# 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]

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 11. 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 (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." *Id.*, at 351.[1] "The *Parker*

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[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 8. 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

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 (1985) (footnote omitted).

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freedom to compete in our free market system, but it does not implicate the freedom of the States in deciding whether to regulate.

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 (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 (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. 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.

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 by the private actors facing antitrust liability.[2] Our most recent formulation of the "active supervision" requirement was announced in *Patrick* v. *Burget*, 486 U. S. 94 (1988), where we concluded that to satisfy the

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[2]In *324 Liquor Corp.* v. *Duffy*, 479 U. S. 335 (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 *Midcal*, gave no power to the state agency to review or establish the reasonableness of the price schedules "posted" by the wholesalers. *Id.*, at 345.

“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. 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 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 doesn't 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 11. Any other formulation, we are told, will remove the active supervision requirement all together 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 (1985).

The Court insists that its newly required "active supervision" will "increase the States' regulatory flexibility." *Ante*, at 12. 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. *Southern Motor Carriers Rate Conference, Inc.* v. *United States, supra*, at 51. 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 11. A State must establish, staff, and fund a program to approve jointly set rates or prices in order for any activity undertaken by private individuals under that program to be immune under the antitrust

[3]The state regulatory programs in *California Retail Liquor Dealers Assn.* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), *Patrick* v. *Burget,* 486 U.S. 94 (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.

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 14.[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 13. 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 10. 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.

The Court of Appeals found—properly, in my view—

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[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 (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.

that while the States at issue here did not regulate respondents' rates with the vigor the petitioner would like, 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 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.