity of the agency. *Id.* at 1026–27. The mere threat of disclosure posed by the Act's transparency requirements successfully deterred side deals altogether. *Id*. at 1026 (former Acting Assistant Attorney General explaining that the Act "worked well in addressing the principal concern that prompted it: discouraging political interference. There have been very few claims that I know of that the merger review process has become politicized in anything remotely approaching the sense that gave rise to the Act."); Lawrence Frankel, *Rethinking the Tunney Act, A Model for Judicial Review of Antitrust Consent Decrees*, 75 Antitrust L.J. 549, 575 (2008) (former Assistant Chief of the Technology Enforcement Division of the Antitrust Division explaining that "the consensus seems to be that the Act has been successful at preventing the abuses that motivated its passage" by "illuminating or, more commonly, deterring improper conduct"); *see also* Lloyd C. Anderson, *United States v. Microsoft, Antitrust Consent Decrees, and the Need for a Proper Scope of Judicial Review*, 65 Antitrust L.J. 1, 37–38 (1996) (observing, in 1996, that "logic suggests that the Act remains a significant deterrent to influence peddling" because "[s]ince the Act became law there appear to have been almost no controversies like the cries of foul play surrounding the 1956 AT&T, 1967 Natural Gas, and 1971 ITT decrees").

Because the Tunney Act deterred side deals and other similar improprieties so thoroughly, a test case to determine how successfully the Act addressed the impetus for its passage—*i.e.*, another scandal on the order of the ITT affair—never materialized. Until a little over three weeks ago, no Court has had to apply the Act to determine whether a settlement reasonably suspected to be the product of a side deal was in the public interest. See *United States v. Hewlett Packard Enter. Co.,* No. 25-cv-00951, 2026 U.S. Dist. LEXIS 180708, at *83–4 (N.D. Cal. Aug. 12, 2026) (hereinafter "*HPE*") (finding that discovery revealed a proposed side deal but finding no evidence that the DOJ accepted it). In the decades after its passage, however, the Act did have continued salience because of its capacity to address a similar but different risk that threatens to undermine public confidence in the consent decree process: public inequity.

The risk of an antitrust settlement that is unfair to the public arises not when the DOJ steps out of bounds, as in ITT, but rather when it never gets into the game. While ITT's salacious elements stole headlines when the Tunney Act was being deliberated, Congress was equally concerned at the time with instances where it appeared that the DOJ violated the public trust by abdicating its responsibility to enforce the antitrust laws and hid behind the opaque consent decree process to escape scrutiny. While such settlements are arguably different in kind than side deals, Congress believed they were equally problematic because they similarly threatened the integrity of the consent decree process and could undermine public confidence in federal antitrust enforcement.

Numerous examples of settlements perceived as inequitable or unfair to the public were discussed alongside the ITT scandal during legislative proceedings, but perhaps the most prominent was the settlement of *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964). The DOJ had challenged El Paso's acquisition of Pacific Northwest Pipeline under § 7 of the Clayton Act and won on the merits in the Supreme Court. *Id*. at 662. The Court remanded the case with instructions "to order divestiture without delay," *id*., but the DOJ, in the Court's words, "knuckled under to El Paso and 'settled'" the litigation notwithstanding that it had already won, agreeing to a consent decree that delayed the possibility of divestiture for three years and "perpetuat[ed] rather than terminat[ed] this unlawful merger." *Cascade Nat. Gas Corp. v. El Paso Nat. Gas Co.*, 386 U.S. 129, 141 (1967). Doing so, the Court held, "turn[ed] loose on the public" the merger's anticompetitive effects "for the convenience of El Paso," which had preferred to search leisurely for an existing buyer of the divestiture assets rather than immediately divest and create a stand-alone competitor. *Id*. at 141–42.

The Court rejected the DOJ's decree for "do[ing] the opposite of what our prior opinion and mandate commanded," and it reassigned the case to a different district court judge, incredulous that the presiding judge had accepted the decree. *Id*. at 142; *id.* at 142–43; *see AT&T*, 552 F. Supp. at 148 n.72 (D.D.C. 1982) (characterizing the decree as having "completely failed to alleviate the conditions found to violate the antitrust laws"). The case troubled Congress and threatened to undermine public confidence in the consent decree process because the DOJ's voluntary choice to accept less than the expected value of relief was "blatantly inequitable and improper." *Senate Debates,* 119 Cong. Rec. 24598 (1973) (Remarks of Sen. Tunney), *reprinted in* Kintner, *supra*, at 6606. Moreover, the district court, in entering the decree, had made a mockery of judicial power by effectively acting as the DOJ's rubber stamp, failing to protect the public against a readily observable inequity. *See The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 93d Cong. 1 (1973) (statement of Sen. John V. Tunney) (explaining that the Act would "make our courts an independent force rather than a rubber stamp in reviewing consent decrees"), *reprinted in* Kintner, *supra*, at 6566; 119 Cong. Rec. 3449, 3452 (1973) (statement of Sen. John V. Tunney), *reprinted in* Kintner, *supra*, at 6659 ("The court is not to operate simply as a rubber stamp, placing an imprimatur upon whatever is placed before it by the parties."); H.R. 93-1463, at 8 ("One of the abuses sought to be remedied by the bill has been called 'judicial rubber stamping' by district courts of proposals submitted by the Justice Department.").

To clarify that the Tunney Act is not solely an anti-side deal statute and protects against inequitable settlements as well, Congress had made sure to specify that a reviewing court is permitted to consider the competitive impact that the settlement will "turn loose on the public," *Cascade Nat. Gas Corp.*, 386 U.S. at 141, not solely the issue of undue political influence borne of improper lobbying contacts and political pressure. To eliminate any doubt, the original text of Section 2(e) of the Act expressly provided that a reviewing court "may consider" the "competitive impact of [the proposed final] judgment" and "the impact of entry of such judgment upon the public generally." Antitrust Procedures and Penalties Act, Pub. L. No. 93-528, 88 Stat. 1706, 1707 (1974). But in ensuing decades, that language proved insufficient to prevent judicial rubber stamping. *See generally* Darren Bush, *The Death of the Tunney Act at the Hands of an Activist D.C. Circuit*, 63 Antitrust Bull. 113 (2018).

In 2004, Congress amended the Tunney Act because it believed this aspect of its mandate needed strengthening. "A serious concern" had emerged because of "the Justice Department's consistent practice of disclosing its analysis only of competitive issues that are addressed in the consent decree and failing to provide meaningful analysis of alternative remedies that were considered." Grimes, *supra*, at 962. In public comments, third parties were "consistently point[ing] out the Government's failure to address issues beyond those addressed in the settlement and to provide meaningful analysis of alternative remedies considered." *Id.*; *see also id.* at 943 (noting that "[p]re-decisional transparency can be a form of due process, allowing affected parties an opportunity to offer submissions that can avoid unfair or unjust results"). As Kenneth Star and Robert Bork wrote in a brief "challenging the government's settlement of the [second] Microsoft case," the "'independent 'public interest' determination contemplated by the Act would be meaningless if, by failing to comply with the statute's disclosure requirements, parties could deprive courts and the public of the information they need to engage in informed review of a decree's antitrust relief.'" *Id.* at 962 (quoting Brief for Appellants at 51, *Comput. & Commc'ns Indus. Assoc. v.* U.S., No. 03-5030 (D.C. Cir. May 5, 2003)).

In response to these concerns, Congress through the 2004 Amendments reaffirmed that it condemns inequitable settlements like *El Paso* just as vehemently as it condemns side-deal settlements like ITT. Most notably, it expressly ratified "the original Congressional intent" of the Tunney Act and rejected judicial opinions that applied an overly deferential standard of review in determining whether settlements are in the public interest. Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665, 668. In Section 16(e), it also changed "court may [consider]" to "court shall [consider]," making public inequity a floor for public interest review below which district courts may not descend. *Id*. And it changed the language of the catchall provision listed among the section 16(e)(1) factors from "any other considerations bearing upon the adequacy of such judgment," Antitrust Procedures and Penalties Act, Pub. L. 93-528, 88 Stat. 1706, 1707 (1974), to "any other competitive considerations bearing upon the adequacy of such judgment that the court deems necessary to a determination of whether the consent judgment is in the public interest," Antitrust Criminal Penalty Enhancement and Reform Act of 2004, Pub. L. No. 108-237, 118 Stat. 665, 668–69.

But importantly, the 2004 Amendments in no way downgraded Congress's concern about settlements motivated by side deals like ITT. The express ratification of the Act's original Congressional intent confirms as much, as does Congress's preservation or enhancement of all of the Act's provisions designed to detect and deter side deals, including Section 16(b)(3)'s requirement of an explanation of any unusual circumstances in the settlement's formation (rather than solely its terms), Section 16(b)(6)'s requirement of a "description and evaluation of alternatives" to the settlement that were actually considered (which addresses both public-inequity and side-deal risk), Section 16(g)'s requirement of a disclosure of lobbying contacts, and the Act's numerous and onerous publicity requirements.

D. Renewed Pressure to Enter Side Deals at the Department of Justice

Regrettably, side deals in antitrust enforcement have reemerged as a serious concern in the last year. Numerous settlement negotiations at both federal antitrust agencies have reflected terms that do not appear designed to address the public interest in competition in relevant markets. *See, e.g.,* Proposed Decision & Order as to Respondent Express Scripts, Inc. at 6–7, 9, *In re Caremark Rx, L.L.C.,* Dkt. No. 9437, (F.T.C. Feb. 4, 2026) (requiring Express Scripts to provide covered access to TrumpRx and to "re-shore" its Swiss group purchasing organization to the United States, notwithstanding that the complaint challenged anticompetitive rebating practices that allegedly inflated insulin prices in relevant pharmaceutical markets); Proposed Decision & Order as to Respondent Caremark Rx, L.L.C. at 7, 12, *In re Caremark Rx, L.L.C.*, Dkt. No. 9437, (F.T.C. July 14, 2026) (requiring Caremark, in settling the same insulin-pricing claims, to provide for patient use of TrumpRx and maintain its group-purchasing activities in the United States); *HPE*, 2026 U.S. Dist. LEXIS 180708 at *30–32, *38 (describing HPE's proposed "Invest in America" package, under which HPE offered legally binding commitments concerning domestic investment, employment, H1-B visas, and educational grants as "material terms" of a settlement to resolve DOJ's challenge to its acquisition of Juniper Networks, in exchange for accepting settlement terms that, for purposes of protecting competition and consumers, the Antitrust Division leadership considered "'inadequate, to say the least,' because [they] would not meaningfully address the increases in concentration resulting from the merger") (quoting States Exh. 38; States Exh. 1).

Discovery into potential side dealing during the Tunney Act proceeding in *HPE* may have done lasting damage to public confidence in the consent decree process. Exercising some of its enumerated powers under section 16(f) of the Tunney Act to discharge its duty under section 16(e), the district court conducted an inquiry into the DOJ's settlement motivations in resolving its challenge to HPE's proposed acquisition of Juniper as a violation of Section 7 of the Clayton Act. *Id*. at *26–27 (granting motion to intervene by 13 State Attorneys General because their participation would "assist the Court in evaluating whether the proposed Final Judgment serves the public interest" and ordering a hearing, briefing, and discovery encompassing "evidence relating to both the consequences of the proposed settlement and the decision-making process that led to the proposed settlement"). Uncontroverted evidence revealed through discovery showed an attempt to bargain financial support for the President's broader political agenda in exchange for accepting less than the expected value of relief for competition and consumers. *Id.* at *27–46. Members of Congress, 20 states or territorial attorneys general, former employees of the DOJ's Antitrust Division, and numerous public interest and public policy organizations, including AAI, filed public comments expressing concerns about the DOJ's settlement motivations. *Id*. at *20.

"[T]he states produced a detailed narrative of the settlement process that the United States and defendants do not meaningfully contest." *Id*. Discovery raised the prospect of impropriety in how Senior DOJ leadership "conducted litigation and settlement negotiations on behalf of the United States, *id*. at *83, as well as a potential side deal, *id*. at *30–31. After HPE hired lobbyists with close ties to the White House and launched an unusually aggressive lobbying campaign in which it orchestrated the firing of the Principal Deputy Assistant Attorney General and another senior member of the Antitrust Division's front office, *id*. at *45, and also threatened the livelihood of the Senate-confirmed Assistant Attorney General, *id.* at *35 ("'If you don't approve this settlement, I will destroy you. I will destroy your job at the DOJ'") (quoting Mike Davis), HPE proposed a package of side deals it called the "HPE Invest in America Plan," in which it promised to make manufacturing and engineering investments domestically rather than internationally in support of the President's "America First" political agenda as "'legally binding obligations" enforceable "at law or in equity.'" *Id*. at *30–31 (quoting HPE's outside counsel). *Compare, e.g.*, *America First Investment Policy*, Memorandum for the Secretary of the Treasury et al., § 2(a) (Feb. 21, 2025) ("My Administration will make the United States the world's greatest destination for investment dollars. . ."), *with HPE.,* 2026 U.S. Dist. LEXIS 180708, at *30–31 (describing the terms of the HPE Invest in America Plan, which included a commitment to "'invest more than

$70 billion in the United States over the next five years'") (quoting HPE's Invest in American Plan).

Senior DOJ leaders accepted all of the substantive terms of HPE's settlement proposal that were facially directed to redressing harm to competition and consumers, but the settlement did not formally incorporate the HPE Invest in America Plan, confirming that the DOJ voluntarily chose not to accept $70 billion of the expected value of relief (as calculated by the defendants). *See id*. at *44, *81 (discussing evidence suggesting the DOJ did not formally include the HPE Invest in America Plan as an express term of the settlement because it did not want to "set the precedent" of formally accepting such relief to resolve an antitrust case). The district court accepted as true the DOJ's voluntary choice to forego relief valued at $70 billion without further exercising its investigatory powers under the Tunney Act, and without considering whether the relief was accepted informally, on the side. *Cf*. Reeves, *supra* note 2, at 324 (noting that the side deal in ITT was (perhaps obviously) not included formally in the consent decree resolving the merger challenge and quoting President Nixon stating "[n]ow this is very hush hush and it has to be engineered very delicately and it'll take six months to do properly," and in response to Haldeman's question, "Does I.T.T. have money?," stating "Oh God, yes. That's part of this ballgame. But it should be later. It should not be right now…. Nothing done until the deal is over.").

The DOJ's settlement of its monopolization case against Live Nation, now before this Court, bears several of the hallmarks of *HPE* and ITT. Specifically, there is reason to investigate whether the DOJ has agreed to accept less than the expected value of relief in exchange for assistance in using Live Nation's monopoly power to help improve bookings at the Kennedy Center. Reports from credible sources suggest: (1) The President has indicated that he considers the Kennedy Center's success important and serves as Chairman of the Kennedy Center; (2) Live Nation mounted an extensive lobbying campaign to settle DOJ's monopolization case, targeting senior White House and DOJ officials outside the Antitrust Division; (3) the President invited Live Nation CEO Michael Rapino to a meeting in the Oval Office shortly before trial, and the discussion included both Live Nation's assistance in improving bookings at the Kennedy Center and the settlement of the DOJ's monopolization case; (4) the President pardoned a person under criminal indictment whom DOJ had identified as a highly important fact witness without securing his cooperation; (5) the President reportedly ordered the DOJ to settle the case; (6) settlement negotiations reportedly accelerated following the President's meeting with Live Nation's CEO; (7) the DOJ's trial team and its leadership were excluded from settlement negotiations and were not kept informed of them; (8) the DOJ's State co-plaintiffs were excluded from settlement negotiations and were not kept informed of them; (9) the President's personal attorney reportedly took a keen interest in the negotiations, and DOJ personnel were uncertain whether he represented the President or Live Nation; (10) settlement negotiations took place at the White House; (11) the President personally appeared during settlement negotiations at the White House; (12) the DOJ's complaint and public statements had identified structural relief, including divestiture of Ticketmaster, as the expected value of relief, but the settlement left Live Nation and Ticketmaster integrated and relied principally on behavioral remedies; (13) the DOJ had previously found that Live Nation repeatedly violated or circumvented behavioral remedies imposed by a 2010 consent decree, leading DOJ to obtain substantial modifications to the decree in 2020, and the DOJ found subsequently that Live Nation engaged in "additional, different, and more expansive" anticompetitive conduct after the 2020 modifications; (14) the great majority of the DOJ's State co-plaintiffs declined to join the federal settlement and instead proceeded to trial; (15) the DOJ's co-lead trial counsel believed that the government had an exceptionally strong case and would prevail at trial; (16) the remaining State plaintiffs subsequently obtained a unanimous jury verdict establishing the relevant antitrust violations, with the jury selecting the highest per-ticket damages figure within the range calculated by the States' expert; and (17) Live Nation thereafter appointed Richard Grenell, the President's designee to lead the Kennedy Center, to its Board of Directors. *See* Rebecca Ballhaus et al., *The Trump Intervention That Got the DOJ Off Live Nation's*

Back, Wall St. J. (Aug. 24, 2026), https://perma.cc/U2C4-LS2B; Andrew Flanagan, *Former DoJ Antitrust Attorneys Slam Live Nation-Ticketmaster Settlement*, Variety (June 8, 2026), https://perma.cc/C2JL-JRXG; Proceeding Plaintiff States' Mem. Supp. Mot. Mistrial at 1, *United States v. Live Nation Ent., Inc.*, No. 1:24-cv-03973-AS (S.D.N.Y. Mar. 9, 2026); U.S. Dep't of Justice, *Justice Department Will Move to Significantly Modify and Extend Consent Decree with Live Nation/Ticketmaster* (Dec. 19, 2019), https://perma.cc/5WMY-KX3D; U.S. Dep't of Justice, *Court Enters Judgment That Significantly Modifies and Extends Consent Decree With Live Nation/Ticketmaster* (Jan. 28, 2020), https://perma.cc/V87D-J8GN (describing modifications intended to prevent and detect future violations); Jody Godoy, *Ticketmaster Keeps $7.58 From Each Ticket, New York Attorney Says at Trial,* Reuters (Mar. 3, 2026), https://perma.cc/UYL7-YVC9; Live Nation Ent., Inc., Current Report (Form 8-K) (June 11, 2026); Amended Compl. ¶¶ 13, 67, *United States v. Live Nation Ent., Inc.*, No. 1:24-cv-03973-AS (S.D.N.Y. Aug. 30, 2024), ECF No. 257.

SUMMARY OF ARGUMENT

After calculating the expected value of relief to competition and consumers in this nationwide monopolization case, based on full information from a series of CID investigations dating back to February 2009, the DOJ determined that it could reasonably expect to obtain a forced divestiture of Ticketmaster from Live Nation for the benefit of competition and consumers. It stated as much in its complaint and publicly pledged to seek that relief, "at a minimum," because it is "necessary" to restore competition and protect consumers in nationwide relevant antitrust markets for the ticketing and booking of live events. Am. Compl. ¶ 517(f), (i); Press Release, Dep't of Justice, *Justice Department Sues Live Nation-Ticketmaster for Monopolizing Markets Across the Live Concert Industry* (May 23, 2024). But the DOJ settled for less: it voluntarily chose to accept a largely behavioral remedy that is substantially indistinguishable from two others that failed because they preserved Live Nation's anticompetitive incentives and repeatedly proved susceptible to easy circumvention by a serial recidivist. *Id*. ¶¶ 66–67.

No evidence suggests the DOJ downwardly adjusted its expected value of relief due to litigation risk. It did not even consult its trial team before settling, whose co-lead "knew the case," "knew the witnesses," "knew the evidence," and "believed that [it was] going to win," Flanagan; *see also Weinberger v. Kendrick*, 698 F.2d 61, 73 (2d Cir. 1982) (noting that settling parties get deference during judicial review of settlements because “counsel [are] thoroughly familiar with the strengths and weaknesses of their respective cases”), nor did it consult its co-plaintiffs who were given 24 hours to review the settlement, rejected it in favor of trial, and won a unanimous verdict awarding the highest per-ticket damages figure within the range calculated by their expert. Proceeding Plaintiff States’ Mem. Supp. Mot. Mistrial at 1.

Numerous reports from credible sources raise suspicions or suggestions that the settlement is the product of a DOJ side deal. *Supra* Pt. D. The public therefore requires assurance that those reports are false before the Court can enter the proposed final judgment. If the settlement together with a side deal allows Ticketmaster to remain integrated with Live Nation in exchange for Live Nation’s assistance in improving bookings at the Kennedy Center or other similar side benefits, as those reports suggest, then the settlement cannot be within the reaches of the public interest as a matter of law. *Infra* Part I.

The DOJ’s proposed standard of public interest review would prevent the Court from even considering the grave risk that such a side deal poses to competition and consumers. It asks this Court instead to take an ostrich-like approach and serve as its rubber stamp, accounting for the risk of side deals only by observing that none are memorialized in the Proposed Final Judgment or its Tunney Act disclosures, which fail to even address public concern that “the government gave up more than it need have or should have.'" *Senate Debate*, 93d Cong., 1st Sess., 119 Cong. Rec. 24597, *reprinted in* Kintner, *supra*, at 6605–6 (statement of Sen. John V. Tunney) (citation omitted); *cf. HPE*, 2026 U.S. Dist. LEXIS 180708, at *30–31 (noting that the DOJ allowed the merging parties to write the Competitive Impact Statement it filed in the *HPE* case). The DOJ's arguments in support of its claimed standard are meritless and wrong. They directly contravene the basic purpose of the Tunney Act and the 2004 amendments Congress made to strengthen judicial review and avoid judicial rubber stamping. *Infra* Part II.

ARGUMENT

I. Compromised Relief Pursuant to a Side Deal Is Not Within the Reaches of the Public Interest as a Matter of Law

The public interest contemplated by the Tunney Act is the public interest in competition. *Paramount Famous Lasky Corp. v. United States*, 282 U.S. 30, 44 (1930) ("[P]reservation of competition is the primary consideration."). Settlement terms that accept an elevated risk of harm to competition and consumers in the service of a perceived greater good are not a cognizable form of relief within the reaches of that interest. As the Supreme Court has put it, "[t]he [Sherman Act] is its own measure of right and wrong, of what it permits, or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties." *Id*.

Moreover, that policy is a "congressional policy—adopted under the commerce power—in favor of competition." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 106 (1980); *see also Summit Health v. Pinhas*, 500 U.S. 322, 329 (1991) ("It is firmly settled that when Congress passed the Sherman Act, it 'left no area of its constitutional power [over commerce] unoccupied.'" (citation omitted)); *National Soc. of Professional Engineers v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment."). Because the Court, pursuant to the Tunney Act, has been asked to undertake a judicial act by entering the consent decree as a consent "judgment," 15 U.S.C. 16(e), it lacks authority, under the public interest standard, to subordinate the congressional policy favoring competition by demurring to private ordering between the DOJ and Live Nation. *See NCAA v. Alston*, 594 U.S. 69, 73 (2021) ("In the Sherman Act, Congress *tasked courts* with enforcing a policy of competition." (emphasis added)); *see also United States v. Swift & Co.*, 286 U.S. 106, 115 (1932) ("[A] decree entered upon consent is to be treated … as a judicial act."); James Rob Savin, *Tunney Act '96: Two Decades of Judicial Misapplication*, 46 EMORY L.J. 363, 377 n.102 (1997) ("A denial of the court's power to refuse to enter decrees that do not protect the public interest … would arguably prevent the court from accomplishing its constitutionally assigned function of enforcing the laws.").

Numerous litigants have appealed to the Supreme Court requesting that it choose to sacrifice competition in the service of a higher social calling, as the alleged side deal would. *See, e.g., FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 419 (1990) (competition should be sacrificed for the sake of securing legal representation for indigent defendants); *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 463 (1986) (for the sake of public health); *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) (for the sake of public safety); *Northern Securities Co. v. United States*, 193 U.S. 197 (1903) (for the good of the stock market); *United States v. Trans-Missouri Freight Ass'n*, 166 U.S. 290, 369 (1897) (White, J., dissenting) (for the good of the railroad industry).

The Court has greeted these requests as "nothing less than a frontal assault on the basic policy of the Sherman Act." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. To be sure, there is nothing improper when the government acts for the good of the Kennedy Center, which Congress created by statute as a bureau of the Smithsonian Institution with a mandate to develop innovative arts and educational programs for children and families. 20 U.S.C. § 76h(a)(1), 76j(a)(1). But to sacrifice the public interest in competition for the good of the Kennedy Center in an antitrust consent decree entered as a judgment by a federal court in a Tunney Act proceeding would be to make "[a] value choice … beyond the ordinary limits of judicial competence," and which "has been made for [the judiciary] already, by Congress." *United States* *v. Phila. Nat'l Bank*, 374 U.S. 321, 371 (1963). *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695 ("Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad.").

Here, the side deal that credible reports suggest motivated the settlement would not just pit a competing social policy against the congressional policy in favor of competition, as the Supreme Court has instructed courts may not do. It would also pit the congressional policy in favor of competition against *itself*. The alleged side deal is not merely indifferent to the competitive harm caused by potentially inadequate relief; it is actively enhanced by it. To the same degree that Live Nation's monopoly power is preserved intact by a potentially inadequate settlement, its capacity to enhance Kennedy Center bookings would be strengthened. If the government made an "economically beneficial concession with regard to the merits provisions" of the settlement pursuant to the alleged side deal, *Staton*, 327 F.3d at 964, the Kennedy Center would stand to benefit from precisely "what makes the defendant's acts unlawful" and "what the antitrust laws are designed to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977) (finding it "inimical to the purpose of the antitrust laws" to award relief where the recipient stands to benefit because "competition was reduced.").

II. The DOJ's Crabbed Reading of the Standard of Public Interest Review Is Meritless

In its Response to Public Comments in *HPE*, the DOJ made the extraordinary claim that "The Tunney Act's public interest standard" *prohibits* inquiry into the "motivations of the Department of Justice" in entering a consent decree. Response of United States to Public Comments on the Proposed Final Judgment at 19–20, *United States v. Hewlett Packard Enterprise Co.*, No. 5:25-cv-00951-PCP (N.D. Cal. filed Nov. 14, 2025), ECF No. 311 (The Tunney Act's Public Interest standard "directs the Court" not to do so); *see also id*. at 12 ("any suggestion that courts should inquire into" the "motivations of a co-equal branch of government" is "barred"). Equating any inquiry into a potential side deal with an intrusion into the executive branch's deliberative process privilege, it argued that the Court must "limit its Tunney Act review to the terms and competitive impact of the proposed Final Judgment" itself, implying a standard analogous to the parole evidence rule in contract law. *Id*. at 21. It purported to ground many of these arguments in principles of statutory interpretation, pointing out that "the term 'public interest' keeps company with the rest of 15 U.S.C. § 16(e)(1)," which factors it says bear only upon "the substantive adequacy" of consent decrees. *Id*. at 20 ("All of the factors enumerated in both Sections 16(e)(1)(A) and (B) share a common aim: they require the court to consider the *impact* of the proposed consent judgment" and "[n]one … authorizes a court inquiry" into its settlement motivations). And it claims that "the legislative history shows that the intent" of section 16(b)(3)'s required explanation of any unusual circumstances giving rise to the settlement or its terms "was ensuring the court was informed of unique substantive reasons that would justify terms of the settlement." *Id*. at 22

The DOJ's *HPE* arguments are exceedingly misleading and come close to—if they do not cross—the line between zealous advocacy and "paltering." *See* Todd Rogers et al., *Artful Paltering: The Risks and Rewards of Using Truthful Statements to Mislead Others* , (Dec. 5, 2016), https://www.library.hbs.edu/working-knowledge/why-one-must-not-palter-when-negotiating (defining paltering as "the active use of truthful statements to create a false impression" and characterizing it as "deception"). This Court should categorically reject them if it receives them again here. In the DOJ's telling, one would never know that the Tunney Act cares at all about preventing and deterring undisclosed side deals and undue political influence in antitrust settlements.

A. Inquiry Into Undisclosed Side Deals Falls Squarely Within the Purview of the Public Interest Standard.

The DOJ's suggestion that the scope of Tunney Act review under Section 16(e) cannot reach its settlement motivations is not credible. When it has previously marshalled selective quotations to create a misleading impression of an unduly narrow standard of public interest review, district courts have appropriately taken it to task, and the DOJ has appropriately apologized. The district court's reaction in the first Microsoft case, in particular, warrants quoting in full because it directly addressed discovery into undisclosed side deals:

> The Justice Department has pointedly suggested that even a so-called "side deal" is out of the purview of the District Court's consideration. It would seem quite incongruous for the Congress to pass an elaborate statute requiring a U.S. district court to determine whether the decree was in the public interest, while at the same time telling the district court that it should not inquire into whether there was an undisclosed "side deal." Suppose, hypothetically, for example, that in affirming a "weak" antitrust decree, the Antitrust Division had told the antitrust violator it would not oppose certain proposed mergers it was considering. The Court, in making a public interest determination, would obviously be entitled to such information. This Court believes that the construction suggested by the Justice Department can in no way be rationalized or in any way sustained based on the congressional record. Indeed, even without the Tunney Act, an inquiry into such matters by a court would be completely justified. The elaborate nature of the Act, which gives the Court plenary authority, *inter alia*, to "appoint a special master and such outside consultants or expert witnesses as the court may deem appropriate; and request and obtain views, evaluations, or advice of any individual, . . . and take such other action in the public interest as the Court may deem appropriate" is totally inconsistent with the narrow interpretation given the Act by the Justice Department.

United States v. Microsoft Corp., 1995 U.S. Dist. LEXIS 3150, *14-15 (1995). The Assistant Attorney General of the Antitrust Division, Anne Bingamen, responded personally to that portion of the opinion in a letter to the court emphasizing that the Antitrust Division vehemently *supports* district court inquiry into undisclosed side deals. It, too, warrants quoting in full:

> Dear Judge Sporkin,
>
> I am writing to provide a quick correction of a misunderstanding embodied in your opinion released today. Your opinion misreads our brief to the court of appeals in this case to suggest that the Tunney Act precludes inquiry into any

> “side deal” that is part of an agreement to settle a case by a consent decree. In fact, our brief means to assert precisely the opposite: the Tunney Act permits inquiry into any such side deal, and we have repeatedly told both you, and the court of appeals, that no such side deal exists today or ever existed. It is precisely because we believe that such an inquiry is proper that we have unhesitatingly thought it proper to discuss this question, and to answer fully any questions from you in this regard. We regret if our wording of the sentence from our brief was confusing in this regard.

See generally Order that the Attached Letters be Filed, *United States v. Microsoft Corp.*, 1995 U.S. Dist. LEXIS 3148 (D.D.C. Mar. 14, 1995).

The DOJ’s textualist argument that public interest review is limited to the “terms” and “impact” of those terms is equally feeble and unsupportable. To be sure, after the 2004 Amendments to the Tunney Act, the judgment’s terms and competitive impact represent a mandatory floor for providing the requisite assurance that the settlement is in the public interest. But the DOJ’s claim that they represent a ceiling is plainly incorrect. *United States v. AT&T*, 552 F. Supp. 131, 149 (D.D.C. 1982) (“[T]he legislative history indicates that the listing of these factors was not meant to limit the court’s inquiry. These criteria therefore cannot be regarded as embodying *the* standard against which a proposed decree is to be measured.”) (citing S. Rep. No. 93-298, at 6; 120 Cong. Rec. 36344 (1974) (Remarks of Rep. Jordan); 119 Cong. Rec. 24599 (1973) (Remarks of Sen. Tunney)); *see also* Frankel, 75 Antitrust L.J. at 5606 & n.218 (2008) (“[T]he passage of the Act was largely motivated by a legitimate congressional desire to prevent improprieties such as undue political influence from adversely affecting decrees”; “Although the public interest factors listed in the Act do not explicitly refer to this concern, they do so implicitly…. [T]he Act's requirement that the court consider the competitive efficacy and adequacy can be viewed as an indirect means of requiring courts to ensure that the decree was not affected by improper considerations.").

The DOJ is correct that a statute's terms are to be interpreted based on the company they keep, but it would have the *noscitur a sociis* cannon contradict, rather than complement, the whole-statute cannon. *United States v. Microsoft Corp.*, 159 F.R.D. 318, 330 (D.D.C. 1995), *overruled on other grounds*, 56 F.3d 1448 (D.C. Cir. 1995) ("By focusing only on snippets of Section 16 to defend its position as to the narrow scope of the Tunney Act, the Department ignores the cardinal rule of statutory interpretation "that a statute is to be read as a whole."). That approach is plainly erroneous as matter of statutory interpretation. *Lagos v. United States*, 584 U.S. 577, 581 ("Our conclusion rests in large part upon the statute's wording, both its individual words and the text taken as whole."); *see also Hardcastle v. Harris*, 170 S.W.3d 67, 84 (Tenn. Ct. App. 2004) ("*Because* words are known by the company they keep, we should construe the words in a statute in the context of the entire statute and in light of the statute's general purpose.") (emphasis added; citations omitted).

Read both in isolation and in the context of the statute as a whole, none of the Section 16(b) requirements can plausibly be interpreted as scope limited in the manner the DOJ suggests, for the same reason *AT&T* articulates. 552 F. Supp. 131, 149. The DOJ's reading cannot be reconciled with the text of Section 16(b) even considered in isolation because Section 16(b)(3) requires an explanation of any unusual circumstances "giving rise to" the formation of the settlement, which by definition is antecedent to both the settlement's terms and competitive impact. Moreover, its claim that the legislative history supports its interpretation is inexplicable after even a cursory review. Debate around the language leaves no doubt that it was broadly defined and reaches concerns about malfeasance. *The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 93d Cong. 429 (1973) ("'[A]n explanation of any unusual circumstances giving rise to the proposed judgment or any provision contained therein' appears to assume that a proposed judgment may be the result from some oddity, quirk, misfeasance, malfeasance or even worse.'"). Even the portions of the legislative history it cites do not support its interpretation, because the witnesses were discussing concerns that the language was worded too broadly and could capture extraneous material, yet Congress chose to keep it as is, including in the 2004 Amendments. *See The Antitrust Procedures and Penalties Act: Hearings on S. 782 and S. 1088 Before the Subcomm. on Antitrust & Monopoly of the S. Comm. on the Judiciary*, 93d Cong. 22–23 (1973) (statement of Sen. John V. Tunney) ("I have heard that argument before, and it seems to me the fairness in consent decrees or in the investigative and litigative function of the Department of Justice is a must. If the Department has made a mistake, it seems to me that they ought to be prepared to say they made a mistake.").

Read as a whole, a statute that requires an explanation of any unusual circumstances in the settlement's formation, a "description and evaluation of alternatives" to the settlement that were actually considered, disclosure of lobbying contacts, and publication in the Federal Register despite the absence of any factual record or findings, cannot plausibly be construed as concerned only with the four corners of the proposed final judgment and its substantive terms.

B. The Court Should Conduct a "Meaningful Review" to Determine Whether the Settlement is within the Reaches of the Public Interest in Competition

Put simply, "the court's role in protecting the public interest is one of insuring that the government has not breached its duty to the public in consenting to the decree." *United States v. Bechtel Corp.*, 648 F.2d 660, 666 (9th Cir.), *cert. denied*, 454 U.S. 1083 (1981). Here, the public interest determination does not require inquiry into whether the government gave up more than it need have, but whether it gave up more than should have. The public already knows, with the perfect clarity of 20/20 hindsight, that the DOJ did not "need" to accept less than the expected value of the relief it calculated. Thirty-four States confirmed as much at trial when they rejected the settlement as inadequate, continued the same case using all the same evidence, and won a unanimous verdict and damages determination at the outer limit of the upper bound of the range their economic expert estimated. The operative question for the public interest is whether the DOJ "should have" chosen to settle for less. That is—whether it did so to protect competition and consumers or pursuant to a side deal that would utilize Live Nation's monopoly power rather the cure it.

That question cannot be answered by looking at the four corners of the proposed settlement paperwork. It requires inquiry into the DOJ's settlement motivations, and specifically whether the government settled for less pursuant to an undisclosed side deal. Discovery in HPE revealed clear evidence of HPE's aggressive attempt to impose a side deal it valued at $70 billion over five years that the DOJ refused to explicitly include in the settlement agreement because of the precedent it would set, yet the remaining material terms did not change after the side deal was removed. The only conclusions that could follow from that fact is that the side deal remained but went undisclosed or the government received nothing in its place, which would make it poor a negotiator on behalf of competition and consumers. The district could should have fully investigated what became of that portion of the settlement value that HPE calculated to be a significant portion the expected value of the total settlement relief. This Court should not make the same mistake. It should fully investigate credible suspicions of improper settlement motivations and an undisclosed side deal.

CONCLUSION

For the foregoing reasons, the Court should apply the correct public interest standard of review.

Respectfully submitted,

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