IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 03-5245, 03-5278

BRENTWOOD ACADEMY,
Plaintiff/Appellee/Cross-Appellant,

v.

TENNESSEE SECONDARY SCHOOL ATHLETIC ASSOCIATION
and RONNIE CARTER, Executive Director and Individually,
Defendants/Appellants/Cross-Appellees,

On Appeal from the United States District Court
for the Middle District of Tennessee

The Honorable Todd J. Campbell, District Judge

District Court No. 3-97-1249

BRIEF OF FEDERAL TRADE COMMISSION AS *AMICUS CURIAE* SUPPORTING CROSS-APPELLANT AND URGING REVERSAL

WILLIAM E. KOVACIC
General Counsel

JOHN F. DALY
Deputy General Counsel for
Litigation

MICHELE ARINGTON
Attorney
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-3157

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

QUESTION PRESENTED 1

STATEMENT OF THE CASE 2

ARGUMENT 5

I. The *Parker* State Action Doctrine Shields Anticompetitive Conduct from Federal Antitrust Scrutiny Only When the Conduct Is in Furtherance of Clearly Articulated State Policy to Displace Competition and When the Conduct Is Actively Supervised by the State 6

A. The *Parker* State Action Doctrine 6

B. The "Clear Articulation" Requirement 8

C. The "Active Supervision" Requirement 12

II. The District Court Erroneously Held Conduct Exempt from the Sherman Act in the Absence of a State Policy to Displace Competition 15

CONCLUSION 24

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

CASES **PAGE**

Brentwood Academy v. Tennessee Secondary School Athletic Association,
13 F. Supp. 2d 670 (M.D. Tenn. 1998) 2, 16, 20

Brentwood Academy v. Tennessee Secondary School Athletic Association,
531 U.S. 288 (2001) 17

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980) 8, 12, 14, 15

City of Columbia v. Omni Outdoor Advertising, Inc.,
499 U.S. 365 (1991) 10, 19, 21

Community Communications Co. v. City of Boulder,
455 U.S. 40 (1982) 8, 9, 19

Federal Trade Commission v. Ticor Title Insurance Co.,
504 U.S. 621 (1992) 8, 13, 15, 22

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) 7

Hoover v. Ronwin,
466 U.S. 558 (1984) 7, 8, 18

National Collegiate Athletic Association v. Board of Regents of the University of Okla.,
468 U.S. 85 (1984) 20

Parker v. Brown,
317 U.S. 341 (1943) . . . . . *passim*

Patrick v. Burget,
486 U.S. 94 (1988) 15

Riverview Investments, Inc. v. Ottowa Community Improvement Corp.,
899 F.2d 474 (6th Cir. 1990) 14

Southern Motor Carriers Rate Conference v. United States,
471 U.S. 48 (1985) 7, 11, 18, 19

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985) . . . . . *passim*

STATUTES

Federal Trade Commission Act, 15 U.S.C. § 45 1

Sherman Act, 15 U.S.C. §§ 1 and 2 2

42 U.S.C. § 1983 . . . . . 3, 16

Tenn. Code Ann. § 49-1-302 . . . . . 3, 18

MISCELLANEOUS

Federal Trade Commission, Office of Policy Planning, *Report of the State Action Task Force*, (September 2003) 1, 13, 14, 20, 21

I Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*
(2d ed. 2000) 12, 14, 17

Tenn. Board of Educ. Rule 0520-1-2-.08 . . . . . 3, 17, 19

Tenn. Bd. of Educ. Rule 0520-1-2-.26 2

STATEMENT OF INTEREST

The Federal Trade Commission ("FTC" or "Commission") is an independent agency of the United States whose primary mission is to protect consumers. The Commission enforces, *inter alia*, Section 5 of the Federal Trade Commission Act ("FTC Act"), 15 U.S.C. § 45, which prohibits "unfair methods of competition." Through enforcement of the federal antitrust laws, the Commission seeks to ensure that the nation's markets function competitively and are vigorous, efficient, and free of undue restrictions. The district court's erroneous interpretation of the scope of the state action exemption from the federal antitrust laws threatens both public and private enforcement of those laws. Accordingly, the FTC has a strong interest in the proper determination of this appeal.[1]

QUESTION PRESENTED

Whether the alleged anticompetitive conduct of a Tennessee interscholastic athletic association is exempt from the Sherman Act as state action, simply because the association previously has been found to be a "state actor" subject to suit under 42 U.S.C. § 1983, without regard to whether that conduct was pursuant to a clearly

---

[1] The Commission's staff recently conducted an in-depth review of the antitrust state action doctrine and released a report concluding that the doctrine has become unmoored from its original objectives, and is frequently invoked to protect private conduct without proper foundation in state policy. *See* Office of Policy Planning, Federal Trade Commission, *Report of the State Action Task Force* (September 2003), available at http://www.ftc.gov/opa/2003/09/stateaction.htm.

articulated state policy to displace competition with regulation, monopoly public service, or any other alternative to the competitive market.

STATEMENT OF THE CASE

The Tennessee Secondary School Athletic Association ("TSSAA") is a not-for-profit membership corporation organized to regulate interscholastic athletic competition among the public and private high schools in Tennessee that belong to it. Public high schools compose 84% of the voting membership of TSSAA.[2] Since 1925, the Tennessee State Board of Education ("State Board") has recognized TSSAA's role in providing rules for interscholastic athletic competition for public high schools in Tennessee.[3] In 1972, the State Board enacted a rule designating TSSAA as "the organization to supervise and regulate the athletic activities in which the public junior and senior high schools of Tennessee participate on an interscholastic basis." Tenn. Bd. of Educ. Rule 0520-1-2-.26 (later moved to Rule 0520-1-2.08).[4] In 1995, the State Board rescinded this rule and replaced it with a

---

[2] *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 13 F. Supp. 2d 670, 673 (M.D. Tenn. 1998). TSSAA is governed by its Legislative Council and its Board of Control, each composed of nine members – elected by the member schools – who are high school principals, assistant principals, or superintendents. *Id.*

[3] *Id.* at 675.

[4] *See Brentwood Academy*, 13 F. Supp. 2d at 675.

rule stating that the State Board "recognizes the value of participation in interscholastic athletics and the role of [TSSAA] in coordinating interscholastic athletic competition" and "authorizes the public schools of the state to voluntarily maintain membership in [TSSAA]." Tenn. Board of Educ. Rule 0520-1-2-.08.

The State Board's own authority for enacting such rules derives from Tennessee Code § 49-1-302, which delegates to the State Board broad authority to develop policies for the operation of public schools in Tennessee. This statute does not refer to interscholastic athletics or to TSSAA. The state legislature itself has not enacted any legislation recognizing the role of TSSAA in regulating interscholastic athletic competition.

In 1997, Brentwood Academy, a private parochial high school member of TSSAA, sued the association under 42 U.S.C § 1983, alleging that TSSAA's conduct in enforcing its rule prohibiting member schools from contacting prospective student-athletes prior to their enrollment (the "Recruiting Rule") violated the First and the Fourteenth Amendments to the United States Constitution. The complaint also claimed antitrust violations under Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, based on TSSAA's allegedly anticompetitive conduct in imposing sanctions upon Brentwood Academy – including barring the school from competing for a state championship for two

years – for purported violations of the Recruiting Rule. The complaint alleged, *inter alia*, that these sanctions materially hindered Brentwood Academy's ability to compete for students and to compete in interscholastic athletics with other member schools.[5]

Upon TSSAA's motion for summary judgment as to the constitutional claims, the district court found that TSSAA was a state actor subject to suit under § 1983. On appeal, this Court reversed. The Supreme Court granted certiorari and reversed this Court's decision, holding that TSSAA was a state actor under § 1983 and the Fourteenth Amendment, despite TSSAA's nominally private character, in light of the "pervasive entwinement" of public institutions and public officials in the TSSAA's composition and workings. The case was remanded to the district court, and, after a trial, the district court entered judgment for Brentwood Academy on the First Amendment and Fourteenth Amendment claims.

After the case was remanded to the district court, Brentwood Academy amended its complaint, alleging additional violations of Sections 1 and 2 of the Sherman Act based on TSSAA's implementation of a regulation creating a Division I/Division II classification, which provides that TSSAA member schools

---

[5] The Commission's submission is limited to questions concerning the state action exemption from the federal antitrust laws. The Commission expresses no view regarding the merits of Brentwood Academy's antitrust claims or any other aspect of this case.

that give need-based financial aid to student-athletes cannot participate in Division I competition. The amended complaint alleged that TSSAA's Division I/Division II classification had the anticompetitive effect, *inter alia*, of raising the cost of attending private schools in Tennessee, because some of these schools had ceased to offer financial aid as a condition of competing in Division I. The district court granted summary judgment for TSSAA on Brentwood Academy's antitrust claims, ruling that TSSAA was entitled to protection from antitrust scrutiny under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). The district court found that "TSSAA, for all practical purposes, is a state subdivision regarding its regulatory activity over interscholastic athletics and acts pursuant to clearly articulated and affirmatively expressed state policy." Docket No. 254. The court did not elaborate on the basis for this conclusion, but merely referred to its prior decision and the decision of the Supreme Court, which held that TSSAA and the State of Tennessee are "pervasively entwined," making TSSAA a state actor subject to suit under § 1983.

ARGUMENT

Contrary to the district court's ruling, the prior findings of "pervasive entwinement" between state officials and TSSAA do not support holding TSSAA's alleged anticompetitive conduct exempt from the federal antitrust laws under the

Parker state action doctrine. The test for "state action" in antitrust analysis is far narrower than under the Fourteenth Amendment: in antitrust analysis, "state action" narrowly refers to conduct that (1) is undertaken pursuant to a "clearly articulated and affirmatively expressed" policy of the sovereign state, and (2) is actively supervised by the state. Subordinate state agencies themselves cannot accord antitrust state action protection to others by authorizing their anticompetitive conduct. Rather, it is the state as sovereign – *i.e.*, the state legislature or state supreme court – that must, in the first instance, make clear its intent to displace competition. Here, the state as sovereign has not clearly articulated a policy to displace competition, and, for this reason alone, the district court's decision that TSSAA is entitled to antitrust state action protection must be overturned.

I. The *Parker* State Action Doctrine Shields Anticompetitive Conduct from Federal Antitrust Scrutiny Only When the Conduct Is in Furtherance of Clearly Articulated State Policy to Displace Competition and When the Conduct Is Actively Supervised by the State.

A. The *Parker* State Action Doctrine.

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme Court determined that federal 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 350-51. Accordingly, the Court held that when a "state in adopting and enforcing [a] program . . . , as sovereign, imposed the restraint as an act of government," the Sherman Act does not prohibit the restraint. *Id.* at 352.

While states may adopt and implement policies that depart from the federal antitrust laws, subordinate political subdivisions, including state regulatory boards 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) (a municipality is not the sovereign); *see Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 62-63 (1985) (state Public Service Commissions "acting alone" could not shield anticompetitive conduct from antitrust scrutiny); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791-92 (1975) (state bar association, which was a state agency for certain purposes, was not entitled to state action exemption). The Supreme Court has recognized that a state legislature or state supreme court acting in its legislative capacity is "the sovereign itself," whose conduct is exempt from liability under the Sherman Act without need for further inquiry. *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984).[6] However, when the activity "is not directly that of the legislature or supreme court

[6] The Court has left open the question "whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine." *Hoover*, 466 U.S. at 568 n.17.

but is carried out by others pursuant to state authorization," *id.* at 568, the challenged restraint qualifies for state action exemption only if it is (1) undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition, and (2) actively supervised by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Like other judicially imposed exemptions from the antitrust laws, the Supreme Court has held that the *Parker* doctrine must be narrowly construed. *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

B. The "Clear Articulation" Requirement.

To fall within the state action doctrine, the activities of nonsovereign subordinate entities must, in the first instance, be authorized by the state. General or neutral authorizing language will not be construed to grant authority to undertake action contravening the antitrust laws. In *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), for example, the Supreme Court held that the *Parker* doctrine did not protect a municipality's activities that were clearly "authorized" by a "home rule" statute, because the statutory provision was neutral on the question whether the state clearly intended its municipalities to be permitted to engage in anticompetitive acts. *Id*. at 55-56.[7] Even explicit state authorization

[7] The Court explained that "[a]cceptance of this proposition – that the general grant of power to enact ordinances necessarily implies state authorization

of conduct constituting a Sherman Act violation does not suffice to shield the conduct from antitrust liability unless that authorization clearly evidences a state policy to displace competition as the primary means of serving the public interest. *Parker*, 317 U.S. at 351 ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"); *Town of Hallie*, 471 U.S. at 39. As the Court emphasized in *Town of Hallie*, a subordinate entity must prove not only its authority to act, but also "that a state policy to displace competition exists." 471 U.S. at 39.

The state need not follow any particular formula in expressing its intent to displace competition or 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 Town of Hallie*, 471 U.S. at 43. The municipal conduct at issue in *Town of 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

---

to enact specific anticompetitive ordinances – would wholly eviscerate the concepts of 'clear articulation and affirmative expression' that our precedents require." *City of Boulder*, 455 U.S. at 56.

agreed to annexation, with inevitable 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 unincorporated 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 protected 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*.

Subordinate state agencies themselves cannot shield the conduct of others from federal antitrust scrutiny by authorizing their anticompetitive acts, unless the

state as sovereign has clearly authorized the agency to displace competition. In *Southern Motor Carriers*, for example, the Court considered whether the *Parker* doctrine applied to common carrier rate bureaus that engaged in collective rate-making permitted by state Public Service Commissions. The Court pointed out that the state agencies' actions permitting collective rate-making standing alone were insufficient to confer state action protection, because "*Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the state itself." 471 U.S. at 62-63. Although the Court ultimately found such clear articulation, it did so only because the state statutes in question either explicitly permitted collective rate-making, *id*. at 63, or otherwise plainly contemplated an "inherently anticompetitive rate-setting process." *Id*. at 64.

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

that falls within its authority under state law – does not constitute state action for purposes of the Sherman Act.

C. The "Active Supervision" Requirement.

While a state may substitute its own regulatory program in place of the competitive market, principles of federalism and state sovereignty do not empower a state simply to displace the federal antitrust laws and then abandon the market at issue to the unsupervised discretion of non-governmental actors.[8] Accordingly, to qualify for the state action exemption from antitrust liability, a challenged restraint effectuated by such actors not only must be in accordance with a clearly articulated state policy to displace competition, but also must be actively supervised by the state. *Midcal*, 445 U.S. at 105. Questions concerning state supervision of anticompetitive conduct become relevant only if it is determined, as a threshold matter, that the state has clearly articulated a policy to displace competition.

"[T]he requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie*, 471 U.S. at 46. At its core, the active state supervision requirement is meant to identify those

---

[8] *See* I Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 226, at 464 (2d ed. 2000).

responsible for public policy decisions. As the Court stated in *Ticor*, "[f]ederalism serves to assign political responsibility, not to obscure it." 504 U.S. at 636.[9]

In *Town of Hallie*, the Supreme Court held that active state supervision is not required when the actor is a municipality, because "there is little or no danger that it is involved in a *private* [anticompetitive] arrangement." *Town of Hallie*, 471 U.S. at 47 (emphasis in original). In contrast "[w]here a private party is engaged in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State." *Id*. The Court further suggested, although it did not decide the issue, that "[i]n cases in which the actor is a state agency, it is likely that active supervision would also not be required." *Id.* at 46 n.10.

When private parties act together with state or city officials, or when the entity in question has both public and private attributes, it may not be immediately apparent whether active state supervision is required. In such cases, the inquiry should focus on whether the entity has sufficient nexus with the state or municipal government to minimize the risk that the entity will make decisions to further its (or its constituent members') own interests rather than the state's policies. *Id.* at

---

[9] *See Report of the State Action Task Force*, *supra* note 1, at 12-15 (describing the electoral accountability function of the active supervision requirement).

47. The entity's structure, membership, decision-making, and openness to the public are all relevant to this inquiry.[10]

When an entity is subject to the active supervision requirement, the Supreme Court has made clear that the standard for such supervision is a rigorous one. It is not enough that the state approves private agreements with little review. As the Court held in *Midcal*, "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private [anticompetitive] arrangement." 445 U.S. at 106. Rather,

---

[10] *See* I Areeda & Hovenkamp, § 227, at 499-500. Although some courts have considered an entity's non-profit status or its exercise of governmental functions (such as bond authority), these criteria do not necessarily have probative value to the relevant inquiry: whether there is a danger that the entity will make decisions based on its own interests rather than the state's policies. *See Report of the State Action Task Force*, *supra* note 1, at 37-40, 55-56 (setting forth criteria for identifying whether hybrid entities should be subject to the active supervision requirement).

This Court examined such factors in *Riverview Investments, Inc. v. Ottowa Community Improvement Corp.*, 899 F.2d 474 (6th Cir. 1990), asking whether the *Parker* doctrine protected a nonprofit "community improvement" corporation ("CIC") that approved of bonds on behalf of the city. The Court concluded that, although the corporation was properly considered an "agent" of the city, it was subject to the active state supervision requirement: it made decisions without input or oversight from the city or other governmental body, *id*. at 481-82; its "structure and operation were not determined by" the city, but instead it "controlled its own internal activities in accordance with the provisions of its articles of incorporation and code of regulations," which "reserved to the CIC exclusive rights to amend the regulations without further approval of" the city, *id*. at 479; and "[a]lthough CIC was required to have 40% public officials on its governing board, it was free to appoint people of its own choosing." *Id*. at 482.

state officials must engage in a "pointed reexamination" of the private conduct. *Id.*; *accord Ticor*, 504 U.S. at 634-35; *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988). State officials must exercise "sufficient independent judgment and control so that the details" of the restraint "have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634-35. As the Supreme Court has cautioned, "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." *Id*. at 638.

Thus, while clear articulation requires that a state enunciate an affirmative intent to displace competition and replace it with an alternative means of promoting the public interest, active supervision requires the state to examine the particular conduct at issue to ensure that it comports with the standards of the state's alternative regulatory regime. Only then can the underlying conduct of non-governmental actors accurately be deemed conduct of the state itself that is exempt from liability under the federal antitrust laws.

II. The District Court Erroneously Held Conduct Exempt from the Sherman Act in the Absence of a State Policy to Displace Competition.

The district court ruled that TSSAA was entitled to protection from antitrust scrutiny based solely on its earlier decision, and that of the Supreme Court, which found that the "pervasive entwinement" between TSSAA and the State of

Tennessee made TSSAA a "state actor" for purposes of 42 U.S.C. § 1983 and the Fourteenth Amendment.[11] The district court concluded that TSSAA was a "state subdivision" regarding its regulatory activity over interscholastic athletics and acted pursuant to "clearly articulated and affirmatively expressed state policy," but provided no analysis to support this conclusion, merely referring to the earlier findings of "pervasive entwinement." These earlier findings, however, do not address the question now at issue.[12] Instead, what is needed is a careful examination of the relevant provisions of state law to determine whether the *sovereign state itself* has articulated a policy to displace competition.

In equating "state action" under § 1983 and the Fourteenth Amendment with "state action" for purposes of antitrust analysis, the district court misapplied the Supreme Court's *Parker* doctrine. Although the term is the same, "state action" has different legal significance in each of these two contexts. In Fourteenth Amendment analysis, "state action" is defined broadly to encompass activity that

---

[11] *Brentwood Academy v. Tennessee Secondary School Athletic Ass'n*, 13 F. Supp. 2d 670 (M.D. Tenn. 1998), *rev'd*, 180 F.3d 758 (6th Cir. 1999), *rev'd*, 531 U.S. 288 (2001).

[12] While the earlier factual findings concerning the "pervasive entwinement" of state institutions and state officials in the TSSAA's composition and workings may have some relevance to an inquiry whether TSSAA is subject to the active state supervision requirement, they have no bearing on the crucial threshold question whether the state as sovereign clearly intended to displace competition.

may be fairly attributable to the government – not merely the sovereign state itself, but also its subordinate subdivisions, including municipalities.[13] In contrast, the term "state action" in the antitrust context narrowly refers only to actions undertaken in conformity with a policy clearly articulated by *the sovereign itself* that departs from the federal antitrust laws. If the sovereign itself has not clearly articulated its intent to displace competition, subordinate state subdivisions – even those (such as municipalities) that are plainly "state actors" under the Fourteenth Amendment – are not relieved of their obligation to comply with the federal antitrust laws. For this reason, "conclusions of state action in the Fourteenth Amendment context should *never* be used to support a finding of state action in the antitrust context." I Areeda & Hovenkamp, § 221, at 356 (emphasis added).

The district court appears to have confused the State Board's general authorization of TSSAA's regulation of interscholastic athletic competition with a state policy to displace competition.[14] Even if the State Board arguably

---

[13] *See Brentwood Academy*, 531 U.S. at 295-96 (citing cases); I Areeda & Hovenkamp, § 221, at 356 ("Fourteenth Amendment state action can also cover the inadvertent or unilateral acts of state officials *not acting pursuant to a state policy*.") (emphasis added).

[14] *See* Tenn. Bd. of Educ. Rule 0520-1-2-.08 (State Board "recognizes the value of participation in interscholastic athletics and the role of [TSSAA] in coordinating interscholastic athletic competition," and "authorizes the public schools of the state to voluntarily maintain membership in [TSSAA]").

contemplated that TSSAA's activities would have the anticompetitive effects alleged here, however, the State Board's authorization would not shield TSSAA from antitrust scrutiny, because a state agency acting alone cannot exempt anticompetitive conduct from the federal antitrust laws. Rather, the question is whether the state as sovereign – *i.e.*, the state legislature or state supreme court acting in its legislative capacity – has made clear its intent to establish an anticompetitive regulatory program. *Southern Motor Carriers*, 471 U.S. at 62-63; *Hoover*, 466 U.S. 567-68.

Here, the state as sovereign has not clearly articulated a policy to displace competition, nor has it clearly articulated its intent to allow the State Board to shield TSSAA from the federal antitrust laws. Instead, the General Assembly has merely delegated to the State Board general authority to develop policies for the operation of public schools in Tennessee. Tenn. Code Ann. § 49-1-302 (authorizing the State Board, *inter alia*, to "set policies for the completion" of schools, "develop and adopt policies" for "the fair and equitable distribution and use of public funds among public schools," and "set policies governing all curricula and courses of study in the public schools"). This is precisely the type of general, neutral authorizing language that the Supreme Court has held will *not* be construed as state authorization of anticompetitive conduct. *See City of Boulder*,

455 U.S. at 55-56. This statute neither explicitly permits TSSAA's activities nor plainly contemplates an "inherently anticompetitive" program for the regulation of interscholastic athletics. *Southern Motor Carriers*, 471 U.S. at 64. In fact, the statute makes no mention at all of interscholastic athletics. Furthermore, it cannot be said that the anticompetitive effects claimed here by Brentwood Academy – most notably, the increased costs of private school in Tennessee allegedly resulting from TSSAA's Division I/Division II classification rule, and the constraints on the private school's ability to compete for students allegedly resulting from TSSAA's implementation of its Recruiting Rule – are the "foreseeable result" of authorizing the State Board to develop policies for public schools. *See Omni*, 499 U.S. at 373; *Town of Hallie*, 471 U.S. at 42-43.

Moreover, even assuming *arguendo* that the legislature's general grant of authority to the State Board could be read as clearly granting the State Board the authority to "coordinat[e] interscholastic athletic competition" (*see* Tenn. Bd. of Educ. Rule 0520-1-2-.08), it would not follow that the anticompetitive effects alleged here by Brentwood Academy would be the foreseeable result of granting the State Board that authority. On the contrary, interscholastic sports leagues can be and commonly are organized in ways that do not conflict with the federal antitrust laws. *See National Collegiate Athletic Ass'n v. Board of Regents of the*

Univ. of Okla., 468 U.S. 85, 98-104 (1984). Thus, a grant of authority by the state legislature to coordinate interscholastic athletic competition should not be read to evidence an intent to displace the nation's antitrust laws. Instead, a clearer statement from the legislature is required before the competition laws are cast aside.

The lack of any clear articulation by the Tennessee legislature to displace competition in this area is dispositive of the issue before this Court. Even if the State Board itself wished to displace competition,[15] that would be irrelevant. The State Board, as a subordinate state entity, cannot alter application of the federal antitrust laws in the absence of action by "the state itself," which, in the present context, can only be the legislature.[16]

---

[15] There is no indication, however, that the State Board itself had any such intent. Although the district court, in the context of its § 1983 state action analysis, found that the State Board "approved" TSSAA's rules and regulations, including the Recruiting Rule, on several occasions between 1972 and 1992, *Brentwood Academy*, 13 F. Supp. 2d at 675, the State Board does not appear to have contemplated the potential anticompetitive effects of any of these rules; rather, its "approval" appears to have been perfunctory. Moreover, the State Board does not appear to have ever "approved" TSSAA's more recent rule, promulgated in 1997, creating a Division I/Division II classification.

[16] *See Report of the State Action Task Force*, *supra* note 1, at 6-7 (surveying the types of entities that may be considered "the state itself" for purposes of articulating a state policy).

The district court's approach to this important issue, if followed, would have dangerous consequences. If analysis stops with a finding of general authority to act, conduct that the state legislature never intended to protect may be shielded from competition. It would mean that any time a state authorizes its subordinate subdivisions to regulate in a particular field, entities whose activities are authorized by these subdivisions could claim a special license to violate the antitrust laws with impunity.[17] 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 entities independently to decide – without any state policy to displace competition – not to obey the federal antitrust laws. This result has nothing to do with deferring to state sovereignty.

Indeed, the district court's version of the state action doctrine has the potential to undercut state policy as well as federal law, because it interferes with the state's ability to determine and implement its policies. As the Supreme Court observed in rejecting a broad claim of state action exemption in *Ticor*:

> If 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. . . .

---

[17] *See Report of the State Action Task Force*, *supra* note 1, at 26-34 (describing hazards of equating a mere grant of authority with a "clearly articulated" policy of the sovereign state).

> Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends.

504 U.S. at 635.

Accordingly, the district court erred in its conclusion that TSSAA acted "pursuant to clearly articulated and affirmatively expressed state policy." Docket No. 254. On the contrary, the State of Tennessee has articulated no policy contemplating the alleged anticompetitive consequences of TSSAA's actions, and, for that reason alone, the lower court's grant of state action exemption from the federal antitrust laws must be reversed. Thus, there is no need for this Court to decide whether the district court also erred in according antitrust protection to TSSAA without regard to whether its alleged anticompetitive conduct was actively supervised by the state.[18]

It may be that the district court's perfunctory finding that TSSAA was entitled to "state action" antitrust protection reflects its views about the validity of

---

[18] In stating that TSSAA was a "state subdivision," the district court appears to have concluded (although it did not explain its reasoning) that, despite its nominally private character, TSSAA is properly exempted from the active state supervision requirement. As reflected in the discussion above, however, such cursory analysis fails to grapple with the essential issue – *i.e.*, whether the entity has sufficient nexus with state authorities to minimize the risk that it will make decisions to further its (or its constituent members') own interests, rather than the state's policies. *See* pp. 12-14, *supra*.

Brentwood Academy's antitrust claims. However, whether an actor is exempt from antitrust liability and whether the challenged conduct violates the antitrust laws are two entirely separate inquiries. Indeed, much conduct that does not qualify as "state action" probably does not violate the antitrust laws. But the *Parker* doctrine should not be employed as a shortcut for a merits analysis. Such an overbroad application of *the Parker* state action doctrine is inconsistent with the principles of federalism and state sovereignty that underlie the doctrine and, by blurring the narrow parameters of the doctrine, threatens enforcement of this nation's antitrust laws.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's ruling that TSSAA's conduct challenged in this action is "state action" that is exempt from antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943).

Respectfully submitted,

WILLIAM E. KOVACIC
General Counsel

JOHN F. DALY
Deputy General Counsel for
Litigation

MICHELE ARINGTON
Attorney
Federal Trade Commission
600 Pennsylvania Ave., N.W.
Washington, D.C. 20580
(202) 326-3157

November 13, 2003

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. 32(a)(7)(C), I certify that the attached Brief of Federal Trade Commission as *Amicus Curiae* is proportionally spaced, has a typeface of 14 points, and contains 5,326 words.

_____

MICHELE ARINGTON

CERTIFICATE OF SERVICE

I hereby certify that on November 13, 2003, the original and six copies of the Brief of the Federal Trade Commission as *Amicus Curiae* Supporting Cross-Appellant and Urging Reversal were sent to the Clerk of Court by overnight courier; and two copies of the foregoing brief were sent by overnight courier to counsel for each party as follows:

Richard L. Colbert
W. Gregory Miller
J. Christopher Anderson
COLBERT & WINSTEAD, P.C.
1812 Broadway
Nashville, Tennessee 37203

H. Lee Barfield, II
W. Brantley Phillips, Jr.
Ross I. Booher
BASS, BERRY & SIMS PLC
315 Deaderick Street, Suite 2700
Nashville, Tennessee 37238-3001

James F. Blumstein
Vanderbuilt University School of Law
131 21st Avenue South
Nashville, Tennessee 37203

_____
MICHELE ARINGTON