No. 97-30887

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

SURGICAL CARE CENTER OF HAMMOND, L.C., d/b/a
ST. LUKE'S SURGICENTER
Plaintiff-Appellant,
v.

HOSPITAL SERVICE DISTRICT NO. 1 OF TANGIPAHOA
PARISH, d/b/a NORTH OAKS MEDICAL CENTER, and
QUORUM HEALTH RESOURCES, INC.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF LOUISIANA

# SUPPLEMENTAL *EN BANC* BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE URGING REVERSAL IN SUPPORT OF APPELLANT

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TABLE OF CONTENTS

## TABLE OF AUTHORITIES

*CASES* *Page(s)*

*STATUTES AND RULES*



*OTHER AUTHORITIES*

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## STATEMENT OF INTEREST

The United States and the Federal Trade Commission (FTC) are principally responsible for enforcing the federal antitrust laws. The district court's erroneous

interpretation of the scope of state action immunity from the antitrust laws for state political subdivisions threatens both public and private enforcement of those laws. Accordingly, the United States and the FTC have a strong interest in the proper determination of this appeal. These concerns previously led us to file an amicus brief in support of rehearing en banc, as well as an amicus brief in a similar case now pending in this Court, *see* Brief for the United States and the Federal Trade Commission as Amici Curiae in Support of Appellant, *Willis-Knighton Medical Center v. City of Bossier City*, No. 97-31199 (5th Cir.). We file pursuant to the first sentence of Fed. R. App. P. 29(a).

## QUESTION PRESENTED

Whether the alleged anticompetitive conduct of a Louisiana hospital service district is immune from the federal antitrust laws as state action simply on the ground that anticompetitive conduct was foreseeable in light of state statutes authorizing the hospital district to contract and otherwise act like a private market participant, without regard to whether that conduct was pursuant to a state policy to displace competition by regulation, monopoly public service, or any other alternative to the competitive market.

## STATEMENT

1. St. Luke's SurgiCenter, an outpatient surgery center, sued North Oaks Medical Center, whose nearby hospital also offered, among other things, outpatient surgical services. The complaint claimed antitrust violations under Section 2 of the Sherman Act, 15 U.S.C. 2, based on alleged anticompetitive acts including "exclusive" contracts with five managed care plans, *Surgical Care Center of Hammond v. Hospital Service District No. 1*, No. Civ. 97-1840, 1997 WL 465289, at *1 (E.D. La. Aug. 11, 1997), (i.e., contracts preventing the plans' members from using St. Luke's services, Complaint ¶ 25), as well as a diverse array of other actions and refusals to act. *Surgical Care Center of Hammond v. Hospital Service District No. 1*, 153 F.3d 220, 222 n.1 (5th Cir. 1998), *vacated upon grant of reh'g en banc*, Order (5th Cir. Nov. 24, 1998); Complaint ¶ 38.[1]

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[1]Because St. Luke's complaint was dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P., we treat its allegations as true. *Green v. State Bar of Texas*, 27 F.3d 1083 (5th Cir. 1994). We address only questions of state action immunity, and so take no position on whether the alleged conduct would violate the antitrust laws: while most economic conduct is subject to the federal antitrust laws, little of it violates the antitrust laws. In addition, we note that St. Luke's concedes that any federal antitrust damage claim against North Oaks is barred by statute, 15 U.S.C. 35. Complaint ¶ 42. Finally, we do not address here immunity or damage issues related specifically to defendant Quorum Health Resources, Inc., which allegedly manages and operates North Oaks pursuant to a management agreement with North Oaks. Complaint ¶ 4.

2. The district court found the challenged conduct to be immune from the federal antitrust laws under the state action immunity doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), and therefore dismissed pursuant to Rule 12(b)(6), Fed. R. Civ. P. Relying upon this Court's decision in *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), it determined that the question before it was "whether the alleged noncompetitive activities of North Oaks may be fairly considered the foreseeable result of the state policy articulated in the Louisiana Hospital Service District Law, La.R.S. 46:1051 et seq." 1997 WL 465289, at *3. The court then held North Oaks's exclusive contracts were the "foreseeable result" of statutory authority to contract "with any entity to promote the delivery of health services" (*id.* at *4), as were attempts to enter into "whatever contracts . . . North Oaks may have attempted to enter" (*id.* at *5). Moreover, certain "attempts to lure patients from another facility . . . by whatever manner . . . are reasonably foreseeable results of the statutory license for hospitals to develop confidential marketing strategies." *Id.* Finally, without apparent reference to foreseeability, certain other conduct was "clearly in the realm of the routine business decisions concerning day-to-day operations to which the state action immunity should apply." *Id.* All challenged conduct was thus immune.

3. A panel of this Court (Judges King, Smith, and Parker) affirmed. Relying primarily on *Martin*, it held that, as a state political subdivision, North Oaks was "entitled to *Parker* immunity if its anticompetitive conduct is the foreseeable result of the [Louisiana] statutory scheme" authorizing hospital districts and specifying their powers and duties. 153 F.3d at 223. It concluded that "[t]he exclusive nature of the contracts was reasonably foreseeable by the Louisiana legislature" and so held that conduct immune as state action. *Id.* at 225. Regarding the other alleged conduct, the panel said only that "we agree with the district court that while North Oaks may have engaged in 'cutthroat' and 'hardball' business practices by trying to lure patients to North Oaks, it is conduct that is a reasonably foreseeable result of the Louisiana statute." *Id.*

Judge King was "troubled by [this Court's] opinion in *Martin*" but found it to be controlling. *Id.* (King, J., specially concurring).

This Court granted rehearing en banc on November 24, 1998.

## SUMMARY OF ARGUMENT

Relying on "principles of federalism and state sovereignty," the Supreme Court has long held that the Sherman Act does not apply to "anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 370 (1991) (quoting *Parker v. Brown*,

317 U.S. 341, 352 (1943)). State subdivisions, such as municipalities, however, are not sovereign, and they may claim "state action" immunity from the Sherman Act for particular conduct only if they can "demonstrate that their anticompetitive activities were authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985) (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978)). This Court foreshadowed this principle in *Layfayette*, 532 F.2d 431 (5th Cir. 1976), and restated it most recently in *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1040-44 (5th Cir), *cert. denied*, 119 S. Ct. 444 (1998). *See also Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1400 (5th Cir. 1996) (finding Mississippi state policy to displace competition among physicians in a hospital in performing certain critical operations and thus finding state action immunity for exclusive contract to perform such operations).

The district court did not even mention the principle that state action for non-sovereign entities depends on an articulated state policy to displace competition by regulation or monopoly public service. Instead, it erroneously awarded state action immunity because the legislature's delegation of authority to engage in ordinary commercial behavior -- to contract, to engage in strategic

planning, and so forth -- made it "foreseeable" that these activities would be carried out in an anticompetitive manner. This reasoning robs of meaning the Supreme Court's repeated admonitions that the sine qua non of the state action doctrine is a state policy to displace competition, as a sovereign act of government. The district court's reasoning would allow subordinate political subdivisions participating in commercial markets to nullify the procompetitive national policy embodied in the Sherman Act in the absence of any state policy determination that anticompetitive conduct serves the public interest. Indeed, the district court's reasoning results in immunity even if, as in this case, the state has acted to promote competition rather than displace it.

## ARGUMENT

### I. The Supreme Court Has Established That State Action Immunity Protects State Subdivisions Only When They Act Pursuant to State Policy to Displace Competition

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court determined that statutes do not limit the sovereign states' autonomous authority over their own officers, agents, and policies in the absence of clear congressional intent to do so, and it found no such intent in the language or legislative history of the Sherman Act. *Id.* at 351. Accordingly, it held that when a "state in adopting and enforcing [a] 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[,] . . . the Sherman Act did not undertake to prohibit" the restraint. *Id.* at 352. But while states may adopt and implement policies that depart from the policies of the Sherman Act,[2] subordinate political subdivisions, such as hospital districts and municipalities, "are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985). The conduct of such subordinate entities qualifies for state action immunity only if it is undertaken pursuant to a state policy to displace competition in favor of an alternative means of promoting the public interest.

Even explicit state authorization of conduct constituting a Sherman Act violation does not suffice for immunity unless that authorization clearly evidences a state policy to displace competition as the primary means of directing the economy to the common benefit. *Hallie*, 471 U.S. at 39 ("[T]he State may not validate a municipality's anticompetitive conduct simply by declaring it to be lawful."). Accordingly, in *Hallie*, the Court emphasized that the subdivision must

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[2]States do not have unlimited freedom to do so. *See, e.g., California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (affirming order not to enforce state law because of conflict with policies of the Sherman Act). The boundaries of that freedom are not at issue here.

prove not only its authority to act, but also "that a state policy to displace competition exists." *Id.*

The state need not follow any particular formula in expressing its intent to displace competition; indeed, it need not even refer expressly to anticompetitive effects if it is clear from the nature of the policy the state has articulated that it contemplates such an outcome. *See Hallie*, 371 U.S. at 43. The municipal conduct at issue in *Hallie* was a refusal to supply sewage treatment facilities outside the city's borders except to those who agreed to become annexed to the city. *Id.* at 41, 44-45 n.8. The state statute did not refer to competition, but it authorized the city to refuse to provide sewage treatment to adjacent unincorporated areas unless they agreed to annexation, with obvious effects on sewage collection and transportation services competing with the city's. After reviewing "the statutory structure in some detail," *id.* at 41, the Court found it "clear that anticompetitive effects logically would result from this broad authority to regulate." *Id.* at 42. Thus, the Court concluded, "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." *Id.*

Similarly, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the challenged municipal ordinance restricting the size, spacing, and location of new billboards was immune because the state had clearly articulated a policy to rely on zoning rather than competitive market forces to regulate billboards. *Id.* at 373. Although the state legislature had not specifically stated that it expected municipalities to use their zoning powers to limit competition, the Court found "suppression of competition" to be the "foreseeable result" of what the statute authorized because "[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." *Id.*

In short, the critical question in cases like this is whether the state has decided to displace competition (or at least has decided to authorize subdivisions to choose to do so) as an act of government to which federalism principles demand deference. To evidence such a decision sufficiently, the state law must at least clearly articulate a public policy that intrinsically departs from the Sherman Act's competitive model.[3] In the absence of such a state policy, the conduct of a

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[3]Monopoly public service and classic public utility-style regulation are not the only permissible departures from the competitive model. *Omni* offers zoning as another species of regulation, and, as discussed below, *see infra* p. 13, *Martin* can be read as offering another regulatory model, administrative control of work within an institution.

nonsovereign political subdivision, even conduct that falls within its authority under state law, does not constitute state action for purposes of the Sherman Act.

## II. This Court's Precedents Also Hold State Subdivisions Immune Only When They Act Pursuant to State Policy to Displace Competition

This Court's decisions embody the same principles of state action immunity. Indeed, Supreme Court doctrine concerning state action immunity for state subdivisions is rooted in one of this Court's own decisions, and this Court restated that doctrine as recently as April of this year.

*Hallie*'s rule that municipal activities are immune from the federal antitrust policy only if "authorized by the State 'pursuant to state policy to displace competition with regulation or monopoly public service,'" 471 U.S. at 38-39, comes from the plurality opinion in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (opinion of Brennan, J.).[4] *Lafayette* affirmed a decision of this Court, 532 F.2d 431 (5th Cir. 1976), and the seeds of the Supreme Court's rule can be found in Judge Tjoflat's opinion for the Court. Louisiana Power & Light had alleged that certain Louisiana cities had violated

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[4]On this point, three other justices joined Justice Brennan's opinion. Another viewed the requirement that the activity be pursuant to a state policy to displace competition with regulation or monopoly public service as necessary but not sufficient to state action immunity. *Lafayette*, 435 U.S. at 425-26 & n.6 (Burger, C.J., concurring in the judgment). A majority, therefore, supported the requirement.

the federal antitrust laws by, among other things, including anticompetitive covenants in their debentures. Properly rejecting a claim that state action immunity for municipalities was as broad as that for the sovereign states themselves, the Court explained:

> A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. In our opinion, though, it 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.

532 F.2d at 434 (footnotes omitted). This plainly anticipates the principle that a mere grant of power to act does not provide antitrust immunity for all exercises of that power: "[t]he test . . . is whether the challenged action is the type of activity which the legislature intended the governmental body to perform." *Id.* at 435.

Only this past April the Court restated the principles of state action antitrust immunity for subordinate state entities in a case challenging certain rules promulgated by the State Board of Certified Public Accountants of Louisiana. *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033, 1040-44 (5th

Cir.), *cert. denied*, 119 S. Ct. 444 (1998). State action immunity is properly found only if "the alleged anticompetitive conduct [was] taken pursuant to a clearly articulated and affirmatively expressed state policy to displace competition with state regulation." *Id.* at 1041. The state entity must be both "acting within its authority" and acting "pursuant to a clearly established state policy." *Id.* In that case, the relevant statutes authorized the Board to adopt rules to regulate the accounting profession -- "a broad grant of authority which includes the power to adopt rules that may have anticompetitive effects." *Id.* at 1043. Thus, the Court concluded, "the state rejected pure competition among public accountants in favor of establishing a regulatory regime that inevitably has anticompetitive effects." *Id.* at 1044. Accordingly, a "'foreseeable result' of enacting such a statute [is] that the Board may actually promulgate a rule that has anticompetitive effects." *Id.* at 1043. The Board was therefore immune with respect to the challenged rules.

The Court also enunciated the correct principle in *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), although application of that principle was more problematic. Dr. Martin challenged his exclusion from treating end stage renal disease (ESRD) at a municipally owned hospital in Mississippi as a result of the hospital's exclusive contract for ESRD services with

another doctor. This Court found state action immunity, but not because of a mere statutory grant of contractual authority. Instead, it found a state policy to displace competition by allowing contractual exclusivity as an alternative means of controlling the practice of medicine within an individual hospital, and it emphasized that the state had authorized the specific type of contract at issue.

> [T]he Mississippi Code does not merely provide general authority for the hospital to enter contracts. . . . *The very purpose of the statutory authorization is to enable the hospital to displace unfettered competition among physicians* in the performance of critical operations such as chronic dialysis in ESRD units so as to promote efficiency of health care provision, reduce the hospital's supervisory burden, and control its exposure to liability.

86 F.3d at 1400 (emphasis added).[5] The Court thus found a state policy to displace the very competition displacement of which Dr. Martin challenged, and to substitute for that competition a contractual mechanism to regulate conduct.

Although North Oaks contends otherwise (*see* Response of Defendants-Appellees, Hospital Service District No. 1 of Tangipahoa Parish and Quorum Health Resources, LLC to Suggestion for Rehearing En Banc ("Response") at 15-18), both the Eleventh and the Fourth Circuits similarly apply correct principles of state action immunity. The Eleventh Circuit did not reject the principle that immunity depends on a state policy to displace competition by regulation or monopoly public service in *FTC v. Hospital Board of Directors of Lee County*,

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[5]It is uncertain why the *Martin* court concluded that the purpose of the statutory authorization was to enable a hospital to displace competition among physicians. It did state that the Mississippi legislature authorized "a hospital to enter an *exclusive* contract with a single individual," 86 F.3d at 1399 (emphasis added), which may provide some support for the conclusion, but the relevant statute does not mention exclusivity, *see* Miss. Code Ann. § 41-13-35(5)(g), *reprinted at* 86 F.3d at 1399 n.1. Since *Martin* applied the right principles of state action immunity, however, it is of no importance now whether it also reached the right result.

A finding here that Louisiana's statutes embody the same state policy as the *Martin* court found Mississippi statutes to embody would not result in immunity for North Oaks's alleged exclusive contracts. The exclusive contract in *Martin* allegedly eliminated competition among physicians within the contracting hospital, precisely what this Court found Mississippi state policy to support. The exclusive contracts here are wholly different in nature. They allegedly eliminate competition between the contracting hospital and its competitor, a surgical care center, not competition between providers within the hospital itself. A policy to displace competition only in one arena provides no immunity for actions threatening competition in a wholly different arena.

38 F.3d 1184 (11th Cir. 1994). Although we think *Lee County* was wrongly decided for several reasons, the court emphasized legislative contemplation of monopoly public service. It found that the legislature had created the defendant Board at a time when it necessarily acquired a monopoly if it acquired a hospital at all. *Id.* at 1192. The court further found that the legislature, with presumed knowledge of a changed competitive situation in Lee County, subsequently gave the Board further powers which, if exercised at all, would necessarily result in precisely the lessening of competition the FTC challenged. *Id.* Moreover, *Coastal Neuro-Psychiatric Ass'n v. Onslow Mem. Hosp.*, 795 F.2d 340, 342 (4th Cir. 1986), *discussed at* Response 17-18, undermines North Oaks's argument, for the Fourth Circuit there relied on the regulatory character of the statute at issue: "[t]he North Carolina legislature must have foreseen this anticompetitive consequence [of local use of statutory powers] and decided that the regulatory benefits conferred by the statute simply outweighed it."

## III. The District Court Erroneously Held Conduct Immune From The Sherman Act In The Absence Of A State Policy To Displace Competition

The district court, while recognizing the state action doctrine's requirement of a clear articulation of state policy, *see* 1997 WL 465289, at *3, overlooked the requirement that the articulated state policy be to displace competition by

regulation or monopoly public service. Having thus truncated the state action doctrine, it found that a statute intended to "cure a competitive disadvantage" previously suffered by certain public hospitals, *id.* at *4, somehow gave those hospitals license to act anticompetitively with impunity. It awarded state action immunity primarily on the foreseeablity that a public business entity, armed with the authority to take actions private business entities routinely take (such as entering into contracts), might act anticompetitively, just as some private business entities do from time to time.[6]

The district court misapplied the Supreme Court's foreseeability test. The Supreme Court's state action decisions use the concept of foreseeability to mean that the nature of the authorized conduct itself -- such as regulation (*Omni*) or monopoly public service (*Hallie*) -- demonstrated that the state legislature must

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[6]The predictability of anticompetitive conduct is legendary: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the public, or in some contrivance to raise prices." Adam Smith, *An Inquiry into the Nature and Causes of the Wealth of Nations* 128 (Modern Library ed., 1937).

With respect to certain conduct "in the realm of . . . routine business decisions concerning day-to-day operations," 1997 WL 465289, at *5, the court appears to have found state action immunity on the ground that such immunity "should apply" since otherwise hospital service districts, like private hospitals, would be subject to antitrust challenges. Although the court may have intended to apply its foreseeability theory here as well, it plainly erred to the extent it rested immunity on its belief that hospital service districts simply should not be subject to the federal antitrust laws as other institutions routinely are.

have contemplated that competition would be displaced, i.e., that the authorized conduct would have anticompetitive effects. Here, however, the state authorized only functions that are routinely carried out by economic actors in freely competitive markets without anticompetitive consequences. None of these authorizations implies a policy to depart from the Sherman Act's competitive model in the markets in which North Oaks competes. Indeed, the district court itself noted the statutory purpose of removing a competitive disadvantage previously handicapping hospital service districts, 1997 WL 465289, at *4, which suggests a policy to advance, not displace, the competitive model.

The district court's incorrect test of state action immunity has dangerous consequences. It means that any time a state authorizes its subdivisions to compete on more or less equal terms with private firms in the competitive marketplace, by that authorization it also grants these subdivisions a special license to violate the antitrust laws with impunity, and thereby to limit the very competition the authorization was intended to foster. This would divorce the state action doctrine from its roots in "principles of federalism and state sovereignty." *See Omni*, 499 U.S. at 370; *Parker*, 317 U.S. at 352. It would allow nonsovereign, subordinate entities independently to decide -- without any state policy to displace competition -- not to obey the federal antitrust laws when

participating in competitive markets. Such a result has nothing to do with deferring to state sovereignty.

Indeed, this mistaken version of the state action doctrine has the potential to undercut state policy as well as federal law. *See Hallie*, 471 U.S. at 47 (noting that the requirement that a municipality act pursuant to state policy provides protection against the danger that the municipally owned enterprise "will seek to further purely parochial public interests at the expense of more overriding state goals"). Automatically affording subdivisions immunity from the Sherman Act when the state has sought to promote competition by authorizing their participation on an equal basis in competitive markets interferes with the state's ability to implement its policies. As the Supreme Court observed in rejecting a broad claim of state action immunity in *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 635 (1992), "[i]f 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."

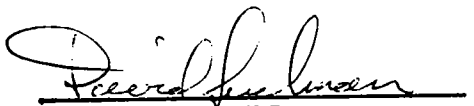
At the same time the ruling undermines the principle that in enacting the Sherman Act, "Congress mandated competition as the polestar by which all must be guided in ordering their business affairs." *Lafayette*, 435 U.S. at 406. The Supreme Court in *Lafayette* and subsequent decisions has made it clear that this

fundamental national policy applies equally to local government participants in competitive markets. It is true that the Court has held that municipalities, unlike private defendants, need not be actively supervised by the state in carrying out a state policy to displace competition. But that holding rested on the assumption that state action immunity would be available to the municipality only if it was acting pursuant to a clearly articulated state policy. When combined with the protections afforded by the political process, a sufficiently clear articulation of state policy adequately protects the public interest. *Hallie*, 471 U.S. at 46-47. By contrast, granting a nonsovereign entity a license to violate the federal antitrust laws when the state has merely authorized participation in a competitive market "would impair the goals Congress sought to achieve by those laws . . . without furthering the policy underlying the *Parker* 'exemption.'" *Lafayette*, 435 U.S. at 415.

## CONCLUSION

The district court's order dismissing the case on the ground that the conduct alleged is immune from the federal antitrust laws under the state action doctrine should be reversed, and the cause should be remanded for further proceedings.

Respectfully submitted.



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## CERTIFICATE OF SERVICE

I hereby certify that on this 15th day of December 1998, I caused two copies of the Supplemental En Banc Brief for the United States and the Federal Trade Commission as Amici Curiae Urging Reversal in Support of Appellant to be served by commercial carrier for delivery within 3 calendar days, on

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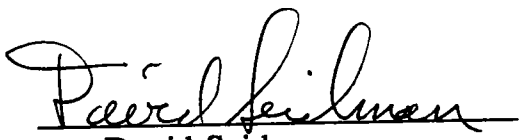

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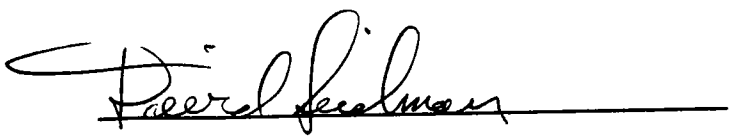

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