IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: STOCK EXCHANGES OPTIONS TRADING ANTITRUST LITIGATION

LYNN S. MILLER, Individually and on behalf of all others similarly situated, MARK STEINBERG, individually and on behalf of all others similarly situated, RAM YARIV, individually and on behalf of all others similarly situated, ALAN HAENEL, individually and on behalf of all others similarly situated, YAKOV PRAGER, individually and on behalf of all ohers similarly situated, THOMAS P. LYNCH, individually and on behalf of all others similarly situated, MARY CHIU, individually and on behalf of all others similarly situated, HARRY BINDER, individually and on behalf of all others similarly situated, ESTATE OF WANDA GRAHAM, on behalf of itself and all others similarly situated,

Consolidated-Plaintiff-Appellants,
(Caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF AMICUS CURIAE OF THE UNITED STATES URGING REVERSAL IN SUPPORT OF APPELLANTS

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Plaintiff-Appellants,

v.

AMERICAN STOCK EXCHANGE, INC., a New York not for profit Corp., CHICAGO BOARD OPTIONS EXCHANGE, INC., a Delaware not for profit Corp. PHILADELPHIA STOCK EXCHANGE, INC., A Delaware not for profit Corp., PACIFIC EXCHANGE, INC., a California Corporation., NEW YORK STOCK EXCHANGE, INC., a New York not-for-profit corp., WOLVERINE TRADING, L.P., SUSQUEHANNA INVESTMENT GROUP INC., JOHN DOES 1-100, SPEAR, LEEDS & KELLOGG, L.P., a New York Limited Parternship., AMEX, CBOE, PHX, PCX, M.J.T. SECURITES LLC, COLE, ROESLER TRADING, L.P., ASSETS MONDIAL, LLC., KODIAK CAPITAL MANAGEMENT, LLC., CHIN OPTIONS LLC., OPPENHEIMER, NOONAN, WEISS, L.P., ARBITRADE LLC., TIMBER HILL L.L.C., PROFESSIONAL EDGE FUND, L.P. TAGUE SECURITES CORP., LAKOTA TRADING INC., REFCO SECURITIES, INC., BRIDGEPORT SECURITIES GROUP CO., JOHNSON TRADING CORP., GROUP ONE TRADING L.P., BEARTOOTH TRADING INC., CRANMER & CRANMER, INC. GOIN & CO., L.L.C., AGS SPECIALIST PARTNERS, LETCO, BEARHUNTER LLC., KALB, VOORSHI & CO., LLC. HIGHLAND SECURITIES CO., GHM, INC., D.A. DAVIDSON & CO., INC., CHARLTON, INC., HULL TRADING CO. L.L.C., BINARY TRADERS, INC.,

Defendants-Appellees.

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STATEMENT OF INTEREST

The United States has primary responsibility for enforcing the federal antitrust laws, which express the nation's fundamental economic policy in favor of free competition. Although the design of federal regulatory programs on occasion clearly indicates that Congress intended this policy to defer to other federal policies, implied repeal of the antitrust laws is disfavored and must be found only when and to the extent necessary to make a federal regulatory

program work as Congress intended. The United States is concerned that the district court's holding of implied repeal of the antitrust laws here unduly restricts application of the antitrust laws and could cause serious damage to the nation's fundamental economic policy.

The United States has substantial familiarity with alleged conduct similar or identical to that alleged here. The Antitrust Division of the Department of Justice worked together with the Securities and Exchange Commission (the "Commission" or the "SEC") in conducting and resolving parallel investigations of related allegations.[1] The United States submitted an *amicus* memorandum below urging that there was no implied repeal of the antitrust laws with respect to alleged conduct prohibited by SEC rule (A-910).[2]

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[1]*See* SEC, "SEC and Department of Justice Sanction Four Options Exchanges for Anticompetitive Conduct," Press Release No. 2000-126 (Sept. 11, 2000) (A-929); U.S. Dept. of Justice, "Justice Department Files Suit Challenging Anticompetitive Agreement Among Options Exchanges," Press Release No. 00-530 (Sept. 11, 2000) (A-932). *See also* Complaint, *United States v. American Stock Exchange, LLC* (D.D.C. No. 00-2174, filed Sept. 11, 2000) (A-938); Stipulated Final Judgment, *id.* (A-960).

[2]At the district court's request, the Commission filed a Statement in that court indicating it "agrees with the conclusion reached in the memorandum *amicus curiae* of the United States that the federal antitrust laws are not impliedly repealed with respect to the conduct alleged in these cases." The Commission currently lacks a quorum respecting this matter, *see* 17 C.F.R. 200.41. It has

(continued…)

The United States files this brief pursuant to the first sentence of Fed. R. App. P. 29(a).

QUESTION PRESENTED

Whether the federal antitrust laws are impliedly repealed with respect to conduct prohibited by Securities and Exchange Commission rule pursuant to the Commission's statutory authority under the Securities and Exchange Act of 1934.

STATEMENT

1. This antitrust case concerns the listing of options for trading on national exchanges. The Consolidated Antitrust Class Action Complaint ("Complaint") alleges that five national securities exchanges (the "Exchange Defendants") and others agreed among themselves that they would not multiply list options that already were listed by one of the exchanges (i.e., they would not list the same option class on more than one exchange). Complaint ¶¶ 1,3 (A-68-69). Plaintiffs allege that such an agreement is a *per se* violation of Section 1 of the Sherman Act, *id*. ¶¶ 4, 8 (A-70, A-73), and we assume for purposes of this brief that this allegation is correct — unless implied repeal renders the Sherman Act inapplicable.

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[2](…continued)
therefore not authorized the filing of a brief *amicus curiae* in this Court.

2. Options trading falls within the Commission's regulatory jurisdiction. As the District Court explained, Section 9(b) of the Securities and Exchange Act of 1934 ("the Exchange Act") "makes it unlawful for any person to engage in various options transactions 'in contravention of such rules and regulations as the Commission may prescribe as necessary or appropriate in the public interest or for the protection of investors . . . .'" Op. 2 (A-1901), quoting 15 U.S.C. 78(i)(b).

In exercising its regulatory responsibilities, the Commission first considered the desirability of multiple listing of option classes in 1973, *see* SEC Release No. 10490 (Nov. 14, 1973) (A-1062-1064) (requesting public comment on whether to permit the trading of the same options class on multiple exchanges), and it has continued to do so to the present. In the early years of this consideration, the Commission at times discouraged and restricted multiple listing. *See* Op. 5-7 (A-1904-1906). But in light of experience and changed circumstances, in 1987 it proposed, and in 1989 adopted, SEC Rule 19c-5, which mandates that the rules of each national securities exchange "shall provide" that "no rule, stated policy, practice, or interpretation of this exchange shall prohibit or condition, or be construed to prohibit or condition or otherwise limit, directly or indirectly, the

ability of this exchange to list any stock options class because that options class is listed on another options exchange." 17 C.F.R. 240.19c-5(a)(3). As the Commission explained, the national securities exchanges "are prohibited from restricting the listing of any new stock options class to a single exchange." 54 Fed. Reg. 23963, 23963 (June 5, 1989).

The SEC proposed this rule after preliminarily determining that "exchange rules prohibiting multiple trading may now be inconsistent with the [Exchange Act, as amended], particularly because they may impose a burden on competition no longer necessary in furtherance of the Act's purposes." *Id*. at 23964. It explained that it proposed the rule pursuant to statutory provisions that "codify a Congressional intent that the U.S. securities markets, including options markets, be free from competitive restraints to the furthest extent possible consistent with the other goals of the Act." *Id*. at 23970.[3]

Plaintiffs allege the agreement contravenes Rule 19c-5. We understand that the Exchange Defendants did not contest below that such an agreement, if it existed, would violate the rule.

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[3]The rule provided a phase-in period, *see* SEC Release No. 34-26870 (May 26, 1989) (A-1594), but has been fully in effect since December 1994. Complaint ¶17 (A-78).

3. The Exchange Defendants moved to dismiss the complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., on the ground that "Congress has impliedly repealed the antitrust laws as those laws might be applied to conduct of the exchanges relating to the listing of option classes, and replaced them with a regulatory scheme," Memorandum of Law in Support of Options Exchange Defendants' Motion to Dismiss Consolidated Antitrust Class Action Complaint 2, even as to conduct the regulators have, in the exercise of their statutory authority, determined to burden competition in a way unnecessary to further the purposes of the Exchange Act and have therefore prohibited.[4] The court converted the motion to dismiss into a "limited motion for summary judgment on the implied repeal issue only," Op. 11 (A-1910), and granted the motion. It concluded that implied repeal was appropriately found "when an agency, acting pursuant to a specific Congressional directive, actively regulates the particular conduct challenged," *id*. at 13 (A-1912) (attributing this rule to an extrapolation from *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975)), and found that the circumstances here satisfied that standard.

[4]The district court did not reach other grounds urged in support of dismissal, *see* Op. 11 n.3 (A-1910), and we do not discuss them here.

SUMMARY OF ARGUMENT

Supreme Court decisions make clear that the existence of a regulatory program does not necessarily demonstrate that Congress intended to free the regulated industry from the federal antitrust laws and the fundamental national economic policy favoring competition. Rather, implied repeal of the antitrust laws "can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system," *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981) (internal quotation omitted), so that repeal must be implied to make the regulatory system work.

Under that standard, it was plainly improper to find immunity here, for both the federal antitrust laws and a rule of the Securities and Exchange Commission adopted pursuant to the federal securities laws prohibit the conduct at issue. No implied repeal is required to make the securities laws work, for antitrust law and securities law are in complete harmony. Indeed, the two federal agencies most directly concerned, the Securities and Exchange Commission and the Antitrust Division of the U.S. Department of Justice, made clear to the district court that there is no reason to find implied repeal of the antitrust laws here.

The district court incorrectly rejected this conclusion, relying on the possibility that the Commission could, in the future, change its rules so that the conduct would no longer be prohibited under the securities laws. But this possibility provides no basis for implied repeal. Speculative possibilities like this do not justify immunity from the antitrust laws, *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 221-22 (1966); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 376-77 (1973), although care in the drafting of an injunction to avoid unnecessary creation of conflict is, of course, appropriate. *See also Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 84 n.9 (2d Cir. 1981). The district court read *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), to say otherwise, but *Gordon* addressed only conduct approved by the Commission at the time it occurred, and the Court merely rejected the Commission's subsequent change of policy as a basis for permitting the conduct that had been approved when it occurred to be condemned under the antitrust laws despite Commission approval. The district court's result, unsound as a matter of policy, is also without supporting precedent.

ARGUMENT

Congress Has Not Impliedly Repealed The Federal Antitrust Laws With Respect to Anticompetitive Exchange Conduct that Contravenes Rule 19c-5.

Section 1 of the Sherman Act by its terms prohibits concerted restraints of any "trade or commerce among the several States, or with foreign nations." 15 U.S.C. 1. Nonetheless, it is well established that statutes establishing regulatory regimes may, but do not necessarily, imply congressional intent not to apply the federal antitrust laws to certain conduct.[5] The courts have found such implied antitrust immunity, or implied repeal of the antitrust laws, for certain conduct within the Commission's jurisdiction that is either (a) authorized by statute until barred by regulatory decision, or (b) approved by the regulators. As this Court has explained, the applicable principle is that there may be implied repeal of the antitrust laws "when they would prohibit an action that a regulatory scheme permits," *Finnegan v. Campeau Corp.*, 915 F.2d 824, 828 (2d Cir. 1990), citing *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27 (2d Cir. 1985).

Neither the Supreme Court nor the courts of appeals have held that there is implied immunity from the federal antitrust laws for conduct that was *prohibited* by the Commission at the time it occurred. Since there is no convincing reason to believe that Congress intended to deprive those injured by such anticompetitive

[5]Congress may, of course, provide explicitly by statute that a particular area of commerce is to be governed by some regulatory scheme to the complete exclusion of the federal antitrust laws. The Exchange Act, however, provides no such express immunity to the conduct alleged here.

conduct of their ordinary antitrust remedies, the district court's holding that there was implied repeal of the antitrust laws is plain legal error.

I. Implied Antitrust Immunities Are Disfavored, and When Found At All Are Strictly Limited

"Claims of antitrust immunity in the context of various regulated industries" have been frequent, and so "[t]he general principles applicable to such claims are well established." *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1981). Because "[t]he antitrust laws represent a 'fundamental national economic policy,' *id.*, quoting *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213, 218 (1966), "'[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system.'" *Id.*, quoting *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20 (1975) ("*NASD*"). *Accord Northeastern Tel. Co. v. AT&T*, 651 F.2d 76, 83 (2d Cir. 1981).

Such "clear repugnancy" does not follow automatically from the existence of a regulatory system applicable to the challenged conduct. Rather, "'[r]epeal is to be regarded as implied only if necessary to make the [subsequent law] work, and even then only to the minimum extent necessary. This is the guiding

principle to reconciliation of the two statutory schemes.'" *National Gerimedical*, 452 U.S. at 388, quoting *Silver v. New York Stock Exchange*, 373 U.S. 341, 357 (1963). As this Court has explained,

> regulation is not an end in itself; it is only a means of inferring that Congress intended to free the regulated industry from the discipline of competition. The more focused inquiry is whether the industry is so extensively regulated that application of the antitrust laws would be incompatible with the regulatory framework, that is, whether immunity must be inferred to make the system work.

Northeastern Tel., 651 F.2d at 83.

Even in the context of heavily regulated industries, the Supreme Court has sought to give effect to the policies of both statutory schemes. It has "refused . . . a blanket exemption, despite a clear congressional finding that some substitution of regulation for competition was necessary," *National Gerimedical*, 452 U.S. at 392, citing *Carnation*, 383 U.S. at 217-19 (declining to find "an unstated legislative purpose to free the shipping industry from the antitrust laws"); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-74 (1973) (finding no legislative "purpose to insulate electric power companies from the operation of the antitrust laws" despite Federal Power Commission regulation). Only an analysis focusing on the particular conduct at issue can allow the court to determine whether there is a "clear repugnancy" between the statutory and

regulatory context and application of the federal antitrust laws to the particular conduct at issue.

II. Because the Challenged Conduct Violates Both the Sherman Act and SEC Rules, There Is No "Clear Repugnancy" Here Between Application of the Antitrust Laws and the Regulatory Scheme

Application of the antitrust laws to anticompetitive conduct *prohibited* by SEC rules enacted pursuant to the Exchange Act would not prevent the Exchange Act from working precisely as intended. Accordingly, there is no repugnancy between application of the antitrust laws and the regulatory scheme, and no implied repeal of the antitrust laws here.

The case law confirms that there is no basis for implied repeal of the antitrust laws as to conduct that is not approved under a regulatory scheme. Courts have routinely held that the antitrust laws apply to conduct either prohibited or not approved through the applicable regulatory scheme even though the antitrust laws were repealed for approved conduct. Thus in *United States v. Borden Co.*, 308 U.S. 188, 197-201 (1939), the Court held that the Sherman Act was repealed with respect to agricultural marketing agreements approved by the Secretary of Agriculture pursuant to the Agricultural Marketing Agreement Act of 1937, but not with respect to unapproved agreements. *See also Carnation*, 383

U.S. at 215-17 (price fixing agreements approved by the Federal Maritime Commission pursuant to the Shipping Act were exempt from the antitrust laws although unapproved agreements remained subject to the antitrust laws).

The Supreme Court underscored the difference between conduct approved under a regulatory scheme and conduct that violates regulatory norms in *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1972). Ricci alleged that the Chicago Mercantile Exchange's transfer of his membership to another violated the Exchange's rules, the Commodity Exchange Act, and the Sherman Act. The Court affirmed a stay of the antitrust litigation pending administrative proceedings before the Commodity Exchange Commission, explaining that the antitrust court would have to consider immunity if the transfer "was pursuant to a valid rule." *Id*. at 303. In contrast (*id*. at 304),

> if . . . loss of his membership was contrary to Exchange rules, the antitrust action should very likely take its normal course, absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commission are exclusive.

This Court also has considered, and squarely rejected, the argument that "conduct specifically prohibited by the Commodity Exchange Act cannot be the basis for a treble damage award under the antitrust laws." *Strobl v. New York*

Mercantile Exchange, 768 F.2d 22, 24 (2d Cir. 1985). Reading *Gordon*, *Silver*, and other Supreme Court decisions to provide that implied repeal of the antitrust laws may be found only "when such laws would prohibit an action that a regulatory scheme might allow," 768 F.2d at 27, this Court found no immunity because both the Commodity Exchange Act and the antitrust laws prohibited the challenged conduct (price manipulation).[6] Similarly, in this case, there is no prospect of conflict arising from a holding that the antitrust laws apply to conduct that contravenes SEC rules.

The Exchange Act does not bar the Commission from changing its policy and permitting agreements like that alleged here at some time in the future, but this Court has made clear that such a possibility does not create "clear repugnancy" between the antitrust laws and the regulatory scheme with respect to conduct that has already occurred. In *Northeastern Tel.*, AT&T, charged with an antitrust violation related to the design of a protective coupler, claimed implied immunity because "implementation of the coupler requirement was subject to

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[6]The *Strobl* court also rejected the argument, supported by two cases from the Northern District of Illinois, that because there was an implied private right of action under the Commodity Exchange Act, with damage, statute of limitations, and other features that differed from those under the antitrust laws, no right of action was available under the antitrust laws. 768 F.2d at 29-31.

review by the Federal Communications Commission." 651 F.2d at 82.[7] The FCC, when it initially permitted the revised tariff embodying the coupler requirement to take effect pending further investigation, emphasized that it was not specifically approving the revised tariff, and seven years later invalidated that tariff. *Id.* at 84. The Court therefore found no immunity, explaining (*id.*):

> That the [FCC] never approved the protective coupler tariff demonstrates that no conflict will arise between the Federal Communications Act and the antitrust laws if we hold that [AT&T is] subject to antitrust liability for designing the coupler as they did.[8]

Courts have concluded in some cases that Congress impliedly repealed the antitrust laws with respect to conduct approved by the regulatory statute or the

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[7]The district court here erroneously asserted that in *Northeastern Tel.* "the FCC was not authorized to approve the anti-competitive conduct." Op. 17 (A-1916). This Court had noted only that the relevant statute did "not *expressly* authorize the FCC to approve protective coupler designs that unreasonably restrict competition." 651 F.2d at 83 (emphasis added). It then reviewed the FCC's actions to determine whether it had in fact approved the conduct, *id.* at 83-84, plainly recognizing that the FCC could have done so, *id.* at 84 n.9. The district court similarly erred regarding *Jacobi v. Bache & Co.*, 520 F.2d 1231 (2d Cir. 1975), saying it found no implied repeal "where the SEC had no jurisdiction to regulate and supervise the NYSE rules at issue[]." Op. 17 (A-1916). But this Court said not that the SEC had no jurisdiction, but only that it had "disclaimed the exercise of any power of review." 520 F.2d at 1237.

[8]Observing that the plaintiff sought only damages for AT&T's past activities, the Court noted that "[h]ad it requested an injunction prohibiting [AT&T] from engaging in conduct expressly approved by the FCC, a different question might be presented." 651 F.2d at 84 n.9.

actions of the regulatory agency. Those decisions, however, reinforce the point that there is no reason to exempt conduct prohibited under the regulatory scheme from antitrust scrutiny.

Thus, in *NASD*, the Court found certain restrictions on the distribution of mutual fund shares to be authorized by statute if they were properly disclosed and did "not contravene any rules and regulations the Commission may prescribe." 422 U.S. at 721; *see also id.* at 726 (statutory provision "authorizes funds to impose transferability or negotiability restrictions, subject to Commission disapproval"). The Court found immunity, not only for conduct authorized by the statute under the standard, but also for conduct both subject to pervasive regulation and SEC approved, *see id.* at 733 ("the investiture of such pervasive supervisory authority in the SEC suggests that Congress intended to lift the ban of the Sherman Act from association activities *approved by the SEC*") (emphasis added). The Court further found immunity for an alleged conspiracy "to encourage . . . precisely the restriction that the SEC consistently has approved pursuant to [statute] for nearly 35 years." *Id.* It is clear that the result in *NASD* with respect to antitrust immunity would have been different if the SEC had acted to prohibit, rather than approve, the challenged conduct.

Similarly, in *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990), this Court considered an antitrust challenge to an agreement between bidders in a takeover contest. It concluded that

> because the SEC has the power to regulate bidders' agreements under [the Williams Act] . . . *and has implicitly authorized them* by requiring their disclosure . . . as part of a takeover battle, . . . to permit an antitrust suit to lie against joint takeover bidders would conflict with the proper functioning of the securities laws.

Id. at 831 (emphasis added).[9]

Controlling case law thus makes clear that when the antitrust laws and the regime of exchange regulation both prohibit the same conduct, there is no repugnancy between the two, no conflict threatening the proper working of exchange regulation, and no basis for finding an implied repeal of the antitrust

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[9] *See also, e.g., Harding v. American Stock Exchange, Inc.*, 527 F.2d 1366, 1369-70 (5th Cir. 1976) (conduct by an exchange immune where undertaken pursuant to an exchange rule subject to SEC review and control, and the action was subject to SEC approval and covered by a formal order of the SEC in the particular case), cited at Op. 17 (A-1916); *Friedman v. Salomon/Smith Barney, Inc.*, No. 98 Civ. 5990, 2000 WL 180419, at *11-12 (S.D.N.Y. 2000) (where SEC has explicitly or implicitly authorized challenged conduct, immunity is necessary to avoid subjecting actors to conflicting standards, although court might have jurisdiction to impose antitrust penalties if the SEC had declared the practice unlawful), cited at Op. 13 (A-1912).

laws.[10] In *Finnegan*, this Court said it could not "assume that Congress was so muddled that it gave with the right hand of securities regulation that which it then took away with the left hand of antitrust law." 915 F.2d at 826. But here the two hands pull harmoniously in the same direction.

III. The District Court's Reasons for Finding Implied Repeal Are Incorrect

Despite the clear lack of repugnancy between the two regulatory regimes, the district court held that the antitrust laws have been impliedly repealed with respect to the conduct challenged in this case. The court's holding apparently rested primarily on two factors: its reading of the Supreme Court's decision in *Gordon* and its assumption that the possibility of a future change in the SEC's rules can be accommodated only by treating the antitrust laws as impliedly repealed in this case. Neither rationale justifies its holding.

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[10]This Court need not reach the question whether there could *ever* be a justification for finding the antitrust laws impliedly repealed with respect to conduct prohibited by a regulatory agency, for the district court did not purport to find any special circumstances justifying such a result in this case. *Cf. Ricci*, 409 U.S. at 303-04 (if the challenged conduct was "contrary to Exchange rules, the antitrust action should very likely take its normal course, absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the Commission are exclusive"). *See also* SEC Statement at 5 (A-906) ("we are not aware of any facts or circumstances pertaining to this case that would require the antitrust laws to be displaced by the regime of federal securities regulation").

A. *Gordon*'s Implied Repeal Rested On An Actual Conflict Between Regulatory Standards

Although the district court found "compelling" the argument that "because Rule 19c-5 currently prevents prohibitions on multiple listing, there is no conflict at this moment in time and thus the antitrust laws are applicable," it nonetheless concluded that that result "is contrary to the rationale of *Gordon*." Op. 15 (A-1914). *Gordon* involved a challenge to fixed commission rates for stock brokerage, a practice dating to 1792 and long approved by the SEC. As the district court emphasized, the SEC adopted a rule barring the practice shortly before the Supreme Court considered the case, so that the conduct was prohibited both by SEC rule and by the antitrust laws at the time the case was decided. Nonetheless, the Supreme Court found implied repeal. Op. 15 (A-1914).

The district court failed to appreciate that the SEC had approved *all* the conduct at issue in *Gordon* at the time it occurred. Gordon filed his class action in 1971, years before the Commission barred fixed rates, and sought $1.5 billion in damages.[11] Applying the antitrust laws would have subjected the defendants to antitrust liability for conduct approved by the SEC through actions that the Court

[11]The plaintiff also sought an injunction directed at implementation of certain negotiated rates scheduled to go into effect that year, 422 U.S. at 661 n.3, but the injunction appears to relate to claims not pursued before the Supreme Court.

concluded were "to be viewed as having an effect equivalent to that of a formal order." 422 U.S. at 689 n.13.[12] The SEC's subsequent policy change did not erase the preexisting conflict of standards applicable to the conduct at issue, and so the Court concluded "that to deny antitrust immunity with respect to commission rates would be to subject the exchanges and their members to conflicting standards." 422 U.S. at 689. Moreover, since "failure to imply repeal" with respect to conduct approved by the SEC when it occurred would leave fixed commission rates unlawful if the Commission changed its position again in the future, it "would render nugatory the legislative provision for regulatory agency supervision of exchange commission rates," and prevent the regulatory structure from working as Congress intended. *Id*. at 691.

Nothing in *Gordon* speaks directly to implied repeal with respect to unapproved conduct that contravenes an SEC rule. The Supreme Court had no need to address the question, since it was not before the Court — although the

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[12]The United States as *amicus curiae* in *Gordon* agreed "that if the SEC 'were to order the exchanges to adhere to a fixed commission rate system of some kind, no antitrust liability could arise,'" 422 U.S. at 689 n.13, quoting Brief for United States as *Amicus Curiae* 48, but distinguished the SEC's actions from such an order. Ultimately, the difference between the positions of the United States and the SEC in conflicting amicus briefs in *Gordon* came down to that distinction, which the Court rejected. 422 U.S. at 689 n.13.

Court perhaps implicitly resolved it by emphasizing the SEC's approval of fixed commission rates in finding implied repeal. *See* 422 U.S. at 689. Indeed, despite the district court's suggestion to the contrary, Op. 15 n.6 (A-1914), the United States and the SEC were in accord on this point in *Gordon*. The SEC's General Counsel explained in oral argument that if exchange members and the exchange conspired to fix commission rates, either outside the scope of exchange rules approved by the Commission or after the Commission had prohibited fixed commission rates, the SEC would not "claim that the existence of the Exchange Act, the presence of the SEC, repeals or exempts antitrust application to that situation." *Gordon*, Transcript of Oral Argument, reprinted in 35 Antitrust Law: Major Briefs and Oral Arguments of the Supreme Court of the United States 1955 Term - 1975 Term 291, 328 (Philip B. Kurland & Gerhard Casper eds., 1979).

B. The Possibility That The Commission Will Change Its Policy In The Future Does Not Support Implied Repeal of the Sherman Act

Having misread *Gordon* to turn on the possibility of future regulatory policies creating a conflict with the antitrust laws, and not on the SEC's approval of the challenged conduct when it occurred, the district court improperly based its implied repeal holding on the possibility that the SEC could change its policy

toward the conduct at issue here.[13] It is clearly possible that future policy changes could create a conflict; the Commission explained as much to the district court:

> we note that the Commission's regulatory authority to revisit the decision embodied in Rule 19c-5 continues, and that a different judgment about the desirability of competition in the future could compel a different result on the implied repeal issue.

SEC Statement at 7 (A-908), quoted at Op. 16 (A-1915). But it is not necessary to grant antitrust immunity to conduct that violated both SEC rules and the antitrust laws in order to take account of that possibility. As the Commission pointed out, the court can tailor any forward-looking decree it enters to take account of the Commission's regulatory authority. *Id*.[14]

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[13]There is no merit to the court's suggestion, Op. 18 (A-1917), that the SEC in 1997 approved agreements barring multiple listing. At most, the SEC's statements address whether certain agreements exist as alleged, *see* Release 34-38541, 62 Fed. Reg. 23516, 23519 (April 30, 1997) (A-409), a factual question that does not bear on implied repeal. Broader statements in Release 34-38542 were, on their face, nothing more than SEC paraphrases of "the representations of the [New York Stock Exchange]." 62 Fed. Reg. 23521, 23523 (April 30, 1997) (A-404).

[14]The United States similarly suggested that "[t]o avoid any possible future conflict with SEC regulatory policy, the court should consider including in any injunction language permitting otherwise enjoined conduct should the SEC, acting pursuant to statutory authorization, permit such conduct in the future." (A-294-295).

Case law supports this suggestion. Thus, in *Carnation*, the Court, drawing on *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), and *Far East Conference v. United States*, 342 U.S. 570 (1952), made clear that courts were permitted "to subject activities which are clearly unlawful under the Shipping Act to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers." 383 U.S. at 221. In particular, "[t]he award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission." *Id.* at 222.[15] And even injunctive relief that is not "unconditional," *id.* at 221, would avoid interfering with that exercise of power.

Similarly, in *Otter Tail*, a district court found the defendant power company, Otter Tail, had unlawfully monopolized retail distribution of electric

[15]The Court also made clear that even uncertainty about the status of the challenged conduct under the regulatory regime is no basis for finding implied immunity. The "clearly violated" language reflected the Court's concern that "imposing antitrust sanctions for activities of debatable legality under the Shipping Act" raised "the possibility of conflict between the courts and the [Federal Maritime] Commission," 383 U.S. at 220, which, however, the Court concluded could be avoided by vesting primary jurisdiction in the Commission to "ascertain[] and interpret[] the circumstances underlying the legal issues." *Id.* at 221. At this stage, this case raises no issue posing comparable problems.

power in its service area; the court enjoined Otter Tail from, among other things, refusing to sell electric power at wholesale to municipal power systems in its service area. Although the Federal Power Commission (FPC) had authority to order such interconnection in certain circumstances, the Court rejected the argument that this provision of the district court's decree impermissibly conflicted with FPC authority. 410 U.S. at 376. It noted that because the FPC had in fact ordered interconnection in the only relevant instance, there was "no actual conflict between the federal judicial decree and an order of the Federal Power Commission." *Id.* And as for instances that might arise in the future, "[t]he decree of the district court has an open end by which that court retains jurisdiction 'necessary or appropriate' to carry out the decree or 'for the modification of any of the provisions'"; it also contemplated that future disputes would be "subject to [FPC] perusal." *Id.* at 376-77. Accordingly, "[i]t will be time enough to consider whether the antitrust remedy may override the power of the Commission . . . if and when the Commission denies the interconnection and the District Court nevertheless undertakes to direct it. At present, there is only a potential conflict." *Id.*[16]

[16]The district court's analysis here echoes Justice Stewart's *Otter Tail* dissent. (continued…)

A potential conflict here similarly requires only care in wording an injunction, not repeal of the Sherman Act.

[16](…continued)
Justice Stewart argued that the Court's reliance on the lack of a present conflict, and its suggestion "that there will be time to cope with the problem of a Commission refusal to order interconnection which conflicts with this antitrust decree when such a conflict arises" did not adequately dispose of "the basic conflict between the Commission's authority and the decree entered in the District Court." 410 U.S. at 394 (Stewart, J., concurring in part and dissenting in part). The majority, of course, did not accept this argument.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below and remand for further proceedings.

Respectfully submitted.

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July 20, 2001

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