THE UNITED STATES DEPARTMENT OF JUSTICE ANTITRUST DIVISION PUBLIC ROUNDTABLE SERIES ON COMPETITION AND DEREGULATION, FIRST ROUNDTABLE ON STATE ACTION, STATUTORY EXEMPTIONS AND IMPLIED IMMUNITIES,
COMMENT OF THE GLOBAL ANTITRUST INSTITUTE,
ANTONIN SCALIA LAW SCHOOL, GEORGE MASON UNIVERSITY

March 13, 2018

This comment is submitted in response to the United States Department of Justice Antitrust Division's ("Antitrust Division") Public Roundtable Discussion Series on Competition and Deregulation—First Roundtable. We appreciate the opportunity to comment and commend the Antitrust Division for inviting discussion on these important topics. We submit this comment based upon our extensive experience and expertise in antitrust law and economics.[1]

GENERAL COMMENTS

From an economic standpoint, both the state action and implied immunity doctrines question if and when the displacement of competition by regulation should be

[1] The Global Antitrust Institute (GAI), a division of the Antonin Scalia Law School at George Mason University (Scalia Law), is a leading international platform for economic education and research that focuses upon the legal and economic analysis of key antitrust issues confronting competition agencies and courts around the world. University Professor Joshua D. Wright, Ph.D. (economics), is the Executive Director of the GAI and a former U.S. Federal Trade Commissioner. John M. Yun, Ph.D. (economics), is the Director of Economic Education, Associate Professor of Law at Scalia Law, and former Acting Deputy Assistant Director in the Bureau of Economics, Antitrust Division, at the U.S. Federal Trade Commission. Professor of Law Douglas H. Ginsburg is a Senior Judge, United States Court of Appeals for the District of Columbia Circuit, Chairman of the GAI's International Board of Advisors, and a former Assistant Attorney General in charge of the Antitrust Division of the U.S. Department of Justice. Associate Dean for Research and Faculty Development and Professor of Law Bruce H. Kobayashi, Ph.D. (economics), is a GAI Senior Scholar and Founding Director. Tad Lipsky is the Director of GAI's Competition Advocacy Program, Adjunct Professor at Scalia Law, a former Deputy Assistant Attorney General for Antitrust and a former Acting Director, Bureau of Competition, U.S. Federal Trade Commission.

subject to scrutiny under the antitrust laws. State action immunity focuses on laws and regulations undertaken by states, while implied immunity focuses on conflicting federal regulations. But both doctrines face the policy challenge of striking the right balance between competing interests that are often hard to measure. In this comment, we share our perspective on how each doctrine should be understood in light of its economic foundation.

1. *How implied immunities and exemptions have affected antitrust enforcement.* We examine the appropriate roles of Congress and the courts in creating immunities and exemptions from antitrust laws. We discuss whether the "implied repeal" doctrine in *Credit Suisse v. Billing*, 551 U.S. 264 (2007), helps or hampers competition.

The Supreme Court's implied immunity doctrine is based upon a marginal analysis that considers both the costs and the benefits of extending antitrust enforcement given an existing regulatory framework.[2] At its core, the implied immunity doctrine restricts the domain of the antitrust laws when the marginal benefits

[2] On the general economic analysis of implied immunity and an application to patent holdup, *see* Bruce H. Kobayashi & Joshua D. Wright, *Federalism, Substantive Preemption, and Limits on Antitrust: An Application to Patent Holdup*, 5 J. COMPETITION L. & ECON. 469 (2009) [hereinafter Kobayashi & Wright, *An Application to Patent Holdup*]; Bruce H. Kobayashi & Joshua D. Wright, *The Limits of Antitrust and Patent Holdup: A Reply to Cary et al.*, 78 ANTITRUST L.J. 701, 717 (2012) [hereinafter Kobayashi & Wright, *A Reply to Cary et al.*]. *See also* Jacob A. Kling, *Securities Regulation in the Shadow of the Antitrust Laws: The Case for a Broad Implied Immunity Doctrine*, 120 YALE L.J. 910 (2011). The most closely related economic analysis comes from Ganglmair, Froeb, and Werden, who demonstrate that ex post antitrust litigation cannot improve upon bargaining outcomes in the SSO context and therefore may act as a "tax" on innovation. *See* Bernhard Ganglmair, Luke M. Froeb & Gregory J. Werden, *Patent Hold Up and Antitrust: How a Well-Intentioned Rule Could Retard Innovation*, 60 J. INDUS. ECON. 249 (2012); *see also* Timothy J. Brennan, *Essential Facilities and Trinko: Should Antitrust and Regulation Be Combined?*, 61 FED. COMM. L.J. 133 (2008).

of its application to particular conduct exceed the marginal costs of doing so. The potential social benefits and costs of the application of antitrust law and remedies in the context of an existing regulatory framework include not only administrative costs, but also those arising from changes in deterrence levels. This benefit-cost approach is thus necessarily predicated upon the error-cost framework the Court has adopted in many antitrust actions, including *Brooke Group*,[3] *Trinko*,[4] *Weyerhauser*,[5] *Leegin*,[6] *linkLine*,[7] and *Twombly*.[8]

Credit Suisse,[9] *Discon*,[10] and *Trinko*[11] set forth the implied immunity doctrine by focusing upon the two main variables in the Court's marginal analysis: (1) the Courts' ability to identify accurately the competitive effects of the conduct and to avoid error – either false positives or false negatives; and (2) whether the existing regulatory scheme covers the underlying conduct effectively. With respect to the first factor, the Court's analysis teaches that where concerns with false positives are especially high – such as is the case with unilateral conduct and allegations of monopolization – the net benefit from adding antitrust enforcement to a regulatory scheme is likely negative. Conversely, where the antitrust laws may be applied without significant concern for

---

[3] Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209, 223 (1993).
[4] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).
[5] Weyerhaeuser Co. v. Ross-Simmons Hardwood Lumber Co., 549 U.S. 312, 324–26 (2007).
[6] Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007).
[7] Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009).
[8] Bell Atl. Corp. v. Twombly, 550 U.S. 544 (2007).
[9] Credit Suisse Sec. (USA) LLC v. Billing, 551 U.S. 264 (2007).
[10] NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).
[11] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

error – such as with cartels – the net benefits of additional deterrence are high and potentially positive. And with respect to the second factor, the Court's analysis demonstrates that the net benefit of additional antitrust enforcement is smaller when competent regulatory schemes and remedies exist and they are able to deal with the underlying conduct without the help of antitrust.

In *Credit Suisse*,[12] the Court dismissed allegations by the plaintiff class that leading underwriting firms had conspired to manipulate the collective initial public offering process by driving up the prices of less attractive shares in the aftermarket in violation of Section 1 of the Sherman Act. The majority held that the antitrust claims against the investment banks were impliedly preempted under a "clear incompatibility" standard, which featured four factors: (1) the existence of regulatory authority under the securities law to supervise the activities in question; (2) evidence that the responsible regulatory entities exercise that authority; (3) a risk that the securities and antitrust laws, if both applicable, would produce conflicting guidance, requirements, duties, privileges, or standards of conduct; and (4) whether the affected practices lie squarely within an area of financial market activity that the securities laws seek to regulate.[13]

---

[12] *Credit Suisse*, 551 U.S. at 264.

[13] *Id*. at 267–68, 275–76 (citing Gordon v. New York Stock Exch., Inc., 422 U.S. 659, 682 (1975); United States v. Nat'l Ass'n of Sec. Dealers, Inc., 422 U.S. 694 (1975); Silver v. N.Y. Stock Exch., 373 U.S. 341 (1963)).

Recognizing that only the third factor was at issue in the case, the Court focused its analysis upon the costs of judicial and administrative errors and their impact on the potential benefits of antitrust enforcement. The Court's primary concern was the possibility that the benefits of antitrust enforcement might not outweigh its costs in this particular part of the securities industry.[14] The Court observed that intricate securities-related laws distinguished outlawed behaviors from those that were permissible or encouraged; that securities-related expertise was needed to properly decide such cases; that "reasonable but contradictory inferences" could be reached from the same or overlapping evidence; and that there was a substantial risk of inconsistent court results.[15] The Court noted the significant potential for costly false positives, saying "these factors suggest that antitrust courts are likely to make unusually serious mistakes," and then extended implied immunity to the securities market conduct in question based upon its conclusion that antitrust enforcement in this particular setting would simply do more harm than good.[16]

Discon[17] also played an important role in the development of the Court's marginal analysis framework for application of the implied immunity doctrine. There,

---

[14] *Credit Suisse*, 551 U.S. at 282.
[15] *Id.*
[16] *Id.* at 283 ("We believe it fair to conclude that, where conduct at the core of the marketing of new securities is at issue; where securities regulators proceed with great care to distinguish the encouraged and permissible from the forbidden; where the threat of antitrust lawsuits, through error and disincentive, could seriously alter underwriter conduct in undesirable ways, to allow an antitrust lawsuit would threaten serious harm to the efficient functioning of the securities markets.").
[17] NYNEX Corp. v. Discon, Inc., 525 U.S. 128 (1998).

the Court declined to extend antitrust liability to a defendant's decision to switch its purchases from the plaintiff to a rival provider, even though the defendant had used its monopoly power to avoid pricing restraints.[18]

Justice Breyer's opinion recognized how other laws and regulations, such as unfair competition laws, business tort laws, and regulation, could properly limit the reach of antitrust.[19] Justice Breyer recognized that antitrust need not cover all varieties of business related wrongdoing at all times, and there is no doubt that Justice Breyer relied upon the efficiency of regulatory alternatives to determine the optimal scope of the antitrust laws. The appropriate question was not simply whether the two sets of laws could coexist when some conduct violated each set because such an approach avoids any analysis of the benefits and costs of antitrust enforcement. Instead, Justice Breyer merely recognized that the costs of adding antitrust enforcement may exceed its benefits when the conduct at issue is already adequately regulated by alternative legal rules and institutions.[20]

Trinko[21] is also consistent with the marginal cost-benefit framework of implied immunity. In *Trinko*, the Court considered whether an incumbent firm breaching a statutorily imposed duty to share its network with competitors also supported a claim

[18] *Id.* at 135.
[19] *Id.* at 137.
[20] Then Judge Breyer also authored Concord v. Boston Edison, 915 F. 2d 17 (1st Cir. 1990), cert. denied, 499 U.S. 931 (1991) (rejecting a price squeeze claim on the basis of cost-benefit analysis informed by the likelihood of error costs in light of the nature of the claim as well as the presence of a federal and state regulatory scheme), an important precursor to *Credit Suisse* and *Trinko*.
[21] Verizon Commc'ns, Inc. v. Law Offices of Curtis V. Trinko, 540 U.S. 398 (2004).

under section 2 of the Sherman Act.[22] Despite the fact that the statute in question included a savings clause explaining that it did not intend to preclude antitrust enforcement, the majority held that antitrust law did not cover the conduct, stating that the savings clause "preserves claims that satisfy existing antitrust standards, it does not create new claims that go beyond existing antitrust standards."[23] Accordingly, the Court explored the "existing antitrust standards" and utilized the marginal benefit-cost analysis to locate unilateral refusals to deal "at or near the outer boundary of Section 2 liability."[24]

The Court saw very little marginal benefit in extending antitrust liability to such refusals to deal as they were adequately covered under the backdrop of the Telecommunications Act and FCC regulations. The Court explained that when "a regulatory structure designed to deter and remedy anticompetitive harm,"[25] already exists, courts should be hesitant to extend antitrust enforcement because "the additional benefit to competition provided . . . will tend to be small."[26]

The Court also expressed significant concerns about the high marginal cost of extending antitrust enforcement to reach such refusals to deal in light of the potential for error. Justice Scalia explained:

---

[22] *Id.* at 401.
[23] *Id.* at 407.
[24] *Id.*
[25] *Id.* at 412.
[26] *Id.*

> Against the slight benefits of antitrust intervention here, we must weigh a realistic assessment of its costs . . . . Mistaken inferences and the resulting false condemnations 'are especially costly, because they chill the very conduct the antitrust laws are designed to protect.' The cost of false positives counsels against an undue expansion of § 2 liability.[27]

With these significant costs weighed against the marginally small benefits of increased antitrust enforcement, the Court found ample reason to place the conduct outside the purview of antitrust.[28]

As demonstrated in *Credit Suisse*, *Discon,* and Trinko, the central theme of the Court's implied immunity jurisprudence is simple and economically sound: the Court is inclined to refrain from exercising the antitrust laws when antitrust enforcement provides little, no, or negative marginal value. In this context, the Supreme Court has explicitly recognized judicial error costs where the competitive effects of the conduct are difficult to reliably identify, and enforcement therefore risks chilling procompetitive conduct.[29]

The economic foundation of the implied immunity doctrine reveals its critical role in preventing the expansion of antitrust to applications in which its marginal value to competition and consumers will be negative. The doctrine remains flexible, as the benefits and costs of antitrust enforcement will vary with the conduct at issue, the propensity for judicial and administrative error, the administrative costs of antitrust

---

[27] *Id.* at 414 (quoting Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 594 (1986)).
[28] *Id.* at 414-15.
[29] *See* Kobayashi & Wright, *A Reply to Cary et al.*, *supra* note 2, at 717.

enforcement, and the efficiency of the alternative regulatory regime.[30] For these reasons, it is our view that the implied immunity doctrine is an important safeguard against conflicting regulation that would ultimately undermine competition.

Along these lines, we believe the Division should consider opportunities to clarify or strengthen courts' understanding of this doctrine, through amicus briefs or otherwise. In addition, the Division can minimize unnecessary and excessive regulatory intervention in the competitive process by continuing its longstanding tradition of advocating the benefits of competition. And, where otherwise appropriate, the Division can advise Congress and federal agencies to recognize and preserve the benefits of competition even where serious market failure or a supervening public policy objective may require a regulatory intervention.[31]

---

[30] Writing before the Court's decision in *Credit Suisse*, Areeda and Hovenkamp suggest that in contrast to the "soft" immunity contained in cases like *Trinko*, which varies with the incremental benefit of antitrust intervention, traditional implied immunity applies "without regard to the nature of the particular antitrust claim before the court." *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 243g1, at 358 (3d ed. 2006). But non-variation may have been due to the homogeneity of the pre-Credit Suisse cases. *See id.* ("[A] great number of implied immunity cases involve naked or nearly naked price fixing, conduct in which application of the antitrust laws is not generally thought to be problematic and anticompetitive effects are clear."). However, writing after *Credit Suisse*, Areeda and Hovenkamp, in comparing the *Credit Suisse* "immunity" approach and the *Trinko* "nonimmunity" approach, note that "[n]otwithstanding . . . differences in verbal formulation, however, the differences between the modes of analysis are very slight. Both *Trinko* and *Credit Suisse* . . . emphasized the substantive difficulty of antitrust administration in the markets in question." PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 243, at 41–42 (Supp. 2011). Thus, Justice Breyer's opinion in Credit Suisse may represent an evolution of the traditional implied immunity doctrine toward the type of marginal analysis called for in the soft preemption cases when error costs and administrative costs are not insignificant.

[31] Following a prior Commission's evaluation of antitrust exemptions and immunities, these were the lead recommendations of the National Commission for the Review of Antitrust Laws and Procedures in a report to the President and Attorney General:
"RECOMMENDATION l: Free market competition, protected by the antitrust laws, should continue to be the general organizing principle for our economy. RECOMMENDATION 2: Exceptions from this general

2. ***Whether the state action doctrine in its current form strikes the appropriate balance between state sovereignty and the federal policy favoring competition in interstate commerce.***

We assess policies and regulations states are adopting that may be considered exempt from antitrust scrutiny, and consider the resultant harm to competition and consumers. We will also query whether the dormant Commerce Clause could provide a meaningful limit on states' ability to reduce competition involving interstate commerce.

Under the state action doctrine, the Supreme Court has protected state sovereignty and the principles of federalism by broadly holding that the Sherman Act is directed against "individual and not state action."[32] Therefore, regardless of its

---

principle should only be made where there is compelling evidence of the unworkability of competition or a clearly paramount social purpose. RECOMMENDATION 3: Where such an exception is required, the least anticompetitive method of achieving the regulatory objective should be employed." NAT'L COMM'N FOR THE REVIEW OF ANTITRUST LAWS & PROCEDURES, REPORT TO THE PRESIDENT AND ATTORNEY GENERAL ix (1979).

These principles were reflected again in the Report of the Antitrust Modernization Commission: "56: Congress should not displace free-market competition absent extensive, careful analysis and strong evidence that either (1) competition cannot achieve societal goals that outweigh consumer welfare, or (2) a market failure requires the regulation of prices, costs, and entry in place of competition. 57: Statutory immunities from the antitrust laws should be disfavored. They should be granted rarely, and only where, and for so long as, a clear case has been made that the conduct in question would subject the actors to antitrust liability and is necessary to satisfy a specific societal goal that trumps the benefit of a free market to consumers and the U.S. economy in general." ANTITRUST MODERNIZATION COMM'N, REPORT & RECOMMENDATIONS 20 (2007).

[32] Parker v. Brown, 317 U.S. 341, 352 (1943).

anticompetitive effect or intent, the antitrust laws cannot abrogate a state action that supplants competition with regulation.[33]

However, although the state action doctrine allows a state to supplant competition with a regulatory scheme, it does not allow a state to shield illegal conduct from the Sherman Act "by authorizing [private parties] to violate it, or by declaring that their action is lawful."[34] Thus, the Sherman Act preempts state regulation that "mandates or authorizes conduct that necessarily constitutes a violation of the antitrust laws in all cases, or . . . places irresistible pressure on a private party to violate the antitrust laws in order to comply with the statute."[35]

Under the Court's state action holdings, private parties have a state action defense to an antitrust suit only when they can show that (1) they are acting pursuant to a clearly articulated and affirmatively expressed state intent to displace competition with a regulatory scheme; and (2) the scheme is actively supervised by the state.[36] The requirement that the anticompetitive dimension of the regulations be "clearly articulated" is often explained as a mechanism to increase the extent to which states are

---

[33] *Id. See also* N.C. State Bd. of Dental Examiners v FTC, 135 S.Ct. 1101, 1121-22 (2015); FTC v. Ticor Title Ins. Co., 504 U. S. 621, 632 (1992); Rice v. Norman, 458 U.S. 654, 659 (1982); Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc., 445 U. S. 97, 105 (1980)); New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 110-11 (1978); Exxon Corp. v. Governor of Md., 437 U.S. 117, 133 (1978).

[34] *Parker*, 317 U.S. at 351. *See also Midcal*, 445 U.S. at 106 (the state cannot save a regulatory scheme from preemption by placing a "gauzy cloak of state involvement over what is essentially a private price-fixing arrangement").

[35] *Rice*, 458 U.S. at 661.

[36] *N.C. Dental*, 135 S.Ct. at 1121-22; *Midcal*, 445 U.S. at 105.

held politically accountable for the effects of these regulations.[37] On the other hand, the active supervision requirement has been explained as a penalty option—suppressing the overall demand for anticompetitive state legislation by raising the cost to states and the private parties that would stand to benefit from the anticompetitive regulations.[38]

However, critics highlight the costs of the Court's current approach, noting that it is far from clear that the active supervision requirement serves as a deterrent to anticompetitive regulations.[39] And, absent that deterrence, conditioning the availability of state action antitrust immunity on active supervision by the state is puzzling. If state regulations are in fact anticompetitive schemes to reward politically powerful interest groups, it would seem odd to base antitrust immunity on active supervision by the state, which purportedly created the anticompetitive scheme in the first place.[40] Worse still, regulations actively supervised by the state can be particularly costly when compared to less supervised regulation or to no regulation at all. Indeed, compared with alternative approaches to regulation, active supervision may be worse for consumers and regulated firms alike.[41]

---

[37] James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 BOSTON U. L. REV. 1555 (2010).
[38] *See Id.*; Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. L. & ECON. 23, 24 (1983); Richard Squire, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77, 119-20 (2006) (arguing that the state must incur "public costs" to supervise a price setting regime).
[39] *See* Easterbrook, *supra* note 39, at 33 (arguing that such an all or nothing choice would result in a net increase in regulatory costs).
[40] Timothy Brennan, Trinko v. Baxter: *The Demise of U.S. v. AT&T*, 50 ANTITRUST BULL. 635 (2006).
[41] Easterbrook, *supra* note 39, at 29-33.

It is far from clear that the current state action doctrine actually serves to facilitate jurisdictional competition and promote the principles of federalism. Examining the Court's state action rulings, Judge Easterbrook found the Court had, in fact, actually reduced the extent and effectiveness of competition among the states by increasing the cost of exit and relocation. In particular, the Court's rulings were indifferent as to whether the effects of the regulation were actually internalized by the regulating state.[42] As a result, the Court's approach fails to prevent costly anticompetitive regulations that benefit in-state interests while largely exporting the anticompetitive effects to consumers in other jurisdictions.

Indeed, that was precisely the situation in the Court's original state action decision, *Parker v. Brown*.[43] *Parker* involved an antitrust challenge to a California regulatory scheme (an output reducing raisin prorate program) that set up a raisin cartel. According to the Court's opinion, ninety-five percent of U.S. raisins and half of the world's raisins were grown in California and subject to the state's anticompetitive prorate program. Moreover, more than ninety percent of the output was shipped through interstate or foreign commerce to consumers outside California. As a result, in-state private interests (California raisin growers) captured the vast majority of the benefits of the resulting anticompetitive price increase while ninety percent of the

---

[42] *Id.* For a discussion of the conditions under which competitive federalism is effective, *see* Charles M. Tiebout, *A Pure Theory of Local Expenditures*, 64 J. Pol. Econ. 416 (1956); Bruce H. Kobayashi & Larry E. Ribstein, *The Economics of Federalism* (Univ. Ill. L. & Econ. Research Paper No. LE06-001, 2006).
[43] Easterbrook, *supra* note 39, at 39.

anticompetitive effect (of increased prices) was exported to consumers outside of California. The decision in *Parker* demonstrates that despite the fact that the state clearly articulated its anticompetitive intentions and actively supervised the cartel, the politicians and voters in the State of California may very well have still approved of the scheme.

However, an alternative approach would focus upon the extent to which the effects of anticompetitive state regulations spillover to other states. Easterbrook would replace the Court's current approach with a single rule that would allow states and local jurisdictions to adopt any regulation they choose, if and only if the anticompetitive effects of the regulation are internalized by residents of that state.[44] By focusing solely on the incidence of the anticompetitive overcharge, this approach would be more administrable than attempting to address such regulations through the dormant Commerce Clause and the difficult balancing tests it requires.[45] The California raisin prorate program at issue in *Parker* clearly would fail this test and be subject to antitrust scrutiny. Exclusive focus on the jurisdictional incidence of anticompetitive effects, however, might also result in many of the anticompetitive regulations previously denied immunity by the Court receiving state action protection (*e.g.*, *Phoebe Putney*,

[44] *Id.* at 45-47.

[45] *Id.* at 46 ("[an antitrust] doctrine proscribing state regulation that had 'excessive' interstate effects might breed confusion without corresponding benefit"); *see, e.g.*, Hughes v. Oklahoma, 441 U.S. 322, 336 (1979) ("the first step in analyzing any law subject to judicial scrutiny under the negative Commerce Clause is to determine whether it "regulates evenhandedly with only 'incidental' effects on interstate commerce, or discriminates against interstate commerce").

where the anticompetitive price effect of a "hospital authority" monopolizing hospital services in a particular region of the state would be felt exclusively in-state).

Accordingly, the substantive policy of the antitrust laws, the Commerce Clause, and other constitutional provisions that limit state economic parochialism might be advanced even more effectively by a hybrid approach: Anticompetitive state action meeting the criteria of the current state action doctrine would be immune from antitrust attack unless the anticompetitive effects of the state action are predominantly exported. This approach would safeguard the sovereign prerogatives of the states where they seek to supervise the local anticompetitive aspects of displacing competition, while still recognizing the clear exception identified in *Parker* (prohibiting mere authorization of private restraint) and protecting the federal interest in an integrated national economy.

Using these insights, the Department of Justice could encourage the Court to revisit and supplement its current criteria for state action immunity by either initiating its own cases or filing *amicus* briefs in private cases. For example, the Department could challenge a state regulatory regime that meets the Court's current criteria for immunity – clear articulation and active supervision – but has anticompetitive effects felt predominantly beyond the borders of the regulating state. In either endeavor, however, the Department could aim to persuade the Court to impose a third condition for state action immunity (i.e., the lack of substantial out-of-state anticompetitive effects).

CONCLUSION

We appreciate the opportunity to comment and would be happy to respond to any questions the Antitrust Division may have regarding this comment.