SUPREME COURT OF THE UNITED STATES

No. 91–72

FEDERAL TRADE COMMISSION, PETITIONER *v.* TICOR TITLE INSURANCE COMPANY ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

[June 12, 1992]

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 abandonment of 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 (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 of our "active supervision" doctrine, which has not been challenged here; and because I am skeptical about the *Parker* v. *Brown* exemption for state-programmed private collusion in the first place.