2023 Legislative Legal Seminar

Occupational Licensing – Antitrust Liability and State Action Immunity

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63 S.Ct. 307
Supreme Court of the United States.

PARKER, Director of Agriculture, et al.
v.
BROWN.

No. 46
|
Reargued Oct. 12, 13, 1942.
|
Decided Jan. 4, 1943.

Synopsis
Appeal from the District Court of the United States for the Southern District of California.

Action by Porter L. Brown against W. B. Parker, Director of Agriculture, Agricultural Prorate Advisory Commission, Raisin Proration Zone No. 1, and others, to restrain enforcement as to plaintiff of a prorate program for raisins prescribed under authority of the California Agricultural Prorate Act, wherein defendant Proration Zone No. 1 filed a cross-complaint. From a judgment of a statutory three-judge District Court, 39 F.Supp. 895, defendants appeal.

Reversed.

See, also, 62 S.Ct. 946; 62 S.Ct. 1266, 86 L.Ed. 1778.

Attorneys and Law Firms

***343** ****310** Messrs. Walter L. Bowers, of Los Angeles, Cal., and Strother P. Walton, of Fresno, Cal., for appellants.

Mr. G. Levin Aynesworth, of Fresno, Cal., for appellees.

Mr. Robert L. Stern, of Washington, D.C., for the United States as amicus curiae by special leave of Court.

Opinion

***344** Mr. Chief Justice STONE delivered the opinion of the Court.

The questions for our consideration are whether the marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act[1] is rendered invalid (1) by the Sherman Act, 15 U.S.C.A. s 1—7, 15 note, or (2) by the Agricultural Marketing Agreement Act of 1937, as amended, 7 U.S.C. s 601 et seq., 7 U.S.C.A. s 601 et seq., or (3) by the Commerce Clause of the Constitution, art. 1, s 8, cl. 3.

Appellee, a producer and packer of raisins in California, brought this suit in the district court to enjoin appellants—the State Director of Agriculture, Raisin Proration Zone No. 1, the members of the State Agricultural Prorate Advisory Commission and of the Program Committee for Zone No. 1, and others charged by the statute with the administration of the Prorate Act—from enforcing, as to appellee, a program for marketing the 1940 crop of raisins produced in 'Raisin Proration Zone No. 1'. After a trial upon oral testimony, a stipulation of facts and certain exhibits, the district court held that the 1940 raisin marketing program was an illegal interference with and undue burden upon interstate commerce and gave judgment for appellee granting the injunction prayed for. D.C., 39 F.Supp. 895. The case was tried by a district court of three judges ***345** and comes here on appeal under ss 266 and 238 of the Judicial Code as amended, 28 U.S.C. ss 380, 345, 28 U.S.C.A. ss 380, 345.

As appears from the evidence and from the findings of the district court, almost all the raisins consumed in the United States, and nearly one-half of the world crop, are produced in Raisin Proration Zone No. 1. Between 90 and 95 per cent of the raisins grown in California are ultimately shipped in interstate or foreign commerce.

The harvesting and marketing of the crop in California follows a uniform procedure. ****311** The grower of raisins picks the bunches of grapes and places them for drying on trays laid between the rows of vines. When the grapes have been sufficiently dried he places them in 'sweat boxes' where their moisture content is equalized. At this point the curing process is complete. The growers sell the raisins and deliver them in the 'sweat boxes' to handlers or packers whose plants are all located within the Zone. The packers process them at their plants and then ship them in interstate commerce. Those raisins which are to be marketed in clusters are sometimes merely packed, unstemmed, in suitable containers, but are more often cleaned, fumigated, and, when necessary, steamed to make the stems pliable. Most of the raisins are not sold in clusters; such raisins are stemmed before packing, and most packers also clean, grade and sort them. One variety is also seeded before packing.

The packers sell their raisins through agents, brokers, jobbers and other middlemen, principally located in other states or foreign countries. Until he is ready to ship the raisins the

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packer stores them in the form in which they have been received from producers. The length of time that the raisins remain at the packing plants before processing and shipping varies from a few days up to two years, depending upon the packer's current supply of raisins and the market demand. The packers frequently place orders with producers for fall delivery, before the ***346** crop is harvested, and at the same time enter into contracts for the sale of raisins to their customers. In recent years most packers have had a substantial 'carry over' of stored raisins at the end of each crop season, which are usually marketed before the raisins of the next year's crop are marketed.

The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural crops' of the state. It authorizes, s 3, the creation of an Agricultural Prorate Advisory Commission of nine members, of which a state official, the Director of Agriculture, is ex-officio a member. The other eight members are appointed for terms of four years by the Governor and confirmed by the Senate, and are required to take an oath of office. s 4.

Upon the petition of ten producers for the establishment of a prorate marketing plan for any commodity within a defined production zone, s 8, and after a public hearing, s 9, and after making prescribed economic findings, s 10, showing that the institution of a program for the proposed zone will prevent agricultural waste and conserve agricultural wealth of the state without permitting unreasonable profits to producers, the Commission is authorized to grant the petition. The Director, with the approval of the commission, is then required to select a program committee from among nominees chosen by the qualified producers within the zone, to which he may add not more than two handlers or packers who receive the regulated commodity from producers for marketing. ss 11, 14, 15.

***347** The program committee is required, s 15, to formulate a proration marketing program for the commodity produced in the zone, which the Commission is authorized to approve after a public hearing and a finding that 'the program is reasonably calculated to carry out the objectives of this act.' The Commission may, if so advised, modify the program and approve it as modified. If the proposed program, as approved by the Commission, is consented to by 65 per cent in number of producers in the zone owning 51 per cent of the acreage devoted to production of the regulated crop, the Director is required to declare the program instituted. s 16.

Authority to administer the program, subject to the approval of the Director of Agriculture, is conferred on the program committee. ss 6, 18, 22. Section 22.5 declares that it shall be a misdemeanor, which is punishable by fine and imprisonment (Penal Code s 19), for any producer to sell or any handler to receive or possess without proper authority any commodity for ****312** which a proration program has been instituted. Like penalty is imposed upon any person who aids or abets in the commission of any of the acts specified in the section, and it is declared that each 'infraction shall constitute a separate and distinct offense'. Section 25 imposes a civil liability of $500 'for each and every violation' of any provision of a proration program.

The seasonal proration marketing program for raisins, with which we are now concerned, became effective on September 7, 1940. This provided that the program committee should classify raisins as 'standard', 'substandard', and 'inferior'; 'inferior' raisins are those which are unfit for human consumption, as defined in the Federal Food, Drug and Cosmetic Act, 21 U.S.C. s 301 et seq., 21 U.S.C.A. s 301 et seq. The committee is required to establish receiving stations within the zone to which every producer must deliver all raisins which he desires to market. The raisins are graded at these stations. All inferior raisins are to be placed in the ***348** 'inferior raisin pool', to be disposed of by the committee 'only for assured by-product and other diversion purposes'. All substandard raisins, and at least 20 per cent of the total standard and substandard raisins produced, must be placed in a 'surplus pool'. Raisins in this pool may also be disposed of only for 'assured by-product and other diversion purposes', except that under certain circumstances the program committee may transfer standard raisins from the surplus pool to the stabilization pool. Fifty per cent of the crop must be placed in a 'stabilization pool'.

Under the program the producer is permitted to sell the remaining 30 per cent of his standard raisins, denominated 'free tonnage', through ordinary commercial channels, subject to the requirement that he obtain a 'secondary certificate' authorizing such marketing and pay a certificate fee of $2.50 for each ton covered by the certificate. Certification is stated to be a device for controlling 'the time and volume of movement' of free tonnage into such ordinary commercial channels. Raisins in the stabilization pool are to be disposed of by the committee 'in such manner as to

obtain stability in the market and to dispose of such raisins', but no raisins, (other than those subject to special lending or pooling arrangements of the Federal Government) can be sold by the committee at less than the prevailing market price for raisins of the same variety and grade on the date of sale. Under the program the committee is to make advances to producers of from $25 to $27.50 a ton, depending upon the variety of raisins, for deliveries into the surplus pool, and from $50 to $55 a ton for deliveries into the stabilization pool. The committee is authorized to pledge the raisins held in those pools in order to secure funds to finance pool operations and make advances to growers.

Appellee's bill of complaint challenges the validity of the proration program as in violation of the Commerce ***349** Clause and the Sherman Act; in support of the decree of the district court he also urges that it conflicts with and is superseded by the Federal Agricultural Marketing Agreement Act of 1937. The complaint alleges that he is engaged within the marketing zone both in producing and in purchasing and packing raisins for sale and shipment interstate; that before the adoption of the program he had entered into contracts for the sale of 1940 crop raisins; that unless enjoined appellants will enforce the program against respondent by criminal prosecutions and will prevent him from marketing his 1940 crop, from fulfilling his sales contracts, and from purchasing for sale and selling in interstate commerce raisins of that crop.

Appellee's allegations of irreparable injury are in general terms, but it appears from the evidence that he had produced 200 tons of 1940 crop raisins; that he had contracted to sell 762 1/2 tons of the 1940 crop; that he had dealt in 2,000 tons of raisins of the 1939 crop, and expected to sell, if the challenged program were not in force, 3,000 tons of the 1940 crop at $60 a ton; that the pre-season price to growers of raisins of the 1940 crop, before the program became effective, was $45 per ton, and that immediately afterward it rose to $55 per ton or higher. It also appears that the district court having awarded the final injunction prayed, appellee has proceeded with the marketing of his 1940 crop and has disposed of all except twelve tons, which remain on hand. Although the district court found that the amount in controversy exceeds $3,000, we are of opinion that as ****313** the complaint assails the validity of the program under the anti-trust laws, 15 U.S.C. ss 1—33, 15 U.S.C.A. ss 1—33, the suit is one ‘arising under’ a ‘law regulating commerce’ and allegation and proof of the jurisdictional amount are not required. 28 U.S.C. s 41(1), (8), 28 U.S.C.A. s 41(1, 8); Peyton v. Railway Express Agency, 316 U.S. 350, 62 S.Ct. 1171, 56 L.Ed. 1525. The majority of the Court is also of opinion that the suit is within the equity jurisdiction of the court since the complaint ***350** alleges and the evidence shows threatened irreparable injury to respondent's business and threatened prosecutions by reason of his having marketed his crop under the protection of the district court's decree.

Validity of the Prorate Program under the Sherman Act

Section 1 of the Sherman Act, 15 U.S.C. s 1, 15 U.S.C.A. s 1, makes unlawful ‘every contract, combination * * * or conspiracy, in restraint of trade or commerce among the several States'. And s 2, 15 U.S.C. s 2, 15 U.S.C.A. s 2, makes it unlawful to ‘monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States'. We may assume for present purposes that the California prorate program would violate the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate. We may assume also, without deciding, that Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce. Occupation of a legislative ‘field’ by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws. See Adams Express Co. v. Croninger, 226 U.S. 491, 505, 33 S.Ct. 148, 151, 57 L.Ed. 314, 44 L.R.A.,N.S., 257; Napier v. Atlantic Coast Line, 272 U.S. 605, 607, 47 S.Ct. 207, 71 L.Ed. 432; Missouri Pacific R. Co. v. Porter, 273 U.S. 341, 47 S.Ct. 383, 71 L.Ed. 672; Illinois Natural Gas Co. v. Central Illinois Public Service Co., 314 U.S. 498, 510, 62 S.Ct. 384, 389, 86 L.Ed. 371.

But it is plain that the prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its ***351** legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.

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The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state. The Act is applicable to 'persons' including corporations, s 7, 15 U.S.C.A., and it authorizes suits under it by persons and corporations. s 15. A state may maintain a suit for damages under it, State of Georgia v. Evans, 316 U.S. 159, 62 S.Ct. 972, 86 L.Ed. 1346, but the United States may not, United States v. Cooper Corp., 312 U.S. 600, 61 S.Ct. 742, 85 L.Ed. 1071—conclusions derived not from the literal meaning of the words 'person' and 'corporation' but from the purpose, the subject matter, the context and the legislative history of the statute.

There is no suggestion of a purpose to restrain state action in the Act's legislative history. The sponsor of the bill which was ultimately enacted as the Sherman Act declared that it prevented only 'business combinations'. 21 Cong.Rec. 2562, 2457; see also at 2459, 2461. That its purpose was to suppress combinations to restrain competition and attempts to monopolize by individuals and corporations, abundantly appears from its legislative history. See Apex Hosiery Co. v. Leader, 310 U.S. 469, 492, 493, 60 S.Ct. 982, 992, 84 L.Ed. 1311, 128 A.L.R. 1044, and note 15; United States v. Addyston Pipe & Steel Co., 6 Cir., 85 F. 271, 46 L.R.A. 122, affirmed 175 U.S. 211, 20 S.Ct. 96, 44 L.Ed. 136; ****314** Standard Oil Co. v. United States, 221 U.S. 1, 54-58, 31 S.Ct. 502, 513, 515, 55 L.Ed. 619, 34 L.R.A.,N.S., 834, Ann.Cas.1912D, 734.

True, a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful, Northern Securities Co. v. United States, 193 U.S. 197, 332, 344—347, 24 S.Ct. 436, 454, 459—461, 48 L.Ed. 679; and we have no question of the state or its municipality becoming a participant in a private agreement or combination ***352** by others for restraint of trade, cf. Union Pacific R. Co. v. United States, 313 U.S. 450, 61 S.Ct. 1064, 85 L.Ed. 1453. Here the state command to the Commission and to the program committee of the California Prorate Act is not rendered unlawful by the Sherman Act since, in view of the latter's words and history, it must be taken to be a prohibition of individual and not state action. It is the state which has created the machinery for establishing the prorate program. Although the organization of a prorate zone is proposed by producers, and a prorate program, approved by the Commission, must also be approved by referendum of producers, it is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions, in the execution of a governmental policy. The prerequisite approval of the program upon referendum by a prescribed number of producers is not the imposition by them of their will upon the minority by force of agreement or combination which the Sherman Act prohibits. The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application. The required vote on the referendum is one of these conditions. Compare Currin v. Wallace, 306 U.S. 1, 16, 59 S.Ct. 379, 387, 83 L.Ed. 441; Hampton, Jr., & Co. v. United States, 276 U.S. 394, 407, 48 S.Ct. 348, 351, 72 L.Ed. 624; Wickard v. Filburn, 317 U.S. 111, 63 S.Ct. 82, 87 L.Ed. 122.

The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit. Olsen v. Smith, 195 U.S. 332, 344, 345, 25 S.Ct. 52, 54, 55, 49 L.Ed. 224; cf. Lowenstein v. Evans, C.C., 69

F. 908, 910. Validity of the Program Under the Agricultural Marketing Agreement Act

The Agricultural Marketing Agreement Act of 1937, 50 Stat. 246, 7 U.S.C. s 601 et seq., 7 U.S.C.A. s 601 et seq., authorizes the Secretary ***353** of Agriculture to issue orders limiting the quantity of specified agricultural products, including fruits, which may be marketed 'in the current of * * * or so as directly to burden, obstruct, or affect interstate or foreign commerce'. Such orders may allot the amounts which handlers may purchase from any producer by means which equalize the amount marketed among producers; may provide for the control and elimination of surpluses and for the establishment of reserve pools of the regulated produce. s 8c(6), 7 U.S.C.A. s 608c(6). The federal statute differs from the California Prorate Act in that its sanction falls upon handlers alone while the state act, s 22.5(3), applies to growers and extends also to handlers so far as they may unlawfully receive or have in their possession within the state any commodity subject to a prorate program.

We may assume that the powers conferred upon the Secretary would extend to the control of surpluses in the raisin industry through a pooling arrangement such as was promulgated under the California Prorate Act in the present case. See United States v. Rock Royal Co-op., 307 U.S. 533, 59 S.Ct. 993, 83 L.Ed. 1446; Currin v. Wallace, supra. We may assume also that a stabilization program adopted under the

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Agricultural Marketing Agreement Act would supersede the state act. But the federal act becomes effective only if a program is ordered by the Secretary. Section 8c(3) provides that whenever the Secretary of Agriculture 'has reason to believe' that the issuance of an order will tend to effectuate the declared policy of the Act with respect to any commodity he shall give due notice of an opportunity for a hearing upon a proposed order, and s 8c(4) provides that after the hearing he shall issue an order if he finds and sets forth in the order that its issuance will tend to effectuate the declared policy of the Act with respect to the commodity ****315** in question. Since the Secretary has not given notice of hearing and has not proposed or promulgated any order regulating raisins it must be ***354** taken that he has no reason to believe that issuance of an order will tend to effectuate the policy of the Act.

The Secretary, by s 10[i], 7 U.S.C.A. s 610(i), is authorized 'in order to effectuate the declared policy' of the Act, and 'in order to obtain uniformity in the formulation, administration, and enforcement of Federal and State programs relating to the regulation of the handling of agricultural commodities,' to confer and cooperate with duly constituted authorities of any state. From this and the whole structure of the Act, it would seem that it contemplates that its policy may be effectuated by a state program either with or without the promulgation of a federal program by order of the Secretary. Cf. United States v. Rock Royal Co-op., Inc., supra. It follows that the adoption of an adequate program by the state may be deemed by the Secretary a sufficient ground for believing that the policies of the federal act will be effectuated without the promulgation of an order.

It is evident, therefore, that the Marketing Act contemplates the existence of state programs at least until such time as the Secretary shall establish a federal marketing program, unless the state program in some way conflicts with the policy of the federal act. The Act contemplates that each sovereign shall operate 'in its own sphere but can exert its authority in conformity rather than in conflict with that of the other'. H.Rep.No.1241, 74th Cong., 1st Sess. pp. 22—23; S.Rep. 1011, 74th Cong., 1st Sess. p. 15.[2] The only suggested possibility of conflict is between the declared purposes of the two acts. The object of the federal statutes is stated to be the establishment, by exercise ***355** of the power conferred on the Secretary, of 'orderly marketing conditions for agricultural commodities in interstate commerce' such as will tend to establish 'parity prices' for farm products,[3] but with the further purpose that, in the interest of consumers, current consumptive demand is to be considered and that no action shall be taken for the purpose of maintaining prices above the parity level. s 2, 7 U.S.C.A. s 602.

The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market, and although the statute speaks in terms of 'economic stability' and 'agricultural waste' rather than of price, the evident purpose and effect of the regulation is to 'conserve the agricultural wealth of the State' by raising and maintaining prices, but 'without permitting unreasonable profits to the producers'. ****316** s 10. The only possibility of conflict would seem to be if a State program were to raise prices beyond the parity price prescribed by the Federal Act, a condition which has not occurred.[4]

***356** That the Secretary has reason to believe that the state act will tend to effectuate the policies of the federal act so as not to require the issuance of an order under the latter is evidenced by the approval given by the Department of Agriculture to the state program by the loan agreement between the state and the Commodity Credit Corporation.[5] By s 302(a) of the Agricultural Adjustment Act of 1938, 52 Stat. 43, 7 U.S.C. s 1302(a), 7 U.S.C.A. s 1302(a) the Commodity Credit Corporation is authorized 'upon recommendation of the Secretary and with the approval of the President, to make available loans on agricultural commodities * * *'. The 'amount, terms, and conditions' of such loans are to be 'fixed by the Secretary, subject to the approval of the Corporation and the President'. Under this authority the Commodity Credit Corporation made loans of $5,146,000 to Zone No. 1, secured by a ***357** pledge of 109,000 tons of 1940 crop raisins in the surplus and stabilization pools. These loans were ultimately liquidated by sales of 76,000 tons to packers and 33,000 tons to the Federal Surplus Marketing Administration, an agency of the Department of Agriculture,[6] for relief distribution and for export under the Lend-Lease program.[7] The loans ****317** were conditional upon the adoption by the state of the present seasonal marketing program. We are informed by the Government, which at our request filed a brief amicus curiae, that under the loan agreement prices and sales policies as to the pledged raisins were to be controlled by a committee appointed by the Secretary, and that officials of the Department of Agriculture collaborated in drafting the 1940 state raisin program.

***358** Section 302 of the Agricultural Adjustment Act of 1938 requires the Commodity Credit Corporation to

make non-recourse loans to producers of certain agricultural products at specified percentages of the parity price, and authorizes loans on any agricultural commodity. The Government informs us that in making loans under the latter authority, s 302 has been construed by the Department of Agriculture as requiring the loans to be made only in order to effectuate the policy of federal agricultural legislation.[8] Section 2 of the Agricultural Adjustment Act of 1938, 7 U.S.C.A. s 1282, declares it to be the policy of Congress to achieve the statutory objective through loans. The Agricultural Adjustment Act of 1938 and the Agricultural Marketing Agreement Act of 1937 were both derived from the Agricultural Adjustment Act of 1933, 48 Stat. 31, 7 U.S.C.A. s 601 et seq., and are coordinate parts of a single plan for raising farm prices to parity levels. The conditions imposed by the Secretary of Agriculture in the loan agreement with the State of California, and the collaboration of federal officials in the drafting of the program, must be taken as an expression of opinion by the Department of Agriculture that the state program thus aided by the loan is consistent with the policies of the Agricultural Adjustment and Agricultural Marketing Agreement Acts. We find no conflict between the two acts and no such occupation of the legislative field by the mere adoption of the Agricultural Marketing Agreement Act, without the issuance of any order by the Secretary putting it into effect, as would preclude the effective operation of the state act.

We have no occasion to decide whether the same conclusion would follow if the state program had not been adopted with the collaboration of officials of the Department of Agriculture and aided by loans from the Commodity ***359** Credit Corporation recommended by the Secretary of Agriculture.

Validity of the Program under the Commerce Clause

The court below found that approximately 95 per cent of the California raisin crop finds its way into interstate or foreign commerce. It is not denied that the proration program is so devised as to compel the delivery by each producer, including appellee, of over two-thirds of his 1940 raisin crop to the program committee, and to subject it to the marketing control of the committee. The program, adopted through the exercise of the legislative power delegated to state officials, has the force of law. It clothes the committee with power and imposes on it the duty to control marketing of the crop so as to enhance the price or at least to maintain prices by restraints on competition of producers in the sale of their crop. The program operates to eliminate competition of the producers in the terms of sale of the crop, including price. And since 95 per cent of the crop is marketed in interstate commerce the program may be taken to have a substantial effect on the commerce, in placing restrictions on the sale and marketing of a product to buyers who eventually sell and ship it in interstate commerce.

The question is thus presented whether in the absence of congressional legislation prohibiting or regulating the transactions affected by the state program, the restrictions which it imposes upon the sale within the state of a commodity by its producer to a processor who contemplates doing, and in fact does work upon the commodity before packing and shipping it in interstate commerce, violate the Commerce Clause.

The governments of the states are sovereign within their territory save ****318** only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, ***360** or with Congressional legislation enacted in the exercise of those powers. This Court has repeatedly held that the grant of power to Congress by the Commerce Clause did not wholly withdraw from the states the authority to regulate the commerce with respect to matters of local concern, on which Congress has not spoken. Minnesota Rate Cases (Simpson v. Shepard), 230 U.S. 352, 399, 400, 33 S.Ct. 729, 739, 740, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18; South Carolina State Highway Dept. v. Barnwell Bros., 303 U.S. 177, 187 et seq., 625, 58 S.Ct. 510, 514 et seq., 82 L.Ed. 734; People of State of California v. Thompson, 313 U.S. 109, 113, 114, 61 S.Ct. 930, 932, 933, 85 L.Ed. 1219, and cases cited; Duckworth v. Arkansas, 314 U.S. 390, 62 S.Ct. 311, 86 L.Ed. 294, 138 A.L.R. 1144. A fortiori there are many subjects and transactions of local concern not themselves interstate commerce or a part of its operations which are within the regulatory and taxing power of the states, so long as state action serves local ends and does not discriminate against the commerce, even though the exercise of those powers may materially affect it. Whether we resort to the mechanical test sometimes applied by this Court in determining when interstate commerce begins with respect to a commodity grown or manufactured within a state and then sold and shipped out of it—or whether we consider only the power of the state in the absence of Congressional action to regulate matters of local concern, even though the regulation affects or in some measure restricts the commerce—we think the present regulation is within state power.

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In applying the mechanical test to determine when interstate commerce begins and ends (see Federal Compress & Warehouse Co. v. McLean, 291 U.S. 17, 21, 54 S.Ct. 267, 268, 269, 78 L.Ed. 622, and cases cited; State of Minnesota v. Blasius, 290 U.S. 1, 54 S.Ct. 34, 78 L.Ed. 131, and cases cited) this Court has frequently held that for purposes of local taxation or regulation 'manufacture' is not interstate commerce even though the manufacturing process is of slight extent. Crescent Cotton Oil Co. v. Mississippi, 257 U.S. 129, 42 S.Ct. 42, 66 L.Ed. 166; Oliver Iron Mining Co. v. Lord, 262 U.S. 172, 43 S.Ct. 526, 67 L.Ed. 929; Utah Power & Light Co. v. Pfost, 286 U.S. 165, 52 S.Ct. 548, 76 L.Ed. 1038; Hope Natural Gas Co. v. Hall, 274 U.S. 284, 47 S.Ct. 639, 71 L.Ed. 1049; Heisler v. Thomas Colliery Co., 260 U.S. 245, 43 S.Ct. 83, 67 L.Ed. 237; ***361** Champlin Refining Co. v. Corporation Commission 286 U.S. 210, 52 S.Ct. 559, 76 L.Ed. 1062, 86 A.L.R. 403; Bayside Fish Flour Co. v. Gentry, 297 U.S. 422, 56 S.Ct. 513, 80 L.Ed. 772. And such regulations of manufacture have been sustained where, aimed at matters of local concern, they had the effect of preventing commerce in the regulated article. Kidd v. Pearson, 128 U.S. 1, 9 S.Ct. 6, 32 L.Ed. 346; Champlin Refining Co. v. Corporation Commission, supra; Sligh v. Kirkwood, 237 U.S. 52, 35 S.Ct. 501, 59 L.Ed. 835; see Capital City Dairy Co. v. Ohio, 183 U.S. 238, 245, 22 S.Ct. 120, 123, 46 L.Ed. 171; Thompson v. Consolidated Gas Utilities Corp., 300 U.S. 55, 77, 57 S.Ct. 364, 374, 375, 81 L.Ed. 510; cf. Bayside Fish Flour Co. v. Gentry, supra. A state is also free to license and tax intrastate buying where the purchaser expects in the usual course of business to resell in interstate commerce. Chassaniol v. Greenwood, 291 U.S. 584, 54 S.Ct. 541, 78 L.Ed. 1004. And no case has gone so far as to hold that a state could not license or otherwise regulate the sale of articles within the state because the buyer, after processing and packing them, will, in the normal course of business, sell and ship them in interstate commerce.

All of these cases proceed on the ground that the taxation or regulation involved, however drastically it may affect interstate commerce, is nevertheless not prohibited by the Commerce Clause where the regulation is imposed before any operation of interstate commerce occurs. Applying that test, the regulation here controls the disposition, including the sale and purchase, of raisins before they are processed and packed preparatory to interstate sale and shipment. The regulation is thus applied to transactions wholly intrastate before the raisins are ready for shipment in interstate commerce.

****319** It is for this reason that the present case is to be distinguished from Lemke v. Farmers' Grain Co., 258 U.S. 50, 42 S.Ct. 244, 66 L.Ed. 458, and Shafer v. Farmers' Grain Co., 268 U.S. 189, 45 S.Ct. 481, 69 L.Ed. 909, on which appellee relies. There the state regulation held invalid was of the business of those who purchased grain within the state for immediate shipment out of it. The Court was of opinion that the purchase of the wheat for shipment out of the state without resale or processing was a ***362** part of the interstate commerce. Compare Chassaniol v. Greenwood, supra.

This distinction between local regulation of those who are not engaged in commerce, although the commodity which they produce and sell to local buyers is ultimately destined for interstate commerce, and the regulation of those who engage in the commerce by selling the product interstate, has in general served, and serves here, as a ready means of distinguishing those local activities which, under the Commerce Clause, are the appropriate subject of state regulation despite their effect on interstate commerce. But courts are not confined to so mechanical a test. When Congress has not exerted its power under the Commerce Clause, and state regulation of matters of local concern is so related to interstate commerce that it also operates as a regulation of that commerce, the reconciliation of the power thus granted with that reserved to the state is to be attained by the accommodation of the competing demands of the state and national interests involved. See Di Santo v. Pennsylvania, 273 U.S. 34, 44, 47 S.Ct. 267, 271, 71 L.Ed. 524 (with which compare People of State of California v. Thompson, supra); South Carolina State Highway Dept. v. Barnwell Bros., supra; Milk Control Board v. Eisenberg Farm Products, 306 U.S. 346, 59 S.Ct. 528, 83 L.Ed. 752; Ilinois Natural Gas Co. v. Central Illinois Public Service Comm., 314 U.S. 498, 504, 505, 62 S.Ct. 384, 386, 387, 86 L.Ed. 371.

Such regulations by the state are to be sustained, not because they are 'indirect' rather than 'direct', see Di Santo v. Pennsylvania, supra; cf. Wickard v. Filburn, supra, not because they control interstate activities in such a manner as only to affect the commerce rather than to command its operations. But they are to be upheld because upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character and the practical difficulties involved, may never be adequately dealt with ***363** by Congress. Because of its local character also there may be wide scope for local regulation without substantially impairing the national

interest in the regulation of commerce by a single authority and without materially obstructing the free flow of commerce, which were the principal objects sought to be secured by the Commerce Clause. See Minnesota Rate Cases (Simpson v. Shepard), supra, 230 U.S. 398-412, 33 S.Ct. 739, 745, 57 L.Ed. 1511, 48 L.R.A.,N.S., 1151, Ann.Cas.1916A, 18; People of State of California v. Thompson, supra, 313 U.S. 113, 61 S.Ct. 932, 85 L.Ed. 1219. There may also be, as in the present case, local regulations whose effect upon the national commerce is such as not to conflict but to coincide with a policy which Congress has established with respect to it.

Examination of the evidence in this case and of available data of the raisin industry in California, of which we may take judicial notice, leaves no doubt that the evils attending the production and marketing of raisins in that state present a problem local in character and urgently demanding state action for the economic protection of those engaged in one of its important industries. [9] Between 1914 and 1920 ****320** there was a spectacular rise in price of all types of California grapes, including raisin grapes. The price of raisins reached its peak, $235 per ton, in 1921, and was followed by large increase in acreage with accompanying reduction in price. The price of raisins in most ***364** years since 1922 has ranged from $40 to $60 per ton but acreage continued to increase until 1926 and production reached its peak, 1,433,000 tons of raisin grapes and 290,000 tons of raisins, in 1938. Since 1920 there has been a substantial carry over of 30 to 50% of each year's crop. The result has been that at least since 1934 the industry, with a large increase in acreage and the attendant fall in price, has been unable to market its product and has been compelled to sell at less than parity prices and in some years at prices regarded by students of the industry as less than the cost of production. [10]

The history of the industry at least since 1929 is a record of a continuous search for expedients which would stabilize the marketing of the raisin crop and maintain a price standard which would bring fair return to the producers. [11] It is significant of the relation of the local interest in maintaining this program to the national interest in interstate commerce, that throughout the period from 1929 until the adoption of the prorate program for ***365** the 1940 raisin crop, the national government has contributed to these efforts either by its establishment of marketing programs pursuant to Act of Congress or by aiding programs sponsored by the state. Local cooperative market stabilization programs for raisins in 1929 and 1930 were approved by the Federal Farm Board which supported them with large loans. [12] In 1934 a marketing agreement for California raisins was put into effect under s 8(2) of the Agricultural Adjustment Act of 1933, as amended, 48 Stat. 528, which authorized the Secretary of Agriculture, in order to effectuate the Act's declared policy of achieving parity ****321** prices, to enter into marketing agreements with processors, producers and others engaged in handling agricultural commodities ‘in the current of or in competition with, or so as to burden, obstruct, or in any way affect, interstate or foreign commerce’. [13]

***366** Raisin Proration Zone No. 1 was organized in the latter part of 1937. No proration program was adopted for the 1937 crop but loans of $1,244,000 were made on raisins of that crop by the Commodity Credit Corporation. [14] In aid of a proration program adopted under the California Act for the 1938 crop, a substantial part of that crop was pledged to the Commodity Credit Corporation as security for a loan of $2,688,000, and was ultimately sold to the Federal Surplus Commodities Corporation for relief distribution. [15] Substantial purchases of raisins of the 1939 crop were also made by Federal Surplus Commodities Corporation, although no proration program was adopted for that year. [16] In aid of the 1940 program, as we have already noted, the Commodity Credit Corporation made loans in excess of $5,000,000, and 33,000 tons of the raisins pledged to it were sold to the Federal Surplus Marketing Administration. [17]

***367** This history shows clearly enough that the adoption of legislative measures to prevent the demoralization of the industry by stabilizing the marketing of the raisin crop is a matter of state as well as national concern and, in the absence of inconsistent Congressional action, is a problem whose solution is peculiarly within the province of the state. In the exercise of its power the state has adopted a measure appropriate to the end sought. The program was not aimed at nor did it discriminate against interstate commerce, although it undoubtedly affected the commerce by increasing the interstate price of raisins and curtailing interstate shipments to some undetermined extent. The effect on the commerce is not greater, and in some instances was far less, than that which this Court has held not to afford a basis for denying to the states the right to pursue a legitimate state end. Cf. Kidd v. Pearson, supra; Sligh v. Kirkwood, supra; Champlain Refining Co. v. Corporation Commission, supra; ****322** South Carolina State Highway Department v. Barnwell Bros., supra, and cases cited at page 189, of 303 U.S., at page 516 of 58 S.Ct. 82 L.Ed. 734, and notes 4 and 5; People of State

of California v. Thompson, supra, 313 U.S. 113, 115, 61 S.Ct. 932, 933, 85 L.Ed. 1219, and cases cited.

In comparing the relative weights of the conflicting local and national interests involved it is significant that Congress, by its agricultural legislation, has recognized the distressed condition of much of the agricultural production of the United States, and has authorized marketing procedures, substantially like the California prorate program, for stabilizing the marketing of agricultural products. Acting under this legislation the Secretary of Agriculture has established a large number of market stabilization programs for agricultural commodities moving in interstate commerce in various parts of the country, including seven affecting California crops.[18] All involved attempts ***368** in one way or another to prevent over-production of agricultural products and excessive competition in marketing them, with price stabilization as the ultimate objective. Most if not all had a like effect in restricting shipments and raising or maintaining prices of agricultural commodities moving in interstate commerce.

It thus appears that whatever effect the operation of the California program may have on interstate commerce, it is one which it has been the policy of Congress to aid and encourage through federal agencies in conformity to the Agricultural Marketing Agreement Act, and s 302 of the Agricultural Adjustment Act. Nor is the effect on the commerce greater than or substantially different in kind from that contemplated by the stabilization programs authorized by federal statutes. As we have seen, the Agricultural Marketing Agreement Act is applicable to raisins only on the direction of the Secretary of Agriculture who, instead of establishing a federal program has, as the statute authorizes, cooperated in promoting the state program and aided it by substantial federal loans. Hence we cannot say that the effect of the state program on interstate commerce is one which conflicts with Congressional policy or is such as to preclude the state from this exercise of its reserved power to regulate domestic agricultural production. We conclude that the California prorate program for the 1940 raisin crop is a regulation of state industry of local concern which, in all the circumstances of this case which we have detailed, does not impair national control over the commerce in a manner or to a degree forbidden by the Constitution.

Reversed.

All Citations

317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315

Footnotes

1 Act of June 5, 1933, ch. 754, p. 1969, Statutes of California of 1933, as amended by chs. 471 and 743, pp. 1526, 2087, Statutes of 1935; ch. 6, p. 39, Extra Session, 1938; chs. 363, 548 and 894, pp. 1702, 1947, 2485, Statutes of 1939; and chs. 603, 1150 and 1186, pp. 2050, 2858, 2943, Statutes of 1941. Its constitutionality under both Federal and State Constitutions was sustained by the California Supreme Court in Agricultural Prorate Commission v. Superior Court, 5 Cal.2d 550, 55 P.2d 495.

2 See also 79 Cong.Rec. 9470, 11149-50, 11153; Hearings Before the Senate Committee on Agriculture and Forestry on S. 1807, (March, 1935) 29, 73; Hearings Before the House Committee on Agriculture (Feb. —March, 1935) 53, 178-9. The Agricultural Marketing Agreement Act of 1937 was for the most part a reenactment of certain provisions of the Agricultural Adjustment Act of 1933, 48 Stat. 31, as amended in 1935, 49 Stat. 753. s 10(i) was first introduced in 1935, and reenacted without change in 1937.

3 A ‘parity’ price is one which will ‘give agricultural commodities a purchasing power with respect to articles that farmers buy, equivalent to the purchasing power of agricultural commodities in the base period’. 7 U.S.C. s 602(1), 7 U.S.C.A. s 602(1). The parity price is computed by multiplying an index of prices paid by farmers for goods used in farm production, and for family living expenses, together with real estate taxes and interest on farm indebtedness, by the average price during the base period of the commodity in question. See Dept. of Agriculture, Parity Prices, What They Are and How They Are Calculated (1942). The base period for

commodities other than tobacco and potatoes is August 1909—July 1914. However, by 7 U.S.C. s 608e, 7 U.S.C.A. s 608e, the period of August 1919—July 1929 or a part thereof may be used for any commodity as to which the Secretary finds and proclaims that adequate statistics for the 1909-14 period are not available. By proclamation dated June 26, 1942, the Secretary designated the period 1919—1929 as the base period for raisins. 7 Red.Reg. 4867.

4 The parity price for raisins on June 15, 1942, as published by the Department of Agriculture was $100.51 per ton. Preliminary figures show the average price for the 1941-42 crop to be $80.60. Parity Prices, What They Are and How They are Computed, supra, vii. Parity prices for raisins for previous years are not published. However they may be computed from the base period price of $105.80 and the indices of prices paid by farmers published by the Department of Agriculture in the statistical publications cited infra, note 9. Such computations for 1933 and subsequent years, supplied by the Department of Agriculture, indicate that while the price received by the farmer for the 1940 crop was $57.60 the parity price for 1940 was $80.41 and for 1941 was $86.76. They further indicate that raisin prices have not since 1933 equalled parity and that the field prices for all crops prior to that of 1941 have been from $15 to $40 per ton below parity.

5 The Commodity Credit Corporation was created by Executive Order No. 6340, October 16, 1933. It has been continued in existence by Acts of Congress, 49 Stat. 4; 50 Stat. 5; 53 Stat. 510. By Reorganization Plan No. I, 53 Stat. 1429, approved by Act of Congress, 53 Stat. 813, and effective July 1, 1939, 5 U.S.C.A. following section 133t, the Corporation was transferred to the Department of Agriculture, to be 'administered in such department under the general direction and supervision of the Secretary of Agriculture.' By Executive Order No. 8219, Aug. 7, 1939, 4 Fed.Reg. 3565, exclusive voting rights in its capital stock were vested in the Secretary.

6 The Surplus Marketing Administration was created by Reorganization Plan No. III, 45 Stat. 1232, approved 54 Stat. 231, effective June 30, 1940, 5 U.S.C.A. following section 133t, as a consolidation of the Division of Marketing and Marketing Agreements of the Agricultural Adjustment Administration, and the Federal Surplus Commodities Corporation. The Surplus Commodities Corporation was incorporated on October 4, 1933, under the name of the Federal Surplus Relief Corporation. Its existence as 'an agency of the United States under the direction of the Secretary of Agriculture' was continued by Acts of Congress, 50 Stat. 323; 52 Stat. 38. The members of the Corporation are the Secretary of Agriculture, the Administrator of the Agricultural Adjustment Administration, and the Governor of the Farm Credit Administration.

As successor to the Corporation the Surplus Marketing Administration exercises the authority given by s 32 of the Agricultural Adjustment Act of 1935, 7 U.S.C. s 612c, 7 U.S.C.A. s 612c, to use 30% of annual gross customs receipts to encourage the exportation, and the domestic consumption by persons in low income groups, of agricultural commodities, and to reestablish farmers' purchasing power. As successor to the Division of Markets and Marketing Agreements, the Administration is charged with the enforcement of the Agricultural Marketing Agreement Act of 1937.

7 Report of the President of the Commodity Credit Corporation (1941) 14, 21; Wm. J. Cecil (Zone Agent, Raisin Proration Zone No. 1), The 1940 Raisin Program, 30 Calif. Dept. of Agriculture Bulletin 46.

8 See also Report of the President of the Commodity Credit Corporation (1940) 4, 6.

9 The principal statistical sources are U.S. Tariff Commission, Grapes, Raisins and Wines, Report No. 134, Second Series, issued pursuant to 19 U.S.C. s 1332, 19 U.S.C.A. s 1332 and the following publications of the U.S. Department of Agriculture: Yearbook of Agriculture (published annually until 1936); Agricultural Statistics (published annually since 1936); Crops and Markets (published quarterly); Season Average Prices and Value of Production, Principal Crops, 1940 and 1941 (Dec. 18, 1941). For general discussions of the economic status of the raisin industry see Grapes, Raisins and Wines, supra; Shear and Gould, Economic Status of

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the Grape Industry, University of California, Agricultural Experiment Station Bulletin No. 429 (1927); Shear and Howe, Factors Affecting California Raisin Sales and Prices, 1922-29, Giannini Foundation of Agricultural Economics, Paper No. 20 (1931).

10 Studies made under the auspices of the University of California indicate that the cost of production of Thompson Seedless raisins, including the growers' labor, a management charge, depreciation, and interest on investment, is $49.58 per ton on a farm yielding two tons per acre, and $72.07 per ton on a farm yielding 1 ton per acre. A two-ton yield is described as 'good'; a one-ton yield as 'usual'. Adams, Farm Management Crop Manual, University of California Syllabus Series No. 278 (1941) 142-5. Another student has computed the cost of production at $53.96 for a two-ton per acre yield, about $65 for a 1.5 ton yield, and $90 for a one-ton yield. Shultis, Standards of Production, Labor, Material and other Costs for Selected Crops and Livestock Enterprises, University of California Extension Service (1938) 13. Field prices for Thompson Seedless raisins were below $49.50 in 1923, 1928, 1932, and 1938; since 1922 they have been at $65.00 or higher in only 5 years, and have only once been as high as $72.00. Grapes, Raisins and Wines, supra, 149.

For parity prices for raisins, see supra, note 4.

11 For discussion of private efforts within the industry prior to 1929 to regulate the marketing of raisins, see Grapes, Raisins and Wines, supra, 153—5.

12 See Annual Report of the Federal Farm Board (1930) 18, 73; id. (1931) 59-61, 91; Grapes, Raisins and Wines, supra, 62-64; S. W. Shear, The California Grape Control Plan, Giannini Foundation of Agricultural Economics, Paper No. 22 (1931); Stokdyk and West, The Farm Board (1930) 135-9. Loans of $4,500,000 in 1929 and $6,755,000 in 1930 were made by the Federal Farm Board. Shear, supra, states that the 1930 program, which provided for the formation of a single marketing agency, and the destruction or diversion to by-product use of surplus raisins, 'was designed by the Federal Farm Board'.

The Federal Farm Board was created by s 2 of the Agricultural Marketing Act of 1929, 46 Stat. 11, 12 U.S.C.A. s 1141a, which authorized the Board to make loans to cooperative associations to aid in 'the effective merchandising of agricultural commodities * * *' s 7, 12 U.S.C.A. s 1141e, so as to achieve the statutory objective of placing agriculture on a 'basis of economic equality with other industries' s 1, 12 U.S.C.A. s 1141.

13 See U.S. Dept. of Agriculture, Agricultural Adjustment in 1934, 202. The marketing program adopted is published by the Agricultural Adjustment Administration, Department of Agriculture, as Marketing Agreement Series—Agreement No. 44, License Series—License No. 55. It was in effect from May 29, 1934 to Sept. 14, 1935. The agreement provided for the creation of a control board on which representatives of packers and growers should have an equal voice. Subject to the approval of the Secretary of Agriculture the control board could fix minimum prices to be paid growers and require a percentage of the crop to be delivered to the control board. 15% of the 1934 crop was required to be delivered to the board, and prices for that crop were fixed at $60, $65 and $70 per ton for Muscat, Sultana, and Thompson Seedless raisins respectively.

14 Report of the President of the Commodity Credit Corporation (1940) 16. These raisins were ultimately sold to the Federal Surplus Commodities Corporation for relief distribution. Ibid.; Report of the Federal Surplus Commodities Corporation (1938) 16.

15 Report of the President of the Commodity Credit Corporation (1940) 16; Report of the Associate Administrator of the Agricultural Adjustment Administration in Charge of the Division of Marketing and Marketing Agreements, and the President of the Federal Surplus Commodities Corporation (1939) 52. The federal loan was conditioned upon the adoption of a state proration program by which 20% of the crop was delivered into a stabilization pool.

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16 Cecil, the 1940 Raisin Proration Program, supra, 48; Report of the Federal Surplus Commodities Corporation (1940) 6.

17 The Commodity Credit Corporation similarly made loans on the 1937, 1938, and 1940 crops of dried prunes, the loans on the 1938 and 1940 crops being in aid of proration programs which were very similar to those adopted for raisins. Report of the President of the Commodity Credit Corporation (1940) 15, 21, id. (1941) 13-14, 21; Report of the Surplus Mar keting Administration (1941) 33-4.

18 Twenty-eight such programs affect-milk, and nineteen affecting other agricultural commodities, were in effect during the fiscal year ending June 30, 1941. Report of the Surplus Marketing Administration (1941) pp. 7, 12. For discussions of the nature and purpose of these programs see the annual reports of the Agricultural Adjustment Administration; Nourse, Marketing Agreements under the A.A.A. (1935).

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100 S.Ct. 937
Supreme Court of the United States

CALIFORNIA RETAIL LIQUOR DEALERS ASSOCIATION, Petitioner,
v.
MIDCAL ALUMINUM, INC., et al.

No. 79–97
|
Argued Jan. 16, 1980.
|
Decided March 3, 1980.

Synopsis
Wholesale distributor of wine filed writ of mandate asking for injunction against California's wine pricing system. The California Court of Appeal, 90 Cal.App.3d 979, 153 Cal.Rptr. 757, ruled that wine pricing scheme restrained trade in violation of Sherman Act and ordered California Department of Alcoholic Control not to enforce resale price maintenance and price posting statutes for the wine trade, and intervenor, association of liquor retailers, appealed. The California Supreme Court declined to hear the case, and certiorari was granted. The Supreme Court, Mr. Justice Powell, held that: (1) California's system for wine pricing constituted resale price maintenance in violation of Sherman Act; (2) state's involvement in price-setting program was insufficient to establish antitrust immunity under *Parker v. Brown* ; and (3) Twenty-first Amendment did not bar application of Sherman Act.

Affirmed.

Procedural Posture(s): On Appeal.

****939 *97** *Syllabus* *

A California statute requires all wine producers and wholesalers to file fair trade contracts or price schedules with the State. If a producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule and are prohibited from selling wine to a retailer at other than the price set in a price schedule or fair trade contract. A wholesaler selling below the established prices faces fines or license suspension or revocation. After being charged with selling wine for less than the prices set by price schedules and also for selling wines for which no fair trade contract or schedule had been filed, respondent wholesaler filed suit in the California Court of Appeal asking for an injunction against the State's wine-pricing scheme. The Court of Appeal ruled that the scheme restrains trade in violation of the Sherman Act, and granted injunctive relief, rejecting claims that the scheme was immune from liability under that Act under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, and was also protected by § 2 of the Twenty-first Amendment, which prohibits the transportation or importation of intoxicating liquors into any State for delivery or use therein in violation of the State's laws.

Held:

1. California's wine-pricing system constitutes resale price maintenance in violation of the Sherman Act, since the wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. And the State's involvement in the system is insufficient to establish antitrust immunity under *Parker v. Brown, supra*. While the system satisfies the first requirement for such immunity that the challenged restraint be "one clearly articulated and affirmatively expressed as state policy," it does not meet the other requirement that the policy be "actively supervised" by the State itself. Under the system the State simply authorizes price setting and enforces the prices established by private parties, and it does not establish prices, review the reasonableness of price schedules, regulate the terms of fair trade contracts, monitor market conditions, or engage in any "pointed reexamination" ***98** of the program. The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. Pp. 941–944.

2. The Twenty-first Amendment does not bar application of the Sherman Act to California's wine-pricing system. Pp. 944–948.

(a) Although under that Amendment States retain substantial discretion to establish liquor regulations over and above those governing the importation or sale of liquor and the structure of the liquor distribution system, those controls may be subject to the federal commerce power in appropriate situations. Pp. 944–946.

(b) There is no basis for disagreeing with the view of the California courts that the asserted state interests behind the resale price maintenance system of promoting temperance and protecting small retailers are less substantial than the

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national policy in favor of competition. Such view is reasonable and is supported by the evidence, there being nothing to indicate that the wine-pricing system helps sustain small retailers or inhibits the consumption of alcohol by Californians. Pp. 946–948.

90 Cal.App.3d 979, 153 Cal.Rptr. 757, affirmed.

Attorneys and Law Firms

****940** William T. Chidlaw, Sacramento, Cal., for petitioner.

Jack B. Owens, San Francisco, Cal., for respondents.

George J. Roth, Sacramento, Cal., for the State of California, as amicus curiae, by special leave of Court.

Opinion

***99** Mr. Justice POWELL delivered the opinion of the Court.

In a state-court action, respondent Midcal Aluminum, Inc., a wine distributor, presented a successful antitrust challenge to California's resale price maintenance and price posting statutes for the wholesale wine trade. The issue in this case is whether those state laws are shielded from the Sherman Act by either the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), or § 2 of the Twenty-first Amendment.

I

Under § 24866(b) of the California Business and Professions Code, all wine producers, wholesalers, and rectifiers must file fair trade contracts or price schedules with the State.[1] If a wine producer has not set prices through a fair trade contract, wholesalers must post a resale price schedule for that producer's brands. § 24866(a). No state-licensed wine merchant may sell wine to a retailer at other than the price set "either in an effective price schedule or in an effective fair trade contract . . . ." § 24862 (West Supp.1980).

The State is divided into three trading areas for administration of the wine pricing program. A single fair trade contract or schedule for each brand sets the terms for all wholesale transactions in that brand within a given trading area. §§ 24862, 24864, 24865 (West Supp.1980). Similarly, state ***100** regulations provide that the wine prices posted by a single wholesaler within a trading area bind all wholesalers in that area. *Midcal Aluminum, Inc. v. Rice,* 90 Cal.App.3d 979, 983–984, 153 Cal.Rptr. 757, 760 (1979). A licensee selling below the established prices faces fines, license suspension, or outright license revocation. Cal.Bus. & Prof.Code Ann. § 24880 (West Supp.1980).[2] The State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers.

Midcal Aluminum, Inc., is a wholesale distributor of wine in southern California. In July 1978, the Department of Alcoholic Beverage Control charged Midcal with selling 27 cases of wine for less than the prices set by the effective price schedule of the E. & J. Gallo Winery. The Department also alleged that Midcal sold wines for which no fair trade contract or schedule had been filed. Midcal stipulated that the allegations were true and that the State could fine it or suspend its license for those transgressions. App. 19–20. Midcal then filed a writ of mandate in the California Court of Appeal for the Third Appellate District asking for an injunction against the State's wine pricing system.

The Court of Appeal ruled that the wine pricing scheme restrains trade in violation of the Sherman Act, 15 U.S.C. § 1 *et seq.* The court relied entirely on the reasoning in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d 431, 146 Cal.Rptr. 585, 579 P.2d 476 (1978), where the California Supreme Court struck down parallel restrictions on the sale of distilled liquors. In that ****941** case, the court held that because the State played only a passive part in liquor pricing, there was no *Parker v. Brown* immunity for the program.

> "In the price maintenance program before us, the state plays no role whatever in setting the retail prices. The ***101** prices are established by the producers according to their own economic interests, without regard to any actual or potential anticompetitive effect; the state's role is restricted to enforcing the prices specified by the producers. There is no control or 'pointed re-examination,' by the state to insure that the policies of the Sherman Act are not 'unnecessarily subordinated' to state policy." 21 Cal.3d, at 445, 146 Cal.Rptr., at 595, 579 P.2d, at 486.

Rice also rejected the claim that California's liquor pricing policies were protected by § 2 of the Twenty-first Amendment, which insulates state regulation of intoxicating liquors from many federal restrictions. The court determined that the national policy in favor of competition should prevail over the state interests in liquor price maintenance

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—the promotion of temperance and the preservation of small retail establishments. The court emphasized that the California system not only permitted vertical control of prices by producers, but also frequently resulted in horizontal price fixing. Under the program, many comparable brands of liquor were marketed at identical prices. [3] Referring to congressional and state legislative studies, the court observed that resale price maintenance has little positive impact on either temperance or small retail stores. See *infra*, at 947.

In the instant case, the State Court of Appeal found the analysis in *Rice* squarely controlling. 90 Cal.App.3d, at 984, 153 Cal.Rptr., at 760. The court ordered the Department of Alcoholic Beverage Control not to enforce the resale price maintenance and price posting statutes for the wine trade. The Department, which in *Rice* had not sought certiorari from ***102** this Court, did not appeal the ruling in this case. [4] An appeal was brought by the California Retail Liquor Dealers Association, an intervenor. [5] The California Supreme Court declined to hear the case, and the Dealers Association sought certiorari from this Court. We granted the writ, 444 U.S. 824, 100 S.Ct. 45, 62 L.Ed.2d 31 (1979), and now affirm the decision of the state court.

II

The threshold question is whether California's plan for wine pricing violates the Sherman Act. This Court has ruled consistently that resale price maintenance illegally restrains trade. In *Dr. Miles Medical Co. v. John D. Park & Sons Co.*, 220 U.S. 373, 407, 31 S.Ct. 376, 384, 55 L.Ed. 502 (1911), the Court observed that such arrangements are "designed to maintain prices . . ., and to prevent competition among those who trade in [competing goods]." See *Albrecht v. Herald Co.*, 390 U.S. 145, 88 S.Ct. 869, 19 L.Ed.2d 998 (1968); *United States v. Parke, Davis & Co.*, 362 U.S. 29, 80 S.Ct. 503, 4 L.Ed.2d 505 (1960); *United States v. A. Schrader's Son, Inc.*, 252 U.S. 85, 40 S.Ct. 251, 64 L.Ed. 471 (1920). For many years, however, the Miller-Tydings Act of 1937 permitted the States to authorize resale price maintenance. 50 Stat. 693. The goal of that statute was to allow the States to protect small retail establishments that Congress ****942** thought might otherwise be driven from the marketplace by large-volume discounters. But in 1975 that congressional permission was rescinded. The Consumer Goods Pricing Act of 1975, 89 Stat. 801, repealed the Miller-Tydings Act and related legislation. [6] Consequently, the Sherman Act's ban on resale price ***103** maintenance now applies to fair trade contracts unless an industry or program enjoys a special antitrust immunity.

California's system for wine pricing plainly constitutes resale price maintenance in violation of the Sherman Act. *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951); see *Albrecht v. Herald Co., supra; Kiefer-Stewart Co. v. Joseph E. Seagram & Sons*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *Dr. Miles Medical Co. v. John D. Park & Sons Co., supra*. The wine producer holds the power to prevent price competition by dictating the prices charged by wholesalers. As Mr. Justice Hughes pointed out in *Dr. Miles*, such vertical control destroys horizontal competition as effectively as if wholesalers "formed a combination and endeavored to establish the same restrictions . . . by agreement with each other." 220 U.S., at 408, 31 S.Ct., at 384. [7] Moreover, there can be no claim that the California program is simply intrastate regulation beyond the reach of the Sherman Act. See *Schwegmann Bros. v. Calvert Corp., supra; Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967) (*per curiam*).

Thus, we must consider whether the State's involvement in the price-setting program is sufficient to establish antitrust immunity under *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). That immunity for state regulatory programs is grounded in our federal structure. "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, ***104** an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 351, 63 S.Ct., at 313. In *Parker v. Brown*, this Court found in the Sherman Act no purpose to nullify state powers. Because the Act is directed against "individual and not state action," the Court concluded that state regulatory programs could not violate it. *Id.,* at 352, 63 S.Ct., at 314.

Under the program challenged in *Parker*, the State Agricultural Prorate Advisory Commission authorized the organization of local cooperatives to develop marketing policies for the raisin crop. The Court emphasized that the Advisory Commission, which was appointed by the Governor, had to approve cooperative policies following public hearings: "It is the state which has created the machinery for establishing the prorate program. . . . [I]t is the state, acting through the Commission, which adopts the

program and enforces it . . . ." *Ibid.* In view of this extensive official oversight, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different. The Court expressly noted that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." *Id.*, at 351, 63 S.Ct., at 314.

Several recent decisions have applied *Parker* 's analysis. In ****943** *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. "It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Id.*, at 791, 95 S.Ct., at 2015. Similarly, in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), a majority of the Court found that no antitrust immunity was conferred when a state agency passively accepted a public utility's tariff. In contrast, Arizona rules against lawyer advertising were held immune from Sherman Act challenge because ***105** they "reflect[ed] a clear articulation of the State's policy with regard to professional behavior" and were "subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." *Bates v. State Bar of Arizona*, 433 U.S. 350, 362, 97 S.Ct. 2691, 2698, 53 L.Ed.2d 810 (1977).

Only last Term, this Court found antitrust immunity for a California program requiring state approval of the location of new automobile dealerships. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978). That program provided that the State would hold a hearing if an automobile franchisee protested the establishment or relocation of a competing dealership. *Id.*, at 103, 99 S.Ct., at 408. In view of the State's active role, the Court held, the program was not subject to the Sherman Act. The "clearly articulated and affirmatively expressed" goal of the state policy was to "displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." *Id.*, at 109, 99 S.Ct., at 412.

These decisions establish two standards for antitrust immunity under *Parker v. Brown.* First, the challenged restraint must be "one clearly articulated and affirmatively expressed as state policy"; second, the policy must be "actively supervised" by the State itself. *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of Brennan, J.). [8] The California system for wine pricing satisfies the first standard. The legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance. The program, however, does not meet the second requirement for *Parker* immunity. The State simply authorizes price setting and enforces the prices established by private parties. The State neither establishes prices nor reviews the reasonableness of the price schedules; nor does it regulate ***106** the terms of fair trade contracts. The State does not monitor market conditions or engage in any "pointed reexamination" of the program. [9] The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement. As *Parker* teaches, "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." 317 U.S., at 351, 63 S.Ct., at 314.

****944** III

Petitioner contends that even if California's system of wine pricing is not protected state action, the Twenty-first Amendment bars application of the Sherman Act in this case. Section 1 of that Amendment repealed the Eighteenth Amendment's prohibition on the manufacture, sale, or transportation of liquor. The second section reserved to the States certain power to regulate traffic in liquor: "The transportation or importation into any State, Territory, or possession of the United States for delivery or use therein of intoxicating liquors, in violation of the laws thereof, is hereby prohibited." The remaining question before us is whether § 2 permits California to countermand the congressional policy—adopted under the commerce power—in favor of competition.

A

In determining state powers under the Twenty-first Amendment, the Court has focused primarily on the language of the ***107** provision rather than the history behind it. *State Board v. Young's Market Co.*, 299 U.S. 59, 63–64, 57 S.Ct. 77, 78–79, 81 L.Ed. 38 (1936). [10] In terms, the Amendment gives the States control over the "transportation or importation" of liquor into their territories. Of course, such control logically

entails considerable regulatory power not strictly limited to importing and transporting alcohol. *Ziffrin, Inc. v. Reeves*, 308 U.S. 132, 138, 60 S.Ct. 163, 166, 84 L.Ed. 128 (1939). We should not, however, lose sight of the explicit grant of authority.

This Court's early decisions on the Twenty-first Amendment recognized that each State holds great powers over the importation of liquor from other jurisdictions. *Young's Market, supra*, concerned a license fee for interstate imports of alcohol; another case focused on a law restricting the types of liquor that could be imported from other States, *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401, 58 S.Ct. 952, 82 L.Ed. 1424 (1938); two others ***108** involved "retaliation" statutes barring imports from States that proscribed shipments of liquor from other States, *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395, 59 S.Ct. 256, 83 L.Ed. 246 (1939); *Indianapolis Brewing Co. v. Liquor Control Comm'n*, 305 U.S. 391, 59 S.Ct. 254, 83 L.Ed. 243 (1939). The Court upheld the challenged state authority in each case, largely on the basis of the States' special power over the "importation and transportation" of intoxicating liquors. Yet even when the States had acted under the explicit terms of the Amendment, the Court resisted the contention that § 2 "freed the States from all restrictions upon the police power to be found in other provisions of the Constitution." *Young's Market, supra*, 229 U.S., at 64, 57 S.Ct., at 79.

Subsequent decisions have given "wide latitude" to state liquor regulation, ****945** *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 42, 86 S.Ct. 1254, 1259, 16 L.Ed.2d 336 (1966), but they also have stressed that important federal interests in liquor matters survived the ratification of the Twenty-first Amendment. The States cannot tax imported liquor in violation of the Export-Import Clause. *Department of Revenue v. James Beam Co.*, 377 U.S. 341, 84 S.Ct. 1247, 12 L.Ed.2d 362 (1964). Nor can they insulate the liquor industry from the Fourteenth Amendment's requirements of equal protection, *Craig v. Boren*, 429 U.S. 190, 204–209, 97 S.Ct. 451, 460–463, 50 L.Ed.2d 397 (1976), and due process, *Wisconsin v. Constantineau*, 400 U.S. 433, 436, 91 S.Ct. 507, 509, 27 L.Ed.2d 515 (1971).

More difficult to define, however, is the extent to which Congress can regulate liquor under its interstate commerce power. Although that power is directly qualified by § 2, the Court has held that the Federal Government retains some Commerce Clause authority over liquor. In *William Jameson & Co. v. Morgenthau*, 307 U.S. 171, 59 S.Ct. 804, 83 L.Ed. 1189 (1939) (*per curiam*), this Court found no violation of the Twenty-first Amendment in a whiskey-labeling requirement prescribed by the Federal Alcohol Administration Act, 49 Stat. 977. And in *Ziffrin, Inc. v. Reeves, supra*, the Court did not uphold Kentucky's system of licensing liquor haulers until it was satisfied that the state program was reasonable. 308 U.S., at 139, 60 S.Ct., at 167.

***109** The contours of Congress' commerce power over liquor were sharpened in *Hostetter v. Idlewild Liquor Corp.*, 377 U.S. 324, 331–332, 84 S.Ct. 1293, 1298, 12 L.Ed.2d 350 (1964).

> "To draw a conclusion . . . that the Twenty-first Amendment has somehow operated to 'repeal' the Commerce Clause wherever regulation of intoxicating liquors is concerned would, however, be an absurd oversimplification. If the Commerce Clause had been *pro tanto* 'repealed,' then Congress would be left with no regulatory power over interstate or foreign commerce in intoxicating liquor. Such a conclusion would be patently bizarre and is demonstrably incorrect."

The Court added a significant, if elementary, observation: "Both the Twenty-first Amendment and the Commerce Clause are parts of the same Constitution. Like other provisions of the Constitution, each must be considered in the light of the other, and in the context of the issues and interests at stake in any concrete case." *Id.*, at 332, 84 S.Ct., at 1298. See *Craig v. Boren*, 429 U.S., at 206, 97 S.Ct., at 461. [11]

This pragmatic effort to harmonize state and federal powers has been evident in several decisions where the Court held liquor companies liable for anticompetitive conduct not mandated by a State. See *Kiefer-Stewart Co. v. Joseph E. Seagram & Sons, Inc.*, 340 U.S. 211, 71 S.Ct. 259, 95 L.Ed. 219 (1951); *United States v. Frankfort Distilleries, Inc.*, 324 U.S. 293, 65 S.Ct. 661, 89 L.Ed. 951 (1945). In *Schwegmann Bros. v. Calvert Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951), for example, a liquor manufacturer attempted to force a distributor to comply with Louisiana's resale price maintenance program, a ***110** program similar in many respects to the California system at issue here. The Court held that because the Louisiana statute violated the Sherman Act, it could not be enforced against the distributor. Fifteen years later, the Court rejected a Sherman Act challenge to a New York law requiring liquor dealers to attest that their prices were "no higher than the lowest price" charged anywhere in the United States. *Seagram & Sons v. Hostetter*, *supra*. The Court concluded that the statute exerted "no irresistible

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economic pressure on the [dealers] to violate the Sherman Act in order to comply," but it ****946** also cautioned that "[n]othing in the Twenty-first Amendment, of course, would prevent enforcement of the Sherman Act" against an interstate conspiracy to fix liquor prices. *Id.*, at 45–46, 86 S.Ct., at 1261. See *Burke v. Ford*, 389 U.S. 320, 88 S.Ct. 443, 19 L.Ed.2d 554 (1967) (*per curiam*).

These decisions demonstrate that there is no bright line between federal and state powers over liquor. The Twenty-first Amendment grants the States virtually complete control over whether to permit importation or sale of liquor and how to structure the liquor distribution system. Although States retain substantial discretion to establish other liquor regulations, those controls may be subject to the federal commerce power in appropriate situations. The competing state and federal interests can be reconciled only after careful scrutiny of those concerns in a "concrete case." *Hostetter v. Idlewild Liquor Corp.*, *supra*, at 332, 84 S.Ct., at 1298.

B

The federal interest in enforcing the national policy in favor of competition is both familiar and substantial.

> "Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." ***111** i*United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972).

See *Northern Pacific R. Co. v. United States*, 356 U.S. 1, 4, 78 S.Ct. 514, 517, 2 L.Ed.2d 545 (1958). Although this federal interest is expressed through a statute rather than a constitutional provision, Congress "exercis[ed] all the power it possessed" under the Commerce Clause when it approved the Sherman Act. *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435, 52 S.Ct. 607, 609, 76 L.Ed. 1204 (1932); see *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S., at 398, 98 S.Ct., at 1129. We must acknowledge the importance of the Act's procompetition policy.

The state interests protected by California's resale price maintenance system were identified by the state courts in this case, 90 Cal.App.3d, at 983, 153 Cal.Rptr., at 760, and in *Rice v. Alcoholic Beverage Control Appeals Bd.*, 21 Cal.3d, at 451, 146 Cal.Rptr., at 598, 579 P.2d, at 490. [12] Of course, the findings and conclusions of those courts are not binding on this Court to the extent that they undercut state rights guaranteed by the Twenty-first Amendment. See *Hooven & Allison Co. v. Evatt*, 324 U.S. 652, 659, 65 S.Ct. 870, 874, 89 L.Ed. 1252 (1945); *Creswill v. Knights of Pythias*, 225 U.S. 246, 261, 32 S.Ct. 822, 827, 56 L.Ed. 1074 (1912). Nevertheless, this Court accords "respectful consideration and great weight to the views of the state's highest court" on matters of state law, *Indiana ex rel. Anderson v. Brand*, 303 U.S. 95, 100, 58 S.Ct. 443, 446, 82 L.Ed. 685 (1938), and we customarily accept the factual findings of state courts in the ***112** absence of "exceptional circumstances." *Lloyd A. Fry Roofing Co. v. Wood*, 344 U.S. 157, 160, 73 S.Ct. 204, 206, 97 L.Ed. 168 (1952).

The California Court of Appeal stated that its review of the State's system of wine pricing was "controlled by the reasoning of the [California] Supreme Court in *Rice [supra]*." 90 Cal.App.3d, at 983, 153 Cal.Rptr., at 760. Therefore, we turn to that opinion's treatment of the state interests in resale price maintenance for distilled liquors.

****947** In *Rice*, the State Supreme Court found two purposes behind liquor resale price maintenance: "to promote temperance and orderly market conditions." 21 Cal.3d, at 451, 146 Cal.Rptr., at 599, 579 P.2d, at 490. [13] The court found little correlation between resale price maintenance and temperance. It cited a state study showing a 42% increase in per capita liquor consumption in California from 1950 to 1972, while resale price maintenance was in effect. *Id.*, at 457–458, 146 Cal.Rptr., at 602–603, 579 P.2d, at 494, citing California Dept. of Finance, Alcohol and the State: A Reappraisal of California's Alcohol Control Policies, xi, 15 (1974). Such studies, the court wrote, "at the very least raise a doubt regarding the justification for such laws on the ground that they promote temperance." 21 Cal.3d, at 457–458, 146 Cal.Rptr., at 603, 579 P.2d, at 494. [14]

The *Rice* opinion identified the primary state interest in orderly market conditions as "protect[ing] small licensees from predatory pricing policies of large retailers." *Id.*, at 456, 146 Cal.Rptr., at 602, 579 P.2d, at 493. [15] In gauging this interest, the court ***113** adopted the views of the Appeals Board of the Alcoholic Beverages Control Department, which first ruled on the claim in *Rice*. The state agency "rejected the argument that fair trade laws were necessary to the economic survival of small retailers . . . ." *Ibid.* The agency relied on

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a congressional study of the impact on small retailers of fair trade laws enacted under the Miller-Tydings Act. The study revealed that "states with fair trade laws had a 55 percent higher rate of firm failures than free trade states, and the rate of growth of small retail stores in free trade states between 1956 and 1972 was 32 per cent higher than in states with fair trade laws." *Ibid.*, citing S.Rep. No. 94–466, p. 3 (1975). Pointing to the congressional abandonment of fair trade in the 1975 Consumer Goods Pricing Act, see *supra*, at 942, the State Supreme Court found no persuasive justification to continue "fair trade laws which eliminate price competition among retailers." 21 Cal.3d, at 457, 146 Cal.Rptr., at 603, 579 P.2d, at 494. The Court of Appeal came to the same conclusion with respect to the wholesale wine trade. 90 Cal.App.3d, at 983, 153 Cal.Rptr., at 760.

We have no basis for disagreeing with the view of the California courts that the asserted state interests are less substantial than the national policy in favor of competition. That evaluation of the resale price maintenance system for wine is reasonable, and is supported by the evidence cited by the State Supreme Court in *Rice*. Nothing in the record in this case suggests that the wine pricing system helps sustain small retail establishments. Neither the petitioner nor the State Attorney General in his *amicus* brief has demonstrated that the program inhibits the consumption of alcohol by Californians. We need not consider whether the legitimate state interests in temperance and the protection of small retailers ***114** ever could prevail against the undoubted federal interest in a competitive economy. The unsubstantiated state concerns put forward in this case simply are not of the same stature as the goals of the Sherman Act.

We conclude that the California Court of Appeal correctly decided that the Twenty-first Amendment provides no shelter for the violation of the Sherman Act caused by ****948** the State's wine pricing program.[16] The judgment of the California Court of Appeal, Third Appellate District, is

Affirmed.

Mr. Justice BRENNAN did not take part in the consideration or decision of this case.

All Citations

445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233, 1980-1 Trade Cases P 63,201

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The statute provides:

"Each wine grower, wholesaler licensed to sell wine, wine rectifier, and rectifier shall:

"(a) Post a schedule of selling prices of wine to retailers or consumers for which his resale price is not governed by a fair trade contract made by the person who owns or controls the brand.

"(b) Make and file a fair trade contract and file a schedule of resale prices, if he owns or controls a brand of wine resold to retailers or consumers." Cal.Bus. & Prof.Code Ann. § 24866 (West 1964).

2 Licensees that sell wine below the prices specified in fair trade contracts or schedules also may be subject to private damages suits for unfair competition. § 24752 (West 1964).

3 The court cited record evidence that in July 1976 five leading brands of gin each sold in California for $4.89 for a fifth of a gallon, and that five leading brands of Scotch whiskey sold for either $8.39 or $8.40 a fifth. *Rice*

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v. Alcoholic Beverage Control Appeals Bd., 21 Cal.3d, at 454, and nn. 14, 16, 146 Cal.Rptr. 585, 600, and nn. 14, 16, 579 P.2d, at 491–492, and nn. 14, 16.

4 The State also did not appeal the decision in *Capiscean Corp. v. Alcoholic Beverage Control Appeals Bd.*, 87 Cal.App.3d 996, 151 Cal.Rptr. 492 (1979), which used the analysis in *Rice* to invalidate California's resale price maintenance scheme for retail wine sales to consumers.

5 The California Retail Liquor Dealers Association, a trade association of independent retail liquor dealers in California, claims over 3,000 members.

6 The congressional Reports accompanying the Consumer Goods Pricing Act of 1975, noted that repeal of fair trade authority would not alter whatever power the States hold under the Twenty-first Amendment to control liquor prices. S.Rep. No. 94–466, p. 2 (1975); H.R.Rep. No. 94–341, p. 3, n. 2 (1975), U.S.Code Cong. & Admin.News, p. 1569. We consider the effect of the Twenty-first Amendment on this case in Part III, *infra*.

7 In *Rice*, the California Supreme Court found direct evidence that resale price maintenance resulted in horizontal price fixing. See *supra*, at 941, and n. 3. Although the Court of Appeal made no such specific finding in this case, the court noted that the wine pricing system “cannot be upheld for the same reasons the retail price maintenance provisions were declared invalid in *Rice*.” *Midcal Aluminum, Inc. v. Rice*, 90 Cal.App.3d 979, 983, 153 Cal.Rptr. 757, 760 (1979).

8 See *Norman's On the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (CA3 1971); *Asheville Tobacco Bd. v. FTC*, 263 F.2d 502, 509–510 (CA4 1959); Note, *Parker v. Brown* Revisited: The State Action Doctrine After *Goldfarb, Cantor*, and *Bates*, 77 Colum.L.Rev. 898, 916 (1977).

9 The California program contrasts with the approach of those States that completely control the distribution of liquor within their boundaries. *E. g.*, Va.Code §§ 4–15, 4–28 (1979). Such comprehensive regulation would be immune from the Sherman Act under *Parker v. Brown*, since the State would “displace unfettered business freedom” with its own power. *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 412, 58 L.Ed.2d 361 (1978); see *State Board v. Young's Market Co.*, 299 U.S. 59, 63, 57 S.Ct. 77, 78, 81 L.Ed. 38 (1936).

10 The approach is supported by sound canons of constitutional interpretation and demonstrates a wise reluctance to wade into the complex currents beneath the congressional proposal of the Amendment and its ratification in the state conventions. The Senate sponsor of the Amendment resolution said the purpose of § 2 was “to restore to the States . . . absolute control in effect over interstate commerce affecting intoxicating liquors. . . .” 76 Cong.Rec. 4143 (1933) (remarks of Sen. Blaine). Yet he also made statements supporting Midcal's claim that § 2 was designed only to ensure that “dry” States could not be forced by the Federal Government to permit the sale of liquor. See 76 Cong.Rec., at 4140–4141. The sketchy records of the state conventions reflect no consensus on the thrust of § 2, although delegates at several conventions expressed their hope that state regulation of liquor traffic would begin immediately. E. Brown, Ratification of the Twenty-first Amendment to the Constitution 104 (1938) (Wilson, President of Idaho Convention); *id.*, at 191–192 (Darnall, President of Maryland Convention); *id.*, at 247 (Gaylord, Chairman of Missouri Convention); *id.*, at 469–473 (resolution adopted at Washington Convention calling for state action “to regulate the liquor traffic”). See generally Note, The Effect of the Twenty-First Amendment on State Authority to Control Intoxicating Liquors, 75 Colum.L.Rev. 1578, 1580 (1975); Note, Economic Localism in State Alcoholic Beverage Laws—Experience Under the Twenty-First Amendment, 72 Harv.L.Rev. 1145, 1147 (1959).

11 In *Nippert v. Richmond*, 327 U.S. 416, 66 S.Ct. 586, 90 L.Ed. 760 (1946), the Court commented in a footnote:

“[E]ven the commerce in intoxicating liquors, over which the Twenty-first Amendment gives the States the highest degree of control, is not altogether beyond the reach of the federal commerce power, at any rate

when the State's regulation squarely conflicts with regulation imposed by Congress . . . ." *Id.*, at 425, n. 15, 66 S.Ct., at 591, n. 15.

12 As the unusual posture of this case reflects, the State of California has shown less than an enthusiastic interest in its wine pricing system. As we noted, the state agency responsible for administering the program did not appeal the decision of the California Court of Appeal. See *supra*, at 941; Tr. of Oral Arg. 20. Instead, this action has been maintained by the California Retail Liquor Dealers Association, a private intervenor. But neither the intervenor nor the State Attorney General, who filed a brief *amicus curiae* in support of the legislative scheme, has specified any state interests protected by the resale price maintenance system other than those noted in the state-court opinions cited in text.

13 The California Court of Appeal found no additional state interests in the instant case. 90 Cal.App.3d, at 984, 153 Cal.Rptr., at 760–761. That court rejected the suggestion that the wine price program was designed to protect the State's wine industry, pointing out that the statutes "do not distinguish between California wines and imported wines." *Ibid.*

14 See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 39, 86 S.Ct. 1254, 1258, 16 L.Ed.2d 336 (1966) (citing study concluding that resale price maintenance in New York State had "no significant effect upon the consumption of alcoholic beverages").

15 The California Supreme Court also stated that orderly market conditions might "reduce excessive consumption, thereby encouraging temperance." 21 Cal.3d, at 456, 146 Cal.Rptr., at 602, 579 P.2d, at 493. The concern for temperance, however, was considered by the court as an independent state interest in resale price maintenance for liquor.

16 Since Midcal requested only injunctive relief from the state court, there is no question before us involving liability for damages under 15 U.S.C. § 15.

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95 S.Ct. 2004
Supreme Court of the United States

Lewis H. GOLDFARB et al., Petitioners,
v.
VIRGINIA STATE BAR et al.

No. 74—70
|
Argued March 25, 1975.
|
Decided June 16, 1975.
|
Rehearing Denied Oct. 6, 1975.

See 423 U.S. 886, 96 S.Ct. 162.

Synopsis

Petitioners who unsuccessfully tried to find a lawyer who would perform title examination for less than the fee prescribed in minimum fee schedule published by county bar brought class action against state and county bars for injunctive relief and damages and alleged that the fee schedule and its enforcement mechanism, as applied to fees for legal services relating to residential real estate transactions, constituted price-fixing in violation of the Sherman Act. The United States District Court for the Eastern District of Virginia, 355 F.Supp. 491, held that state bar was exempt from the Sherman Act but granted judgment against county bar and enjoined publication of fee schedule and petitioners appealed. The Court of Appeals, 497 F.2d 1, reversed and certiorari was granted. The Supreme Court, Mr. Chief Justice Burger, held that the fee schedule and its enforcement mechanism constituted price-fixing in that the schedule operated as a fixed, rigid price floor; that interstate commerce was sufficiently affected for Sherman Act purposes in that significant amount of funds furnished for financing purchase of homes in county came from outside the state and title examination was an integral part of such interstate transactions; that a title examination is a service, and the exchange of such service for money is 'commerce'; and that activities of state and county bars were not exempt from Sherman Act as 'state action' where activities were not compelled by direction of state acting as a sovereign.

Judgment of Court of Appeals reversed and case remanded.

Mr. Justice Powell took no part in consideration or decision of case.

****2006 *773** Syllabus [*]

Petitioners, husband and wife, contracted to buy a home in Fairfax County, Va., and the lender who financed the purchase required them to obtain title insurance, which necessitated a title examination that could be performed legally only by a member of respondent Virginia State Bar. Petitioners unsuccessfully tried to find a lawyer who would examine the title for less than the fee prescribed in a minimum-fee schedule published by respondent Fairfax County Bar Association and enforced by respondent Virginia State Bar. Petitioners then brought this class action against respondents, seeking injunctive relief and damages, and alleging that the minimum-fee schedule and its enforcement mechanism, as applied to fees for legal services relating to residential real estate transactions, constitute price fixing in violation of s 1 of the Sherman Act. Although holding that the State Bar was exempt from the Sherman Act, the District Court granted judgment against the County Bar Association and enjoined the publication of the fee schedule. The Court of Appeals reversed, holding not only that the State Bar's actions were immune from liability as 'state action,' Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 but also that the County Bar Association was immune because the practice of law, as a 'learned profession,' is not 'trade or commerce' under the Sherman Act; and that, in any event, respondents' activities did not have sufficient effect on interstate commerce to support Sherman Act jurisdiction. Held: The minimum-fee schedule, as published by the County Bar Association and enforced by the State Bar, violates s 1 of the Sherman Act. Pp. 2009—2016.

(a) The schedule and its enforcement mechanism constitute price fixing since the record shows that the schedule, rather than being purely advisory, operated as a fixed, rigid price floor. The fee schedule was enforced through the prospect of professional discipline by the State Bar, by reason of attorneys' desire to comply with announced professional norms, and by the assurance that other lawyers would not compete by underbidding. Pp. 2010—2011.

***774** (b) Since a significant amount of funds furnished for financing the purchase of homes in Fairfax County comes from outside the State, and since a title examination is an integral part of such interstate transactions, interstate

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commerce is sufficiently affected for Sherman Act purposes notwithstanding that there is no showing that prospective purchasers were discouraged from buying homes in Fairfax County by the challenged activities, and no showing that the fee scheduled resulted in raising fees. Pp. 2011—2012.

(c) Congress did not intend any sweeping 'learned profession' exclusion from the Sherman Act; a title examination is a service, and the exchange of such a service for money is 'commerce' in the common usage of that term. Pp. 2012—2014.

(d) Respondents' activities are not exempt from the Sherman Act as 'state action' within the meaning of Parker v. Brown, supra. Neither the Virginia Supreme Court nor any Virginia statute required such activities, and, although the State Bar has the power to issue ethical opinions, it does not appear that the Supreme Court approves them. It is not enough that the anticompetitive conduct ****2007** is 'prompted' by state action; to be exempt, such conduct must be compelled by direction of the State acting as a sovereign. Here the State Bar, by providing that deviation from the minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity and hence cannot claim it is beyond the Sherman Act's reach. Pp. 2014—2016.

497 F.2d 1, reversed and remanded.

Attorneys and Law Firms

Alan B. Morrison, Washington, D.C., for petitioners.

Sol. Gen. Robert H. ***775** Bork, for the U.S., as amicus curiae, by special leave of Court.

Lewis T. Booker, Richmond, Va., for respondent Fairfax County Bar Ass'n.

Andrew P. Miller, Richmond, Va., for respondent Va. State Bar.

Opinion

Mr. Chief Justice BURGER delivered the opinion of the Court.

We granted certiorari to decide whether a minimum-fee schedule for lawyers published by the Fairfax County Bar Association and enforced by the Virginia State Bar violates s 1 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. s 1. The Court of Appeals held that, although the fee schedule and enforcement mechanism substantially restrained competition among lawyers, publication of the schedule by the County Bar was outside the scope of the Act because the practice of law is not 'trade or commerce,' and enforcement of the schedule by the State Bar was exempt from the Sherman Act as state action as defined in Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

I

In 1971 petitioners, husband and wife, contracted to buy a home in Fairfax County, Va. The financing agency required them to secure title insurance; this required a title examination, and only a member of the Virginia State Bar could legally perform that service.[1] ***776** Petitioners therefore contacted a lawyer who quoted them the precise fee suggested in a minimum-fee schedule published by respondent Fairfax County Bar Association; the lawyer told them that it was his policy to keep his charges in line with the minimum-fee schedule which provided for a fee of 1% of the value of the property involved. Petitioners then tried to find a lawyer who would examine the title for less than the fee fixed by the schedule. They sent letters to 36 other Fairfax County lawyers requesting their fees. Nineteen replied, and none indicated that he would charge less than the rate fixed by the schedule; several stated that they knew of no attorney who would do so.

The fee schedule the lawyers referred to is a list of recommended minimum prices for common legal services. Respondent Fairfax County Bar Association published the fee schedule although, as a purely voluntary association of attorneys, the County Bar has no formal power to enforce it. Enforcement has been provided by respondent Virginia State Bar which is the administrative agency[2] through which the Virginia Supreme Court regulates the practice of law in that State; membership in the ****2008** State Bar is required in order to practice in YVirginia.[3] Although the State Bar has never taken formal disciplinary action to compel adherence to any fee schedule, ***777** it has published reports[4] condoning fee schedules, and has issued two ethical opinions[5] indicating that fee schedules cannot be ignored. The most recent opinion states that 'evidence that an attorney habitually charges ***778** less than the suggested minimum fee schedule adopted by his local bar Association, raises a presumption that such lawyer is guilty of misconduct . . ..'[6]

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Because petitioners could not find a lawyer willing to charge a fee lower than the schedule dictated, they had their title examined by the lawyer they had first contacted. They then brought this class action against the State Bar and the County Bar[7] alleging that the operation of the minimum-fee schedule, as applied to fees for legal services relating to residential real estate transactions, constitutes price fixing in violation of s 1 of the Sherman Act. Petitioners sought both injunctive relief and damages.

After a trial solely on the issue of liability the District Court held that the minimum-fee schedule violated the Sherman Act.[8] 355 F.Supp. 491 (ED Va. **2009 (1973). The *779 court viewed the fee-schedule system as a significant reason for petitioners' failure to obtain legal services for less than the minimum fee, and it rejected the County Bar's contention that as a 'learned profession' the practice of law is exempt from the Sherman Act.

Both respondents argued that their actions were also exempt from the Sherman Act as state action. Parker v. Brown, supra. The District Court agreed that the Virginia State Bar was exempt under that doctrine because it is an administrative agency of the Virginia Supreme Court, and more important, because its 'minor role in this matter . . . derived from the judicial and 'legislative command of the State and was not intended to operate or become effective without that command.'' The County Bar, on the other hand, is a private organization and was under no compulsion to adopt the fee schedule recommended by the State Bar. Since the County Bar chose its own course of conduct the District Court held that the antitrust laws 'remain in full force and effect as to it.' The court enjoined the fee schedule, 15 U.S.C. s 26, and set the case down for trial to ascertain damages. 15 U.S.C. s 15.

The Court of Appeals reversed as to liability. 497 F.2d 1 (CA4 1974). Despite its conclusion that it 'is abundantly clear from the record before us that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County,' id., at 13, the Court of Appeals held the State Bar immune under Parker v. Brown, supra, and held the County Bar immune because the practice of law is not 'trade or commerce' under the Sherman Act. There has long been judicial recognition of a limited exclusion of 'learned professions' from the scope of the antitrust laws, the court said; that exclusion is based upon the special form *780 of regulation imposed upon the professions by the States, and the incompatibility of certain competitive practices with such professional regulation. It concluded that the promulgation of a minimum-fee schedule is one of 'those matters with respect to which an accord must be reached between the necessities of professional regulation and the dictates of the antitrust laws.' The accord reached by that court was to hold the practice of law exempt from the antitrust laws.

Alternatively, the Court of Appeals held that respondents' activities did not have sufficient effect on interstate commerce to support Sherman Act jurisdiction. Petitioners had argued that the fee schedule restrained the business of financing and insuring home mortgages by inflating a component part of the total cost of housing, but the court concluded that a title examination is generally a local service, and even where it is part of a transaction which crosses state lines its effect on commerce is only 'incidental,' and does not justify federal regulation.

We granted certiorari, 419 U.S. 963, 95 S.Ct. 223, 42 L.Ed.2d 178 (1974), and are thus confronted for the first time with the question of whether the Sherman Act applies to services performed by attorneys in examining titles in connection with financing the purchase of real estate.

II

Our inquiry can be divided into four steps: did respondents engage in price fixing? If so, are their activities in interstate commerce or do they affect interstate commerce? If so, are the activities exempt from the Sherman Act because they involve a 'learned profession?' If not, are the activities 'state **2010 action' within the meaning of Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), and therefore exempt from the Sherman Act?

*781 A

The County Bar argues that because the fee schedule is merely advisory, the schedule and its enforcement mechanism do not constitute price fixing. Its purpose, the argument continues, is only to provide legitimate information to aid member lawyers in complying with Virginia professional regulations. Moreover, the County Bar contends that in practice the schedule has not had the effect of producing fixed fees. The facts found by the trier belie these contentions, and nothing in the record suggests these findings lack support.

A purely advisory fee schedule issued to provide guidelines, or an exchange of price information without a showing of an

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actual restraint on trade, would present us with a different question, e.g., American Column Co. v. United States, 257 U.S. 377, 42 S.Ct. 114, 66 L.Ed. 284 (1921); Maple Flooring Assn. v. United States, 268 U.S. 563, 580, 45 S.Ct. 578, 584, 69 L.Ed. 1093 (1925). But see United States v. National Assn. of Real Estate Boards, 339 U.S. 485, 488—489, 495, 70 S.Ct. 711, 713—714, 717, 94 L.Ed. 1007 (1950). The record here, however, reveals a situation quite different from what would occur under a purely advisory fee schedule. Here a fixed, rigid price floor arose from respondents' activities: every lawyer who responded to petitioners' inquiries adhered to the fee schedule, and no lawyer asked for additional information in order to set an individualized fee. The price information disseminated did not concern past standards, cf. Cement Mfrs. Protective Ass'n v. United States, 268 U.S. 588, 45 S.Ct. 586, 69 L.Ed. 1104 (1925), but rather minimum fees to be charged in future transactions, and those minimum rates were increased over time. The fee schedule was enforced through the prospective professional discipline from the State Bar, and the desire of attorneys to comply with announced professional norms, see generally American Column Co., supra, at 411,42 S.Ct. at 121; ***782** the motivation to conform was reinforced by the assurance that other lawyers would not compete by underbidding. This is not merely a case of an agreement that may be inferred from an exchange of price information, United States v. Container Corp., 393 U.S. 333, 337, 89 S.Ct. 510, 512, 21 L.Ed.2d 526 (1969), for here a naked agreement was clearly shown, and the effect on prices is plain.[9] Id., at 339, 89 S.Ct. at 513 (Fortas, J., concurring).

Moreover, in terms of restraining competition and harming consumers like petitioners the price-fixing activities found here are unusually damaging. A title examination is indispensable in the process of financing a real estate purchase, and since only an attorney licensed to practice in Virginia may legally examine a title, see n. 1, supra, consumers could not turn to alternative sources for the necessary service. All attorneys of course, were practicing under the constraint of the fee schedule. See generally ****2011** United States v. Container Corp., supra, at 337, 89 S.Ct. at 512. The County Bar makes much of the fact that it is a voluntary organization; however, the ethical opinions issued by the State Bar provide that any lawyer, whether or not a member of his county bar association, ***783** may be disciplined for 'habitually charg(ing) less than the suggested minimum fee schedule adopted by his local bar Association . . ..' See supra, at 2008, and n. 4. These factors coalesced to create a pricing system that consumers could not realistically escape. On this record respondents' activities constitute a classic illustration of price fixing.

B

The County Bar argues, as the Court of Appeals held, that any effect on interstate commerce caused by the fee schedule's restraint on legal services was incidental and remote. In its view the legal services, which are performed wholly intrastate, are essentially local in nature and therefore a restraint with respect to them can never substantially affect interstate commerce. Further, the County Bar maintains, there was no showing here that the fee schedule and its enforcement mechanism increased fees, and that even if they did there was no showing that such an increase deterred any prospective homeowner from buying in Fairfax County.

These arguments misconceive the nature of the transactions at issue and the place legal services play in those transactions. As the District Court found,[10] 'a significant portion of funds furnished for the purchasing of homes in Fairfax County comes from without the State of Virginia,' and 'significant amounts of loans on Fairfax County real estate are guaranteed by the United States Veterans Administration and Department of Housing and Urban Development both headquartered in the District of Columbia.' Thus in this class action the transactions which create the need for the particular legal ***784** services in question frequently are interstate transactions. The necessary connection between the interstate transactions and the restraint of trade provided by the minimum-fee schedule is present because, in a practical sense,[11] title examinations are necessary in real estate transactions to assure a lien on a valid title of the borrower. In financing realty purchases lenders require, 'as a condition of making the loan, that the title to the property involved be examined . . ..'[12] Thus a title examination is an integral part of an interstate transaction[13] and this Court has long held that

****2012** 'there is an obvious distinction to be drawn between a course of conduct wholly within a state and conduct which is an inseparable element of a larger program dependent for its success upon activity which affects commerce between the states.' ***785** United States v. Frankfort Distilleries, 324 U.S. 293, 297, 65 S.Ct. 661, 663, 89 L.Ed. 951 (1945).

See United States v. Yellow Cab Co., 332 U.S. 218, 228—229, 67 S.Ct. 1560, 1566, 91 L.Ed. 2010 (1947).

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Given the substantial volume of commerce involved,[14] and the inseparability of this particular legal service from the interstate aspects of real estate transactions, we conclude that interstate commerce has been sufficiently affected. See Montague & Co. v. Lowry, 193 U.S. 38, 45—46, i4 S.Ct. 307, 309, 48 L.Ed. 608 (1904); United States v. Women's Sportswear Assn., 336 U.S. 460, 464—465, 69 S.Ct. 714, 716, 93 L.Ed. 805 (1949).

The fact that there was no showing that home buyers were discouraged by the challenged activities does not mean that interstate commerce was not affected. Otherwise, the magnitude of the effect would control, and our cases have shown that, once an effect is shown, no specific magnitude need be proved. E.g., United States v. McKesson & Robbins, Inc., 351 U.S. 305, 310, 76 S.Ct. 937, 940, 100 L.Ed. 1209 (1956). Nor was it necessary for petitioners to prove that the fee schedule raised fees. Petitioners clearly proved that the fee schedule fixed fees and thus 'deprive(d) purchasers or consumers of the advantages which they derive from from competition.' Apex Hosiery Co. v. Leader, 310 U.S. 469, 501, 60 S.Ct. 982, 996, 84 L.Ed. 1311 (1940). See United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 60 S.Ct. 811, 84 L.Ed. 1129 (1940).

Where, as a matter of law or practical necessity, legal services are an integral part of an interstate transaction, a restraint on those services may substantially affect commerce for Sherman Act purposes. Of course, there may be legal services that involve interstate commerce in other fashions, just as there may be legal services that ***786** have no nexus with interstate commerce and thus are beyond the reach of the Sherman Act.

C

The County Bar argues that Congress never intended to include the learned professions within the terms 'trade or commerce' in s 1 of the Sherman Act,[15] and therefore the sale of professional ****2013** services is exempt from the Act. No explicit exemption or legislative history is provided to support this contention; rather, the existence of state regulation seems to be its primary basis. Also, the County Bar maintains that competition is inconsistent with the practice of a profession because enhancing profit is not the goal of professional activities; the goal is to provide services necessary to the community.[16] That, indeed, is the classic basis traditionally ***787** advanced to distinguish professions from trades, businesses, and other occupations, but it loses some of its force when used to support the fee control activities involved here.

In arguing that learned professions are not 'trade or commerce' the County Bar seeks a total exclusion from antitrust regulation. Whether state regulation is active or dormant, real or theoretical, lawyers would be able to adopt anticompetitive practices with impunity. We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, Associated Press v. United States, 326 U.S. 1, 7, 65 S.Ct. 1416, 1418, 89 L.Ed. 2013 (1945), nor is the public-service aspect of professional practice controlling in determining whether s 1 includes professions. United States v. National Assn. of Real Estate Boards, 339 U.S., at 489, 70 S.Ct., at 714. Congress intended to strike as broadly as it could in s 1 of the Sherman Act, and to read into it so wide an exemption as that urged on us would be at odds with that purpose.

The language of s 1 of the Sherman Act, of course, contains no exception. 'Language more comprehensive is difficult to conceive.' United States v. South-Eastern Underwriters Assn., 322 U.S. 533, 553, 64 S.Ct. 1162, 1174, 88 L.Ed. 1440 (1944). And our cases have repeatedly established that there is a heavy presumption against implicit exemptions, United States v. Philadelphia National Bank, 374 U.S. 321, 350—351, 83 S.Ct. 1715, 1734—1735, 10 L.Ed.2d 915 (1963); California v. FPC, 369 U.S. 482, 485, 82 S.Ct. 901, 904, 8 L.Ed.2d 54 (1962). Indeed, our cases have specifically included the sale of services within s 1. E.g., American Medical Assn. v. United States, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed. 434 (1943); Radovich v. National Football League, 352 U.S. 445, 77 S.Ct. 390, 1 L.Ed.2d 456 (1957). Whatever else it may be, the examination of a land title is a service; the exchange of such a service for money is 'commerce' ***788** in the most common usage of that word. It is no disparagement of the practice of law as a profession to acknowledge that it has this business aspect,[17] and s 1 of the Sherman Act

'(o)n its face . . . shows a carefully studied attempt to bring within ****2014** the Act every person engaged in business whose activities might restrain or monopolize commercial intercourse among the states.' United States v. South-Eastern Underwriters Assn., supra, 322 U.S., at 553, 64 S.Ct., at 1174.

In the modern world it cannot be denied that the activities of lawyers play an important part in commercial intercourse, and

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that anticompetitive activities by lawyers may exert a restraint on commerce.

D

In Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the Court held that an anticompetitive marketing program which 'derived its authority and its efficacy from the legislative command of the state' was not a violation of the Sherman Act because the Act was intended to regulate private practices and not to prohibit a State from imposing a restraint as an act of government. Id., at 350—352, 63 S.Ct., at 313; Olsen v. Smith, 195 U.S. 332, 344—345, 25 S.Ct. 52, 54, 55, 49 L.Ed. 224 (1904). Respondent State Bar and respondent County Bar both seek to avail themselves of this so-called state-action exemption.

***789** Through its legislature Virginia has authorized its highest court to regulate the practice of law. [18] That court has adopted ethical codes which deal in part with fees, and far from exercising state power to authorize binding price fixing, explicitly directed lawyers not 'to be controlled' by fee schedules. [19] The State Bar, ***790** a state agency by law, [20] argues that in issuing fee schedule reports and ethical opinions dealing with fee schedules it was merely implementing the fee provisions of the ethical codes. The County Bar, although it is a voluntary association and not a ****2015** state agency, claims that the ethical codes and the activities of the State Bar 'prompted' it to issue fee schedules and thus its actions, too, are state action for Sherman Act purposes.

The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Parker v. Brown, 317 U.S., at 350—352, 63 S.Ct., at 313—314; Continental Ore Co. v. Union Carbide, 370 U.S. 690, 706—707, 82 S.Ct. 1404, 1414—1415, 8 L.Ed.2d 777 (1962). Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent to supply them, or require the type of price floor which arose from respondents' activities. ***791** Although the State Bar apparently has been granted the power to issue ethical opinions, there is no indication in this record that the Virginia Supreme Court approves the opinions. Respondents' arguments, at most, constitute the contention that their activities complemented the objective of the ethical codes. In our view that is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.

The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. [21] Cf. Gibson v. Berryhill, 411 U.S. 564, 578—579, 93 S.Ct. 1689, 1698, 36 L.Ed.2d 488 (1973). The State Bar, by providing that ***792** deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act. [22] Parker v. Brown, supra, 317 U.S. at 351—352, 63 S.Ct. at 313—314. Its activities resulted in a rigid price floor from which petitioners, as consumers, ****2016** could not escape if they wished to borrow money to buy a home.

III

We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions. We also recognize that in some instances the State may decide that 'forms of competition usual in the business world may be demoralizing to the ethical standards of a profession.' United States v. Oregon State Medical Society, 343 U.S. 326, 336, 72 S.Ct. 690, 697, 96 L.Ed. 978 (1952). See also Semler v. Oregon State Board of Dental Examiners, 294 U.S. 608, 611—613, 55 S.Ct. 570, 571—572, 79 L.Ed. 1086 (1935). The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' See Sperry v. Florida ex rel. Florida Bar, 373 U.S. 379, 383, 83 S.Ct. 1322, 1325, 10 L.Ed.2d 428 (1963); Cohen v. Hurley, 366 U.S. 117, 123—124, 81 S.Ct. 954, 958, 6 L.Ed.2d 156 (1961); ***793** Law Students Research Council v. Wadmond, 401 U.S. 154, 157, 91 S.Ct. 720, 723, 27 L.Ed.2d 749 (1971). In holding that certain anticompetitive

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conduct by lawyers is within the reach of the Sherman Act we intend no diminution of the authority of the State to regulate its professions.

The judgment of the Court of Appeals is reversed and the case is remanded to that court with orders to remand to the District Court for further proceedings consistent with this opinion.

Reversed and remanded.

Mr. Justice POWELL took no part in the consideration or decision of this case.

All Citations

421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572, 1975-1 Trade Cases P 60,355

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Timber & Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Unauthorized Practice of Law, Opinion No. 17, Aug. 5, 1942, Virginia State Bar—Opinions 239 (1965).

2 Virginia Code Ann. s 54—49 (1972) provides:

> ‘The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations organizing and governing the association known as the Virginia State Bar, composed of the attorneys at law of this State, to act as an administrative agency of the Court for the purpose of investigating and reporting the violation of such rules and regulations as are adopted by the Court under this article to a court of competent jurisdiction for such proceedings as may be necessary, and requiring all persons practicing law in this State to be members thereof in good standing.’

3 Ibid.

4 In 1962 the State Bar published a minimum-fee-schedule-report that listed a series of fees and stated that they ‘represent the considered judgment of the Committee (on Economics of Law Practice) as to (a) fair minimum fee in each instance.’ The report stated, however, that the fees were not mandatory, and it recommended only that the State Bar consider adopting such a schedule. Nevertheless, shortly thereafter the County Bar adopted its own minimum-fee schedule that purported to be ‘a conscientious effort to show lawyers in their true perspective of dignity, training and integrity.’ The suggested fees for title examination were virtually identical to those in the State Bar report. In accord with Opinion 98 of the State Bar Committee on Legal Ethics the schedule stated that, although there is an ethical duty to charge a lower fee in a deserving case, if a lawyer

“purely for his own advancement, intentionally and regularly bills less than the customary charges of the bar for similar services . . . (in order to) increase his business with resulting personal gain, it becomes a form of solicitation contrary to Canon 27 and also a violation of Canon 7, which forbids the efforts of one lawyer to encroach upon the employment of another.” App. 30.

In 1969 the State Bar published a second fee-schedule report that, as it candidly stated, 'reflect(ed) a general scaling up of fees for legal services.' The report again stated that no local bar association was bound by its recommendations; however, respondent County Bar again quickly moved to publish an updated minimum-fee schedule, and generally to raise fees. The new schedule stated that the fees were not mandatory, but tempered that by referring again to Opinion 98. This time the schedule also stated that lawyers should feel free to charge more than the recommended fees; and to avoid condemnation of higher fees charged by some lawyers, it cautioned County Bar members that 'to . . . publicly criticize lawyers who charge more than the suggested fees herein might in itself be evidence of solicitation . . ..'

5 Virginia State Bar Committee on Legal Ethics, Opinion No. 98, June 1, 1960; Virginia State Bar Committee on Legal Ethics, Opinion No. 170, May 28, 1971.

6 Ibid. The parties stipulated that these opinions are a substantial influencing factor in lawyers' adherence to the fee schedules. One reason for this may be because the State Bar is required by statute to 'investigat(e) and report . . . the violation of . . . rules and regulations as are adopted by the (Virginia Supreme Court) to a court of competent jurisdiction for such proceedings as may be necessary . . ..' Va.Code Ann. s 54—49 (1972). Therefore any lawyer who contemplated ignoring the fee schedule must have been aware that professional sanctions were possible, and that an enforcement mechanism existed to administer them.

7 Two additional county bar associations were originally named as defendants but they agreed to a consent judgment under which they were directed to cancel their existing fee schedules, and were enjoined from adopting, publishing, or distributing any future schedules of minimum or suggested fees. Damage claims against these associations were then dismissed with prejudice.

8 The court was satisfied that interstate commerce was sufficiently affected to sustain jurisdiction under the Sherman Act because a significant portion of the funds and insurance involved in the purchase of homes in Fairfax County comes from outside the State of Virginia. 355 F.Supp. 491, 497 (ED Va.1973).

9 The Court of Appeals accurately depicted the situation:

'(I)t is clear from the record that all or nearly all of the (County Bar) members charged fees equal to or exceeding the fees set forth in the schedule for title examinations and other services involving real estate.' 497 F.2d 1, 12 (CA4 1974).

"A significant reason for the inability of (petitioners) to obtain legal services . . . for less than the fee set forth in the Minimum Fee Schedule . . . was the operation of the minimum fee schedule system." Id., at 4.

'It is abundantly clear from the record before us that the fee schedule and the enforcement mechanism supporting it act as a substantial restraint upon competition among attorneys practicing in Fairfax County.' Id., at 13.

10 The Court of Appeals did not disturb the District Court's findings of fact. It simply disagreed on the conclusions of law drawn therefrom.

11 It is in a practical sense that we must view an effect on interstate commerce, Swift & Co. v. United States, 196 U.S. 375, 398, 25 S.Ct. 276, 280, 49 L.Ed. 518 (1905); Mandeville Island Farms, Inc. v. American Crystal Sugar Co., 334 U.S. 219, 233, 68 S.Ct. 996, 1004, 92 L.Ed. 1328 (1948).

12 355 F.Supp., at 494.

13 The County Bar relies on United States v. Yellow Cab Co., 332 U.S. 218, 67 S.Ct. 1560, 91 L.Ed. 2010 (1947), to support its argument that the 'essentially local' legal services at issue here are beyond the Sherman Act. There we held, inter alia, that intrastate taxi trips that occurred at the start and finish of interstate rail travel

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were 'too unrelated to interstate commerce to constitute a part thereof within the meaning of the Sherman Act.' Id., at 230, 67 S.Ct., at 1567. The ride to the railway station, we said, '(f) rom the standpoints of time and continuity . . . may be quite distinct and separate from the interstate journey.' Id., at 232, 67 S.Ct., at 1567. Here, on the contrary, the legal services are coincidental with interstate real estate transactions in terms of time, and, more important, in terms of continuity they are essential. Indeed, it would be more apt to compare the legal services here with a taxi trip between stations to change trains in the midst of an interstate journey. In Yellow Cab we held that such a trip was a part of the stream of commerce. Id., at 228—229, 67 S.Ct., at 1566.

14 355 F.Supp., at 497.

15 The County Bar cites phrases in several cases that implied the practice of a learned profession is not 'trade or commerce' under the antitrust laws. E.g., Federal Club v. National League, 259 U.S. 200, 209, 42 S.Ct. 465, 466, 66 L.Ed. 898 (1922) ('a firm of lawyers sending out a member to argue a case . . . does not engage in . . . commerce because the lawyer . . . goes to another State'); FTC v. Raladam Co., 283 U.S. 643, 653, 51 S.Ct. 587, 592, 75 L.Ed. 1324 (1931) ('medical practitioners . . . follow a profession and not a trade . . .'); Atlantic Cleaners & Dyers v. United States, 286 U.S. 427, 436, 52 S.Ct. 607, 610, 76 L.Ed. 1204 (1932); United States v. National Assn. of Real Estate Boards, 339 U.S. 485, 490, 70 S.Ct. 711, 715, 94 L.Ed. 1007 (1950). These citations are to passing references in cases concerned with other issues; and, more important, until the present case it is clear that we have not attempted to decide whether the practice of a learned profession falls within s 1 of the Sherman Act. In National Assn. of Real Estate Boards, we specifically stated that the question was still open, 339 U.S., at 492, 70 S.Ct., at 716, as we had done earlier in American Medical Assn. v. United States, 317 U.S. 519, 528, 63 S.Ct. 326, 328, 87 L.Ed. 434 (1943).

16 The reason for adopting the fee schedule does not appear to have been wholly altruistic. The first sentence in respondent State Bar's 1962 Minimum Fee Schedule Report states:

"The lawyers have slowly, but surely, been committing economic suicide as a profession." Virginia State Bar, Minimum Fee Schedule Report 1962, p. 3, App. 20.

17 The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities, and automatically to apply to the professions antitrust concepts which originated in other areas. The public service aspect, and other features of the professions, may require that a particular practice, which could properly be viewed as a violation of the Sherman Act in another context, be treated differently. We intimate no view on any other situation than the one with which we are confronted today.

18 Virginia Code Ann. s 54—48 (1972) provides:

'Rules and regulations defining practice of law and prescribing codes of ethics and disciplinary procedure. —The Supreme Court of Appeals may, from time to time, prescribe, adopt, promulgate and amend rules and regulations:

'(a) Defining the practice of law.

'(b) Prescribing a code of ethics governing the professional conduct of attorneys at law and a code of judicial ethics.

'(c) Prescribing procedure for disciplining, suspending, and disbarring attorneys at law.' In addition, the Supreme Court of Virginia, has inherent power to regulate the practice of law in that State. Button v. Day,

204 Va. 547, 132 S.E.2d 292 (1963). See Lathrop v. Donohue, 367 U.S. 820, 81 S.Ct. 1826, 6 L.Ed.2d 1191 (1961).

19 In 1938 the Supreme Court of Virginia adopted Rules for the Integration of the Virginia State Bar, and Rule II, s 12, dealt with the procedure for setting fees. Among six factors that court directed to be considered in setting a fee were 'the customary charges of the Bar for similar services.' The court also directed that

'(i)n determining the customary charges of the Bar for similar services, it is proper for a lawyer to consider a schedule of minimum fees adopted by a Bar Association, but no lawyer should permit himself to be controlled thereby or to follow it as his sole guide in determining the amount of his fee.' Rules for Integration of the Virginia State Bar, 171 Va. xvii, xxiii. (Emphasis supplied.)

In 1970 the Virginia Supreme Court amended the 1938 rules in part, and adopted the Code of Professional Responsibility, effective January 1, 1971. 211 Va. 295 (1970). Certain of its provisions also dealt with the fee-setting procedure. In EC 2—18 lawyers were told again that fees vary according to many factors, but that '(s)uggested fee schedules and economic reports of state and local bar associations provide some guidance on the subject of reasonable fees.' 211 Va., at 302. In DR 2—106(B), which detailed eight factors that should be considered in avoiding an excessive fee, one of the factors was '(t)he fee customarily charged in the locality for similar legal services.' DR 2—106(B) (3). 211 Va., at 313.

20 See supra, at 2007 n. 2.

21 The District Court stated that the State Bar acted in only a 'minor role' as far as the price fixing was concerned, 355 F.Supp., at 496, and one member of the Court of Appeals panel was prepared to exonerate the State Bar because its participation was so minimal as to be insufficient to impose Sherman Act liability. 497 F.2d, at 21 (Craven, J., concuring and dissenting). Of course, an alleged participant in a restraint of trade may have so insubstantial a connection with the restraint that liability under the Sherman Act would not be found, see United States v. National Assn. of Real Estate Boards, 339 U.S., at 495, 70 S.Ct., at 717; however, that is not the case here. The State Bar's fee schedule reports provided the impetus for the County Bar, on two occasions, to adopt minimum-fee schedules. More important, the State Bar's ethical opinions provided substantial reason for lawyers to comply with the minimum-fee schedules. Those opinions threatened professional discipline for habitual disregard of fee schedules, and thus attorneys knew their livelihood was in jeopardy if they did so. Even without that threat the opinions would have constituted substantial reason to adhere to the schedules because attorneys could be expected to comply in order to assure that they did not discredit themselves by departing from professional norms, and perhaps betraying their professional oaths.

22 The State Bar also contends that it is protected by the Eleventh Amendment. See Edelman v. Jordan, 415 U.S. 651, 94 S.Ct. 1347, 39 L.Ed.2d 662 (1974). Petitioners dispute this contention, and the District Court had no occasion to reach it in view of its holding. Given the record before us we intimate no view on the issue, leaving it for the District Court on remand.

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108 S.Ct. 1658
Supreme Court of the United States

Timothy A. PATRICK, Petitioner,
v.
William M. BURGET et al.

No. 86–1145
|
Argued Feb. 22, 1988.
|
Decided May 16, 1988.
|
Rehearing Denied June 30, 1988.
|
See 487 U.S. 1243, 108 S.Ct. 2921.

Synopsis

Surgeon brought action against physicians, who were partners in private medical clinic, alleging violations of Sherman Act and interference with prospective economic advantage under Oregon law. The United States District Court for the District of Oregon, Edward Leavy, J., awarded judgment on jury verdict against some physicians on Sherman Act claims and awarded damages against some physicians on state law claim, and appeal was taken. The Court of Appeals, 800 F.2d 1498, reversed and remanded, and certiorari was granted. The Supreme Court, Justice Marshall held that state-action doctrine did not protect Oregon physicians from federal antitrust liability for their activities on hospital peer-review committees.

Reversed and remanded.

Justice Blackmun did not participate.

Order on remand, 852 F.2d 1241.

****1659 *94** *Syllabus* [*]

Petitioner, an Astoria, Oregon, surgeon, declined an invitation by respondents to join them as a partner in the Astoria Clinic, and instead began an independent practice in competition with the Clinic. Thereafter, petitioner experienced difficulties in his professional dealings with Clinic physicians, culminating in respondents' initiation of, and participation in, peer-review proceedings to terminate petitioner's privileges at Astoria's only hospital (a majority of whose staff members were employees or partners of the Clinic), on the ground that his care of his patients was below the hospital's ****1660** standards. Petitioner filed suit in Federal District Court, alleging that respondents had violated §§ 1 and 2 of the Sherman Act by initiating and participating in the peer-review proceedings in order to reduce competition from petitioner rather than to improve patient care. Ultimately, the court entered a judgment against respondents, but the Court of Appeals reversed on the ground that respondents' conduct was immune from antitrust scrutiny under the state-action doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, and its progeny, because Oregon has articulated a policy in favor of peer review and actively supervises the peer-review process.

Held: The state-action doctrine does not protect Oregon physicians from federal antitrust liability for their activities on hospital peer-review committees. The “active supervision” prong of the test used to determine whether private parties may claim state-action immunity requires that state officials have and exercise power to review such parties' particular anticompetitive acts and disapprove those that fail to accord with state policy. This requirement is not satisfied here, since there has been no showing that the State Health Division, the State Board of Medical Examiners, or the state judiciary reviews—or even could review—private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses. The policy argument that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings essentially challenges the wisdom of applying the antitrust ***95** laws to the sphere of medical care, and as such is properly directed to Congress. Pp. 1662–1665.

800 F.2d 1498 (CA 9 1986), reversed.

MARSHALL, J., delivered the opinion for the Court, in which all other Members joined, except BLACKMUN, J., who took no part in the consideration or decision of the case.

Attorneys and Law Firms

Barbee B. Lyon argued the cause for petitioner. With him on the brief was Don H. Marmaduke.

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Thomas M. Triplett argued the cause and filed a brief for respondents.*

* Briefs of amici curiae urging reversal were filed for the United States by Solicitor General Fried, Assistant Attorney General Rule, Deputy Solicitor General Cohen, Deputy Assistant Attorney General Starling, Roy T. Englert, Jr., Robert B. Nicholson, Laura Heiser, and Robert D. Paul; for the American Psychological Association by Donald N. Bersoff and David W. Ogden; and for the Association of American Physicians & Surgeons, Inc., et al. by Russell Iungerich and Kent Masterson Brown.

Briefs of amici curiae urging affirmance were filed for the American Medical Association et al. by Rex E. Lee, Carter G. Phillips, Jack R. Bierig, Douglas R. Carlson, Linda A. Tomaselli, Harold J. Bressler, Raymond F. Mensing, Jr., and Joseph Onek; and for the Federation of State Medical Boards of the United States, Inc., by Robert C. Bass, Jr.

Briefs of amicus curiae were filed for the Board of Medical Quality Assurance of the State of California et al. by Ellis J. Horvitz, Peter Abrahams, James E. Ludlam, and David E. Willett; and for the Central and South West Corporation by Jeffrey H. Howard and Ferd. C. Meyer, Jr.

Opinion

Justice MARSHALL delivered the opinion of the Court.

The question presented in this case is whether the state-action doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), protects physicians in the State of Oregon from federal antitrust liability for their activities on hospital peer-review committees.

I

Astoria, Oregon, where the events giving rise to this lawsuit took place, is a city of approximately 10,000 people ***96** located in the northwest corner of the State. The only hospital in Astoria is the Columbia Memorial Hospital (CMH). Astoria also is the home of a private group-medical practice called the Astoria Clinic. At all times relevant to this case, a majority of the staff members at the CMH were employees or partners of the Astoria Clinic.

Petitioner Timothy Patrick is a general and vascular surgeon. He became an employee of the Astoria Clinic and a member of the CMH's medical staff in 1972. One year later, the partners of the Clinic, who are the respondents in this case, [1] invited petitioner to become a partner of the Clinic. Petitioner declined this offer and instead began an independent practice in competition with the surgical practice of the Clinic. Petitioner continued to serve on the medical staff of the CMH.

After petitioner established his independent practice, the physicians associated with the Astoria Clinic consistently refused ****1661** to have professional dealings with him. Petitioner received virtually no referrals from physicians at the Clinic, even though the Clinic at times did not have a general surgeon on its staff. Rather than refer surgery patients to petitioner, Clinic doctors referred them to surgeons located as far as 50 miles from Astoria. In addition, Clinic physicians showed reluctance to assist petitioner with his own patients. Clinic doctors often declined to give consultations, and Clinic surgeons refused to provide backup coverage for patients under petitioner's care. At the same time, Clinic physicians repeatedly criticized petitioner for failing to obtain outside consultations and adequate backup coverage.

In 1979, respondent Gary Boelling, a partner at the Clinic, complained to the executive committee of the CMH's medical staff about an incident in which petitioner had left a patient in the care of a recently hired associate, who then left the ***97** patient unattended. The executive committee decided to refer this complaint, along with information about other cases handled by petitioner, to the State Board of Medical Examiners (BOME). Respondent Franklin Russell, another partner at the Clinic, chaired the committee of the BOME that investigated these matters. The members of the BOME committee criticized petitioner's medical practices to the full BOME, which then issued a letter of reprimand that had been drafted by Russell. The BOME retracted this letter in its entirety after petitioner sought judicial review of the BOME proceedings.

Two years later, at the request of respondent Richard Harris, a Clinic surgeon, the executive committee of the CMH's medical staff initiated a review of petitioner's hospital privileges. The committee voted to recommend the termination of petitioner's privileges on the ground that petitioner's care of his patients was below the standards of the hospital. Petitioner demanded a hearing, as provided by hospital bylaws, and a five-member ad hoc committee, chaired by respondent Boelling, heard the charges and defense. Petitioner requested that the members of the committee testify as to their personal bias against him,

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but they refused to accommodate this request. Before the committee rendered its decision, petitioner resigned from the hospital staff rather than risk termination. [2]

During the course of the hospital peer-review proceedings, petitioner filed this lawsuit in the United States District Court for the District of Oregon. Petitioner alleged that the partners of the Astoria Clinic had violated §§ 1 and 2 of the Sherman Act, ch. 647, 26 Stat. 209, 15 U.S.C. §§ 1, 2. Specifically, petitioner contended that the Clinic partners had ***98** initiated and participated in the hospital peer-review proceedings to reduce competition from petitioner rather than to improve patient care. Respondents denied this assertion, and the District Court submitted the dispute to the jury with instructions that it could rule in favor of petitioner only if it found that respondents' conduct was the result of a specific intent to injure or destroy competition.

The jury returned a verdict against respondents Russell, Boelling, and Harris on the § 1 claim and against all of the respondents on the § 2 claim. It awarded damages of $650,000 on the two antitrust claims taken together. The District Court, as required by law, see 15 U.S.C. § 15(a), 38 Stat. 731, trebled the antitrust damages.

The Court of Appeals for the Ninth Circuit reversed. 800 F.2d 1498 (1986). It found that there was substantial evidence that respondents had acted in bad faith in the peer-review process. [3] The court held, ****1662** however, that even if respondents had used the peer-review process to disadvantage a competitor rather than to improve patient care, their conduct in the peer-review proceedings was immune from antitrust scrutiny. The court reasoned that the peer-review activities of physicians in Oregon fall within the state-action exemption from antitrust liability because Oregon has articulated a policy in favor of peer review and actively supervises the peer-review process. [4] The court therefore ***99** reversed the judgment of the District Court as to petitioner's antitrust claims.

We granted certiorari, 484 U.S. 814, 108 S.Ct 65, 98 L.Ed.2d 29 (1987), to decide whether the state-action doctrine protects respondents' hospital peer-review activities from antitrust challenge. [5] We now reverse.

II

In *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), this Court considered whether the Sherman Act prohibits anticompetitive actions of a State. Petitioner in that case was a raisin producer who brought suit against the California Director of Agriculture to enjoin the enforcement of a marketing plan adopted under the State's Agricultural Prorate Act. That statute restricted competition among food producers in the State in order to stabilize prices and prevent economic waste. Relying on principles of federalism and state sovereignty, this Court refused to find in the Sherman Act “an unexpressed purpose to nullify a state's control over its officers and agents.” *Id.,* at 351, 63 S.Ct., at 313. The Sherman Act, the Court held, was not intended “to restrain state action or official action directed by a state.” *Ibid.*

Although *Parker* involved a suit against a state official, the Court subsequently recognized that *Parker'* s federalism rationale ***100** demanded that the state-action exemption also apply in certain suits against private parties. See, *e.g., Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). If the Federal Government or a private litigant always could enforce the Sherman Act against private parties, then a State could not effectively implement a program restraining competition among them. The Court, however, also sought to ensure that private parties could claim state-action immunity from Sherman Act liability only when their anticompetitive acts were truly the product of state regulation. We accordingly established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws. See ****1663** *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). First, “the challenged restraint must be ‘one clearly articulated and affirmatively expressed as state policy.’ ” *Id.,* at 105, 100 S.Ct., at 943, quoting *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of BRENNAN, J.). Second, the anticompetitive conduct “must be ‘actively supervised’ by the State itself.” *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., supra,* 445 U.S., at 105, 100 S.Ct., at 943, quoting*Lafayette v. Louisiana Power & Light Co., supra,* 435 U.S., at 410, 98 S.Ct., at 1135 (opinion of BRENNAN, J.). Only if an anticompetitive act of a private party meets both of these requirements is it fairly attributable to the State.

In this case, we need not consider the “clear articulation” prong of the *Midcal* test, because the “active supervision”

requirement is not satisfied. The active supervision requirement stems from the recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Hallie v. Eau Claire,* 471 U.S. 34, 47, 105 S.Ct. 1713, 1720, 85 L.Ed.2d 24 (1985); see *id.,* 45, 105 S.Ct., at 1719–1720 ("A private party ... may be presumed to be acting primarily on his or its own behalf"). The requirement is designed to ensure ***101** that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. *Id.,* at 46–47, 105 S.Ct., at 1720. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct. Cf. *Southern Motor Carriers Rate Conference, Inc. v. United States, supra,* 471 U.S., at 51, 105 S.Ct., at 1723 (noting that state public service commissions "have and exercise ultimate authority and control over all intrastate rates"); *Parker v. Brown, supra,* 317 U.S., at 352, 63 S.Ct., at 314 (stressing that a marketing plan proposed by raisin growers could not take effect unless approved by a state board). The mere presence of some state involvement or monitoring does not suffice. See *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 345, n. 7, 107 S.Ct. 720, 726, n. 7, 93 L.Ed.2d 667 (1987) (holding that certain forms of state scrutiny of a restraint established by a private party did not constitute active supervision because they did not "exer[t] any significant control over" the terms of the restraint). The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Respondents in this case contend that the State of Oregon actively supervises the peer-review process through the State Health Division, the BOME, and the state judicial system. The Court of Appeals, in finding the active supervision requirement satisfied, also relied primarily on the powers and responsibilities of these state actors. Neither the Court of Appeals nor respondents, however, have succeeded in showing that any of these actors reviews—or even could review—private decisions regarding hospital privileges to determine whether such decisions comport with state regulatory policy and to correct abuses.

***102** Oregon's Health Division has general supervisory powers over "matters relating to the preservation of life and health," Ore.Rev.Stat. § 431.110(1) (1987), including the licensing of hospitals, see § 441.025, and the enforcement of health laws, see §§ 431.120(1), 431.150, 431.155(1). Hospitals in Oregon are under a statutory obligation to establish peer-review procedures and to review those procedures on a regular basis. See, § 441.055(3)(c), (d). The ****1664** State Health Division, exercising its enforcement powers, may initiate judicial proceedings against any hospital violating this law. See §§ 431.150, 431.155. In addition, the Health Division may deny, suspend, or revoke a hospital's license for failure to comply with the statutory requirement. See § 441.030(2). Oregon law specifies no other ways in which the Health Division may supervise the peer-review process.

This statutory scheme does not establish a state program of active supervision over peer-review decisions. The Health Division's statutory authority over peer review relates only to a hospital's procedures;[6] that authority does not encompass the actual decisions made by hospital peer-review committees. The restraint challenged in this case (and in most cases of its kind) consists not in the procedures used to terminate hospital privileges, but in the termination of privileges itself. The State does not actively supervise this restraint unless a state official has and exercises ultimate authority over private privilege determinations. Oregon law does not give the Health Division this authority: under the statutory scheme, the Health Division has no power to review private peer-review decisions and overturn a decision that fails to accord with state policy. Thus, the activities of the Health ***103** Division under Oregon law cannot satisfy the active supervision requirement of the state-action doctrine.

Similarly, the BOME does not engage in active supervision over private peer-review decisions. The principal function of the BOME is to regulate the licensing of physicians in the State. As respondents note, Oregon hospitals are required by statute to notify the BOME promptly of a decision to terminate or restrict privileges. See Ore.Rev.Stat. § 441.820(1) (1987). Neither this statutory provision nor any other, however, indicates that the BOME has the power to disapprove private privilege decisions. The apparent purpose of the reporting requirement is to give the BOME an opportunity to determine whether additional action on its part, such as revocation of a physician's license, is warranted.[7] Certainly, respondents have not shown that the BOME in

practice reviews privilege decisions or that it ever has asserted the authority to reverse them.

The only remaining alleged supervisory authority in this case is the state judiciary. Respondents claim, and the Court of Appeals agreed, that Oregon's courts directly review privilege-termination decisions and that this judicial review constitutes active state supervision. This Court has not previously considered whether state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state-action doctrine. All of our prior cases concerning state supervision over private parties have involved administrative agencies, see, *e.g.,* ***104** *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), or State Supreme Courts with agency-like responsibilities over the organized bar, see *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977). This case, however, does not require us to decide the broad question whether judicial review of private conduct ever can constitute ****1665** active supervision, because judicial review of privilege-termination decisions in Oregon, if such review exists at all, falls far short of satisfying the active supervision requirement.

As an initial matter, it is not clear that Oregon law affords any direct judicial review of private peer-review decisions. Oregon has no statute expressly providing for judicial review of privilege terminations. Moreover, we are aware of no case in which an Oregon court has held that judicial review of peer-review decisions is available. The two cases that respondents have cited certainly do not hold that a physician whose privileges have been terminated by a private hospital is entitled to judicial review. In each of these cases, the Oregon Supreme Court assumed, but expressly did not decide, that a complaining physician was entitled to the kind of review he requested. See *Straube v. Emanuel Lutheran Charity Board,* 287 Or. 375, 383, 600 P.2d 381, 386 (1979) ("We have assumed (but not decided) for the purpose of this case that plaintiff is entitled to 'fair procedure' as a common law right"); *Huffaker v. Bailey,* 273 Or. 273, 275, 540 P.2d 1398, 1399 (1975) ("In view of our conclusion that petitioner cannot prevail even assuming the case is properly before us, we find it unnecessary to decide these interesting questions [of reviewability]. Therefore, we assume, but do not decide, that the hospital's decisions are subject to review by mandamus...").

Moreover, the Oregon courts have indicated that even if they were to provide judicial review of hospital peer-review proceedings, the review would be of a very limited nature. The Oregon Supreme Court, in its most recent decision addressing this matter, stated that a court "should [not] decide the merits of plaintiff's dismissal" and that "[i]t would be ***105** unwise for a court to do more than to make sure that some sort of reasonable procedure was afforded and that there was evidence from which it could be found that plaintiff's conduct posed a threat to patient care." *Straube v. Emanuel Lutheran Charity Board, supra,* 287 Or., at 384, 600 P.2d, at 386. This kind of review would fail to satisfy the state-action doctrine's requirement of active supervision. Under the standard suggested by the Oregon Supreme Court, a state court would not review the merits of a privilege termination decision to determine whether it accorded with state regulatory policy. Such constricted review does not convert the action of a private party in terminating a physician's privileges into the action of the State for purposes of the state-action doctrine.

Because we conclude that no state actor in Oregon actively supervises hospital peer-review decisions, we hold that the state-action doctrine does not protect the peer-review activities challenged in this case from application of the federal antitrust laws. In so holding, we are not unmindful of the policy argument that respondents and their *amici* have advanced for reaching the opposite conclusion. They contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, [8] peer ****1666** review is immune from antitrust scrutiny ***106** only if the State effectively has made this conduct its own. The State of Oregon has not done so. Accordingly, we reverse the judgment of the Court of Appeals.

It is so ordered.

Justice BLACKMUN took no part in the consideration or decision of this case.

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All Citations

486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83, 56 USLW 4430,
1988-1 Trade Cases P 67,997

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Petitioner originally named all of the partners of the Astoria Clinic as defendants. One partner, however, was dismissed from the suit at the close of petitioner's case at trial.

2 The court below did not address any issues arising from petitioner's decision to resign from the hospital staff prior to the ad hoc committee's determination, and respondents did not raise this matter in their response to the petition for certiorari. Accordingly, we do not address the significance, if any, of petitioner's resignation.

3 Viewing the evidence in the light most favorable to petitioner, as appropriate in light of the verdicts rendered by the jury, the Court of Appeals characterized respondents' conduct as “shabby, unprincipled and unprofessional.” 800 F.2d, at 1509.

4 The Court of Appeals also determined that respondent Russell's activities as a member of the BOME likewise were immune from antitrust liability under the state-action doctrine. As we read the petition for writ of certiorari in this case, petitioner has declined to challenge this holding of the Court of Appeals. Indeed, petitioner asserts that this holding makes no difference to him because he suffered little or no damage from the BOME proceedings or respondent Russell's participation therein. Because petitioner has not brought this aspect of the Court of Appeals' decision before us, we express no view as to its correctness.

5 The petition for certiorari also presented the question whether, assuming that respondent Russell's activities as a member of the BOME constitute state action and thus cannot directly form the basis for antitrust liability, evidence of those activities is admissible insofar as it indicates the presence of a nonimmune conspiracy in which Russell and others engaged. A close reading of the opinion below, however, reveals that the Court of Appeals did not address this question. This Court usually will decline to consider questions presented in a petition for certiorari that have not been considered by the lower court. See, *e.g., Youakim v. Miller,* 425 U.S. 231, 234, 96 S.Ct. 1399, 1401, 47 L.Ed.2d 701 (1976) *(per curiam).* We see no reason to depart from this practice in the case at bar. Accordingly, we take no position on the evidentiary question raised by petitioner.

6 Indeed, the statutory scheme indicates that the Health Division has only limited power over even a hospital's peer-review procedures. The statute authorizes the Health Division to force a hospital to comply with its obligation to establish and regularly review peer-review procedures, but the statute does not empower the Health Division to review the quality of the procedures that the hospital adopts.

7 The statutory provision requiring hospitals to inform the BOME of a decision to terminate privileges is only one of several statutory reporting requirements involving the BOME. Oregon law also provides that hospitals and licensees shall report medically incompetent conduct to the BOME. See Ore.Rev.Stat. § 677.415(2) (1987). Further, malpractice insurers must report all medical malpractice claims to the BOME. See, § 743.770. All of

these reporting requirements appear designed to ensure that the BOME will learn of instances of substandard medical care so that it can decide whether official action is warranted.

8 Congress in fact insulated certain medical peer-review activities from antitrust liability in the Health Care Quality Improvement Act of 1986, 42 U.S.C. § 11101 *et seq.* (1982 ed., Supp. IV). The Act, which was enacted well after the events at issue in this case and is not retroactive, essentially immunizes peer-review action from liability if the action was taken "in the reasonable belief that [it] was in the furtherance of quality health care." § 11112(a). The Act expressly provides that it does not change other "immunities under law," § 11115(a), including the state-action immunity, thus allowing States to immunize peer-review action that does not meet the federal standard. In enacting this measure, Congress clearly noted and responded to the concern that the possibility of antitrust liability will discourage effective peer review. If physicians believe that the Act provides insufficient immunity to protect the peer-review process fully, they must take that matter up with Congress.

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104 S.Ct. 1989
Supreme Court of the United States

Charles R. HOOVER et al., Petitioners
v.
Edward RONWIN

No. 82-1474
|
Argued Jan. 16, 1984.
|
Decided May 14, 1984.

Synopsis
Rehearing Denied June 25, 1984.

See 467 U.S. 1268, 104 S.Ct. 3564.

Unsuccessful applicant for admission to practice of law in Arizona brought action against the Arizona Supreme Court's Committee on Examinations and Admissions alleging that members of the Commission had conspired to restrain trade in violation of Sherman Act by reducing the number of competing attorneys in the state. The United States District Court for the District of Arizona dismissed and applicant appealed. The Court of Appeals for the Ninth Circuit, 686 F.2d 692, reversed, and certiorari was granted. The Supreme Court, Justice Powell, held that action of the Committee was action of the Arizona Supreme Court and thus was state action exempt from the antitrust laws.

Reversed.

Justice Stevens dissented and filed an opinion in which Justice White and Justice Blackmun joined.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion to Dismiss for Lack of Subject Matter Jurisdiction.

Syllabus [a1]

Respondent Ronwin (hereafter respondent) was an unsuccessful candidate for admission to the Arizona Bar in 1974. Pursuant to the Arizona Constitution, the Arizona Supreme Court has plenary authority to determine admissions to the bar. Under the Arizona Supreme Court Rules in effect in 1974, a Committee on Examinations and Admissions (Committee), appointed by the court, was authorized to examine applicants on specified subjects. The Rules required the Committee to submit its grading formula to the court prior to giving the examination. After grading the examination, the Committee was directed to submit its recommendations for the admission of applicants to the court, which then made the final decision to grant or deny admission to practice. Under the Rules, a rejected applicant was entitled to seek individualized review of the Committee's adverse recommendation by filing a petition with the court. After the Arizona Supreme Court denied respondent's petition for review, he ultimately filed this action in Federal District Court against the Arizona State Bar, members of the Committee (including petitioners), and others. Respondent alleged that petitioners had conspired to restrain trade in violation of § 1 of the Sherman Act by "artificially reducing the numbers of competing attorneys in the State." He argued that the Committee had set the grading scale on the examination with reference to the number of new attorneys it thought desirable, rather than with reference to some "suitable" level of competence. Petitioners contended that they were immune from antitrust liability under the state-action doctrine of Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. The District Court dismissed the complaint on the ground, inter alia, of failure to state a justiciable claim. The Court of Appeals reversed, holding that although petitioners ultimately might be able to show that they were entitled to state-action immunity, the District Court should not have decided the issue on a motion to dismiss.

Held: The District Court properly dismissed the complaint for failure to state a claim on which relief could be granted. Pp. 1995–2002.

(a) Under Parker, when a state legislature adopts legislation, its actions constitute those of the State and ipso facto are exempt from the operation of the antitrust laws. A state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature ***559** for purposes of the state-action doctrine. Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810. When the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization, there must be a showing that the challenged conduct is pursuant to a clearly articulated state policy to replace competition with regulation, and the degree to which the state legislature or supreme court supervises its representative may be relevant to the inquiry. However, where the challenged conduct is in fact that of the state legislature or

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supreme court, the issues of "clear articulation" and "active supervision" need not be addressed. Pp. 1995–1996.

(b) In this case, the actions of the Committee with regard to the bar examination grading formula cannot be divorced from the Arizona Supreme Court's exercise of its sovereign powers. Although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, under the court's Rules the court itself retained the sole authority to determine who should be admitted ****1991** to the practice of law in Arizona. Thus, the challenged conduct was in reality that of the Arizona Supreme Court and is therefore exempt from Sherman Act liability under the state-action doctrine. Cf. Bates v. State Bar of Arizona, supra. Pp. 1996–1998.

(c) Bates cannot be distinguished on the ground that the Arizona Supreme Court is not a petitioner in this case and was not named as a defendant in the complaint, or on the ground that Parker is inapplicable because respondent is not challenging the Arizona Supreme Court's conduct. The same situation existed in Bates. As in Bates, the real party in interest is the Arizona Supreme Court. The case law, as well as the State Supreme Court's Rules, makes clear that the court made the final decision on each applicant. To allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived illegal conspiracies among the committees, commissions, or others who necessarily must advise the sovereign would emasculate the Parker v. Brown doctrine. Pp. 1998–2001.

686 F.2d 692, reversed.

Attorneys and Law Firms

Charles R. Hoover, pro se, argued the cause for petitioners. With him on the briefs were Jefferson L. Lankford and Donn G. Kessler. Philip E. von Ammon filed a brief for the State ***560** Bar of Arizona et al. as respondents under this Court's Rule 19.6, in support of petitioners.

Respondent Edward Ronwin argued the cause andfiled a brief pro se.

Acting Solicitor General Wallace argued the cause for the United States as amicus curiae urging affirmance. With him on the brief were Assistant Attorney General Baxter, John H. Garvey, Barry Grossman and Nancy C. Garrison.*

* Briefs of amici curiae urging reversal were filed for the National Conference of Bar Examiners by Kurt W. Melchior, Allan Ashman, and Jan T. Chilton; and for the State Bar of California by Henry C. Thumann, Herbert M. Rosenthal, Truitt A. Richey, Jr., and Robert M. Sweet.

A brief of amici curiae was filed for the State of Colorado et al. by Stephen H. Sachs, Attorney General of Maryland, Charles O. Monk II and Linda H. Jones, Assistant Attorneys General, Duane Woodard, Attorney General of Colorado, Thomas P. McMahon, First Assistant Attorney General, Thomas J. Miller, Attorney General of Iowa, John R. Perkins, Assistant Attorney General, Robert Abrams, Attorney General of New York, Lloyd Constantine, Assistant Attorney General, William M. Leech, Jr., Attorney General of Tennessee, William J. Haynes, Jr., Deputy Attorney General, Jim Mattox, Attorney General of Texas, David R. Richards, Executive Assistant Attorney General, Bronson C. La Follette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General.

Opinion

Justice POWELL delivered the opinion of the Court.

This case presents the question whether the state-action doctrine of immunity from actions under the Sherman Act applies to the grading of bar examinations by the Committee appointed by, and according to the Rules of, the Arizona Supreme Court.

I

Respondent Ronwin was an unsuccessful candidate for admission to the Bar of Arizona in 1974. Petitioners were four members of the Arizona Supreme Court's Committee on Examinations and Admissions (Committee).[1] The Arizona ***561** Constitution vests authority in the court to determine who should be admitted to practice law in the State. Hunt v. Maricopa County Employees Merit System Comm'n, 127 Ariz. 259, 261–262, 619 P.2d 1036, 1038–1039 (1980); see also Ariz.Rev.Stat.Ann. § 32–275 (1976). Pursuant to that authority, the Arizona Supreme Court established the Committee to examine and recommend applicants for admission to the Arizona Bar.[2] The Arizona Supreme Court Rules, adopted by the court and in effect in 1974,[3] ****1992** delegated certain responsibilities to the Committee while reserving to the court the ultimate authority to grant or deny admission. The ***562** Rules provided that the Committee

"shall examine applicants" on subjects enumerated in the Rules and "recommend to th[e] court for admission to practice" applicants found to have the requisite qualifications. Rule 28(a) (1973).[4] They also authorized the Committee to "utilize such grading or scoring system as the Committee deems appropriate in its discretion,"[5] and to use the Multi–State Bar Examination. Rule 28(c) VII A (1973), as amended, 110 Ariz. xxvii, xxxii (1974). Even with respect to "grading or scoring," the court did not delegate final authority to the Committee. The Rules directed the Committee to file the formula it intended to use in grading the examination with the court 30 days prior to giving the examination.[6] Also, after grading the examination and compiling the list of those applicants whom it considered ***563** qualified to practice law in the State, the Committee was directed to submit its recommendations to the court for final action. Rule 28(a). Under the Rules and Arizona case law, only the court had authority to admit or deny admission.[7] Finally, a rejected applicant was entitled to seek individualized review of an adverse recommendation of the Committee by filing a petition directly with the court.[8] ****1993** The ***564** Rules required the Committee to file a response to such a petition and called for a prompt and fair decision on the applicant's claims by the Arizona Supreme Court.

Ronwin took the Arizona bar examination in February 1974.[9] He failed to pass, the Committee recommended to the Arizona Supreme Court that it deny him admission to the Bar, and the court accepted the recommendation. Ronwin petitioned the court to review the manner in which the Committee conducted and graded the examination. In particular, he alleged that the Committee had failed to provide him with model answers to the examination, had failed to file its grading formula with the court within the time period specified in the Rules, had applied a "draconian" pass-fail process, had used a grading formula that measured group, rather than individual, performance, had failed to test applicants on an area of the law on which the Rules required testing, and had conducted the examination in a "pressure-cooker atmosphere." He further alleged that the Committee's conduct constituted an abuse of discretion, deprived him of due process and equal protection, and violated the Sherman Act.[10] The court denied his petition and two subsequent petitions for rehearing.[11] Ronwin then sought review of the Arizona ***565** Supreme Court's action in this Court. We denied his petition for certiorari. 419 U.S. 967, 95 S.Ct. 231, 42 L.Ed.2d 183 (1974).

Some four years later, in March 1978, Ronwin filed this action in the United States District Court for the District of Arizona. Petitioners were named as defendants in the suit in their capacity as individual members of the Committee.[12] Ronwin renewed his complaint that petitioners had conspired to restrain trade in violation of § 1 of the Sherman Act, 26 Stat. 209, 15 U.S.C. § 1, by "artificially reducing the numbers of competing attorneys in the State of Arizona."[13] The gist ****1994** of Ronwin's argument is that the Committee of which petitioners constituted a majority had set the grading scale on the February examination with reference to the number of new attorneys they thought desirable, rather than with reference to some "suitable" level of competence. Petitioners moved to dismiss the complaint under Federal Rule of Civil Procedure 12(b)(6) for failure to state a claim upon which ***566** relief could be granted, and under Federal Rule of Civil Procedure 12(b)(1) for lack of subject-matter jurisdiction. In particular, petitioners alleged that, acting as a Committee, they were immune from antitrust liability under Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Petitioners also argued that Ronwin suffered no damage from the conduct of which he complained and that the Committee's conduct had not affected interstate commerce. The District Court granted petitioners' motion after finding that the complaint failed to state a justiciable claim, that the court had no jurisdiction, and that Ronwin lacked standing.[14]

The Court of Appeals for the Ninth Circuit reversed the dismissal of the complaint. Ronwin v. State Bar of Arizona, 686 F.2d 692 (1982). The Court of Appeals read the District Court's ruling that Ronwin had failed to state a claim as a holding that bar examination grading procedures are immune from federal antitrust laws under Parker v. Brown. It reasoned that, although petitioners ultimately might be able to show that they are entitled to state-action immunity, the District Court should not have decided this issue on a Rule 12(b)(6) motion. See 686 F.2d, at 698. The court stated that under Parker and its progeny, the mere fact that petitioners were state officials appointed by the Arizona Supreme Court was insufficient to confer state-action immunity on them. 686 F.2d, at 697. Relying on its reading of several recent opinions of this Court,[15] the Court of Appeals noted that the petitioners might be able to invoke the state-action ***567** doctrine, but reasoned that they first must show that they were acting pursuant to a "clearly articulated and affirmatively expressed ... state policy." Id., at 696. Therefore, dismissal for failure to state a claim was improper. The court also held

that Ronwin had standing to bring this action. The case was remanded to the District Court for further action. [16]

We granted certiorari to review the Court of Appeals' application of the state-action doctrine. 461 U.S. 926, 103 S.Ct. 2084, 77 L.Ed.2d 296 (1983). We now reverse.

II

The starting point in any analysis involving the state-action doctrine is the reasoning of Parker v. Brown. In Parker, ****1995** the Court considered the antitrust implications of the California Agriculture Prorate Act—a state statute that restricted competition among food producers in California. Relying on principles of federalism and state sovereignty, the Court declined to construe the Sherman Act as prohibiting the anticompetitive actions of a State acting through its legislature:

"We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S., at 350–351, 63 S.Ct., at 313.

Thus, under the Court's rationale in Parker, when a state legislature adopts legislation, its actions constitute those of ***568** the State, see id., at 351, 63 S.Ct., at 313, and ipso facto are exempt from the operation of the antitrust laws.

In the years since the decision in Parker, the Court has had occasion in several cases to determine the scope of the state-action doctrine. It has never departed, however, from Parker's basic reasoning. Applying the Parker doctrine in Bates v. State Bar of Arizona, 433 U.S. 350, 360, 97 S.Ct. 2691, 2697, 53 L.Ed.2d 810 (1977), the Court held that a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature. Therefore, a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action. See also Goldfarb v. Virginia State Bar, 421 U.S. 773, 790, 95 S.Ct. 2004, 2014, 44 L.Ed.2d 572 (1975). Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, [17] but is carried out by others pursuant to state authorization. See, e.g., Community Communications Co. v. Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982) (municipal regulation of cable television industry); California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) (private price-fixing arrangement authorized by State); New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96 (1978) (new franchises controlled by state administrative board). In such cases, it becomes important to ensure that the anticompetitive conduct of the State's representative was contemplated by the State. Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413–415, 98 S.Ct. 1123, 1137–1138, 55 L.Ed.2d 364 (1978) (opinion of BRENNAN, J.); see New Mexico v. American Petrofina, Inc., 501 F.2d 363, 369–370 (CA9 1974). If the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of Parker is inapposite. As a result, in cases ***569** involving the anticompetitive conduct of a nonsovereign state representative the Court has required a showing that the conduct is pursuant to a "clearly articulated and affirmatively expressed state policy" to replace competition with regulation. Boulder, supra, at 54, 102 S.Ct., at 842. The Court also has found the degree to which the state legislature or supreme court supervises its representative to be relevant to the inquiry. See Midcal Aluminum, supra, at 105, 100 S.Ct., at 943; Goldfarb, supra, at 791, 95 S.Ct., at 2015. When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of "clear articulation" and "active supervision."

****1996** Pursuant to the State Constitution the Arizona Supreme Court has plenary authority to determine admissions to the bar. [18] Therefore, the first critical step in our analysis must be to determine whether the conduct challenged here is that of the court. If so, the Parker doctrine applies and Ronwin has no cause of action under the Sherman Act.

III

At issue here is the Arizona plan of determining admissions to the bar, and petitioners' use thereunder of a grading formula. Ronwin has alleged that petitioners conspired to use ***570** that formula to restrain competition among lawyers. [19] His argument is that, although petitioners qualified as state officials in their capacity as members of the Committee, they acted independently of the Arizona Supreme Court. As a

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result, the argument continues, the Committee's actions are those of a Supreme Court representative, rather than those of the court itself, and therefore are not entitled to immunity.

We cannot agree that the actions of the Committee can be divorced from the Supreme Court's exercise of its sovereign powers. The Court's opinion in Bates v. State Bar of Arizona, 433 U.S., at 360, 97 S.Ct. 2691, 2697, 53 L.Ed.2d 810, is directly pertinent.[20] In Bates, two ***571** attorneys were suspended temporarily from the practice of law in Arizona for violating a disciplinary rule of the American Bar Association (ABA) that prohibited most lawyer advertising. The Arizona Supreme Court had incorporated the ABA's advertising prohibition ****1997** into the local Supreme Court Rules.[21] Those Rules also provided that the Board of Governors of the Arizona State Bar Association, acting on the recommendation of a local Bar disciplinary committee, could recommend the censure or suspension of a member of the Bar for violating the advertising ban. Under the Rules, the Board of Governor's recommendation automatically would become effective if the aggrieved party did not object to the recommendation within 10 days. If the party objected, he was entitled to have the Arizona Supreme Court review the findings and recommendations of the Board of Governors and the local committee. The plaintiffs challenged the Rule on Sherman Act and First Amendment grounds. This Court ultimately concluded that the ABA Rule violated the First Amendment, but it first held that the State Bar Association was immune from Sherman Act liability because its enforcement of the disciplinary Rules was state action. In reaching this conclusion, the Court noted that, although only the State Bar was named as a defendant in the suit, the suspended attorneys' complaint was with the State. The Court stated:

"[T]he appellants' claims are against the State. The Arizona Supreme Court is the real party in interest; it adopted the rules, and it is the ultimate trier of fact and law in the enforcement process. ***572** In re Wilson, 106 Ariz. 34, 470 P.2d 441 (1970). Although the State Bar plays a part in the enforcement of the rules, its role is completely defined by the court; the [State Bar] acts as the agent of the court under its continuous supervision."

Id., 433 U.S., at 361, 97 S.Ct., at 2697. The opinion and holding in Bates with respect to the state-action doctrine were unanimous.

The logic of the Court's holding in Bates applies with greater force to the Committee and its actions. The petitioners here were each members of an official body selected and appointed by the Arizona Supreme Court. Indeed, it is conceded that they were state officers. The court gave the members of the Committee discretion in compiling and grading the bar examination, but retained strict supervisory powers and ultimate full authority over its actions. The Supreme Court Rules specified the subjects to be tested, and the general qualifications required of applicants for the Bar. With respect to the specific conduct of which Ronwin complained—establishment of an examination grading formula—the Rules were explicit. Rule 28(c) VII A authorized the Committee to determine an appropriate "grading or scoring system" and Rule 28(c) VII B required the Committee to submit its grading formula to the Supreme Court at least 30 days prior to the examination.[22] After giving and grading the examination, the Committee's authority was limited to ***573** making recommendations to the Supreme Court. The court itself made the final decision to grant or deny admission to practice. Finally, Rule 28(c) XII F provided for a detailed mandatory review procedure by which an aggrieved candidate could challenge the Committee's grading formula.[23] In light of these provisions ****1998** and the Court's holding and reasoning in Bates, we conclude that, although the Arizona Supreme Court necessarily delegated the administration of the admissions process to the Committee, the court itself approved the particular grading formula and retained the sole authority to determine who should be admitted to the practice of law in Arizona. Thus, the conduct that Ronwin challenges was in reality that of the Arizona Supreme Court. See Bates, 433 U.S., at 361, 97 S.Ct., at 2697. It therefore is exempt from Sherman Act liability under the state-action doctrine of Parker v. Brown.[24]

***574** At oral argument, Ronwin suggested that we should not attribute to the Arizona Supreme Court an intent to approve the anticompetitive activity of petitioners in the absence of proof that the court was aware that petitioners had devised a grading formula the purpose of which was to limit the number of lawyers in the State. This argument misconceives the basis of the state-action doctrine. The reason that state action is immune from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act. "There is no suggestion of a purpose to restrain state action in the [Sherman] Act's legislative history." Parker, 317 U.S., at 351, 63 S.Ct., at 313. The Court did not suggest in Parker, nor has it suggested since, that a state action is exempt from antitrust liability only if the sovereign acted wisely after full disclosure from its subordinate officers. The only requirement is that the action be that of "the State acting as a sovereign."

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Bates, supra, at 360, 97 S.Ct., at 2697. The action at issue here, whether anticompetitive or not, clearly was that of the Arizona Supreme Court. [25]

IV

The dissenting opinion of Justice STEVENS would, if it were adopted, alter dramatically the doctrine of state-action immunity. We therefore reply directly. The dissent concedes, as it must, that "the Arizona Supreme Court exercises sovereign power with respect to admission to the Arizona Bar," and "if the challenged conduct were that of the court, it would be immune under Parker." Post, at 2006. It also is conceded ***575** that the members of the court's Committee on Examinations and ****1999** Admissions—petitioners here—are state officers. These concessions are compelled by the Court's decision in Bates, and we think they dispose of Ronwin's contentions.

In its effort to distinguish Bates, the dissent notes that the Arizona Supreme Court "is not a petitioner [in this case], nor was it named as a defendant in respondent's complaint," and "because respondent is not challenging the conduct of the Arizona Supreme Court, Parker [v. Brown] is simply inapplicable." Post, at 2006. The dissent fails to recognize that this is precisely the situation that existed in Bates. In that case, the Supreme Court of Arizona was not a party in this Court, nor was it named as a defendant by the complaining lawyers. Yet, in our unanimous opinion, we concluded that the claims by appellants in Bates were "against the State," and that the "Arizona Supreme Court [was] the real party in interest; it adopted the rules, and it [was] the ultimate trier of fact and law in the enforcement process." Bates v. State Bar of Arizona, supra, at 361, 97 S.Ct., at 2697; see supra, at 1997. [26]

The core argument of the dissent is that Ronwin has challenged only the action of the Committee and not that of the Arizona Supreme Court. It states that "there is no claim that the court directed [the Committee] to artificially reduce the number of lawyers in Arizona," and therefore the Committee cannot assert the sovereign's antitrust immunity. Post, at 2008 (emphasis in original). The dissent does not acknowledge that, conspire as they might, the Committee could not reduce the number of lawyers in Arizona. [27] Only ***576** the Arizona Supreme Court had the authority to grant or deny admission to practice in the State. [28] As in Bates "[t]he Arizona Supreme Court is the real party in interest." 433 U.S., at 361, 97 S.Ct., at 2697.

The dissent largely ignores the Rules of the Arizona Supreme Court. [29] A summary of the court's commands suggests why the dissent apparently prefers not to address them. The Arizona Supreme Court established the Committee for the sole purpose of examining and recommending applicants for admission to the Bar. Rule 28(a). Its Rules provided: "The examination and admission of applicants ... shall conform to this Rule.... The committee shall examine applicants and recommend [qualified applicants] to this court.... Two examinations will be held each year...." Ibid.; Rule 28(c) VI (1973), as amended, 110 Ariz. xxxii (1974) (emphasis added). The Rules also specified the subjects to be tested and required the Committee to submit its grading formula to the court in advance of each examination. Rule 28(c) VII (1973), as amended, 110 Ariz. xxxii (1974).

As a further safeguard, a disappointed applicant was accorded the right to seek individualized review by filing a petition directly with the court—as Ronwin did unsuccessfully. ****2000** Pursuant to Rule 28(c) XII F, Ronwin filed a complaint with the court that contained a plethora of charges ***577** including the substance of the complaint in this case. The court denied his petition as well as two petitions for rehearing. See supra, at 1993. Thus, again there was state action by the court itself explicitly rejecting Ronwin's claim. [30] Finally, the ***578** case law, as well as the Rules, makes clear that the Arizona Supreme Court made the final decision on each applicant. [31] See n. 6, supra. Unlike the actions of the Virginia State Bar in Goldfarb, the actions of the Committee are governed by the court's Rules. Those Rules carefully reserve to the court the authority to make the decision to admit or deny, and that ****2001** decision is the critical state action here. [32] See ***579** Bates, 433 U.S., at 359–361, 97 S.Ct. at 2696–2697. Our opinion, therefore, also is wholly consistent with the Court's reasoning in Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S.Ct. 1123, 53 L.Ed.2d 364 (1978) and Community Communications Co. v. Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). [33]

Our holding is derived directly from the reasoning of Parker and Bates. Those cases unmistakably hold that, where the action complained of—here the failure to admit ***580** Ronwin to the Bar—was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action. Application of that standard to the facts of this case requires that we reverse the judgment of the Court of Appeals.

The reasoning adopted by the dissent would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the Parker v. Brown doctrine. For example, if a state legislature enacted a law based on studies performed, or advice given, by an advisory committee, the dissent would find the State exempt from Sherman Act liability but not the committee. A party dissatisfied with the new law could circumvent the state-action doctrine by alleging that the committee's advice reflected an undisclosed collective desire to restrain trade without the knowledge of the legislature. The plaintiff certainly would survive a motion to dismiss—or even summary judgment—despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in Parker. [34]

****2002** ***581** In summary, this case turns on a narrow and specific issue: who denied Ronwin admission to the Arizona Bar? The dissent argues, in effect, that since there is no court order in the record, the denial must have been the action of the Committee. This argument ignores the incontrovertible fact that under the law of Arizona only the State Supreme Court had authority to admit or deny admission to practice law:
"[It] is not the function of the committee to grant or deny admission to the bar. That power rests solely in the Supreme Court...." Application of Burke, 87 Ariz. 336, 338, 351 P.2d 169, 171 (1960) (see n. 30, supra).

Thus, if the dissent's argument were accepted all decisions made with respect to admissions and denials of those who took the examination in February 1974 are void. Ronwin did not allege that he alone was a victim: his complaint avers ***582** that he "was among those artificially prevented from entering into competition as an attorney in the state of Arizona" by the Committee's action with respect to the February 1974 examination. We are unwilling to assume that the Arizona Supreme Court failed to comply with state law, and allowed the Committee alone to make the decisions with respect to the February 1974 examination. In any event, the record is explicit that Ronwin's postexamination petition complaining about his denial was rejected by an order of the Arizona Supreme Court. That there was state action at least as to Ronwin could not be clearer.

V

We conclude that the District Court properly dismissed Ronwin's complaint for failure to state a claim upon which relief can be granted. Therefore, the judgment of the Court of Appeals is

Reversed.

Justice REHNQUIST took no part in the decision of this case.

Justice O'CONNOR took no part in the consideration or decision of this case.

Justice STEVENS, with whom Justice WHITE and Justice BLACKMUN join, dissenting.

In 14th-century London the bakers' guild regulated the economics of the craft and ****2003** the quality of its product. In the year 1316, it was adjudged that one Richard de Lughteburghe "should have the punishment of the hurdle" because he sold certain loaves of bread in London; the bread had been baked in Suthwerke, rather than London, and the loaves were not of "the proper weight." [1] Thus Richard had violated ***583** a guild restriction designed to protect the economic interests of the local bakers [2] as well as a restriction designed to protect the public from the purchase of inferior products.

For centuries the common law of restraint of trade has been concerned with restrictions on entry into particular professions and occupations. As the case of the Suthwerke baker illustrates, the restrictions imposed by medieval English guilds served two important but quite different purposes. The guilds limited the number of persons who might engage in a particular craft in order to be sure that there was enough work available to enable guild members to earn an adequate livelihood. [3] They also protected the public by ensuring that apprentices, journeymen, and master craftsmen would have the skills that were required for their work. In numerous occupations today, licensing requirements [4] may serve ***584** either or both of the broad purposes of the medieval guild restrictions.

The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of both the development of the common law of restraint of trade and our antitrust jurisprudence. At the same time, the risk that the free market may not adequately protect the public from purveyors

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of inferior goods and services has provided a legitimate justification for the public regulation of entry into a wide variety of occupations. Private regulation is generally proscribed by the antitrust laws; public regulation is generally consistent with antitrust ****2004** policy. A potential conflict arises, however, whenever government delegates licensing power to private parties whose economic interests may be served by limiting the number of competitors who may engage in a particular trade. In fact private parties have used licensing to advance their own interests in restraining competition at the expense of the public interest. See generally Gellhorn, The Abuse of Occupational Licensing, 44 U.Chi.L.Rev. 6 (1976).

The potential conflict with the antitrust laws may be avoided in either of two ways. The State may itself formulate the governing standards and administer the procedures ***585** that determine whether or not particular applicants are qualified. When the State itself governs entry into a profession, the evils associated with giving power over a market to those who stand to benefit from inhibiting entry into that market are absent. For that reason, state action of that kind, even if it is specifically designed to control output and to regulate prices, does not violate the antitrust laws. Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). Alternatively, the State may delegate to private parties the authority to formulate the standards and to determine the qualifications of particular applicants. When that authority is delegated to those with a stake in the competitive conditions within the market, there is a risk that public power will be exercised for private benefit. To minimize that risk, state policies displacing competition must be "clearly and affirmatively expressed" and must be appropriately supervised. See Community Communications Co. v. Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 103–106, 100 S.Ct. 937, 942–943, 63 L.Ed.2d 233 (1980).

In this case respondent has been unable to obtain a license to practice law in Arizona. He alleges that this is not because of any doubts about his competence as a lawyer, but because petitioners have engaged in an anticompetitive conspiracy in which they have used the Arizona bar examination to artificially limit the number of persons permitted to practice law in that State. Petitioners claim that the alleged conspiracy is not actionable under § 1 of the Sherman Act, 15 U.S.C. § 1, because it represents the decision of the State. But petitioners do not identify any state body that has decided that it is in the public interest to limit entry of even fully qualified persons into the Arizona Bar. Indeed, the conspiracy that is alleged is not the product of any regulatory scheme at all; there is no evidence that any criterion except competence has been adopted by Arizona as the basis for granting licenses to practice law. The conspiracy respondent has alleged is private; market participants are allegedly ***586** attempting to protect their competitive position through a misuse of their powers. Yet the Court holds that this conspiracy is cloaked in the State's immunity from the antitrust laws. In my judgment, the competitive ideal of the Sherman Act may not be so easily escaped.

I

Petitioners are members of the Arizona Supreme Court's Committee on Examinations and Admissions. The Arizona Supreme Court established the Committee to recommend applicants for admission to the Arizona Bar; it consists of seven members of the State Bar selected from a list of nominees supplied by the Arizona State Bar Association's Board of Governors.[5] Petitioners administered the 1974 bar examination which respondent took and failed. In his complaint, respondent alleged that after the scores of each candidate were known, petitioners selected a particular score which would equal the passing grade. The complaint alleges that the petitioners would adjust the grading formula in order to limit the number of persons who could enter the market and compete with members of the Arizona Bar. ****2005** In this manner, respondent was "artificially prevented from entering into competition as an attorney in the State of Arizona."[6]

The Arizona Supreme Court has instructed petitioners to recommend for admission to the Bar "[a]ll applicants who receive a passing grade in the general examination and who are found to be otherwise qualified...."[7] There is no indication that any criterion other than competence is appropriate under the Supreme Court's Rules for regulating admission to the Bar.[8] Indeed with respect to respondent's application ***587** for admission, the Arizona Supreme Court wrote: "The practice of law is not a privilege but a right, conditioned solely upon the requirement that a person have the necessary mental, physical and moral qualifications." Application of Ronwin, 113 Ariz. 357, 358, 555 P.2d 315, 316 (1976), cert. denied, 430 U.S. 907, 97 S.Ct. 1178, 51 L.Ed. 583 (1977). In short, one looks in vain in Arizona law, petitioners' briefs, or the pronouncements of the Arizona Supreme Court for an articulation of any policy beside that of admitting only competent attorneys to practice in Arizona.

Thus, respondent does not challenge any state policy. He contests neither the decision to license those who wish to practice law, nor the decision to require a certain level of competence, as measured in a bar examination, as a precondition to licensing. Instead, he challenges an alleged decision to exclude even competent attorneys from practice in Arizona in order to protect the interests of the Arizona Bar.

As we have often reiterated in cases that involve the sufficiency of a pleading, a federal court may not dismiss a complaint for failure to state a claim unless it appears beyond doubt, even when the complaint is liberally construed, that the plaintiff can prove no set of facts which would entitle him to relief. [9] The allegations of the complaint must be taken as true for purposes of a decision on the pleadings. [10]

A judge reading a complaint of this kind is understandably somewhat skeptical. It seems highly improbable that members of the profession entrusted by the State Supreme Court ***588** with a public obligation to administer an examination system that will measure applicants' competence would betray that trust, and secretly subvert that system to serve their private ends. Nevertheless, the probability that respondent will not prevail at trial is no justification for dismissing the complaint. "Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test." Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 1686, 40 L.Ed.2d 90 (1974). The Court does not purport to justify dismissal of this complaint by reference to the low probability that respondent will prevail at trial. Instead, it substantially broadens the doctrine of antitrust immunity, using an elephant gun to kill a flea.

****2006** II

If respondent were challenging a restraint of trade imposed by the sovereign itself, this case would be governed by Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), which held that the Sherman Act does not apply to the sovereign acts of States. See id., at 350–352, 63 S.Ct. at 313–314. As the Court points out, the Arizona Supreme Court exercises sovereign power with respect to admission to the Arizona Bar; hence if the challenged conduct were that of the court, it would be immune under Parker. Ante, at 1995–1996. [11] The majority's conclusion that the challenged action was that of the Arizona Supreme Court is, however, plainly wrong. Respondent alleged that the decision to place an artificial limit on the number of lawyers was made by petitioners—not by the State Supreme Court. There is no contention that petitioners made that decision at the direction or behest of the Supreme Court. That court is not a petitioner, nor was it named as a defendant in respondent's complaint. Nor, unlike the Court, have petitioners suggested that the Arizona Supreme Court played any part in establishing the grading standards for the bar examination ***589** or made any independent decision to admit or reject any individual applicant for admission to the Bar. [12] Because respondent is not challenging the conduct of the Arizona Supreme Court, Parker is simply inapplicable.

Any possible claim that the challenged conduct is that of the State Supreme Court is squarely foreclosed by Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). There an antitrust action was brought challenging minimum-fee schedules published by a county bar association and enforced by the State Bar pursuant to its mandate from the Virginia Supreme Court to regulate the practice of law in that State. After acknowledging that the State Bar was a state agency which had enforced the schedules pursuant to the authority granted it by the State Supreme Court, we stated a simple test for antitrust immunity:

"The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. Here we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent. Respondents have pointed to no Virginia statute requiring their activities; state law simply does not refer to fees, leaving regulation of the profession to the Virginia Supreme Court; although the Supreme Court's ethical codes mention advisory fee schedules they do not direct either respondent ***590** to supply them, or require the type of price floor which arose from respondents' activities." Id., at 790, 95 S.Ct. at 2014 (emphasis supplied) (citations omitted).

In Bates v. State Bar of Arizona, 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977), the Court applied the Goldfarb test to a disciplinary rule restricting advertising by Arizona attorneys that the Supreme Court itself "has imposed and enforces," 433 U.S., at 353, 97 S.Ct., at 2693:

"In the instant case ... the challenged restraint is the affirmative command of the Arizona Supreme Court under its Rules 27(a) and 29(a) and its Disciplinary Rule 2–101(B). That court is the ultimate body wielding the State's power ****2007** over the practice of law, see Ariz. Const., Art. 3;

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In re Bailey, 30 Ariz. 407, 248 P. 29 (1926), and, thus, the restraint is 'compelled by direction of the State acting as a sovereign.' 421 U.S., at 791, 95 S.Ct., at 2015 (footnote omitted)." Id., at 359–360, 97 S.Ct., at 2696–2697.

The test stated in Goldfarb and Bates is that the sovereign must require the restraint. Indeed, that test is derived from Parker itself: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature [or supreme court]." 317 U.S., at 350–351, 63 S.Ct., at 313 (emphasis supplied). Here, the sovereign is the State Supreme Court, not petitioners, and the court did not require petitioners to grade the bar examination as they did. [13] The fact that petitioners are part of a state agency under the direction of the sovereign is insufficient to cloak them in the sovereign's immunity; that much was also decided in Goldfarb:

***591** "The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar, by providing that deviation from County Bar minimum fees may lead to disciplinary action, has voluntarily joined in what is essentially a private anticompetitive activity, and in that posture cannot claim it is beyond the reach of the Sherman Act." 421 U.S., at 791–792, 95 S.Ct., at 2015 (footnotes and citation omitted).

"Goldfarb therefore made it clear that, for purposes of the Parker doctrine, not every act of a state agency is that of the State as sovereign." Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (plurality opinion). Rather, "anticompetitive actions of a state instrumentality not compelled by the State acting as sovereign are not immune from the antitrust laws." Id., at 411, n. 41, 98 S.Ct., at 1136, n. 41. See also id., at 425, 98 S.Ct., at 1143 (opinion of BURGER, C.J.); Cantor v. Detroit Edison Co., 428 U.S. 579, 604, 96 S.Ct. 3110, 3124, 49 L.Ed.2d 1141 (1976) (opinion of BURGER, C.J.). An antitrust attack falls under Parker only when it challenges a decision of the sovereign and not the decision of the state bar which indisputably is not the sovereign. See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 104–105, 100 S.Ct. 937, 942–943, 63 L.Ed.2d 233 (1980). [14] Here no decision of the sovereign, the Arizona Supreme Court, is attacked; [15] only a ***592** conspiracy of petitioners which was neither compelled nor directed by the sovereign is at stake. Since there is no claim that the court directed petitioners to artificially reduce the number of lawyers in Arizona, petitioners ****2008** cannot utilize the sovereign's antitrust immunity. [16]

The majority's confused analysis is illustrated by its difficulty in identifying the sovereign conduct which it thinks is at issue here. To support its conclusion that the challenged action is that of the Arizona Supreme Court, the majority suggests that what respondent challenges is the court's decision to deny respondent's application for admission to the Bar. Ante, at 2000, n. 30. I find nothing in the record to indicate that the court ever made such a decision. Respondent's complaint alleges only that petitioners "announced the results" of the bar examination. App. 9. In their answer, petitioners admitted this and added nothing else of significance. Id., at 17. The Rules of the Supreme Court do not call for the court to deny the application of a person who has failed the bar examination; rather they state only that any "applicant aggrieved by any decision of the Committee ... may within 20 days after such occurrence file a verified petition ***593** with this Court for a review." Ariz.Sup.Ct.Rule 28(c) XII. Yet the Court disavows reliance on the Supreme Court's denial of Ronwin's petition, ante, at 2000, n. 30, [17] and with good reason, see n. 15, supra. [18] Thus, if the Supreme Court did not itself deny Ronwin's application, if its denial of Ronwin's petition for review is irrelevant, and if the only criterion it ever required petitioners to employ was competence, it is difficult to see why petitioners should have immunity from the requirements of federal law if, as alleged, they took the initiative in employing a criterion other than competence. "It is not enough that ... anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." Goldfarb, 421 U.S., at 791, 95 S.Ct., at 2015.

III

It is, of course, true that the Arizona Supreme Court delegated to petitioners the task of administering the bar exam, and retained the authority to review or revise any action taken by petitioners. However, neither of these factors ***594** is sufficient to accord petitioners immunity under the Sherman Act.

In Bates, the Court held that the State Bar's restrictions on attorney advertising qualified for antitrust immunity, 433 U.S., at 359–362, 97 S.Ct., at 2696–2698, because "the state policy requiring the anticompetitive restraint as part of a

comprehensive regulatory system, was one clearly articulated and affirmatively expressed as state ****2009** policy, and that the State's policy was actively supervised by the State Supreme Court as the policymaker." Lafayette, 435 U.S., at 410, 98 S.Ct., at 1135 (plurality opinion) (footnote omitted). This Court has since "adopted the principle, expressed in the plurality opinion in Lafayette, that anticompetitive restraints engaged in by state municipalities or subdivisions must be 'clearly articulated and affirmatively expressed as state policy' in order to gain an antitrust exemption." Community Communications Co. v. Boulder, 455 U.S., at 51, n. 14, 102 S.Ct., at 841, n. 14 (quoting Midcal, 445 U.S., at 105, 100 S.Ct., at 943).[19]

Here there is nothing approaching a clearly articulated and affirmatively expressed state policy favoring an artificial limit on the number of lawyers licensed to practice in Arizona. Indeed, the majority does not attempt to argue that petitioners satisfy this test. The only articulated policy to be found in Arizona law is that competent lawyers should be admitted to practice; indeed this is the only policy petitioners articulate in this Court. An agreement of the type alleged in respondent's complaint is entirely unrelated to any "clearly articulated and affirmatively expressed" policy of Arizona. While the Arizona Supreme Court may have permitted petitioners to grade and score respondent's bar examination as they did, Parker itself indicates that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful...." 317 U.S., at 351, 63 S.Ct., at 313. The Arizona Supreme Court ***595** may permit the challenged restraint, but it has hardly required it as a consequence of some affirmatively expressed and clearly articulated policy. What we said of a state home-rule provision that permitted but did not require municipalities to adopt a challenged restraint on competition applies fully here:

"[P]lainly the requirement of 'clear articulation and affirmative expression' is not satisfied when the State's position is one of mere neutrality respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have 'contemplated' the specific anticompetitive actions for which municipal liability is sought.... Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." Boulder, 455 U.S., at 55–56, 102 S.Ct., at 842–843 (emphasis in original).

Unless the Arizona Supreme Court affirmatively directed petitioners to restrain competition by limiting the number of otherwise qualified lawyers admitted to practice in Arizona, it simply cannot be said that its position is anything more than one of neutrality; mere authorization for anticompetitive conduct is wholly insufficient to satisfy the test for antitrust immunity. See Midcal, 445 U.S., at 105–106, 100 S.Ct., at 943; Lafayette, 435 U.S., at 414–415, 98 S.Ct., at 1137–1138 (plurality opinion).[20] ****2010** No ***596** affirmative decision of the Arizona Supreme Court to restrain competition by limiting the number of qualified persons admitted to the Bar is disclosed on the present record. The alleged conspiracy to introduce a factor other than competence into the bar examination process is not the product of a clearly articulated and affirmatively expressed state policy and hence does not qualify for antitrust immunity.[21]

IV

The conclusion that enough has been alleged in the complaint to survive a motion to dismiss does not warrant the further conclusion that the respondent is likely to prevail at ***597** trial, or even that his case is likely to survive a motion for summary judgment. For it is perfectly clear that the admissions policy that is described in the Arizona Supreme Court's Rules does not offend the Sherman Act. Any examination procedure will place a significant barrier to entry into the profession; moreover, a significant measure of discretion must be employed in the administration of testing procedures. Yet ensuring that only the competent are licensed to serve the public is entirely consistent with the Sherman Act. See Goldfarb, 421 U.S., at 792–793, 95 S.Ct., at 2015–2016.[22]

The Court is concerned about the danger that because thousands of aspirants fail to pass bar examinations every year, "affirmance of the Court of Appeals in this case could well invite numerous suits" questioning bar examiners' motives; the Court fears that the burdens of discovery and trial and "the threat of treble damages" will deter " 'able citizens' from performing this essential public service." Ante, at 2002, n. 34. The Court is, I submit, unduly alarmed.[23] A ***598** denial of antitrust immunity ****2011** in this case would not necessarily pose any realistic threat of liability, or even of prolonged litigation. Respondent must first produce sufficient evidence that petitioners have indeed abused their

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public trust to survive summary judgment, a task that no doubt will prove formidable.[24] Moreover, petitioners' motives will not necessarily be relevant to respondent's case. If the proof demonstrates that petitioners have adopted a reasonable means for regulating admission to the Arizona Bar on the basis of competence, respondent will be unable to show the requisite adverse effect on competition even if the subjective motivation of one or more bar examiners was tainted by sinister self-interest. Indeed, even if respondent can show that he was "arbitrarily" denied admission to the Bar for reasons unrelated to his qualifications, unless he can also show that this occurred as part of an anticompetitive scheme, his antitrust claim will fail.

In any event, there is true irony in the Court's reliance on these concerns. In essence, the Court is suggesting that a special protective shield should be provided to lawyers because they—unlike bakers, engineers, or the members of any other craft—may not have sufficient confidence in the ability of our legal system to identify and reject unmeritorious claims to be willing to assume the ordinary risks of litigation associated with the performance of civic responsibilities. I do not share the Court's fear that the administration of bar ***599** examinations by court-appointed lawyers cannot survive the scrutiny associated with rather ordinary litigation that persons in most other walks of life are expected to endure.

The Court also no doubt believes that lawyers—or at least those leaders of the bar who are asked to serve as bar examiners—will always be faithful to their fiduciary responsibilities. Though I would agree that the presumption is indeed a strong one, nothing in the sweeping language of the Sherman Act justifies carving out rules for lawyers inapplicable to any other profession. In Goldfarb we specifically rejected such parochialism. Indeed, the argument that it is unwise or unnecessary to require the petitioners to comply with the Sherman Act "is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws." Boulder, 455 U.S., at 56, 102 S.Ct., at 843. We should not ignore that commitment today.

Denial of antitrust immunity in this case would hardly leave the State helpless to cope with felt exigencies; should it wish to do so, the Arizona Supreme Court remains free to give petitioners an affirmative direction to engage in the precise conduct that respondent has alleged. The antitrust laws hardly create any inescapable burdens for the State; they simply require that decisions to displace the free market be made overtly by public officials subject to public accountability, rather than secretly in the course of a conspiracy involving representatives of a private guild accountable to the public indirectly if at all. See id., at 56–57, 102 S.Ct., at 843–844; Lafayette, 435 U.S., at 416–417, 98 S.Ct., at 1138 (plurality opinion). "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." Midcal, 445 U.S., at 106, 100 S.Ct., at 943.

The practical concerns identified by the Court pale when compared with the principle ****2012** that should govern the decision ***600** of this case. The rule of law that applies to this case is applicable to countless areas of the economy in which arbitrary restraints on entry may impose the very costs on the consuming public which the antitrust laws were designed to avoid.[25] Experience in the administration of the Sherman Act has demonstrated that there is a real risk that private associations that purport merely to regulate professional standards may in fact use their powers to restrain competition which threatens their members.[26] It is little short of irresponsible to tear a gaping hole in the fabric of antitrust law simply because we may be confident that respondent will be unable to prove what he alleges.

***601** Frivolous cases should be treated as exactly that, and not as occasions for fundamental shifts in legal doctrine.[27] Our legal system has developed procedures for speedily disposing of unfounded claims; if they are inadequate to protect petitioners from vexatious litigation, then there is something wrong with those procedures, not with the law of antitrust immunity. That body of law simply does not permit the Sherman Act to be displaced when neither the state legislature nor the state supreme court has expressed any desire to preclude application of the antitrust laws to the conduct of those who stand to benefit from restraints of trade. A healthy respect for state regulatory policy does not require immunizing those who abuse their public trust; such a thin veneer of state involvement is insufficient justification for casting aside the competitive ideal of the Sherman Act. The commitment to free markets and open competition that has evolved over the centuries and is embodied in the Sherman Act should be sturdy enough to withstand petitioners' flimsy claim. That claim might have merited the support of the 14th–century guilds; today it should be accorded the "punishment of the hurdle."

I respectfully dissent.

All Citations

466 U.S. 558, 104 S.Ct. 1989, 80 L.Ed.2d 590, 1984-1 Trade Cases P 65,980

Footnotes

a1 The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See United States v. Detroit Lumber Co., 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Although petitioners represent only four of the seven members of the Committee at the time of the February 1974 bar examination, Ronwin named all seven members in his original complaint. Apparently, three of the original defendants to this action did not join, for reasons not apparent, the petition for certiorari in this Court. There is no claim that these members of the Committee failed to participate in or dissented from the actions of the Committee.

2 The procedure in Arizona is not unique to that State. In recent years, the burgeoning number of candidates for admission to practice law and the increased complexity of the subjects that must be tested have combined to make grading and administration of bar examinations a burdensome task. As a result, although the highest court in each State retains ultimate authority for granting or denying admission to the bar, each of those courts has delegated to a subordinate committee responsibility for preparing, grading, and administering the examination. See F. Klein, S. Leleiko, & J. Mavity, Bar Admission Rules and Student Practice Rules 30–33 (1978).

3 The parties disagree on the wording of the Rules at the time Ronwin took the bar examination. The disagreement centers around the effective date of some amendments promulgated in 1974. Petitioners contend that the amendments took effect before Ronwin took the February 1974 bar examination; Ronwin submits that they became effective in March 1974. Ronwin concedes that the Supreme Court order amending the Rules provided that the amendments would become effective in January 1974. Notwithstanding this directive, he argues that Ariz.Rev.Stat.Ann. § 12–109 (1982) provided that amendments to the Supreme Court's Rules may not become effective until 60 days after publication and distribution. Since the Supreme Court's released the amendments on January 11, Ronwin submits that the earliest possible effective date was March 12.

Ronwin has misread § 12–109. That section only applied to Rules that regulated pleading, practice, and procedure in judicial proceedings in state courts. By its terms, the statute did not limit the jurisdiction of the Arizona Supreme Court to establish the terms of admission to practice law in the State. See Ariz.Rev.Stat.Ann. § 32–275 (1976).

4 Rule 28(a) provided:

> “Examination and Admission.... The examination and admission of applicants for membership in the State Bar of Arizona shall conform to this Rule. For such purpose, a committee on examinations and admissions consisting of seven active members of the state bar shall be appointed by this court.... The committee shall examine applicants and recommend to this court for admission to practice applicants who are found by the

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> committee to have the necessary qualifications and to fulfill the requirements prescribed by the rules of the board of governors as approved by this court respecting examinations and admissions.... The court will then consider the recommendations and either grant or deny admission."

5 According to Ronwin's complaint, the Committee announced before the February examination that the passing grade on the test would be 70, but it assigned grades using a scaled scoring system. Under this system, the examinations were graded first without reference to any grading scale. Thus, each examination was assigned a "raw score" based on the number of correct answers. The Committee then converted the raw score into a score on a scale of zero to 100 by establishing the raw score that would be deemed the equivalent of "seventy." See n. 19, infra.

6 Rule 28(c) VII B provided:

"The Committee on Examinations and Admissions will file with the Supreme Court thirty (30) days before each examination the formula upon which the Multi–State Bar Examination results will be applied with the other portions of the total examination results. In addition the Committee will file with the Court thirty (30) days before each examination the proposed formula for grading the entire examination." 110 Ariz., at xxxii.

7 See n. 4, supra; Application of Courtney, 83 Ariz. 231, 233, 319 P.2d 991, 993 (1957) ("[T]his court may in the exercise of its inherent powers, admit to the practice of law with or without favorable action by the Committee"); Hackin v. Lockwood, 361 F.2d 499, 501 (CA9) ("[W]e find the power to grant or deny admission is vested solely in the Arizona Supreme Court"), cert. denied, 385 U.S. 960, 87 S.Ct. 396, 17 L.Ed.2d 305 (1966). See also Application of Burke, 87 Ariz. 336, 351 P.2d 169 (1960).

8 Rule 28(c) XII F provided:

"1. An applicant aggrieved by any decision of the Committee

"(A) Refusing permission to take an examination upon the record;

"(B) Refusing permission to take an examination after hearing;

"(C) For any substantial cause other than with respect to a claimed failure to award a satisfactory grade upon an examination;

"may within 20 days after such occurrence file a verified petition with this Court for a review....

"2. A copy of said petition shall be promptly served upon the chairman or some member of the Committee and the Committee shall within 15 days of such service transmit said applicant's file and a response to the petition fully advising this Court as to the Committee's reasons for its decision and admitting or contesting any assertions made by applicant in said petition. Thereupon this Court shall consider the papers so filed together with the petition and response and make such order, hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision as to the rights and obligations of applicant judged in the light of the Committee's and this Court's obligation to the public to see that only qualified applicants are admitted to practice as attorneys at law." 110 Ariz., at xxxv–xxxvi. Under Rule 28(c) XII G, an applicant who wished to challenge the grading of an answer to a particular question first had to submit his claim to the Committee for review. The applicant was entitled to request Arizona Supreme Court review only if three members of the Committee agreed with the applicant that his answer had not received the

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grade it deserved. The Rule also provided that the court could grant or deny such a request in its discretion. Id., at xxxvi–xxxvii.

9 The Arizona Supreme Court Rules instructed the Committee to give two examinations each year—one in July and one in February. Id., at xxxii.

10 He also alleged that the Committee had violated his constitutional rights by refusing, after the grades had been released, to provide him with the questions and answers to the Multi–State portion of the examination.

11 Rule 28(c) XII F 2 provides, with respect to the petition of an aggrieved applicant, that the Arizona Supreme Court "shall consider" the petition and response, and "hold such hearings and give such directions as it may in its discretion deem best adapted to a prompt and fair decision." 110 Ariz., at xxxvi. Ronwin makes no claim that the court failed to comply with its Rules, although—of course—he disagrees with the court's judgment denying his petition. Thus, the court's denial of his petition must be construed as a consideration and rejection of the arguments made in the petition—including Ronwin's claim that the Sherman Act was violated.

12 Also named as defendants were petitioners' spouses and the Arizona State Bar. The District Court dismissed the suit as to these defendants and the Court of Appeals affirmed the dismissal. Ronwin v. State Bar of Arizona, 686 F.2d 692, 694, n. 1 (CA9 1981). Ronwin challenged this aspect of the Court of Appeals' opinion in a conditional cross-petition for certiorari. We denied the cross-petition. Ronwin v. Hoover, 461 U.S. 938, 103 S.Ct. 2110, 77 L.Ed.2d 314 (1983).

13 The averment of a Sherman Act violation in Ronwin's complaint is as follows:

"The aforesaid conduct [the "scoring system or formula," see n. 4, supra], which the Defendants entered into as a conspiracy or combination, was intended to and did result in a restraint of trade and commerce among the Several States by artifically reducing the numbers of competing attorneys in the State of Arizona; and, in further consequence of said conduct, Plaintiff was among those artificially prevented from entering into competition as an attorney in the State of Arizona and thereby further deprived of the right to compete as an attorney for the legal business deriving from or involving the Several States of the United States, including Arizona." App. 10–11.

The adequacy of these conclusory averments of intent is far from certain. The Court of Appeals, however, found the complaint sufficient. Accordingly, we address the "state action" issue.

14 The District Court also denied Ronwin's motion requesting the trial judge to recuse himself. The Court of Appeals held that the District Court had not abused its discretion in denying the motion. 686 F.2d, at 701. We declined to review that finding. Ronwin v. Hoover, supra.

15 Community Communications Co. v. Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982); California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978); Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

16 The Court of Appeals also held that the District Court should give Ronwin the opportunity to show that petitioners' actions sufficiently affected interstate commerce to fall within the jurisdiction of the Sherman Act. Petitioners did not seek review of this holding.

17 This case does not present the issue whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine.

18 Ronwin does not dispute that regulation of the bar is a sovereign function of the Arizona Supreme Court. In Bates v. State Bar of Arizona, 433 U.S. 350, 361, 97 S.Ct. 2691, 2697, 53 L.Ed.2d 810 (1977), the Court noted

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that "the regulation of the activities of the bar is at the core of the State's power to protect the public." Likewise, in Goldfarb v. Virginia State Bar, 421 U.S. 773, 792, 95 S.Ct. 2004, 2016, 44 L.Ed.2d 572 (1975), the Court stated: "The interest of the States in regulating lawyers is especially great since lawyers are essential to the primary governmental function of administering justice, and have historically been 'officers of the courts.' " See also In re Griffiths, 413 U.S. 717, 722–723, 93 S.Ct. 2851, 2855, 37 L.Ed.2d 910 (1973). Few other professions are as close to "the core of the State's power to protect the public." Nor is any trade or other profession as "essential to the primary governmental function of administering justice."

19 Ronwin's complaint, see supra, at 1994, focuses on the grading formula as the means used to "restrain competition." He describes it as follows:

"The Defendants did not grade on a Zero to One Hundred (0 to 100) scale; rather they used a "raw score" system. After the raw scores were known, the Defendants picked a particular raw score value as equal to the passing grade of Seventy (70). Thereby the number of Bar applicants who would receive a passing grade depended upon the exact raw score value chosen as equal to Seventy (70); rather than achievement by each Bar applicant of a pre-set standard." App. 10.

Apparently Ronwin was trying to describe a "procedure commonly known as test standardization" or "scaled scoring." See Brief for State Bar of California as Amicus Curiae 7. This method of scoring, viewed as the fairest by the Educational Testing Service (ETS) for the Multistate Bar Examination (MBE), see S. Duhl, The Bar Examiners' Handbook 61–62 (2d ed. 1980), published by The National Conference of Bar Examiners, is described as follows:

> "In addition to the 'raw' scores (number of correct answers), ETS reports a 'scaled' score for each applicant. In a series of tests, such as the MBE, which are intended to measure levels of competence, it is important to have a standardized score which represents the same level of competence from test to test. The raw score is not dependable for this purpose since the level of difficulty varies from test to test. It is not possible to draft two tests of exactly the same level of difficulty. Scaled scores are obtained by reusing some questions from earlier tests which have been standardized. A statistical analysis of the scores on the reused questions determines how many points are to be added to or subtracted from the raw score to provide an applicant's scaled score. Thus a particular scaled score represents the same level of competence from examination to examination."

20 Although the Court of Appeals recognized the similarity between this case and Bates, it found the facts in Goldfarb v. Virginia State Bar, supra, to be more analogous. The court's reliance on Goldfarb was misplaced. As the dissent of Judge Ferguson noted, Goldfarb involved procedures that were not approved by the State Supreme Court or the state legislature. In contrast, petitioners here performed functions required by the Supreme Court Rules and that are not effective unless approved by the court itself.

21 Rule 29(a) of the Supreme Court of Arizona provided: "The duties and obligations of members [of the Bar] shall be as prescribed by the Code of Professional Responsibility of the American Bar Association...."

22 Following petitioners' request for a rehearing in the Court of Appeals, the parties debated whether and to what extent the Committee complied with this Rule. For purposes of determining the application of the state-action doctrine, it is sufficient that the Rules contained an enforceable provision calling for submission of the grading formula. Moreover, the Rules contained a review procedure that allowed an aggrieved applicant to bring to the Supreme Court's attention any failure of the Committee to comply with the filing requirements

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in Rule 28(c) VII B. The record reveals that Ronwin, in fact, alleged in his petition for review in the Arizona Supreme Court that the Committee had not filed its grading formula within the time provided in the Rule. The court rejected the petition. See supra, at 1993.

23 This procedure allowed a disappointed applicant to challenge "[f]or any substantial cause" a Committee decision other than "a claimed failure to award a satisfactory grade." Rule 28(c) XII F 1(C). As we have noted, Ronwin took full advantage of Rule 28(c) XII F 1(C) in his challenge to the action of the Committee and the court. See supra, at 5. He did not, however, challenge the particular grade assigned to any of his answers.

24 The Solicitor General, on behalf of the United States as amicus, contends that our recent opinion in Community Communications Co. v. Boulder, 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), precludes a finding that the Committee's action was attributable to the Arizona Supreme Court. Contrary to the Solicitor General's suggestion, our reasoning in Boulder supports the conclusion we reach today. In Boulder, we reiterated the analysis of Justice BRENNAN'S opinion in Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978). We noted that the state-action doctrine is grounded in concepts of federalism and state sovereignty. 455 U.S., at 54, 102 S.Ct., at 842. We stated that Parker did not confer state-action immunity automatically on municipalities, because the actions of a municipality are not those of the State itself. 455 U.S., at 53, 102 S.Ct., at 841. Under our holding in Boulder, municipalities may be eligible for state action immunity, but only "to the extent that they ac[t] pursuant to a clearly articulated and affirmatively expressed state policy." Id., at 54, 102 S.Ct., at 842; see also Lafayette, supra, at 411–412, 98 S.Ct., at 1136 (opinion of BRENNAN, J.). Consistent with our reasoning in Boulder, our decision today rests on our conclusion that the conduct Ronwin complains of clearly is the action of the State. Bates is explicit authority for this conclusion.

25 Our holding that petitioners' conduct is exempt from liability under the Sherman Act precludes the need to address petitioners' contention that they are immune from liability under the Noerr–Pennington doctrine. See Mine Workers v. Pennington, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

We also do not address Ronwin's contention that the Arizona method of limiting bar admissions violates the Fifth and Fourteenth Amendments. As Ronwin concedes, he made this argument for the first time in his response to petitioners' motion for rehearing in the Court of Appeals. His failure to raise this issue in a timely manner precludes our consideration.

26 The authority of the Arizona Supreme Court to determine who shall be admitted to the Bar, and by what procedure, is even more clearly defined than the role of that court in Bates. In that case, State Bar Committee members were not appointed by the court, and the court did not expressly accept or reject each of the Committee's actions.

27 Under Arizona law, the responsibility is on the court—and only on it—to admit or deny admission to the practice of law. This Court certainly cannot assume that the Arizona court, in the exercise of its specifically reserved power under its Rules, invariably agrees with its Committee. Even if it did, however, it would be action of the sovereign.

28 Even if Committee members had decided to grade more strictly, under the grading formula approved by the court, for the purpose of reducing the total number of lawyers admitted to practice, the court knew and approved the number of applicants. This was the definitive action. There is nothing in the state-action doctrine, or in antitrust law, that permits us to question the motives for the sovereign action of the court.

29 The dissent recites the provisions of the Rules regulating the composition and origin of the Committee and notes that the Rules require the Committee to recommend qualified applicants to the Supreme Court. Post,

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at 2004–2005. The dissent does not mention, however, several critical provisions, summarized in the text infra, that articulate the Arizona Supreme Court's intent to retain full authority over, and responsibility for, the bar admissions process.

30 The dissent states, post, at 2007, n. 15, that we "advanced the theory that the relevant 'state action' " was the State Supreme Court's denial of Ronwin's postexamination petitions filed with the court. (Emphasis supplied.) The dissent is inaccurate. Our holding is based on the court's direct participation in every stage of the admissions process, including retention of the sole authority to admit or deny. The critical action in this case was the court's decision to deny Ronwin admission to the Bar. The dissent's suggestion that the Arizona Supreme Court never made this decision simply ignores Arizona law. The Arizona Supreme Court has stated on several occasions that it, and not the Committee, makes the decision to admit or deny admission to applicants. In Application of Burke, 87 Ariz., at 338, 351 P.2d, at 171–172, the court stated:

"[I]t is not the function of the committee to grant or deny admission to the bar. That power rests solely in the Supreme Court.... The committee's bounden duty is to 'put up the red flag' as to those applicants about whom it has some substantial doubt. If such doubt exists, then its recommendation should be withheld. The applicant may feel that any questions raised as to his character or qualifications are without substance. In such case, he may apply directly to this court for admission. In the final analysis—it being a judicial function —we have the duty of resolving those questions, one way or the other...." (Emphasis supplied.)

In a similar vein, the court stated in Application of Levine, 97 Ariz. 88, 92, 397 P.2d 205, 207 (1964):

> "If the committee fails to recommend the admission of an applicant, he may challenge the committee's conclusions by an original application to this Court.... This Court will direct the committee to show cause why the applicant has been refused a favorable recommendation and on the applicant's petition and the committee's response, using our independent judgment, de novo determine whether the necessary qualifications have been shown."

See also Application of Kiser, 107 Ariz. 326, 327, 487 P.2d 393, 394 (1971).

Thus, the Arizona Supreme Court repeatedly has affirmed its responsibility as the final decisionmaker on admissions to the Bar. The dissent, relying on the absence in the record before us of a specific order of the court at the time Ronwin was not admitted, nevertheless would have us hold that the Committee rather than the court made the final decisions as to admissions and denials of the applicants who took the examination in February 1974. If the dissent were correct, there would have been no valid action with respect to those who took that examination since, under Arizona law, the Committee had no independent power to act. Ronwin's complaint makes no such extreme averment, and certainly this Court will not assume that the Supreme Court of Arizona failed to discharge its responsibility. Moreover, as we have noted, supra, at 2000, Ronwin's claims were specifically rejected by the court.

31 It is true, of course, that framing examination questions and particularly the grading of the examinations involved the exercise of judgment and discretion by the examiners. This discretion necessarily was delegated to the Arizona Committee, just as it must be unless state supreme courts themselves undertake the grading. By its Rules, the Arizona Supreme Court gave affirmative directions to the Committee with respect to every nondiscretionary function, reserving the ultimate authority to control the number of lawyers admitted to the Arizona Bar. Ronwin avers a "conspiracy to limit the number" of applicants admitted. He makes no claim of animus or discriminatory intent with respect to himself.

Ronwin apparently would have us believe that grading examinations is an exact science that separates the qualified from the unqualified applicants. Ideally, perhaps, this should be true. But law schools and bar examining committees must identify a grade below which students and applicants fail to pass. No setting of a passing grade or adoption of a grading formula can eliminate—except on multiple choice exams—the discretion exercised by the grader. By its very nature, therefore, grading examinations does not necessarily separate the competent from the incompetent or—except very roughly—identify those qualified to practice law and those not qualified. At best, a bar examination can identify those applicants who are more qualified to practice law than those less qualified.

32 Justice STEVENS' dissent states that "[a]ny possible claim that the challenged conduct is that of the State Supreme Court is squarely foreclosed by Goldfarb v. Virginia State Bar, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975)." Post, at 2006. At issue in Goldfarb was a Sherman Act challenge to minimum-fee schedules maintained by the Fairfax County Bar Association and enforced by the Virginia State Bar. In Goldfarb, state law did not refer to lawyers' fees, the Virginia Supreme Court Rules did not direct the State Bar to supply fee schedules, and the Supreme Court did not approve the fee schedules established by the State Bar. To the contrary, the court "directed lawyers not 'to be controlled' by fee schedules." 421 U.S., at 789, 95 S.Ct., at 2014. Thus, even though the State Bar was a state agency, the Court concluded that "it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of either respondent." Id., at 790, 95 S.Ct., at 2015. As is evident from the provisions in the Arizona Supreme Court Rules, this case arises under totally different circumstances, although the relevant legal principles are the same. The dissent's reliance on Goldfarb simply misreads the decision in that case.

33 The dissent relies on Boulder, arguing that the "clearly articulated and affirmatively expressed state policy" does not exist in this case. Post, at 2009. What the dissent overlooks is that the Court in Boulder was careful to say that action is not "exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see Parker, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see City of Lafayette...." 455 U.S., at 52, 102 S.Ct., at 841. Thus, unlike the dissent here, Justice BRENNAN in Boulder was careful to distinguish between action by the sovereign itself and action taken by a subordinate body.

The dissent also cites Cantor v. Detroit Edison Co., 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), and California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), as presenting situations analogous to the action of the Arizona Supreme Court. This argument overlooks the fundamental difference between this case and the several cases cited by respondent. In each of those cases, it was necessary for the Court to determine whether there had been a clearly articulated and affirmatively expressed state policy because the challenged conduct was not that of the State "acting as sovereign." Here, as we have noted above, the Arizona Supreme Court, acting in its sovereign capacity, made the final decision to deny admission to Ronwin. See n. 30, supra.

34 The amicus curiae brief of the National Conference of Bar Examiners points out that many States have bar admission processes like those at issue in this case. See Brief for the National Conference of Bar Examiners as Amicus Curiae 1, 2, 8. Typically, the state supreme court is the ultimate decisionmaker and a committee or board conducts the examinations pursuant to court rules. It is customary for lawyers of recognized standing and integrity to serve on these bodies, usually as a public duty and with little or no compensation. See S. Duhl, The Bar Examiner's Handbook 95, 99 (2d ed. 1980). In virtually all States, a significant percentage of those who take the bar examination fail to pass. See 1982 Bar Examination Statistics, 52 Bar Examiner 24–26 (1983). Thus, every year, there are thousands of aspirants who, like Ronwin, are disappointed. For example, in 1974 (the year Ronwin first took the Arizona bar examination), of the 43,798 applicants who took bar examinations nationwide, 10,440 failed to pass. 44 Bar Examiner 115 (1975). The National Conference of Bar Examiners, in its amicus brief, cautions that affirmance of the Court of Appeals in this case could well invite

numerous suits. It is no answer to say that, of course, such suits are likely to be frivolous. Ronwin, who failed the bar in 1974, has been litigating his claim for a decade on the basis of a complaint that basically challenges the motive of the Arizona Committee. His claim is that the grading formula was devised for the purpose of limiting competition. If such an allegation is sufficient to survive a motion to dismiss, examining boards and committees would have to bear the substantial "discovery and litigation burdens" attendant particularly upon refuting a charge of improper motive. See Areeda, Antitrust Immunity for "State Action" after Lafayette, 95 Harv.L.Rev. 435, 451 (1981). Moreover, Ronwin has brought a suit for damages under the Sherman Act, with the threat of treble damages. There can be no question that the threat of being sued for damages—particularly where the issue turns on subjective intent or motive—will deter "able citizens" from performing this essential public service. See Harlow v. Fitzgerald, 457 U.S. 800, 814, 102 S.Ct. 2727, 2736, 73 L.Ed.2d 396 (1982). In our view, as the action challenged by Ronwin was that of the State, the motive of the Committee in its recommendations to the court was immaterial. We nevertheless think, particularly in view of the decision below, that the consequences of an affirmance should be understood. The consequences of reversal by the Court today will have only a limited effect. Our attention has not been drawn to any trade or other profession in which the licensing of its members is determined directly by the sovereign itself—here the State Supreme Court.

1 H. Riley, Memorials of London and London Life in the XIIIth, XIVth, and XVth Centuries 119–120 (1868). The punishment is described in a footnote as "[b]eing drawn on a hurdle through the principal streets of the City." Id., at 119, n. 5.

2 "The principal reason for the existence of the gild was to preserve to its own members the monopoly of trade. No one not in the gild merchant of the town could buy or sell there except under conditions imposed by the gild. Foreigners coming from other countries or traders from other English towns were prohibited from buying or selling in any way that might interfere with the interest of the gildsmen. They must buy and sell at such times and in such places and only such articles as were provided by the gild regulations." E. Cheyney, An Introduction to the Industrial and Social History of England 52–53 (1920).

3 "The craft gilds existed usually under the authority of the town government, though frequently they obtained authorization or even a charter from the crown. They were formed primarily to regulate and preserve the monopoly of their own occupations in their own town, just as the gild merchant existed to regulate the trade of the town in general. No one could carry on any trade without being subject to the organization which controlled that trade." Id., at 55.

4 Professor Handler has pointed out:

"Entry into various fields of endeavor is guarded by numerous licensing restrictions. Licenses are demanded of physicians and surgeons, dentists, optometrists, pharmacists and druggists, nurses, midwives, chiropodists, veterinarians, certified public accountants, lawyers, architects, engineers and surveyors, shorthand reporters, master plumbers, undertakers and embalmers, real estate brokers, junk dealers, pawnbrokers, ticket agents, liquor dealers, private detectives, auctioneers, milk dealers, peddlers, master pilots and steamship engineers, weighmasters, forest guides, motion picture operators, itinerant retailers on boats, employment agencies, commission merchants of farm produce, and manufacturers of frozen desserts, concentrated feeds, and commercial fertilizers. No factory, cannery, place of public assembly, laundry, cold storage warehouse, shooting gallery, bowling alley and billiard parlor, or place of storage of explosives can be operated nor can industrial house work be carried on without registration or license. Licenses are also required for the sale of minnows, use of fishing nets, and the operation of educational institutions, correspondence schools, filling stations and motor vehicles. Motion pictures cannot be exhibited unless licensed, and canal boats must be registered." M. Handler, Cases and Other Materials on Trade Regulation 3–4 (1937) (footnotes omitted).

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5 Ariz.Sup.Ct.Rule 28(a).

6 See App. 10–11.

7 Ariz.Sup.Ct.Rule 28(c) VIII.

8 Petitioners certainly do not suggest the existence of any other criterion under Arizona law. To the contrary, at oral argument they expressly acknowledged that there is no state policy adopting any criterion but competence for admission to the Bar. Tr. of Oral Arg. 22–24.

9 See McClain v. Real Estate Bd. of New Orleans, 444 U.S. 232, 246–247, 100 S.Ct. 502, 511, 62 L.Ed.2d 441 (1980); Lake Country Estates v. Tahoe Regional Planning Agency, 440 U.S. 391, 397, n. 11, 99 S.Ct. 1171, 1175, n. 11, 59 L.Ed.2d 401 (1979); Hospital Building Co. v. Trustees of Rex Hospital, 425 U.S. 738, 746, 96 S.Ct. 1848, 1853, 48 L.Ed.2d 338 (1976); Scheuer v. Rhodes, 416 U.S. 232, 236, 94 S.Ct. 1683, 40 L.Ed.2d 90 (1974); Conley v. Gibson, 355 U.S. 41, 45–46, 78 S.Ct. 99, 2 L.Ed.2d 80 (1957).

10 See Hughes v. Rowe, 449 U.S. 5, 10, 101 S.Ct. 173, 176, 66 L.Ed.2d 163 (1980) (per curiam); Cruz v. Beto, 405 U.S. 319, 322, 92 S.Ct. 1079, 1081, 31 L.Ed.2d 263 (1972) (per curiam); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 515–516, 92 S.Ct. 609, 614, 30 L.Ed.2d 642 (1972); Jenkins v. McKeithen, 395 U.S. 411, 421, 89 S.Ct. 1843, 1848, 23 L.Ed.2d 404 (1969) (plurality opinion); Walker Process Equipment, Inc. v. Food Machinery & Chemical Corp., 382 U.S. 172, 174–175, 86 S.Ct. 347, 348–49, 15 L.Ed.2d 247 (1965).

11 See Bates v. State Bar of Arizona, 433 U.S. 350, 359–360, 97 S.Ct. 2691, 2696–2697, 53 L.Ed.2d 810 (1977).

12 It should be noted that petitioners do not advance the imaginative argument on which this Court's decision rests—that the examination procedure is merely advisory and that the Arizona Supreme Court itself “made the final decision on each applicant.” Ante, at 2000 (footnote omitted). Presumably petitioners are more familiar with how their own procedures work than is this Court. The Court shows precious little deference to “administrative expertise” in its analysis of the facts.

13 It is not surprising that petitioners (who must practice before the Arizona Supreme Court) did not advance the theory on which this Court relies—that their challenged conduct is actually conduct of the Arizona Supreme Court. They surely understand that they are not the court, but rather its subordinate.

14 See also New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978); Cantor v. Detroit Edison Co., 428 U.S., at 593–595, 96 S.Ct., at 3118–3119.

15 In response to this dissent, the Court has advanced the theory that the relevant “state action” was the State Supreme Court's rejection of an original complaint filed in that court containing a “plethora of charges, including the substance of the complaint in this case.” Ante, at 2000. See also ante, at 2002. Presumably, that complaint was simply deficient as a matter of state law; if the allegations of respondent's current complaint are taken as true then the fact that respondent failed the bar examination would have provided an adequate ground for the dismissal of respondent's complaint without any review of respondent's allegations. Even if it were the case that the Arizona Supreme Court reviewed petitioner's complaint on its merits, all that would indicate is that the court has declined to exercise its power of revision with respect to petitioners' alleged anticompetitive policies. That is far different from having required petitioners to adopt those policies in the first place, which is what Goldfarb requires.

16 The Court argues that “[o]nly the Arizona Supreme Court had the authority to grant or deny admission to practice in the State,” ante, at 1999 (footnote omitted), and therefore concludes that the challenged conduct is that of the court. But there is no allegation that the challenged policy was adopted by the court; at most

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the court has permitted it by accepting the recommendations of petitioners. Yet as Bates and Goldfarb make clear, the challenged policy must be required by the sovereign. The fact that the court retained the power to disapprove of the examination procedure adopted by petitioners is no different from the fact that the Virginia Supreme Court retained the power to disapprove of the fee schedules set by the bar association in Goldfarb. Similar powers of revision were held insufficient to justify immunity in Lafayette, Cantor, and Midcal.

17 While the majority's disavowal in its note 30 is quite unequivocal, at other points in its opinion, see ante, at 1999–2000, and in its ultimate statement of its holding, see ante, at 2002, it does seem to rely on the denial of respondent's petition for review. If that truly is critical for the majority, then it would follow that an individual in respondent's position who did not file a petition for review would be able to mount an antitrust challenge free from the immunity barrier the majority erects. If it indeed is that easy to escape the majority's holding, then that holding will not protect bar examiners against the parade of horribles discussed by the majority ante, at 2001–2002 and n. 34.

18 The cases the Court cites ante, at 2000, n. 30, 2002, all involve instances in which an applicant who had passed the bar examination was nevertheless not recommended for admission. If the applicant seeks judicial review, those cases indicate that the court will decide for itself whether to admit the applicant. However, none of those cases indicates that the court makes an independent decision, or indeed any decision at all, to deny the application of a person who has failed the bar examination.

19 See also 455 U.S., at 51–52, 54, 102 S.Ct., at 841–842; Midcal, 445 U.S., at 104–105, 100 S.Ct., at 942–943; New Motor Vehicle Board of California v. Orrin W. Fox Co., 439 U.S., at 109, 99 S.Ct., at 411.

20 See also Cantor v. Detroit Edison Co., 428 U.S., at 604–605, 96 S.Ct. 3110, 3124, 49 L.Ed.2d 1141 (opinion of BURGER, C.J.). In Cantor, the Court wrote:

"Respondent could not maintain the lamp-exchange program without the approval of the Commission, and now may not abandon it without such approval. Nevertheless, there can be no doubt that the option to have, or not to have, such a program is primarily respondent's, not the Commission's. Indeed, respondent initiated the program years before the regulatory agency was even created. There is nothing unjust in a conclusion that respondent's participation in the decision is sufficiently significant to require that its conduct implementing the decision, like comparable conduct by unregulated businesses, conform to applicable federal law. Accordingly, even though there may be cases in which the State's participation in a decision is so dominant that it would be unfair to hold a private party responsible for his conduct in implementing it, this record discloses no such unfairness." Id., at 594–595, 96 S.Ct., at 3119 (footnotes omitted).

21 In this Court petitioners appear to have abandoned the argument, advanced for the first time in a petition for rehearing in the Court of Appeals, that the examination grading formula was actually approved by the State Supreme Court. Because the majority appears to revive this abandoned contention, ante, at 1997–1998, and n. 22, see also ante, at 1999–2000, it is necessary to address it, though that requires no more than brief reference to the Court of Appeals' opinion:

"Defendants contend for the first time on rehearing that the Committee's grading formula 'was submitted to the Court, reviewed by the Court, and accepted by the Court.' In response, Ronwin has tendered to this court what purports to be the letter the Committee filed with the Supreme Court on February 8, 1974 pursuant to Rule 28(c)(VII)(B). If, as Ronwin alleges, the Committee scored the examination to admit a pre-determined number of applicants, the letter does not so advise the court. Accordingly, if the letter presented to us constitutes the submission to the Supreme Court, it cannot be the basis for a clearly articulated and affirmatively expressed state policy. Although dismissal might have been proper if the facts were as defendants now argue for the first time on rehearing, those facts were never brought to the district court's attention. Dismissal was therefore

improper on the basis of the information before the district court." Ronwin v. State Bar of Arizona, 686 F.2d 692, 697 (CA9 1981).

It is, of course, equally improper for this Court to rely on evidence not presented to the District Court as a basis for holding that the complaint was not sufficient to withstand a motion to dismiss. See Adickes v. S.H. Kress & Co., 398 U.S. 144, 157–158, n. 16, 90 S.Ct. 1598, 1608, n. 16, 26 L.Ed.2d 142 (1970).

22 See generally Arizona v. Maricopa County Medical Society, 457 U.S. 332, 348–349, 102 S.Ct. 2466, 2475–2476, 73 L.Ed.2d 48 (1982); National Society of Professional Engineers v. United States, 435 U.S. 679, 696, 98 S.Ct. 1355, 1367, 55 L.Ed.2d 637 (1978).

23 The majority makes the rather surprising suggestion that under the well-settled principles I have discussed, those who advise state legislatures on legislation which restrains competition could be sued under the Sherman Act. Ante, at 2002. Such persons of course would have a complete defense since in such a case they would have been delegated no power which could be used to restrain competition and hence cannot be liable for a restraint they did not impose. Moreover, the Sherman Act protects the right to seek favorable legislation, even if the reason for doing so is to injure competitors. See California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508, 92 S.Ct. 609, 609, 30 L.Ed.2d 642 (1972); Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961). The majority's focus on cases not before the Court surely reflects the weakness of its position with respect to the case that is here.

24 In order to preserve the secrecy of bar examination questions, the test must vary from year to year; after a test has been given, it may become apparent that the anticipated passing grade should be adjusted in order to provide roughly the same measure of competence as was used in prior years. Thus respondent's burden of proving the conspiracy he has alleged requires far more than evidence that petitioners exercised discretion in setting the passing grade after the results were known.

25 The conspiracy respondent has alleged, if proved, would have no procompetitive justification at all; it would be plainly inconsistent with the goals of the Sherman Act. Thus petitioners' claim of antitrust immunity arises in the least defensible context:

"[A]s a general proposition ... state-sanctioned anticompetitive activity must fall like any other if its potential harms outweigh its benefits. This does not mean that state-sanctioned and private activity are to be treated alike. The former is different because the fact of state sanction figures powerfully in the calculus of harm and benefit. If, for example, the justification for the scheme lies in the protection of health or safety, the strength of that justification is forcefully attested to by the existence of a state enactment.... A particularly strong justification exists for a state-sanctioned scheme if the State in effect has substituted itself for the forces of competition, and regulates private activity to the same ends sought to be achieved by the Sherman Act. Thus, an anticompetitive scheme which the State institutes on the plausible ground that it will improve the performance of the market in fostering efficient resource allocation and low prices can scarcely be assailed." Cantor v. Detroit Edison Co., 428 U.S., at 610–611, 96 S.Ct., at 3127 (BLACKMUN, J., concurring in judgment).

26 See, e.g., Arizona v. Maricopa County Medical Society, 457 U.S. 332, 102 S.Ct. 2466, 73 L.Ed.2d 48 (1982); American Society of Mechanical Engineers, Inc. v. Hydrolevel Corp., 456 U.S. 556, 102 S.Ct. 1935, 72 L.Ed.2d 330 (1982); National Society of Professional Engineers v. United States, 435 U.S. 679, 98 S.Ct. 1355, 55 L.Ed.2d 637 (1978); Silver v. New York Stock Exchange, 373 U.S. 341, 83 S.Ct. 1246, 10 L.Ed.2d 389 (1963); American Medical Assn. v. United States, 317 U.S. 519, 63 S.Ct. 326, 87 L.Ed.2d 434 (1943);

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Fashion Originators' Guild of America, Inc. v. FTC, 312 U.S. 457, 465–466, 61 S.Ct. 703, 706–707, 85 L.Ed.2d 949 (1941).

27 If, as seems likely, respondent's claim proves insubstantial, it should be dealt with in the same manner as other such claims—by means of summary judgment, perhaps coupled with an award of attorneys' fees should it also develop that this case was "unreasonably and vexatiously" brought. See 28 U.S.C. § 1927.

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102 S.Ct. 835
Supreme Court of the United States

COMMUNITY COMMUNICATIONS COMPANY, INC., Petitioner,
v.
CITY OF BOULDER, COLORADO, et al.

No. 80–1350
|
Argued Oct. 13, 1981.
|
Decided Jan. 13, 1982.

Synopsis

Cable television operator sued city, alleging that an ordinance prohibiting it from expanding its business for three months, during which time the city council was to draft a model cable television ordinance and to invite new businesses to enter the market under the terms of that ordinance, violated the antitrust laws. The United States District Court for the District of Colorado, Richard P. Matsch, J., 485 F.Supp. 1035, issued a preliminary injunction. The United States Court of Appeals for the Tenth Circuit, 630 F.2d 704, reversed and certiorari was granted. The Supreme Court, Justice Brennan, held that the ordinance, enacted under the "home rule" powers of the city, did not enjoy the "state action" exemption from the Sherman Act liability.

Court of Appeals' judgment reversed and remanded.

Justice Stevens filed a concurring opinion.

Justice Rehnquist filed a dissenting opinion in which Chief Justice Burger and Justice O'Connor joined.

Procedural Posture(s): Motion for Preliminary Injunction.

****835 *40** *Syllabus* *

Respondent city of Boulder is a "home rule" municipality, granted by the Colorado Constitution extensive powers of self-government in local and municipal matters. Petitioner is the assignee of a permit granted by a city ordinance to conduct a cable television business within the city limits. Originally, only limited service within a certain area of the city could be provided by petitioner, but improved technology offered petitioner an opportunity to expand its business into other areas, and also offered opportunities to potential competitors, one of whom expressed interest in obtaining a permit to provide competing service. The City Council then enacted an "emergency" ordinance prohibiting petitioner from expanding its business for three months, during which time the Council was to draft a model cable television ordinance and to invite new businesses to enter the market under the terms of that ordinance. Petitioner filed suit in Federal District Court, alleging that such a restriction would violate § 1 of the Sherman Act, and seeking a ****836** preliminary injunction to prevent the city from restricting petitioner's proposed expansion. The city responded that its moratorium ordinance could not be violative of the antitrust laws because, *inter alia*, the city enjoyed antitrust immunity under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. The District Court held that the *Parker* exemption was inapplicable and that the city was therefore subject to antitrust liability. Accordingly, the District Court issued a preliminary injunction. The Court of Appeals reversed, holding that the city's action satisfied the criteria for a *Parker* exemption.

Held : Boulder's moratorium ordinance is not exempt from antitrust scrutiny under the *Parker* doctrine. Pp. 839–844.

(a) The ordinance cannot be exempt from such scrutiny unless it constitutes either the action of the State itself in its sovereign capacity or municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy. Pp. 839–840.

(b) The *Parker* "state action" exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under the Federal Constitution. But this principle is inherently limited: Ours is a "*dual* system of ***41** government," *Parker, supra*, at 351, 63 S.Ct., at 313, which has no place for sovereign cities. Here, the direct delegation of powers to the city through the Home Rule Amendment to the Colorado Constitution does not render the cable television moratorium ordinance an "act of government" performed by the city acting as the State in local matters so as to meet *Parker* 's "state action" criterion. Pp. 841–842.

(c) Nor is the requirement of "clear articulation and affirmative expression" of a state policy fulfilled here by the Home Rule Amendment's "guarantee of local autonomy," since the State's position is one of mere neutrality respecting the challenged moratorium ordinance. This case involves city

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action in the absence of any regulation by the State, and such action cannot be said to further or implement any clearly articulated or affirmatively expressed state policy. Pp. 842–843.

(d) Respondents' argument that denial of the *Parker* exemption in this case will have serious adverse consequences for cities and will unduly burden the federal courts is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws, which laws apply to municipalities not acting in furtherance of clearly articulated and affirmatively expressed state policy. Pp. 843–844.

630 F.2d 704 (10th Cir.), reversed and remanded.

Attorneys and Law Firms

Harold R. Farrow, Oakland, Cal., for petitioner.

Thomas P. McMahon, Asst. Atty. Gen. of Colorado, for the State of Colorado, et al., amici curiae, by special leave of Court.

Jeffrey H. Howard, Washington, D. C., for respondents.

Opinion

***43** Justice BRENNAN delivered the opinion of the Court.

The question presented in this case, in which the District Court for the District of Colorado granted preliminary injunctive relief, is whether a "home rule" municipality, granted by the state constitution extensive powers of self-government in local and municipal matters, enjoys the "state action" exemption from Sherman Act liability announced in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed.2d 315 (1943).

I

Respondent city of Boulder is organized as a "home rule" municipality under the Constitution of the State of Colorado.[1] The ****837** city is thus entitled to exercise "the full right of self-government in both local and municipal matters," and with respect to such matters the City Charter and ordinances ***44** supersede the laws of the State. Under that Charter, all municipal legislative powers are exercised by an elected City Council.[2] In 1964 the City Council enacted an ordinance granting to Colorado Televents, Inc., a 20-year, revocable, nonexclusive permit to conduct a cable television business within the city limits. This permit was assigned to petitioner in 1966, and since that time petitioner has provided cable television service to the University Hill area of Boulder, an area where some 20% of the city's population lives, and where, for geographical reasons, broadcast television signals cannot be received.

From 1966 until February 1980, due to the limited service that could be provided with the technology then available, petitioner's service consisted essentially of retransmissions of programming broadcast from Denver and Cheyenne, Wyo. Petitioner's market was therefore confined to the University Hill area. However, markedly improved technology became available in the late 1970's, enabling petitioner to offer many more channels of entertainment than could be provided by local broadcast television.[3] Thus presented with an opportunity ***45** to expand its business into other areas of the city, petitioner in May 1979 informed the City Council that it planned such an expansion. But the new technology offered opportunities to potential competitors, as well, and in July 1979 one of them, the newly formed Boulder Communications Co. (BCC),[4] also wrote to the City Council, expressing its interest in obtaining a permit to provide competing cable television service throughout the city.[5]

The City Council's response, after reviewing its cable television policy,[6] was the ****838** enactment of an "emergency" ordinanceprohibiting ***46** petitioner from expanding its business into other areas of the city for a period of three months.[7] The City Council announced that during this moratorium it planned to draft a model cable television ordinance and to invite new businesses to enter the Boulder market under its terms, but that the moratorium was necessary because petitioner's continued expansion during the drafting of the model ordinance would discourage potential competitors from entering the market.[8]

Petitioner filed this suit in the United States District Court for the District of Colorado, and sought, *inter alia*, a preliminary injunction to prevent the city from restricting petitioner's ***47** proposed business expansion, alleging that such a restriction would violate § 1 of the Sherman Act.[9] The city responded that its moratorium ordinance could

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not be violative of the antitrust laws, either because that ordinance constituted an exercise of the city's police powers, or because Boulder enjoyed antitrust immunity under the *Parker* doctrine. The District Court considered the city's status as a home rule municipality, but determined that that status gave autonomy to the city only in matters of local concern, and that the operations of cable television embrace "wider concerns, including interstate commerce ... [and] the First Amendment rights of communicators." 485 F.Supp. 1035, 1038–1039 (1980). Then, assuming, *arguendo*, that the ordinance was within the city's authority as a home rule municipality, the District Court considered *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), and concluded that the *Parker* exemption was "wholly inapplicable," and that the city was therefore subject to antitrust liability. ****839** 485 F.Supp., at 1039. [10] Petitioner's motion for a preliminary injunction was accordingly granted.

On appeal, a divided panel of the United States Court of Appeals for the Tenth Circuit reversed. 630 F.2d 704 (1980). The majority, after examining Colorado law, rejected the District Court's conclusion that regulation of the cable television business was beyond the home rule authority ***48** of the city. *Id.*, at 707. The majority then addressed the question of the city's claimed *Parker* exemption. It distinguished the present case from *City of Lafayette* on the ground that, in contrast to the municipally operated revenue-producing utility companies at issue there, "no proprietary interest of the City is here involved." 630 F.2d, at 708. After noting that the city's regulation "was the only control or active supervision exercised by state or local government, and ... represented the only expression of policy as to the subject matter," *id.*, at 707, the majority held that the city's actions therefore satisfied the criteria for a *Parker* exemption, 630 F.2d, at 708. [11] We granted certiorari, 450 U.S. 1039, 101 S.Ct. 1756, 68 L.Ed.2d 236 (1981). We reverse.

II

A

Parker v. Brown, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), addressed the question whether the federal antitrust laws prohibited a State, in the exercise of its sovereign powers, from imposing certain anticompetitive restraints. These took the form of a "marketing program" adopted by the State of California for the 1940 raisin crop; that program prevented appellee from freely marketing his crop in interstate commerce. *Parker* noted that California's program "derived its authority ... ***49** from the legislative command of the state," *id.*, at 350, 63 S.Ct., at 313, and went on to hold that the program was therefore exempt, by virtue of the Sherman Act's own limitations, from antitrust attack:

> "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 350–351, 63 S.Ct., at 313–314.

The availability of this exemption to a State's municipalities was the question presented in *City of Lafayette, supra.* In that case, petitioners were Louisiana cities empowered to own and operate electric utility systems both within and beyond their municipal limits. Respondent brought suit against petitioners under the Sherman Act, alleging that they had committed various antitrust offenses in the conduct of their utility systems, to the injury of respondent. ****840** Petitioners invoked the *Parker* doctrine as entitling them to dismissal of the suit. The District Court accepted this argument and dismissed. But the Court of Appeals for the Fifth Circuit reversed, holding that a "subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws," *City of Lafayette v. Louisiana Power & Light Co.*, 532 F.2d 431, 434 (1976) (footnote omitted), and directing the District Court on remand to examine "whether the state legislature contemplated a certain type of anticompetitive restraint," *ibid.* [12]

***50** This Court affirmed. In doing so, a majority rejected at the outset petitioners' claim that, quite apart from *Parker*, "Congress never intended to subject local governments to the antitrust laws." 435 U.S., at 394, 98 S.Ct., at 1127. A plurality opinion for four Justices then addressed petitioners' argument that *Parker*, properly construed, extended to "all governmental entities, whether state agencies or subdivisions of a State, ... simply by reason of their status as such." 435 U.S., at 408, 98 S.Ct., at 1134. The plurality opinion rejected this argument, after a discussion of *Parker, Goldfarb v. Virginia State Bar*, 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d

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572 (1975), and *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2697, 53 L.Ed.2d 810 (1977). [13] These precedents were construed as holding that the *Parker* exemption reflects the federalism principle that we are a Nation of *States*, a principle that makes no accommodation for sovereign subdivisions of States. The plurality opinion said:

> "Cities are not themselves sovereign; they do not receive all the federal deference of the States that create them. *Parker* 's limitation of the exemption to 'official action directed by a state,' is consistent with the fact that the States' subdivisions generally have not been treated as ***51** equivalents of the States themselves. In light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." 435 U.S., at 412–413, 98 S.Ct., at 1136–1137 (footnote and citations omitted).

The opinion emphasized, however, that the State as sovereign might sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability. Under the plurality's standard, the *Parker* doctrine would shield from antitrust liability municipal conduct engaged in "pursuant to state policy to displace competition with regulation or monopoly public service." 435 U.S., at 413, 98 S.Ct., at 1137. This was simply a recognition that a State may frequently choose to effect its policies through the instrumentality of its cities and towns. It was stressed, however, that the "state policy" relied upon would have to be "clearly articulated and ****841** affirmatively expressed." *Id.*, at 410, 98 S.Ct., at 1135. This standard has since been adopted by a majority of the Court. *New Motor Vehicle Board of California v. Orrin W. Fox Co.*, 439 U.S. 96, 109, 99 S.Ct. 403, 411–12, 58 L.Ed.2d 361 (1978); *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980). [14]

***52** B

Our precedents thus reveal that Boulder's moratorium ordinance cannot be exempt from antitrust scrutiny unless it constitutes the action of the State of Colorado itself in its sovereign capacity, see *Parker*, or unless it constitutes municipal action in furtherance or implementation of clearly articulated and affirmatively expressed state policy, see *City of Lafayette, Orrin W. Fox Co.*, and *Midcal.* Boulder argues that these criteria are met by the direct delegation of powers to municipalities through the Home Rule Amendment to the Colorado Constitution. It contends that this delegation satisfies both the *Parker* and the *City of Lafayette* standards. We take up these arguments in turn.

(1)

Respondent city's *Parker* argument emphasizes that through the Home Rule Amendment the people of the State of Colorado have vested in the city of Boulder " '*every power* theretofore possessed by the legislature ... in local and municipal affairs.' " [15] The power thus possessed by Boulder's ***53** City Council assertedly embraces the regulation of cable television, which is claimed to pose essentially local problems. [16] Thus, it is suggested, the city's cable television moratorium ordinance is an "act of government" performed by the city *acting* ****842** *as the State* in local matters, which meets the "state action" criterion of *Parker.* [17]

We reject this argument: it both misstates the letter of the law and misunderstands its spirit. The *Parker* state-action exemption reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution. But this principle contains its own limitation: Ours is a "*dual* system of government," *Parker*, 317 U.S., at 351, 63 S.Ct., at 313 (emphasis added), which has no place for sovereign cities. As this Court stated long ago, all sovereign authority "within the geographical limits of the United States" resides either with

> "the Government of the United States, or [with] the States of the Union. *There exist within the broad domain of sovereignty but these two.* There may be cities, counties, and other organized bodies with limited legislativefunctions, ***54** but they are all derived from, or exist in, subordination to one or the other of these." *United States v. Kagama*, 118 U.S. 375, 379, 6 S.Ct. 1109, 1111, 30 L.Ed. 228 (1886) (emphasis added).

The dissent in the Court of Appeals correctly discerned this limitation upon the federalism principle: "We are a nation not of 'city-states' but of States." 630 F.2d, at 717. *Parker* itself took this view. When *Parker* examined Congress' intentions in enacting the antitrust laws, the opinion, as previously indicated, noted that: "[N]othing in the language

of the Sherman Act or in its history ... suggests that its purpose was to restrain a state or its officers or agents from activities *directed by its legislature*.... [And] an unexpressed purpose to nullify a *state's control over its officers and agents* is not lightly to be attributed to Congress." 317 U.S., at 350–351, 63 S.Ct., at 313–314 (emphasis added). Thus *Parker* recognized Congress' intention to limit the state-action exemption based upon the federalism principle of limited state sovereignty. *City of Lafayette, Orrin W. Fox Co.*, and *Midcal* reaffirmed both the vitality and the intrinsic limits of the *Parker* state-action doctrine. It was expressly recognized by the plurality opinion in *City of Lafayette* that municipalities "are not themselves sovereign," 435 U.S., at 412, 98 S.Ct., at 1136, and that accordingly they could partake of the *Parker* exemption only to the extent that they acted pursuant to a clearly articulated and affirmatively expressed state policy, 435 U.S., at 413, 98 S.Ct., at 1137. The Court adopted this view in *Orrin W. Fox Co.*, 439 U.S., at 109, 99 S.Ct., at 411–412, and *Midcal*, 445 U.S., at 105, 100 S.Ct., at 943. We turn then to Boulder's contention that its actions were undertaken pursuant to a clearly articulated and affirmatively expressed state policy.

(2)

Boulder first argues that the requirement of "clear articulation and affirmative expression" is fulfilled by the Colorado Home Rule Amendment's "guarantee of local autonomy." It contends, quoting from *City of Lafayette*, 435 U.S., at 394, 415, 98 S.Ct., at 1127, 1138, ***55** that by this means Colorado has "comprehended within the powers granted" to Boulder the power to enact the challenged ordinance, and that Colorado has thereby "contemplated" Boulder's enactment of an anticompetitive regulatory program. Further, Boulder contends that it may be inferred, "from the authority given" to Boulder "to operate in a particular area"—here, the asserted home rule authority to regulate cable television—"that the *legislature* contemplated the kind of action complained of." (Emphasis supplied.) Boulder therefore concludes that the "adequate state mandate" required by ****843** *City of Lafayette, supra*, at 415, 98 S.Ct., at 1138, is present here. [18]

But plainly the requirement of "clear articulation and affirmative expression" is not satisfied when the State's position is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive. A State that allows its municipalities to do as they please can hardly be said to have "contemplated" the specific anticompetitive actions for which municipal liability is sought. Nor can those actions be truly described as "comprehended within the powers *granted*," since the term, "granted," necessarily implies an affirmative addressing of the subject by the State. The State did not do so here: The relationship of the State of Colorado to Boulder's moratorium ordinance is one of precise neutrality. As the majority in the Court of Appeals below acknowledged: "[W]e are here concerned with City action in the absence of any regulation whatever by the State of Colorado. Under these circumstances there is no interaction of state and local regulation. We have only the action or exercise of authority by the City." 630 F.2d, at 707. Indeed, Boulder argues that ***56** as to local matters regulated by a home rule city, the Colorado General Assembly is without power to act. Cf. *City of Lafayette, supra*, at 414 and n. 44, 98 S.Ct., at 1137 and n. 44. Thus, in Boulder's view, it can pursue its course of regulating cable television competition, while another home rule city can choose to prescribe monopoly service, while still another can elect free-market competition: and all of these policies are equally "contemplated," and "comprehended within the powers granted." Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require.

III

Respondents argue that denial of the *Parker* exemption in the present case will have serious adverse consequences for cities, and will unduly burden the federal courts. But this argument is simply an attack upon the wisdom of the longstanding congressional commitment to the policy of free markets and open competition embodied in the antitrust laws. [19] Those laws, like other federal laws imposing civil or criminal sanctions upon "persons," of course apply to municipalities as well as to other corporate entities. [20] Moreover, judicial ****844** enforcement ***57** of Congress' will regarding the state-action exemption renders a State "no less able to allocate governmental power between itself and its political subdivisions. It means only that when the State itself has not directed or authorized an anticompetitive practice, the State's subdivisions in exercising their delegated power must obey the antitrust laws." *City of Lafayette*, 435 U.S., at 416, 98 S.Ct., at 1138. As was observed in that case:

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> "Today's decision does not threaten the legitimate exercise of governmental power, nor does it preclude municipal government from providing services on a monopoly basis. *Parker* and its progeny make clear that a State properly may ... direct or authorize its instrumentalities to act in a way which, if it did not reflect state policy, would be inconsistent with the antitrust laws.... [A]ssuming that the municipality is authorized to provide a service on a monopoly basis, these limitations on municipal action will not hobble the execution of legitimate governmental programs." *Id.*, at 416–417, 98 S.Ct., at 1138–1139 (footnote omitted).

The judgment of the Court of Appeals is reversed, and the action is remanded for further proceedings consistent with this opinion.

It is so ordered.

JUSTICE WHITE took no part in the consideration or decision of this case.

***58** Justice STEVENS, concurring.

The Court's opinion, which I have joined, explains why the city of Boulder is not entitled to an exemption from the antitrust laws. The dissenting opinion seems to assume that the Court's analysis of the exemption issue is tantamount to a holding that the antitrust laws have been violated. The assumption is not valid. The dissent's dire predictions about the consequences of the Court's holding should therefore be viewed with skepticism. [1]

In *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364, we held that municipalities' activities as providers of services are not exempt from the Sherman Act. The reasons for denying an exemption to the city of Lafayette are equally applicable to the city of Boulder, even though Colorado is a home-rule State. We did not hold in *City of Lafayette* that the City had violated the antitrust laws. Moreover, that question is quite different from the question whether the city of Boulder violated the Sherman Act because the character of their respective activities differs. In both cases, the violation issue is separate and distinct from the exemption issue.

A brief reference to our decision in *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141, will identify the invalidity of the dissent's assumption. In that case, the Michigan Public Utility Commission had approved a tariff that required the Detroit Edison Co. to provide its customers free light bulbs. The company contended that its light bulb distribution program was therefore exempt from the antitrust laws on the authority of *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. See 428 U.S., at 592, 96 S.Ct., at 3118. ***59** The Court rejected the company's interpretation of *Parker* and held that the plaintiff could proceed with his antitrust attack against the company's program. We surely did not suggest that the members of the Michigan Public Utility Commission who had authorized the program under attack had thereby become parties to ****845** a violation of the Sherman Act. On the contrary, the plurality opinion reviewed the *Parker* case in great detail to emphasize the obvious difference between a charge that public officials have violated the Sherman Act and a charge that private parties have done so. [2]

It would be premature at this stage of the litigation to comment on the question whether petitioner will be able to establish that respondents have violated the antitrust laws. The ***60** answer to that question may depend on factual and legal issues that must and should be resolved in the first instance by the District Court. In accordance with my belief that "the Court should adhere to its settled policy of giving concrete meaning to the general language of the Sherman Act by a process of case-by-case adjudication of specific controversies," 428 U.S., at 603, 96 S.Ct., at 3124 (opinion of STEVENS, J.), I offer no gratuitous advice about the questions I think might be relevant. My only observation is that the violation issue is not nearly as simple as the dissenting opinion implies.

Justice REHNQUIST, with whom THE CHIEF JUSTICE and Justice O'CONNOR join, dissenting.

The Court's decision in this case is flawed in two serious respects, and will thereby impede, if not paralyze, local governments' efforts to enact ordinances and regulations aimed at protecting public health, safety, and welfare, for fear of subjecting the local government to liability under the Sherman Act, 15 U.S.C. § 1 *et seq.* First, the Court treats the issue in this case as whether a municipality is "exempt" from the Sherman Act under our decision in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The question addressed in *Parker* and in this case is not whether state and local governments are *exempt* from the Sherman Act, but whether statutes, ordinances, and regulations enacted as an act of government are *pre-empted* by the Sherman Act under the

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operation of the Supremacy Clause. Second, in holding that a municipality's ordinances can be "exempt" from antitrust scrutiny only if the enactment furthers or implements a "clearly articulated and affirmatively expressed state policy," *ante*, at 841, the Court treats a political subdivision of a State as an entity indistinguishable from any privately owned business. As I read the Court's opinion, a municipality may be said to *violate* the antitrust laws by enacting legislation in conflict with the Sherman Act, unless the legislation is enacted pursuant to an affirmative state policy to supplant competitive market forces in the area of the economy to be regulated.

***61** I

Pre-emption and exemption are fundamentally distinct concepts. Pre-emption, because it involves the Supremacy Clause, implicates our basic notions of federalism. ****846** Pre-emption analysis is invoked whenever the Court is called upon to examine "the interplay between the enactments of two *different* sovereigns—one federal and the other state." Handler, Antitrust—1978, 78 Colum.L.Rev. 1363, 1379 (1978). We are confronted with questions under the Supremacy Clause when we are called upon to resolve a purported conflict between the enactments of the Federal Government and those of a state or local government, or where it is claimed that the Federal Government has occupied a particular field exclusively, so as to foreclose any state regulation. Where pre-emption is found, the state enactment must fall without any effort to accommodate the State's purposes or interests. Because pre-emption treads on the very sensitive area of federal-state relations, this Court is "reluctant to infer pre-emption," *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 132, 98 S.Ct. 2207, 2217, 57 L.Ed.2d 91 (1978), and the presumption is that pre-emption is not to be found absent the clear and manifest intention of Congress that the federal Act should supersede the police powers of the States. *Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157, 98 S.Ct. 988, 994, 55 L.Ed.2d 179 (1978).

In contrast, exemption involves the interplay between the enactments of a single sovereign—whether one enactment was intended by Congress to relieve a party from the necessity of complying with a prior enactment. See, *e.g., National Broiler Marketing Assn. v. United States*, 436 U.S. 816, 98 S.Ct. 2122, 56 L.Ed.2d 728 (1978) (Sherman Act and Capper-Volstead Act); *United States v. Philadelphia National Bank*, 374 U.S. 321, 350–355, 83 S.Ct. 1715, 1734–37, 10 L.Ed.2d 915 (1963) (Clayton Act and Bank Merger Act of 1960); *Silver v. New York Stock Exchange*, 373 U.S. 341, 357–361, 83 S.Ct. 1246, 1257–59, 10 L.Ed.2d 389 (1963) (Sherman Act and Securities Exchange Act). Since the enactments of only one sovereign are involved, no problems of federalism are present. The court interpreting the ***62** statute must simply attempt to ascertain congressional intent, whether the exemption is claimed to be express or implied. The presumptions utilized in exemption analysis are quite distinct from those applied in the pre-emption context. In examining exemption questions, "the proper approach ... is an analysis which reconciles the operation of both statutory schemes with one another rather than holding one completely ousted." *Silver v. New York Stock Exchange, supra*, at 357, 83 S.Ct. at 1257.

With this distinction in mind, I think it quite clear that questions involving the so-called "state action" doctrine are more properly framed as being ones of pre-emption rather than exemption. Issues under the doctrine inevitably involve state and local regulation which, it is contended, are in conflict with the Sherman Act.

Our decision in *Parker v. Brown, supra*, was the genesis of the "state action" doctrine. That case involved a challenge to a program established pursuant to the California Agricultural Prorate Act, which sought to restrict competition in the State's raisin industry by limiting the producer's ability to distribute raisins through private channels. The program thus sought to maintain prices at a level higher than those maintained in an unregulated market. This Court assumed that the program would violate the Sherman Act were it "organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," and that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a stabilization program like the present because of its effect on interstate commerce." 317 U.S., at 350, 63 S.Ct., at 313. In this regard, we noted that "[o]ccupation of a legislative field by Congress in the exercise of a granted power is a familiar example of its constitutional power to suspend state laws." *Ibid.* We then held, however, that "[w]e find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. ****847** In a dual system of government ***63** in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control

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over its officers and agents is not lightly to be attributed to Congress." *Id.*, at 350–351, 63 S.Ct., at 313–14.

This is clearly the language of federal pre-emption under the Supremacy Clause. This Court decided in *Parker* that Congress did not intend the Sherman Act to override state legislation designed to regulate the economy. There was no language of "exemption," either express or implied, nor the usual incantation that "repeals by implication are disfavored." Instead, the Court held that state regulation of the economy is not necessarily pre-empted by the antitrust laws even if the same acts by purely private parties would constitute a violation of the Sherman Act. The Court recognized, however, that some state regulation is pre-empted by the Sherman Act, explaining that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful ...." *Id.*, at 351, 63 S.Ct., at 314.

Our two most recent *Parker* doctrine cases reveal most clearly that the "state action" doctrine is not an exemption at all, but instead a matter of federal pre-emption.

In *New Motor Vehicle Bd. of California v. Orrin W. Fox Co.*, 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978), we examined the contention that the California Automobile Franchise Act conflicted with the Sherman Act. That Act required a motor vehicle manufacturer to secure the approval of the California New Motor Vehicle Board before it could open a dealership within an existing franchisee's market area, if the competing franchisee objected. By so delaying the opening of a new dealership whenever a competing dealership protested, the Act arguably gave effect to privately initiated restraints of trade, and thus was invalid under *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951). We held that the Act was outside the purview of the Sherman Act because it contemplated ***64** "a system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter of the establishment and relocation of automobile dealerships." 439 U.S., at 109, 99 S.Ct., at 411–412. We also held that a state statute is not invalid under the Sherman Act merely because the statute will have an anticompetitive effect. Otherwise, if an adverse effect upon competition were enough to render a statute invalid under the Sherman Act, " 'the States' power to engage in economic regulation would be effectively destroyed.' " *Id.*, at 111, 99 S.Ct., at 412 (quoting *Exxon Corp. v. Governor of Maryland*, 437 U.S., at 133, 98 S.Ct., at 2218). In *New Motor Vehicle Bd.*, we held that a state statute could stand in the face of a purported conflict with the Sherman Act.

In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), we invalidated California's wine-pricing system in the face of a challenge under the Sherman Act. We first held that the price-setting program constituted resale price maintenance, which this Court has consistently held to be a "*per se*" violation of the Sherman Act. *Id.*, at 102–103, 100 S.Ct., 941–42. We then concluded that the program could not fit within the *Parker* doctrine. Although the restraint was imposed pursuant to a clearly articulated and affirmatively expressed state policy, the program was not actively supervised by the State itself. The State merely authorized and enforced price fixing established by private parties, instead of establishing the prices itself or reviewing their reasonableness. In the absence of sufficient state supervision, we held that the pricing system was invalid under the Sherman Act. 455 U.S., at 105–106, 100 S.Ct., at 943–944.

Unlike the instant case, *Parker, Midcal*, and *New Motor Vehicle Bd.* involved challenges ****848** to a state statute. There was no suggestion that a State *violates* the Sherman Act when it enacts legislation not saved by the *Parker* doctrine from invalidation under the Sherman Act. Instead, the statute is simply unenforceable because it has been pre-empted by the Sherman Act. By contrast, the gist of the Court's ***65** opinion is that a municipality may actually violate the antitrust laws when it merely enacts an ordinance invalid under the Sherman Act, unless the ordinance implements an affirmatively expressed state policy.[1] According to the majority, a municipality may be liable under the Sherman Act for enacting anticompetitive legislation, unless it can show that it is acting simply as the "instrumentality" of the State.

Viewing the *Parker* doctrine in this manner will have troubling consequences for this Court and the lower courts who must now adapt antitrust principles to adjudicate Sherman Act challenges to local regulation of the economy. The majority suggests as much in footnote 20. Among the many problems to be encountered will be whether the "*per se*" rules of illegality apply to municipal defendants in the same manner as they are applied to private defendants. Another is the question of remedies. The Court understandably leaves open the question whether municipalities may be liable for treble damages for enacting anticompetitive ordinances which are not protected by the *Parker* doctrine.[2]

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Most troubling, however, will be questions regarding the factors which may be examined by the Court pursuant to the Rule of Reason. In ***66** *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695, 98 S.Ct. 1355, 1367, 55 L.Ed.2d 637 (1978), we held that an anticompetitive restraint could not be defended on the basis of a private party's conclusion that competition posed a potential threat to public safety and the ethics of a particular profession. "[T]he Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable." *Id.*, at 696, 98 S.Ct., at 1368. *Professional Engineers* holds that the decision to replace competition with regulation is not within the competence of private entities. Instead, private entities may defend restraints only on the basis that the restraint is not unreasonable in its effect on competition or because its procompetitive effects outweigh its anticompetitive effects. See *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 97 S.Ct. 2549, 53 L.Ed.2d 568 (1977).

Applying *Professional Engineers* to municipalities would mean that an ordinance could not be defended on the basis that its benefits to the community, in terms of traditional health, safety, and public welfare concerns, outweigh its anticompetitive effects. A local government would be disabled from displacing competition with regulation. Thus, a municipality would violate the Sherman Act by enacting restrictive zoning ordinances, by requiring business and occupational licenses, and by granting exclusive franchises to utility services, even if the city determined that it would be in the best interests of its inhabitants to displace competition with regulation. Competition simply does not and cannot further ****849** the interests that lie behind most social welfare legislation. Although state or local enactments are not invalidated by the Sherman Act merely because they may have anticompetitive effects, *Exxon Corp. v. Governor of Maryland, supra*, at 133, 98 S.Ct., at 2217–2218, this Court has not hesitated to invalidate such statutes on the basis that such a program would violate the antitrust laws if engaged in by private parties. See *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc., supra*, at 102–103, 100 S.Ct., at 941–942 (resale price maintenance); *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951) (same). Cf. *Parker v. Brown*, 317 U.S., at 350, 63 S.Ct., at 313 ***67** Court assumed the stabilization program would violate the Sherman Act if organized and effected by private persons). Unless the municipality could point to an affirmatively expressed state policy to displace competition in the given area sought to be regulated, the municipality would be held to violate the Sherman Act and the regulatory scheme would be rendered invalid. Surely, the Court does not seek to require a municipality to justify every ordinance it enacts in terms of its procompetitive effects. If municipalities are permitted only to enact ordinances that are consistent with the procompetitive policies of the Sherman Act, a municipality's power to regulate the economy would be all but destroyed. See *Exxon Corp. v. Governor of Maryland*, 437 U.S., at 133, 98 S.Ct., at 2217–2218. This country's municipalities will be unable to experiment with innovative social programs. See *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311, 52 S.Ct. 371, 386–387, 76 L.Ed. 747 (1932) (Brandeis, J., dissenting).

On the other hand, rejecting the rationale of *Professional Engineers* to accommodate the municipal defendant opens up a different sort of Pandora's Box. If the Rule of Reason were "modified" to permit a municipality to defend its regulation on the basis that its benefits to the community outweigh its anticompetitive effects, the courts will be called upon to review social legislation in a manner reminiscent of the *Lochner* (*Lochner v. New York*, 198 U.S. 45, 25 S.Ct. 539, 49 L.Ed. 937 (1905)) era. Once again, the federal courts will be called upon to engage in the same wide-ranging, essentially standardless inquiry into the reasonableness of local regulation that this Court has properly rejected. Instead of "liberty of contract" and "substantive due process," the procompetitive principles of the Sherman Act will be the governing standard by which the reasonableness of all local regulation will be determined.[3] Neither the Due Process Clause nor the Sherman Act authorizes federal courts to invalidate ***68** local regulation of the economy simply upon opining that the municipality has acted unwisely. The Sherman Act should not be deemed to authorize federal courts to "substitute their social and economic beliefs for the judgment of legislative bodies, who are elected to pass laws." *Ferguson v. Skrupa*, 372 U.S. 726, 730, 83 S.Ct. 1028, 1031, 10 L.Ed.2d 93 (1963). The federal courts have not been appointed by the Sherman Act to sit as a "superlegislature to weigh the wisdom of legislation." *Lincoln Federal Labor Union v. Northwestern Iron & Metal Co.*, 335 U.S. 525, 535, 69 S.Ct. 251, 256, 93 L.Ed. 212 (1949).

Before this Court leaps into the abyss and holds that municipalities may *violate* the Sherman Act by enacting economic and social legislation, it ought to think about the consequences of such a decision in terms of its effect both upon the very antitrust principles the Court desires to apply to local governments and upon the role of the federal courts in examining the validity of local regulation of the economy.

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****850** Analyzing this problem as one of federal pre-emption rather than exemption will avoid these problems. We will not be confronted with the anomaly of holding a municipality liable for enacting anticompetitive ordinances.[4] The federal courts will not be required to engage in a standardless review of the reasonableness of local legislation. Rather, the question simply will be whether the ordinance enacted is pre-empted by the Sherman Act. I see no reason why a different rule of pre-emption should be applied to testing the validity of municipal ordinances than the standard we presently apply in assessing state statutes. I see no reason why a municipal ordinance should not be upheld if it satisfies the ***69** *Midcal* criteria: the ordinance survives if it is enacted pursuant to an affirmative policy on the part of the city to restrain competition and if the city actively supervises and implements this policy.[5] As with the case of the State, I agree that a city may not simply authorize private parties to engage in activity that would violate the Sherman Act. See *Parker v. Brown*, 317 U.S., at 351, 63 S.Ct., at 313. As in the case of a State, a municipality may not become "a participant in a private agreement or combination by others for restraint of trade." *Id.*, at 351–352, 63 S.Ct., at 313–14.

Apart from misconstruing the *Parker* doctrine as a matter of "exemption" rather than pre-emption, the majority comes to the startling conclusion that our federalism is in no way implicated when a municipal ordinance is invalidated by the Sherman Act. I see no principled basis to conclude, as does the Court, that municipal ordinances are more susceptible to invalidation under the Sherman Act than are state statutes. The majority concludes that since municipalities are not States, and hence are not "sovereigns," our notions of federalism are not implicated when federal law is applied to invalidate otherwise constitutionally valid municipal legislation. I find this reasoning remarkable indeed. Our notions of federalism are implicated when it is contended that a municipal ordinance is preempted by a federal statute. This Court has made no such distinction between States and their subdivisions with regard to the pre-emptive effects of federal law. ***70** The standards applied by this Court are the same regardless of whether the challenged enactment is that of a State or one of its political subdivisions. See, *e.g., City of Burbank v. Lockheed Air Terminal, Inc.*, 411 U.S. 624, 93 S.Ct. 1854, 36 L.Ed.2d 547 (1973); *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440, 80 S.Ct. 813, 4 L.Ed.2d 852 (1960). I suspect that the Court has not intended to so dramatically alter established principles of Supremacy Clause analysis. Yet, this is precisely what it appears to have done by holding that a municipality may invoke the *Parker* doctrine only to the same extent as can a private litigant. Since the *Parker* doctrine is a matter of federal pre-emption under the Supremacy Clause, it should apply in challenges to municipal regulation in similar fashion as it applies in a challenge to a state regulatory enactment. The distinction between cities and States created by the majority has no principled basis to support it if the issue is properly framed in terms of pre-emption rather than exemption.

****851** As with the States, the *Parker* doctrine should be employed to determine whether local legislation has been pre-empted by the Sherman Act. Like the State, a municipality should not be haled into federal court in order to justify its decision that competition should be replaced with regulation. The*Parker* doctrine correctly holds that the federal interest in protecting and fostering competition is not infringed so long as the state or local regulation is so structured to ensure that it is truly the government, and not the regulated private entities, which is replacing competition with regulation.

II

By treating the municipal defendant as no different from the private litigant attempting to invoke the *Parker* doctrine, the Court's decision today will radically alter the relationship between the States and their political subdivisions. Municipalities will no longer be able to regulate the local economy without the imprimatur of a clearly expressed state policy ***71** to displace competition.[6] The decision today effectively destroys the "home rule" movement in this country, through which local governments have obtained, not without persistent state opposition, a limited autonomy over matters of local concern.[7] The municipalities that stand most to lose by the decision today are those with the most autonomy. Where the State is totally disabled from enacting legislation dealing with matters of local concern, the municipality will be defenseless from challenges to its regulation of the local economy. In such a case, the State is disabled from articulating a policy to displace competition with regulation. Nothing short of altering the relationship between the municipality and the State will enable the local government to legislate on matters important to its inhabitants. In order to defend itself from Sherman Act attacks, the home rule municipality will have to cede its authority back to the State. It is unfortunate enough that the Court today holds that our federalism is not implicated when municipal legislation is invalidated by a federal statute.

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It is nothing less than a novel and egregious error when this Court uses the Sherman Act to regulate the relationship between the States and their political subdivisions.

All Citations

455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810, 50 Rad. Reg. 2d (P & F) 1183, 1982-1 Trade Cases P 64,448

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Colorado Home Rule Amendment, Colo.Const., Art. XX, § 6, provides in pertinent part:

“The people of each city or town of this state, having a population of two thousand inhabitants ..., are hereby vested with, and they shall always have, power to make, amend, add to or replace the charter of said city or town, which shall be its organic law and extend to all its local and municipal matters.

“Such charter and the ordinances made pursuant thereto in such matters shall supersede within the territorial limits and other jurisdiction of said city or town any law of the state in conflict therewith.

. . .

“It is the intention of this article to grant and confirm to the people of all municipalities coming within its provisions the full right of self-government in both local and municipal matters....

“The statutes of the state of Colorado, so far as applicable, shall continue to apply to such cities and towns, except insofar as superseded by the charters of such cities and towns or by ordinance passed pursuant to such charters.”

2 Boulder, Colo., Charter § 11 (1965 rev. ed.).

3 The District Court below noted:

“Up to late 1975, cable television throughout the country was concerned primarily with retransmission of television signals to areas which did not have normal reception, with some special local weather and news services originated by the cable operators. During the late 1970's however, satellite technology impacted the industry and prompted a rapid, almost geometric rise in its growth. As earth stations became less expensive, and ‘Home Box Office’ companies developed, the public response to cable television greatly increased the market demand for such expanded services.

“The ‘state of the art’ presently allows for more than 35 channels, including movies, sports, FM radio, and educational, children's, and religious programming. The institutional uses for cable television are fast increasing, with technology for two-way service capability. Future potential for cable television is referred to as ‘blue sky’, indicating that virtually unlimited technological improvements are still expected.” 485 F.Supp. 1035, 1036–1037 (1980).

4 BCC was a defendant below, and is a respondent here.

5 Regarding this letter, the District Court noted that “BCC outlined a proposal for a new system, acknowledging the presence of [petitioner] in Boulder but stating that ‘(w)hatever action the City takes in regard to [petitioner],

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it is the plan of BCC to begin building its system as soon as feasible after the City grants BCC its permit.' " *Id.*, at 1037.

6 "The ... City Council ... initiat[ed] a review and reconsideration of cable television in view of the many changes in the industry since ... 1964.... Accordingly, they hired a consultant, ... and held a number of study meetings to develop a governmental response to these changes. The primary thrust of [the consultant's] advice was that the City should be concerned about the tendency of a cable system to become a natural monopoly. Much discussion in the City Council centered around a supposed unfair advantage that [petitioner] had because it was already operating in Boulder. Members of the Council, and the City Manager, expressed fears that [petitioner might] not be the best cable operator for Boulder, but would nonetheless be the only operator because of its head start in the area. The Council wanted to create a situation in which other cable companies could make offers and not be hampered by the possibility that [petitioner] would build out the whole area before they even arrived." *Ibid.*

7 The preamble to this ordinance offered the following declarations as justification for its enactment:

"[C]able television companies have within recent months displayed interest in serving the community and have requested the City Council to grant [them] permission to use the public right-of-way in providing that service; and

"... the present permittee, [petitioner], has indicated that it intends to extend its services in the near future ...; and

"... the City Council finds that such an extension ... would result in hindering the ability of other companies to compete in the Boulder market; and

"... the City Council intends to adopt a model cable television permit ordinance, solicit applications from interested cable television companies, evaluate such applications, and determine whether or not to grant additional permits ... [within] 3 months, and finds that an extension of service by [petitioner] would result in a disruption of this application and evaluation process; and

"... the City Council finds that placing temporary geographical limitations upon the operations of [petitioner] would not impair the present services offered by [it] to City of Boulder residents, and would not impair [its] ability ... to improve those services within the area presently served by it." Boulder, Colo., Ordinance No. 4473 (1979).

8 The Council reached this conclusion despite BCC's statement to the contrary, see n.5, *supra.*

9 26 Stat. 209, as amended, 15 U.S.C. § 1. Section 1 of the Sherman Act provides in pertinent part that "[e]very contract, combination ..., or conspiracy, in restraint of trade or commerce among the several States ..., is declared to be illegal."

Petitioner also alleged, *inter alia*, that the city and BCC were engaged in a conspiracy to restrict competition by substituting BCC for petitioner. The District Court noted that although petitioner had gathered some circumstantial evidence that might indicate such a conspiracy, the evidence was insufficient to establish a probability that petitioner would prevail on this claim. 485 F.Supp., at 1038.

10 The District Court also held that no *per se* antitrust violation appeared on the record before it, and that petitioner was not protected by the First Amendment from all regulation attempted by the city. *Id.*, at 1039–1040.

11 The majority cited *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), as support for its reading of *City of Lafayette*, and concluded "that *City of*

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Lafayette is not applicable to a situation wherein the governmental entity is asserting a governmental rather than proprietary interest, and that instead the *Parker-Midcal* doctrine is applicable to exempt the City from antitrust liability." 630 F.2d, at 708.

The dissent urged affirmance, agreeing with the District Court's analysis of the antitrust exemption issue. *Id.*, at 715–718 (Markey, C. J., United States Court of Customs and Patent Appeals, sitting by designation, dissenting). The dissent also considered the city's actions to violate "[c]ommon principles of contract law and equity," *id.*, at 715, as well as the First Amendment rights of petitioner and its customers, both actual and potential, *id.*, at 710–714. The petition for certiorari did not present the First Amendment question, and we do not address it in this opinion.

12 The Court of Appeals described the applicable standard as follows:

"[I]t is not necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent. Thus, a trial judge may ascertain, from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of. On the other hand, the connection between a legislative grant of power and the subordinate entity's asserted use of that power may be too tenuous to permit the conclusion that the entity's intended scope of activity encompassed such conduct.... A district judge's inquiry on this point should be broad enough to include all evidence which might show the scope of legislative intent." 532 F.2d, at 434–435 (footnote and citation omitted).

13 THE CHIEF JUSTICE, in a concurring opinion, focused on the nature of the challenged activity rather than the identity of the parties to the suit. 435 U.S., at 420, 98 S.Ct., at 1140. He distinguished between "the proprietary enterprises of municipalities," *id.*, at 422, 98 S.Ct., at 1141 (footnote omitted), and their "traditional government functions," *id.*, at 424, 98 S.Ct., at 1142, and viewed the *Parker* exemption as extending to municipalities only when they engaged in the latter.

14 In *Midcal* we held that a California resale price maintenance system, affecting all wine producers and wholesalers within the State, was not entitled to exemption from the antitrust laws. In so holding, we explicitly adopted the principle, expressed in the plurality opinion in *City of Lafayette*, that anticompetitive restraints engaged in by state municipalities or subdivisions must be "clearly articulated and affirmatively expressed as state policy" in order to gain an antitrust exemption. *Midcal*, 445 U.S., at 105, 100 S.Ct., at 943. The price maintenance system at issue in *Midcal* was denied such an exemption because it failed to satisfy the "active state supervision" criterion described in *City of Lafayette*, 435 U.S., at 410, 98 S.Ct., at 1135, as underlying our decision in *Bates v. State Bar of Arizona*, 433 U.S. 350, 97 S.Ct. 2697, 53 L.Ed.2d 810 (1977). Because we conclude in the present case that Boulder's moratorium ordinance does not satisfy the "clear articulation and affirmative expression" criterion, we do not reach the question whether that ordinance must or could satisfy the "active state supervision" test focused upon in *Midcal.*

15 *Denver Urban Renewal Authority v. Byrne*, Colo., 618 P.2d 1374, 1381 (1980), quoting *Four-County Metropolitan Capital Improvement District v. Board of County Comm'rs*, 149 Colo. 284, 294, 369 P.2d 67, 72 (1962) (emphasis in original). The *Byrne* court went on to state that "by virtue of Article XX, a home rule city is not inferior to the General Assembly concerning its local and municipal affairs." Colo., 618 P.2d, at 1381. Petitioner strongly disputes respondent city's premise and its construction of *Byrne*, citing *City and County of Denver v. Sweet*, 138 Colo. 41, 48, 329 P.2d 441, 445 (1958), *City and County of Denver v. Tihen*, 77 Colo. 212, 219–220, 235 P. 777, 780–781 (1925), and 2 E. McQuillin, Municipal Corporations § 9.08a, p. 638 (1979), as contrary authority. But it is not for us to determine the correct view on this issue as a matter of state law. *Parker* affords an exemption from *federal* antitrust laws, based upon *Congress'* intentions respecting the scope of those laws. Thus the availability of the *Parker* exemption is and must be a matter of federal law.

16 Boulder cites the decision of the Colorado Supreme Court in *Manor Vail Condominium Assn. v. Vail*, 199 Colo. 62, 66–67, 604 P.2d 1168, 1171–1172 (1980), as authority for the proposition that the regulation of cable television is a local matter. Petitioner disputes this proposition and Boulder's reading of *Manor Vail*, citing in rebuttal *United States v. Southwestern Cable Co.*, 392 U.S. 157, 168–169, 88 S.Ct. 1994, 2000–2001, 20 L.Ed.2d 1001 (1968), holding that cable television systems are engaged in interstate communication. In this contention, petitioner is joined by the State of Colorado, which filed an *amicus* brief in support of petitioner. For the purposes of this decision we will assume, without deciding, that respondent city's enactment of the moratorium ordinance under challenge here did fall within the scope of the power delegated to the city by virtue of the Colorado Home Rule Amendment.

17 Respondent city urges that the only distinction between the present case and *Parker* is that here the "act of government" is imposed by a home rule city rather than by the state legislature. Under *Parker* and Colorado law, the argument continues, this is a distinction without a difference, since in the sphere of local affairs home rule cities in Colorado possess every power once held by the state legislature.

18 Boulder also contends that its moratorium ordinance qualifies for antitrust immunity under the test set forth by THE CHIEF JUSTICE in his *City of Lafayette* concurrence, see n. 13, *supra*, because the challenged activity is clearly a "traditional government function," rather than a "proprietary enterprise."

19 Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise. They are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms. And the freedom guaranteed each and every business, no matter how small, is the freedom to compete—to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *United States v. Topco Associates, Inc.*, 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972).

20 See *City of Lafayette*, 435 U.S., at 394–397, 98 S.Ct., at 1127–1128.

We hold today only that the *Parker v. Brown* exemption was no bar to the District Court's grant of injunctive relief. This case's preliminary posture makes it unnecessary for us to consider other issues regarding the applicability of the antitrust laws in the context of suits by private litigants against government defendants. As we said in *City of Lafayette*, "[i]t may be that certain activities which might appear anticompetitive when engaged in by private parties, take on a different complexion when adopted by a local government." 435 U.S., at 417, n.48, 98 S.Ct., at 1139, n.48. Compare, *e.g., National Society of Professional Engineers v. United States*, 435 U.S. 679, 687–692, 98 S.Ct. 1355, 1363–1365, 55 L.Ed.2d 637 (1978) (considering the validity of anticompetitive restraint imposed by private agreement), with *Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133, 98 S.Ct. 2207, 2217–2218, 57 L.Ed.2d 91 (1978) (holding that anticompetitive effect is an insufficient basis for invalidating a state law). Moreover, as in *City of Lafayette, supra*, at 401–402, 98 S.Ct., at 1130–1131, we do not confront the issue of remedies appropriate against municipal officials.

1 Cf. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 615, 96 S.Ct. 3110, 3129, 49 L.Ed.2d 1141 (Stewart, J., dissenting) (the Court's holding "will surely result in disruption of the operation of every state-regulated public utility company in the Nation and in the creation of 'the prospect of massive treble damage liabilities' ") (quoting Posner, The Proper Relationship Between State Regulation and the Federal Antitrust Laws, 49 N.Y.U.L.Rev. 693, 728 (1974)). See also *United States Railroad Retirement Bd. v. Fritz*, 449 U.S. 166, 176, n.10, 101 S.Ct. 453, 460, n.10, 66 L.Ed.2d 368.

2 See 428 U.S., at 585–592, 96 S.Ct., at 3115–3118 (opinion of STEVENS, J.). The point was made explicit in two passages of the plurality opinion. In a footnote, the plurality stated:

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"The cumulative effect of these carefully drafted references unequivocally differentiates between official action, on the one hand, and individual action (even when commanded by the State), on the other hand." *Id.*, at 591, n.24, 96 S.Ct., at 3118, n.24.

The point was repeated in the text:

"The federal statute proscribes the conduct of persons, not programs, and the narrow holding in *Parker* concerned only the legality of the conduct of the state officials charged by law with the responsibility for administering California's program. What sort of charge might have been made against the various private persons who engaged in a variety of different activities implementing that program is unknown and unknowable because no such charges were made." *Id.*, at 601, 96 S.Ct., at 3122 (footnote omitted).

The footnote omitted in the above quotation stated:

"Indeed, it did not even occur to the plaintiff that the state officials might have violated the Sherman Act; that question was first raised by this Court." *Id.*, at 601, n.42, 96 S.Ct., at 3122, n.42.

See *Bates v. State Bar of Arizona*, 433 U.S. 350, 361, 97 S.Ct. 2691, 2697, 53 L.Ed.2d 810 ("[O]bviously, *Cantor* would have been an entirely different case if the claim had been directed against a public official or public agency, rather than against a private party").

1 Most challenges to municipal ordinances undoubtedly will be made pursuant to § 1. One of the elements of a § 1 violation is proof of a contract, combination, or conspiracy. It may be argued that municipalities will not face liability under § 1, because it will be difficult to allege that the enactment of an ordinance was the product of such a contract, combination, or conspiracy. The ease with which the ordinance in the instant case has been labeled a "contract" will hardly give municipalities solace in this regard.

2 It will take a considerable feat of judicial gymnastics to conclude that municipalities are not subject to treble damages to compensate any person "injured in his business or property." Section 4 of the Clayton Act, 15 U.S.C. § 15, is mandatory: "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws ... shall recover threefold the damages by him sustained." See *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 442–443, 98 S.Ct. 1123, 1151–52, 55 L.Ed.2d 364 (1978) (BLACKMUN, J., dissenting).

3 During the *Lochner* era, this Court's interpretation of the Due Process Clause complemented its antitrust policies. This Court sought to compel competitive behavior on the part of private enterprise and generally forbade government interference with competitive forces in the marketplace. See Strong, The Economic Philosophy of Lochner: Emergence, Embrasure and Emasculation, 15 Ariz.L.Rev. 419, 435 (1973).

4 Since a municipality does not violate antitrust laws when it enacts legislation pre-empted by the Sherman Act, there will be no problems with the remedy. Pre-empted state or local legislation is simply invalid and unenforceable.

5 The *Midcal* standards are not applied until it is either determined or assumed that the regulatory program would violate the Sherman Act if it were conceived and operated by private persons. See *Parker v. Brown*, 317 U.S., at 350, 63 S.Ct., at 313; *California Retail Liquor Dealers Assn. v. Midcal Aluminum Inc.*, 445 U.S. 97, 102–103, 100 S.Ct. 937, 941–942, 63 L.Ed.2d 233 (1980). A statute is not pre-empted simply because some conduct contemplated by the statute might violate the antitrust laws. See *Joseph E. Seagram & Sons, Inc. v. Hostetter*, 384 U.S. 35, 45–46, 86 S.Ct. 1254, 1260–61, 16 L.Ed.2d 336 (1966). Conversely, reliance on a state statute does not insulate a private party from liability under the antitrust laws unless the statute satisfies the *Midcal* criteria.

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6 The Court understandably avoids determining whether local ordinances must satisfy the "active state supervision" prong of the *Midcal* test. It would seem rather odd to require municipal ordinances to be enforced by the State rather than the city itself.

7 Seeing this opportunity to recapture the power it has lost over local affairs, the State of Colorado, joined by 22 other States, has supported petitioner as *amicus curiae.* It is curious, indeed, that these States now seek to use the Supremacy Clause as a sword, when they so often must defend their own enactments from its invalidating effects.

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105 S.Ct. 1713
Supreme Court of the United States

TOWN OF HALLIE, et al., Petitioners
v.
CITY OF EAU CLAIRE.

No. 82–1832
|
Argued Nov. 26, 1984.
|
Decided March 27, 1985.

Synopsis

Townships appealed from the judgment of the United States District Court for the Western District of Wisconsin, dismissing their antitrust claims against a city. The Court of Appeals affirmed, 700 F.2d 376. Certiorari was granted, and the Supreme Court, Justice Powell, held that a municipality's anticompetitive activities were protected by the state action exemption to federal antitrust laws when the activities were authorized, but not compelled, by the state, and though the state did not actively supervise the anticompetitive conduct.

Affirmed.

Procedural Posture(s): On Appeal.

****1714 *34** *Syllabus* [*]

Petitioners, unincorporated townships located in Wisconsin adjacent to respondent city, filed suit against respondent in Federal District Court, alleging that petitioners were potential competitors of respondent in the collection and transportation of sewage, and that respondent had violated the Sherman Act by acquiring a monopoly over the provision of sewage treatment services in the area and by tying the provision of such services to the provision of sewage collection and transportation services. Respondent refused to supply sewage treatment services to petitioners, but supplied the services to individual landowners in petitioners' areas if a majority of the individuals in the area voted by referendum election to have their homes annexed by respondent and to use its sewage collection and transportation services. The District Court dismissed the complaint, finding, *inter alia,* that Wisconsin statutes regulating the municipal provision of sewage services expressed a clear state policy to replace competition with regulation. The court concluded that respondent's allegedly anticompetitive conduct fell within the "state action" exemption to the federal antitrust laws established by *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315. The Court of Appeals affirmed.

Held: Respondent's anticompetitive activities are protected by the state action exemption to the federal antitrust laws. Pp. 1716–1721.

(a) Before a municipality may claim the protection of the state action exemption, it must demonstrate that it is engaging in the challenged activity pursuant to a "clearly articulated" state policy. *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364. Pp. 1716–1717.

(b) Wisconsin statutes grant authority to cities to construct and maintain sewage systems, to describe the district to be served, and to refuse to serve unannexed areas. The statutes are not merely neutral on state policy but, instead, clearly contemplate that a city may engage in anti-competitive conduct. To pass the "clear articulation" test, the legislature need not expressly state in a statute or the legislative history that it intends for the delegated action to have anticompetitive effects. The Wisconsin statutes evidence a clearly articulated state policy to displace competition with regulation in the area of municipal provision of sewage services. Pp. 1717–1719.

***35** c) The "clear articulation" requirement of the state action test does not require that respondent show that the State "compelled" it to act. Although compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated ****1715** state policy. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141, and *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572, distinguished. Pp. 1719–1720.

(d) Active state supervision of anticompetitive conduct is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party. The requirement of active state supervision serves essentially the evidentiary function of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. Where the actor is a municipality rather than a private party, there is little or no danger that it is involved in a *private* price-fixing arrangement. The danger that a municipality will seek to further purely parochial public interests at the expense of more overriding state goals is minimal, because of the

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requirement that the municipality act pursuant to a clearly articulated state policy. P. 1720–1721.

700 F.2d 376 (CA7 1983), affirmed.

Attorneys and Law Firms

John J. Covelli argued the cause for petitioners. With him on the briefs was Michael P. May.

Frederick W. Fischer argued the cause and filed a brief for respondent.*

* Ronald A. Zumbrun and Robert K. Best filed a brief for the Pacific Legal Foundation as amicus curiae urging reversal.

Briefs of amici curiae urging affirmance were filed for the United States by Solicitor General Lee, Assistant Attorney General McGrath, Deputy Solicitor General Wallace, Deputy Assistant Attorney General Rule, Carter G. Phillips, Catherine G. O'Sullivan, and Nancy C. Garrison; for the State of Illinois et al. by Neil F. Hartigan, Attorney General of Illinois, Robert E. Davy, Thomas J. DeMay, Linley E. Pearson, Attorney General of Indiana, Frank A. Baldwin, Deputy Attorney General, Bronson C. La Follette, Attorney General of Wisconsin, and Michael L. Zaleski, Assistant Attorney General; for the Commonwealth of Virginia et al. by Gerald L. Baliles, Attorney General of Virginia, Elizabeth B. Lacy, Deputy Attorney General, Craig Thomas Merritt, Assistant Attorney General, Joseph I. Lieberman, Attorney General of Connecticut, Robert M. Langer, Assistant Attorney General, Hubert H. Humphrey III, Attorney General of Minnesota, Stephen P. Kilgriff, Assistant Attorney General, LeRoy S. Zimmerman, Attorney General of Pennsylvania, Eugene F. Waye, Deputy Attorney General, Brian McKay, Attorney General of Nevada, David L. Wilkenson, Attorney General of Utah, and Suzanne M. Dallimore, Assistant Attorney General; for the U.S. Conference of Mayors et al. by Stephen Chapple, Frederic Lee Ruck, and Ross D. Davis; for the American Public Power Association et al. by Carlos C. Smith, Frederick L. Hitchcock, Edward D. Meyer, Stanley P. Hebert, John W. Pestle, John D. Maddox, June W. Wiener, Clifford D. Pierce, Jr., Donald W. Jones, Eugene N. Collins, and Randall L. Nelson; and for the National Institute of Municipal Law Officers by Roger F. Cutler, Roy D. Bates, George Agnost, Benjamin L. Brown, J. Lamar Shelley, John W. Witt, Robert J. Alfton, James K. Baker, Clifford D. Pierce, Jr., William H. Taube, William I. Thornton, Jr., Henry W. Underhill, Jr., and Charles S. Rhyne.

David Epstein filed a brief for the American Ambulance Association et al. as amici curiae.

Opinion

***36** Justice POWELL delivered the opinion of the Court.

This case presents the question whether a municipality's anticompetitive activities are protected by the state action exemption to the federal antitrust laws established by *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), when the activities are authorized, but not compelled, by the State, and the State does not actively supervise the anticompetitive conduct.

I

Petitioners—Town of Hallie, Town of Seymour, Town of Union, and Town of Washington (the Towns)—are four Wisconsin unincorporated townships located adjacent to respondent, the City of Eau Claire (the City). Town of Hallie is located in Chippewa County, and the other three towns are located in Eau Claire County.[1] The Towns filed suit against the City in United States District Court for the Western District of Wisconsin seeking injunctive relief and alleging that the City violated the Sherman Act, 15 U.S.C. § 1 *et seq.,* by acquiring a monopoly over the provision of sewage treatment services in Eau Claire and Chippewa Counties, and by tying ***37** the provision of such services to the provision of sewage collection and transportation services.[2] Under the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.,* the City had obtained federal funds to help build a sewage treatment facility within the Eau Claire Service Area, that included the Towns; the facility is the only one in the market available to the Towns. The City has refused to supply sewage treatment services to the Towns. It does supply the services to individual landowners in areas of the Towns if a majority of the individuals in the area vote by referendum election to have their homes annexed by the City, see Wis.Stat. §§ 66.024(4), 144.07(1) (1982), and to use the City's sewage collection and transportation services.

Alleging that they are potential competitors of the City in the collection and transportation of sewage, the Towns contended in the District Court that the City used its monopoly over sewage treatment to gain an unlawful monopoly over the provision of sewage collection and transportation services, in violation of the Sherman Act. They also contended that the

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City's actions constituted an illegal tying arrangement and an unlawful refusal to deal with the Towns.

****1716** The District Court ruled for the City. It found that Wisconsin's statutes regulating the municipal provision of sewage service expressed a clear state policy to replace competition with regulation. The court also found that the State adequately supervised the municipality's conduct through the State's Department of Natural Resources, that was authorized to review municipal decisions concerning provision of sewage services and corresponding annexations of land. The court concluded that the City's allegedly anticompetitive conduct fell within the state action exemption to the federal antitrust laws, as set forth in ***38** *Community Communications Co. v. Boulder,* 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982), and *Parker v. Brown, supra.* Accordingly, it dismissed the complaint.

The United States Court of Appeals for the Seventh Circuit affirmed. 700 F.2d 376 (1983). It ruled that the Wisconsin statutes authorized the City to provide sewage services and to refuse to provide such services to unincorporated areas. The court therefore assumed that the State had contemplated that anticompetitive effects might result, and concluded that the City's conduct was thus taken pursuant to state authorization within the meaning of *Parker v. Brown, supra.* The court also concluded that in a case such as this involving "a local government performing a traditional municipal function," 700 F.2d, at 384, active state supervision was unnecessary for *Parker* immunity to apply. Requiring such supervision as a prerequisite to immunity would also be unwise in this situation, the court believed, because it would erode traditional concepts of local autonomy and home rule that were clearly expressed in the State's statutes.

We granted certiorari, 467 U.S. 1240, 104 S.Ct. 3508, 82 L.Ed.2d 818 (1984), and now affirm.

II

The starting point in any analysis involving the state action doctrine is the reasoning of *Parker v. Brown.* In *Parker,* relying on principles of federalism and state sovereignty, the Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature. 317 U.S., at 350–351, 63 S.Ct., at 313–314. Rather, it ruled that the Sherman Act was intended to prohibit *private* restraints on trade, and it refused to infer an intent to "nullify a state's control over its officers and agents" in activities directed by the legislature. *Id.,* at 351, 63 S.Ct., at 313.

Municipalities, on the other hand, are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 412, 98 S.Ct. 1123, 1136, 55 L.Ed.2d 364 (1978) (opinion of BRENNAN, J.). Rather, to obtain exemption, municipalities ***39** must demonstrate that their anticompetitive activities were authorized by the State "pursuant to state policy to displace competition with regulation or monopoly public service." *Id.,* at 413, 98 S.Ct., at 1137.

The determination that a municipality's activities constitute state action is not a purely formalistic inquiry; the State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful. *Parker v. Brown,* 317 U.S., at 351, 63 S.Ct., at 313. On the other hand, in proving that a state policy to displace competition exists, the municipality need not "be able to point to a specific, detailed legislative authorization" in order to assert a successful *Parker* defense to an antitrust suit. 435 U.S., at 415, 98 S.Ct., at 1138. Rather, *Lafayette* suggested, without deciding the issue, that it would be sufficient to obtain *Parker* immunity for a municipality to show that it acted pursuant to a "clearly articulated and affirmatively expressed ... state policy" that was "actively supervised" by the State. 435 U.S., at 410, 98 S.Ct., at 1135. The plurality viewed this approach as desirable because it "preserv[ed] to the States their freedom ... to administer state regulatory policies free of the inhibitions of the federal antitrust laws ****1717** without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id.,* at 415–416, 98 S.Ct., at 1138–1139.

In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), a unanimous Court applied the *Lafayette* two-pronged test to a case in which the state action exemption was claimed by a private party.[3] In ***40** that case, we found no antitrust immunity for California's wine-pricing system. Even though there was a clear legislative policy to permit resale liquor price maintenance, there was no state supervision of the anticompetitive activity. Thus, the private wine producers who set resale prices were not entitled to the state action exemption. When we again addressed the issue of a municipality's exemption from the antitrust laws in *Boulder, supra,* we declined to accept *Lafayette'* s suggestion

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that a municipality must show more than that a state policy to displace competition exists. We held that Colorado's Home Rule Amendment to its Constitution, conferring on municipal governments general authority to govern local affairs, did not constitute a "clear articulation" of a state policy to authorize anticompetitive conduct with respect to the regulation of cable television in the locale. Because the city could not meet this requirement of the state action test, we declined to decide whether governmental action by a municipality must also be actively supervised by the State. 455 U.S., at 51–52, n. 14, 102 S.Ct., at 840–841, n. 14.

It is therefore clear from our cases that before a municipality will be entitled to the protection of the state action exemption from the antitrust laws, it must demonstrate that it is engaging in the challenged activity pursuant to a clearly expressed state policy. We have never fully considered, however, how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action. Moreover, we have expressly left open the question whether action by a municipality—like action by a private party—must satisfy the "active state supervision" requirement. *Boulder, supra,* 455 U.S., at 51–52, n. 14, 102 S.Ct., at 840–841, n. 14. We consider both of those issues below.

III

The City cites several provisions of the Wisconsin code to support its claim that its allegedly anticompetitive activity ***41** constitutes state action. We therefore examine the statutory structure in some detail.

A

Wisconsin Stat. § 62.18(1) (1981–1982) grants authority to cities to construct, add to, alter, and repair sewage systems. The authority includes the power to "describe with reasonable particularity the district to be [served]." *Ibid.* This grant of authority is supplemented by Wis.Stat. § 66.069(2)(c) (1981–1982), providing that a city operating a public utility

> "may by ordinance fix the limits of such service in unincorporated areas. Such ordinance shall delineate the area within which service will be provided and the municipal utility shall have no obligation to serve beyond the area so delineated."

With respect to joint sewage systems, Wis.Stat. § 144.07(1) (1981–1982) provides that the State's Department of Natural Resources may require a city's sewage system to be constructed so that other cities, towns, or areas may connect to the system, and the Department may order that such ****1718** connections be made. Subsection (1m) provides, however, that an order by the Department of Natural Resources for the connection of unincorporated territory to a city system shall be void if that territory refuses to become annexed to the city. [4]

B

The Towns contend that these statutory provisions do not evidence a state policy to displace competition in the provision of sewage services because they make no express mention ***42** of anticompetitive conduct. [5] As discussed above, the statutes clearly contemplate that a city may engage in anticompetitive conduct. Such conduct is a foreseeable result of empowering the City to refuse to serve unannexed areas. It is not necessary, as the Towns contend, for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects. Applying the analysis of *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978), it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served. We think it is clear that anticompetitive effects logically would result from this broad authority to regulate. See *New Motor Vehicle Board v. Orrin W. Fox Co.,* 439 U.S. 96, 109, 99 S.Ct. 403, 411, 58 L.Ed.2d 361 (1978) (no express intent to displace the antitrust laws, but statute provided regulatory structure that inherently "displace[d] unfettered business freedom"). Accord, 1 P. Areeda & D. Turner, Antitrust Law ¶ 212.3, p. 54 (Supp.1982).

***43** Nor do we agree with the Towns' contention that the statutes at issue here are neutral on state policy. The Towns attempt to liken the Wisconsin statutes to the Home Rule Amendment involved in *Boulder,* arguing that the Wisconsin statutes are neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition in the field of sewage services. The analogy to the Home Rule Amendment involved in *Boulder* is inapposite. That Amendment to the Colorado Constitution allocated only the most general authority to municipalities to govern local affairs. We held that it was neutral and did not satisfy the

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"clear articulation" component of the state action test. The Amendment simply did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was. [6]

****1719** The Towns' argument amounts to a contention that to pass the "clear articulation" test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.

***44** Furthermore, requiring such explicit authorization by the State might have deleterious and unnecessary consequences. Justice Stewart's dissent in *Lafayette* was concerned that the plurality's opinion would impose this kind of requirement on legislatures, with detrimental side effects upon municipalities' local autonomy and authority to govern themselves. 435 U.S., at 434–435, 98 S.Ct., at 1147–1148. In fact, this Court has never required the degree of specificity that the Towns insist is necessary. [7]

In sum, we conclude that the Wisconsin statutes evidence a "clearly articulated and affirmatively expressed" state policy to displace competition with regulation in the area of municipal provision of sewage services. These statutory provisions plainly show that " 'the legislature contemplated the kind of action complained of.' " *City of Lafayette, supra,* at 415, 98 S.Ct., at 1138 (quoting the decision of the Court of Appeals, 532 F.2d 431, 434 (CA5 1976)). [8] This is sufficient to satisfy the "clear articulation" requirement of the state action test.

***45** C

The Towns further argue that the "clear articulation" requirement of the state action test requires at least that the City show that the State "compelled" it to act. In so doing, they rely on language in *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), and *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975). We disagree with this contention for several reasons. *Cantor* and *Goldfarb* concerned private parties—not municipalities—claiming the state action exemption. This fact distinguishes those cases because a municipality is an arm of the State. We may presume, absent a showing to the contrary, that the municipality acts in the public interest. [9] A private party, on the ****1720** other hand, may be presumed to be acting primarily on his or its own behalf.

None of our cases involving the application of the state action exemption to a municipality has required that compulsion be shown. Both *Boulder,* 455 U.S., at 56–57, 102 S.Ct., at 843–844, and *Lafayette,* 435 U.S., at 416–417, 98 S.Ct., at 1138–1139, spoke in terms of the State's direction *or authorization* of the anticompetitive practice at issue. This is so because where the actor is a municipality, acting pursuant to a clearly articulated state policy, compulsion is simply unnecessary as an evidentiary matter to prove that the challenged practice constitutes state action. In short, although compulsion affirmatively ***46** expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy.

IV

Finally, the Towns argue that as there was no active state supervision, the City may not depend on the state action exemption. The Towns rely primarily on language in *Lafayette.* It is fair to say that our cases have not been entirely clear. The plurality opinion in *Lafayette* did suggest, without elaboration and without deciding the issue, that a city claiming the exemption must show that its anticompetitive conduct was actively supervised by the State. 435 U.S., at 410, 98 S.Ct., at 1135. In *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), a unanimous Court held that supervision is required where the anticompetitive conduct is by private parties. In *Boulder,* however, the most recent relevant case, we expressly left this issue open as to municipalities. 455 U.S., at 51–52, n. 14, 102 S.Ct., at 840–841, n. 14. We now conclude that the active state supervision requirement should not be imposed in cases in which the actor is a municipality. [10]

As with respect to the compulsion argument discussed above, the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy. In *Midcal,* we stated that the active state supervision requirement was necessary to prevent a State from circumventing the Sherman Act's proscriptions "by casting ... a gauzy cloak of state involvement over what is ***47** essentially a private price-fixing arrangement." 445 U.S., at 106, 100 S.Ct., at 943. Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

V

We conclude that the actions of the City of Eau Claire in this case are exempt from the Sherman Act. They were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation. We further hold that active state supervision is not a prerequisite to exemption from the antitrust laws where the actor is a municipality rather than a private party. We accordingly ****1721** affirm the judgment of the Court of Appeals for the Seventh Circuit.

It is so ordered.

All Citations

471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24, 23 ERC 1544, 53 USLW 4418, 1985-1 Trade Cases P 66,484, 15 Envtl. L. Rep. 20,373

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The City is located in both Eau Claire and Chippewa Counties.

2 The complaint also alleged violations of the Federal Water Pollution Control Act, 33 U.S.C. § 1251 *et seq.,* and of a common-law duty of a utility to serve. The District Court dismissed these claims, and they are not at issue in this Court.

3 *Midcal* was originally brought as a mandamus action seeking an injunction against a state agency, the California Department of Alcoholic Beverage Control. The State played no role, however, in setting prices or reviewing their reasonableness, activities carried out by the private wine dealers. 445 U.S., at 100–101, 100 S.Ct., at 940–941. The mere fact that the state agency was a named defendant was not sufficient to alter the state action analysis from that appropriate to a case involving the state regulation of private anticompetitive acts. See *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 56–57, 105 S.Ct. 1721, 1726–1727, 85 L.Ed.2d 36 (1985).

4 There is no such order of the Department of Natural Resources at issue in this case.

5 The Towns also rely on Wis.Stat.Ann. §§ 66.076(1) and 66.30 (1965 and Supp.1984) to argue that the State's policy on the provision of sewage services is actually procompetitive. This claim must fail because, aside

from the fact that it was not raised below, the provisions relied upon do not support the contention. First, it is true that § 66.076(1) permits certain municipalities, including towns, to operate sewage systems. The provision is simply a general enabling statute, however, not a mandatory prescription. In addition, subsection (8) of § 66.076 incorporates into the enabling statute all of the limitations of § 66.069, including the power to limit the area of service. Thus, § 66.076(1) does not express a procompetitive state attitude.

Nor does § 66.30 aid the Towns. It is a general provision concerning all utilities—not just sewage systems—that permits municipalities to enter into cooperative agreements. The statute is not mandatory, but merely permissive. Moreover, even assuming two municipalities agreed pursuant to this section to cooperate in providing sewage services, the result would not necessarily be greater competition. Rather, the two combined might well be more effective than either alone in keeping other municipalities out of the market.

6 Nor does it help the Towns' claim that the statutes leave to the City the discretion whether to provide sewage services. States must always be free to delegate such authority to their political subdivisions.

7 Requiring such a close examination of a state legislature's intent to determine whether the federal antitrust laws apply would be undesirable also because it would embroil the federal courts in the unnecessary interpretation of state statutes. Besides burdening the courts, it would undercut the fundamental policy of *Parker* and the state action doctrine of immunizing state action from federal antitrust scrutiny. See 1 P. Areeda & D. Turner, Antitrust Law ¶ 212.3(b) (Supp.1982).

8 Our view of the legislature's intent is supported by *Town of Hallie v. City of Chippewa Falls,* 105 Wis.2d 533, 314 N.W.2d 321 (1982), in which the Supreme Court of Wisconsin rejected the Town of Hallie's challenge under state antitrust laws against the City of Chippewa Falls in a case quite similar to the one at bar. There, the Town of Hallie argued that the City's refusal to provide it with sewage treatment services, the requirement of annexation, and the City's conditioning of the provision of treatment services on the acceptance also of sewage collection and other city services, violated the state antitrust laws. The State Supreme Court disagreed, concluding that the legislature intended the City to undertake the challenged actions. Those actions therefore were exempt from the State's antitrust laws. Analyzing §§ 66.069(2)(c) and 144.07(1m), the court concluded that the legislature had "viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer services to the area." *Id.,* at 540–541, 314 N.W.2d, at 325.

Although the Wisconsin Supreme Court's opinion does not, of course, decide the question presented here of the City's immunity under the *federal* antitrust laws, it is instructive on the question of the state legislature's intent in enacting the statutes relating to the municipal provision of sewerage services.

9 Among other things, municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct. Municipalities in some States are subject to "sunshine" laws or other mandatory disclosure regulations, and municipal officers, unlike corporate heads, are checked to some degree through the electoral process. Such a position in the public eye may provide some greater protection against antitrust abuses than exists for private parties.

10 In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists. See *Southern Motor Carriers Rate Conference, Inc. v. United States, supra,* 471 U.S., at 62, 105 S.Ct., at 1729–1730.

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133 S.Ct. 1003
Supreme Court of the United States

FEDERAL TRADE COMMISSION, Petitioner
v.
PHOEBE PUTNEY HEALTH SYSTEM, INC., et al.

No. 11–1160
|
Argued Nov. 26, 2012.
|
Decided Feb. 19, 2013.

Synopsis
Background: Federal Trade Commission (FTC), along with the State of Georgia, brought action seeking to enjoin hospital authority's acquisition of second hospital, alleging the acquisition would substantially reduce competition in the market for acute-care hospital services in violation of the Federal Trade Commission Act and the Clayton Act. The United States District Court for the Middle District of Georgia, W. Louis Sands, J., 793 F.Supp.2d 1356, denied plaintiffs' request for a preliminary injunction and granted defendants' motion to dismiss. FTC appealed. The United States Court of Appeals for the Eleventh Circuit, Tjoflat, Circuit Judge, 663 F.3d 1369, affirmed. Certiorari was granted.

The Supreme Court, Justice Sotomayor, held that hospital authority was not entitled to state-action immunity from federal antitrust laws.

Reversed and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss; Motion for Preliminary Injunction.

****1004** *Syllabus* [*]

Under Georgia's Hospital Authorities Law (Law), political subdivisions may create special-purpose public entities called hospital authorities to provide "for the operation and maintenance of needed health care facilities in the several counties and municipalities of th[e] state." The Law permits authorities to "exercise public and essential governmental functions" and delegates to them numerous general powers, including the ability to acquire and lease hospitals and other public health facilities. Ga.Code Ann. § 31–7–75.

The Hospital Authority of Albany–Dougherty County (Authority) owns ****1005** Phoebe Putney Memorial Hospital (Memorial), one of two hospitals in the county. The Authority formed two private nonprofit corporations to manage Memorial: Phoebe Putney Health System, Inc. (PPHS) and Phoebe Putney Memorial Hospital, Inc. (PPMH). After the Authority decided to purchase the second hospital in the county and lease it to a subsidiary of PPHS, the Federal Trade Commission (FTC) issued an administrative complaint alleging that the transaction would substantially reduce competition in the market for acute-care hospital services, in violation of § 5 of the Federal Trade Commission Act and § 7 of the Clayton Act. The FTC and Georgia subsequently sued the Authority, PPHS, PPMH, and others (collectively respondents), seeking to enjoin the transaction pending administrative proceedings. The District Court denied the request for a preliminary injunction and granted respondents' motion to dismiss, holding that respondents are immune from antitrust liability under the state-action doctrine. The Eleventh Circuit affirmed. It concluded that the Authority, as a local governmental entity, was entitled to state-action immunity because the challenged anticompetitive conduct was a foreseeable result of the Law. The court reasoned that the state legislature could have readily anticipated an anticompetitive effect, given the breadth of the powers delegated to hospital authorities, particularly leasing and acquisition powers that could lead to consolidation of hospital ownership.

Held : Because Georgia has not clearly articulated and affirmatively expressed a policy allowing hospital authorities to make acquisitions that substantially lessen competition, state-action immunity does not apply. Pp. 1009 – 1017.

(a) This Court recognized in *Parker v. Brown,* 317 U.S. 341, 350–352, 63 S.Ct. 307, 87 L.Ed. 315, that the federal antitrust laws do not prevent States from imposing market restraints "as an act of government...." Under the state-action doctrine, immunity from federal antitrust law may extend to nonstate actors carrying out the State's regulatory program. See, *e.g., Patrick v. Burget,* 486 U.S. 94, 99–100, 108 S.Ct. 1658, 100 L.Ed.2d 83. But given the antitrust laws' values of free enterprise and economic competition, "state-action immunity is disfavored," *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636, 112 S.Ct. 2169, 119 L.Ed.2d 410, and is recognized only when it is clear that the challenged anticompetitive conduct

is undertaken pursuant to the "State's own" regulatory scheme, *id.,* at 635, 112 S.Ct. 2169. Immunity will attach only to activities of substate governmental entities that are undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. *Community Communications Co. v. Boulder,* 455 U.S. 40, 52, 102 S.Ct. 835, 70 L.Ed.2d 810. A state legislature need not "expressly state" that intent, *Hallie v. Eau Claire,* 471 U.S. 34, 43, 105 S.Ct. 1713, 85 L.Ed.2d 24, but the anticompetitive effect must have been the "foreseeable result" of what the State authorized, *id.,* at 42, 105 S.Ct. 1713. Pp. 1009 – 1012.

(b) Respondents' state-action immunity defense fails under the clear-articulation test because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership. The Authority's powers, including its acquisition and leasing powers, mirror general powers routinely conferred by state law on private corporations. More is required to establish state-action immunity; the Authority must show that it has been delegated authority not just to act, but to act or regulate anticompetitively. *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 372, 111 S.Ct. 1344, 113 L.Ed.2d 382. In ****1006** *Boulder,* this Court concluded that a Colorado law granting municipalities the power to enact ordinances governing local affairs did not satisfy the clear-articulation test, 455 U.S., at 55–56, 102 S.Ct. 835, because, when a State's position "is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive," the State cannot be said to have " 'contemplated' " those anticompetitive actions, *id.,* at 55, 102 S.Ct. 835.

That principle controls here. Grants of general corporate power allowing substate governmental entities to participate in a competitive marketplace are typically used without raising federal antitrust concerns, so a State cannot be said to have contemplated that such powers will be used anticompetitively. Here, though the Law allows the Authority to acquire hospitals, it does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that will substantially lessen competition. Pp. 1011 – 1012.

(c) In concluding otherwise, the Eleventh Circuit applied the concept of "foreseeability" too loosely. This Court, recognizing that no legislature "can be expected to catalog all of the anticipated effects" of a statute delegating authority to a substate governmental entity, *Hallie,* 471 U.S., at 43, 105 S.Ct. 1713, has approached the clear-articulation inquiry practically, but without diluting the ultimate requirement that the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the "state itself," *Parker,* 317 U.S., at 352, 63 S.Ct. 307. Thus, the Court has found a state policy to displace federal antitrust law was sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals. See *Hallie,* 471 U.S., at 41, 105 S.Ct. 1713; *Omni,* 499 U.S., at 373, 111 S.Ct. 1344. By contrast, when a State grants an entity a general power to act, it does so against the backdrop of federal antitrust law. Entities might transgress antitrust requirements by exercising their powers anticompetitively, but a reasonable legislature's ability to anticipate that possibility falls well short of clearly articulating an affirmative state policy to displace competition. The Eleventh Circuit's argument, echoed by respondents, that the case falls within the foreseeability standard used in *Hallie* and *Omni* is rejected. Pp. 1012 – 1014.

(d) Respondents' additional arguments are also unpersuasive. They contend that because hospital authorities are granted unique powers and responsibilities to fulfill Georgia's objective of providing access to adequate and affordable health care, it was foreseeable that they would decide that the best way to serve their communities was to acquire an existing local hospital, instead of incurring the additional expense and regulatory burden of expanding, or constructing, a facility. But even though the authorities may differ from private corporations offering hospital services, neither the Law nor any other state-law provision clearly articulates a state policy allowing authorities to exercise their general corporate powers without regard to anticompetitive effects. Respondents also contend that when there is doubt about whether the clear-articulation test is satisfied, federal courts should err on the side of recognizing immunity to avoid improper interference with state policy choices. But the Law here is not ambiguous, and respondents' suggestion is inconsistent with the principle that "state-action immunity is disfavored," ****1007** *Ticor Title,* 504 U.S., at 636, 112 S.Ct. 2169. Pp. 1014 – 1017.

663 F.3d 1369, reversed and remanded.

SOTOMAYOR, J., delivered the opinion for a unanimous Court.

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Opinion

Justice SOTOMAYOR delivered the opinion of the Court.

***219** Under this Court's state-action immunity doctrine, when a local governmental entity acts pursuant to a clearly articulated and affirmatively expressed state policy to displace competition, it is exempt from scrutiny under the federal antitrust laws. In this case, we must decide whether a Georgia ***220** law that creates special-purpose public entities called hospital authorities and gives those entities general corporate powers, including the power to acquire hospitals, clearly articulates and affirmatively expresses a state policy to permit acquisitions that substantially lessen competition. Because Georgia's grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively, we hold that the clear-articulation test is not satisfied and state-action immunity does not apply.

I

A

In 1941, the State of Georgia amended its Constitution to allow political subdivisions to provide health care services. 1941 Ga. Laws p. 50. The State concurrently enacted the Hospital Authorities Law (Law), *id.,* at 241, Ga.Code Ann. § 31–7–70 *et seq.* (2012), "to provide a mechanism for the operation and maintenance of needed health care facilities in the several counties and municipalities of th[e] state." § 31–7–76(a). "The purpose of the constitutional provision and the statute based thereon was to ... create an organization which could carry out and make more workable the duty which the State owed to its indigent sick." *DeJarnette v. Hospital Auth. of Albany,* 195 Ga. 189, 200, 23 S.E.2d 716, 723 (1942) (citations omitted). As amended, the Law authorizes each county and municipality, and certain combinations of counties or municipalities, to create "a public body corporate and politic" called a "hospital authority." §§ 31–7–72(a), (d). Hospital authorities are governed by 5– to 9–member boards that are appointed by the governing body of the county or municipality in their area of operation. § 31–7–72(a).

Under the Law, a hospital authority "exercise[s] public and essential governmental functions" and is delegated "all the powers necessary or convenient to carry out and effectuate" the Law's purposes. § 31–7–75. Giving more content to ***221** that general delegation, the Law enumerates 27 powers conferred upon hospital authorities, including the power "[t]o acquire by purchase, ****1008** lease, or otherwise and to operate projects," § 31–7–75(4), which are defined to include hospitals and other public health facilities, § 31–7–71(5); "[t]o construct, reconstruct, improve, alter, and repair projects," § 31–7–75(5); "[t]o lease ... for operation by others any project" provided certain conditions are satisfied, § 31–7–75(7); and "[t]o establish rates and charges for the services and use of the facilities of the authority," § 31–7–75(10). Hospital authorities may not operate or construct any project for profit, and accordingly they must set rates so as only to cover operating expenses and create reasonable reserves. § 31–7–77.

B

In the same year that the Law was adopted, the city of Albany and Dougherty County established the Hospital Authority of Albany–Dougherty County (Authority) and the Authority promptly acquired Phoebe Putney Memorial Hospital (Memorial), which has been in operation in Albany since 1911. In 1990, the Authority restructured its operations by forming two private nonprofit corporations to manage Memorial: Phoebe Putney Health System, Inc. (PPHS), and its subsidiary, Phoebe Putney Memorial Hospital, Inc. (PPMH). The Authority leased Memorial to PPMH for $1 per year for 40 years. Under the lease, PPMH has exclusive authority over the operation of Memorial, including the ability to set rates for services. Consistent with § 31–7–75(7), PPMH

is subject to lease conditions that require provision of care to the indigent sick and limit its rate of return.

Memorial is one of two hospitals in Dougherty County. The second, Palmyra Medical Center (Palmyra), was established in Albany in 1971 and is located just two miles from Memorial. At the time suit was brought in this case, Palmyra was operated by a national for-profit hospital network, HCA, Inc. (HCA). Together, Memorial and Palmyra account ***222** for 86 percent of the market for acute-care hospital services provided to commercial health care plans and their customers in the six counties surrounding Albany. Memorial accounts for 75 percent of that market on its own.

In 2010, PPHS began discussions with HCA about acquiring Palmyra. Following negotiations, PPHS presented the Authority with a plan under which the Authority would purchase Palmyra with PPHS controlled funds and then lease Palmyra to a PPHS subsidiary for $1 per year under the Memorial lease agreement. The Authority unanimously approved the transaction.

The Federal Trade Commission (FTC) shortly thereafter issued an administrative complaint alleging that the proposed purchase-and-lease transaction would create a virtual monopoly and would substantially reduce competition in the market for acute-care hospital services, in violation of § 5 of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. § 45, and § 7 of the Clayton Act, 38 Stat. 731, 15 U.S.C. § 18. The FTC, along with the State of Georgia, [1] subsequently filed suit against the Authority, HCA, Palmyra, PPHS, PPMH, and the new PPHS subsidiary created to manage Palmyra (collectively respondents), seeking to enjoin the transaction pending administrative proceedings. See 15 U.S.C. §§ 26, 53(b).

The United States District Court for the Middle District of Georgia denied the request for a preliminary injunction and ****1009** granted respondents' motion to dismiss. 793 F.Supp.2d 1356 (2011). The District Court held that respondents are immune from antitrust liability under the state-action doctrine. See *id.,* at 1366–1381.

The United States Court of Appeals for the Eleventh Circuit affirmed. 663 F.3d 1369 (2011). As an initial matter, the court "agree[d] with the [FTC] that, on the facts alleged, the joint operation of Memorial and Palmyra would substantially ***223** lessen competition or tend to create, if not create, a monopoly." *Id.,* at 1375. But the court concluded that the transaction was immune from antitrust liability. See *id.,* at 1375–1378. The Court of Appeals explained that as a local governmental entity, the Authority was entitled to state-action immunity if the challenged anticompetitive conduct was a " 'foreseeable result' " of Georgia's legislation. *Id.,* at 1375. According to the court, anticompetitive conduct is foreseeable if it could have been " 'reasonably anticipated' " by the state legislature; it is not necessary, the court reasoned, for an anticompetitive effect to " be 'one that ordinarily occurs, routinely occurs, or is inherently likely to occur as a result of the empowering legislation.' " *Id.,* at 1375–1376 (quoting *FTC v. Hospital Bd. of Directors of Lee Cty.,* 38 F.3d 1184, 1188, 1190–1191 (C.A.11 1994)). Applying that standard, the Court of Appeals concluded that the Law contemplated the anticompetitive conduct challenged by the FTC. The court noted the "impressive breadth" of the powers given to hospital authorities, which include traditional powers of private corporations and a few additional capabilities, such as the power to exercise eminent domain. See 663 F.3d, at 1376. More specifically, the court reasoned that the Georgia Legislature must have anticipated that the grant of power to hospital authorities to acquire and lease projects would produce anticompetitive effects because "[f]oreseeably, acquisitions could consolidate ownership of competing hospitals, eliminating competition between them." *Id.,* at 1377. [2]

***224** The Court of Appeals also rejected the FTC's alternative argument that state-action immunity did not apply because the transaction in substance involved a transfer of control over Palmyra from one private entity to another, with the Authority acting as a mere conduit for the sale to evade antitrust liability. See *id.,* at 1376, n. 12.

We granted certiorari on two questions: whether the Georgia Legislature, through the powers it vested in hospital authorities, clearly articulated and affirmatively expressed a state policy to displace competition in the market for hospital services; and if so, whether state-action immunity is nonetheless inapplicable as a result of the Authority's minimal participation in negotiating the terms of the sale of Palmyra and the Authority's limited supervision of the two hospitals' operations. See 567 U.S. ––––, 133 S.Ct. 28, 183 L.Ed.2d 674 (2012). Concluding that the answer to the first question is "no," we reverse without reaching the second question. [3]

****1010** II

In *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), this Court held that because "nothing in the language of the Sherman Act [15 U.S.C. § 1 *et seq.*] or in its history" suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints "as an act of government." *Id.,* at 350, 352, 63 S.Ct. 307. Following *Parker,* we have held that under certain circumstances, immunity from ***225** the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program. See *Patrick v. Burget,* 486 U.S. 94, 99–100, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988); *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 56–57, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985).

But given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, "state-action immunity is disfavored, much as are repeals by implication." *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 636, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). Consistent with this preference, we recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that "is the State's own." *Id.,* at 635, 112 S.Ct. 2169. Accordingly, "[c]loser analysis is required when the activity at issue is not directly that of" the State itself, but rather "is carried out by others pursuant to state authorization." *Hoover v. Ronwin,* 466 U.S. 558, 568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984). When determining whether the anticompetitive acts of private parties are entitled to immunity, we employ a two-part test, requiring first that "the challenged restraint ... be one clearly articulated and affirmatively expressed as state policy," and second that "the policy ... be actively supervised by the State." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980) (internal quotation marks omitted).

This case involves allegedly anticompetitive conduct undertaken by a substate governmental entity. Because municipalities and other political subdivisions are not themselves sovereign, state-action immunity under *Parker* does not apply to them directly. See *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 370, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991); *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 411–413, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978) (plurality opinion). At the same time, however, substate governmental entities do receive immunity from antitrust scrutiny when they act "pursuant to state policy to displace competition with regulation or monopoly public service." ***226** *Id.,* at 413, 98 S.Ct. 1123.[4] This ****1011** rule "preserves to the States their freedom ... to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id.,* at 415–416, 98 S.Ct. 1123.

As with private parties, immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. *Community Communications Co. v. Boulder,* 455 U.S. 40, 52, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). But unlike private parties, such entities are not subject to the "active state supervision requirement" because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies. *Hallie v. Eau Claire,* 471 U.S. 34, 46–47, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985).[5]

"[T]o pass the 'clear articulation' test," a state legislature need not "expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects." *Id.,* at 43, 105 S.Ct. 1713. Rather, we explained ***227** in *Hallie* that state-action immunity applies if the anticompetitive effect was the "foreseeable result" of what the State authorized. *Id.,* at 42, 105 S.Ct. 1713. We applied that principle in *Omni,* where we concluded that the clear-articulation test was satisfied because the suppression of competition in the billboard market was the foreseeable result of a state statute authorizing municipalities to adopt zoning ordinances regulating the construction of buildings and other structures. 499 U.S., at 373, 111 S.Ct. 1344.

III

A

Applying the clear-articulation test to the Law before us, we conclude that respondents' claim for state-action immunity fails because there is no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership. The acquisition and leasing powers exercised by the Authority in the challenged transaction, which were the principal powers relied upon by the Court of Appeals in finding state-action immunity, see 663 F.3d, at 1377,

mirror general powers routinely conferred by state law upon private corporations.[6] Other powers possessed by hospital authorities that the Court of Appeals characterized as having "impressive breadth," *id.,* at 1376, also fit this pattern, ****1012** including the ability to make and execute contracts, § 31–7–75(3), to set rates for services, § 31–7–75(10), to sue and be sued, § 31–7–75(1), to borrow money, § 31–7–75(17), and the residual authority to exercise any or all powers possessed by private corporations, § 31–7–75(21).

***228** Our case law makes clear that state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively. See *Omni,* 499 U.S., at 372, 111 S.Ct. 1344. In *Boulder,* we held that Colorado's Home Rule Amendment allowing municipalities to govern local affairs did not satisfy the clear-articulation test. 455 U.S., at 55–56, 102 S.Ct. 835. There was no doubt in that case that the city had authority as a matter of state law to pass an ordinance imposing a moratorium on a cable provider's expansion of service. *Id.,* at 45–46, 102 S.Ct. 835. But we rejected the proposition that "the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances" because such an approach "would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Id.,* at 56, 102 S.Ct. 835. We explained that when a State's position "is one of mere *neutrality* respecting the municipal actions challenged as anticompetitive," the State cannot be said to have " 'contemplated' " those anticompetitive actions. *Id.,* at 55, 102 S.Ct. 835.

The principle articulated in *Boulder* controls this case. Grants of general corporate power that allow substate governmental entities to participate in a competitive marketplace should be, can be, and typically are used in ways that raise no federal antitrust concerns. As a result, a State that has delegated such general powers "can hardly be said to have 'contemplated' " that they will be used anticompetitively. *Ibid.* See also 1A P. Areeda & H. Hovenkamp, Antitrust Law ¶ 225a, p. 131 (3d ed.2006) (hereinafter Areeda & Hovenkamp) ("When a state grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anticompetitively"). Thus, while the Law does allow the Authority to acquire hospitals, it does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that will substantially lessen competition.

B

***229** In concluding otherwise, and specifically in reasoning that the Georgia Legislature "must have anticipated" that acquisitions by hospital authorities "would produce anticompetitive effects," 663 F.3d, at 1377, the Court of Appeals applied the concept of "foreseeability" from our clear-articulation test too loosely.

In *Hallie,* we recognized that it would "embod[y] an unrealistic view of how legislatures work and of how statutes are written" to require state legislatures to explicitly authorize specific anticompetitive effects before state-action immunity could apply. 471 U.S., at 43, 105 S.Ct. 1713. "No legislature," we explained, "can be expected to catalog all of the anticipated effects" of a statute delegating authority to a substate governmental entity. *Ibid.* Instead, we have approached the clear-articulation inquiry more practically, but without diluting the ultimate requirement that the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the "state itself." *Parker,* 317 U.S., at 352, 63 S.Ct. 307. Thus, we have concluded that a state policy to displace federal antitrust ****1013** law was sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.

For example, in *Hallie,* Wisconsin statutory law regulating the municipal provision of sewage services expressly permitted cities to limit their service to surrounding unincorporated areas. See 471 U.S., at 41, 105 S.Ct. 1713. While unincorporated towns alleged that the city's exercise of that power constituted an unlawful tying arrangement, an unlawful refusal to deal, and an abuse of monopoly power, we had no trouble concluding that these alleged anticompetitive effects were affirmatively contemplated by the State because it was ***230** "clear" that they "logically would result" from the grant of authority. *Id.,* at 42, 105 S.Ct. 1713. As described by the Wisconsin Supreme Court, the state legislature " 'viewed annexation by the city of a surrounding unincorporated area as a reasonable *quid pro quo* that a city could require before extending sewer services to the area.' " *Id.,* at 44–45, n. 8, 105 S.Ct. 1713 (quoting *Hallie v. Chippewa Falls,* 105 Wis.2d 533, 540–541, 314 N.W.2d 321,

325 (1982)). Without immunity, federal antitrust law could have undermined that arrangement and taken completely off the table the policy option that the State clearly intended for cities to have.

Similarly, in *Omni,* where the respondents alleged that the city had used its zoning power to protect an incumbent billboard provider against competition, we found that the clear-articulation test was easily satisfied even though the state statutes delegating zoning authority to the city did not explicitly permit the suppression of competition. We explained that "[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition" and that a zoning ordinance regulating the size, location, and spacing of billboards "necessarily protects existing billboards against some competition from newcomers." 499 U.S., at 373, 111 S.Ct. 1344. Other cases in which we have found a "clear articulation" of the State's intent to displace competition without an explicit statement have also involved authorizations to act or regulate in ways that were inherently anticompetitive. [7]

***231** By contrast, "simple permission to play in a market" does not "foreseeably entail permission to roughhouse in that market unlawfully." *Kay Elec. Cooperative v. Newkirk,* 647 F.3d 1039, 1043 (C.A.10 2011). When a State grants some entity general power to act, whether it is a private corporation or a public entity like the Authority, it does so against the backdrop of federal antitrust law. See *Ticor Title,* 504 U.S., at 632, 112 S.Ct. 2169. Of course, both private parties and local governmental ****1014** entities conceivably may transgress antitrust requirements by exercising their general powers in anticompetitive ways. But a reasonable legislature's ability to anticipate that (potentially undesirable) possibility falls well short of clearly articulating an affirmative state policy to displace competition with a regulatory alternative.

Believing that this case falls within the scope of the foreseeability standard applied in *Hallie* and *Omni,* the Court of Appeals stated that "[i]t defies imagination to suppose the [state] legislature could have believed that every geographic market in Georgia was so replete with hospitals that authorizing acquisitions by the authorities could have no serious anticompetitive consequences." 663 F.3d, at 1377. Respondents echo this argument, noting that each of Georgia's 159 counties covers a small geographical area and that most of them are sparsely populated, with nearly three-quarters having fewer than 50,000 residents as of the 2010 Census. Brief for Respondents 46.

Even accepting, *arguendo,* the premise that facts about a market could make the anticompetitive use of general corporate powers "foreseeable," we reject the Court of Appeals' and respondents' conclusion because only a relatively small subset of the conduct permitted as a matter of state law by Ga.Code Ann. § 31–7–75(4) has the potential to negatively affect competition. Contrary to the Court of Appeals' and ***232** respondents' characterization, § 31–7–75(4) is not principally concerned with hospital authorities' ability to acquire multiple hospitals and consolidate their operations. Section 31–7–75(4) allows authorities to acquire "projects," which includes not only "hospitals," but also "health care facilities, dormitories, office buildings, clinics, housing accommodations, nursing homes, rehabilitation centers, extended care facilities, and other public health facilities." § 31–7–71(5). Narrowing our focus to the market for hospital services, the power to acquire hospitals still does not ordinarily produce anticompetitive effects. Section 31–7–75(4) was, after all, the source of power for newly formed hospital authorities to acquire a hospital in the first instance—a transaction that was unlikely to raise any antitrust concerns even in small markets because the transfer of ownership from private to public hands does not increase market concentration. See 1A Areeda & Hovenkamp ¶ 224e(c), at 126 ("[S]ubstitution of one monopolist for another is not an antitrust violation"). While subsequent acquisitions by authorities have the potential to reduce competition, they will raise federal antitrust concerns only in markets that are large enough to support more than one hospital but sufficiently small that the merger of competitors would lead to a significant increase in market concentration. This is too slender a reed to support the Court of Appeals' and respondents' inference.

IV

A

Taking a somewhat different approach than the Court of Appeals, respondents insist that the Law should not be read as a mere authorization for hospital authorities to participate in the hospital-services market and exercise general corporate powers. Rather, they contend that hospital authorities are granted unique powers and responsibilities to fulfill the State's objective of providing all residents with access to

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adequate ***233** and affordable health and hospital care. See, *e.g.,* Ga.Code Ann. § 31–7–75(22). Respondents argue that in view of hospital authorities' statutory objective, their specific attributes, and the regulatory context in which they operate, it was foreseeable that authorities facing capacity ****1015** constraints would decide they could best serve their communities' needs by acquiring an existing local hospital rather than incur the additional expense and regulatory burden of expanding a facility or constructing a new one. See Brief for Respondents 33–39.

In support of this argument, respondents observe that hospital authorities are simultaneously empowered to act in ways private entities cannot while also being subject to significant regulatory constraints. On the power side, as the Court of Appeals noted, 663 F.3d, at 1376–1377, hospital authorities may acquire through eminent domain property that is "essential to the [authority's] purposes." § 31–7–75(12).[8] On the restraint side, hospital authorities are managed by a publicly accountable board, §§ 31–7–74.1, 31–7–76, they must operate on a nonprofit basis, § 31–7–77, and they may only lease a project for others to operate after determining that doing so will promote the community's public health needs and that the lessee will not receive more than a reasonable rate of return on its investment, § 31–7–75(7). Moreover, hospital authorities operate within a broader regulatory context in which Georgia requires any party seeking to establish or significantly expand certain medical facilities, including ***234** hospitals, to obtain a certificate of need from state regulators. See § 31–6–40 *et seq.*[9]

We have no doubt that Georgia's hospital authorities differ materially from private corporations that offer hospital services. But nothing in the Law or any other provision of Georgia law clearly articulates a state policy to allow authorities to exercise their general corporate powers, including their acquisition power, without regard to negative effects on competition. The state legislature's objective of improving access to affordable health care does not logically suggest that the State intended that hospital authorities pursue that end through mergers that create monopolies. Nor do the restrictions imposed on hospital authorities, including the requirement that they operate on a nonprofit basis, reveal such a policy. Particularly in light of our national policy favoring competition, these restrictions should be read to reflect more modest aims. The legislature may have viewed profit generation as incompatible with its goal of providing care for the indigent sick. In addition, the legislature may have believed that some hospital authorities would operate in markets with characteristics of natural monopolies, ****1016** in which case the legislature could not rely on competition to control prices. See *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 595–596, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976).

***235** We recognize that Georgia, particularly through its certificate of need requirement, does limit competition in the market for hospital services in some respects. But regulation of an industry, and even the authorization of discrete forms of anticompetitive conduct pursuant to a regulatory structure, does not establish that the State has affirmatively contemplated other forms of anticompetitive conduct that are only tangentially related. Thus, in *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), we rejected a state-action defense to price-fixing claims where a state bar adopted a compulsory minimum fee schedule. Although the State heavily regulated the practice of law, we found no evidence that it had adopted a policy to displace price competition among lawyers. *Id.,* at 788–792, 95 S.Ct. 2004. And in *Cantor,* we concluded that a state commission's regulation of rates for electricity charged by a public utility did not confer state-action immunity for a claim that the utility's free distribution of light bulbs restrained trade in the light-bulb market. 428 U.S., at 596, 96 S.Ct. 3110.

In this case, the fact that Georgia imposes limits on entry into the market for medical services, which apply to both hospital authorities and private corporations, does not clearly articulate a policy favoring the consolidation of existing hospitals that are engaged in active competition. Accord, *FTC v. University Health, Inc.,* 938 F.2d 1206, 1213, n. 13 (C.A.11 1991). As to the Authority's eminent domain power, it was not exercised here and we do not find it relevant to the question whether the State authorized hospital authorities to consolidate market power through potentially anticompetitive acquisitions of existing hospitals.

B

Finally, respondents contend that to the extent there is any doubt about whether the clear-articulation test is satisfied in this context, federal courts should err on the side of recognizing immunity to avoid improper interference with ***236** state policy choices. See Brief for Respondents 43–44. But we do not find the Law ambiguous on the question whether it clearly articulates a policy authorizing anticompetitive acquisitions; it does not.

More fundamentally, respondents' suggestion is inconsistent with the principle that "state-action immunity is disfavored." *Ticor Title,* 504 U.S., at 636, 112 S.Ct. 2169. *Parker* and its progeny are premised on an understanding that respect for the States' coordinate role in government counsels against reading the federal antitrust laws to restrict the States' sovereign capacity to regulate their economies and provide services to their citizens. But federalism and state sovereignty are poorly served by a rule of construction that would allow "essential national policies" embodied in the antitrust laws to be displaced by state delegations of authority "intended to achieve more limited ends." 504 U.S., at 636, 112 S.Ct. 2169. As an *amici* brief filed by 20 States in support of the FTC contends, loose application of the clear-articulation test would attach significant unintended consequences to States' frequent delegations of corporate authority to local bodies, effectively requiring States to disclaim any intent to displace competition to avoid inadvertently authorizing anticompetitive conduct. Brief for State of Illinois et al. as *Amici Curiae* 12–17; see also ****1017** *Surgical Care Center of Hammond, L.C. v. Hospital Serv. Dist. No. 1,* 171 F.3d 231, 236 (C.A.5 1999) (en banc). We decline to set such a trap for unwary state legislatures.

* * *

We hold that Georgia has not clearly articulated and affirmatively expressed a policy to allow hospital authorities to make acquisitions that substantially lessen competition. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

All Citations

568 U.S. 216, 133 S.Ct. 1003, 185 L.Ed.2d 43, 81 USLW 4075, 2013-1 Trade Cases P 78,269, 13 Cal. Daily Op. Serv. 1873, 2013 Daily Journal D.A.R. 2221, 24 Fla. L. Weekly Fed. S 8

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 Georgia did not join the notice of appeal filed by the FTC and is no longer a party in the case.

2 In tension with the Court of Appeals' decision, other Circuits have held in analogous circumstances that substate governmental entities exercising general corporate powers were not entitled to state-action immunity. See *Kay Elec. Cooperative v. Newkirk,* 647 F.3d 1039, 1043, 1045–1047 (C.A.10 2011); *First Am. Title Co. v. Devaugh,* 480 F.3d 438, 456–457 (C.A.6 2007); *Surgical Care Center of Hammond, L.C. v. Hospital Serv. Dist. No. 1,* 171 F.3d 231, 235–236 (C.A.5 1999) (en banc); *Lancaster Community Hospital v. Antelope Valley Hospital Dist.,* 940 F.2d 397, 402–403 (C.A.9 1991).

3 After issuing its decision, the Court of Appeals dissolved the temporary injunction that it had granted pending appeal and the transaction closed. The case is not moot, however, because the District Court on remand could enjoin respondents from taking actions that would disturb the status quo and impede a final remedial decree. See *Knox v. Service Employees,* 567 U.S. ——, ——, 132 S.Ct. 2277, 2287, 183 L.Ed.2d 281 (2012) ("A case becomes moot only when it is impossible for a court to grant any effectual relief whatever to the prevailing party" (internal quotation marks omitted)); see also *FTC v. Whole Foods Market, Inc.,* 548 F.3d 1028, 1033–1034 (C.A.D.C.2008) (opinion of Brown, J.) (rejecting a mootness argument in a similar posture).

4 An *amicus curiae* contends that we should recognize and apply a "market participant" exception to state-action immunity because Georgia's hospital authorities engage in proprietary activities. Brief for National Federation of Independent Business 6–24; see also *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 374–375, 379, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) (leaving open the possibility of a market

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participant exception). Because this argument was not raised by the parties or passed on by the lower courts, we do not consider it. *United Parcel Service, Inc. v. Mitchell,* 451 U.S. 56, 60, n. 2, 101 S.Ct. 1559, 67 L.Ed.2d 732 (1981).

5 The Eleventh Circuit has held that while Georgia's hospital authorities are “unique entities” that lie “somewhere between a local, general-purpose governing body (such as a city or county) and a corporation,” they qualify as “an instrumentality, agency, or ‘political subdivision’ of Georgia for purposes of state action immunity.” *Crosby v. Hospital Auth. of Valdosta & Lowndes Cty.,* 93 F.3d 1515, 1524–1526 (1996). The FTC has not challenged that characterization of Georgia's hospital authorities, and we accordingly operate from the assumption that hospital authorities are akin to political subdivisions.

6 Compare Ga.Code Ann. §§ 31–7–75(4), (7) (2012) (authorizing hospital authorities to acquire projects and enter lease agreements), with § 14–2–302 (outlining general powers of private corporations in Georgia, which include the ability to acquire and lease property), § 14–2–1101 (allowing corporate mergers), and §§ 14–2–1201, 14–2–1202 (allowing sales of corporate assets to other corporations).

7 See *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 64, 65, and n. 25, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985) (finding that a state commission's decision to encourage collective ratemaking by common carriers was entitled to state-action immunity where the legislature had left “[t]he details of the inherently anticompetitive rate-setting process ... to the agency's discretion”); *Hallie v. Eau Claire,* 471 U.S. 34, 42, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985) (describing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978), as a case where there was not an “express intent to displace the antitrust laws” but where the regulatory structure at issue restricting the establishment or relocation of automobile dealerships “inherently displaced unfettered business freedom” (internal quotation marks and brackets omitted)).

8 The Court of Appeals also invoked Ga.Code Ann. § 31–7–84, which provides that hospital authorities do not have the power to assess taxes, but allows the applicable governing body in the authority's area of operation to impose taxes to cover the authority's expenses. See 663 F.3d, at 1377. This provision applies in cases in which the county or municipality has entered into a contract with a hospital authority for the use of its facilities. See §§ 31–7–84(a), 31–7–85. No such contract exists in this case, and respondents have not relied on this provision in briefing or argument before us.

9 Georgia first adopted certificate of need legislation in 1978 in part to comply with a since-repealed federal law conditioning federal funding for a number of health care programs on a State's enactment of certificate of need laws. See 1978 Ga. Laws p. 941, as amended, Ga.Code Ann. § 31–6–40 *et seq.* (2012); see also National Health Planning and Resources Development Act of 1974, 88 Stat. 2246, repealed by § 701(a), 100 Stat. 3799. Many other States also have certificate of need laws. See National Conference of State Legislatures, Certificate of Need: State Health Laws and Programs, online at http://www.ncsl.org/issues-research/health/con-certificate-of-need-state-laws.aspx (as visited Feb. 15, 2013, and available in Clerk of Court's case file) (indicating in “States with CON Programs” table that 35 States retained some type of certificate of need program as of December 2011 while 15 other States had such programs but have repealed them).

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105 S.Ct. 1721
Supreme Court of the United States

SOUTHERN MOTOR CARRIERS RATE CONFERENCE, INC., et al.
v.
UNITED STATES.

No. 82–1922
|
Argued Nov. 26, 1984.
|
Decided March 27, 1985.

Synopsis

United States instituted action against rate bureaus composed of motor common carriers operating in North Carolina, Georgia, Tennessee and Mississippi alleging that the two rate bureaus had violated the Sherman Act. The United States District Court for the Northern District of Georgia, 467 F.Supp. 471, entered summary judgment in favor of the Government. The United States Court of Appeals for the Fifth Circuit, 672 F.2d 469 and 702 F.2d 532, affirmed the judgment of the District Court and the rate bureaus petitioned for certiorari. The Supreme Court, Justice Powell held that where legislatures of North Carolina, Georgia and Tennessee expressly permitted motor carriers to submit collective rate proposals to public service commissions which had the authority to accept, reject or modify any recommendation and where Mississippi, the fourth State in which rate bureaus operated, did not expressly approve of collective rate making, but had articulated clearly its intent to displace price competition among common carriers with a regulatory structure, collective rate-making activities of rate bureaus, which were composed of motor common carriers operating in the four states, were entitled to Sherman Act immunity under the "state action" doctrine.

Reversed.

Justice Stevens filed dissenting opinion in which Justice White joined.

Order on remand, 764 F.2d 748.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

****1722 *48** *Syllabus* [*]

Petitioner Southern Motor Carriers Rate Conference and petitioner North Carolina Motor Carriers Association (petitioners), "rate bureaus" composed of motor common carriers operating in North Carolina, Georgia, Tennessee, and Mississippi, submit, on behalf of their members, joint rate proposals to the Public Service Commission in each State. This collective ratemaking is authorized, but not compelled, by the respective States. The United States, contending that petitioners' collective ratemaking violates the federal antitrust laws, filed an action in Federal District Court to enjoin it. Petitioners responded that their conduct was immune from the federal antitrust laws by virtue of the "state action" doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The District Court entered a summary judgment in the Government's favor. The Court of Appeals affirmed, holding that compulsion is a threshold requirement to a finding of *Parker* immunity. The court reasoned that the two-pronged test of *California Retail Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), for determining whether state regulation of private parties is shielded from the federal antitrust laws —the challenged restraint must be one clearly articulated and affirmatively expressed as a state policy and the State must supervise actively any private anticompetitive conduct —is inapplicable to suits against private parties; that even if *Midcal* is applicable, private conduct that is not compelled cannot be taken pursuant to a "clearly articulated state policy" within the meaning of *Midcal* 's first prong; and that because *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975)—which held that a State Bar, acting alone, could not immunize from the federal antitrust laws its anticompetitive conduct in fixing minimum fees for lawyers—was cited with approval in *Midcal,* the *Midcal* Court endorsed the continued validity of a "compulsion requirement."

Held: Petitioners' collective ratemaking activities, although not compelled by the respective States, are immune from federal antitrust liability under the state action doctrine. The *Midcal* test should be used to determine whether the private rate bureaus' collective ratemaking activities are protected under the federal antitrust laws. Moreover, the actions of a private party can be attributed to a "clearly articulated state ***49** policy," within the meaning of ****1723** the *Midcal* test's first prong, even in the absence of compulsion. The anticompetitive conduct is taken pursuant

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to a "clearly articulated state policy" under the first prong of the *Midcal* test. Here North Carolina, Georgia, and Tennessee statutes expressly permit collective ratemaking. Mississippi, while not expressly approving of collective ratemaking, has clearly articulated its intent to displace price competition among common carriers with a regulatory structure. Because the Government conceded that there was adequate state supervision, both prongs of the *Midcal* test are satisfied. Pp. 1726–1731.

702 F.2d 532 (CA5 1983), reversed.

Attorneys and Law Firms

Allen I. Hirsch argued the cause for petitioners. With him on the brief for petitioner Southern Motor Carriers Rate Conference, Inc., was Simon A. Miller. Bryce Rea, Jr., and Patrick McEligot filed briefs for petitioner North Carolina Motor Carriers Association, Inc. William Paul Rodgers, Jr., filed briefs for petitioner National Association of Regulatory Utility Commissioners.

Deputy Solicitor General Wallace argued the cause for the United States. With him on the brief were Solicitor General Lee, Assistant Attorney General McGrath, Deputy Assistant Attorney General Rule, Carter G. Phillips, Catherine G. O'Sullivan, Elliott M. Seiden, and Nancy C. Garrison.*

* Briefs of amici curiae urging reversal were filed for the American Movers Conference et al. by James A. Calderwood, Edward J. Kiley, and Robert R. Harris; and for the Edison Electric Institute by S. Eason Balch and H. Hampton Boles.

Briefs of amici curiae urging affirmance were filed for the State of Iowa et al. by Thomas G. Miller, Attorney General of Iowa, John R. Perkins and William F. Raisch, Assistant Attorneys General, Charles M. Oberly III, Attorney General of Delaware, Dennis J. Roberts II, Attorney General of Rhode Island, Faith A. La Salle, Special Assistant Attorney General, Bronson C. La Follette, Attorney General of Wisconsin, Michael L. Zaleski, Assistant Attorney General, Linley E. Pearson, Attorney General of Indiana, and Frank A. Baldwin, Deputy Attorney General; for the National Industrial Transportation League by John F. Donelan and Frederic L. Wood; and for the National Small Shipments Traffic Conference et al. by Daniel J. Sweeney.

Opinion

Justice POWELL delivered the opinion of the Court.

***50** Southern Motor Carriers Rate Conference, Inc. (SMCRC), and North Carolina Motor Carriers Association, Inc. (NCMCA), petitioners, are "rate bureaus" composed of motor common carriers operating in four Southeastern States. The rate bureaus, on behalf of their members, submit joint rate proposals to the Public Service Commission in each State for approval or rejection. This collective ratemaking is authorized, but not compelled, by the States in which the rate bureaus operate. The United States, contending that collective ratemaking violates the federal antitrust laws, filed this action to enjoin the rate bureaus' alleged anticompetitive practices. We here consider whether the petitioners' collective ratemaking activities, though not compelled by the States, are entitled to Sherman Act immunity under the "state action" doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

I

A

In North Carolina, Georgia, Mississippi, and Tennessee, Public Service Commissions set motor common carriers' rates for the intrastate transportation of general commodities. [1] Common carriers are required to submit proposed rates to the relevant Commission for approval. [2] A proposed ***51** rate becomes effective if the state agency takes no action within a specified period of time. If a hearing is scheduled, however, a rate will become effective only after affirmative agency approval. [3] The State Public Service Commissions thus have and exercise ultimate authority and control over all intrastate rates.

In all four States, common carriers are allowed to agree on rate proposals prior to their joint submission to the regulatory agency. [4] By reducing the number of proposals, collective ratemaking permits the agency to consider more carefully each submission. In fact, some Public Service Commissions have stated that without collective ****1724** ratemaking they would be unable to function effectively as rate-setting bodies. [5] Nevertheless, collective ratemaking is not compelled by any of the States; every common carrier

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remains free to submit individual rate proposals to the Public Service Commissions. [6]

***52** As indicated above, SMCRC and NCMCA are private associations composed of motor common carriers operating in North Carolina, Georgia, Mississippi, and Tennessee. [7] Both organizations have committees that consider possible rate changes. [8] If a rate committee concludes that an intrastate rate should be changed, a collective proposal for the changed rate is submitted to the State Public Service Commission. Members of the bureau, however, are not bound by the joint proposal. Any disapproving member may submit an independent rate proposal to the state regulatory Commission. [9]

B

On November 17, 1976, the United States instituted this action against SMCRC and NCMCA in the United States District Court for the Northern District of Georgia. [10] The ***53** United States charged that the two rate bureaus had violated § 1 of the Sherman Act by conspiring with their members to fix rates for the intrastate transportation of general commodities. The rate bureaus responded that their conduct was exempt from the federal antitrust laws by virtue of the state action doctrine. See *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). [11] They further asserted that their collective ratemaking activities did not violate the Sherman Act because the rates ultimately were determined by the appropriate state agencies. The District Court found the rate bureaus' arguments meritless, and entered a summary ****1725** judgment in favor of the Government. 467 F.Supp. 471 (1979). The defendants were enjoined from engaging in collective ratemaking activities with their members.

The Court of Appeals for the Fifth Circuit (Unit B, now the Eleventh Circuit), sitting en banc, affirmed the judgment of the District Court. 702 F.2d 532 (1983). [12] Relying primarily on *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), the court held that the rate bureaus' challenged conduct, because it was not compelled by the State, was not entitled to *Parker* immunity. The two-pronged test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), was irrelevant, the court reasoned, for in that case a public official was the ***54** named defendant. [13] 702 F.2d, at 539. The Court of Appeals further held that even if *Midcal* were applicable to a private party's claim of state action immunity, the rate bureaus were not shielded from liability under the Sherman Act. The court concluded that only if the anticompetitive acts of a private party are compelled can a State's policy be held "clearly articulated and affirmatively expressed" within the meaning of *Midcal.* 702 F.2d, at 539.

After finding the rate bureaus not entitled to *Parker* immunity, the Court of Appeals held that their collective ratemaking activities violated the Sherman Act. 672 F.2d 469, 481 (CA5 1982). [14] It rejected the rate bureaus' contention that because the regulatory agencies had ultimate authority and control over the rates charged, the federal antitrust laws were not violated. The Court of Appeals found that "joint ratesetting ... reduce[d] the amount of independent rate filing that otherwise would characterize the market process," and thus raised the prices charged for intrastate transportation of general commodities. *Id.,* at 478. This "naked price restraint," the court reasoned, is *per se* illegal. *Ibid.*

Four judges strongly dissented. They argued that *Midcal* was applicable to a private party's claim of state action immunity. The success of an antitrust action should depend upon the activity challenged rather than the identity of the defendant. 702 F.2d, at 543–544. After asserting that *Midcal* provided the relevant test, the dissenters concluded that the lack of compulsion was not dispositive. Even in the absence of compulsion, a "state can articulate a clear and express policy." *Id.,* at 546. The dissent further concluded that a *per se* compulsion requirement denies States needed flexibility in the formation of regulatory programs, and thus is ***55** inconsistent with the principles of federalism that Congress intended to embody in the Sherman Act. [15]

We granted certiorari [16] 467 U.S. 1240, 104 S.Ct. 3508, 82 L.Ed.2d 818 (1984), to decide whether petitioners' collective ratemaking activities, though not compelled by the States in which they operate, are entitled to *Parker* immunity. [17]

II

In *Parker v. Brown,* 317 U.S., at 341, 63 S.Ct., at 307, this Court held that the Sherman Act was not intended to prohibit ****1726** States from imposing restraints on competition. [18]

There, a raisin producer ***56** filed an action against the California Director of Agriculture to enjoin the enforcement of the State's Agricultural Prorate Act. Under that statute, a cartel of private raisin producers was created in order to stabilize prices and prevent "economic waste." *Id.,* at 346, 63 S.Ct., at 311. The Court recognized that the State's program was anticompetitive, and it assumed that Congress, "in the exercise of its commerce power, [could] prohibit a state from maintaining [such] a stabilization program...." *Id.,* at 350, 63 S.Ct., at 313. Nevertheless, the Court refused to find in the Sherman Act "an unexpressed purpose to nullify a state's control over its officers and agents...." *Id.,* at 351, 63 S.Ct., at 313.

Although *Parker* involved an action against a state official, the Court's reasoning extends to suits against private parties. The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce.[19] If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated, for a State would be unable to implement programs that restrain competition among private parties. A plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the ***57** state officials who implement the plan. We decline to reduce *Parker* 's holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties. *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 616–617, n. 4, 96 S.Ct. 3110, 3130, n. 4, 49 L.Ed.2d 1141 (1976) (Stewart, J., dissenting).

The circumstances in which *Parker* immunity is available to private parties, and to state agencies or officials regulating the conduct of private parties, are defined most specifically by our decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S., at 97, 100 S.Ct., at 937. See ****1727** *Hallie v. Eau Claire,* 471 U.S. 34, 46, n. 10, 105 S.Ct. 1713, 1720, n. 10, 85 L.Ed.2d 25 (1985). In *Midcal,* we affirmed a state-court injunction prohibiting officials from enforcing a statute requiring wine producers to establish resale price schedules. We set forth a two-pronged test for determining whether state regulation of private parties is shielded from the federal antitrust laws. First, the challenged restraint must be " 'one clearly articulated and affirmatively expressed as state policy.' " 445 U.S., at 105, 100 S.Ct., at 943, quoting, *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 410, 98 S.Ct. 1123, 1135, 55 L.Ed.2d 364 (1978) (opinion of BRENNAN, J.). Second, the State must supervise actively any private anticompetitive conduct. 445 U.S., at 105, 100 S.Ct., at 943.[20] This supervision requirement prevents the State from frustrating the national policy in favor of competition by casting a "gauzy cloak of state involvement" over what is essentially private anticompetitive conduct. *Id.,* at 106, 100 S.Ct., at 943.[21]

***58** III

The *Midcal* test does not expressly provide that the actions of a private party must be compelled by a State in order to be protected from the federal antitrust laws. The Court of Appeals, however, held that compulsion is a threshold requirement to a finding of *Parker* immunity. It reached this conclusion by finding that: (i) *Midcal* is inapplicable to suits brought against private parties; (ii) even if *Midcal* is applicable, private conduct that is not compelled cannot be taken pursuant to a "clearly articulated state policy," within the meaning of *Midcal* 's first prong; and (iii) because *Goldfarb* was cited with approval in *Midcal,* the *Midcal* Court endorsed the continued validity of a "compulsion requirement." We consider these points in order.

A

The Court of Appeals held that *Midcal,* that involved a suit against a state agency, is inapplicable where a private party is the named defendant. *Midcal,* however, should not be given such a narrow reading. In that case we were concerned, as we are here, with state regulation restraining competition among private parties. Therefore, the two-pronged test set forth in *Midcal* should be used to determine whether the private rate bureaus' collective ratemaking activities are protected from the federal antitrust laws. The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the ***59** defendant. See *Cantor v. Detroit Edison Co., supra,* 428 U.S., at 604, 96 S.Ct., at 3124 (BURGER, C.J., concurring in part and concurring in judgment); *Lafayette v. Louisiana Power & Light Co., supra,* 435 U.S., at 420, 98 S.Ct., at 1140 (BURGER, C.J., concurring in part and concurring in judgment).

****1728** B

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The Court of Appeals held that even if *Midcal* were applicable here, the rate bureaus would not be immune from federal antitrust liability. According to that court, the actions of a private party cannot be attributed to a clearly articulated state policy, within the meaning of the *Midcal* test's first prong, "when it is left to the private party to carry out that policy or not as he sees fit." 702 F.2d, at 539. In the four States in which petitioners operate, all common carriers are free to submit proposals individually. The court therefore reasoned that the States' policies are neutral with respect to collective ratemaking, and that these policies will not be frustrated if the federal antitrust laws are construed to require individual submissions.

In reaching its conclusion, the Court of Appeals assumed that if anticompetitive activity is not compelled, the State can have no interest in whether private parties engage in that conduct. This type of analysis ignores the manner in which the States in this case clearly have intended their permissive policies to work. Most common carriers probably will engage in collective ratemaking, as that will allow them to share the cost of preparing rate proposals. If the joint rates are viewed as too high, however, carriers individually may submit lower proposed rates to the Commission in order to obtain a larger share of the market. Thus, through the self-interested actions of private common carriers, the States may achieve the desired balance between the efficiency of collective ratemaking and the competition fostered by individual submissions. Construing the Sherman Act to prohibit collective rate proposals eliminates the free choice necessary to ensure that these policies function in the manner intended ***60** by the States. The federal antitrust laws do not forbid the States to adopt policies that permit, but do not compel, anticompetitive conduct by *regulated* private parties. As long as the State clearly articulates its intent to adopt a permissive policy, the first prong of the *Midcal* test is satisfied.[22]

In *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975), this Court said that "[t]he threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Id.,* at 790, 95 S.Ct., at 2015. *Midcal* cited *Goldfarb* with approval. 445 U.S., at 104, 100 S.Ct., at 942–943. On the basis of this citation, the Court of Appeals reasoned that *Midcal* did not eliminate the "compulsion requirement" of *Goldfarb.*

Goldfarb, however, is not properly read as making compulsion a *sine qua non* to state action immunity. In that case, the Virginia State Bar, a state agency, compelled Fairfax County lawyers to adhere to a minimum-fee schedule. 421 U.S., at 776–778, 95 S.Ct., at 2007–2008. The *Goldfarb* Court therefore was not concerned with the necessity of compulsion—its presence in the case was not an issue. The focal point of the *Goldfarb* opinion was the *source* of the anticompetitive policy, rather than whether the challenged conduct was *compelled.* The Court held that a State Bar, *acting alone,* could not immunize its anticompetitive conduct. Instead, the Court held that private parties were entitled to *Parker* immunity only if the State "acting as sovereign" intended to displace competition. 421 U.S., at 790, 95 S.Ct., at 2015; see ***61** *Lafayette v. Louisiana Power & Light Co.,* 435 U.S., at 410, 98 S.Ct., at 1135 (opinion of BRENNAN, J.) ("*Goldfarb* ... made it clear that, for purposes of the ****1729** *Parker* doctrine, not every act of a state agency is that of the State as sovereign").

Although *Goldfarb* did employ language of compulsion, it is beyond dispute that the Court would have reached the same result had it applied the two-pronged test later set forth in *Midcal.* As stated above, Virginia "as sovereign" did not have a "clearly articulated policy" designed to displace price competition among lawyers. In fact, the Supreme Court of Virginia had explicitly directed lawyers not "to be controlled" by minimum-fee schedules. *Goldfarb, supra,* 421 U.S., at 789, n. 19, 95 S.Ct., at 2014, n. 19. Although we recognize that the language in *Goldfarb* is not without ambiguity, we do not read that opinion as making compulsion a prerequisite to a finding of state action immunity.

D

The *Parker* doctrine represents an attempt to resolve conflicts that may arise between principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace. A compulsion requirement is inconsistent with both values. It reduces the range of regulatory alternatives available to the State. At the same time, insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade. We do not believe that Congress intended to resolve conflicts between two competing interests by impairing both more than necessary.

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In summary, we hold *Midcal's* two-pronged test applicable to private parties' claims of state action immunity. Moreover, a state policy that expressly *permits,* but does not compel, anticompetitive conduct may be "clearly articulated" within the meaning of *Midcal.* [23] Our holding today does not ***62** suggest, however, that compulsion is irrelevant. To the contrary, compulsion often is the best evidence that the State has a clearly articulated and affirmatively expressed policy to displace competition. See *Hallie v. Eau Claire,* 471 U.S., at 45–46, 105 S.Ct., at 1719–1720; 1 P. Areeda & D. Turner, Antitrust Law ¶ 212.5, p. 62 (Supp.1982) (compulsion is "powerful evidence" of existence of state policy). Nevertheless, when other evidence conclusively shows that a State intends to adopt a permissive policy, the absence of compulsion should not prove fatal to a claim of *Parker* immunity.

IV

A

Our holding that there is no inflexible "compulsion requirement" does not suggest necessarily that petitioners' collective ratemaking activities are shielded from the federal antitrust laws. A private party may claim state action immunity only if both prongs of the *Midcal* test are satisfied. Here the Court of Appeals found, and the Government concedes, that the State Public Service Commissions actively supervise the collective ratemaking activities of the rate bureaus. Therefore, the only issue left to resolve is whether the petitioners' challenged conduct was taken pursuant to a clearly articulated state policy.

The Public Service Commissions in North Carolina, Georgia, Mississippi, and Tennessee permit collective ratemaking. See n. 4, *supra.* Acting alone, however, these agencies ****1730** ***63** could not immunize private anticompetitive conduct. In *Goldfarb,* the State Bar—a special type of "state agency"—prohibited lawyers from charging fees lower than those set forth in schedules published by the local bar. Nevertheless, this Court held that the local lawyers were not immune from antitrust liability because their anticompetitive conduct was not required by the State as sovereign. 421 U.S., at 790, 95 S.Ct., at 2014. *Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature, see *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.,* 439 U.S. 96, 99 S.Ct. 403, 58 L.Ed.2d 361 (1978), or a State Supreme Court, *Bates v. State Bar of Arizona,* 433 U.S. 350, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977).

In this case, therefore, the petitioners are entitled to *Parker* immunity only if collective ratemaking is clearly sanctioned by the legislatures of the four States in which the rate bureaus operate. North Carolina, Georgia, and Tennessee have statutes that explicitly permit collective ratemaking by common carriers. [24] The rate bureaus' challenged actions, at least in these States, are taken pursuant to an express and clearly articulated state policy. Mississippi's legislature, however, has not specifically addressed collective ratemaking. We therefore must consider whether, in the absence of a statute expressly permitting the challenged conduct, the first prong of the *Midcal* test can be satisfied.

B

The Mississippi Motor Carrier Regulatory Law of 1938, Miss.Code Ann. § 77–7–1 *et seq.* (1972 and Supp.1984), gives the State Public Service Commission authority to regulate common carriers. The statute provides that the Commission is to prescribe "just and reasonable" rates for the intrastate transportation of general commodities. § 77–7–221. The legislature thus made clear its intent that intrastate rates ***64** would be determined by a regulatory agency, rather than by the market. The details of the inherently anticompetitive rate-setting process, however, are left to the agency's discretion. The State Commission has exercised its discretion by actively encouraging collective ratemaking among common carriers. See Response of the State of Mississippi and the Mississippi Public Service Comm'n as *Amici Curiae* in District Court, No. 76–1909A (ND Ga.1977), p. 11. We do not believe that the actions petitioners took pursuant to this regulatory program should be deprived of *Parker* immunity.

A private party acting pursuant to an anticompetitive regulatory program need not "point to a specific, detailed legislative authorization" for its challenged conduct. *Lafayette v. Louisiana Power & Light Co.,* 435 U.S., at 415, 98 S.Ct., at 1138 (opinion of BRENNAN, J.). As long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied. In *Goldfarb,* the Court held that *Parker* immunity was unavailable only because the State *as sovereign* did not intend to do away with competition among

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lawyers. 421 U.S., at 790, 95 S.Ct., at 2014. Similarly, in *Cantor* the anticompetitive acts of a private utility were held unprotected because the Michigan Legislature had indicated no intention to displace competition in the relevant market. 428 U.S., at 584–585, 96 S.Ct., at 3114–3115.

If more detail than a clear intent to displace competition were required of the legislature, States would find it difficult to implement through regulatory agencies their anticompetitive policies. Agencies are created because they are able to deal with problems unforeseeable to, or outside ****1731** the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness. Cf. *Hallie v. Eau Claire,* 471 U.S., at 44, 105 S.Ct., at 1719 (requiring explicit legislative authorization of anticompetitive activity would impose "detrimental side effects upon municipalities' local autonomy"). Therefore, we hold ***65** that if the State's intent to establish an anticompetitive regulatory program is clear, as it is in Mississippi,[25] the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws.

In summary, we hold that the petitioners' collective ratemaking activity is immune from Sherman Act liability. This anticompetitive conduct is taken pursuant to a "clearly articulated state policy." The legislatures of North Carolina, Georgia, and Tennessee expressly permit motor common carriers to submit collective rate proposals to Public Service Commissions, which have the authority to accept, reject, or modify any recommendation. Mississippi, the fourth State in which the petitioners operate, has not expressly approved of collective ratemaking, but it has articulated clearly its intent to displace price competition among common carriers with a regulatory structure. Anticompetitive conduct taken pursuant to such a regulatory program satisfies the first ***66** prong of the *Midcal* test. The second prong of the *Midcal* test likewise is met, for the Government has conceded that the relevant States, through their agencies, actively supervise the conduct of private parties.

V

We conclude that the petitioners' collective ratemaking activities, although not compelled by the States, are immune from antitrust liability under the doctrine of *Parker v. Brown.* Accordingly, the judgment of the Court of Appeals is reversed.

It is so ordered.

Justice STEVENS, with whom Justice WHITE joins, dissenting.

The term "price fixing" generally refers to a process by which competitors agree upon the prices that will prevail in the market for the goods or services they offer. Such behavior is not essential to every public program for regulating industry. In this case, for example, four Southern States have established programs for evaluating the reasonableness of rates that motor carriers propose to charge for intrastate transport, but the States do not require price fixing by motor carriers. They merely tolerate it.

Reasoning deductively from a dictum in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233 (1980), the Court holds that Congress did not intend ****1732** to prohibit price fixing by motor carrier rate bureaus—at least when such conduct is prompted, but not required, by a State Public Service Commission. The result is inconsistent with the language[1] and policies of the Sherman Act, and this Court's precedent. The Sherman Act only would interfere with the regulatory process if the States compelled price ***67** fixing that is unlawful under federal law. In that situation, the regulated carriers would face conflicting obligations under state and federal law, and the success of the States' regulatory programs would be threatened. Except under those circumstances, immunity from the antitrust laws under the state-action doctrine is not available for private persons.[2]

I

"Whatever may be its peculiar problems and characteristics, the Sherman Act, so far as price-fixing agreements are concerned, establishes one uniform rule applicable to all industries alike":[3] agreements and combinations tampering with competitive price structures are unlawful. State legislatures, whose powers are limited by the Supremacy Clause,[4] may not expressly modify the obligations of any person under this federal law. Only Congress, expressly or by implication, may authorize price fixing, and has done so in particular industries or compelling circumstances. Implied

antitrust immunities, however, are disfavored, [5] and any exemptions ***68** from the antitrust laws are to be strictly construed. [6] These "canon[s] of construction ... reflec[t] the felt indispensable role of antitrust policy in the maintenance of a free economy." *United States v. Philadelphia National Bank,* 374 U.S. 321, 348, 83 S.Ct. 1715, 1733, 10 L.Ed.2d 915 (1963).

Applying these principles, this Court has consistently embraced the view that "[r]egulated industries are not *per se* exempt from the Sherman Act." *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 456, 65 S.Ct. 716, 725, 89 L.Ed. 1051 (1945). For many years prior to the enactment of the Sherman Act, state agencies regulated the business of insurance, but we rejected the view that these programs of public scrutiny supported "our reading into the Act an exemption" allowing insurance businesses to fix premium rates and agents' commissions. *United States v. South-Eastern Underwriters Assn.,* 322 U.S. 533, 559, 64 S.Ct. 1162, 1176–1177, 88 L.Ed. 1440 (1944). In *South-Eastern Underwriters,* the Court ****1733** tersely observed that "if exceptions are to be written into the Act, they must come from Congress, not this Court." *Id.,* at 561, 64 S.Ct., at 1178. Thereafter, in the McCarran-Ferguson Act of 1945, 59 Stat. 33, Congress decided, as a matter of policy, that the Sherman Act's prohibition of price fixing "shall [only] be applicable to the business of insurance to the extent that such business is not regulated by State Law." 15 U.S.C. § 1012(b).

Consistent with its treatment of the insurance business in *South-Eastern Underwriters,* this Court has repeatedly held that collusive price fixing by railroads is unlawful even though the end result is a reasonable charge approved by a public rate commission. [7] ***69** *Georgia v. Pennsylvania R. Co.,* 324 U.S., at 455–463, 65 S.Ct., at 725–729; *United States v. Trans-Missouri Freight Assn.,* 166 U.S. 290, 337–340, 17 S.Ct. 540, 557–559, 41 L.Ed. 1007 (1897). In the *Pennsylvania Railroad* case, the Court explained why this is so:

> "The fact that the rates which have been fixed may or may not be held unlawful by the [Interstate Commerce] Commission is immaterial to the issue before us.... [E]ven a combination to fix reasonable and non-discriminatory rates may be illegal. [*Keogh v. Chicago & Northwestern R. Co.,* 260 U.S. 156, 161, 43 S.Ct. 47, 49, 67 L.Ed. 183 (1922)]. The reason is that the Interstate Commerce Act does not provide remedies for the correction of all the abuses of rate-making which might constitute violations of the anti-trust laws. Thus a 'zone of reasonableness exists between maxima and minima within which a carrier is ordinarily free to adjust its charges for itself.' *United States v. Chicago, M., St. P. & P.R. Co.,* 294 U.S. 499, 506 [55 S.Ct. 462, 465, 79 L.Ed. 1023] [1935]. Within that zone the Commission lacks power to grant relief even though the rates are raised to the maxima by a conspiracy among carriers who employ ***70** unlawful tactics.... Damage must be presumed to flow from a conspiracy to manipulate rates within that zone." 324 U.S., at 460–461, 65 S.Ct., at 727–728.

Collusive price fixing by regulated carriers causes upward pressure on rates within the zone of reasonableness, and such combinations and conspiracies are generally actionable under the Sherman Act on the theory of the *Pennsylvania Railroad* case.

Congress reacted to the *Pennsylvania Railroad* decision much as it reacted to the *South-Eastern Underwriters* decision. It decided, as a matter of policy, that some price fixing should be permitted in the transportation industry, and enacted the Reed-Bulwinkle Act of 1948 to effectuate ****1734** that policy choice. [8] In the Motor Carrier Act of 1980, [9] however, Congress sharply curtailed the availability of this antitrust exemption. Collective ratemaking is still permitted in limited circumstances, but rate bureaus must comply with strict procedural requirements. See n. 19, *infra.*

The defendants have stipulated that their price-fixing arrangements are identical to those followed by the Carrier Rate Committees in the *Pennsylvania Railroad* case which were declared unlawful under the Sherman Act. See App. 40–41. They also acknowledge that neither the Reed-Bulwinkle Act nor any other federal statute expressly exempts their price fixing from the antitrust laws. Nevertheless, they contend that Congress would not have intended to prohibit collective ratemaking by intrastate motor carriers when it is permitted, but not required, by state law.

***71** II

The basis for the defendants' claim of implied immunity from the antitrust laws is the state-action doctrine of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). This Court, however, has repeatedly recognized that private entities may not claim the state-action immunity unless their unlawful conduct is compelled by the State.

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In the *Parker* case, this Court held that the Sherman Act does not reach "state action or official action directed by a state." *Id.,* at 351, 63 S.Ct., at 313. The case involved price fixing that was mandated by a California statute in the furtherance of a price-support program for raisin farmers. The Court held that the price fixing was not prohibited by the Sherman Act:

> "[T]he prorate program here was never intended to operate by force of individual agreement or combination. It derived its authority and its efficacy from the legislative command of the state and was not intended to operate or become effective without that command. We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.,* at 350–351, 63 S.Ct., at 313.

Under *Parker,* private anticompetitive conduct must be "directed" by the State to be eligible for the state-action immunity.

In a later case involving price fixing by attorneys through minimum-fee schedules, the Court unanimously stated: "The threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign. *Parker v. Brown,* 317 U.S., at 350–352 [63 S.Ct., at 313–314]; *Continental Co. v. Union Carbide,* 370 U.S. 690, 706–707 [82 S.Ct. 1404, 1414–1415, 8 L.Ed.2d 777] (1962)." *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 790, 95 S.Ct. 2004, 2015, 44 L.Ed.2d 572 (1975). In *Goldfarb,* no state statute or Supreme Court rule required the defendant County Bar Association to ***72** adopt the minimum-fee schedule, and this Court concluded that this "is not state action for Sherman Act purposes. It is not enough that, as the County Bar puts it, anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign." *Id.,* at 791, 95 S.Ct., at 2015.

In *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), the Court was also unanimous in its understanding that sovereign compulsion was a prerequisite for state-action immunity. ****1735** [10] The opinion for the Court observed that it has long been settled "that state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity." *Id.,* at 592–593, 96 S.Ct., at 3118–3119 (footnotes omitted). [11] The dissenting Justices agreed: "private conduct, if it is to come within the state-action exemption, must be not merely 'prompted' but 'compelled' by state action." *Id.,* at 637, 96 S.Ct., at 3140 (STEWART, J., dissenting, joined by POWELL and REHNQUIST, JJ.).

In *Cantor,* the Court only divided on the question whether the compulsion requirement *alone* was sufficient to confer antitrust immunity. The dissent argued that Congress would not have intended to penalize Detroit Edison for engaging in a light-bulb-distribution program that had been approved by the Michigan Public Service Commission and that could not be discontinued without approval of the Commission. *Id.,* at 614–615, 96 S.Ct., at 3129. The Court, on the other hand, acknowledged that continuation of the light-bulb program was ostensibly required by the State, but went on to consider ***73** whether an antitrust exemption for this conduct was fundamental to the State's regulatory program. Since Michigan's statutes only expressed an interest in regulating the electricity market, and not the light-bulb market, the Court concluded that "[r]egardless of the outcome of this case, Michigan's interest in regulating its utilities' distribution of electricity will be almost entirely unimpaired." *Id.,* at 598, 96 S.Ct., at 3121. Because the State had not articulated any intention to regulate the light-bulb market, and the idea for the distribution program had come from the private utility, the State's requirement that the program continue was not sufficient to establish state-action immunity from the antitrust laws.

The Court's unanimous decision in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), signaled no departure from settled principles in this area. In discussing the principles of law applicable to state-action immunity, the Court quoted extensively from the language in *Parker* and *Goldfarb* [12] that recognized the compulsion requirement. In any case, it was quite clear in *Midcal* that the California statutes required the unlawful resale-price-maintenance activities. Thus, this Court had no occasion in that case to explore the contours of the compulsion requirement. The references, in the *Midcal* opinion, to "clearly articulated and affirmatively expressed" policies and "actively supervised" activities merely restated the standards to be applied in evaluating whether conduct ostensibly compelled by the State is entitled to the ***74** state-action immunity. These requirements *limited* the scope of the state-action immunity for private entities; they did not expand the immunity to protect conduct that is merely prompted by the State. [13]

****1736** III

Today the Court abandons the settled view that a private party is not entitled to state-action immunity unless the State compelled him to act in violation of federal law. Hereafter, a State may exempt price fixing from the federal antitrust laws if it clearly articulates its intention to supplant competition with regulation in the relevant market, and if it actively supervises the unlawful conduct by evaluating the reasonableness of the prices charged. The Court justifies this change in the law by finding it more consistent with "principles of federalism and the goal of the antitrust laws, unfettered competition in the marketplace." *Ante,* at 1729. I believe these conclusions are unsound.

Deference to State Regulatory Programs

The Court's reliance today on vague "principles of federalism" obscures our traditional disfavor for implied exemptions to the Sherman Act. We have only authorized exemptions from the Sherman Act for businesses regulated by federal law when "that exemption was necessary in order to make the regulatory Act work 'and even then only to the minimum extent necessary.' "[14] No lesser showing of repugnancy ***75** should be sufficient to justify an implied exemption based on a state regulatory program.

Any other view separates the state-action exemption from the reason for its existence. The program involved in the *Parker* case was designed to enhance the market price of raisins by regulating both output and price.[15] In other words, the state policy was one that replaced price competition with economic regulation. Price support programs like the one involved in *Parker* cannot possibly succeed if every individual producer is free to participate or not participate in the program at his option. In *Parker,* the challenged price fixing was the heart of California's support program for agriculture; without immunity from the Sherman Act, the State would have had to abandon the project.

In this case, the common denominator in the States' regulatory programs for motor carriers is their reservation of the power to evaluate the reasonableness of proposed rates and ***76** terms of carriage.[16] In these ****1737** programs, "no State requires that all rates among competing carriers for identical service be uniform, [and] no State requires, either by statute or regulation, or other express legislative or administrative mandate, that rates proposed by carriers be formulated by rate conferences." 467 F.Supp. 471, 477 (ND Ga.1979). When, as here, state regulatory policies are permissive rather than mandatory, there is no necessary conflict between the antitrust laws and the regulatory systems; the regulated entity may comply with the edicts of each sovereign. Indeed, it is almost meaningless to contemplate a "regulatory" policy that gives every regulated entity *carte blanche* to excuse itself from the consequences of the regulation. Even a policy against speeding could not be enforced if every motorist could drive as fast as he chose. When a State declares that a regulated entity need not follow a regulatory procedure, it as much as admits that this element is inconsequential to the ultimate success of the regulatory program.[17]

***77** As I have noted, the Reed-Bulwinkle Act[18] authorizes collective ratemaking by interstate carriers under some circumstances. The Court doubts whether "Congress intended to prevent the States from adopting virtually identical policies at the intrastate level." *Ante,* at 1728, n. 22. The Reed-Bulwinkle exemption, however, has been abolished for single-line rate requests, and to the extent that it still applies to general rate requests, the rate bureaus must follow stringent procedural safeguards which channel their conduct into useful informational tasks and thereby diminish the threat of anticompetitive misconduct.[19] Even if there were sound policy reasons[20] for extending the Reed-Bulwinkle ****1738** exemption, ***78** as amended, to a state regulatory program that did not contain comparable procedural safeguards, "[t]hese considerations are ... not for us.... Congress is the body to amend [the statute] and not this court, by a process of judicial legislation wholly unjustifiable." *United States v. Trans-Missouri Freight Assn.,* 166 U.S., at 340, 17 S.Ct., at 559.

The Policy of Competition

The Court embraces the defendants' specious argument that "insofar as it encourages States to require, rather than merely permit, anticompetitive conduct, a compulsion requirement may result in *greater* restraints on trade." *Ante,* at 1729. The Court finds this "result" inconsistent with the policies of the Sherman Act. This argument is seriously flawed.

On a practical level, the Court's argument assumes that a decision for the Government today would cause the States to rush into enactment legislation compelling price

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fixing in the motor carrier industry. Moreover, the Court's argument assumes that a Congress that only recently has acted to increase competition in the interstate motor carrier field would remain silent in the face of anticompetitive legislation at the intrastate level. These assumptions are wholly speculative.

On a more theoretical level, the Court ignores the anticompetitive effect of the collective ratemaking practices challenged in *this* litigation.[21] The Court of Appeals correctly observed that "[c]ollective [rate] formulation clearly tampers with the price structure for intrastate commodities; the rate ***79** bureau arrangement substitutes concerted pricing decisions among competing carriers for the influence of impersonal market forces on proposed rates." 672 F.2d 469, 478 (CA5, Unit B, now CA11, 1982). The increased rates for transportation caused by this behavior are especially grave in a basic industry, like transportation, where the ripple effects of the increased rates are magnified as raw materials, semifinished and finished goods are transported at various stages of production and distribution.

Active supervision of the rate bureau process—like that provided in the Motor Carrier Act of 1980—might minimize the anticompetitive effects of collective ratemaking.[22] To the extent that the State Regulatory Commissions are structured like the ICC in the *Pennsylvania Railroad* case, however, they only have the power to reject the rates proposed by the carriers if those rates fall outside the "zone of reasonableness." Unless the Commissions "actively supervise" the price-fixing process itself, they cannot eliminate the upward pressure on rates caused by collusive ratemaking. Unfortunately, the nature of the "active supervision" of those carriers who take part in collective ratemaking is not fully disclosed by the record.[23]

IV

Whether it is wise or unwise policy for the Federal Government to seek to enforce the Sherman Act in this case is not a question that this Court is authorized to consider. The District Court and the Court of Appeals correctly applied established precedent ****1739** in holding that the Government is entitled ***80** to an injuction against the defendants' price fixing. Such price fixing is unlawful unless it is expressly authorized by statute, or required by a State's regulatory program. Today the Court authorizes collective ratemaking by intrastate motor carriers even though the State has only permitted it in a program regulating the reasonableness of prices in the industry. Immunity of this type was rejected by the Court in the *South-Eastern Underwriters* and *Pennsylvania Railroad* cases, but today, under the shroud of the state-action doctrine,[24] it is resurrected.

Accordingly, I respectfully dissent.

All Citations

471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36, 53 USLW 4422, 1985-1 Trade Cases P 66,485

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499 (1906).

1 N.C.Gen.Stat. § 62–130(a) (1982); Ga.Code Ann. § 46–7–18 (Supp.1984); Miss.Code Ann. § 77–7–217 (1972); Tenn.Code Ann. § 65–15–106(a) (Supp.1984).

The Interstate Commerce Commission has the power to fix common carriers' rates for the interstate transportation of general commodities. 49 U.S.C. § 10704. The Interstate Commerce Act, however, expressly reserves to the States the regulation of common carriers' intrastate rates, even if these rates affect interstate commerce. 49 U.S.C. § 10521(b).

2 N.C.Gen.Stat. § 62–134(a) (1982); Ga.Code Ann. § 46–2–25(a) (1982); Miss.Code Ann. §§ 77–7–211 and 77–7–215 (1972); Tenn.Code Ann. § 65–5–202 (1982).

3 N.C.Gen.Stat. § 62–134(b) (1982); Ga.Code Ann. § 46–2–25(b) (1982); Miss.Code Ann. §§ 77–7–217 and 77–7–219 (1972); Tenn.Code Ann. § 65–5–203(a) (Supp.1984).

4 N.C.Gen.Stat. § 62–152.1(b) (1982); Ga.Code Ann. § 46–7–18 (Supp.1984), Ga.Pub.Serv.Comm'n Rule 1–3–1–.14 (1983); Response of the State of Mississippi and the Mississippi Public Service Comm'n as *Amici Curiae* in No. 76–1909A (ND Ga.1917), p. 11; Tenn.Code Ann. § 65–15–119 (Supp.1984), Tenn.Pub.Serv.Comm'n Rule 1220–2–1–.40, Rules, Regulations and Statutes Governing Motor Carriers, p. 29 (1974).

5 See, *e.g.,* Response of the State of Mississippi and the Mississippi Public Service Comm'n, *supra,* at 15–16.

Moreover, the uniformity in prices that collective ratemaking tends to produce is considered desirable by the legislature of at least one State and the Public Service Commission of another. See N.C.Gen.Stat. § 62–152.1(b) (1982); Miss.Pub.Serv.Comm'n Rule 39D(4), Rules of Practice and Procedure and General Rules and Regulations under the Miss. Motor Carrier Act of 1938, as amended, p. 37 (1972).

6 N.C. Gen.Stat. § 62–152.1(e) (1982); Ga.Pub.Serv.Comm'n Rule 1–3–1–. 14, *supra,*; Response of the State of Mississippi and the Mississippi Public Service Comm'n, *supra,* at 11; Tenn.Pub.Serv.Comm'n Rule 1220–2–1–. 40, *supra.*

7 At the time this action was filed, SMCRC represented its common carrier members before Public Service Commissions in North Carolina, Georgia, Mississippi, Tennessee, and Alabama. SMCRC, however, is no longer active before the Alabama Public Service Commission. Brief for Petitioners 3, n. 2. NCMCA represents its members before the regulatory agency in North Carolina.

8 SMCRC has a separate rate committee for each of the States in which its members operate—North Carolina, Georgia, Mississippi, and Tennessee. NCMCA, which is concerned solely with matters before the North Carolina Public Service Commission, has only one rate committee.

9 In addition to providing a forum for their members to discuss rate proposals, the rate bureaus: "[(i)] publish tariffs and supplements containing the rates on which the carriers agree; and [(ii)] provide counsel, staff experts, and facilities for the preparation of cost studies, other exhibits and testimony for use in support of proposed rates at hearings held by the regulatory commissions." 702 F.2d 532, 534 (CA5 1983).

10 Motor Carriers Traffic Association, Inc. (MCTA), another rate bureau operating in North Carolina, also was named as a defendant. MCTA did not appeal from the District Court's judgment, and is not a party before this Court.

The District Court permitted the National Association of Regulatory Utility Commissioners (NARUC), an organization composed of state agencies, to intervene as a defendant. See Fed.Rule Civ.Proc. 24(a). Throughout this litigation, the NARUC has represented the interests of the Public Service Commissions of those States in which the defendant rate bureaus operate.

11 The defendants also contended that their collective ratemaking activities were protected by the *Noerr-Pennington* doctrine. See *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961); *Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Both the District Court and the Court of Appeals rejected this defense, and we do not address it. See n. 17, *infra.*

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12 A panel of that court, with one judge dissenting, had affirmed the District Court's judgment. *United States v. Southern Motor Carriers Rate Conference, Inc.,* 672 F.2d 469 (1982).

13 In this case, the Government elected, without explanation, not to name as defendants the state Public Service Commissions that regulated the motor common carriers' intrastate rates.

14 The en banc Court of Appeals reinstated the part of the panel's opinion that addressed the Sherman Act violation. 702 F.2d, at 542.

15 Judge Clark's separate dissenting opinion criticized the majority for ignoring "the Interstate Commerce Act, public policy, history, and fairness." *Id.,* at 548.

16 The joint petition for a writ of certiorari was filed by SMCRC, NCMCA, and the NARUC.

17 Although we granted certiorari on the *Noerr-Pennington* issue as well, see n. 11, *supra,* our disposition of this case makes it unnecessary to consider the applicability of that doctrine to the petitioners' collective ratemaking activities.

18 Justice STEVENS, noting that "[i]mplied antitrust immunities ... are disfavored ...," *post,* at 1732, cites *United States v. South-Eastern Underwriters Assn.,* 322 U.S. 533, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944), for the proposition that "if exceptions are to be written into the Sherman Act, they must come from Congress, and not this Court." *Id.,* at 561, 64 S.Ct., at 1178. The dissent apparently finds some significance in the fact that no federal statute expressly exempts the petitioners' collective ratemaking activities from the antitrust laws. See *post,* at 1734.

The dissent's argument on this point, of course, does not suggest that compulsion should be a prerequisite to a finding of state action immunity. Instead, the logical result of its reasoning would require us to overrule *Parker v. Brown* and its progeny, for the state action doctrine is an implied exemption to the antitrust laws. After over 40 years of congressional acquiescence, we are unwilling to abandon the *Parker* doctrine.

Justice STEVENS relies primarily upon *United States v. South-Eastern Underwriters, supra,* and *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 65 S.Ct. 716, 89 L.Ed. 1051 (1945), in the first section of his dissent. Neither of these cases, however, has any bearing on the scope of *Parker* immunity. In *South-Eastern Underwriters, supra,* the Court held only that the "business of insurance is interstate commerce," *Group Life & Health Ins. Co. v. Royal Drug Co.,* 440 U.S. 205, 217, 99 S.Ct. 1067, 1076, 59 L.Ed.2d 261 (1979), and thus is subject to the Sherman Act's proscriptions. The Court did not suggest that, because of congressional silence, state regulation could not immunize insurance companies from the federal antitrust laws. Instead, it reasoned that *Parker* did not protect the insurance companies because "no states authorize combinations of insurance companies to coerce, intimidate, and boycott competitors and consumers in the manner ... [there] alleged." 322 U.S., at 562, 64 S.Ct., at 1178. In *Georgia v. Pennsylvania R. Co., supra,* the Court was concerned with whether Congress intended to immunize a *federal* regulatory program from the antitrust laws. See n. 21, *infra.*

19 In holding that the States were free to regulate "domestic commerce," the *Parker* Court relied upon congressional silence. There are, however, some statements in the legislative history that affirmatively express a desire not "to invade the legislative authority of the several States...." H.R.Rep. No. 1707, 51st Cong., 1st Sess., 1 (1890). See *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 632, 96 S.Ct. 3110, 3137, 49 L.Ed.2d 1141 (1976) (Stewart, J., dissenting).

20 As we hold today in *Hallie v. Eau Claire,* 471 U.S. 34, 46, 105 S.Ct. 1713, 1720, 85 L.Ed.2d 25 (1985), the second prong of the *Midcal* test is inapplicable to municipalities. Although its anticompetitive conduct must

be taken pursuant to a clearly articulated state policy, a municipality need not be supervised by the State in order to qualify for *Parker* immunity. See 471 U.S., at 46, 105 S.Ct., at 1720.

21 The dissent argues that a state regulatory program is entitled to *Parker* immunity only if an antitrust exemption is " 'necessary ... to make the [program] work....' " *Post,* at 1736 (quoting *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 597, 96 S.Ct. 3110, 3121, 49 L.Ed.2d 1141 (1976)). This argument overlooks the fact that, with the exception of a questionable dictum in *Cantor, supra,* the dissent's proposed test has been used only in deciding whether Congress intended to immunize a federal regulatory program from the Sherman Act's proscriptions. See, *e.g., Silver v. New York Stock Exchange,* 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963). In this context, if the federal courts wrongly conclude that an antitrust exemption is "unnecessary," Congress can correct the error. As the dissent recognizes, however, the Supremacy Clause would prevent state legislatures from taking similar remedial action. *Post,* at 1732. Moreover, the proposed test would prompt the "kind of interference with state sovereignty ... that ... *Parker* was intended to prevent." 1 P. Areeda & D. Turner, Antitrust Law ¶ 214, p. 88 (1978). Therefore, we hold that state action immunity is not dependent on a finding that an exemption from the federal antitrust laws is "necessary."

22 Under the Interstate Commerce Act, motor common carriers are permitted, but not compelled, to engage in collective *interstate* ratemaking. 49 U.S.C. §§ 10706(b)(2) and 10706(d)(2)(C). It is clear, therefore, that Congress has recognized the advantages of a permissive policy. We think it unlikely that Congress intended to prevent the States from adopting virtually identical policies at the intrastate level.

23 Contrary to the Government's arguments, our holding here does not suggest that a State may "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker v. Brown,* 317 U.S., at 351, 63 S.Ct., at 313–314; see *Schwegmann Bros. v. Calvert Distillers Corp.,* 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951). A clearly articulated *permissive* policy will satisfy the first prong of the *Midcal* test. The second prong, however, prevents States from "casting ... a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal,* 445 U.S., at 106, 100 S.Ct., at 943. This active supervision requirement ensures that a State's actions will immunize the anticompetitive conduct of private parties only when the "state has demonstrated its commitment to a program through its exercise of regulatory oversight." See 1 P. Areeda & D. Turner, *Antitrust Law* ¶§ 213a, p. 73 (1978).

24 N.C.Gen.Stat. § 62–152.1(b) (1982); Ga.Code Ann. § 46–7–18 (1982 and Supp.1984); Tenn.Code Ann. § 65–15–119 (1982).

25 The Mississippi statute stands in sharp contrast to the Colorado Home Rule Amendment, which we considered in *Community Communications Co. v. Boulder,* 455 U.S. 40, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). In *Boulder,* the State Constitution gave municipalities extensive powers of self-government. *Id.,* at 43–44, 102 S.Ct., at 836–837. Pursuant to this authority, the city of Boulder prohibited a cable television company from expanding its operations. The Court held that because the Home Rule Amendment did not evidence an intent to displace competition in the cable television industry, *id.,* at 55, 102 S.Ct., at 842, Boulder's anti-competitive ordinance was not enacted pursuant to a clearly articulated state policy. This holding was premised on the fact that Boulder, as a "home rule municipality," was authorized to elect free-market competition as an alternative to regulation. *Id.,* at 56, 102 S.Ct., at 843.

In this case, on the other hand, the Mississippi Public Service Commission is not authorized to choose free-market competition. Instead, it is required to prescribe rates for motor common carriers on the basis of statutorily enumerated factors. Miss.Code Ann. § 77–7–221 (1972). These factors bear no discernible relationship to the prices that would be set by a perfectly efficient and unregulated market. Therefore, the Mississippi statute clearly indicates that the legislature intended to displace competition in the intrastate trucking industry with a regulatory program.

1 "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

2 Of course, public agencies like municipalities need only establish that their anticompetitive conduct is taken pursuant to a clearly articulated and affirmatively expressed state policy. *Hallie v. Eau Claire,* 471 U.S. 34, 46–47, 105 S.Ct. 1713, 1720–1721, 85 L.Ed.2d 25 (1985). The less stringent requirement reflects the presumption "that the municipality acts in the public interest." *Id.,* at 45, 105 S.Ct., at 1720; cf. *Affiliated Capital Corp. v. City of Houston,* 735 F.2d 1555, 1571–1572 (CA5 1984) (en banc) (Higginbotham, J., concurring), cert. pending, No. 84–951.

3 *United States v. Socony-Vacuum Oil Co.,* 310 U.S. 150, 222, 60 S.Ct. 811, 843, 84 L.Ed. 1129 (1940); see also *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 785, 95 S.Ct. 2004, 2012, 44 L.Ed.2d 572 (1975); *United States v. McKesson & Robbins, Inc.,* 351 U.S. 305, 309–310, 76 S.Ct. 937, 939–940, 100 L.Ed. 1209 (1956); *United States v. Paramount Pictures, Inc.,* 334 U.S. 131, 143, 68 S.Ct. 915, 922, 92 L.Ed. 1260 (1948).

4 "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof ... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2.

5 *E.g., National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City,* 452 U.S. 378, 388–389, 101 S.Ct. 2415, 2421–2422, 69 L.Ed.2d 89 (1981); *United States v. National Assn. of Securities Dealers, Inc.,* 422 U.S. 694, 719–720, 95 S.Ct. 2427, 2442–2443, 45 L.Ed.2d 486 (1975).

6 *E.g., Group Life & Health Insurance Co. v. Royal Drug Co.,* 440 U.S. 205, 231, 99 S.Ct. 1067, 1083, 59 L.Ed.2d 261 (1979); *Abbott Laboratories v. Portland Retail Druggists Assn., Inc.,* 425 U.S. 1, 11, 96 S.Ct. 1305, 1313, 47 L.Ed.2d 537 (1976).

7 "In [*Keogh v. Chicago & Northwestern R. Co.,* 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922)], the suit was one for damages under the Sherman Act. The charge was that the defendant carriers had formed a rate bureau or committee to secure agreement in respect to freight rates among the constituent railroad companies which would otherwise be competing carriers. As we have seen, the Court held that damages could not be recovered. But Mr. Justice Brandeis speaking for a unanimous Court stated that a conspiracy to fix rates might be illegal though the rates fixed were reasonable and non-discriminatory. He said: 'All the rates fixed were reasonable and non-discriminatory. That was settled by the proceedings before the Commission.... But under the Anti-Trust Act, a combination of carriers to fix reasonable and non-discriminatory rates may be illegal; and if so, the Government may have redress by criminal proceedings under § 3, by injunction under § 4, and by forfeiture under § 6. That was settled by *United States v. Trans-Missouri Freight Association,* 166 U.S. 290 [17 S.Ct. 540, 41 L.Ed. 1007] [1897], and *United States v. Joint Traffic Association,* 171 U.S. 505 [19 S.Ct. 25, 43 L.Ed. 259] [1898]. The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the Government.' [260 U.S., at 161–162, 43 S.Ct., at 49]." *Georgia v. Pennsylvania R. Co.,* 324 U.S. 439, 457–458, 65 S.Ct. 716, 726, 89 L.Ed. 1051 (1945). Although the Court in *Pennsylvania Railroad* was divided on the question whether Georgia could pursue its antitrust remedy by invoking this Court's original jurisdiction, the dissenting Justices recognized that the United States could obtain an injunction against the alleged price fixing in an appropriate forum. See *id.,* at 484, 489, 65 S.Ct., at 738, 740 (Stone, C.J., dissenting). It is, of course, the United States that seeks relief in the case now before us.

8 "Parties to any agreement approved by the Commission under this section and other persons are ... hereby relieved from the operation of the antitrust laws with respect to the making of such agreement, and with respect to the carrying out of such agreement in conformity with its provisions and in conformity with the

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terms and conditions prescribed by the Commission." 62 Stat. 473. The current version of the exemption is codified at 49 U.S.C. § 10706(b)(2).

9 94 Stat. 803, 49 U.S.C. §§ 10706(b)(3)(B)–(D).

10 See, *e.g., Cantor v. Detroit Edison Co.,* 428 U.S., at 609, 96 S.Ct., at 3126 (BLACKMUN, J., concurring in judgment).

11 For the proposition stated, the Court relied on *Goldfarb v. Virginia State Bar,* 421 U.S., at 791, 95 S.Ct., at 2015; *Continental Co. v. Union Carbide,* 370 U.S. 690, 706–707, 82 S.Ct. 1404, 1414–1415, 8 L.Ed.2d 777 (1962); *Parker v. Brown,* 317 U.S. 341, 351, 63 S.Ct. 307, 313, 87 L.Ed. 315 (1943); *Union Pacific R. Co. v. United States,* 313 U.S. 450, 467–468, 61 S.Ct. 1064, 1074, 85 L.Ed. 1453 (1941); and *Northern Securities Co. v. United States,* 193 U.S. 197, 346, 24 S.Ct. 436, 460, 48 L.Ed. 679 (1904).

12 "Several recent decisions have applied *Parker's* analysis. In *Goldfarb v. Virginia State Bar,* 421 U.S. 773 [95 S.Ct. 2004, 44 L.Ed.2d 572] (1975), the Court concluded that fee schedules enforced by a state bar association were not mandated by ethical standards established by the State Supreme Court. The fee schedules therefore were not immune from antitrust attack. 'It is not enough that ... anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.' *Id.,* at 791 [95 S.Ct., at 2015]." 445 U.S., at 104, 100 S.Ct., at 942–943.

13 As in *Cantor,* the Court concluded in the *Midcal* case that the State's ostensible compulsion of the resale-price-maintenance program was not alone sufficient to confer state-action immunity. The State neither set the prices nor reviewed their reasonableness, nor did it monitor market conditions and evaluate the effectiveness of the program. Under those conditions, the "State simply authorizes price setting and enforces the prices set by private parties.... The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." 445 U.S., at 105–106, 100 S.Ct., at 943.

14 *Cantor v. Detroit Edison Co.,* 428 U.S., at 597, 96 S.Ct., at 3121 (quoting *Silver v. New York Stock Exchange,* 373 U.S. 341, 357, 83 S.Ct. 1246, 1257, 10 L.Ed.2d 389 (1963)). In *United States v. National Assn. of Securities Dealers,* the Court pointed out that "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between antitrust laws and the regulatory system. See, *e.g., United States v. Philadelphia National Bank,* 374 U.S., at 348 [83 S.Ct., at 1733]; *United States v. Borden Co.,* 308 U.S. 188, 197–206 [60 S.Ct. 182, 187–192, 84 L.Ed. 181] (1939)." 422 U.S., at 719–720, 95 S.Ct., at 2442–2443; see also nn. 5, 6, *supra.* These cases are, of course, consistent with the "cardinal rule," applicable to legislation generally, that repeals by implication are not favored. *Posadas v. National City Bank,* 296 U.S. 497, 503, 56 S.Ct. 349, 352, 80 L.Ed. 351 (1936).

15 "The California Agricultural Prorate Act authorizes the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state, so as to restrict competition among the growers and maintain prices in the distribution of their commodities to packers. The declared purpose of the Act is to 'conserve the agricultural wealth of the State' and to 'prevent economic waste in the marketing of agricultural products' of the state." 317 U.S., at 346, 63 S.Ct., at 311.

"The declared objective of the California Act is to prevent excessive supplies of agricultural commodities from 'adversely affecting' the market, and although the statute speaks in terms of 'economic stability' and 'agricultural waste' rather than of price, the evident purpose and effect of the regulation is to 'conserve agricultural wealth of the state' by raising and maintaining prices, but 'without permitting unreasonable profits to producers.' " *Id.,* at 355, 63 S.Ct., at 315.

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16 See Ga.Code Ann. §§ 46–2–25(b), 46–7–18 (Supp.1984); Miss.Code Ann. §§ 77–7–217, 77–7–221 (1972); N.C.Gen.Stat. §§ 62–134(b), 62–146, 62–147 (1982); Tenn.Code Ann. §§ 65–5–203, 65–15–119 (1982).

17 By consolidating petitions for rate modifications, collective ratemaking arguably preserves the resources of the state regulatory Commissions and promotes simplicity and uniformity in the intrastate rate structure. See App. 60–61, 83–84, 90–91. Under the statutes governing the state regulatory programs, however, the carriers may, at any time, decline to participate in collective ratemaking, and deprive the States of these purported advantages. *Ante,* at 1724. That being so, it is difficult for the States to argue that these facets of their regulatory systems are essential to the program's success. Brief for State of Iowa et al. as *Amici Curiae* 6 ("The authorization of the price-fixing agreement, collective ratemaking, by the states serves no cognizable state interest").

The States also contend that the defendants provide a valuable information-gathering service for motor carriers. App. 60–61, 84, 90. The District Court's final judgment, however, would not have interfered with this function. *Id.,* at 99 ("Each defendant may provide statistical and other economic data and advice to any carrier wishing to avail itself of defendants' expertise").

18 See n. 8, *supra.*

19 Under the exemption, as amended, the ratemaking conferences, among other things, must disclose the names of their members and affiliates of their members, 49 U.S.C. § 10706(b)(3)(A); the organization must limit discussion and voting to allowed subjects and parties, § 10706(b)(3)(B)(i); "the organization may not file a protest or complaint with the Commission against any tariff item published by or for the account of any motor carrier," § 10706(b)(3)(B)(iii); "the organization may not permit one of its employees or any employee committee to docket or act upon any proposal effecting a change in any tariff item," § 10706(b)(3)(B)(iv); "upon request, the organization must divulge to any person the name of the proponent of a rule or rate docketed with it, must admit any person to any meeting at which rates or rules will be discussed or voted upon, and must divulge to any person the vote cast by any member carrier on any proposal before the organization," § 10706(b)(3)(B)(v); and the organization shall make a final disposition of rate proposals within 120 days, § 10706(b)(3)(B)(vii). See generally *ICC v. American Trucking Assns., Inc.,* 467 U.S. 354, 104 S.Ct. 2458, 81 L.Ed.2d 282 (1984).

20 In the legislative history of the 1980 Motor Carrier Act, however, Congress suggested otherwise:

"During the course of its hearings, the Committee heard a good deal of criticism of the rate bureau process.... The disadvantage is that the system inherently tends to result in rates that will be compensatory for even the least efficient motor carrier participating in the rate discussions. When this happens, consumers lose the benefit of price competition that would occur if more efficient carriers were able to offer more attractive rates. Another serious problem has been the closed nature of the rate bureau proceedings. Voting upon specific rate proposals is done behind closed doors." S.Rep. No. 96–641, p. 13 (1980). See also H.R.Rep. No. 96–1069, p. 27 (1980), U.S.Code Cong. & Admin.News 1980, pp. 2283, 2309.

21 "It has been held too often to require elaboration now that price fixing is contrary to the policy of competition underlying the Sherman Act and that its illegality does not depend on a showing of unreasonableness since it is conclusively presumed to be unreasonable." *United States v. McKesson & Robbins, Inc.,* 351 U.S., at 309–310, 76 S.Ct., at 940.

22 The Court of Appeals, however, found that the State Commissions' scrutiny of the reasonableness of proposed rates satisfies the active supervision requirement. 702 F.2d 532, 539, n. 12 (CA5, Unit B, now CA11, 1983) (en banc).

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23 Some of the States' statutes and implementing regulations indicate that the process of collective ratemaking is being supervised on a limited basis. See, *e.g.,* N.C.Gen.Stat. § 62–152.1(c) (1982); Ga.Pub.Serv.Comm'n Rule 1–3–1–.14 (1983); Tenn.Pub.Serv.Comm'n Rule 1220–2–1–.40 (1974).

24 Since the Court does not reach it, *ante,* at 1725, n. 11, 1726, n. 17, I do not address the merits of the *Noerr-Pennington* question. See *Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

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112 S.Ct. 2169
Supreme Court of the United States

FEDERAL TRADE COMMISSION, Petitioner,
v.
TICOR TITLE INSURANCE COMPANY, et al.

No. 91–72
|
Argued Jan. 13, 1992.
|
Decided June 12, 1992.

Synopsis
Federal Trade Commission (FTC) filed administrative complaint charging title insurance companies with horizontal price fixing and setting fees for title searches and examinations, in violation of the Federal Trade Commission Act. The FTC determined that companies engaged in unfair methods of competition in Connecticut, Wisconsin, Arizona, and Montana, and companies petitioned for review. The Court of Appeals for the Third Circuit, 922 F.2d 1122, reversed, and FTC petitioned for certiorari. The Supreme Court, Justice Kennedy, held that state action immunity was not available under regulatory schemes in Wisconsin and Montana.

Reversed and remanded.

Justice Scalia filed a concurring opinion.

Chief Justice Rehnquist filed a dissenting opinion, in which Justice O'Connor and Justice Thomas joined.

Justice O'Connor filed a dissenting opinion, in which Justice Thomas joined.

****2171** *Syllabus* [*]

Petitioner Federal Trade Commission filed an administrative complaint charging respondent title insurance companies with horizontal price fixing in setting fees for title searches and examinations in violation of § 5(a)(1) of the Federal Trade Commission Act. In each of the four States at issue—Connecticut, Wisconsin, Arizona, and Montana—uniform rates were established by a rating bureau licensed by the State and authorized to establish joint rates for its members. Rate filings were made to the state insurance office and became effective unless the State rejected them within a specified period. The Administrative Law Judge held, *inter alia,* that the rates had been fixed in all four States, but that, in Wisconsin and Montana, respondents' anticompetitive activities were entitled to state-action immunity, as contemplated in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, and its progeny. Under this doctrine, a state law or regulatory scheme can be the basis for antitrust immunity if the State (1) has articulated a clear and affirmative policy to allow the anticompetitive conduct and (2) provides active supervision of anticompetitive conduct undertaken by private actors. *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S.Ct. 937, 943, 63 L.Ed.2d 233. The Commission, which conceded that the first part of the test was met, held on review that none of the States had conducted sufficient supervision to warrant immunity. The Court of Appeals reversed, holding that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the active supervision requirement. Thus, it concluded, respondents' conduct in all the States was entitled to state-action immunity.

Held:

1. State-action immunity is not available under the regulatory schemes in Montana and Wisconsin. Pp. 2176–2180.

(a) Principles of federalism require that federal antitrust laws be subject to supersession by state regulatory programs. *Parker, supra,* 317 U.S., at 350–352, 63 S.Ct., at 312–14; *Midcal, supra; Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83. *Midcal* 's two-part test confirms that States may not confer antitrust immunity on private persons by fiat. Actual state involvement is the precondition for immunity, which is conferred out of respect for the State's ongoing ***622** regulation, not the economics of price restraint. The purpose of the active supervision inquiry is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention. Although this immunity doctrine was developed in actions brought under the Sherman Act, the issue whether it applies to Commission action under the Federal Trade Commission Act need not be determined, since the Commission does not assert any superior pre-emption authority here. Pp. 2176–2178.

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(b) Wisconsin, Montana, and 34 other States correctly contend that a broad interpretation of state-action immunity would not serve their best interests. The doctrine would impede, rather than advance, the States' freedom of action if it required them to act in the shadow of such immunity whenever they entered the realm of economic regulation. Insistence on real compliance with both parts of the *Midcal* test serves to make clear that the States are responsible for only the price fixing they have sanctioned and undertaken to control. Respondents' contention that such concerns are better addressed by the first part of the *Midcal* test misapprehends the close relation between ****2172** *Midcal* 's two elements, which are both directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. A clear policy statement ensures only that the State did not act through inadvertence, not that the State approved the anticompetitive conduct. Sole reliance on the clear articulation requirement would not allow the States sufficient regulatory flexibility. P. 2178.

(c) Where prices or rates are initially set by private parties, subject to veto only if the State chooses, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for the State's decision. Thus, the standard relied on by the Court of Appeals in this case is insufficient to establish the requisite level of active supervision. The Commission's findings of fact demonstrate that the potential for state supervision was not realized in either Wisconsin or Montana. While most rate filings were checked for mathematical accuracy, some were unchecked altogether. Moreover, one rate filing became effective in Montana despite the rating bureau's failure to provide requested information, and additional information was provided in Wisconsin after seven years, during which time another rate filing remained in effect. Absent active supervision, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And state judicial review cannot fill the void. See *Patrick, supra,* 486 U.S., at 103–105, 108 S.Ct., at 1664–65. This Court's decision in ***623** *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36, which involved a similar negative option regime, is not to the contrary, since it involved the question whether the first part of the *Midcal* test was met. This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact, and it should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. Pp. 2178–2180.

2. The Court of Appeals should have the opportunity to reexamine its determinations with respect to Connecticut and Arizona in order to address whether it accorded proper deference to the Commission's factual findings as to the extent of state supervision in those States. P. 2180.

922 F.2d 1122 (CA3 1991), reversed and remanded.

KENNEDY, J., delivered the opinion of the Court, in which WHITE, BLACKMUN, STEVENS, SCALIA, and SOUTER, JJ., joined. SCALIA, J., filed a concurring opinion, *post,* p. 2180. REHNQUIST, C.J., filed a dissenting opinion, in which O'CONNOR and THOMAS, JJ., joined, *post,* p. 2181. O'CONNOR, J., filed a dissenting opinion, in which THOMAS, J., joined, *post,* p. 2183.

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Briefs of amici curiae were filed for the American Land Title Association by Philip H. Rudolph and James R. Maher; and for the Pennsylvania Electric Association by Jeffrey H. Howard.

Opinion

***624** Justice KENNEDY delivered the opinion of the Court.

The Federal Trade Commission filed an administrative complaint against six of the Nation's largest title insurance ***625** companies, alleging horizontal price fixing in their fees for title searches and title examinations. One company settled by consent decree, while five other firms continue to contest the matter. The Commission charged the title companies with violating § 5(a)(1) of the Federal Trade Commission Act, 38 Stat. 719, 15 U.S.C. § 45(a)(1), which prohibits "[u]nfair methods of competition in or affecting commerce." One of the principal defenses the companies assert is state-action immunity from antitrust prosecution, as contemplated in the line of cases beginning with *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). The Commission rejected this defense, *In re Ticor Title Ins. Co.,* 112 F.T.C. 344 (1989), and the firms sought review in ****2173** the United States Court of Appeals for the Third Circuit. Ruling that state-action immunity was available under the state regulatory schemes in question, the Court of Appeals reversed. 922 F.2d 1122 (1991). We granted certiorari. 502 U.S. 807, 112 S.Ct. 47, 116 L.Ed.2d 25 (1991).

I

Title insurance is the business of insuring the record title of real property for persons with some interest in the estate, including owners, occupiers, and lenders. A title insurance policy insures against certain losses or damages sustained by reason of a defect in title not shown on the policy or title report to which it refers. Before issuing a title insurance ***626** policy, the insurance company or one of its agents

performs a title search and examination. The search produces a chronological list of the public documents in the chain of title to the real property. The examination is a critical analysis or interpretation of the condition of title revealed by the documents disclosed through this search.

The title search and examination are major components of the insurance company's services. There are certain variances from State to State and from policy to policy, but a brief summary of the functions performed by the title companies can be given. The insurance companies exclude from coverage defects uncovered during the search; that is, the insurers conduct searches in order to inform the insured and to reduce their own liability by identifying and excluding known risks. The insured is protected from some losses resulting from title defects not discoverable from a search of the public records, such as forgery, missing heirs, previous marriages, impersonation, or confusion in names. They are protected also against errors or mistakes in the search and examination. Negligence need not be proved in order to recover. Title insurance also includes the obligation to defend in the event that an insured is sued by reason of some defect within the scope of the policy's guarantee.

The title insurance industry earned $1.35 billion in gross revenues in 1982, and respondents accounted for 57 percent of that amount. Four of respondents are the nation's largest title insurance companies: Ticor Title Insurance Co., with 16.5 percent of the market; Chicago Title Insurance Co., with 12.8 percent; Lawyers Title Insurance Co., with 12 percent; and SAFECO Title Insurance Co. (now operating under the name Security Union Title Insurance Co.), with 10.3 percent. Stewart Title Guarantee Co., with 5.4 percent of the market, is the country's eighth largest title insurer, with a strong position in the West and Southwest. App. to Pet. for Cert. 145a.

***627** The Commission issued an administrative complaint in 1985. Horizontal price fixing was alleged in these terms:

> " 'Respondents have agreed on the prices to be charged for title search and examination services or settlement services through rating bureaus in various states. Examples of states in which one or more of the respondents have fixed prices with other respondents or other competitors for all or part of their search and examination services or settlement services are Arizona, Connecticut, Idaho, Louisiana, Montana, New Jersey, New Mexico, New York, Ohio, Oregon, Pennsylvania, Wisconsin and Wyoming.' " 112 F.T.C., at 346.

The Commission did not challenge the insurers' practice of setting uniform rates for insurance against the risk of loss from defective titles, but only the practice of setting uniform rates for the title search, examination, and settlement, aspects of the business which, the Commission alleges, do not involve insurance.

Before the Administrative Law Judge (ALJ), respondents defended against liability on three related grounds. First, they maintained that the challenged conduct is exempt from antitrust scrutiny under the McCarran–Ferguson Act, 59 Stat. 34, 15 U.S.C. § 1012(b), which confers antitrust immunity ****2174** over the "business of insurance" to the extent regulated by state law. Second, they argued that their collective ratemaking activities are exempt under the *Noerr–Pennington* doctrine, which places certain "[j]oint efforts to influence public officials" beyond the reach of the antitrust laws. *Mine Workers v. Pennington,* 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965); *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 136, 81 S.Ct. 523, 529, 5 L.Ed.2d 464 (1961). Third, respondents contended their activities are entitled to state-action immunity, which permits anticompetitive conduct if authorized and supervised by state officials. See ***628** *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980); *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). App. to Pet. for Cert. 218a. As to one State, Ohio, respondents contended that the rates for title search, examination, and settlement had not been set by a rating bureau.

Title insurance company rates and practices in 13 States were the subject of the initial complaint. Before the matter was decided by the ALJ, the Commission declined to pursue its complaint with regard to fees in five of these States: Louisiana, New Mexico, New York, Oregon, and Wyoming. Upon the recommendation of the ALJ, the Commission did not pursue its complaint with regard to fees in two additional States, Idaho and Ohio. This left six States in which the Commission found antitrust violations, but in two of these States, New Jersey and Pennsylvania, the Commission conceded the issue on which certiorari was sought here, so the regulatory regimes in these two States are not before us. Four States remain in which violations were alleged: Connecticut, Wisconsin, Arizona, and Montana.

The ALJ held that the rates for search and examination services had been fixed in these four States. For reasons we

need not pause to examine, the ALJ rejected the McCarran–Ferguson and *Noerr–Pennington* defenses. The ALJ then turned his attention to the question of state-action immunity. A summary of the ALJ's extensive findings on this point is necessary for a full understanding of the decisions reached at each level of the proceedings in the case.

Rating bureaus are private entities organized by title insurance companies to establish uniform rates for their members. The ALJ found no evidence that the collective setting of title insurance rates through rating bureaus is a way of pooling risk information. Indeed, he found no evidence that any title insurer sets rates according to actuarial loss experience. Instead, the ALJ found that the usual practice is for rating bureaus to set rates according to profitability studies that focus on the costs of conducting searches and examinations. Uniform rates are set notwithstanding differences in ***629** efficiencies and costs among individual members. App. to Pet. for Cert. 183a–184a.

The ALJ described the regulatory regimes for title insurance rates in the four States still at issue. In each one, the title insurance rating bureau was licensed by the State and authorized to establish joint rates for its members. Each of the four States used what has come to be called a "negative option" system to approve rate filings by the bureaus. Under a negative option system, the rating bureau filed rates for title searches and title examinations with the state insurance office. The rates became effective unless the State rejected them within a specified period, such as 30 days. Although the negative option system provided a theoretical mechanism for substantive review, the ALJ determined, after making detailed findings regarding the operation of each regulatory regime, that the rate filings were subject to minimal scrutiny by state regulators.

In Connecticut the State Insurance Department has the authority to audit the rating bureau and hold hearings regarding rates, but it has not done so. The Connecticut rating bureau filed only two major rate increases, in 1966 and in 1981. The circumstances ****2175** behind the 1966 rate increase are somewhat obscure. The ALJ found that the Insurance Department asked the rating bureau to submit additional information justifying the increase, and later approved the rate increase although there is no evidence the additional information was provided. In 1981 the Connecticut rating bureau filed for a 20 percent rate increase. The factual background for this rate increase is better developed though the testimony was somewhat inconsistent. A state insurance official testified that he reviewed the rate increase with care and discussed various components of the increase with the rating bureau. The same official testified, however, that he lacked the authority to question certain expense data he considered quite high. *Id.,* at 189a–195a.

***630** In Wisconsin the State Insurance Commissioner is required to examine the rating bureau at regular intervals and authorized to reject rates through a process of hearings. Neither has been done. The Wisconsin rating bureau made major rate filings in 1971, 1981, and 1982. The 1971 rate filing was approved in 1971 although supporting justification, which had been requested by the State Insurance Commissioner, was not provided until 1978. The 1981 rate filing requested an 11 percent rate increase. The increase was approved after the office of the Insurance Commissioner checked the supporting data for accuracy. No one in the agency inquired into insurer expenses, though an official testified that substantive scrutiny would not be possible without that inquiry. The 1982 rate increase received but a cursory reading at the office of the Insurance Commissioner. The supporting materials were not checked for accuracy, though in the absence of an objection by the agency, the rate increase went into effect. *Id.,* at 196a–200a.

In Arizona the Insurance Director was required to examine the rating bureau at least once every five years. It was not done. In 1980 the State Insurance Department announced a comprehensive investigation of the rating bureau. It was not conducted. The rating bureau spent most of its time justifying its escrow rates. Following conclusion in 1981 of a federal civil suit challenging the joint fixing of escrow rates, the rating bureau went out of business without having made any major rate filings, though it had proposed minor rate adjustments. *Id.,* at 200a–205a.

In Montana the rating bureau made its only major rate filing in 1983. In connection with it, a representative of the rating bureau met with officials of the State Insurance Department. He was told that the filed rates could go into immediate effect though further profit data would have to be provided. The ALJ found no evidence that the additional data were furnished. *Id.,* at 211a–214a.

***631** To complete the background, the ALJ observed that none of the rating bureaus are now active. The respondents abandoned them between 1981 and 1985 in response to numerous private treble-damages suits, so by the time the Commission filed its formal complaint in 1985, the rating

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bureaus had been dismantled. *Id.,* at 195a, 200a, 205a, 208a. The ALJ held that the case is not moot, though, because nothing would preclude respondents from resuming the conduct challenged by the Commission. *Id.,* at 246a–247a. See *United States v. W.T. Grant Co.,* 345 U.S. 629, 632–633, 73 S.Ct. 894, 897, 97 L.Ed. 1303 (1953).

These factual determinations established, the ALJ addressed the two-part test that must be satisfied for state-action immunity under the antitrust laws, the test we set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors. *Id.,* at 105, 100 S.Ct., at 943. The Commission having conceded that the first part of the test was satisfied in the four States still at issue, the immunity question, beginning with the hearings before the ALJ ****2176** and in all later proceedings, has turned upon the proper interpretation and application of *Midcal* 's active supervision requirement. The ALJ found the active supervision test was met in Arizona and Montana but not in Connecticut or Wisconsin. App. to Pet. for Cert. 248a.

On review of the ALJ's decision, the Commission held that none of the four States had conducted sufficient supervision, so that the title companies were not entitled to immunity in any of those jurisdictions. *Id.,* at 47a. The Court of Appeals for the Third Circuit disagreed with the Commission, adopting the approach of the First Circuit in *New England Motor Rate Bureau, Inc. v. FTC,* 908 F.2d 1064 (1990), which ***632** had held that the existence of a state regulatory program, if staffed, funded, and empowered by law, satisfied the requirement of active supervision. *Id.,* at 1071. Under this standard, the Court of Appeals for the Third Circuit ruled that the active state supervision requirement was met in all four States and held that the respondents' conduct was entitled to state-action immunity in each of them. 922 F.2d, at 1140.

We granted certiorari to consider two questions: First, whether the Third Circuit was correct in its statement of the law and in its application of law to fact, and second, whether the Third Circuit exceeded its authority by departing from the factual findings entered by the ALJ and adopted by the Commission. Before this Court, the parties have confined their briefing on the first of these questions to the regulatory regimes of Wisconsin and Montana, and focused on the regulatory regimes of Connecticut and Arizona in briefing on the second question. We now reverse the Court of Appeals under the first question and remand for further proceedings under the second.

II

The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610, 92 S.Ct. 1126, 1135, 31 L.Ed.2d 515 (1972). A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people. Continued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls. Against this background, in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), we upheld a state-supervised, market sharing scheme against a Sherman Act challenge. We announced the doctrine that federal antitrust laws are subject to supersession by state regulatoryprograms. ***633** Our decision was grounded in principles of federalism. *Id.,* at 350–352, 63 S.Ct., at 312–13.

The principle of freedom of action for the States, adopted to foster and preserve the federal system, explains the later evolution and application of the *Parker* doctrine in our decisions in *Midcal, supra,* and *Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988). In *Midcal* we invalidated a California statute forbidding licensees in the wine trade to sell below prices set by the producer. There we announced the two-part test applicable to instances where private parties participate in a price-fixing regime. “First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself.” 445 U.S., at 105, 100 S.Ct., at 943, (internal quotation marks omitted). *Midcal* confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private pricefixing arrangements under the general auspices of state law, is the precondition for immunity from federal law. Immunity is conferred out of ****2177** respect for ongoing regulation by the State, not out of respect for the economics of

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price restraint. In *Midcal* we found that the intent to restrain prices was expressed with sufficient precision so that the first part of the test was met, but that the absence of state participation in the mechanics of the price posting was so apparent that the requirement of active supervision had not been met. *Ibid.*

The rationale was further elaborated in *Patrick v. Burget.* In *Patrick* it had been alleged that private physicians participated in the State's peer review system in order to injure or destroy competition by denying hospital privileges to a physician who had begun a competing clinic. We referred to the purpose of preserving the State's own administrative ***634** policies, as distinct from allowing private parties to foreclose competition, in the following passage:

> "The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.... The requirement is designed to ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies. To accomplish this purpose, the active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct.... The mere presence of some state involvement or monitoring does not suffice.... The active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." 486 U.S., at 100–101, 108 S.Ct., at 1663 (internal quotation marks and citations omitted).

Because the particular anticompetitive conduct at issue in *Patrick* had not been supervised by governmental actors, we decided that the actions of the peer review committee were not entitled to state-action immunity. *Id.,* 486 U.S., at 106, 108 S.Ct., at 1666.

Our decisions make clear that the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices. Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not ***635** simply by agreement among private parties. Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own.

Although the point bears but brief mention, we observe that our prior cases considered state-action immunity against actions brought under the Sherman Act, and this case arises under the Federal Trade Commission Act. The Commission has argued at other times that state-action immunity does not apply to Commission action under § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45. See U.S. Bureau of Consumer Protection, Staff Report to the Federal Trade Commission on Prescription Drug Price Disclosures, Chs. VI(B) and (C) (1975); see also Note, The State Action Exemption and Antitrust Enforcement under the Federal Trade Commission Act, 89 Harv.L.Rev. 715 (1976). A leading treatise has expressed its skepticism of this view. See 1 P. Areeda & D. Turner, Antitrust Law ¶ 218 (1978). We need not determine whether the antitrust statutes can be distinguished on this basis, because the Commission does not assert any ****2178** superior pre-emption authority in the instant matter. We apply our prior cases to the one before us.

Respondents contend that principles of federalism justify a broad interpretation of state-action immunity, but there is a powerful refutation of their viewpoint in the briefs that were filed in this case. The State of Wisconsin, joined by Montana and 34 other States, has filed a brief as *amici curiae* on the precise point. These States deny that respondents' broad immunity rule would serve the States' best interests. We are in agreement with the *amici* submission.

If the States must act in the shadow of state-action immunity whenever they enter the realm of economic regulation, then our doctrine will impede their freedom of action, not advance it. The fact of the matter is that the States regulate ***636** their economies in many ways not inconsistent with the antitrust laws. For example, Oregon may provide for peer review by its physicians without approving anticompetitive conduct by them. See *Patrick,* 486 U.S., at 105, 108 S.Ct., at 1665. Or Michigan may regulate its public utilities without authorizing monopolization in the market for electric light bulbs. See *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 596, 96 S.Ct. 3110, 3120, 49 L.Ed.2d 1141 (1976). So we have

held that state-action immunity is disfavored, much as are repeals by implication. *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 398–399, 98 S.Ct. 1123, 1129, 55 L.Ed.2d 364 (1978). By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility.

States must accept political responsibility for actions they intend to undertake. It is quite a different matter, however, for federal law to compel a result that the States do not intend but for which they are held to account. Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends. For States which do choose to displace the free market with regulation, our insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the price fixing it has sanctioned and undertaken to control.

Respondents contend that these concerns are better addressed by the requirement that the States articulate a clear policy to displace the antitrust laws with their own forms of economic regulation. This contention misapprehends the close relation between *Midcal's* two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy. See *Patrick, supra,* 486 U.S., at 100, 108 S.Ct., at 1662. In the usual case, *Midcal*'s requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; ***637** it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State. It seems plain, moreover, in light of the *amici curiae* brief to which we have referred, that sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that these States deem necessary. For States whose object it is to benefit their citizens through regulation, a broad doctrine of state-action immunity may serve as nothing more than an attractive nuisance in the economic sphere. To oppose these pressures, sole reliance on the requirement of clear articulation could become a rather meaningless formal constraint.

III

In the case before us, the Court of Appeals relied upon a formulation of the active supervision requirement articulated by the First Circuit:

> ****2179** " 'Where ... the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.' " 922 F.2d, at 1136, quoting *New England Motor Rate Bureau, Inc. v. FTC,* 908 F.2d, at 1071.

Based on this standard, the Third Circuit ruled that the active supervision requirement was met in all four States, and held that the respondents' conduct was entitled to state-action immunity from antitrust liability. 922 F.2d, at 1140.

While in theory the standard articulated by the First Circuit might be applied in a manner consistent with our precedents, it seems to us insufficient to establish the requisite level of active supervision. The criteria set forth by the First Circuit may have some relevance as the beginning ***638** point of the active state supervision inquiry, but the analysis cannot end there. Where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it, the party claiming the immunity must show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme. The mere potential for state supervision is not an adequate substitute for a decision by the State. Under these standards, we must conclude that there was no active supervision in either Wisconsin or Montana.

Respondents point out that in Wisconsin and Montana the rating bureaus filed rates with state agencies and that in both States the so-called negative option rule prevailed. The rates became effective unless they were rejected within a set time. It is said that as a matter of law in those States inaction signified substantive approval. This proposition cannot be reconciled, however, with the detailed findings, entered by the ALJ and adopted by the Commission, which demonstrate that the potential for state supervision was not realized in fact. The ALJ found, and the Commission agreed, that at most the rate filings were checked for mathematical accuracy. Some were unchecked altogether. In Montana, a rate filing became effective despite the failure of the rating bureau to provide additional requested information. In Wisconsin, additional information was provided after a lapse of seven

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years, during which time the rate filing remained in effect. These findings are fatal to respondents' attempts to portray the state regulatory regimes as providing the necessary component of active supervision. The findings demonstrate that, whatever the potential for state regulatory review in Wisconsin and Montana, active state supervision did not occur. In the absence of active supervision in fact, there can be no state-action immunity for what were otherwise private price-fixing arrangements. And as in *Patrick,* the availability of state judicial review could not fill the void. Because of the state agencies' limited role and ***639** participation, state judicial review was likewise limited. See *Patrick,* 486 U.S., at 103–105, 108 S.Ct., at 1664–65.

Our decision in *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985), though it too involved a negative option regime, is not to the contrary. The question there was whether the first part of the *Midcal* test was met, the Government's contention being that a pricing policy is not an articulated one unless the practice is compelled. We rejected that assertion and undertook no real examination of the active supervision aspect of the case, for the Government conceded that the second part of the test had been met. *Id.,* at 62, 66, 105 S.Ct., at 1729, 1731. The concession was against the background of a District Court determination that, although submitted rates could go into effect without further state activity, ****2180** the State had ordered and held ratemaking hearings on a consistent basis, using the industry submissions as the beginning point. See *United States v. Southern Motor Carriers Rate Conference, Inc.,* 467 F.Supp. 471, 476–477 (ND Ga.1979). In the case before us, of course, the Commission concedes the first part of the *Midcal* requirement and litigates the second; and there is no finding of substantial state participation in the ratesetting scheme.

This case involves horizontal price fixing under a vague *imprimatur* in form and agency inaction in fact. No antitrust offense is more pernicious than price fixing. *FTC v. Superior Court Trial Lawyers Assn.,* 493 U.S. 411, 434, n. 16, 110 S.Ct. 768, 781, n. 16, 107 L.Ed.2d 851 (1990). In this context, we decline to formulate a rule that would lead to a finding of active state supervision where in fact there was none. Our decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision. We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices. Cf. *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991) (city billboard zoning ordinance entitled to state-action immunity). We do ***640** not have before us a case in which governmental actors made unilateral decisions without participation by private actors. Cf. *Fisher v. Berkeley,* 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986) (private actors not liable without private action). And we do not here call into question a regulatory regime in which sampling techniques or a specified rate of return allow state regulators to provide comprehensive supervision without complete control, or in which there was an infrequent lapse of state supervision. Cf. *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 344, n. 6, 107 S.Ct. 720, 725, n. 6, 93 L.Ed.2d 667 (1987) (a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement). In the circumstances of this case, however, we conclude that the acts of respondents in the States of Montana and Wisconsin are not immune from antitrust liability.

IV

In granting certiorari we undertook to review the further contention by the Commission that the Court of Appeals was incorrect in disregarding the Commission's findings as to the extent of state supervision. The parties have focused their briefing on this question on the regulatory schemes of Connecticut and Arizona. We think the Court of Appeals should have the opportunity to reexamine its determinations with respect to these latter two States in light of the views we have expressed.

The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

Justice SCALIA, concurring.

The Court's standard is in my view faithful to what our cases have said about “active supervision.” On the other hand, I think THE CHIEF JUSTICE and Justice O'CONNOR are correct that this standard will be a fertile source of uncertainty and (hence) litigation, and will produce total abandonmentof ***641** some state programs because private individuals will not take the chance of participating in them. That is true, moreover, not just in the “negative option” context, but even in a context such as that involved in *Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83

(1988): Private physicians invited to participate in a state-supervised hospital peer review system may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the State's supervision will be "active" enough.

I am willing to accept these consequences because I see no alternative within the constraints ****2181** of our "active supervision" doctrine, which has not been challenged here; and because I am skeptical about the *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), exemption for state-programmed private collusion in the first place.

Chief Justice REHNQUIST, with whom Justice O'CONNOR and Justice THOMAS join, dissenting.

The Court holds today that to satisfy the "active supervision" requirement of state-action immunity from antitrust liability, private parties acting pursuant to a regulatory scheme enacted by a state legislature must prove that "the State has played a substantial role in determining the specifics of the economic policy." *Ante,* at 2177. Because this standard is neither supported by our prior precedent nor sound as a matter of policy, I dissent.

Immunity from antitrust liability under the state-action doctrine was first established in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). As noted by the majority, in *Parker,* we relied on principles of federalism in concluding that the Sherman Act did not apply to state officials administering a regulatory program enacted by the state legislature. We concluded that state action is exempt from antitrust liability, because in the Sherman Act Congress evidences no intent to "restrain state action or official action directed by a state." ***642** *Id.,* at 351, 63 S.Ct., at 312.[1] "The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 56, 105 S.Ct. 1721, 1726, 85 L.Ed.2d 36 (1985) (footnote omitted).

We developed our present analysis for state-action immunity for private actors in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980). We held in *Midcal* that our prior precedent had granted state-action immunity from antitrust liability to conduct by private actors where a program was "clearly articulated and affirmatively expressed as state policy [and] the policy [was] actively supervised by the State itself." *Id.,* at 105, 100 S.Ct., at 943 (internal quotation marks and citation omitted). In *Midcal,* we found the active supervision requirement was not met because under the California statute at issue, which required liquor retailers to charge a certain percentage above a price "posted" by area wholesalers, "[t]he State has no direct control over wine prices, and it does not review the reasonableness of the prices set by wine dealers." *Id.,* at 100, 100 S.Ct., at 940. We noted that the state-action defense does not allow the States to authorize what is nothing more than private price fixing. *Id.,* at 105, 100 S.Ct., at 943.

In each instance since *Midcal* in which we have concluded that the active supervision requirement for state-action immunity was not met, the state regulators lacked authority, under state law, to review or reject the rates or action taken ***643** by the private actors facing antitrust liability.[2] Our most recent formulation of the "active supervision" requirement ****2182** was announced in *Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), where we concluded that to satisfy the "active supervision" requirement, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.,* at 101, 108 S.Ct., at 1663. Until today, therefore, we have never had occasion to determine whether a state regulatory program which gave state officials authority—"power"—to review and regulate prices or conduct, might still fail to meet the requirement for active state supervision because the State's regulation was not sufficiently detailed or rigorous.

Addressing this question, the Court of Appeals in this case used the following analysis:

> " 'Where, as here, the state's program is in place, is staffed and funded, grants to the state officials ample power and the duty to regulate pursuant to declared standards of state policy, is enforceable in the state's courts, and demonstrates some basic level of activity directed towards seeing that the private actors carry out the state's policy and not simply their own policy, more need not be established.' " 922 F.2d 1122, 1136 (CA3 1991), quoting *New England Motor Rate Bureau, Inc. v. FTC,* 908 F.2d 1064, 1071 (CA1 1990).

The Court likens this test to doing away all together with the active supervision requirement for immunity based on state action. But the test used by the Court of Appeals is ***644** much more closely attuned to our "have and exercise power" formulation in *Patrick v. Burget* than is the rule adopted by the Court today. The Court simply does not say

just how active a State's regulators must be before the "active supervision" requirement will be satisfied. The only guidance it gives is that the inquiry should be one akin to causation in a negligence case; does the State play "a substantial role in determining the specifics of the economic policy." *Ante,* at 2177. Any other formulation, we are told, will remove the active supervision requirement altogether as a practical matter.

I do not believe this to be the case. [3] In the States at issue here, the particular conduct was approved by a state agency. The agency manifested this approval by raising no objection to a required rate filing by the entity subject to regulation. This is quite consistent with our statement that the active supervision requirement serves mainly an "evidentiary function" as "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie v. Eau Claire,* 471 U.S. 34, 46, 105 S.Ct. 1713, 1720, 85 L.Ed.2d 24 (1985).

The Court insists that its newly required "active supervision" will "increase the States' regulatory flexibility." *Ante,* at 2178. But if private actors who participate, through a joint rate filing, in a State's "negative option" regulatory scheme may be liable for treble damages if they cannot prove that the State approved the specifics of a filing, the Court makes it highly unlikely that private actors will choose to participate in such a joint filing. This in turn *lessens* the States' regulatory flexibility, because as we have noted before, joint rate filings can improve the regulatory process by ensuring that the state agency has fewer filings to consider, allowing more resources to be expended on each filing. ***645** *Southern Motor Carriers Rate Conference, Inc. v. United States, supra,* 471 U.S., at 51, 105 S.Ct. at 1723. The view advanced by the Court of Appeals does not sanction price fixing in areas regulated by a State "not inconsistent with the antitrust laws." *Ante,* at 2178. A State must establish, staff, and fund a program to approve ****2183** jointly set rates or prices in order for any activity undertaken by private individuals under that program to be immune under the antitrust laws. [4]

The Court rejects the test adopted by the Court of Appeals, stating that it cannot be the end of the inquiry. Instead, the party seeking immunity must "show that state officials have undertaken the necessary steps to determine the specifics of the price-fixing or ratesetting scheme." *Ante,* at 2179. [5] Such an inquiry necessarily puts the federal court in the position of determining the efficacy of a particular State's regulatory scheme, in order to determine whether the State has met the "requisite level of active supervision." *Ante,* at 2179. The Court maintains that the proper state-action inquiry does not determine whether a State has met some "normative standard" in its regulatory practices. *Ante,* at 2177. But the Court's focus on the actions taken by state regulators, *i.e.,* the way the State regulates, necessarily requires a judgment as to whether the State is sufficiently active—surely a normative judgment.

***646** The Court of Appeals found—properly, in my view—that while the States at issue here did not regulate respondents' rates with the vigor petitioner would have liked, the States' supervision of respondents' conduct was active enough so as to provide for immunity from antitrust liability. The Court of Appeals, having concluded that the Federal Trade Commission applied an incorrect legal standard, reviewed the facts found by the Commission in light of the correct standard and reached a different conclusion. This does not constitute a rejection of the Commission's factual findings.

I would therefore affirm the judgment below.

Justice O'CONNOR, with whom Justice THOMAS joins, dissenting.

Notwithstanding its assertions to the contrary, the Court has diminished the States' regulatory flexibility by creating an impossible situation for those subject to state regulation. Even when a State has a "clearly articulated policy" authorizing anticompetitive behavior—which the Federal Trade Commission concedes was the case here—and even when the State establishes a system to supervise the implementation of that policy, the majority holds that a federal court may later find that the State's supervision was not sufficiently "substantial" in its "specifics" to insulate the anticompetitive behavior from antitrust liability. *Ante,* at 2177. Given the threat of treble damages, regulated entities that have the option of heeding the State's anticompetitive policy would be foolhardy to do so; those that are compelled to comply are less fortunate. The practical effect of today's decision will likely be to eliminate so-called "negative option" regulation from the universe of schemes available to a State that seeks to regulate without exposing certain conduct to federal antitrust liability.

The Court does not dispute that each of the States at issue in this case *could have* supervised respondents' joint ratemaking; rather, it argues that "the potential for state supervision ***647** was not realized in fact." *Ante,* at 2179. Such an after-the-fact evaluation of a State's exercise of its supervisory ****2184** powers is extremely unfair to regulated parties.

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Liability under the antitrust laws should not turn on how enthusiastically a state official carried out his or her statutory duties. The regulated entity has no control over the regulator, and very likely will have no idea as to the degree of scrutiny that its filings may receive. Thus, a party could engage in exactly the same conduct in two States, each of which had exactly the same policy of allowing anticompetitive behavior and exactly the same regulatory structure, and discover afterward that its actions in one State were immune from antitrust prosecution, but that its actions in the other resulted in treble-damages liability.

Moreover, even if a regulated entity could assure itself that the State will undertake to actively supervise its rate filings, the majority does not offer any guidance as to what level of supervision will suffice. It declares only that the State must "pla[y] a substantial role in determining the specifics of the economic policy." *Ante,* at 2177. That standard is not only ambiguous, but also runs the risk of being counterproductive. The more reasonable a filed rate, the less likely that a State will have to play any role other than simply reviewing the rate for compliance with statutory criteria. Such a vague and retrospective standard, combined with the threat of treble damages if that standard is not satisfied, makes "negative option" regulation an unattractive option for both States and the parties they regulate.

Finally, it is important to remember that antitrust actions can be brought by private parties as well as by government prosecutors. The resources of state regulators are strained enough without adding the extra burden of asking them to serve as witnesses in civil litigation and respond to allegations that they did not do their job.

For these reasons, as well as those given by THE CHIEF JUSTICE, I dissent.

All Citations

504 U.S. 621, 112 S.Ct. 2169, 119 L.Ed.2d 410, 60 USLW 4515, 1992-1 Trade Cases P 69,847

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 The Court states that "[c]ontinued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls," *ante,* at 2176. However, in *Parker,* we held that the Sherman Act simply does not apply to conduct regulated by the State. The enforcement of the national antitrust policy, as embodied in the antitrust laws, may grant individuals more freedom to compete in our free market system, but it does not implicate the freedom of the States in deciding whether to regulate.

2 In *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 107 S.Ct. 720, 93 L.Ed.2d 667 (1987), we held that a New York statute failed to shelter private actors from antitrust liability because the state legislation required retailers to charge 112% of the price "posted" by wholesalers. The New York statute, like the California statute at issue in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), gave no power to the state agency to review or establish the reasonableness of the price schedules "posted" by the wholesalers. *324 Liquor, supra,* 479 U.S., at 345, 107 S.Ct., at 726.

3 The state regulatory programs in *Midcal, supra, Patrick v. Burget,* 486 U.S. 94, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988), and *324 Liquor, supra,* would all fail to provide immunity for lack of active supervision under the test adopted by the Court of Appeals.

4 In neither of the examples cited by the majority as instances of state regulation not intended to authorize anticompetitive conduct would application of a less detailed active supervision test change the result. In

Patrick v. Burget, supra, we concluded there was no immunity because the State did not have the authority to review the anticompetitive action undertaken by the peer review committee; in *Cantor v. Detroit Edison Co.,* 428 U.S. 579, 96 S.Ct. 3110, 49 L.Ed.2d 1141 (1976), it is unlikely that the clear articulation requirement under our current jurisprudence would be met with respect to the market for light bulbs.

5 It is not clear, from the Court's formulation, whether this is a separate test applicable only to negative option regulatory schemes, or whether it applies more generally to issues of immunity under the state-action doctrine.

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111 S.Ct. 1344
Supreme Court of the United States

CITY OF COLUMBIA and Columbia Outdoor Advertising, Inc., Petitioners,
v.
OMNI OUTDOOR ADVERTISING, INC.

No. 89–1671
|
Argued Nov. 28, 1990.
|
Decided April 1, 1991.

Synopsis

Outdoor advertising company brought antitrust action against competitor and city which adopted rezoning ordinances restricting billboards. The United States District Court for the District of South Carolina granted motion of defendants for judgment notwithstanding the verdict, and outdoor advertising company appealed. The Court of Appeals for the Fourth Circuit reversed, 891 F.2d 1127, and certiorari was granted. The Supreme Court, Justice Scalia, held that: (1) city could not be deprived of its *Parker* immunity on the grounds that its action was not taken for the purpose of promoting health, safety, morals, or general welfare of the community and thus was not authorized; (2) authority given to city by the state to regulate land use and buildings included authority to displace competition; (3) there is no conspiracy exception to the *Parker* immunity; and (4) there is no conspiracy exception to *Noerr - Pennington* doctrine.

Reversed and remanded.

Justice Stevens dissented and filed an opinion in which Justice White and Justice Marshall joined.

Procedural Posture(s): On Appeal.

****1346** *Syllabus* [*]

After respondent Omni Outdoor Advertising, Inc., entered the billboard market in petitioner Columbia, South Carolina, petitioner Columbia Outdoor Advertising, Inc. (COA), which controlled more than 95% of the market and enjoyed close relations with city officials, lobbied these officials to enact zoning ordinances restricting billboard construction. After such ordinances were passed, Omni filed suit against petitioners under §§ 1 and 2 of the Sherman Act and the State's Unfair Trade Practices Act, alleging, *inter alia,* that the ordinances were the result of an anticompetitive conspiracy that stripped petitioners of any immunity to which they might otherwise be entitled. After Omni obtained a jury verdict on all counts, the District Court granted petitioners' motions for judgment notwithstanding the verdict on the ground that their activities were outside the scope of the federal antitrust laws. The Court of Appeals reversed and reinstated the verdict.

Held:

1. The city's restriction of billboard construction is immune from federal antitrust liability under *Parker v. Brown,* 317 U.S. 341, 352, 63 S.Ct. 307, 314, 87 L.Ed. 315—which held that principles of federalism and state sovereignty render the Sherman Act inapplicable to anticompetitive restraints imposed by the States "as an act of government"—and subsequent decisions according *Parker* immunity to municipal restriction of competition in implementation of state policy, see, *e.g., Hallie v. Eau Claire,* 471 U.S. 34, 38, 105 S.Ct. 1713, 1716, 85 L.Ed.2d 24. Pp. 1348–1353.

(a) The Court of Appeals correctly concluded that the city was prima facie entitled to *Parker* immunity for its billboard restrictions. Although *Parker* immunity does not apply directly to municipalities or other political subdivisions of the States, it does apply where a municipality's restriction of competition is an authorized implementation of state policy. South Carolina's zoning statutes unquestionably authorized the city to regulate the size, location, and spacing of billboards. The additional *Parker* requirement that the city possess clear delegated authority to suppress competition, see, *e.g., Hallie, supra,* 471 U.S., at 40–42, 105 S.Ct., at 1717–18, is also met here, since suppression of competition is at the very least a foreseeable result of zoning regulations. Pp. 1348–1350.

***366** b) The Court of Appeals erred, however, in applying a "conspiracy" exception to *Parker,* which is not supported by the language of that case. Such an exception would swallow up the *Parker* rule if "conspiracy" means nothing more than agreement to impose the regulation in question, since it is both inevitable and desirable that public officials agree to do what one or another group of private citizens urges upon them. It would be similarly impractical to limit "conspiracy" to instances of governmental "corruption," or governmental acts "not in the public interest"; virtually all anticompetitive regulation is open to such charges and the risk

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of unfavorable *ex post facto* judicial assessment would impair the States' ability to regulate their domestic commerce. Nor is it appropriate to limit "conspiracy" to instances in which bribery or some other violation of state or federal law has been established, since the exception would then be unrelated to the purposes of the Sherman Act, which condemns trade restraints, not political activity. With the possible exception of the situation in which the State is acting as a market participant, *any* action that qualifies as state action is *ipso facto* exempt from the operation of the antitrust laws. Pp. 1350–1353.

2. COA is immune from liability for its activities relating to enactment of the ordinances under ****1347** *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 141, 81 S.Ct. 523, 531, 5 L.Ed.2d 464, which states a corollary to *Parker:* The federal antitrust laws do not regulate the conduct of private individuals in seeking anticompetitive action from the government. The Court of Appeals erred in applying the "sham" exception to the *Noerr* doctrine. This exception encompasses situations in which persons use the governmental process itself—as opposed to the *outcome* of that process—as an anticompetitive weapon. That is not the situation here. *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 512, 92 S.Ct. 609, 612, 30 L.Ed.2d 642, distinguished. Omni's suggestion that this Court adopt a "conspiracy" exception to *Noerr* immunity is rejected for largely the same reasons that prompt the Court to reject such an exception to *Parker.* Pp. 1353–1356.

3. The Court of Appeals on remand must determine (if the theory has been properly preserved) whether the evidence was sufficient to sustain a verdict for Omni based solely on its assertions that COA engaged in *private* anticompetitive actions, and whether COA can be held liable to Omni on its state-law claim. P. 1356.

891 F.2d 1127 (CA4 1989), reversed and remanded.

SCALIA, J., delivered the opinion of the Court, in which REHNQUIST, C.J., and BLACKMUN, O'CONNOR, KENNEDY, and SOUTER, JJ., joined. STEVENS, J., filed a dissenting opinion, in which WHITE and MARSHALL, JJ., joined, *post,* p. 1356.

Attorneys and Law Firms

***367** Joel I. Klein argued the cause for petitioners. With him on the briefs were Paul M. Smith, Roy D. Bates, James S. Meggs, David W. RobinsonII, and Heyward E. McDonald.

A. Camden Lewis argued the cause for respondent. With him on the brief was Randall M. Chastain.*

*Charles Rothfeld, Benna Ruth Solomon, and Peter J. Kalis filed a brief for the National League of Cities et al. as amici curiae urging reversal.

Steven C. McCracken, Maurice Baskin, and John R. Crews filed a brief for Associated Builders and Contractors, Inc., as amicus curiae urging affirmance.

Eric M. Rubin and Walter E. Diercks filed a brief for the Outdoor Advertising Association of America, Inc., as amicus curiae.

Opinion

Justice SCALIA delivered the opinion of the Court.

This case requires us to clarify the application of the Sherman Act to municipal governments and to the citizens who seek action from them.

I

Petitioner Columbia Outdoor Advertising, Inc. (COA), a South Carolina corporation, entered the billboard business in the city of Columbia, South Carolina (also a petitioner here), in the 1940's. By 1981 it controlled more than 95% of what has been conceded to be the relevant market. COA was a local business owned by a family with deep roots in the community, and enjoyed close relations with the city's political leaders. The mayor and other members of the city council were personal friends of COA's majority owner, and the company and its officers occasionally contributed funds and free billboard space to their campaigns. According to respondent Omni Outdoor Advertising, Inc., these beneficences were part of a "longstanding" "secret anticompetitive agreement" whereby "the City and COA would each use their [*sic*] respective power and resources to protect ... COA's monopoly position," in return for which "City Council members received advantages made possible by COA's monopoly." Brief for Respondent 12, 16.

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***368** In 1981, Omni, a Georgia corporation, began erecting billboards in and around the city. COA responded to this competition in several ways. First, it redoubled its own billboard construction efforts and modernized its existing stock. Second—according to Omni—it took a number of anticompetitive private actions, such as offering artificially low rates, spreading untrue and malicious rumors about Omni, and attempting to induce Omni's customers to break their contracts. Finally (and this is what gives rise to the issue we address today), COA executives met with city officials to seek the enactment of zoning ordinances that would restrict billboard construction. COA was not alone in urging this course; concerned about the city's recent explosion of billboards, a number of citizens including writers of articles ****1348** and editorials in local newspapers advocated restrictions.

In the spring of 1982, the city council passed an ordinance requiring the council's approval for every billboard constructed in downtown Columbia. This was later amended to impose a 180–day moratorium on the construction of billboards throughout the city, except as specifically authorized by the council. A state court invalidated this ordinance on the ground that its conferral of unconstrained discretion upon the city council violated both the South Carolina and Federal Constitutions. The city then requested the State's regional planning authority to conduct a comprehensive analysis of the local billboard situation as a basis for developing a final, constitutionally valid, ordinance. In September 1982, after a series of public hearings and numerous meetings involving city officials, Omni, and COA (in all of which, according to Omni, positions contrary to COA's were not genuinely considered), the city council passed a new ordinance restricting the size, location, and spacing of billboards. These restrictions, particularly those on spacing, obviously benefited COA, which already had its billboards in place; they severely hindered Omni's ability to compete.

***369** In November 1982, Omni filed suit against COA and the city in Federal District Court, charging that they had violated §§ 1 and 2 of the Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. §§ 1, 2,[1] as well as South Carolina's Unfair Trade Practices Act, S.C.Code Ann. § 39–5–140 (1976). Omni contended, in particular, that the city's billboard ordinances were the result of an anticompetitive conspiracy between city officials and COA that stripped both parties of any immunity they might otherwise enjoy from the federal antitrust laws. In January 1986, after more than two weeks of trial, a jury returned general verdicts against the city and COA on both the federal and state claims. It awarded damages, before trebling, of $600,000 on the § 1 Sherman Act claim, and $400,000 on the § 2 claim.[2] The jury also answered two special interrogatories, finding specifically that the city and COA had conspired both to restrain trade and to monopolize the market. Petitioners moved for judgment notwithstanding the verdict, contending among other ***370** things that their activities were outside the scope of the federal antitrust laws. In November 1988, the District Court granted the motion.

A divided panel of the United States Court of Appeals for the Fourth Circuit reversed the judgment of the District Court and reinstated the jury verdict on all counts. 891 F.2d 1127 (1989). We granted certiorari, 496 U.S. 935, 110 S.Ct. 3211, 110 L.Ed.2d 659 (1990).

II

In the landmark case of *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), we rejected the contention that a program restricting the marketing of privately produced raisins, adopted pursuant to California's Agricultural Prorate Act, violated ****1349** the Sherman Act. Relying on principles of federalism and state sovereignty, we held that the Sherman Act did not apply to anticompetitive restraints imposed by the States "as an act of government." *Id.,* at 352, 63 S.Ct., at 314.

Since *Parker* emphasized the role of sovereign *States* in a federal system, it was initially unclear whether the governmental actions of political subdivisions enjoyed similar protection. In recent years, we have held that *Parker* immunity does not apply directly to local governments, see *Hallie v. Eau Claire,* 471 U.S. 34, 38, 105 S.Ct. 1713, 1716, 85 L.Ed.2d 24 (1985); *Community Communications Co. v. Boulder,* 455 U.S. 40, 50–51, 102 S.Ct. 835, 840–841, 70 L.Ed.2d 810 (1982); *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 412–413, 98 S.Ct. 1123, 1136–1137, 55 L.Ed.2d 364 (1978) (plurality opinion). We have recognized, however, that a municipality's restriction of competition may sometimes be an authorized implementation of state policy, and have accorded *Parker* immunity where that is the case.

The South Carolina statutes under which the city acted in the present case authorize municipalities to regulate the use of land and the construction of buildings and other structures within their boundaries.[3] It is undisputed that, as a matter

***371** of state law, these statutes authorize the city to regulate the size, location, and spacing of billboards. It could be argued, however, that a municipality acts beyond its delegated authority, for *Parker* purposes, whenever the nature of its regulation is substantively or even procedurally defective. On such an analysis it could be contended, for example, that the city's regulation in the present case was not "authorized" by S.C.Code Ann. § 5–23–10 (1976), see n. 3, *supra,* if it was not, as that statute requires, adopted "for the purpose of promoting health, safety, morals or the general welfare of the community." As scholarly commentary has noted, such an expansive interpretation of the *Parker*–defense authorization requirement would have unacceptable consequences.

> "To be sure, state law 'authorizes' only agency decisions that are substantively and procedurally correct. Errors of fact, law, or judgment by the agency are not 'authorized.' Erroneous acts or decisions are subject to ***372** reversal by superior tribunals because unauthorized. If the antitrust court demands unqualified 'authority' in this sense, it inevitably becomes the standard reviewer not only of federal agency activity but also of state and local activity whenever it is alleged that the governmental body, though possessing the power to engage in the challenged conduct, has actually exercised its power in a manner not authorized by state law. We should not ****1350** lightly assume that *Lafayette* 's authorization requirement dictates transformation of state administrative review into a federal antitrust job. Yet that would be the consequence of making antitrust liability depend on an undiscriminating and mechanical demand for 'authority' in the full administrative law sense." P. Areeda & H. Hovenkamp, Antitrust Law ¶ 212.3b, p. 145 (Supp.1989).

We agree with that assessment, and believe that in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law. We have adopted an approach that is similar in principle, though not necessarily in precise application, elsewhere. See *Stump v. Sparkman,* 435 U.S. 349, 98 S.Ct. 1099, 55 L.Ed.2d 331 (1978). It suffices for the present to conclude that here no more is needed to establish, for *Parker* purposes, the city's authority to regulate than its unquestioned zoning power over the size, location, and spacing of billboards.

Besides authority to regulate, however, the *Parker* defense also requires authority to suppress competition—more specifically, "clear articulation of a state policy to authorize anticompetitive conduct" by the municipality in connection with its regulation. *Hallie,* 471 U.S., at 40, 105 S.Ct., at 1717 (internal quotation omitted). We have rejected the contention that this requirement can be met only if the delegating statute explicitly permits the displacement of competition, see *id.,* at 41–42, 105 S.Ct., at 1717–1718. ***373** It is enough, we have held, if suppression of competition is the "foreseeable result" of what the statute authorizes, *id.,* at 42, 105 S.Ct., at 1718. That condition is amply met here. The very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants. A municipal ordinance restricting the size, location, and spacing of billboards (surely a common form of zoning) necessarily protects existing billboards against some competition from newcomers. [4]

***374** The Court of Appeals was therefore correct in its conclusion that the city's restriction of billboard construction was prima facie entitled to *Parker* immunity. The ****1351** Court of Appeals upheld the jury verdict, however, by invoking a "conspiracy" exception to *Parker* that has been recognized by several Courts of Appeals. See, *e.g., Whitworth v. Perkins,* 559 F.2d 378 (CA5 1977), vacated, 435 U.S. 992, 98 S.Ct. 1642, 56 L.Ed.2d 81, aff'd on rehearing, 576 F.2d 696 (1978), cert. denied, 440 U.S. 911, 99 S.Ct. 1224, 59 L.Ed.2d 460 (1979). That exception is thought to be supported by two of our statements in *Parker:* "[W]e have no question of the state or its municipality becoming a *participant in a private agreement* or combination by others for restraint of trade, cf. *Union Pacific R. Co. v. United States,* 313 U.S. 450 [61 S.Ct. 1064, 85 L.Ed. 1453]." *Parker,* 317 U.S., at 351–352, 63 S.Ct., at 314 (emphasis added). "The state in adopting and enforcing the prorate program made no contract or agreement *and entered into no conspiracy in restraint of trade or to establish monopoly* but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit." *Id.,* at 352, 63 S.Ct., at 314 (emphasis added). *Parker* does not apply, according to the Fourth Circuit, "where politicians or political entities are involved as conspirators" with private actors in the restraint of trade. 891 F.2d, at 1134.

There is no such conspiracy exception. The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators. The sentences from the opinion quoted above

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simply clarify that this immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial ***375** participant in a given market. That is evident from the citation of *Union Pacific R. Co. v. United States,* 313 U.S. 450, 61 S.Ct. 1064, 85 L.Ed. 1453 (1941), which held unlawful under the Elkins Act certain rebates and concessions made by Kansas City, Kansas, in its capacity as the owner and operator of a wholesale produce market that was integrated with railroad facilities. These sentences should not be read to suggest the general proposition that even governmental *regulatory* action may be deemed private —and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties. The impracticality of such a principle is evident if, for purposes of the exception, "conspiracy" means nothing more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a "conspiracy" charge. See Areeda & Hovenkamp, *supra,* ¶ 203.3b, at 34, and n. 1; Elhauge, The Scope of Antitrust Process, 104 Harv.L.Rev. 667, 704–705 (1991).[5]

****1352** ***376** Omni suggests, however, that "conspiracy" might be limited to instances of governmental "corruption," defined variously as "abandonment of public responsibilities to private interests," Brief for Respondent 42, "corrupt or bad faith decisions," *id.,* at 44, and "selfish or corrupt motives," *ibid.* Ultimately, Omni asks us not to define "corruption" at all, but simply to leave that task to the jury: "[a]t bottom, however, it was within the jury's province to determine what constituted corruption of the governmental process in their community." *Id.,* at 43. Omni's *amicus* eschews this emphasis on "corruption," instead urging us to define the conspiracy exception as encompassing any governmental act "not in the public interest." Brief for Associated Builders and Contractors, Inc., as *Amicus Curiae* 5.

***377** A conspiracy exception narrowed along such vague lines is similarly impractical. Few governmental actions are immune from the charge that they are "not in the public interest" or in some sense "corrupt." The California marketing scheme at issue in *Parker* itself, for example, can readily be viewed as the result of a "conspiracy" to put the "private" interest of the State's raisin growers above the "public" interest of the State's consumers. The fact is that virtually all regulation benefits some segments of the society and harms others; and that it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners. *Parker* was not written in ignorance of the reality that determination of "the public interest" in the manifold areas of government regulation entails not merely economic and mathematical analysis but value judgment, and it was not meant to shift that judgment from elected officials to judges and juries. If the city of Columbia's decision to regulate what one local newspaper called "billboard jungles," Columbia Record, May 21, 1982, p. 14–A, col. 1; App. in No. 88–1388 (CA4), p. 3743, is made subject to *ex post facto* judicial assessment of "the public interest," with personal liability of city officials a possible consequence, we will have gone far to "compromise the States' ability to regulate their domestic commerce," *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 56, 105 S.Ct. 1721, 1726, 85 L.Ed.2d 36 (1985). The situation would not be better, but arguably even worse, if the courts were to apply a subjective test: not whether the action was in the public interest, but whether the officials involved thought it to be so. This would require the sort of deconstruction of the governmental process and probing of the official "intent" that we have consistently sought to avoid.[6] "[W]here the action complained ***378** of ... was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." ****1353** *Hoover v. Ronwin,* 466 U.S. 558, 579–580, 104 S.Ct. 1989, 2001, 80 L.Ed.2d 590 (1984). See also *Llewellyn v. Crothers,* 765 F.2d 769, 774 (CA9 1985) (Kennedy, J.).

The foregoing approach to establishing a "conspiracy" exception at least seeks (however impractically) to draw the line of impermissible action in a manner relevant to the purposes of the Sherman Act and of *Parker:* prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest. Another approach is possible, which has the virtue of practicality but the vice of being unrelated to those purposes. That is the approach which would consider *Parker* inapplicable only if, in connection with the governmental action in question, bribery or some other violation of state or federal law has been established. Such unlawful activity has no necessary relationship to whether the governmental action is in the public interest. A mayor is guilty of accepting a bribe even if he would and should have taken, in the public interest, the same action for which the bribe was paid. (That is frequently the defense asserted to a criminal bribery charge —and though it is never valid in law, see, *e.g., United States v. Jannotti,* 673 F.2d 578, 601 (CA3) (en banc), cert. denied,

457 U.S. 1106, 102 S.Ct. 2906, 73 L.Ed.2d 1315 (1982), it is often plausible in fact.) When, moreover, the regulatory body is not a single individual but a state legislature or city council, there is even less reason to believe that violation of the law (by bribing a minority of the decisionmakers) establishes that the regulation has no valid public purpose. Cf. *Fletcher v. Peck,* 6 Cranch 87, 130, 3 L.Ed. 162 (1810). To use unlawful political influence as the test of legality of state regulation undoubtedly vindicates (in a rather blunt way) principles of good government. But the statute we are construing is not directed to that end. Congress has passed other laws aimed ***379** at combating corruption in state and local governments. See, *e.g.,* 18 U.S.C. § 1951 (Hobbs Act). "Insofar as [the Sherman Act] sets up a code of ethics at all, it is a code that condemns trade restraints, not political activity." *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 140, 81 S.Ct. 523, 531, 5 L.Ed.2d 464 (1961).

For these reasons, we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on "perceived conspiracies to restrain trade," *Hoover,* 466 U.S., at 580, 104 S.Ct., at 2001. We reiterate that, with the possible market participant exception, *any* action that qualifies as state action is "*ipso facto* ... exempt from the operation of the antitrust laws," *id.,* at 568, 104 S.Ct., at 1995. This does not mean, of course, that the States may exempt *private* action from the scope of the Sherman Act; we in no way qualify the well-established principle that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker,* 317 U.S., at 351, 63 S.Ct., at 314 (citing *Northern Securities Co. v. United States,* 193 U.S. 197, 332, 344–347, 24 S.Ct. 436, 459–461, 48 L.Ed. 679 (1904)). See also *Schwegmann Brothers v. Calvert Distillers Corp.,* 341 U.S. 384, 71 S.Ct. 745, 95 L.Ed. 1035 (1951).

III

While *Parker* recognized the States' freedom to engage in anticompetitive regulation, it did not purport to immunize from antitrust liability the private parties who urge them to engage in anticompetitive regulation. However, it is obviously peculiar in a democracy, and perhaps in derogation of the constitutional right "to petition the Government for a redress of grievances," U.S. Const., Amdt. 1, to establish a category of lawful state action that citizens are not permitted to urge. Thus, beginning with *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc., supra,* we have developed ****1354** a corollary to *Parker:* The federal antitrust laws also do not regulate the conduct of private individuals in seeking ***380** anticompetitive action from the government. This doctrine, like *Parker,* rests ultimately upon a recognition that the antitrust laws, "tailored as they are for the business world, are not at all appropriate for application in the political arena." *Noerr, supra,* 365 U.S., at 141, 81 S.Ct., at 531. That a private party's political motives are selfish is irrelevant: "*Noerr* shields from the Sherman Act a concerted effort to influence public officials regardless of intent or purpose." *Mine Workers v. Pennington,* 381 U.S. 657, 670, 85 S.Ct. 1585, 1593, 14 L.Ed.2d 626 (1965).

Noerr recognized, however, what has come to be known as the "sham" exception to its rule: "There may be situations in which a publicity campaign, ostensibly directed toward influencing governmental action, is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor and the application of the Sherman Act would be justified." 365 U.S., at 144, 81 S.Ct., at 533. The Court of Appeals concluded that the jury in this case could have found that COA's activities on behalf of the restrictive billboard ordinances fell within this exception. In our view that was error.

The "sham" exception to *Noerr* encompasses situations in which persons use the governmental *process*—as opposed to the *outcome* of that process—as an anticompetitive weapon. A classic example is the filing of frivolous objections to the license application of a competitor, with no expectation of achieving denial of the license but simply in order to impose expense and delay. See *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972). A "sham" situation involves a defendant whose activities are "not genuinely aimed at procuring favorable government action" at all, *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 500, n. 4, 108 S.Ct. 1931, 1937, n. 4, 100 L.Ed.2d 497 (1988), not one "who 'genuinely seeks to achieve his governmental result, but does so *through improper means,*' " *id.,* at 508, n. 10, 108 S.Ct., at 1941, n. 10 (quoting *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.,* 827 F.2d 458, 465, n. 5 (CA9 1987)).

***381** Neither of the Court of Appeals' theories for application of the "sham" exception to the facts of the present case is sound. The court reasoned, first, that the jury could have concluded that COA's interaction with city officials

was " 'actually nothing more than an attempt to interfere directly with the business relations *[sic]* of a competitor.' " 891 F.2d, at 1139 (quoting *Noerr, supra,* 365 U.S., at 144, 81 S.Ct., at 533). This analysis relies upon language from *Noerr,* but ignores the import of the critical word "directly." Although COA indisputably set out to disrupt Omni's business relationships, it sought to do so not through the very process of lobbying, or of causing the city council to consider zoning measures, but rather through the ultimate *product* of that lobbying and consideration, viz., the zoning ordinances. The Court of Appeals' second theory was that the jury could have found "that COA's purposes were to delay Omni's entry into the market and even to deny it a meaningful access to the appropriate city administrative and legislative fora." 891 F.2d, at 1139. But the purpose of delaying a competitor's entry into the market does not render lobbying activity a "sham," unless (as no evidence suggested was true here) the delay is sought to be achieved only by the lobbying process itself, and not by the governmental action that the lobbying seeks. "If *Noerr* teaches anything it is that an intent to restrain trade as a *result* of the government action sought ... does not foreclose protection." Sullivan, Developments in the Noerr Doctrine, 56 Antitrust L.J. 361, 362 (1987). As for "deny[ing] ... meaningful access to the appropriate city administrative and legislative fora," that may render the manner of lobbying improper or even unlawful, ****1355** but does not necessarily render it a "sham." We did hold in *California Motor Transport, supra,* that a conspiracy among private parties to monopolize trade by excluding a competitor from participation in the regulatory process did not enjoy *Noerr* protection. But *California Motor Transport* involved a context in which the conspirators' participation in the governmental process was itself claimed to be a ***382** "sham," employed as a means of imposing cost and delay. ("It is alleged that petitioners 'instituted the proceedings and actions ... with or without probable cause, and regardless of the merits of the cases.' " 404 U.S., at 512, 92 S.Ct., at 612.) The holding of the case is limited to that situation. To extend it to a context in which the regulatory process is being invoked genuinely, and not in a "sham" fashion, would produce precisely that conversion of antitrust law into regulation of the political process that we have sought to avoid. Any lobbyist or applicant, in addition to getting himself heard, seeks by procedural and other means to get his opponent ignored. Policing the legitimate boundaries of such defensive strategies, when they are conducted in the context of a genuine attempt to influence governmental action, is not the role of the Sherman Act. In the present case, of course, any denial to Omni of "meaningful access to the appropriate city administrative and legislative fora" was achieved by COA in the course of an attempt to influence governmental action that, far from being a "sham," was if anything more in earnest than it should have been. If the denial was wrongful there may be other remedies, but as for the Sherman Act, the *Noerr* exemption applies.

Omni urges that if, as we have concluded, the "sham" exception is inapplicable, we should use this case to recognize another exception to *Noerr* immunity—a "conspiracy" exception, which would apply when government officials conspire with a private party to employ government action as a means of stifling competition. We have left open the possibility of such an exception, see, *e.g., Allied Tube, supra,* 486 U.S., at 502, n. 7, 108 S.Ct., at 1938, n. 7, as have a number of Courts of Appeals. See, *e.g., Oberndorf v. Denver,* 900 F.2d 1434, 1440 (CA10 1990); *First American Title Co. of South Dakota v. South Dakota Land Title Assn.,* 714 F.2d 1439, 1446, n. 6 (CA8 1983), cert. denied, 464 U.S. 1042, 104 S.Ct. 709, 79 L.Ed.2d 173 (1984). At least one Court of Appeals has affirmed the existence of such an exception in dicta, see *Duke & Co. v. Foerster,* 521 F.2d 1277, 1282 (CA3 1975), and ***383** the Fifth Circuit has adopted it as holding, see *Affiliated Capital Corp. v. Houston,* 735 F.2d 1555, 1566–1568 (1984) (en banc).

Giving full consideration to this matter for the first time, we conclude that a "conspiracy" exception to *Noerr* must be rejected. We need not describe our reasons at length, since they are largely the same as those set forth in Part II above for rejecting a "conspiracy" exception to *Parker.* As we have described, *Parker* and *Noerr* are complementary expressions of the principle that the antitrust laws regulate business, not politics; the former decision protects the States' acts of governing, and the latter the citizens' participation in government. Insofar as the identification of an immunity-destroying "conspiracy" is concerned, *Parker* and *Noerr* generally present two faces of the same coin. The *Noerr*-invalidating conspiracy alleged here is just the *Parker*-invalidating conspiracy viewed from the standpoint of the private-sector participants rather than the governmental participants. The same factors which, as we have described above, make it impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests likewise make it impracticable or beyond that scope to identify and invalidate lobbying that has produced selfishly motivated agreement with public officials. "It would be unlikely that any effort to influence legislative action

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could succeed unless one or more members **1356 of the legislative body became ... 'co-conspirators' " in *some* sense with the private party urging such action, *Metro Cable Co. v. CATV of Rockford, Inc.,* 516 F.2d 220, 230 (CA7 1975). And if the invalidating "conspiracy" is limited to one that involves some element of unlawfulness (beyond mere anticompetitive motivation), the invalidation would have nothing to do with the policies of the antitrust laws. In *Noerr* itself, where the private party "deliberately deceived the public and public officials" in its successful lobbying campaign, we said that ***384** "deception, reprehensible as it is, can be of no consequence so far as the Sherman Act is concerned." 365 U.S., at 145, 81 S.Ct., at 533.

IV

Under *Parker* and *Noerr,* therefore, both the city and COA are entitled to immunity from the federal antitrust laws for their activities relating to enactment of the ordinances. This determination does not entirely resolve the dispute before us, since other activities are at issue in the case with respect to COA. Omni asserts that COA engaged in private anticompetitive actions such as trade libel, the setting of artificially low rates, and inducement to breach of contract. Thus, although the jury's general verdict against COA cannot be permitted to stand (since it was based on instructions that erroneously permitted liability for seeking the ordinances, see *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.,* 370 U.S. 19, 29–30, 82 S.Ct. 1130, 1135–1136, 8 L.Ed.2d 305 (1962)), if the evidence was sufficient to sustain a verdict on the basis of these other actions alone, and if this theory of liability has been properly preserved, Omni would be entitled to a new trial.

There also remains to be considered the effect of our judgment upon Omni's claim against COA under the South Carolina Unfair Trade Practices Act. The District Court granted judgment notwithstanding the verdict on this claim as well as the Sherman Act claims; the Court of Appeals reversed on the ground that "a finding of conspiracy to restrain competition is tantamount to a finding" that the South Carolina law had been violated, 891 F.2d, at 1143. Given our reversal of the "conspiracy" holding, that reasoning is no longer applicable.

We leave these remaining questions for determination by the Court of Appeals on remand. The judgment of the Court of Appeals is reversed, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

***385** Justice STEVENS, with whom Justice WHITE and Justice MARSHALL join, dissenting.

Section 1 of the Sherman Act provides in part: "*Every* contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1 (emphasis added). Although we have previously recognized that a completely literal interpretation of the word "every" cannot have been intended by Congress,[1] the Court today carries **1357 this recognition to an extreme by deciding that agreements between municipalities, or their officials, and private parties to use the zoning power to confer exclusive privileges in a particular line of commerce are beyond the reach of § 1. History, tradition, and the facts of this case all demonstrate that the Court's attempt to create a "better" and less inclusive Sherman Act, cf. ***386** *West Virginia University Hospitals, Inc. v. Casey,* 499 U.S. 83, 101, 111 S.Ct. 1138, 1148, 113 L.Ed.2d 68 (1991) is ill advised.

I

As a preface to a consideration of the "state action" and so-called "*Noerr–Pennington*" exemptions to the Sherman Act, it is appropriate to remind the Court that one of the classic common-law examples of a prohibited contract in restraint of trade involved an agreement between a public official and a private party. The public official—the Queen of England—had granted one of her subjects a monopoly in the making, importation, and sale of playing cards in order to generate revenues for the crown. A competitor challenged the grant in *The Case of Monopolies,* 11 Co.Rep. 84, 77 Eng.Rep. 1260 (Q.B.1602), and prevailed. Chief Justice Popham explained on behalf of the bench:

> "The Queen was ... deceived in her grant; for the Queen ... intended it to be for the weal public, and it will be employed for the private gain of the patentee, and for the prejudice of the weal public; moreover the Queen meant that the abuse should be taken away, which shall never be by this patent, but *potius* the abuse will be increased for the private benefit of the patentee, and therefore ... this grant is void *jure Regio.*" *Id.,* at 87a; 77 Eng. Rep., at 1264.

In the case before us today, respondent alleges that the city of Columbia, S.C., has entered into a comparable agreement to give the private petitioner a monopoly in the sale of billboard advertising. After a 3–week trial, a jury composed of citizens of the vicinage found that, despite the city fathers' denials, there was indeed such an agreement, presumably motivated in part by past favors in the form of political advertising, in part by friendship, and in part by the expectation of a beneficial future relationship—and in any case, not ***387** exclusively by a concern for the general public interest. [2] Today the Court acknowledges the anticompetitive consequences of this and similar agreements but decides that they should be exempted from the coverage of the Sherman Act because it fears that enunciating a rule that allows the motivations of public officials to be probed may mean that innocent municipal officials may be harassed with baseless charges. The holding evidences an unfortunate lack of confidence in our judicial system and will foster ****1358** the evils the Sherman Act was designed to eradicate.

II

There is a distinction between economic regulation, on the one hand, and regulation designed to protect the public health, safety, and environment. In antitrust parlance a "regulated industry" is one in which decisions about prices and output are made not by individual firms, but rather by a public body or a collective process subject to governmental approval. Economic regulation of the motor carrier and airline industries was imposed by the Federal Government in the 1930's; the "deregulation" of those industries did not eliminate all the other types of regulation that continue to protect our safety and environmental concerns.

***388** The antitrust laws reflect a basic national policy favoring free markets over regulated markets. [3] In essence, the Sherman Act prohibits private unsupervised regulation of the prices and output of goods in the marketplace. That prohibition is inapplicable to specific industries which Congress has exempted from the antitrust laws and subjected to regulatory supervision over price and output decisions. Moreover, the so-called "state-action" exemption from the Sherman Act reflects the Court's understanding that Congress did not intend the statute to pre-empt a State's economic regulation of commerce within its own borders.

The contours of the state-action exemption are relatively well defined in our cases. Ever since our decision in *Olsen v. Smith,* 195 U.S. 332, 25 S.Ct. 52, 49 L.Ed. 224 (1904), which upheld a Texas statute fixing the rates charged by pilots operating in the Port of Galveston, it has been clear that a State's decision to displace competition with economic regulation is not prohibited by the Sherman Act. *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943), the case most frequently identified with the state-action exemption, involved a decision by California to substitute sales quotas and price control—the purest form of economic regulation—for competition in the market for California raisins.

In *Olsen,* the State itself had made the relevant pricing decision. In *Parker,* the regulation of the marketing of California's ***389** 1940 crop of raisins was administered by state officials. Thus, when a state agency, or the State itself, engages in economic regulation, the Sherman Act is inapplicable. *Hoover v. Ronwin,* 466 U.S. 558, 568–569, 104 S.Ct. 1989, 1995–1996, 80 L.Ed.2d 590 (1984); *Bates v. State Bar of Arizona,* 433 U.S. 350, 360, 97 S.Ct. 2691, 2697, 53 L.Ed.2d 810 (1977).

Underlying the Court's recognition of this state-action exemption has been respect for the fundamental principle of federalism. As we stated in *Parker,* 317 U.S., at 351, 63 S.Ct., at 312: "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."

However, this Court recognized long ago that the deference due States within our federal system does not extend fully to conduct undertaken by municipalities. Rather, all sovereign authority "within the geographical ****1359** limits of the United States" resides with "the Government of the United States, or [with] the States of the Union. There exist within the broad domain of sovereignty but these two. There may be cities, counties, and other organized bodies with limited legislative functions, but they are all derived from, or exist in, subordination to one or the other of these." *United States v. Kagama,* 118 U.S. 375, 379, 6 S.Ct. 1109, 1111, 30 L.Ed. 228 (1886).

Unlike States, municipalities do not constitute bedrocks within our system of federalism. And also unlike States, municipalities are more apt to promote their narrow parochial interests "without regard to extraterritorial impact and regional efficiency." *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 404, 98 S.Ct. 1123, 1132, 55 L.Ed.2d

364 (1978); see also The Federalist No. 10 (J. Madison) (describing the greater tendency of smaller societies to promote oppressive and narrow interests above the common good). "If municipalities were free to make economic choices counseled solely by their own parochial interests ***390** and without regard to their anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established." *Lafayette v. Louisiana Power & Light Co.,* 435 U.S., at 408, 98 S.Ct., at 1134. Indeed, "[i]n light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws, ... we are especially unwilling to presume that Congress intended to exclude anticompetitive municipal action from their reach." *Id.,* at 412–413, 98 S.Ct., at 1136–37. [4]

Nevertheless, insofar as municipalities may serve to implement state policies, we have held that economic regulation administered by a municipality may also be exempt from Sherman Act coverage if it is enacted pursuant to a clearly articulated and affirmatively expressed state directive "to replace competition with regulation." *Hoover,* 466 U.S., at 569, 104 S.Ct., at 1995. However, the mere fact that a municipality acts within its delegated authority is not sufficient to exclude its anticompetitive behavior from the reach of the Sherman Act. ***391** "Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *Community Communications Co. v. Boulder,* 455 U.S. 40, 56, 102 S.Ct. 835, 843, 70 L.Ed.2d 810 (1982).

Accordingly, we have held that the critical decision to substitute economic regulation for competition is one that must be made by the State. That decision must be articulated with sufficient clarity to identify the industry in which the State intends that economic regulation shall replace competition. The terse statement of the reason why the municipality's actions in ****1360** *Hallie v. Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), was exempt from the Sherman Act illustrates the point: "They were taken pursuant to a clearly articulated state policy to replace competition in the provision of sewage services with regulation." *Id.,* at 47, 105 S.Ct., at 1720. [5]

***392** III

Today the Court adopts a significant enlargement of the state-action exemption. The South Carolina statutes that confer zoning authority on municipalities in the State do not articulate any state policy to displace competition with economic regulation in any line of commerce or in any specific industry. As the Court notes, the state statutes were expressly adopted to promote the " 'health, safety, morals or the general welfare of the community,' " see *ante,* at 1349, n. 3. Like Colorado's grant of "home rule" powers to the city of Boulder, they are simply neutral on the question whether the municipality should displace competition with economic regulation in any industry. There is not even an arguable basis for concluding that the State authorized the city of Columbia to enter into exclusive agreements with any person, or to use the zoning power to protect favored citizens from competition. [6] Nevertheless, under the guise of acting ***393** pursuant to a state legislative grant to regulate health, safety, and welfare, the city of Columbia in this case enacted an ordinance that amounted to economic regulation of the billboard market; as the Court recognizes, the ordinance "obviously benefited COA, which already had its billboards in place ... [and] severely hindered Omni's ability to compete." *Ante,* at 1348.

Concededly, it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare. "Social ****1361** and safety regulation have economic impacts, and economic regulation has social and safety effects." D. Hjelmfelt, Antitrust and Regulated Industries 3 (1985). It is nevertheless important to determine when purported general welfare regulation in fact constitutes economic regulation by its purpose and effect of displacing competition. "An example of economic regulation which is disguised by another stated purpose is the limitation of advertising by lawyers for the stated purpose of protecting the public from incompetent lawyers. Also, economic regulation posing as safety regulation is often encountered in the health care industry." *Id.,* at 3–4.

In this case, the jury found that the city's ordinance—ostensibly one promoting health, safety, and welfare—was in fact enacted pursuant to an agreement between city officials and a private party to restrict competition. In my opinion such a finding necessarily leads to the conclusion that the city's ordinance was fundamentally a form of economic regulation of the billboard market rather than a general

welfare regulation having incidental anticompetitive effects. Because I believe our cases have wisely held that the decision to embark upon economic regulation is a nondelegable one that must expressly be made by the State in the context of a specific industry in order to qualify for state-action immunity, see, *e.g., Olsen v. Smith,* 195 U.S. 332, 25 S.Ct. 52, 49 L.Ed. 224 (1904) (Texas pilotage ***394** statutes expressly regulated both entry and rates in the Port of Galveston); *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943) (California statute expressly authorized the raisin market regulatory program), I would hold that the city of Columbia's economic regulation of the billboard market pursuant to a general state grant of zoning power is not exempt from antitrust scrutiny. [7]

Underlying the Court's reluctance to find the city of Columbia's enactment of the billboard ordinance pursuant to a private agreement to constitute unauthorized economic regulation is the Court's fear that subjecting the motivations and effects of municipal action to antitrust scrutiny will result in public decisions being "made subject to *ex post facto* judicial assessment of 'the public interest.' " *Ante,* at 1352. That fear, in turn, rests on the assumption that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them." *Ante,* at 1351.

The Court's assumption that an agreement between private parties and public officials is an "inevitable" precondition for official action, however, is simply wrong. [8] Indeed, I am ***395** persuaded that such agreements are the exception rather than the rule, and that they are, and should be, disfavored. The mere fact that an official body adopts a position that is advocated by a private lobbyist is plainly not sufficient to establish an agreement ****1362** to do so. See *Fisher v. Berkeley,* 475 U.S. 260, 266–267, 106 S.Ct. 1045, 1049, 89 L.Ed.2d 206 (1986); cf. *Theatre Enterprises, Inc. v. Paramount Film Distributing Corp.,* 346 U.S. 537, 541, 74 S.Ct. 257, 259, 98 L.Ed. 273 (1954). Nevertheless, in many circumstances, it would seem reasonable to infer—as the jury did in this case—that the official action is the product of an agreement intended to elevate particular private interests over the general good.

In this case, the city took two separate actions that protected the local monopolist from threatened competition. It first declared a moratorium on any new billboard construction, despite the city attorney's advice that the city had no power to do so. When the moratorium was invalidated in state court litigation, it was replaced with an apparently valid ordinance that clearly had the effect of creating formidable barriers to entry in the billboard market. Throughout the city's decisionmaking process in enacting the various ordinances, undisputed evidence demonstrated that Columbia Outdoor Advertising, Inc., had met with city officials privately as well as publicly. As the Court of Appeals noted: "Implicit in the jury verdict was a finding that the city was not acting pursuant to the direction or purposes of the South Carolina statutes but conspired solely to further COA's commercial purposes to the detriment of competition in the billboard industry." 891 F.2d 1127, 1133 (CA4 1989).

Judges who are closer to the trial process than we are do not share the Court's fear that juries are not capable of recognizing the difference between independent municipal action and action taken for the sole purpose of carrying out an ***396** anticompetitive agreement for the private party. [9] See, *e.g., In re Japanese Electronic Products Antitrust Litigation,* 631 F.2d 1069, 1079 (CA3 1980) ("The law presumes that a jury will find facts and reach a verdict by rational means. It does not contemplate scientific precision but does contemplate a resolution of each issue on the basis of a fair and reasonable assessment of the evidence and a fair and reasonable application of the relevant legal rules"). Indeed, the problems inherent in determining whether the actions of municipal officials are the product of an illegal agreement are substantially the same as those arising in cases in which the actions of business executives are subjected to antitrust scrutiny. [10]

***397** The difficulty of proving whether an agreement motivated a course of conduct should not in itself intimidate this Court into exempting those illegal agreements that are ****1363** proved by convincing evidence. Rather, the Court should, if it must, attempt to deal with these problems of proof as it has in the past—through heightened evidentiary standards rather than through judicial expansion of exemptions from the Sherman Act. See, *e.g., Matsushita Electric Industrial Co. v. Zenith Radio Corp.,* 475 U.S. 574, 106 S.Ct. 1348, 89 L.Ed.2d 538 (1986) (allowing summary judgment where a predatory pricing conspiracy in violation of the Sherman Act was founded largely upon circumstantial evidence); *Monsanto Co. v. Spray–Rite Service Corp.,* 465 U.S. 752, 768, 104 S.Ct. 1464, 1472, 79 L.Ed.2d 775 (1984) (holding that a plaintiff in a vertical price-fixing case must produce evidence which "tends to exclude the possibility of independent action").

Unfortunately, the Court's decision today converts what should be nothing more than an anticompetitive agreement undertaken by a municipality that enjoys no special status in our federalist system into a lawful exercise of public decisionmaking. Although the Court correctly applies principles of federalism in refusing to find a "conspiracy exception" to the *Parker* state-action doctrine when a State acts in a nonproprietary capacity, it errs in extending the state-action exemption to municipalities that enter into private anticompetitive agreements under the guise of acting pursuant to a general state grant of authority to regulate health, safety, and welfare. Unlike the previous limitations this Court has imposed on Congress' sweeping mandate in § 1, which found support in our common-law traditions or our system of federalism, see n. 1, *supra,* the Court's wholesale exemption of municipal action from antitrust scrutiny amounts to little more than a bold and disturbing act of judicial legislation ***398** which dramatically curtails the statutory prohibition against "every" contract in restraint of trade. [11]

IV

Just as I am convinced that municipal "lawmaking that has been infected by selfishly motivated agreement with private interests," *ante,* at 1355, is not authorized by a grant of zoning authority, and therefore not within the state-action exemption, so am I persuaded that a private party's agreement with selfishly motivated public officials is sufficient to remove the antitrust immunity that protects private lobbying under *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc.,* 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961), and *Mine Workers v. Pennington,* 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965). Although I agree that the "sham" exception to the *Noerr–Pennington* rule exempting lobbying activities from the antitrust laws does not apply to the private petitioner's conduct in this case for the reasons stated by the Court in Part III of its opinion, I am satisfied that the evidence in the record is sufficient to support the jury's finding that a conspiracy existed between the private party and the municipal officials in this case so as to remove the private petitioner's conduct from the scope of *Noerr–Pennington* antitrust immunity. Accordingly, I would affirm ***399** the judgment of the Court of Appeals as to both the city of ****1364** Columbia and Columbia Outdoor Advertising, Inc.

I respectfully dissent.

All Citations

499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382, 59 USLW 4259, 1991-1 Trade Cases P 69,378

Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 287, 50 L.Ed. 499.

1 Section 1 provides in pertinent part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal." 15 U.S.C. § 1.

Section 2 provides in pertinent part: "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony." 15 U.S.C. § 2.

2 The monetary damages in this case were assessed entirely against COA, the District Court having ruled that the city was immunized by the Local Government Antitrust Act of 1984, 98 Stat. 2750, as amended, 15 U.S.C. §§ 34–36, which exempts local governments from paying damages for violations of the federal antitrust laws. Although enacted in 1984, after the events at issue in this case, the Act specifically provides that it may be applied retroactively if "the defendant establishes and the court determines, in light of all the circumstances ...

that it would be inequitable not to apply this subsection to a pending case." 15 U.S.C. § 35(b). The District Court determined that it would be, and the Court of Appeals refused to disturb that judgment. Respondent has not challenged that determination in this Court, and we express no view on the matter.

3 S.C.Code Ann. § 5–23–10 (1976) ("Building and zoning regulations authorized") provides that "[f]or the purpose of promoting health, safety, morals or the general welfare of the community, the legislative body of cities and incorporated towns may by ordinance regulate and restrict the height, number of stories and size of buildings and other structures."

Section 5–23–20 ("Division of municipality into districts") provides that "[f]or any or all of such purposes the local legislative body may divide the municipality into districts of such number, shape and area as may be deemed best suited to carry out the purposes of this article. Within such districts it may regulate and restrict the erection, construction, reconstruction, alteration, repair or use of buildings, structures or land."

Section 6–7–710 ("Grant of power for zoning") provides that "[f]or the purposes of guiding development in accordance with existing and future needs and in order to protect, promote and improve the public health, safety, morals, convenience, order, appearance, prosperity, and general welfare, the governing authorities of municipalities and counties may, in accordance with the conditions and procedures specified in this chapter, regulate the location, height, bulk, number of stories and size of buildings and other structures.... The regulations shall ... be designed to lessen congestion in the streets; to secure safety from fire, panic, and other dangers, to promote the public health and the general welfare, to provide adequate light and air; to prevent the overcrowding of land; to avoid undue concentration of population; to protect scenic areas; to facilitate the adequate provision of transportation, water, sewage, schools, parks, and other public requirements."

4 The dissent contends that, in order successfully to delegate its *Parker* immunity to a municipality, a State must expressly authorize the municipality to engage (1) in specifically "economic regulation," *post,* at 1358, (2) of a specific industry, *post* at 1359. These dual specificities are without support in our precedents, for the good reason that they defy rational implementation.

If, by authority to engage in specifically "economic" regulation, the dissent means authority specifically to regulate competition, we squarely rejected that in *Hallie v. Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), as discussed in text. Seemingly, however, the dissent means only that the state authorization must specify that sort of regulation whereunder "decisions about prices and output are not made by individual firms, but rather by a public body." *Post,* at 1358. But why is not the restriction of billboards in a city a restriction on the "output" of the local billboard industry? It assuredly *is*—and that is indeed the very gravamen of Omni's complaint. It seems to us that the dissent's concession that "it is often difficult to differentiate economic regulation from municipal regulation of health, safety, and welfare," *post,* at 1360, is a gross understatement. Loose talk about a "regulated industry" may suffice for what the dissent calls "antitrust parlance," *post,* at 1358, but it is not a definition upon which the criminal liability of public officials ought to depend.

Under the dissent's second requirement for a valid delegation of *Parker* immunity—that the authorization to regulate pertain to a specific industry—the problem with the South Carolina statute is that it used the generic term "structures," instead of conferring its regulatory authority industry-by-industry (presumably "billboards," "movie houses," "mobile homes," "TV antennas," and every other conceivable object of zoning regulation that can be the subject of a relevant "market" for purposes of antitrust analysis). To describe this is to refute it. Our precedents not only fail to suggest, but positively reject, such an approach. "[T]he municipality need not 'be able to point to a specific, detailed legislative authorization' in order to assert a successful *Parker* defense to an antitrust suit." *Hallie, supra,* at 39, 105 S.Ct., at 1716 (quoting *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 415, 98 S.Ct. 1123, 1138, 55 L.Ed.2d 364 (1978)).

5 The dissent is confident that a jury composed of citizens of the vicinage will be able to tell the difference between "independent municipal action and action taken for the sole purpose of carrying out an anticompetitive agreement for the private party." *Post,* at 1362. No doubt. But those are merely the polar extremes, which like the geographic poles will rarely be seen by jurors of the vicinage. Ordinarily the allegation will merely be (and the dissent says this is enough) that the municipal action was not prompted "*exclusively* by a concern for the general public interest," *post,* at 1357 (emphasis added). Thus, the real question is whether a jury can tell the difference— whether *Solomon* can tell the difference—between municipal-action-not-entirely-independent - because - based - partly - on - agreement - with-private-parties that is *lawful* and municipal - action - not - entirely - independent - because - based - partly - on - agreement - with - private - parties that is *unlawful.* The dissent does not tell us how to put this question coherently, much less how to answer it intelligently. "*Independent* municipal action" is unobjectionable, "action taken for the *sole* purpose of carrying out an anticompetitive agreement for the private party" is unlawful, and everything else (that is, the known world between the two poles) is unaddressed.

The dissent contends, moreover, that "[t]he instructions in this case, fairly read, told the jury that the plaintiff should not prevail *unless* the ordinance was enacted for the sole purpose of interfering with access to the market." *Post,* at 1362, n. 9 (emphasis added). That is not so. The sum and substance of the jury's instructions here were that anticompetitive municipal action is not lawful when taken as part of a conspiracy, and that a conspiracy is "an agreement between two or more persons to violate the law, or to accomplish an otherwise lawful result in an unlawful manner." App. 79. Although the District Court explained that "[i]t is perfectly lawful for any and all persons to petition their government," the court immediately added, "but they may not do so as a part or as the object of a conspiracy." *Ibid.* These instructions, then, are entirely circular: An anticompetitive agreement becomes unlawful if it is part of a conspiracy, and a conspiracy is an agreement to do something unlawful. The District Court's observation, upon which the dissent places so much weight, that "if by the evidence you find that [COA] procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of [Omni] to the marketing area involved in this case ... and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws", *id.,* at 81, see *post,* at 1357 n. 2, is in no way tantamount to an instruction that this was the *only* theory upon which the jury could find an immunity-destroying "conspiracy."

6 We have proceeded otherwise only in the "very limited and well-defined class of cases where the very nature of the constitutional question requires [this] inquiry." *United States v. O'Brien,* 391 U.S. 367, 383, n. 30, 88 S.Ct. 1673, 1682, n. 30, 20 L.Ed.2d 672 (1968) (bill of attainder). See also *Arlington Heights v. Metropolitan Housing Development Corp.,* 429 U.S. 252, 268, n. 18, 97 S.Ct. 555, 565, n. 18, 50 L.Ed.2d 450 (1977) (race-based motivation).

1 Construing the statute in the light of the common law concerning contracts in restraint of trade, we have concluded that only unreasonable restraints are prohibited.

"One problem presented by the language of § 1 of the Sherman Act is that it cannot mean what it says. The statute says that 'every' contract that restrains trade is unlawful. But, as Mr. Justice Brandeis perceptively noted, restraint is the very essence of every contract; read literally, § 1 would outlaw the entire body of private contract law. Yet it is that body of law that establishes the enforceability of commercial agreements and enables competitive markets—indeed, a competitive economy—to function effectively.

"Congress, however, did not intend the text of the Sherman Act to delineate the full meaning of the statute or its application in concrete situations. The legislative history makes it perfectly clear that it expected the courts to give shape to the statute's broad mandate by drawing on common-law tradition. The Rule of Reason, with its origins in common-law precedents long antedating the Sherman Act, has served that purpose.... [The Rule of Reason] focuses directly on the challenged restraint's impact on competitive conditions." *National Society*

of Professional Engineers v. United States, 435 U.S. 679, 687–688, 98 S.Ct. 1355, 1363, 55 L.Ed.2d 637 (1978) (footnotes omitted).

We have also confined the Sherman Act's mandate by holding that the independent actions of the sovereign States and their officials are not covered by the language of the Act. *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

2 The jury returned its verdict pursuant to the following instructions given by the District Court:

"So if by the evidence you find that that person involved in this case procured and brought about the passage of ordinances solely for the purpose of hindering, delaying or otherwise interfering with the access of the Plaintiff to the marketing area involved in this case ... and thereby conspired, then, of course, their conduct would not be excused under the antitrust laws.

"So once again an entity may engage in ... legitimate lobbying ... to procure legislati[on] even if the motive behind the lobbying is anti-competitive.

"If you find Defendants conspired together with the intent to foreclose the Plaintiff from meaningful access to a legitimate decision making process with regard to the ordinances in question, then your verdict would be for the Plaintiff on that issue." App. 81.

3 "The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services. 'The heart of our national economic policy long has been faith in the value of competition.' *Standard Oil Co. v. FTC,* 340 U.S. 231, 248 [71 S.Ct. 240, 249, 95 L.Ed. 239 (1951)]. The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers. Even assuming occasional exceptions to the presumed consequences of competition, the statutory policy precludes inquiry into the question whether competition is good or bad." *National Society of Professional Engineers,* 435 U.S., at 695, 98 S.Ct., at 1367.

4 In *Owen v. City of Independence,* 445 U.S. 622, 100 S.Ct. 1398, 63 L.Ed.2d 673 (1980), this Court recognized that "notwithstanding [42 U.S.C.] § 1983's expansive language and the absence of any express incorporation of common-law immunities, we have, on several occasions, found that a tradition of immunity was so firmly rooted in the common law and was supported by such strong policy reasons that 'Congress would have specifically so provided had it wished to abolish the doctrine.' *Pierson v. Ray,* 386 U.S. 547, 555 [87 S.Ct. 1213, 1218, 18 L.Ed.2d 288] (1967)." *Id.,* at 637, 100 S.Ct., at 1408. Nevertheless, the Court refused to find a firmly established immunity enjoyed by municipal corporations at common law for the torts of their agents. "Where the immunity claimed by the defendant was well established at common law at the time [42 U.S.C.] § 1983 was enacted, and where its rationale was compatible with the purposes of the Civil Rights Act, we have construed the statute to incorporate that immunity. But there is no tradition of immunity for municipal corporations, and neither history nor policy supports a construction of § 1983 that would justify" according them such immunity. *Id.,* at 638, 100 S.Ct., at 1409. See also *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 70, 109 S.Ct. 2304, 2312, 105 L.Ed.2d 45 (1989) ("States are protected by the Eleventh Amendment while municipalities are not ...").

5 Contrary to the Court's reading of *Hallie,* our opinion in that case emphasized the industry-specific character of the Wisconsin legislation in explaining why the delegation satisfied the "clear articulation" requirement. At issue in *Hallie* was the town's independent decision to refuse to provide sewage treatment services to nearby towns—a decision that had been expressly authorized by the Wisconsin legislation. 471 U.S., at 41, 105 S.Ct., at 1717. We wrote:

"Applying the analysis of *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389 [98 S.Ct. 1123, 55 L.Ed.2d 364] (1978), it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served." *Id.,* 471 U.S., at 42, 105 S.Ct., at 1718.

"Nor do we agree with the Towns' contention that the statutes at issue here are neutral on state policy. The Towns attempt to liken the Wisconsin statutes to the Home Rule Amendment involved in *Boulder,* arguing that the Wisconsin statutes are neutral because they leave the City free to pursue either anticompetitive conduct or free-market competition in the field of sewage services. The analogy to the Home Rule Amendment involved in *Boulder* is inapposite. That Amendment to the Colorado Constitution allocated only the most general authority to municipalities to govern local affairs. We held that it was neutral and did not satisfy the 'clear articulation' component of the state action test. The Amendment simply did not address the regulation of cable television. Under home rule the municipality was to be free to decide every aspect of policy relating to cable television, as well as policy relating to any other field of regulation of local concern. Here, in contrast, the State has specifically authorized Wisconsin cities to provide sewage services and has delegated to the cities the express authority to take action that foreseeably will result in anticompetitive effects. No reasonable argument can be made that these statutes are neutral in the same way that Colorado's Home Rule Amendment was." *Id.,* 471 U.S., at 43, 105 S.Ct., at 1718.

We rejected the argument that the delegation was insufficient because it did not expressly mention the foreseeable anticompetitive consequences of the city of Eau Claire's conduct, but we surely did not hold that the mere fact that incidental anticompetitive consequences are foreseeable is sufficient to immunize otherwise unauthorized restrictive agreements between cities and private parties.

6 The authority to regulate the " 'location, height, bulk, number of stories and size of buildings and other structures,' " see *ante,* at 1349, n. 3 (citation omitted), may of course have an indirect effect on the total output in the billboard industry, see *ante,* at 1350, n. 4, as well as on a number of other industries, but the Court surely misreads our cases when it implies that a general grant of zoning power represents a clearly articulated decision to authorize municipalities to enter into agreements to displace competition in every industry that is affected by zoning regulation.

7 A number of Courts of Appeals have held that a municipality which exercises its zoning power to further a private agreement to restrain trade is not entitled to state-action immunity. See, *e.g., Westborough Mall, Inc. v. Cape Girardeau,* 693 F.2d 733, 746 (CA8 1982) ("Even if zoning in general can be characterized as 'state action,' ... a conspiracy to thwart normal zoning procedures and to directly injure the plaintiffs by illegally depriving them of their property is not in furtherance of any clearly articulated state policy"); *Whitworth v. Perkins,* 559 F.2d 378, 379 (CA5 1977) ("The mere presence of the zoning ordinance does not necessarily insulate the defendants from antitrust liability where, as here, the plaintiff asserts that the enactment of the ordinance was itself a part of the alleged conspiracy to restrain trade").

8 No such agreement was involved in *Hallie v. Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985). In that case the plaintiffs challenged independent action—the determination of the service area of the city's sewage system—that had been expressly authorized by Wisconsin legislation. The absence of any such agreement provided the basis for our decision in *Fisher v. Berkeley,* 475 U.S. 260, 266–267, 106 S.Ct. 1045, 1049, 89 L.Ed.2d 206 (1986) ("The distinction between unilateral and concerted action is critical here.... Thus, if the Berkeley Ordinance stabilizes rents without this element of concerted action, the program it establishes cannot run afoul of § 1").

9 The instructions in this case, fairly read, told the jury that the plaintiff should not prevail unless the ordinance was enacted for the sole purpose of interfering with access to the market. See n. 2, *supra.* Thus, this case is an example of one of the "polar extremes," see *ante,* at 1351, n. 5, that juries—as well as Solomon—can readily identify. The mixed motive cases that concern the Court should present no problem if juries are

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given instructions comparable to those given below. When the Court describes my position as assuming that municipal action that was not prompted "exclusively by a concern for the general public interest" is enough to create antitrust liability, *ibid.,* it simply ignores the requirement that the plaintiff must prove that the municipal action is the product of an anticompetitive agreement with private parties. Contrary to our square holding in *Fisher v. Berkeley,* 475 U.S. 260, 106 S.Ct. 1045, 89 L.Ed.2d 206 (1986), today the Court seems to assume that municipal action which is not entirely immune from antitrust scrutiny will automatically violate the antitrust laws.

10 "There are many obstacles to discovering conspiracies, but the most frequent difficulties are three. First, price-fixers and similar miscreants seldom admit their conspiracy or agree in the open. Often, we can infer the agreement only from their behavior. Second, behavior can sometimes be coordinated without any communication or other observable and reprehensible behavior. Third, the causal connection between an observable, controllable act—such as a solicitation or meeting—and subsequent parallel action may be obscure." 6 P. Areeda, Antitrust Law ¶ 1400, at 3–4 (1986).

See also Turner, The Definition of Agreement under the Sherman Act: Conscious Parallelism and Refusals to Deal, 75 Harv.L.Rev. 655 (1962) (discussing difficulties of condemning parallel anticompetitive action absent explicit agreement among the parties).

11 As the Court previously has noted:

"In 1972, there were 62,437 different units of local government in this country. Of this number 23,885 were special districts which had a defined goal or goals for the provision of one or several services, while the remaining 38,552 represented the number of counties, municipalities, and townships, most of which have broad authority for general governance subject to limitations in one way or another imposed by the State. These units may, and do, participate in and affect the economic life of this Nation in a great number and variety of ways. When these bodies act as owners and providers of services, they are fully capable of aggrandizing other economic units with which they interrelate, with the potential of serious distortion of the rational and efficient allocation of resources, and the efficiency of free markets which the regime of competition embodied in the antitrust laws is thought to engender." *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 407–408, 98 S.Ct. 1123, 1134, 55 L.Ed.2d 364 (1978) (footnotes omitted).

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135 S.Ct. 1101
Supreme Court of the United States

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, Petitioner
v.
FEDERAL TRADE COMMISSION.

No. 13–534
|
Argued Oct. 14, 2014.
|
Decided Feb. 25, 2015.

Synopsis

Background: North Carolina State Board of Dental Examiners petitioned for review of an order of the Federal Trade Commission (FTC), 2011 WL 11798463, which prohibited board from directing non-dentists to stop providing teeth whitening services or products, discouraging or barring the provision of those goods and services, or communicating to certain third parties that non-dentist teeth whitening goods or services violated state's Dental Practice Act. The United States Court of Appeals for the Fourth Circuit, Shedd, Circuit Judge, 717 F.3d 359, denied petition. Board's petition for writ of certiorari was granted.

The Supreme Court, Justice Kennedy, held that board was nonsovereign entity controlled by active market participants that did not receive active supervision by state, and thus board's anticompetitive actions were not entitled to *Parker* state-action immunity from federal antitrust law.

Affirmed.

Justice Alito, filed dissenting opinion in which Justices Scalia and Thomas joined.

****1104** *Syllabus* [*]

***494** North Carolina's Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." The Board's principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is "the practice of dentistry." Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board's motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 1109 – 1117.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates ***495** of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 1109 – 1110.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants —such as the Board—enjoys *Parker* immunity only if " 'the

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challenged restraint ... [is] clearly articulated and ****1105** affirmatively expressed as state policy,' and ... 'the policy ... [is] actively supervised by the State.' " *FTC v. Phoebe Putney Health System, Inc.,* 568 U.S. 216, 225, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (quoting *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 1110 – 1116.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 374, 111 S.Ct. 1344, 113 L.Ed.2d 382. Thus, where a State delegates control over a market to a nonsovereign actor, the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal* 's two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 1110 – 1112.

(2) There are instances in which an actor can be excused from *Midcal* 's active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie v. Eau Claire,* 471 U.S. 34, 35, 105 S.Ct. 1713, 85 L.Ed.2d 24. That *Hallie* excused municipalities from *Midcal* 's supervision rule for these reasons, ***496** however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni* 's holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U.S., at 374, 111 S.Ct. 1344, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 633, 112 S.Ct. 2169, 119 L.Ed.2d 410, and *Phoebe Putney, supra,* at 226, 133 S.Ct. 1003. The clear lesson of precedent is that *Midcal* 's active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 1112 – 1114.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal* 's second requirement cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal* 's supervision ****1106** requirement was created to address. See *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 791, 95 S.Ct. 2004, 44 L.Ed.2d 572. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U.S., at 46, n. 10, 105 S.Ct. 1713, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal* 's active supervision standard. 445 U.S., at 105–106, 100 S.Ct. 937. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra,* at 39, 105 S.Ct. 1713. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus, the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal* 's active supervision requirement in order to invoke state-action antitrust immunity. Pp. 1113 – 1115.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a

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calling must embrace ethical standards ***497** that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick v. Burget,* 486 U.S. 94, 105–106, 108 S.Ct. 1658, 100 L.Ed.2d 83, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 1114 – 1116.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 1116.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's ****1107** anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick,* 486 U.S., at 100–101, 108 S.Ct. 1658. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id*., at 102–103, 108 S.Ct. 1658; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra,* at 638, 112 S.Ct. 2169. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 1116 – 1117.

717 F.3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C.J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ***498** ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined post, p. ____.

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Opinion

Justice KENNEDY delivered the opinion of the Court.

***499** This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board's members are engaged in the active practice of the profession it regulates. The question is whether the board's actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court's decisions beginning with *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943).

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern

requiring regulation. N.C. Gen.Stat. Ann. § 90–22(a) (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is "the agency of the State for the regulation of the practice of dentistry." § 90–22(b).

The Board's principal duty is to create, administer, and enforce a licensing system for dentists. See §§ 90–29 to 90–41. To perform that function it has broad authority over licensees. See § 90–41. The Board's authority with respect to unlicensed persons, however, is more restricted: Like "any resident citizen," the Board may file suit to "perpetually enjoin any person from ... unlawfully practicing dentistry." § 90–40.1.

****1108** The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. § 90–22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must ***500** be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed by the Governor. *Ibid.* All members serve 3–year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, § 138A–22(a), and the Board must comply with the State's Administrative Procedure Act, § 150B–1 *et seq.,* Public Records Act, § 132–1 *et seq.,* and open-meetings law, § 143–318.9 *et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§ 90–48, 143B–30.1, 150B–21.9(a).

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern ***501** did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an administrative complaint charging the Board with violating § 5 of ****1109** the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U.S.C. § 45. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively

supervised by the State to claim immunity. App. to Pet. for Cert. 49a. ***502** The FTC further concluded the Board could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia,* "a wealth of evidence ... suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.,* at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F.3d 359, 370 (2013). This Court granted certiorari. 571 U.S. 1236, 134 S.Ct. 1491, 188 L.Ed.2d 375 (2014).

II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.,* 405 U.S. 596, 610, 92 S.Ct. 1126, 31 L.Ed.2d 515 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U.S.C. § 1 *et seq.,* serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See ***503** *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 632, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id.,* at 635–636, 112 S.Ct. 2169, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. See *Exxon Corp. v. Governor of Maryland,* 437 U.S. 117, 133, 98 S.Ct. 2207, 57 L.Ed.2d 91 (1978); see also Easterbrook, ****1110** Antitrust and the Economics of Federalism, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U.S., at 350–351, 63 S.Ct. 307. That ruling recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Communications Co. v. Boulder,* 455 U.S. 40, 53, 102 S.Ct. 835, 70 L.Ed.2d 810 (1982). Since 1943, the Court has reaffirmed the importance of *Parker* 's central holding. See, *e.g., Ticor, supra,* at 632–637, 112 S.Ct. 2169; *Hoover v. Ronwin,* 466 U.S. 558, 568, 104 S.Ct. 1989, 80 L.Ed.2d 590 (1984); *Lafayette v. Louisiana Power & Light Co.,* 435 U.S. 389, 394–400, 98 S.Ct. 1123, 55 L.Ed.2d 364 (1978).

III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the ***504** Board—enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint ... be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy ... be actively supervised by the State.' " *FTC v. Phoebe Putney Health System, Inc.,* 568 U.S. 216, 225, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (2013) (quoting*California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.,* 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its

Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

Although state-action immunity exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.' " *Phoebe Putney, supra,* at 225, 133 S.Ct., at 1010 (quoting *Ticor, supra,* at 636, 112 S.Ct. 2169).

An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 374, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991). State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. *Hoover, supra,* at 567–568, 104 S.Ct. 1989.

But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, ***505** it does not always confer immunity where, as here, a State delegates control over a market to a nonsovereign actor. See *Parker, supra,* at 351, 63 S.Ct. 307 ****1111** ("[A] state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). For purposes of *Parker,* a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover, supra,* at 567–568, 104 S.Ct. 1989. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb v. Virginia State Bar,* 421 U.S. 773, 791, 95 S.Ct. 2004, 44 L.Ed.2d 572 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of *Parker* 's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See Ticor, *Supra,* at 636, 112 S.Ct. 2169.

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal, supra,* at 106, 100 S.Ct. 937 ("The national policy in favor of competition cannot be thwarted by casting ... gauzy cloak of state involvement over what is essentially a private price-fixing arrangement"). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, *e.g., Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 501, 108 S.Ct. 1931, 100 L.Ed.2d 497 (1988); *Hoover, supra,* at 584, 104 S.Ct. 1989 (Stevens, J., dissenting) ("The risk that private regulation of market entry, prices, or output may be ***506** designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of ... our antitrust jurisprudence"); see also Elhauge, The Scope of Antitrust Process, 104 Harv. L.Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, Antitrust and State Action: Economic Efficiency and the Political Process, 96 Yale L.J. 486, 500 (1986).

Parker immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. See *Goldfarb, supra,* at 790, 95 S.Ct. 2004; see also 1A P. Areeda & H. Hovenkamp, Antitrust Law ¶ 226, p. 180 (4th ed. 2013) (Areeda & Hovenkamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor, 504 U.S.,* at 634–635, 112 S.Ct. 2169. Rather, it is "whether anticompetitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws." *Patrick v. Burget,* 486 U.S. 94, 100, 108 S.Ct. 1658, 100 L.Ed.2d 83 (1988).

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To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233, a case arising from California's delegation of price-fixing authority ****1112** to wine merchants. Under *Midcal,* "[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear ... policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct." *Ticor, supra,* at 631, 112 S.Ct. 2169 (citing *Midcal, supra,* at 105, 100 S.Ct. 937).

Midcal 's clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the ***507** state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Phoebe Putney,* 568 U.S., at 229, 133 S.Ct., at 1013. The active supervision requirement demands, *inter alia,* "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick, supra,* at 101, 108 S.Ct. 1658.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor, supra,* at 636–637, 112 S.Ct. 2169. Entities purporting to act under state authority might diverge from the State's considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Midcal 's supervision rule "stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.' " *Patrick, supra,* at 100, 108 S.Ct. 1658. Concern about the private incentives of active market participants animates *Midcal* ' s supervision mandate, which demands "realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick, supra,* at 101, 108 S.Ct. 1658.

B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, ***508** there are instances in which an actor can be excused from *Midcal* 's active supervision requirement. In*Hallie v. Eau Claire,* 471 U.S. 34, 45, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), the Court held municipalities are subject exclusively to *Midcal* 's " 'clear articulation' " requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that "[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals." 471 U.S., at 47, 105 S.Ct. 1713 (emphasis deleted). *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See*id.,* at 45, n. 9, 105 S.Ct. 1713. Critically, the municipality in *Hallie* exercised a wide range of governmental ****1113** powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal* 's supervision rule for these reasons all but confirms the rule's applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U.S., at 45, 105 S.Ct. 1713.

Following *Goldfarb, Midcal,* and *Hallie,* which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni,* an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U.S., at 367–368, 111 S.Ct. 1344. The ***509** Court disagreed, holding there is no "conspiracy exception" to *Parker*. *Omni, supra,* at 374, 111 S.Ct. 1344.

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Omni, like the cases before it, recognized the importance of drawing a line "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." 499 U.S., at 378, 111 S.Ct. 1344. In the context of a municipal actor which, as in *Hallie,* exercised substantial governmental powers, *Omni* rejected a conspiracy exception for "corruption" as vague and unworkable, since "virtually all regulation benefits some segments of the society and harms others" and may in that sense be seen as " 'corrupt.' " 499 U.S., at 377, 111 S.Ct. 1344. *Omni* also rejected subjective tests for corruption that would force a "deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors' structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

Omni 's holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court's two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor*, the Court affirmed that *Midcal* 's limits on delegation must ensure that "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." 504 U.S., at 633, 112 S.Ct. 2169. And in *Phoebe Putney*, the Court observed that *Midcal* 's active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." ***510** 568 U.S., at 226, 133 S.Ct., at 1011 (quoting *Hallie, supra,* at 46–47, 105 S.Ct. 1713). The lesson is clear: *Midcal* 's active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

The Board argues entities designated by the States as agencies are exempt from *Midcal* 's second requirement. ****1114** That premise, however, cannot be reconciled with the Court's repeated conclusion that the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal* 's supervision requirement was created to address. See Areeda & Hovenkamp ¶ 227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick,* 486 U.S., at 100–101, 108 S.Ct. 1658.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had "joined in what is essentially a private anticompetitive activity" for "the benefit of its members." 421 U.S., at 791, 792, 95 S.Ct. 2004. This emphasis on the Bar's private interests explains why *Goldfarb,* though it predates *Midcal,* considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U.S., at 791, 95 S.Ct. 2004; see also *Hoover,* 466 U.S., at 569, 104 S.Ct. 1989 (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz.,* 433 U.S. 350, 361–362, 97 S.Ct. 2691, 53 L.Ed.2d 810 (1977) (granting the Arizona Bar state-action immunity partly because ***511** its "rules are subject to pointed re-examination by the policymaker").

While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U.S., at 46, n. 10, 105 S.Ct. 1713, the entity there, as was later the case in *Omni,* was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie,* "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." *Allied Tube,* 486 U.S., at 500, 108 S.Ct. 1931. For that reason, those associations must satisfy *Midcal* 's active supervision standard. See *Midcal,* 445 U.S., at 105–106, 100 S.Ct. 937.

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra,* at 39, 105 S.Ct. 1713 (rejecting "purely formalistic" analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See Areeda & Hovenkamp ¶ 227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal* 's active ***512** supervision requirement in order to invoke state-action antitrust immunity.

****1115** D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory v. Ashcroft,* 501 U.S. 452, 460, 111 S.Ct. 2395, 115 L.Ed.2d 410 (1991), and may conclude there are substantial benefits to staffing their agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States,* 471 U.S. 48, 64, 105 S.Ct. 1721, 85 L.Ed.2d 36 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, The Hippocratic Oath and the Ethics of Medicine (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, Legal Ethics: The Lawyer's Deskbook on Professional Responsibility (2014); R. Baker, Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of "the privilege and obligation of self-government," has "call[ed] upon dentists to follow high ethical standards," including "honesty, compassion, kindness, integrity, fairness and charity." American Dental Association, Principles of Ethics and Code of Professional Conduct 3–4 (2012). ***513** State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky v. Delia,* 566 U.S. 377, 390, 132 S.Ct. 1657, 1666, 182 L.Ed.2d 662 (2012) (warning in the context of civil rights suits that "the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts"). But this case, which does not present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb,* 421 U.S., at 792, n. 22, 95 S.Ct. 2004; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

> "[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and ****1116** actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress ***514** has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own." *Patrick,* 486 U.S., at 105–106, 108 S.Ct. 1658 (footnote omitted).

The reasoning of *Patrick v. Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny? 162 U. Pa. L.Rev. 1093 (2014).

E

The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes "the practice of dentistry" and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni,* 499 U.S., at 371–372, 111 S.Ct. 1344, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

***515** IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide "realistic assurance" that a nonsovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick, supra,* at 100–101, 108 S.Ct. 1658; see also *Ticor,* 504 U.S., at 639–640, 112 S.Ct. 2169.

The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick,* 486 U.S., at 102–103, 108 S.Ct. 1658; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state supervision is not an adequate substitute for a decision by the State," *Ticor, supra,* at 638, 112 S.Ct. 2169. Further, ****1117** the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

***516** The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

Justice ALITO, with whom Justice SCALIA and Justice THOMAS join, dissenting.

The Court's decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker v. Brown,* 317 U.S. 341, 63 S.Ct. 307, 87 L.Ed. 315 (1943). In *Parker,* the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352, 63 S.Ct. 307. The case now before us involves precisely this type of state regulation—North Carolina's laws governing the practice of dentistry, which are administered by the North Carolina State Board of Dental Examiners(Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina

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Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State's dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff them in this way. [1] Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been ***517** used in such a way. [2] But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker,* and the answer to that question is clear. Under *Parker,* the Sherman Act (and the ****1118** Federal Trade Commission Act, see *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 635, 112 S.Ct. 2169, 119 L.Ed.2d 410 (1992)) do not apply to state agencies; the Board is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate "their purely internal affairs." *Leisy v. Hardin,* 135 U.S. 100, 122, 10 S.Ct. 681, 34 L.Ed. 128 (1890). In exercising their police power in this area, the States had long ***518** enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade. [3]

The Sherman Act was enacted pursuant to Congress' power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power "to the utmost extent." *United States v. South–Eastern Underwriters Assn.,* 322 U.S. 533, 558, 64 S.Ct. 1162, 88 L.Ed. 1440 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, *e.g., Kidd v. Pearson,* 128 U.S. 1, 17–18, 9 S.Ct. 6, 32 L.Ed. 346 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it "exerts a substantial economic effect on interstate commerce." *Wickard v. Filburn,* 317 U.S. 111, 125, 63 S.Ct. 82, 87 L.Ed. 122 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital Building Co. v. Trustees of Rex Hospital,* 425 U.S. 738, 743, n. 2, 96 S.Ct. 1848, 48 L.Ed.2d 338 (1976) ("[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power"). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in *Parker.*

In *Parker,* a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) ***519** to establish marketing plans for certain agricultural commodities within the State. 317 U.S., at 346–347, 63 S.Ct. 307. Raisins were among the regulated commodities, and so the Commission ****1119** established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id*., at 347–348, 63 S.Ct. 307. The *Parker* Court assumed that this program would have violated "the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons," and the Court also assumed that Congress could have prohibited a State from creating a program like California's if it had chosen to do so. *Id*., at

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350, 63 S.Ct. 307. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id*., at 351, 63 S.Ct. 307.

The Court's holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." Ibid. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical ***520** and dental boards, often staffed by doctors or dentists,[4] AND HAD GIVEN Those boards the authority to confer and revoke licenses.[5] This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent v. West Virginia,* 129 U.S. 114, 128, 9 S.Ct. 231, 32 L.Ed. 623 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker v. New York,* 170 U.S. 189, 192, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Court reiterated that a law specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

II

As noted above, the only question in this case is whether the Board ****1120** is really a state agency, and the answer to that question is clearly yes.

- The North Carolina Legislature determined that the practice of dentistry "affect[s] the public health, safety and welfare" of North Carolina's citizens and that therefore the profession should be "subject to regulation and control in the public interest" in order to ensure "that ***521** only qualified persons be permitted to practice dentistry in the State." N.C. Gen.Stat. Ann. § 90–22(a) (2013).

- To further that end, the legislature created the Board "as the agency of the State for the regulation of the practice of dentistry in th[e] State." § 90–22(b).

- The legislature specified the membership of the Board. § 90–22(c). It defined the "practice of dentistry," § 90–29(b), and it set out standards for licensing practitioners, § 90–30. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. § 90–41(a).

- The legislature empowered the Board to "maintain an action in the name of the State of North Carolina to perpetually enjoin any person from ... unlawfully practicing dentistry." § 90–40.1(a). It authorized the Board to conduct investigations and to hire legal counsel, and the legislature made any "notice or statement of charges against any licensee" a public record under state law. §§ 90–41(d)–(g).

- The legislature empowered the Board "to enact rules and regulations governing the practice of dentistry within the State," consistent with relevant statutes. § 90–48. It has required that any such rules be included in the Board's annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature's Joint Regulatory Reform Committee. § 93B–2. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid*.

As this regulatory regime demonstrates, North Carolina's Board is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power in cooperation with other arms of state government.

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***522** The Board is not a private or "nonsovereign" entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not " 'give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.' " *Ante,* at 1111 (quoting *Parker,* 317 U.S., at 351, 63 S.Ct. 307). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co. v. United States,* 193 U.S. 197, 24 S.Ct. 436, 48 L.Ed. 679 (1904), to show what it had in mind. In that case, the Court held that a State's act of chartering a corporation did not shield the corporation's monopolizing activities from federal antitrust law. *Id*., at 344–345, 63 S.Ct. 307. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency* and gave that agency the power to regulate a particular subject affecting public health and safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are "controlled by active ****1121** market participants," *ante,* at 1114, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker,* the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California's law first required the petition of at least 10 producers of the particular commodity. *Parker,* 317 U.S., at 346, 63 S.Ct. 307. If the Commission then agreed that a marketing plan was warranted, the Commission would "select a program committee *from among nominees chosen by the qualified producers*." ***523** *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id*., at 347, 63 S.Ct. 307. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a "sovereign" when it "adopt[ed] and enforc[ed] the prorate program." *Id*., at 352, 63 S.Ct. 307. This reasoning is irreconcilable with the Court's today.

III

The Court goes astray because it forgets the origin of the *Parker* doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.,* 445 U.S. 97, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980), but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both " 'clearly articulated' " and " 'actively supervised' by the State itself. " 445 U.S., at 105, 100 S.Ct. 937. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. ***524** And for purposes of *Parker,* its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina.

Our decision in *Hallie v. Eau Claire,* 471 U.S. 34, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985), which involved Sherman Act claims against a municipality, not a state agency, is similarly inapplicable. In *Hallie,* the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities "are not themselves sovereign." 471 U.S., at 38, 105 S.Ct. 1713. But recognizing that a municipality is "an arm of the State," *id*., at 45, 105 S.Ct. 1713, the Court held that a municipality ****1122** should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), 471 U.S., at 46, 105 S.Ct. 1713. That municipalities are not sovereign was critical to our analysis in *Hallie,* and thus that decision has no application in a case, like this one, involving a state agency.

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Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N.Y. v. Chatham County,* 547 U.S. 189, 193, 126 S.Ct. 1689, 164 L.Ed.2d 367 (2006), and California's sovereignty provided the foundation for the decision in *Parker, supra,* at 352, 63 S.Ct. 307. Municipalities are not sovereign. *Jinks v. Richland County,* 538 U.S. 456, 466, 123 S.Ct. 1667, 155 L.Ed.2d 631 (2003). And for this reason, federal law often treats municipalities differently from States. Compare *Will v. Michigan Dept. of State Police,* 491 U.S. 58, 71, 109 S.Ct. 2304, 105 L.Ed.2d 45 (1989) ("[N]either a State nor its officials acting in their official capacities are 'persons' under [42 U.S.C.] § 1983"), with *Monell v. New York City Dept. of Social Servs.,* 436 U.S. 658, 694, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978) (municipalities liable under § 1983 where "execution of a government's policy or custom ... inflicts the injury").

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court's approach, the Board a full-fledged state agency, ***525** is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court's analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia v. Omni Outdoor Advertising, Inc.,* 499 U.S. 365, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *499 U.S.,* at 374, 111 S.Ct. 1344. The Sherman Act, we said, is not an anticorruption or good-government statute. Id., at 398, 111 S.Ct. 1344. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U.S., at 374–379, 111 S.Ct. 1344. But that is essentially what the Court has done here.

IV

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

As a result of today's decision, States may find it necessary to change the composition ****1123** of medical, dental, and other ***526** boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because "active market participants" constitute "a controlling number of [the] decisionmakers," *ante,* at 1114, but this test raises many questions.

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person "active" in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the ***527** Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.[6] So why ask only whether the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision.

V

The Court has created a new standard for distinguishing between private and state actors for purposes of federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

All Citations

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Footnotes

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.,* 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

1 S. White, History of Oral and Dental Science in America 197–214 (1876) (detailing earliest American regulations of the practice of dentistry).

2 See, *e.g.*, R. Shrylock, Medical Licensing in America 29 (1967) (Shrylock) (detailing the deterioration of licensing regimes in the mid–19th century, in part out of concerns about restraints on trade); Gellhorn, The Abuse of Occupational Licensing, 44 U. Chi. L.Rev. 6 (1976); Shepard, Licensing Restrictions and the Cost of Dental Care, 21 J. Law & Econ. 187 (1978).

3 See Handler, The Current Attack on the *Parker v. Brown* State Action Doctrine, 76 Colum. L.Rev. 1, 4–6 (1976) (collecting cases).

4 Shrylock 54–55; D. Johnson and H. Chaudry, Medical Licensing and Discipline in America 23–24 (2012).

5 In *Hawker v. New York,* 170 U.S. 189, 18 S.Ct. 573, 42 L.Ed. 1002 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.,* at 191–193, n. 1, 18 S.Ct. 573. See also *Douglas v. Noble,* 261 U.S. 165, 166, 43 S.Ct. 303, 67 L.Ed. 590 (1923) ("In 1893 the legislature of Washington provided that only licensed persons should practice dentistry" and "vested the authority to license in a board of examiners, consisting of five practicing dentists").

6 See, *e.g.,* R. Noll, Reforming Regulation 40–43, 46 (1971); J. Wilson, The Politics of Regulation 357–394 (1980). Indeed, it has even been charged that the FTC, which brought this case, has been captured by

entities over which it has jurisdiction. See E. Cox, "The Nader Report" on the Federal Trade Commission vii-xiv (1969); Posner, Federal Trade Commission, Chi. L.Rev. 47, 82–84 (1969).

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901 F.3d 287
United States Court of Appeals, Fifth Circuit.

VERITEXT CORPORATION, Plaintiff-Appellant
v.
Paul A. BONIN, in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; Vincent P. Borrello, Jr., individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; Milton Donegan, Jr., individually and in their official capacity as Member of the Louisiana Board of Examiners of Certified Court Reporters; Suzette Magee, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; Kimya M. Holmes, in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; John H. Anderssen, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; May F. Dunn, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; Elizabeth C. Methvin, individually and in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters; Laura Putnam, in their official capacity as a Member of the Louisiana Board of Examiners of Certified Court Reporters, Defendants-Appellees

No. 17-30691
|
FILED August 17, 2018

Synopsis

Background: Provider of court reporting services brought action against members of the Louisiana Board of Examiners of Certified Shorthand Reporters, alleging that Board's enforcement of Louisiana statute preventing court reporters from entering into long-term or volume-based contracts with frequent users of court reporting services violated equal protection, substantive due process, the dormant Commerce Clause, and the Sherman Act. The United States District Court for the Eastern District of Louisiana, Ivan L.R. Lemelle, Senior District Judge, 259 F.Supp.3d 484, granted Board members' motion to dismiss with respect to the constitutional claims, and dismissed the Sherman Act claim on reconsideration, 2017 WL 3279464. Provider appealed.

Holdings: The Court of Appeals, James C. Ho, Circuit Judge, held that:

Board's enforcement of statute did not violate equal protection or substantive due process;

Board's enforcement of statute did not violate dormant Commerce Clause;

provider adequately alleged that Board's enforcement of statute was a restraint on trade in violation of Sherman Act; and

provider adequately alleged that Board was not entitled to immunity under Sherman Act as a state actor.

Affirmed in part, reversed in part, and remanded.

Procedural Posture(s): On Appeal; Motion to Dismiss for Failure to State a Claim.

***290** Appeal from the United States District Court for the Eastern District of Louisiana

Attorneys and Law Firms

Mark Aaron Cunningham, Alexander N. Breckinridge, Jones Walker, L.L.P., New Orleans, LA, for Plaintiff-Appellant.

James M. Garner, Esq., Joshua Simon Force, Brandon Keay, Esq., David A. Marcello, Sher Garner Cahill Richter Klein & Hilbert, L.L.C., New Orleans, LA, John Elliott Baker, Covington, LA, for Defendants-Appellees.

Before KING, SOUTHWICK, and HO, Circuit Judges.

Opinion

JAMES C. HO, Circuit Judge:

The Louisiana Board of Examiners of Certified Shorthand Reporters enforces Louisiana law regarding the relationship of court reporters to litigants. This law provides, in relevant part, that "deposition[s] shall be taken before an officer authorized to administer oaths, who is not an employee or attorney of any of the parties or otherwise interested in

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the outcome of the case." La. Code Civ. Proc. Ann. art. 1434(A)(1). The law further provides that "an employee includes a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services and also includes a person employed part or full time under contract or otherwise by a person who has a contractual relationship with a party litigant to provide shorthand reporting or other court reporting services." La. Code Civ. Proc. Ann. art. 1434(A)(2).

In 2012, the Board began enforcing Article 1434 more aggressively, declaring that the law prohibits all contracts between court reporters and party litigants, including volume-based discounts and concessions to frequent customers. Veritext, a national private court reporting service regulated by the Board and doing business in Louisiana, filed suit.

Veritext alleges, in sum, that these regulatory efforts reflect nothing more than rent-seeking. As Veritext sees it, local providers are simply harnessing the regulatory power of the state to prevent competition from national and regional court reporting firms, and thereby increase business opportunities and raise prices for freelance court reporters.

To vindicate its concerns, Veritext brought a variety of constitutional claims—substantive due process, equal protection, and the Dormant Commerce Clause—as well as a claim under the Sherman ***291** Act. The district court dismissed the constitutional claims, and subsequently dismissed the Sherman Act claim on reconsideration. *Veritext Corp. v. Bonin*, 259 F.Supp.3d 484, 488 (E.D. La. 2017), *on reconsideration*, 2017 WL 3279464 (E.D. La. Aug. 2, 2017). Veritext appeals on all these grounds.

We conclude that none of the constitutional claims presented by Veritext have merit, but that the Sherman Act claim should proceed on remand.

I.

The district court was correct to dismiss all of the constitutional claims brought by Veritext as a matter of Supreme Court precedent.

Veritext argues that the Board's 2012 decision to ban volume-based discounts and concessions to frequent customers lacks a rational basis, and thereby violates both substantive due process and equal protection under established precedent. The Board responds that these regulatory efforts further the State's legitimate government interest in ensuring and protecting the integrity of legal proceedings. As the Board explains, "[c]ommon sense dictates that court reporters might be more inclined to alter a deposition transcript in favor of party litigants that provide them with long-term financial benefits."

This rationale may find a skeptical audience in certain quarters. But it is legally sufficient to support the Board's action under rational basis review. As the Supreme Court has long recognized, "[a] classification does not fail rational-basis review because it is not made with mathematical nicety or because in practice it results in some inequality." *Heller v. Doe by Doe*, 509 U.S. 312, 319, 113 S.Ct. 2637, 125 L.Ed.2d 257 (1993) (citation and quotations omitted). This is an expansive standard, and the Board's stated goal of protecting against "any appearance of impropriety or bias on the court reporter's behalf" meets it. *Veritext Corp.*, 259 F.Supp.3d at 490.

A similar analysis applies to Veritext's Dormant Commerce Clause argument. "When ... a statute has only indirect effects on interstate commerce and regulates evenhandedly," we consider "whether the State's interest is legitimate and whether the burden on interstate commerce clearly exceeds the local benefits." *Brown-Forman Distillers Corp. v. New York State Liquor Auth.*, 476 U.S. 573, 579, 106 S.Ct. 2080, 90 L.Ed.2d 552 (1986). Here, as previously stated, Louisiana's interest in the integrity of its court reporting system is legally sufficient. And Veritext has failed to clearly identify a burden on interstate commerce imposed by the Board's enforcement of Article 1434 that exceeds its local benefits. Veritext's Dormant Commerce Clause claim therefore fails as well.

II.

Although we agree that the constitutional claims lack merit, we remand this case so that Veritext can proceed on its Sherman Act claim.

To prevail under the Sherman Act, Veritext must show a contract, combination, or conspiracy that imposed an unreasonable restraint on trade. *Am. Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 189, 130 S.Ct. 2201, 176 L.Ed.2d 947 (2010). "When reviewing a summary judgment, we construe all facts and inferences in favor of the nonmoving party." *Deshotel v. Wal-Mart Louisiana, LLC*, 850 F.3d 742, 745 (5th Cir. 2017).

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***292** Veritext pled facts sufficient to support a finding that the Board's conduct does indeed restrain trade. Among other allegations, Veritext argued that the Board is composed of active market participants who "are highly engaged in setting the agenda of the Board and its committees and in directing the Board's business," who actively sought to "discourage a perceived trend of freelance court reporters leaving the profession," and who took regulatory actions calculated to "deter[ ] and delay[ ] entry by national and regional court reporting firms." On the record before us, we agree with the district court that Veritext has alleged facts sufficient to make out a prima facie Sherman Act claim.

This raises the question of immunity. As the district court noted, "anticompetitive conduct by a state is generally immune from federal antitrust law." *Veritext Corp.*, 259 F.Supp.3d at 492. *See also Parker v. Brown*, 317 U.S. 341, 351, 63 S.Ct. 307, 87 L.Ed. 315 (1943) ("The Sherman Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state.").

However, this immunity is not absolute. For the Board to enjoy *Parker* immunity under the Sherman Act, it must satisfy "two requirements: first that 'the challenged restraint ... be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy ... be actively supervised by the State.' " *N. Carolina State Bd. of Dental Examiners v. FTC*, ––– U.S. ––––, 135 S.Ct. 1101, 1110, 191 L.Ed.2d 35 (2015) (citation omitted).

The Board satisfies the first requirement: Its ban on private court reporting arrangements is clearly articulated, as Article 1434 does indeed bar contracts between private court reporting services and party litigants. But the Board fails under the second requirement of active state supervision.

"[T]he active state supervision requirement [is] necessary to prevent a State from circumventing the Sherman Act's proscriptions 'by casting ... a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.' " *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46–47, 105 S.Ct. 1713, 85 L.Ed.2d 24 (1985) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)). Active supervision might include "establish[ing] prices [and] review[ing] the reasonableness of the price schedules," "regulat[ing] the terms of fair trade contracts," "monitor[ing] market conditions," and "engag[ing] in 'pointed reexamination' of the program." *Midcal*, 445 U.S. at 105–06, 100 S.Ct. 937 (citation omitted). And while any such inquiry will necessarily turn on the circumstances of a particular case, *Dental Examiners* made clear that "active supervision" must entail "review [of] the substance of the anticompetitive decision, not merely the procedures followed to produce it," and "the power to veto or modify particular decisions to ensure they accord with state policy." 135 S.Ct. at 1116.

We find that Veritext has pled facts sufficient to support a finding that the active supervision requirement is not met in this case. Nothing in the record indicates that elected or appointed officials oversaw or reviewed the Board's decisions or modified the Board's enforcement priorities. And the Board's argument on this point—that the legislature can amend the law in this area or veto proposed rules under Louisiana's Administrative Procedure Act—is unconvincing. State legislatures *always* possess the power to change the law. Active supervision requires more ***293** than the bare possibility that controlling law might be changed —the "mere potential for state supervision" that *Dental Examiners* expressly identified as insufficient. 135 S.Ct. at 1116. Adoption of the Board's logic would effectively nullify the requirement of active state supervision under *Dental Examiners*.

The Board alternatively contends that the active supervision requirement does not apply here for two reasons: first, because Veritext has not pled sufficient facts to show that the Board's members are active market participants; and second, because the Board does not advance private interests by enforcing the terms of state law.

These arguments are unavailing. To begin with, Louisiana law requires that six of the Board's nine members be "certified shorthand reporter[s]"—the very individuals most likely to be impacted by Veritext's involvement in the market. La. Rev. Stat. § 37:2551(B)(1). The Board attempts to differentiate "freelance" and "official" court reporters, but the boundary between these categories is porous: an individual serving as an official court reporter may readily go freelance if he so chooses. It is sufficiently clear from the record that the members of the Board qualify as active market participants. And it strains credulity to regard the Board's conduct as strictly public-minded, in light of its decision to convene a meeting that included "How to increase rates?" as one of its agenda items. *Veritext Corp.*, 259 F.Supp.3d at 492.

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In sum, the district court was correct the first time when it observed that Veritext alleged sufficient facts that "the board's actions do not resemble a municipality under active supervision but instead represent an unbridled regulatory environment." *Veritext Corp.*, 259 F.Supp.3d at 493. Because Veritext has pled facts sufficient to support a finding that the active supervision requirement of *Midcal* and *Dental Examiners* is not satisfied here, the district court erred in granting summary judgment to the Board on Veritext's Sherman Act claim.

III.

We affirm the district court's dismissal of Veritext's constitutional claims. We reverse the district court's dismissal of Veritext's Sherman Act claim and remand for further proceedings.

All Citations

901 F.3d 287, 2018-2 Trade Cases P 80,484

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976 F.3d 597
United States Court of Appeals, Fifth Circuit.

LOUISIANA REAL ESTATE APPRAISERS BOARD, Plaintiff—Appellee,
v.
UNITED STATES FEDERAL TRADE COMMISSION, Defendant—Appellant.

No. 19-30796
|
FILED October 2, 2020

Synopsis
Background: Louisiana Real Estate Appraisers Board brought action against Federal Trade Commission, alleging Commission's order rejecting Board's assertion of state action immunity, entered in administrative proceedings against Board, violated Administrative Procedure Act (APA). The United States District Court for the Middle District of Louisiana, No. 3:19-CV-214, Brian Anthony Jackson, J., 2019 WL 3412162, entered order staying administrative proceedings. FTC appealed.

Holdings: The Court of Appeals, Edith H. Jones, Circuit Judge, held that:

Commission's order did not resolve an important issue completely separate from merits of action, and thus collateral order doctrine did not apply to render order "final agency action" that would be reviewable under APA, and

order would not be effectively unreviewable on appeal after final judgment, further supporting conclusion that collateral order doctrine did not apply.

Vacated and remanded with instructions.

Procedural Posture(s): On Appeal; Review of Administrative Decision.

***599** Appeal from the United States District Court for the Middle District of Louisiana, 3:19-CV-214, Brian Anthony Jackson, U.S. District Judge

Attorneys and Law Firms

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Jack R. Bierig, Esq., Schiff Hardin, L.L.P., Chicago, IL, for Amicus Curiae Federation of State Medical Boards.

Before Jones, Elrod, and Higginson, Circuit Judges.

Opinion

Edith H. Jones, Circuit Judge:

This is an appeal of a district court order staying administrative proceedings that were initiated by appellant the Federal Trade Commission [1] against appellee the ***600** Louisiana Real Estate Appraisers Board (the "Board") pursuant to the Federal Trade Commission Act. Because the district court lacked jurisdiction, we vacate its stay order and remand with instructions to dismiss.

I. BACKGROUND

The Board is a state agency tasked with licensing and regulating commercial and residential real estate appraisers and management companies in Louisiana. La. Stat. Ann. §§ 37:3395; 37:3415.21. Each of the Board's ten members is appointed by the Governor and confirmed by the state senate, and members are removable by the Governor for cause. *Id*. § 37:3394. Of the ten members, eight must be "licensed as certified real estate appraisers." *Id*. § 37:3394(B)(1)(c), (b).

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires lenders to compensate fee appraisers "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised." 15 U.S.C. § 1639e(i)(1). In response, the Louisiana legislature amended its own law, the Appraisal Management Company Licensing and Regulation Act (the "AMC Act"), to require that appraisal rates be consistent with Section 1639e and its implementing regulations. *See* La. Stat. Ann. § 37:3415:15(A). The

legislature also gave the Board the authority to "adopt any rules and regulations in accordance with the [Louisiana] Administrative Procedure Act necessary for the enforcement of [the AMC Act]." *Id.* § 37:3415.21.

Accordingly, the Board adopted Rule 31101, requiring that licensees "compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised and as prescribed by La. Stat. Ann. § 34:3415.15(A)." La. Admin. Code tit. 46 § 31101. Unlike the federal regulations, which instruct that appraisal fees are "presumptively" customary and reasonable if they meet certain market conditions, Rule 31101 prescribed its own methods by which a licensed appraisal management company can establish that a rate is customary and reasonable. *Compare id.*, *with* 12 C.F.R. § 226.42(f)(2), (3).

In 2017, the FTC filed an administrative complaint against the Board, asserting the Board had engaged in "concerted action that unreasonably restrains trade" in violation of the FTC Act's prohibition on unfair methods of competition. The complaint alleged Rule 31101 "unlawfully restrains competition on its face by prohibiting [appraisal management companies] from arriving at an appraisal fee through the operation of the free market." The FTC also alleged that the Board's enforcement of Rule 31101 unlawfully restrained price competition. In response, the Board denied the FTC's allegations and argued that it was entitled to immunity from antitrust liability under the state action doctrine.

Following the FTC's initiation of proceedings against the Board, the Governor of Louisiana issued an executive order purporting to enhance state oversight of the Board. The Board also revised Rule 31101 in accordance with the Governor's executive order. Based on those changes, the Board moved to dismiss the FTC's complaint in the administrative proceedings, arguing that the executive order and revision of Rule 31101 mooted the FTC's claims. The same day, the FTC cross-moved for summary judgment on the Board's state action immunity defense. On April 10, 2018, the Commission denied the Board's motion and granted the FTC's, rejecting the Board's assertion of state action immunity.

***601** The Commission has not issued a final cease and desist order, but the Board has twice challenged the April 10, 2018 order in federal court to claim immunity. First, in late April, the Board petitioned this court directly for review of the Commission's order. In a published opinion, this court dismissed the petition for lack of jurisdiction. *La. Real Estate Appraisers Bd. v. F.T.C.*, 917 F.3d 389, 393 (5th Cir. 2019) (*LREAB I*). Second, and relevant here, the day after this court denied the Board's petition for *en banc* rehearing, the Board sued the FTC in a federal district court, alleging the Commission's April 10, 2018 order violated the Administrative Procedure Act. The Board also moved to stay the ongoing Commission proceedings. The district court granted the Board's motion and stayed the Commission proceedings pending the resolution of the Board's APA claim. On appeal, the FTC principally contends that the district court lacked jurisdiction.

II. DISCUSSION

We review questions of jurisdiction *de novo*, with the "burden of establishing federal jurisdiction rest[ing] on the party seeking the federal forum." *Gonzalez v. Limon*, 926 F.3d 186, 188 (5th Cir. 2019).

The FTC contends the district court lacked jurisdiction over the Board's lawsuit because the FTC Act vests exclusive jurisdiction to review challenges to Commission proceedings in the courts of appeals. 15 U.S.C. § 45(d) ("Upon the filing of the record with it the jurisdiction of the court of appeals of the Unites States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."). The Board counters that the district court had jurisdiction pursuant to the APA's default review provision, 5 U.S.C. § 704, regardless of the FTC Act's judicial review scheme. We agree with the FTC that the district court lacked jurisdiction but for a different reason: Even if the FTC Act does not preclude Section 704 review—an issue we need not address—the Board fails to meet Section 704's jurisdictional prerequisites. [2]

Section 704 of the APA permits non-statutory judicial review of certain "final agency action." 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). Absent a showing of finality, a district court lacks jurisdiction to review APA challenges to administrative proceedings. *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999). Here, the Board relies on the collateral order doctrine as an expansion of the finality requirement of Section 704. Because the April 10, 2018 order meets the doctrine's predicates, the Board contends, the order

should be treated as final and subject to challenge under the APA. The FTC disagrees with this approach, and so do we.

The collateral order doctrine is a judicially created exception to the "final decision" requirement of 28 U.S.C. § 1291, which governs appellate jurisdiction over appeals of final district court decisions. *See Exxon Chemicals Am. v. Chao*, 298 F.3d 464, 469 (5th Cir. 2002). The doctrine provides ***602** that an interlocutory decision is immediately appealable "as a final decision under § 1291 if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 290 (5th Cir. 2000). This court has recognized that "the requirement of 'final agency action' in [Section 704]" is analogous "to the final judgment requirement of 28 U.S.C. § 1291." *Am. Airlines*, 176 F.3d at 288; *see also LREAB I*, 917 F.3d at 392 ("[C]ourts have recognized that the [APA's] 'final agency action' requirement is analogous to § 1291's 'final decision' requirement.").[3] We assume arguendo that equating finality under Sections 1291 and 704 imports the collateral order doctrine into the Section 704 analysis.[4] Nevertheless, the Board fails to show that the Commission's interlocutory denial of state action immunity in this case meets the doctrine's requirements. As to the first prong of the doctrine, there is no dispute that the Commission's rejection of state action immunity was "conclusive." Problems arise concerning the second prong, whether the issue of state action immunity is "completely separate from the merits" of the FTC's antitrust action, and the third prong, whether the decision is "effectively unreviewable on appeal."

The parties square off in differing interpretations of our case law that has applied the collateral order doctrine to denials of claims of state action immunity. To begin our analysis, however, the background of the substantive issues must be briefly recapitulated. "The state action doctrine was first espoused by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307, 87 L.Ed. 315 [ ] (1943) as an immunity for state regulatory programs from antitrust claims." *Acoustic Systems*, 207 F.3d at 292. In *Parker*, the Court considered whether a state statute that authorized state officials to issue regulations restricting certain agricultural competition violated antitrust law. 317 U.S. at 350–51, 63 S. Ct. at 313–14. The Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id*. Accordingly, the Court concluded that state regulatory programs cannot violate the Sherman Act because the "Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."[5] *Id*. at 351, 63 S. Ct. 307.

***603** "In subsequent cases, the Court extended the state action doctrine to cover, under certain circumstances, acts by private parties that stem from state power or authority ... as well as acts by political subdivisions, cities, and counties." *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1397 (5th Cir. 1996) (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937, 63 L.Ed.2d 233 (1980); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713, 85 L.Ed.2d 24 (1985)). But immunity for such actors is not automatic because they are not sovereign.[6] *Id*. Rather, to invoke state action immunity, private parties must meet two requirements set forth in *Midcal*. First, "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." *Patrick v. Burget*, 486 U.S. 94, 100, 108 S. Ct. 1658, 1663, 100 L.Ed.2d 83 (1988) (quoting *Midcal*, 445 U.S. at 105, 100 S. Ct. at 943). Second, "the anticompetitive conduct must be actively supervised by the state itself." *Id*. Municipalities and other political subdivisions need only satisfy the first *Midcal* prong; they need not show active supervision. *Town of Hallie*, 471 U.S. at 45–46, 105 S. Ct. at 1720.

Following this framework, this court has twice addressed whether the collateral order doctrine authorizes interlocutory appeals from a district court's denial of state action immunity. In *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1396–97 (5th Cir. 1996), this court held that "the denial of a state or state entity's motion for dismissal or summary judgment on the ground of state action immunity" is immediately appealable. The defendant was a municipal hospital, which this court ultimately held immune under the state action doctrine. Drawing an analogy with principles that animate interlocutory appeals of government officials' claims of absolute or qualified immunity, or the Eleventh Amendment, this court reasoned that making a "state or state entity" go to trial to claim immunity renders the defense effectively unreviewable on appeal. *Id*. at 1396–97.

In *Acoustic Systems*, however, we clarified that *Martin*'s extension of the collateral order doctrine was limited "to the denial of a claim of state action immunity 'to the extent that it turns on whether a *municipality* or *subdivision* [of the

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state] acted pursuant to a clearly articulated and affirmatively expressed state policy.' " *Acoustic Systems, Inc. v. Wenger*, 207 F.3d 287, 291 (5th Cir. 2000) (quoting *Martin*, 86 F.3d at 1397). The defendant in *Acoustic Systems* was a private party whose status did not implicate the concerns underlying other immunity doctrines. Therefore, although the defendant could invoke the state action doctrine as a defense to liability, it could not obtain interlocutory review of the issue to avoid suit. *Id*. at 293–94. Likewise, because a defense to liability is effectively reviewable on direct appeal, the denial of state action immunity to a private party "is not an immediately reviewable collateral order." *Id*.

Neither *Martin* nor *Acoustic Systems* fits this case. In neither of those cases was the collateral order doctrine being invoked as an appendage to APA Section 704, thus neither case involved interlocutory interference with an ongoing federal regulatory ***604** proceeding. Further, in each case, applying the Supreme Court's test for state action immunity was relatively straightforward: *Martin* rested on *Town of Hallie*, 471 U.S. at 45-46, 105 S. Ct. at 1720 (holding that municipal entities, though not sovereign, may avail themselves of the immunity if their actions spring from governing state authority); Wenger, the *Acoustic Systems* defendant, could only rely on private party immunity pursuant to *Midcal*'s two-part test.

Here, the jurisdictional issue is more complex, as it concerns both an action by the FTC rather than private litigation, and it involves the Supreme Court's comparatively recent decision in *North Carolina State Board of Dental Examiners v. F.T.C.*, 574 U.S. 494, 135 S. Ct. 1101, 191 L.Ed.2d 35 (2015).

Taking the Supreme Court case first, apprehension over placing private practitioners in regulatory agencies constituted like this Board animated *Dental Examiners*'s application of the *Midcal* test. The Court explained that "[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern." *Id*. at 504, 135 S. Ct. 1101. Hence, it was necessary to apply *Midcal*'s active supervision prong, which "demands 'realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.' " *Id*. at 507, 135 S. Ct. 1101 (quoting *Patrick*, 486 U.S. at 101, 108 S. Ct. at 1663).

The Board nevertheless argues that it is entitled to immunity from suit as a state agency, not a "purely private part[y]." But the Court has rejected such a "purely formalistic inquiry." *See Town of Hallie*, 471 U.S. at 39, 105 S. Ct. at 1716. Instead, in *Dental Examiners*, the Court distinguished "specialized boards dominated by active market participants" from "prototypical state agencies" because of the private incentives inherent in their structure. *Id*. at 511, 135 S. Ct. 1101. Such "agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority ...." *Id*. Thus, while the Board may rightly defend its entitlement to state action immunity, it invokes the state action doctrine as a private party. *See also S.C. St. Bd. of Dentistry v. F.T.C.*, 455 F.3d 436, 439 (4th Cir. 2006); *SmileDirectClub, LLC v. Battle*, 969 F.3d 1134, 1147 (11th Cir. 2020) (Jordan, J., concurring) ("Even if we assume that a state is able to immediately appeal the denial of *Parker* immunity, an interlocutory appeal should not be available to private parties like the members of the Georgia Board of Dentistry, whose status does not implicate sovereignty concerns.").

As a private party, the policy imperatives behind relieving the Board from suit as well as liability do not apply. *See Acoustic Systems*, 207 F.3d at 292–94. To summarize, the collateral order doctrine must be deployed narrowly and "with skepticism," and state action immunity, in particular, though it may extend to private parties, exists principally to secure the full scope of political activity for *state* actors. *Id*. *Dental Examiners* has intensified our skepticism of allowing an interlocutory appeal. This court aptly stated, in reference to the state action "immunity" doctrine, that "[t]he price of the shorthand of using similar labels for distinct concepts is the risk of erroneous migrations of principles." *Surgical Care Center of Hammond, LC v. Hospital Serv. Dist.*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc).

Another reason for rejecting the Board's quest for collateral review is that ***605** this regulatory case was initiated by the FTC. Even if the Board were a sovereign actor, it is paradigmatic that "[s]tates retain no sovereign immunity as against the Federal Government." *West Virginia v. United States*, 479 U.S. 305, 312 n.4, 107 S. Ct. 702, 707 n.4, 93 L.Ed.2d 639 (1987); *see also Bd. of Dentistry*, 455 F.3d at 447 (rejecting collateral order appeal of a *Parker* immunity claim in a suit brought *by* the federal government; "because such suits do not offend the dignity of a state, sovereign immunity is no defense to such an action").

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In sum, case law does not support jurisdiction based on the collateral order doctrine as applied through Section 704 of the APA. Specifically, the second and third prongs of the doctrine are not satisfied here. *Parker* immunity concerns the boundaries of federal antitrust law set against the principles of federalism and the states' authority over their economies. This court explained, "[w]hile thus a convenient shorthand, '*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation." *Surgical Care Center*, 171 F.3d at 234. In this case, where the FTC challenges aspects of rate setting by the Board as restraining price competition, and the FTC rejects the sufficiency of overarching governmental supervision, an interlocutory ruling on state action immunity by this court would inevitably affect the question of liability. The issues relevant to immunity in this case pertain to the reach of the Sherman Act, consequently, a judicial decision at this point would not resolve an issue "completely separate from the merits of the action," as required by the second prong of the collateral order doctrine. *Acoustic Systems*, 207 F.3d at 290. Nor, obviously, is the state action immunity issue "effectively unreviewable on appeal from a final judgment." *Id.*;[7] *see N.C. State Bd. of Dental Exam'rs*, 717 F.3d 359, 366 (4th Cir. 2013) (considering the applicability of state action immunity in a petition for review), *aff'd*, 574 U.S. 494, 135 S.Ct. 1101, 191 L.Ed.2d 35 (2015).

For the foregoing reasons, the April 10, 2018 order does not constitute final agency action under Section 704, and the collateral order doctrine does not apply. Consequently, the district court lacked jurisdiction over the Board's lawsuit.

III. CONCLUSION

We **VACATE** the district court's stay order and **REMAND** with instructions to ***606 DISMISS** the Board's lawsuit for lack of jurisdiction.

All Citations

976 F.3d 597, 2020-2 Trade Cases P 81,395

Footnotes

1 We refer to the FTC acting in its role as complaint counsel as the "FTC" and the FTC acting in its adjudicatory capacity as the "Commission."

2 The Board also argues we lack jurisdiction over the merits of the FTC's appeal, but because the district court lacked jurisdiction, we do not address the merits. *See Arizonans for Official English v. Arizona*, 520 U.S. 43, 73, 117 S. Ct. 1055, 1072, 137 L.Ed.2d 170 (1997) (recognizing that when a district court "lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the [matter]").

3 Other circuits concur. *See, e.g.*, *Chehazeh v. Attorney Gen.*, 666 F.3d 118, 135 (3d Cir. 2012) ("A provision analogous to Section 704's 'final agency action' requirement is found in 28 U.S.C. § 1291, which permits appellate review only of 'final decisions' of a district court."); *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212, 1220 (D.C. Cir. 1996) (Ginsburg, J., concurring) ("Our analysis of the finality requirement imposed by the APA is properly informed by our analysis of that requirement in § 1291.").

4 Note that this is a significant theoretical stretch, as it (a) means the appeal to the district court of an interlocutory order under the APA, which normally requires "final" agency action, and (b) supersedes the FTC Act's direction of appeals to the courts of appeals.

5 The state action analysis applies to FTC actions as well as to federal antitrust litigation. *See F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 112 S. Ct. 2169, 2177, 119 L.Ed.2d 410 (1992) (applying the state action analysis in a case arising only under the FTC Act). We also note that, although "the state action doctrine is often labeled an immunity, that term is actually a misnomer because the doctrine is but a recognition of the

limited reach of the Sherman Act ....” *Acoustic Sys.*, 207 F.3d at 292 n.3. Consistent with our prior opinions, however, we continue to refer to the doctrine as one of immunity. *See generally Veritext Corp. v. Bonin*, 901 F.3d 287 (5th Cir 2018).

6 “For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself.” *N.C. St. Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494, 505, 135 S. Ct. 1101, 1111, 191 L.Ed.2d 35 (2015). Pardon the circularity of this direct quotation.

7 The Board relies perfunctorily on a finality test articulated in *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154, 137 L.Ed.2d 281 (1997). *Bennett* pronounced two conditions that “must be satisfied for an agency action to be ‘final’ ”: (1) the action must “mark the consummation of the agency's decision making process,” and (2) the action must be that “by which rights or obligations have been determined or from which legal consequences will flow.” 520 U.S. at 177–78, 117 S. Ct. at 1168. The Board argues that the April 10, 2018 order is “independently reviewable as a ‘final’ order under the test articulated in *Bennett*” because the order “reflects a consummation of the decision making process” from which “legal consequences will flow, including [the Board's] legal right to immunity from trial.” This is incorrect. Not only is the Board not entitled to immunity from suit, but the Commission's denial of state action immunity will affect the Board adversely only if the Commission ultimately finds the Board liable for antitrust violations. Put differently, the April 10, 2018 order “does not itself adversely affect [the Board] but only affects [its] rights adversely on the contingency of future administrative action.” *Am. Airlines*, 176 F.3d at 288 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130, 59 S. Ct. 754, 757, 83 L.Ed. 1147 (1939)). The April 10, 2018 order does not constitute final agency action under *Bennett*.

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Remarks of Commissioner Noah Joshua Phillips

Regarding the Commission's Withdrawal of the Section 5 Policy Statement

July 1, 2021

The Majority's decision today to rescind the Commission's bipartisan 2015 Section 5 Policy Statement reduces clarity in the application of the law and augurs an attempt to arrogate terrific regulatory power never intended by Congress to a handful of unelected individuals on the FTC.

This policy proposal was announced just a week ago, the bare minimum notice permitted by law[1], diminishing the public's opportunity to give input. And the members of the public we will hear from today will speak after the vote, so that the FTC cannot consider their views. That is inconsistent with rhetoric we have heard about opening up the policy-making process.

On the proposal, I still do not know to what aspects of that bipartisan policy my colleagues object.

Perhaps it is the first principle, *i.e.,* that the public policy underlying the antitrust laws is the promotion of consumer welfare.[2] That has been black-letter Supreme Court law for almost my entire life.[3]

Maybe they object to the second, applying the "Rule of Reason", which means we look carefully at the facts to determine the effect of a company's conduct. That has been the law for over a century, as a unanimous Supreme Court reminded us just days ago, handing plaintiffs a victory in the *NCAA v. Alston* case.[4]

The policy statement we are rescinding was based on court decisions explaining the limits of Section 5.[5] Will we follow those?

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[1] 5 U.S.C. § 552b(e)(1)

[2] Fed. Trade Comm'n, *Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act* (2015), https://www.ftc.gov/system/files/documents/public_statements/735201/150813section5enforcement.pdf.

[3] *See* Reiter v. Sonotone Corp., 442 U.S. 330 (1979) (describing the Sherman Act as a "consumer welfare prescription").

[4] NCAA v. Alston, 594 U. S. __ (2021).

[5] *See, e.g.,* Address by FTC Chairwoman Edith Ramirez, Competition Law Center, George Washington University Law School (Aug. 13, 2015), https://www.ftc.gov/system/files/documents/public_statements/735411/150813section5speech.pdf.

I do not know. The public does not know. The honest businesses looking to follow the law do not know. If it is the Majority's view that the principles outlined in the Statement no longer reflect the Commission's enforcement practice, that the Commission no longer plans to abide by legal precedent, or that Section 5 is a law without limit, they should say so—and how—on the record.

Here we are at a public hearing, with a chance to add transparency, but instead we are doing the opposite: removing guidance and adding uncertainty.

This is not consistent with public statements my colleagues have made. Chair Khan and Commissioner Chopra previously wrote, for example, that clear rules "help deliver consistent enforcement and predictable results".[6] So why is one of their first initiatives to reduce clarity as to the Commission's interpretation of Section 5? They could offer a replacement—*that* could add clarity—but they decline to do so.

Reducing clarity in how the Commission will approach antitrust enforcement is bad enough, but it is particularly troubling in light of my colleagues' publicly-stated desire to fashion antitrust regulations.[7] Not only are they refusing to articulate limits to the Commission's ability to declare conduct illegal after investigating it, they are also refusing to articulate limits on their view of what they can regulate. Today, in effect, the majority is asserting broad authority to regulate the economy. They mean, in other words, for just a handful of people to answer major policy questions with no intelligible principle from Congress to guide us.[8]

My view is that our laws permit no such thing. But leaving that aside; if the majority believe they have that power, I believe it is incumbent upon them to explain its limits.

I am deeply concerned that the Commission's action today unleashes unchecked regulatory authority on businesses subject to Section 5 while keeping those businesses in the dark about which conduct is lawful and which is unlawful. And, we are undertaking it with virtually no input from the public. The need for certainty and predictability are basic tenets of good government. Today, I regret that the Commission came up short.

[6] Rohit Chopra & Lina M. Khan, *The Case for "Unfair Methods of Competition" Rulemaking*, 87 Univ. of Chicago L. Rev. 357, 368 (2020).

[7] *See, e.g., id.*, *Reviving Competition, Part 3: Strengthening the Laws to Address Monopoly Power*: *Hearing Before the H. Comm. on the Judiciary*, 117th Cong. 7 (statement of Acting FTC Chairwoman Rebecca Kelly Slaughter).

[8] *Cf.* Gundy v. United States, 139 S. Ct. 2116 (2019) (Gorsuch, N., dissenting); Paul v. United States, 140 S. Ct. 342. (2019) (Kavanaugh, B., statement respecting denial of cert.).

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Dissenting Statement of Commissioner Noah Joshua Phillips

Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases

July 21, 2021

Over two decades ago, a bipartisan Commission announced we would no longer require prior approval for or prior notice of future transactions as a routine matter in merger consents.[1] Today, a partisan majority will rescind that policy, with the minimum notice required by law, virtually no public input, and no analysis or guidance.

It is bad government and bad policy. I dissent.

The remarks issued by Commissioner Wilson ably recount the expensive and pointless litigation and unfair outcomes for businesses that led the Commission to adopt the policy in 1995.[2] And I share the concerns she raises about exacerbating enforcement disparities with the Department of Justice and—once again, for the second time in a month—leaving the business community without clarity as to how we will exercise our authority.

The Majority's Decision Will Weaken Enforcement by Making Consents More Difficult

Congress enacted the Hart-Scott-Rodino Act of 1976 ("HSR Act") to protect the public from anticompetitive mergers and acquisitions before they occur.[3] Giving regulators an early look at transactions and the time to resolve them before asking skeptical courts to unwind them—and businesses the ability to plan in advance—HSR is a "win-win" for regulators and businesses. In the hopes, presumably, of taxing mergers generally, today the majority elects to tax those parties that attempt to resolve matters with the agency. That, and other things we have seen lately, suggest their willingness to abrogate the HSR Act.[4] That is a mistake.

[1] Statement of Federal Trade Commission Policy Concerning Prior Approval and Prior Notice Provisions in Merger Cases, 60 Fed. Reg. 39,745 (Aug. 3, 1995) [hereinafter "1995 Policy"].

[2] Commissioner Christine S. Wilson, Oral Remarks at the Open Commission Meeting on July 21, 2021, at 8 (July 21, 2021).

[3] Hart-Scott-Rodino Antitrust Improvements Act of 1976, 15 U.S.C. § 18a.

[4] *See e.g.,* FTC Press Release*, FTC, DOJ Temporarily Suspend Discretionary Practice of Early Termination* (Feb. 4, 2021), https://www.ftc.gov/news-events/press-releases/2021/02/ftc-doj-temporarily-suspend-discretionary-practice-early.

Mergers and acquisitions are a constant feature of American markets, one way that they evolve over time. The Commission reviews transactions for their impact upon competition; and, judged from that perspective, the overwhelming bulk noticed to the agencies are not problematic,[5] and go unchallenged. Some we block.[6] Others, consistent with the congressional design of the HSR Act, we resolve through consents, for example by compelling the divestiture of the part of the company that raises the competitive concern.

For six decades before the HSR Act, the Commission challenged mergers and acquisitions that proved to be anticompetitive after the fact. It sought divestitures, but courts were often leery of "unscrambling the eggs".[7] The Commission adopted a policy of (when it could) requiring parties to give prior notice and get Commission approval for future acquisitions in the market covered by the consent order.[8] The HSR Act achieved economy-wide much of what the Commission had been trying to get on an *ad hoc* basis (prior notice and a fighting chance to prevent anticompetitive effects), but in the years following its passage the agency continued its policy of imposing special restrictions on firms that sought to resolve competitive concerns before merging. It fought a long, expensive, unfair, and ultimately pointless battle to make sure that Coca-Cola could not merge without government permission, while Pepsi was free to do so.[9] That embarrassing episode, and the recognition that the pre-merger notification regime under the HSR Act substantially accomplished prior notice and immeasurably strengthened merger enforcement, led the Commission in 1995 to give companies legal clarity and reduce burdens on those that enter into merger consents.

Today, the majority chooses to impose a decade-long M&A tax on anyone who enters into a merger consent.[10] While the agency has once again repealed a policy without offering guidance as to what will replace it, this will deter consents. Meaning, companies will be less likely to work with the Commission to resolve competitive concerns—contrary to the express purpose of the HSR Act, and leading to less efficient merger enforcement. As consent negotiations become more

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[5] By way of example, approximately 97% of HSR reportable transactions in FY 2019 proceeded without a Second Request. Fed. Trade Comm'n and U.S. Dep't. of Justice Antitrust Division, *Hart-Scott-Rodino Annual Report: Fiscal Year 2019*, *available at* https://www.ftc.gov/system/files/documents/reports/federal-trade-commission-bureau-competition-department-justice-antitrust-division-hart-scott-rodino/p110014hsrannualreportfy2019.pdf.

[6] In FY 2020, for example, the Commission brought a record-setting 27 merger enforcement actions, the highest number in a single year since 2001. *See* FED. TRADE COMM'N, ANNUAL PERFORMANCE REPORT FOR FISCAL YEAR 2020 AND ANNUAL PERFORMANCE PLAN FOR FISCAL YEARS 2021 AND 2022 46 (2021), https://www.ftc.gov/system/files/documents/reports/fy-2021-22-performance-plan-fy-2020-performance-report/fy22-app-apr.pdf.

[7] *See e.g.,* William J. Baer, *Reflections on 20 Years of Merger Enforcement under the Hart-Scott-Rodino Act* (Oct. 31, 1996), *available at* https://www.ftc.gov/public-statements/1996/10/reflections-20-years-merger-enforcement-under-hart-scott-rodino-act.

[8] Twelve years before Congress passed the HSR Act and established the premerger notification program, the Commission discussed the appropriateness of limiting future acquisitions by a respondent found to have attempted an unlawful acquisition in the past. *See* Ekco Products Co., 65 F.T.C. 1163, 1201 (1964) (The ALJ noted there is "no legal requirement that the Commission be notified of corporate mergers or acquisitions either before or after consummation. Annual Report of the Federal Trade Commission for the fiscal year ended January 30, 1957, p. 22.").

[9] Coke is better, obvi; but the government should treat them the same. *See* The Coca-Cola Co., 117 F.T.C. 795 (June 13, 1994), Commissioners Azcuenaga & Starek recused; order modified, 119 F.T.C. 724 (May 17, 1995); appeal dismissed per stipulation, Coca-Cola Enters. v. FTC, No. 94-1595 and consolidated case Nos. 94-1596, 95-1086, 95-1087, 1995 U.S. App. LEXIS 15183 (D.C. Cir. May 18, 1995).

[10] *See* 1995 Policy (prior approval provisions in consent orders "usually [have] a duration of 10 years.").

difficult, we will have to go to court more—wasting precious taxpayer dollars, and accomplishing less.[11]

The Majority's Decision Will Chill Procompetitive Deals and Hurt Consumers

A blanket policy of routinely requiring prior approval will impose significant costs on companies that enter into merger consents. The government would be competitively handicapping those companies for an undetermined duration,[12] preventing them from competing on a level playing field against rivals. (For example, making Coke unable to do what Pepsi can.) A company under an FTC order may have to bid higher—for instance, diverting resources from research and development, incurring debt, or lowering salaries—to compensate the seller for the uncertainty and the longer lead time required to obtain prior approval. Companies under an FTC order may not even be considered in a bidding process for a company considering a sale. There will be less competition, for companies.[13]

Such costs are defensible under certain circumstances.[14] The point of a consent is to protect the competition that existed before a transaction takes place and permit the non-problematic aspects of the deal to proceed. Parties to consents should not be able to buy back divested assets,[15] or re-attempt the same transaction under similar market conditions. Our current policy protects against this, saving the Commission resources, in time and money, of re-litigating issues in the same market. The Commission retains discretion to include prior approval or prior notice provisions where we determine there is credible risk that the companies may engage in another

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[11] The Commission routinely cites HSR filings as a justification for additional funding from Congress. Acting Chairwoman Rebecca Kelly Slaughter, *Opening Statement Before the House Subcommittee on Antitrust, Commercial and Administrative Law of the Judiciary Committee* (Mar. 18, 2021), https://www.ftc.gov/system/files/documents/public_statements/1588336/p180101_opening_statement_of_ftc_acting_chairwoman_slaughter.pdf. Where we are deliberately making the HSR process less efficient, Congress should take notice.

[12] The majority has yet to announce the scope and content of their new policy, including the length of prior approval provisions.

[13] Scholars have long recognized the positive competitive effects of the competition for companies, the "market for corporate control". Henry G. Manne, *Mergers and the Market for Corporate Control*, 73 J. POL. ECON. 110, 112 (1965); *see also* Blanaid Clarke, *The Market for Corporate Control: New Insights from the Financial Crisis in Ireland*, 36 SEATTLE U.L. REV. 577, 578 ("Like much of Manne's work, *Mergers and the Market for Corporate Control* has been described quite correctly as 'groundbreaking,' 'revolutionary,' and 'pioneering.' Roberta Romano argued that the article marked the 'intellectual origin of what would become the new paradigm for corporate law.'" (quoting Daniel Fischel, *Efficient Capital Market Theory, the Market for Corporate Control, and the Regulation of Cash Tender Offers*, 57 TEX. L. REV. 1, 5 (1978); Fred S. McChesney, *Manne, Mergers and the Market for Corporate Control*, 50 CASE W. RES. L. REV. 245, 246 (1999); Roberta Romano, *After the Revolution in Corporate Law*, 55 J. LEGAL EDUC. 342, 343 (2005)).

[14] Special Committee to Study the Role of the Federal Trade Commission, *Report of the American Bar Association Section of Antitrust Law Special Committee to Study the Role of the Federal Trade Commission*, 58 Antitrust L. J. 43, 92 (1989) ("A firm-specific order must be justified as removing harm, restoring competition, or preventing likely recidivism; it should last only as long as necessary to prevent the likely resumption of the illegal practices…Orders in excess of five years can be justified only when there is a significant chance that the firm would otherwise engage in illegal activity not subject to the Hart-Scott-Rodino reporting requirements.") (internal citations omitted).

[15] This is the limited context for which the Department of Justice Antitrust Division requires prior approval. *See* Dept. of Justice Antitrust Division, *Merger Remedies Manual*, at 31 (Sept. 2020).

anticompetitive transaction in the same market or fly under the HSR Act radar.[16] We exercise that discretion today and include such provisions, as necessary.

Because the point of the Clayton Act and the HSR Act is to deter anticompetitive mergers, not all mergers. What the majority wants to do today is impose costs on *all* companies that enter into consents. By definition, those are companies seeking to remediate problems with their merger. This is precisely what Congress intended with the passage of the HSR Act. Yes, we might deter some bad deals. Between the HSR Act and the current policy, however, we already have processes in place that alert us to those deals and enable us to stop or remediate them.[17] But attempting to flip the burden of proof for all deals will also deter procompetitive and competitively neutral transactions. Like our (allegedly temporary) suspension of early termination, it amounts to a gratuitous tax on normal market operations. Ultimately, American consumers will have to pick up the cost.

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Our agency has nearly half a century of experience enforcing the HSR Act. We should draw upon that experience to stop the bad mergers and, yes, let the good ones through. Failure to do so will hinder normal market operations and weaken our enforcement efforts, both to the detriment of the American public.

[16] 1995 Policy.

[17] Over the past 10 years, the DOJ and FTC have prevailed in almost 80% of litigated merger challenges. *See* Carl Shapiro & Howard Shelanski, *Judicial Response to the 2010 Horizontal Merger Guidelines*, 58 REV. INDUS. ORG. 51, 54-56 (2021).

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Dissenting Statement of Commissioners Noah Joshua Phillips and Christine S. Wilson

Regarding the Commission's Rescission of the 2020 FTC/DOJ Vertical Merger Guidelines and the Commentary on Vertical Merger Enforcement

September 15, 2021

Today the FTC leadership continues the disturbing trend of pulling the rug out under from honest businesses and the lawyers who advise them, with no explanation and no sound basis of which we are aware. In the past two months, the FTC has withdrawn just as many bipartisan policies.[1] Now, the partisan majority will rescind the 2020 Vertical Merger Guidelines issued jointly by the FTC and the Antitrust Division ("2020 Guidelines") and the Commentary on Vertical Merger Enforcement ("Commentary"),[2] with the minimum notice required by law, virtually no public input, and no analysis or guidance.

Sowing confusion regarding the legality of vertical mergers is particularly troublesome at this time, given American businesses' ongoing attempts to shore up supply chain vulnerabilities exposed during the COVID-19 pandemic. Today's action, together with other recent attacks on the Hart-Scott-Rodino merger review process,[3] threatens to chill legitimate merger activity and undermine attempts to rebuild our economy in the wake of the pandemic.

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[1] Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade Comm'n, Dissenting Statement on the Statement of the Commission on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591710/p210100phillipswilsondissentsec5enforcementprinciples.pdf; Noah Joshua Phillips, Comm'r, Fed. Trade Comm'n, Dissenting Statement Regarding the Commission's Withdrawal of the 1995 Policy Statement Concerning Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592398/dissenting_statement_of_commissioner_phillips_regarding_the_commissions_withdrawal_of_the_1995.pdf; Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Oral Remarks Regarding Policy Statement on Prior Approval and Prior Notice Provisions in Merger Cases (July 21, 2021), https://www.ftc.gov/system/files/documents/public_statements/1592366/commissioner_christine_s_wilson_oral_remarks_at_open_comm_mtg_final.pdf.

[2] U.S. Dep't of Just. & Fed. Trade Comm'n, Vertical Merger Guidelines (hereinafter "VMGs") (June 30, 2020), https://www.ftc.gov/system/files/documents/reports/us-department-justice-federal-trade-commission-vertical-merger-guidelines/vertical_merger_guidelines_6-30-20.pdf; Fed. Trade Comm'n, Commentary on Vertical Merger Enforcement (Dec. 20, 2020), https://www.ftc.gov/system/files/documents/reports/federal-trade-commissions-commentary-vertical-merger-enforcement/p180101verticalmergercommentary_1.pdf.

[3] *See* Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Statement Regarding the Announcement of Pre-Consummation Warning Letters (Aug. 9, 2021), https://www.ftc.gov/system/files/documents/public_statements/1593969/pre-consummation_warning_letters_statement_v11.pdf; Noah Joshua Phillips & Christine S. Wilson, Comm'rs, Fed. Trade

We believe that American consumers, businesses, and taxpayers deserve better. For these reasons, we dissent.

The Majority's Decision Will Chill Procompetitive Deals and Hurt Consumers

Section 7 of the Clayton Act, the main U.S. law governing mergers, bars transactions where "the effect may be substantially to lessen competition".[4] Vertical mergers are *not* mergers of competitors. Rather, they combine firms that are in a buyer-seller relationship.[5] Suppose a company that specializes in manufacturing only smartphones merges with a company that specializes in manufacturing only smartphone chips, some of which it was selling to the smartphone manufacturer. That is a vertical merger. It does not directly eliminate competition, as the companies were not competing (or about to compete) with each other before they merged.

Vertical integration is a common "make or buy" phenomenon similar to choices that consumers make daily—it's one way that companies grow. When considering what to have for dinner, a consumer may choose to outsource food preparation by eating at a restaurant or getting take-out; alternatively, he may rely on groceries in his refrigerator and pantry to make dinner himself. When discovering a leak in her home, a consumer can outsource the repairs by hiring a plumber; alternatively, a handy consumer may fix the leak herself.

One immediate and positive effect of a vertical merger is that transactions (*e.g.,* chip sales) that were occurring at arm's length in the market now take place within the merged firm. As a consequence, the merged firm is no longer paying a markup on the product it is now supplying to itself (*e.g.,* smartphone chips), a phenomenon that economists call the "elimination of double marginalization".[6] The merged firm benefits from a lower manufacturing cost for each unit it produces (*e.g.,* each smartphone), allowing it to compete more aggressively by lowering its price and selling more units, and leaving consumers better off. Vertical mergers can also increase efficiency and competitiveness in other ways, like saving the substantial time and money that often go into finding reliable trading partners, negotiating terms of sale, coordinating R&D and product design, and writing contracts that cover multiple contingencies but can never capture them all. Take Disney's 2006 acquisition of Pixar. Prior to the merger, Disney was partially financing and distributing Pixar's films; but once combined, Pixar revitalized Disney's animation department,

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Comm'n, Statement Regarding the Indefinite Suspension of Early Terminations (Feb. 4, 2021), https://www.ftc.gov/system/files/documents/public_statements/1587047/phillipswilsonetstatement.pdf.

[4] 15 U.S.C. § 18.

[5] Christine S. Wilson, Comm'r, Fed. Trade Comm'n, Closing Remarks at FTC Hearing #5: Vertical Merger Analysis and the Role of the Consumer Welfare Standard in U.S. Antitrust Law, Hearings on Competition and Consumer Protection in the 21st Century (hereinafter "Vertical Merger Hearing") at 360, https://www.ftc.gov/system/files/documents/public_events/1415284/ftc_hearings_session_5_transcript_11-1-18_0.pdf.

[6] As the 2020 VMGs correctly point out, "[t]he elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms". VMGs at 11. *See also* Roger D. Blair, Christine S. Wilson, et. al, *Analyzing Vertical Mergers: Accounting for the Unilateral Effects Tradeoff & Thinking Holistically About Efficiencies*, 27 Geo. Mason L. Rev. 761 (2020).

while Disney used its resources to expand Pixar's production, resulting in several beloved movies.[7] If you or your children watched a Pixar film on Disney+ during the pandemic, you benefited directly from a vertical integration.

Not all vertical mergers are benign. Some may harm competition and consumers. The 2020 Guidelines describe how such harm can occur and the framework that the FTC and DOJ have developed, over decades of experience, to analyze both the anti- and procompetitive effects of vertical mergers.[8] Contrary to decades of established case law, the Majority claim that the 2020 Guidelines "contravene the text of the statute" by recognizing the "procompetitive effects, or efficiencies, of vertical mergers."[9] The Majority commits two flaws in its analysis. First, they conflate procompetitive effects of a merger with merger efficiencies.[10] Second, they ignore the burden shifting framework adopted by the circuit courts recognizing that procompetitive effects may render a competition-eliminating merger procompetitive on the whole.[11] Similarly, a successful efficiency defense, *i.e.,* that the proposed merger's efficiencies would likely offset the merger's potential harm to consumers, is sufficient to save a merger. That said, Guidelines have long counseled skepticism, which is routinely applied. But the fact remains that vertical mergers are different animals from mergers of competitors, changing incentives in ways that are, on the whole, more likely to improve efficiency, bolster competition, and benefit consumers.[12] As such,

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[7] Brooks Barnes, *Disney and Pixar: The Power of the Prenup*, NY TIMES (June 1, 2008), https://www.nytimes.com/2008/06/01/business/media/01pixar.html

[8] Indeed, staff's careful application of that framework to the evidence in the Illumina/Grail investigation led us to support challenging that vertical merger.

[9] Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Vertical Merger Guidelines (Sept. 15, 2021).

[10] VMGs at 11 ("The elimination of double marginalization is not a production, research and development, or procurement efficiency; it arises directly from the alignment of economic incentives between the merging firms. Since the same source drives any incentive to foreclose or raise rivals' costs, the evidence needed to assess those competitive harms overlaps substantially with that needed to evaluate the procompetitive benefits likely to result from the elimination of double marginalization.").

[11] *See* Otto Bock HealthCare North America, Inc., 2019 WL 5957363, at *33-35 (F.T.C. Nov. 1, 2019) (opinion authored by Comm'r Rohit Chopra); United States v. AT&T, Inc., 310 F. Supp. 3d 161 (D.D.C. 2018); FTC v. H.J. Heinz Co., 246 F.3d 708 (D.C. Cir. 2001); United States v. Baker Hughes Inc., 908 F.2d 981, 982 (D.C. Cir. 1990); ProMedica Health Sys. v. FTC, 749 F.3d 559, 571 (6th Cir. 2014); FTC v. H.J. Heinz Co., 246 F.3d 708, 720-22 (D.C. Cir. 2001); FTC v. Tenet Health Care Corp., 186 F.3d 1045, 1054-55 (8th Cir. 1999); FTC v. Univ. Health, Inc., 938 F.2d 1206, 1222–24 (11th Cir. 1991).

[12] *See* Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with other commentators that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases"); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018); Francine Lafontaine & Margaret Slade, Vertical Integration and Firm Boundaries: The Evidence, 45 J. ECON. LIT. 629, 680 (2007) (conducting a broad study of past vertical integrations and concluding "even in industries that are highly concentrated . . . , the net effect of vertical integration appears to be positive in many instances"); Cooper, Froeb, O'Brien, & Vita, supra note 20, at 658 ("Most studies find evidence that vertical restraints/vertical integration are procompetitive" and "[t]his efficiency often is plausibly attributable to the elimination of double-markups or other cost savings."); Global Antitrust Institute, Antonin Scalia Law Sch., Geo. Mason Univ., Comment Submitted in the Federal Trade Commission's Hearings on Competition and Consumer Protection in the 21st Century, Vertical Mergers, at 5-9 (filed Sept. 6, 2018) (summarizing the available empirical studies and concluding that either nine or ten of the eleven studies "indicated vertical integration resulted in positive welfare changes" or "no change" in welfare); David Reiffen and Michael Vita, Is There New Thinking on Vertical

they require an approach that fully accounts for their good as well as their bad effects. Anything less will hurt consumers, not help them.

The Majority Discards Transparency in Favor of Uncertainty

The 2020 Guidelines marked an important development in U.S. merger enforcement and provided needed transparency into the agencies' evaluation of vertical (and other non-horizontal) mergers. They are well founded, based on accepted economic principles, reflect precedent from courts and the agencies, and were the result of robust public comment.

The 2020 Guidelines incorporate the federal antitrust agencies' accumulated knowledge from nearly four decades of experience investigating and challenging anticompetitive non-horizontal mergers, as well as economic analysis on the potential harms and benefits of these types of mergers. By laying out the analytic framework the agencies use to evaluate non-horizontal mergers, the 2020 Guidelines are a useful guidepost for businesses that seek to ensure their conduct is lawful.

The 2020 Guidelines also benefitted from well-informed, substantial, and valuable public input in response to the draft Vertical Merger Guidelines released for comment on January 10, 2020,[13] the FTC's Competition and Consumer Protection Hearings for the 21st Century,[14] and a public workshop the FTC and Department of Justice hosted on March 11, 2020.[15] The Majority discards the 2020 Guidelines today with *zero* public input.

While the 2020 Guidelines reflect the agencies' current enforcement practices and policy, the Commentary provides a historical description of the Commission's analysis in non-horizontal merger cases. This document promotes agency transparency and facilitates the predictability, credibility, and integrity of the Commission's merger review process. Withdrawing the 2020 Guidelines and Commentary leaves the business community without clarity as to how we will carry out vertical merger enforcement. Our colleagues have yet to articulate *any* new proposals or guidance for a new approach to vertical merger enforcement. We do not know whether the Majority intends to issue new guidance. We can only hope that they propose a path forward and will take into account and grapple with sound law and the economics in doing so.

Mergers? A Comment, 63 ANTITRUST L.J. 917 (1995) (arguing the economics suggests the vast majority of vertical mergers are efficiency-enhancing); Michael H. Riordan & Steven C. Salop, Evaluating Vertical Mergers: Reply to Reiffen and Vita Comment, 63 ANTITRUST L.J. 943, 944 (1995) (agreeing with Reiffen and Vita that "efficiency benefits provide the rationale for many vertical mergers, can lead to increased competition and consumer welfare, and are sufficient to offset potential competitive harms in many cases").

[13] *See* 74 Public Comments submitted regarding Draft Vertical Merger Guidelines, https://www.ftc.gov/policy/public-comments/draft-vertical-merger-guidelines.

[14] Vertical Merger Hearing.

[15] Fed. Trade Comm'n and Dep't of Just. Workshop on Draft Vertical Merger Guidelines (March 11, 2020), https://www.justice.gov/atr/public-workshops-draft-vertical-merger-guidelines#information.

The Majority's decision to foster uncertainty at this time is particularly pernicious. The COVID-19 pandemic exposed supply chain vulnerabilities in many sectors of the American economy.[16] Impacted businesses are now attempting to adapt.[17] Some of these businesses seek to bring in-house supply chain functions upstream or downstream from their operations – in other words, they seek to engage in vertical mergers. Other impacted businesses may enter into new contracting arrangements. The uncertainty imposed on businesses – by today's action regarding vertical mergers and recent Commission actions regarding contracting[18] – threatens to slow unnecessarily the American economy's recovery by denying law-abiding businesses the guidance they need to know what actions are permissible as they try to respond to supply shortages.

The Majority's decision to withdraw the Vertical Merger Guidelines also adds to the divide between enforcement at the FTC and the Department of Justice. There have long been concerns about different procedures at the agencies and perceived differences in the standards for an injunction, leading to repeated calls to modify the procedures for the FTC's merger enforcement program.[19] More recently the concerns have led members of Congress to discuss transferring the FTC's competition authority to DOJ.[20] Unless the DOJ similarly eschews the 2020 Guidelines, a new schism will appear.

The Majority Prefers Unchecked Regulatory Power Over Guidance

The uncertainty the Majority creates today is particularly troubling in light of the administration's promises to increase merger enforcement,[21] and to impose punitive penalties on parties proposing

[16] *See* Juliana Kaplan & Grace Kay, *Can't find chicken wings, diapers, or a new car? Here's a list of all the shortages hitting the reopening economy,* Insider (May 25, 2021), https://www.businessinsider.com/why-supply-shortages-economy-inventory-chips-lumber-cars-toilet-paper-2021-5.

[17] *See*, *e.g.*, Julia Horowitz, *How the pandemic turned humble shipping containers into the hottest items on the planet*, CNN.com (Sept. 8, 2021), https://www.cnn.com/2021/09/08/business/shipping-containers/index.html; Costas Paris, *Shipping Options Dry Up as Businesses Try to Rebuild from Pandemic*, Wall Street Journal (Sept. 12, 2021), https://www.wsj.com/articles/shipping-options-dry-up-as-businesses-try-to-rebuild-from-pandemic-11631439002?st=8wumh3fsb5i4qyp&reflink=article_email_share (describing that WalMart and Home Depot are chartering own ships to move imports from Asia).

[18] Phillips & Wilson *supra* note 1; FTC Press Release, *FTC Extends Deadline for Comments on Workshop Addressing Non-Compete Clauses in Employment Contracts* (Jan. 28, 2020), https://www.ftc.gov/news-events/press-releases/2020/01/ftc-extends-deadline-comments-workshop-addressing-non-compete.

[19] *See* SMARTER Act, S. 4876, 116th Cong. (2020).

[20] *See* One Agency Act, S. 633, 117th Cong. § 4 (2021). *See also* The House Judiciary Republican Agenda for Taking on Big Tech (July 6, 2021), https://republicans-judiciary.house.gov/wp-content/uploads/2021/07/2021-07-06-The-House-Judiciary-Republican-Agenda-for-Taking-on-Big-Tech.pdf ("The current system of splitting antitrust enforcement between the Department of Justice and the Federal Trade Commission is inefficient and counterproductive. The arbitrary division of labor empowers radical Biden bureaucrats at the expense of Americans. This proposal will consolidate antitrust enforcement within the Department of Justice so that it is more effective and accountable.").

[21] *See* Exec Order No. 14036, *Promoting Competition in the American Economy*, 86 Fed. Reg. 36987 (July 9, 2021); Lina M. Khan, Chair, Fed. Trade Comm'n, Remarks on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591506/remarks_of_chair_khan_on_the_withdrawal_of_the_statement_of_enforcement_principles_re_umc_under.pdf.

mergers that the Majority believes are anticompetitive.[22] The majority could have waited to rescind the 2020 Guidelines until they had something with which to replace it. It appears they prefer sowing uncertainly in the market and arrogating unbridled authority to condemn mergers without reference to law, agency practice, economics, or market realities. The public and Congress should be alarmed by the majority's repeated withdrawal of existing guidance and transparency in favor of an amorphous bureaucratic fog that will provide cover for those who seek to politicize antitrust.

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We lament the majority's continued rejection of administrable, predictable, and credible merger enforcement. Going forward, we fear consumers will lose the benefits of competition from vertical integration, and honest businesses will lose clarity regarding the boundaries of lawful conduct.

[22] *See* Letter from Lina M. Khan, Chair, Fed. Trade Comm'n, to Brian Deese, Director, Nat'l Econ. Council (Aug. 25, 2021), https://www.whitehouse.gov/wp-content/uploads/2021/08/Letter-to-Director-Deese-National-Economic-Council.pdf; Lina M. Khan, Rohit Chopra, & Rebecca Kelly Slaughter, Chair & Comm'rs, Fed. Trade Comm'n, Statement on the Withdrawal of the Statement of Enforcement Principles Regarding "Unfair Methods of Competition" Under Section 5 of the FTC Act (July 1, 2021), https://www.ftc.gov/system/files/documents/public_statements/1591498/final_statement_of_chair_khan_joined_by_rc_and_rks_on_section_5_0.pdf.

FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*

I. Introduction

States craft regulatory policy through a variety of actors, including state legislatures, courts, agencies, and regulatory boards. While most regulatory actions taken by state actors will not implicate antitrust concerns, some will. Notably, states have created a large number of regulatory boards with the authority to determine who may engage in an occupation (*e.g.*, by issuing or withholding a license), and also to set the rules and regulations governing that occupation. Licensing, once limited to a few learned professions such as doctors and lawyers, is now required for over 800 occupations including (in some states) locksmiths, beekeepers, auctioneers, interior designers, fortune tellers, tour guides, and shampooers.[1]

In general, a state may avoid all conflict with the federal antitrust laws by creating regulatory boards that serve only in an advisory capacity, or by staffing a regulatory board exclusively with persons who have no financial interest in the occupation that is being regulated. However, across the United States, "licensing boards are largely dominated by active members of their respective industries . . ."[2] That is, doctors commonly regulate doctors, beekeepers commonly regulate beekeepers, and tour guides commonly regulate tour guides.

Earlier this year, the U.S. Supreme Court upheld the Federal Trade Commission's determination that the North Carolina State Board of Dental Examiners ("NC Board") violated the federal antitrust laws by preventing non-dentists from providing teeth whitening services in competition with the state's licensed dentists. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015). NC Board is a state agency established under North Carolina law and charged with administering and enforcing a licensing system for dentists. A majority of the members of this state agency are themselves practicing dentists, and thus they have a private incentive to limit

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* This document sets out the views of the Staff of the Bureau of Competition. The Federal Trade Commission is not bound by this Staff guidance and reserves the right to rescind it at a later date. In addition, FTC Staff reserves the right to reconsider the views expressed herein, and to modify, rescind, or revoke this Staff guidance if such action would be in the public interest.

[1] Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny*, 162 U. PA. L. REV. 1093, 1096 (2014).

[2] *Id.* at 1095.

competition from non-dentist providers of teeth whitening services. NC Board argued that, because it is a state agency, it is exempt from liability under the federal antitrust laws. That is, the NC Board sought to invoke what is commonly referred to as the "state action exemption" or the "state action defense." The Supreme Court rejected this contention and affirmed the FTC's finding of antitrust liability.

In this decision, the Supreme Court clarified the applicability of the antitrust state action defense to state regulatory boards controlled by market participants:

> "The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* [*Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)] active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

In the wake of this Supreme Court decision, state officials have requested advice from the Federal Trade Commission regarding antitrust compliance for state boards responsible for regulating occupations. This outline provides FTC Staff guidance on two questions. *First*, when does a state regulatory board require active supervision in order to invoke the state action defense? *Second*, what factors are relevant to determining whether the active supervision requirement is satisfied?

Our answers to these questions come with the following caveats.

- Vigorous competition among sellers in an open marketplace generally provides consumers with important benefits, including lower prices, higher quality services, greater access to services, and increased innovation. For this reason, a state legislature should empower a regulatory board to restrict competition only when necessary to protect against a credible risk of harm, such as health and safety risks to consumers. The Federal Trade Commission and its staff have frequently advocated that states avoid unneeded and burdensome regulation of service providers.[3]

- Federal antitrust law does <u>not</u> require that a state legislature provide for active supervision of any state regulatory board. A state legislature may, and generally should, prefer that a regulatory board be subject to the requirements of the federal antitrust

[3] *See, e.g.*, Fed. Trade Comm'n Staff Policy Paper, *Policy Perspectives: Competition and the Regulation of Advanced Practice Registered Nurses* (Mar. 2014), https://www.ftc.gov/system/files/documents/reports/policy-perspectives-competition-regulation-advanced-practice-nurses/140307aprnpolicypaper.pdf; Fed. Trade Comm'n & U.S. Dept. of Justice, Comment before the South Carolina Supreme Court Concerning Proposed Guidelines for Residential and Commercial Real Estate Closings (Apr. 2008), https://www.ftc.gov/news-events/press-releases/2008/04/ftcdoj-submit-letter-supreme-court-south-carolina-proposed.

laws. If the state legislature determines that a regulatory board should be subject to antitrust oversight, then the state legislature need not provide for active supervision.

- Antitrust analysis – including the applicability of the state action defense – is fact-specific and context-dependent. The purpose of this document is to identify certain overarching legal principles governing when and how a state may provide active supervision for a regulatory board. We are not suggesting a mandatory or one-size-fits-all approach to active supervision. Instead, we urge each state regulatory board to consult with the Office of the Attorney General for its state for customized advice on how best to comply with the antitrust laws.

- This FTC Staff guidance addresses only the active supervision prong of the state action defense. In order successfully to invoke the state action defense, a state regulatory board controlled by market participants must also satisfy the clear articulation prong, as described briefly in Section II. below.

- This document contains guidance developed by the staff of the Federal Trade Commission. Deviation from this guidance does not necessarily mean that the state action defense is inapplicable, or that a violation of the antitrust laws has occurred.

II. Overview of the Antitrust State Action Defense

"Federal antitrust law is a central safeguard for the Nation's free market structures . . . . The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market." *N.C. Dental*, 135 S. Ct. at 1109.

Under principles of federalism, "the States possess a significant measure of sovereignty." *N.C. Dental*, 135 S. Ct. at 1110 (*quoting Community Communications Co. v. Boulder*, 455 U.S. 40, 53 (1982)). In enacting the antitrust laws, Congress did not intend to prevent the States from limiting competition in order to promote other goals that are valued by their citizens. Thus, the Supreme Court has concluded that the federal antitrust laws do not reach anticompetitive conduct engaged in by a State that is acting in its sovereign capacity. *Parker v. Brown*, 317 U.S. 341, 351-52 (1943). For example, a state legislature may "impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *N.C. Dental*, 135 S. Ct. at 1109.

Are the actions of a state regulatory board, like the actions of a state legislature, exempt from the application of the federal antitrust laws? In *North Carolina State Board of Dental Examiners*, the Supreme Court reaffirmed that a state regulatory board is not the sovereign. Accordingly, a state regulatory board is not necessarily exempt from federal antitrust liability.

More specifically, the Court determined that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates" may invoke the state action defense only when two requirements are satisfied: first, the challenged restraint must be clearly articulated and affirmatively expressed as state policy; and second, the policy must be actively supervised by a state official (or state agency) that is not a participant in the market that is being regulated. *N.C. Dental*, 135 S. Ct. at 1114.

- The Supreme Court addressed the clear articulation requirement most recently in *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). The clear articulation requirement is satisfied "where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id*. at 1013.

- The State's clear articulation of the intent to displace competition is not alone sufficient to trigger the state action exemption. The state legislature's clearly-articulated delegation of authority to a state regulatory board to displace competition may be "defined at so high a level of generality as to leave open critical questions about how

and to what extent the market should be regulated." There is then a danger that this delegated discretion will be used by active market participants to pursue private interests in restraining trade, in lieu of implementing the State's policy goals. *N.C. Dental*, 135 S. Ct. at 1112.

➢ The active supervision requirement "seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming [antitrust] immunity." *Id.*

Where the state action defense does not apply, the actions of a state regulatory board controlled by active market participants may be subject to antitrust scrutiny. Antitrust issues may arise where an unsupervised board takes actions that restrict market entry or restrain rivalry. The following are some scenarios that have raised antitrust concerns:

➢ A regulatory board controlled by dentists excludes non-dentists from competing with dentists in the provision of teeth whitening services. *Cf. N.C. Dental,* 135 S. Ct. 1101.

➢ A regulatory board controlled by accountants determines that only a small and fixed number of new licenses to practice the profession shall be issued by the state each year. *Cf. Hoover v. Ronwin*, 466 U.S. 558 (1984).

➢ A regulatory board controlled by attorneys adopts a regulation (or a code of ethics) that prohibits attorney advertising, or that deters attorneys from engaging in price competition. *Cf. Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977); *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975).

III. Scope of FTC Staff Guidance

A. This Staff guidance addresses the applicability of the state action defense under the federal antitrust laws. Concluding that the state action defense is inapplicable does not mean that the conduct of the regulatory board necessarily violates the federal antitrust laws. A regulatory board may assert defenses ordinarily available to an antitrust defendant.

1. **Reasonable restraints on competition do not violate the antitrust laws, even where the economic interests of a competitor have been injured.**

Example 1: A regulatory board may prohibit members of the occupation from engaging in fraudulent business practices without raising antitrust concerns. A regulatory board also may prohibit members of the occupation from engaging in untruthful or deceptive advertising. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

Example 2: Suppose a market with several hundred licensed electricians. If a regulatory board suspends the license of one electrician for substandard work, such action likely does not unreasonably harm competition. *Cf. Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696 (4th Cir. 1991) (en banc).

2. **The ministerial (non-discretionary) acts of a regulatory board engaged in good faith implementation of an anticompetitive statutory regime do not give rise to antitrust liability. See 324 Liquor Corp. v. Duffy, 479 U.S. 335, 344 n. 6 (1987).**

Example 3: A state statute requires that an applicant for a chauffeur's license submit to the regulatory board, among other things, a copy of the applicant's diploma and a certified check for $500. An applicant fails to submit the required materials. If for this reason the regulatory board declines to issue a chauffeur's license to the applicant, such action would not be considered an unreasonable restraint. In the circumstances described, the denial of a license is a ministerial or non-discretionary act of the regulatory board.

3. **In general, the initiation and prosecution of a lawsuit by a regulatory board does not give rise to antitrust liability unless it falls within the "sham exception." Professional Real Estate Investors v. Columbia Pictures Industries, 508 U.S. 49 (1993); California Motor Transport Co. v. Trucking Unlimited, 404 U.S. 508 (1972).**

Example 4: A state statute authorizes the state's dental board to maintain an action in state court to enjoin an unlicensed person from practicing dentistry. The members of the dental board have a basis to believe that a particular individual is practicing dentistry but does not hold a valid license. If the dental board files a lawsuit against that individual, such action would not constitute a violation of the federal antitrust laws.

B. Below, FTC Staff describes when active supervision of a state regulatory board is required in order successfully to invoke the state action defense, and what factors are relevant to determining whether the active supervision requirement has been satisfied.

1. When is active state supervision of a state regulatory board required in order to invoke the state action defense?

General Standard: "[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." *N.C. Dental*, 135 S. Ct. at 1114.

Active Market Participants: A member of a state regulatory board will be considered to be an active market participant in the occupation the board regulates if such person (i) is licensed by the board or (ii) provides any service that is subject to the regulatory authority of the board.

- If a board member participates in any professional or occupational sub-specialty that is regulated by the board, then that board member is an active market participant for purposes of evaluating the active supervision requirement.
- It is no defense to antitrust scrutiny, therefore, that the board members themselves are not directly or personally affected by the challenged restraint. For example, even if the members of the NC Dental Board were orthodontists who do not perform teeth whitening services (as a matter of law or fact or tradition), their control of the dental board would nevertheless trigger the requirement for active state supervision. This is because these orthodontists are licensed by, and their services regulated by, the NC Dental Board.
- A person who temporarily suspends her active participation in an occupation for the purpose of serving on a state board that regulates her former (and intended future) occupation will be considered to be an active market participant.

Method of Selection: The method by which a person is selected to serve on a state regulatory board is not determinative of whether that person is an active market participant in the occupation that the board regulates. For example, a licensed dentist is deemed to be an active market participant regardless of whether the dentist (i) is appointed to the state dental board by the governor or (ii) is elected to the state dental board by the state's licensed dentists.

***A Controlling Number, Not Necessarily a Majority, of Actual Decisionmakers*:**

- ➢ Active market participants need not constitute a numerical majority of the members of a state regulatory board in order to trigger the requirement of active supervision. A decision that is controlled, either as a matter of law, procedure, or fact, by active participants in the regulated market (*e.g.*, through veto power, tradition, or practice) must be actively supervised to be eligible for the state action defense.

- ➢ Whether a particular restraint has been imposed by a "controlling number of decisionmakers [who] are active market participants" is a fact-bound inquiry that must be made on a case-by-case basis. FTC Staff will evaluate a number of factors, including:

  - ✓ The structure of the regulatory board (including the number of board members who are/are not active market participants) and the rules governing the exercise of the board's authority.

  - ✓ Whether the board members who are active market participants have veto power over the board's regulatory decisions.

Example 5: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of five board members. Thus, no regulation may become effective without the assent of at least one electrician member of the board. In this scenario, the active market participants effectively have veto power over the board's regulatory authority. The active supervision requirement is therefore applicable.

  - ✓ The level of participation, engagement, and authority of the non-market participant members in the business of the board – generally and with regard to the particular restraint at issue.

  - ✓ Whether the participation, engagement, and authority of the non-market participant board members in the business of the board differs from that of board members who are active market participants – generally and with regard to the particular restraint at issue.

  - ✓ Whether the active market participants have in fact exercised, controlled, or usurped the decisionmaking power of the board.

Example 6: The state board of electricians consists of four non-electrician members and three practicing electricians. Under state law, new regulations require the approval of a majority of board members. When voting on proposed regulations, the non-electrician members routinely defer to the preferences of the electrician members. Minutes of

board meetings show that the non-electrician members generally are not informed or knowledgeable concerning board business – and that they were not well informed concerning the particular restraint at issue. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

Example 7: The state board of electricians consists of four non-electrician members and three practicing electricians. Documents show that the electrician members frequently meet and discuss board business separately from the non-electrician members. On one such occasion, the electrician members arranged for the issuance by the board of written orders to six construction contractors, directing such individuals to cease and desist from providing certain services. The non-electrician members of the board were not aware of the issuance of these orders and did not approve the issuance of these orders. In this scenario, FTC Staff may determine that the active market participants have exercised the decisionmaking power of the board, and that the active supervision requirement is applicable.

2. What constitutes active supervision?

FTC Staff will be guided by the following principles:

- "[T]he purpose of the active supervision inquiry . . . is to determine whether the State has exercised sufficient independent judgment and control" such that the details of the regulatory scheme "have been established as a product of deliberate state intervention" and not simply by agreement among the members of the state board. "Much as in causation inquiries, the analysis asks whether the State has played a substantial role in determining the specifics of the economic policy." The State is not obliged to "[meet] some normative standard, such as efficiency, in its regulatory practices." *Ticor*, 504 U.S. at 634-35. "The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Id*. at 635.

- It is necessary "to ensure the States accept political accountability for anticompetitive conduct they permit and control." *N.C. Dental*, 135 S. Ct. at 1111. *See also Ticor*, 504 U.S. at 636.

- "The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State.' Further, the state supervisor may not itself be an active market participant." *N.C. Dental*, 135 S. Ct. at 1116–17 (citations omitted).

- ➢ The active supervision must precede implementation of the allegedly anticompetitive restraint.

- ➢ "[T]he inquiry regarding active supervision is flexible and context-dependent." "[T]he adequacy of supervision . . . will depend on all the circumstances of a case." *N.C. Dental*, 135 S. Ct. at 1116–17. Accordingly, FTC Staff will evaluate each case in light of its own facts, and will apply the applicable case law and the principles embodied in this guidance reasonably and flexibly.

3. What factors are relevant to determining whether the active supervision requirement has been satisfied?

FTC Staff will consider the presence or absence of the following factors in determining whether the active supervision prong of the state action defense is satisfied.

- ➢ The supervisor has obtained the information necessary for a proper evaluation of the action recommended by the regulatory board. As applicable, the supervisor has ascertained relevant facts, collected data, conducted public hearings, invited and received public comments, investigated market conditions, conducted studies, and reviewed documentary evidence.

  - ✓ The information-gathering obligations of the supervisor depend in part upon the scope of inquiry previously conducted by the regulatory board. For example, if the regulatory board has conducted a suitable public hearing and collected the relevant information and data, then it may be unnecessary for the supervisor to repeat these tasks. Instead, the supervisor may utilize the materials assembled by the regulatory board.

- ➢ The supervisor has evaluated the substantive merits of the recommended action and assessed whether the recommended action comports with the standards established by the state legislature.

- ➢ The supervisor has issued a written decision approving, modifying, or disapproving the recommended action, and explaining the reasons and rationale for such decision.

  - ✓ A written decision serves an evidentiary function, demonstrating that the supervisor has undertaken the required meaningful review of the merits of the state board's action.

  - ✓ A written decision is also a means by which the State accepts political accountability for the restraint being authorized.

Scenario 1: Example of satisfactory active supervision of a state board regulation designating teeth whitening as a service that may be provided only by a licensed dentist, where state policy is to protect the health and welfare of citizens and to promote competition.

- ➢ The state legislature designated an executive agency to review regulations recommended by the state regulatory board. Recommended regulations become effective only following the approval of the agency.

- ➢ The agency provided notice of (i) the recommended regulation and (ii) an opportunity to be heard, to dentists, to non-dentist providers of teeth whitening, to the public (in a newspaper of general circulation in the affected areas), and to other interested and affected persons, including persons that have previously identified themselves to the agency as interested in, or affected by, dentist scope of practice issues.

- ➢ The agency took the steps necessary for a proper evaluation of the recommended regulation. The agency:

  - ✓ Obtained the recommendation of the state regulatory board and supporting materials, including the identity of any interested parties and the full evidentiary record compiled by the regulatory board.

  - ✓ Solicited and accepted written submissions from sources other than the regulatory board.

  - ✓ Obtained published studies addressing (i) the health and safety risks relating to teeth whitening and (ii) the training, skill, knowledge, and equipment reasonably required in order to safely and responsibly provide teeth whitening services (if not contained in submission from the regulatory board).

  - ✓ Obtained information concerning the historic and current cost, price, and availability of teeth whitening services from dentists and non-dentists (if not contained in submission from the regulatory board). Such information was verified (or audited) by the Agency as appropriate.

  - ✓ Held public hearing(s) that included testimony from interested persons (including dentists and non-dentists). The public hearing provided the agency with an opportunity (i) to hear from and to question providers, affected customers, and experts and (ii) to supplement the evidentiary record compiled by the state board. (As noted above, if the state regulatory board has previously conducted a suitable public hearing, then it may be unnecessary for the supervising agency to repeat this procedure.)

- ➢ The agency assessed all of the information to determine whether the recommended regulation comports with the State's goal to protect the health and

welfare of citizens and to promote competition.

- The agency issued a written decision accepting, rejecting, or modifying the scope of practice regulation recommended by the state regulatory board, and explaining the rationale for the agency's action.

Scenario 2: Example of satisfactory active supervision of a state regulatory board administering a disciplinary process.

A common function of state regulatory boards is to administer a disciplinary process for members of a regulated occupation. For example, the state regulatory board may adjudicate whether a licensee has violated standards of ethics, competency, conduct, or performance established by the state legislature.

Suppose that, acting in its adjudicatory capacity, a regulatory board controlled by active market participants determines that a licensee has violated a lawful and valid standard of ethics, competency, conduct, or performance, and for this reason, the regulatory board proposes that the licensee's license to practice in the state be revoked or suspended. In order to invoke the state action defense, the regulatory board would need to show both clear articulation and active supervision.

- In this context, active supervision may be provided by the administrator who oversees the regulatory board (*e.g.*, the secretary of health), the state attorney general, or another state official who is not an active market participant. The active supervision requirement of the state action defense will be satisfied if the supervisor: (i) reviews the evidentiary record created by the regulatory board; (ii) supplements this evidentiary record if and as appropriate; (iii) undertakes a de novo review of the substantive merits of the proposed disciplinary action, assessing whether the proposed disciplinary action comports with the policies and standards established by the state legislature; and (iv) issues a written decision that approves, modifies, or disapproves the disciplinary action proposed by the regulatory board.

Note that a disciplinary action taken by a regulatory board affecting a single licensee will typically have only a de minimis effect on competition. A pattern or program of disciplinary actions by a regulatory board affecting multiple licensees may have a substantial effect on competition.

The following do <u>not</u> constitute active supervision of a state regulatory board that is controlled by active market participants:

- The entity responsible for supervising the regulatory board is itself controlled by active market participants in the occupation that the board regulates. *See N.C. Dental*, 135 S. Ct. at 1113-14.

- A state official monitors the actions of the regulatory board and participates in deliberations, but lacks the authority to disapprove anticompetitive acts that fail to accord with state policy. *See Patrick v. Burget*, 486 U.S. 94, 101 (1988).

- A state official (*e.g.*, the secretary of health) serves ex officio as a member of the regulatory board with full voting rights. However, this state official is one of several members of the regulatory board and lacks the authority to disapprove anticompetitive acts that fail to accord with state policy.

- The state attorney general or another state official provides advice to the regulatory board on an ongoing basis.

- An independent state agency is staffed, funded, and empowered by law to evaluate, and then to veto or modify, particular recommendations of the regulatory board. However, in practice such recommendations are subject to only cursory review by the independent state agency. The independent state agency perfunctorily approves the recommendations of the regulatory board. *See Ticor*, 504 U.S. at 638.

- An independent state agency reviews the actions of the regulatory board and approves all actions that comply with the procedural requirements of the state administrative procedure act, without undertaking a substantive review of the actions of the regulatory board. *See Patrick*, 486 U.S. at 104-05.

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LSA-R.S. 37:41

§ 41. Short title

Effective: May 30, 2018
Currentness

This Chapter shall be known and may be cited as the "Occupational Board Compliance Act".

Credits
Added by Acts 2018, No. 623, § 1, eff. May 30, 2018.

LSA-R.S. 37:41, LA R.S. 37:41
Current through the 2023 First Extraordinary, Regular, and Veto Sessions.

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LSA-R.S. 37:42

§ 42. Legislative policy

Effective: May 30, 2018
Currentness

By establishing and executing the policies provided in this Chapter, the state intends to ensure that occupational licensing boards and board members will avoid liability under federal antitrust laws.

Credits
Added by Acts 2018, No. 623, § 1, eff. May 30, 2018.

LSA-R.S. 37:42, LA R.S. 37:42
Current through the 2023 First Extraordinary, Regular, and Veto Sessions.

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LSA-R.S. 37:43

§ 43. Definitions

Effective: August 1, 2022
Currentness

For purposes of this Chapter, the following words have the meaning ascribed to them in this Section, unless the context clearly indicates otherwise:

(1) "Active market participant" means an individual or entity that is any of the following:

(a) Licensed by an occupational licensing board.

(b) A provider of any service subject to the regulatory authority of an occupational licensing board.

(c) Subject to the jurisdiction of an occupational licensing board.

(2) "Active supervision" includes but is not limited to the Occupational Licensing Review Commission's responsibilities to do all of the following:

(a) Review the substance of an occupational regulation proposed by any occupational licensing board.

(b) Approve or disapprove with suggested amendments, or allow an occupational licensing board to withdraw for revision an occupational regulation to ensure compliance with state policy.

(3) "Commission" means the Occupational Licensing Review Commission as provided for in R.S. 37:45.

(4) "Fiduciary" has the same meaning as that term is defined in R.S. 9:3801.

(5) "Least restrictive regulation" means, from least to most restrictive, all of the following:

(a) Market competition.

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(b) Third-party or consumer-created ratings and reviews.

(c) Specific private civil cause of action to remedy consumer harm as provided in the Unfair Trade Practices and Consumer Protection Law, R.S. 51:1401 et seq.

(d) Regulation of the process of providing the specific goods or services to consumers.

(e) Inspection.

(f) Bonding or insurance.

(g) Registration.

(h) Occupational license.

(6) "Occupational license" means a nontransferable authorization granted by an occupational licensing board for an individual or entity meeting personal qualifications, as that term is defined in this Section, in order to fulfill a legitimate fiduciary, public health, safety, or welfare objective.

(7) "Occupational licensing board" means any state executive branch board, commission, department, or other agency that is all of the following:

(a) Regulates the entry of persons into, or regulating the conduct of persons within, a particular profession or occupation.

(b) Authorized to issue and revoke occupational licenses or registrations.

(c) Controlled by active market participants.

(8) "Occupational regulation" means a rule, regulation, restraint, practice, or policy allowing an individual to use an occupational title or work in a lawful occupation, including but not limited to registrations and occupational licenses in order to fulfill a legitimate fiduciary, public health, safety, or welfare objective or a financial, tax, or accounting objective. "Occupational regulation" excludes any license, permit, or regulation established by a parish or municipality.

(9) "Personal qualifications" means the criteria related to an individual's personal background and characteristics, including completion of an approved educational program, satisfactory performance on an examination or other assessment, work experience, other evidence of attainment of requisite skills or knowledge, moral standing, criminal history, and completion of continuing education.

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Credits

Added by Acts 2018, No. 623, § 1, eff. May 30, 2018. Amended by Acts 2022, No. 583, § 1.

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LSA-R.S. 37:44

§ 44. State policy for promulgated occupational regulations

Effective: May 30, 2018
Currentness

For occupational regulations promulgated by occupational licensing boards, each of the following apply as policy of this state:

(1) The increase of economic opportunities for all of its citizens by promoting competition and thereby encouraging innovation and job growth to the extent those values can be achieved without harm or threat of significant harm to public health, safety, or welfare.

(2) Use of the least restrictive regulation necessary to protect consumers from present or potential harm that threatens public health, welfare, or safety.

(3) Nothing in this Chapter shall be construed to restrict an occupational licensing board from requiring, as a condition of licensure or registration, that an individual's personal qualifications or entity's qualifications include obtaining or maintaining certification from an organization that credentials individuals in the relevant occupation, field, or industry.

Credits
Added by Acts 2018, No. 623, § 1, eff. May 30, 2018.

LSA-R.S. 37:44, LA R.S. 37:44
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LSA-R.S. 37:45

§ 45. Occupational Licensing Review Commission

Effective: August 1, 2022
Currentness

A. (1) There is hereby created the Occupational Licensing Review Commission to be composed of the governor or his designee, the president of the Senate or his designee, the speaker of the House of Representatives or his designee, the secretary of state or his designee, the chair of the Senate Committee on Commerce, Consumer Protection, and International Affairs or his designee, the chair of the House Committee on Commerce or his designee, the commissioner of agriculture or his designee, the commissioner of insurance or his designee, and the state treasurer or his designee. The governor shall be the chairman of the commission and the secretary of state shall be the secretary. The commission shall meet as needed or as called by the chair and such meetings shall be subject to the Open Meetings Law. A majority of the members constitutes a quorum at any meeting. Any final action taken by the commission requires the affirmative vote of a majority of the members.

(2) The office of the governor shall provide such support of the commission necessary to accomplish the purposes of this Chapter, including but not limited to research and clerical assistance. Any department, division, board, bureau, commission, or agency of the state shall provide, at the request of the chair of the commission, such assistance and data as will enable the commission to carry out its duties.

B. The commission is responsible for the active supervision of state executive branch occupational licensing boards controlled by active market participants to ensure compliance with state policy in the adoption of occupational regulations promulgated by an occupational licensing board. The required active supervision described in this Chapter does not extend to individual disciplinary actions taken or imposed by an occupational licensing board as to any active market participant subject to the jurisdiction of the occupational licensing board.

C. (1) An occupational licensing board shall submit any occupational regulation it seeks to promulgate to the commission prior to the board submitting a notice of intent to the office of the state register if the occupational regulation is subject to the Administrative Procedure Act.

(2) The commission shall review each occupational regulation submitted to ensure compliance with the state policy as provided in R.S. 37:44. This review may include any Federal Trade Commission Guideline adopted by the commission.

(3) Following the review, the commission shall do either of the following:

(a) Approve the occupational regulation and authorize the occupational licensing board to initiate promulgation of the regulation in accordance with the Administrative Procedure Act. This approval shall be in writing and explain the rationale for the action.

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(b)(i) Disapprove the occupational regulation with any recommended amendments and require the occupational licensing board to resubmit the occupational regulation for approval prior to promulgating the regulation in accordance with the Administrative Procedure Act.

(ii) Any recommended amendments shall be provided to the occupational licensing board for its further consideration within thirty days of the date the occupational licensing board provides the proposed regulation to the commission for review.

(iii) The disapproval shall be in writing and explain the rationale for the action.

(iv) In the event the commission elects to disapprove the regulation with suggested amendments, the occupational licensing board shall not go forward with promulgation of the proposed regulation until such time as the occupational regulation is approved by the commission.

D. Prior to submitting the notice of final regulation to the proper legislative oversight committees, the occupational licensing board shall submit such notice to the commission with a summary of any changes made to the proposed regulation or indicate that no changes were made to the proposed regulation. The submission shall include any comments received during the comment period or a recording or the minutes of any proceeding.

(1) If there are changes to the proposed regulation, the commission shall review the changes to the proposed regulation and take any action provided in Subsection C of this Section.

(2) If there are no changes to the proposed regulation or the commission approves the proposed regulation with submitted changes, the occupational licensing board shall submit the notice of final regulation to the proper legislative oversight committees.

E. If the proposed occupational regulation is not subject to promulgation and adoption in accordance with the Administrative Procedure Act, an occupational licensing board shall submit such proposed regulation to the commission for approval prior to enforcement.

F. (1) Emergency rules adopted by an occupational licensing board shall not be subject to the active supervision of the commission as provided in this Section.

(2) However, the occupational licensing board shall submit such emergency rule to the commission on the same day the rule is submitted to the office of the state register.

G. The commission shall issue resolutions necessary to effectuate the provisions of this Chapter, including the process, procedures, and timelines that will govern any submission filed in accordance with this Chapter.

H. Nothing in this Chapter shall be interpreted to subject the commission to any of the administrative procedures of the Administrative Procedure Act.

Credits

Added by Acts 2018, No. 623, § 1, eff. May 30, 2018. Amended by Acts 2022, No. 119, § 1.

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LSA-R.S. 37:46

§ 46. Nonapplicablity

Effective: May 30, 2018
Currentness

The provisions of this Chapter are not applicable to occupational licensing boards that are not controlled by active market participants.

Credits
Added by Acts 2018, No. 623, § 1, eff. May 30, 2018.

LSA-R.S. 37:46, LA R.S. 37:46
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LSA-R.S. 37:47

§ 47. Interpretation

Effective: May 30, 2018
Currentness

Nothing in this Chapter shall be construed to prevent or limit any occupational licensing board from granting or recognizing reciprocity or mobility in the licensing, registration, or certification of occupations or professions where an occupational licensing board has established or seeks to establish occupational regulations providing for reciprocity or mobility of licensed, registered, or certified occupations or professions as authorized by state law.

Credits
Added by Acts 2018, No. 623, § 1, eff. May 30, 2018.

LSA-R.S. 37:47, LA R.S. 37:47
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Chapter 4. Attorney General (Refs & Annos)

LSA-R.S. 49:260

§ 260. Department of Justice Occupational Licensing Review Program

Effective: August 1, 2021
Currentness

A. It is the policy of the state that where the state finds it necessary to displace competition, occupational licensing boards shall use the least restrictive regulation to protect the public from present, significant, and substantiated harms that threaten public health, safety, or welfare. Active state supervision of occupational regulatory actions is a method of ensuring adherence to this clearly articulated state policy. By establishing this program, the state intends to ensure that participating boards and board members will avoid liability under federal antitrust laws.

B. In addition to any other powers, duties, or authority granted to the attorney general and the Department of Justice by the constitution and laws of this state, the attorney general shall have the authority to enter into an agreement to provide active supervision of proposed occupational regulations and proposed anti-competitive disciplinary actions of a state occupational licensing board. Such active supervision shall be performed in accordance with this Section and the terms of the written agreement between the occupational licensing board and the Department of Justice. Participating licensing boards shall pay to the Department of Justice annually the amount set forth in the agreement. The dollar amount set forth in the agreement shall be equal to or less than the number of licensees multiplied by ten.

C. Participation in the Department of Justice Occupational Licensing Review Program established in this Section is voluntary and optional. An occupational licensing board that chooses to participate in the program established in this Section is not required to comply with the requirements of the Occupational Board Compliance Act, R.S. 37:41 et seq.

D. (1) Prior to submitting a notice of final regulation to the proper legislative oversight committees, the occupational licensing board shall submit any occupational regulation it seeks to promulgate, together with a report of any public comments received, agency response to comments, and the statement of proposed fiscal impact, to the Department of Justice.

(2) The Department of Justice shall review the substance of each proposed occupational regulation submitted to ensure compliance with clearly articulated state policy pursuant to this Section and may also consider any other applicable law.

(3) Following the review, the Department of Justice shall do one of the following:

(a) Approve the proposed occupational regulation and authorize the occupational licensing board to proceed with promulgation.

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(b) Disapprove the proposed occupational regulation and require the occupational licensing board to revise and resubmit the occupational regulation for approval.

(4) The decision by the Department of Justice shall be communicated in writing with an explanation of the basis for the decision.

(5) Compliance with this Subsection shall not be required for emergency rules adopted pursuant to the Administrative Procedure Act, but emergency rules shall not be used to circumvent active supervision of proposed occupational regulations. Nothing in this Subsection shall prevent the occupational licensing board from electing to submit an emergency rule that meets the definition of occupational regulation for review.

E. (1) Prior to taking an anti-competitive disciplinary action, the occupational licensing board shall submit the proposed action and supporting documentation to the Department of Justice.

(2) The Department of Justice shall review the substance of the proposed disciplinary action to ensure compliance with clearly articulated state policy pursuant to this Section and may also consider any other applicable law.

(3) Following the review, the Department of Justice shall do any of the following:

(a) Determine that the proposed disciplinary action does not implicate any market competition interests.

(b) Approve the proposed disciplinary action as a proper exercise of state regulatory action in accordance with clearly articulated state policy, notwithstanding possible impact on market competition, and authorize the occupational licensing board to proceed with imposing the disciplinary action.

(c) Disapprove of the proposed disciplinary action and decline to authorize its imposition.

(4) The decision by the Department of Justice shall be communicated in writing with an explanation of the basis of the decision. This written explanation shall be considered confidential until the disciplinary action has become a final determination of the board.

(5) All records, writings, accounts, letters, exhibits, data, pictures, drawings, charts, reports, or photographs shall be considered to be in the custody and control of the occupational licensing board, and all exemptions contained in R.S. 44:1 et seq. or any other provision of law shall continue to apply.

F. (1) There is hereby established in the state treasury a special fund to be known as the Department of Justice Occupational Licensing Review Program Fund, hereafter referred to in this Section as “the fund”.

(2) Notwithstanding any provision of law to the contrary, after compliance with the requirements of Article VII, Section 9(B) of the Constitution of Louisiana, relative to the Bond Security and Redemption Fund, and after a sufficient amount is allocated from that fund to pay all of the obligations secured by the full faith and credit of the state which become due and payable within

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any fiscal year, the treasurer shall pay an amount into the fund equal to the amount of monies received by the attorney general from participating occupational licensing boards as compensation for the regulatory review activities undertaken pursuant to this Subsection.

(3) Monies in the fund shall be subject to annual appropriation to the Department of Justice solely for the support of occupational licensing board regulatory review activities and general operating expenses. Monies so appropriated shall be used to supplement the department's budget and shall not be used to displace, replace, or supplant appropriations from the state general fund for operations of the department below the level of state general fund appropriation for the foregoing year.

(4) All unencumbered and unexpended monies in the fund at the end of the fiscal year shall remain in the fund. Monies in the fund shall be invested by the treasurer in the same manner as those in the state general fund, and any interest earned on such investment shall be deposited in and credited to the fund.

G. For the purposes of this Section:

(1) “Active market participant” means an individual or entity that is any of the following:

(a) Licensed by the occupational licensing board to which they are appointed, including subspecialties licensed by that board.

(b) A provider of any service subject to the regulatory authority of that occupational licensing board.

(2) “Active supervision” shall include all of the following duties and powers:

(a) Independent review and evaluation of the substance of the proposed occupational regulation or the proposed anti-competitive disciplinary action, not merely the procedures followed to produce it.

(b) The ability to approve, reverse, veto, or modify a proposed occupational regulation or proposed anti-competitive disciplinary action to ensure it complies with state policy rather than merely a party's individual interests.

(c) The ability to obtain the information necessary to perform a proper evaluation of the occupational board's proposed occupational regulation or the proposed anti-competitive disciplinary action.

(d) A written decision outlining the reasons and rationale for approving, reversing, vetoing, or modifying the recommended action.

(3) “Occupational licensing board” means any state executive branch board, commission, department, or other agency that is all of the following:

(a) Regulating the entry of persons into, or regulating the conduct of persons within, a particular profession or occupation.

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(b) Authorized to issue or revoke occupational licenses or registrations.

(c) Controlled by active market participants.

(4) "Occupational regulation" means a rule as defined in the Administrative Procedure Act that has reasonably foreseeable anti-competitive effects. Any license, permit, or regulation established by a parish, municipality, or a board not composed of a controlling number of active market participants is excluded.

H. The Department of Justice is authorized to promulgate rules and procedures as necessary to implement the program established by this Section.

I. Nothing in this Section is intended to restrict an occupational licensing board from requiring, as a condition of licensure or renewal of licensure, that an individual's personal qualifications include obtaining or maintaining certification from a private organization that credentials individuals in the relevant occupation.

J. The provisions of this Section shall not apply to the regulation of the practice of law.

Credits
Added by Acts 2021, No. 399, § 1.

LSA-R.S. 49:260, LA R.S. 49:260
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