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Clear Inarticulation—State Action Antitrust Immunity and State Agencies: *Neo Gen Screening, Inc. v. New England Newborn Screening Program*

I. INTRODUCTION

In *Parker v. Brown*,[1] the Supreme Court held that states are immune from federal antitrust law for their actions as sovereigns. This has come to be known as the Parker Doctrine or the state action doctrine. In *Parker*, a raisin distributor, Porter Brown, challenged a 1940 California regulation that raised prices and restricted the supply of California raisins. The Court found that the Sherman Act contained neither a hint nor a suggestion of any intention "to restrain state action or official action directed by a state."[2] Therefore, California's regulation of the raisin industry was immune from federal antitrust scrutiny. Because of this desire to defer to state sovereignty, states were found to be immune from federal antitrust actions.

Predictably, applying the state action doctrine can be confusing. As one court noted, "[O]f late, the state action doctrine has become a road well-traveled by the Court. Its signposts, however, remain less than clear."[3] Unfortunately, the well-traveled road of the state action doctrine splits off into meandering paths that are not so well-traveled. The path of state action antitrust immunity for actions taken by state agencies is one of the more difficult paths to follow, and the signposts that do exist are often confusing. As state reliance on state agency decision making becomes more prevalent, establishing clear guidelines for applying state action immunity to state agencies becomes increasingly important.

The rules and requirements governing state action immunity are different according to the category in which an actor is placed. The Supreme Court has established three categories that are used to de-

1. 317 U.S. 341 (1943).

2. *Id.* at 351.

3. First Am. Title Co. v. South Dakota Land Title Ass'n, 714 F.2d 1439, 1450 (8th Cir. 1983).

termine how state action immunity should be applied. The first category includes acts of the state acting as sovereign. The actions of the state legislature and state supreme court fit into this category[4] and are considered ipso facto immune from antitrust laws.[5] The second category includes acts taken by political subdivisions. The acts of municipalities have been placed in this category.[6] Their actions are immune from antitrust liability only where a clearly articulated state policy authorizes their actions.[7] The final category includes acts taken by private actors pursuant to state regulations.[8] Private actors are immune under the state action doctrine only when they act pursuant to a clearly articulated state policy and the state actively supervises the anticompetitive conduct.[9]

The Supreme Court has not clearly explained how to categorize actions taken by a state agency. Consequently, lower courts—particularly the United States Courts of Appeals—have attempted to decide the issue without guidance and, not surprisingly, have arrived at different conclusions. In *Neo Gen Screening, Inc. v. New England Newborn Screening Program*,[10] the First Circuit held that the actions of state executive agencies should be viewed as the actions of the state acting as a sovereign, thereby treating state agencies like state legislatures and state supreme courts and rendering state agencies immune from antitrust liability.[11] In contrast, the Sixth and Second Circuits have applied the clear articulation requirement to state agency action, determining that the actions of state agencies should be placed in the same category as actions taken by municipalities or political subdivisions.[12]

This Note will argue that the First Circuit correctly determined state agencies' actions to be the actions of the state acting as a sover-

4. *See* Hoover v. Ronwin, 466 U.S. 558, 567 (1984); Bates v. State Bar of Arizona, 433 U.S. 350, 360 (1977).

5. *See Hoover*, 466 U.S. at 567–68.

6. *See* City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 413 (1978).

7. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44 (1985).

8. *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985).

9. *See id.*; California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980).

10. 187 F.3d 24 (1st Cir. 1999).

11. *See id.* at 28–29.

12. *See* Hybud Equip. Corp. v. City of Akron, 742 F.2d 949 (6th Cir. 1984); Automated Salvage Transp., Inc. v. Wheelabrator Envtl. Sys., Inc., 155 F.3d 59 (2d Cir. 1998).

eign and that the actions of state agencies should not be subject to the clear articulation requirement. The clear articulation requirement should not be used because it burdens state agencies by making regulation more difficult, costly, and time consuming. Under the clear articulation requirement, when deciding whether antitrust immunity can be granted to state agencies, courts must search for a statutory provision plainly showing that "the legislature contemplated the kind of action complained of."[13] Resolving the question of how to categorize state agencies is important because state agencies and private actors acting pursuant to state regulations need to be able to determine beforehand whether their actions are likely to be granted immunity and what burdens they will be subjected to before immunity can be granted.

Part II of this Note outlines the background and development of the law regarding state action antitrust immunity. In addition, Part II summarizes the debate between the circuits about whether a clear articulation of a legislative intent for an agency to restrain competition is required before state action immunity can be applied to the state agency. Part III gives the facts of *Neo Gen* and discusses the analysis used by the First Circuit in holding that the actions of state executive agencies should receive immunity from antitrust suits. Next, Part IV appraises the value of the First Circuit's reasoning in *Neo Gen* in light of other attempts to reconcile where state agencies belong in the antitrust state action doctrine. Part IV suggests that the logic and analysis employed by the First Circuit are appropriate for determining when the actions of state agencies are entitled to immunity from antitrust actions. Part V concludes that the actions of state agencies should be deemed actions of the state itself and should not be subject to the same clear articulation requirement that applies to municipalities.

II. BACKGROUND

A. State Action Antitrust Immunity: History, Purpose, and Function

The Supreme Court has developed three categories within the Parker Doctrine to determine whether the state is acting as sovereign

13. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 415 (1978) (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).

and what type of extra safeguards need to be added when the actor is not the state itself. Therefore, the first step in state action immunity analysis is to determine within which category the actor should be placed.

1. State legislatures and state supreme courts

The first category of actors includes state legislatures and state supreme courts. The Supreme Court ruled in *Hoover v. Ronwin*[14] that actors in this category "ipso facto are exempt from the operation of the antitrust laws."[15] The Court further explained that state legislatures are entitled to this immunity because of the language in *Parker*:

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.[16]

State supreme courts were extended the same immunity as state legislatures in *Bates v. State Bar of Arizona*.[17] In reviewing this issue, the *Hoover* Court explained the *Bates* ruling by stating that "a state supreme court, when acting in a legislative capacity, occupies the same position as that of a state legislature. Therefore, a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action."[18]

The *Bates* case focused on the authority of the state supreme court to regulate the practice of law. The Supreme Court explained in *Bates* that the key question was whether the anticompetitive restraint was compelled by the State acting as sovereign.[19] Because the state supreme court was the ultimate body wielding the State's power over the practice of law, the state supreme court was acting in

14. 466 U.S. 558 (1984).
15. *Id.* at 567–68.
16. *Id.* at 567 (quoting Parker v. Brown, 317 U.S. 341, 350–51 (1943)).
17. 433 U.S. 350, 360 (1977).
18. *Hoover*, 466 U.S. at 568 (citing *Bates*, 433 U.S. at 360).
19. *See Bates*, 433 U.S. at 360.

a legislative capacity, representing the State acting as sovereign, when it regulated the practice of law.[20] Based on the reasoning in *Hoover* and *Bates*, the actions of state legislatures and supreme courts (when acting legislatively) are immune from antitrust liability because the Sherman Act does not apply to the actions of a state acting as sovereign.

2. Municipalities and political subdivisions

In the second category, political subdivisions, such as municipalities, are immune from antitrust liability only where their anticompetitive acts flow from a "clearly articulated and affirmatively expressed state policy."[21] Closer analysis of municipality action is required than for state legislature or supreme court action because political subdivisions are not themselves sovereign.[22] Because *Parker's* exemption limitations were aimed at official action directed by a state, the Court required state subdivisions to be able to trace their actions back to the state itself in order to prove they were compelled by the state acting as sovereign.[23] The Supreme Court was unwilling to presume that Congress intended to exclude anticompetitive municipal action from federal antitrust laws.[24] The Court thus refused to extend ipso facto immunity to municipalities because of a fear that economic dislocation could result if cities were free to place their own interests above the nation's economic goals as reflected in the antitrust laws.[25]

3. Private actors

The third category encompasses private actors. Private actors can benefit from state action antitrust immunity only if they act pursuant to a clearly articulated state policy *and* if the state actively supervises the anticompetitive conduct.[26] The Supreme Court extended immu-

20. *See id.*

21. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 44 (1985).

22. *See id.* at 38 (citing City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 412 (1978)).

23. *See Lafayette*, 435 U.S. at 412–13.

24. *See id.* at 413.

25. *See id.*

26. *See* Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 57 (1985); California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 104 (1980).

nity for private action because otherwise the congressional purpose outlined in *Parker* would be frustrated, "for a State would be unable to implement programs that restrain competition among private parties."[27] The Court added the active supervision requirement to prevent "the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct."[28] The active supervision requirement "ensures that a State's actions will immunize the anticompetitive conduct of private parties only when the 'state has demonstrated its commitment to a program through its exercise of regulatory oversight.'"[29]

B. Antitrust Immunity for State Agencies: Development of the Law

The Supreme Court has never determined whether state agencies should be placed in the same antitrust category as state legislatures and supreme courts or in the municipality category. Circuit courts proceeded to address the issue without Supreme Court guidance, leading to a split among the circuits regarding how to treat state agency actions. Some circuits have declined to apply the clear articulation test, finding that the actions of the state agency should be placed within the same category as actions taken by the state legislature or state supreme court. Other circuits have placed state agencies within the political subdivision category, requiring the clear articulation test to be performed before state action immunity can be granted.

1. Circuits holding the clear articulation requirement inapplicable to state agencies

Three circuits have held that the clear articulation test should not apply to state agencies in determining antitrust liability. The First Circuit, for example, has held that the clear articulation test should not be applied to actions taken by state agencies. In *Neo Gen*, the court stated, "[W]e have rejected a 'clear articulation' test as applied to the state's executive branch, at least where a full-fledged depart-

27. *Southern Motor Carriers*, 471 U.S. at 56.

28. *Id.* at 57 (citing *Midcal*, 445 U.S. at 106).

29. *Id.* at 62 n.23 (citing 1 PHILLIP AREEDA & DONALD F. TURNER, ANTITRUST LAW ¶ 213a (1978)).

ment is concerned."[30] The court reasoned that, according to the Parker Doctrine, Congress did not seek to regulate the states themselves and "'the states' include their executive branches quite as much as their legislatures and their courts."[31]

Similarly, the Ninth Circuit held in *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*[32] that "state executives and executive agencies, like the state supreme court, are entitled to *Parker* immunity for actions taken pursuant to their constitutional authority, regardless of whether these particular actions or their anticompetitive effects were contemplated by the legislature."[33] The Ninth Circuit justified its decision to withhold the clear articulation requirement from state agencies, thereby placing the agencies in a different category than municipalities, by explaining that "cities are treated differently from branches of the state governments for purposes of the Eleventh Amendment."[34]

The Ninth Circuit also noted in *Deak-Perera Hawaii, Inc. v. Department of Transportation*[35] that *Hoover v. Ronwin*[36] had left open "the circumstances under which the activities of a state executive branch are entitled to antitrust immunity."[37] The Ninth Circuit held that the Department of Transportation was entitled to immunity because it was fulfilling its state constitutional duty by acting as the governor's subordinate and this action constituted the state acting as sovereign.[38] The court explained that the clear articulation requirement did not apply because of the difference between this case and the situation in *Lafayette*. The court indicated that *Lafayette* "involved a government delegation of authority to private parties" but "this is not a case of private parties imposing competitive restraints in conjunction with state authorities."[39]

30. Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24, 29 (1st Cir. 1999).

31. *Id.*

32. 810 F.2d 869 (9th Cir. 1987).

33. *Id.* at 876.

34. *Id.* at 876 n.6.

35. 745 F.2d 1281 (1984).

36. 466 U.S. 558 (1984).

37. *Deak-Perera*, 745 F.2d at 1282 (citing *Hoover*, 466 U.S. at 568).

38. *See id.*

39. *Id.* at 1283.

The Fifth Circuit also refused to apply the clear articulation test when it held that a state agency was not liable for alleged antitrust violations. In *Saenz v. University Interscholastic League*,[40] the plaintiff argued that the University Interscholastic League ("UIL") violated antitrust law by rejecting his slide rule product for use in an interscholastic competition.[41] The UIL escaped liability because the court held that the agency was "a governmental entity outside the ambit of the Sherman Act,"[42] thus placing the agency in the same category as state legislatures and supreme courts.

These three circuits have refused to apply the clear articulation requirement to state agencies, although not for particularly clear reasons. The First and Ninth Circuits each stated that executive agencies deserved ipso facto immunity because they were part of the executive branch. The Fifth Circuit, however, simply stated that state agencies are outside of the clear articulation requirement without making any distinction regarding executive agencies.

None of the circuits appears to have addressed whether different types of state agencies should be treated differently based on whether they are defined as an executive agency. Although state agencies may be classified as executive, legislative, or perhaps independent, it is not clear whether the circuit court had these distinctions in mind and meant to exclude any type of state agency from ipso facto immunity.

It is not clear what might distinguish state agencies from one another for antitrust purposes. At the federal level, executive agencies are generally defined as "[a]gencies whose heads are subject to unlimited presidential removal authority."[43] Independent agencies are those "headed by persons who the President cannot remove at will."[44] It is unclear whether the First and Ninth Circuits intended to only grant ipso facto immunity to agencies that are a part of the executive department but not those that are independent or attached to the state legislature. It is possible that these courts defined executive agencies as agencies that exercise executive power. Under this type of definition, most agencies would qualify for immunity because agencies "typically wield powers that are characteristic of each of the

40. 487 F.2d 1026 (5th Cir. 1973).

41. *See id.* at 1027.

42. *See id.* at 1028.

43. GARY LAWSON, FEDERAL ADMINISTRATIVE LAW 7 (1998).

44. *Id.* at 8.

three principle branches of government," including "executive power to investigate potential violations of rules or statutes and to prosecute offenders."[45]

Because it is unclear what type of executive ties the First and Ninth Circuits had in mind when granting immunity to "executive agencies," ipso facto immunity should not be denied to agencies that do not fit the federal definition of an executive agency based solely on the circuit courts' choice of words. Based on the arguments given in Part IV, state agencies should be placed within the same category as state supreme courts and legislatures for antitrust immunity purposes.

2. Circuits holding the clear articulation requirement applicable to state agencies

So far, two circuits have adopted the rule making the clear articulation requirement applicable to state agency action. The Second Circuit held in *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*[46] that "[w]hen a state agency, municipality, or other state subdivision claims a state immunity from federal law, it must first identify a 'clearly expressed state policy' that authorizes its actions."[47] However, the Second Circuit later appeared to backtrack from this position in *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*,[48] where the court found that certain types of state agencies should be treated "as the State itself rather than as a municipality."[49] The court left the question of how to treat state agency action open, however, because it decided the case on other grounds and ruled that the clear articulation requirement had been met.[50] Because *Cine 42nd Street Theater* has not been overruled, it appears that the Second Circuit requires the application of the clear articulation test to state agency action. However, the dicta in *Automated Salvage Transport* raises the possibility that the requirement may be overruled in the future and state agencies may be treated the same as the state legislature or supreme court.

45. ERNEST GELLHORN & RONALD M. LEVIN, ADMINISTRATIVE LAW AND PROCESS IN A NUTSHELL 9 (4th ed. 1997).

46. 790 F.2d 1032 (2d Cir. 1986).

47. *Id.* at 1043 (citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 40 (1985)).

48. 155 F.3d 59 (2d Cir. 1998).

49. *Id.* at 70.

50. *See id.* at 71–72.

The Sixth Circuit expressed confusion about whether to apply the clear articulation requirement to the actions of the Ohio Water Development Agency ("OWDA") in *Hybud Equipment Corp. v. City of Akron*.[51] The court noted that there was a good argument that an agency with statewide powers "should not be required to show that its conduct was 'pursuant to an affirmatively expressed and clearly articulated policy' to displace competition."[52] The court ended up applying the clear articulation requirement because the parties never argued whether or not OWDA should have been viewed as the state acting as sovereign.[53]

III. *NEO GEN SCREENING, INC. V. NEW ENGLAND NEWBORN SCREENING PROGRAM*

A. The Facts

Neo Gen Screening, Inc. ("Neo Gen"), a private Pennsylvania corporation, brought a federal antitrust action against the University of Massachusetts, the University's Screening Program (the New England Newborn Screening Program), and officials of the Massachusetts Department of Public Health. Neo Gen charged the Screening Program and University, in concert with the Department of Public Health, with "monopolizing, attempting to monopolize and/or conspiring to monopolize 'newborn screening services' in Massachusetts."[54]

The Screening Program, which consisted of a collection of personnel and a laboratory supervised by the medical school of the University of Massachusetts,[55] operated under a contract between the University and the Department of Public Health to provide screening of newborn infants for specified disorders.[56] In 1997, Neo Gen began trying to persuade hospitals in Massachusetts to use Neo Gen for screening newborns, claiming that it offered better screening at

51. 742 F.2d 949 (6th Cir. 1984).

52. *Id.* at 957.

53. *See id.*

54. Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24, 25–26 (1st Cir. 1999).

55. *See id.* at 26.

56. *See id.* at 25.

half the cost charged by the Screening Program.[57] According to the complaint, the University of Massachusetts and its Screening Program then influenced the Department of Public Health to create emergency regulations requiring screening services in Massachusetts to be done exclusively by the Screening Program.[58]

The district court dismissed the action on the ground that it was barred by the Eleventh Amendment because the University of Massachusetts and the Screening Program were arms of the state.[59] Because Neo Gen failed to effectively dispute the district court's holding that the Eleventh Amendment covered the University and its Screening Program, the First Circuit held the dismissal against those defendants was conceded by Neo Gen.[60]

Neo Gen argued on appeal that the state officials in the Department of Public Health were intended defendants and that injunctive relief was sought against them.[61] Neo Gen further argued that the Eleventh Amendment did not bar injunctive relief against the state officials in the Department of Public Health if they violated the Sherman Act.[62] The First Circuit affirmed the judgment of the district court, finding that even if the complaint was liberally construed to include the state officials, Neo Gen was not entitled to relief because the action of the Department of Public Health fell within actions protected by the state action antitrust immunity doctrine.[63]

B. The Court's Reasoning

In finding that the actions of the state officials were entitled to protection under the state action immunity doctrine, the First Circuit examined the motivations behind the Parker Doctrine.[64] The First Circuit then looked at cases that outlined the different categories within the Parker Doctrine.[65] After examining how other circuits

57. *See id.* at 26.

58. *See id.*

59. *See id.* Because of an apparent pleading error, the district court found that no relief was being sought against the state officers. *See id.* at 27.

60. *See id.* at 26–27.

61. *See id.* at 27.

62. *See id.* at 27–28.

63. *See id.* at 29–30.

64. *See id.* at 28.

65. *See id.* The cases the court looked at in deciding which category they were dealing with included: City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991); Hoo-

had addressed the issue of how to categorize state agencies for state action purposes, the First Circuit determined that executive branch state agencies fit into the same category as state legislatures and courts.[66] Therefore, no clear articulation analysis was required.

1. Parker Doctrine purposes

In analyzing the motivations behind the Parker Doctrine, the court explained that it was well settled that "a state is free to regulate, or act on its own behalf, in ways that are anti-competitive and would not be permitted to a private individual."[67] The court acknowledged that the arrangement with the University and the Department of Health was an effective monopoly of screening services but held that "a regulation or purchase of services made *by* the state is classic state action immunized from the Sherman Act."[68] Because the action taken by the state officials fit within the purposes of the Parker Doctrine, the court then examined whether such action was actually taken by the state or some lesser subdivision of the state that required further analysis before Parker Doctrine immunity could be applied.[69]

2. Subcategories within the Parker Doctrine

Neo Gen argued that the actions of the Department of Public Health should be subject to the clear articulation requirement as outlined in two Supreme Court cases,[70] *City of Lafayette v. Louisiana Power & Light Co.*[71] and *City of Columbia v. Omni Outdoor Advertising, Inc.*[72] In *Lafayette*, cities that owned and operated electric utility systems brought an antitrust action against a competing privately-owned utility, Louisiana Power & Light, which then brought an antitrust counterclaim against the cities. The Supreme Court affirmed the Fifth Circuit's holding that the counterclaim should not have

ver v. Ronwin, 466 U.S. 558 (1984); City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389 (1978).

66. *See Neo Gen*, 187 F.3d at 29.

67. *Id.* at 28 (citing Parker v. Brown, 317 U.S. 341, 350–51 (1943); 1 PHILLIP AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶¶ 221–22 (1997)).

68. *Id.*

69. *See id.* at 28–29.

70. *See id.*

71. 435 U.S. 389 (1978).

72. 499 U.S. 365 (1991).

been dismissed because a municipality is not ipso facto immune from anticompetitive action but must be able to show that "the state legislature contemplated a certain type of anticompetitive restraint."[73] The Court explained that the clear articulation requirement did not make it "necessary to point to an express statutory mandate for each act which is alleged to violate the antitrust laws. It will suffice if the challenged activity was clearly within the legislative intent."[74] The clear articulation requirement created by *Lafayette* established that where a subordinate state governmental body was involved a court must examine the specific facts of the case to determine whether anticompetitive actions were comprehended within the powers granted to it by the state legislature.[75]

Neo Gen also relied on *Omni* to support its argument that the clear articulation requirement should be applied to the Department of Public Health's actions.[76] In this case, Omni brought an antitrust action against the city for adopting ordinances restricting new billboard construction that left Omni's competitor, Columbia Outdoor Advertising, in control of more than ninety-five percent of the billboard market.[77] The Court held that the clear articulation requirement applied to the city's actions and found that the requirement was met. The Court explained that a statute met the clear articulation requirement as long as the "suppression of competition [was] the 'foreseeable result' of what the statute authorizes."[78]

The First Circuit rejected Neo Gen's use of the *Lafayette* and *Omni* cases to argue that the clear articulation requirement should apply to the actions of the Department of Public Health, explaining that the clear articulation requirement in *Lafayette* and *Omni* was applied only to municipalities, not to the state itself.[79] The court then held that the actions of an executive branch agency should be viewed as the actions of the state, fitting within the same category as actions taken by the state legislature or state supreme court.[80]

73. 435 U.S. at 393.

74. *Id.* at 393–94 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434–35 (5th Cir. 1976)).

75. *See id.* at 394.

76. *See Neo Gen*, 187 F.3d at 28.

77. *See* 499 U.S. at 365.

78. *Id.* at 373 (citing Town of Hallie v. City of Eau Claire, 471 U.S. 34, 42 (1985)).

79. *See Neo Gen*, 187 F.3d at 28 (citing Hoover v. Ronwin, 466 U.S. 558, 568 (1984)).

80. *See id.* at 28–29.

The court justified its holding by explaining that the Supreme Court "has held that acts of the state legislature or state supreme court are protected under *Parker*, but it reserved decision as to whether state-level executive branch departments or agencies are entitled to similar treatment."[81] Looking at how other circuits had dealt with the issue of which category to fit state agencies into, the court determined that only two other circuits had "squarely faced the issue."[82] The court explained that those two circuits, the Ninth Circuit in *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*[83] and the Fifth Circuit in *Saenz v. University Interscholastic League*,[84] "extended *Parker*'s ordinary protection to actions of the state executive branch."[85]

Based on the holdings of these courts and its own analysis, the First Circuit determined that the clear articulation requirement should not be applied to the actions of the Department of Health. The Department of Health's contract with the University's Screening Program was entitled to immunity from the antitrust allegations just as a state legislature or supreme court would be.

IV. ANALYSIS

The controversy about whether state agencies should be granted the same level of antitrust immunity given to state legislatures and state supreme courts stems from two competing views of agencies. On the one side, agencies are viewed as legitimate policy makers because they are made up of independent experts who are best able to understand complex fact patterns and make the best regulatory decisions for a specialized area.[86] On the other side, agencies are seen as illegitimate speakers for the state because they are not politically re-

81. *Id.* at 28 (citing *Hoover*, 466 U.S. at 568 n.17). The cited footnote reads: "This case does not present the issue 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.

82. *Id.* at 28.

83. 810 F.2d 869 (9th Cir. 1987).

84. 487 F.2d 1026 (5th Cir. 1973).

85. *Neo Gen*, 187 F.3d at 28–29 (citing Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc., 810 F.2d 869, 875–76 (9th Cir. 1987); Deak-Perera Haw., Inc. v. Dep't of Transp., 745 F.2d 1281, 1282–83 (9th Cir. 1984); Saenz v. Univ. Interscholastic League, 487 F.2d 1026, 1027–28 (5th Cir. 1973)).

86. *See* Lloyd N. Cutler & David R. Johnson, *Regulation and the Political Process*, 84 YALE L.J. 1395, 1397 (1975).

sponsive like a legislature and are susceptible to the corrupting influence of regulated industries.[87] Those who fear industry capture worry that state agencies are too susceptible to losing control of the regulation process to the industries they supposedly regulate.[88]

Although the Supreme Court has not discussed why agencies should or should not be held to the clear articulation requirement, examining those points actually addressed by the Court and the different arguments given by commentators for and against applying the clear articulation requirement helps to establish why the clear articulation requirement should not be applied to state agency action.

A. The Supreme Court Has Not Required Application of the Clear Articulation Test to State Agencies

An antitrust case dealing specifically with the actions of a state agency has not yet come before the Supreme Court. The Court's discussion in *City of Lafayette v. Louisiana Power & Light Co.*[89] is the closest the Court has come to deciding the state agency issue. Examining the Court's reasoning and language in *Lafayette*, along with other courts' efforts to interpret this case, demonstrates that the clear articulation requirement should not be imposed on state agencies.

1. Lafayette *does not require that the clear articulation requirement be applied to state agencies*

In *Lafayette*, the Court established the clear articulation rule, explaining that "cities and other subordinate governmental units" are only immune from antitrust liability where "the legislature contemplated the kind of action complained of."[90] The Court required closer analysis of political subdivision actions than state legislatures or state supreme courts because political subdivisions were not seen as sovereign actors. An example of how political subdivisions are not considered sovereign actors is the fact that the Eleventh Amendment does not provide political subdivisions with immunity from suit in federal court.[91] The Court placed the burden of identifying a clear

87. *See id.* at 1397–99.

88. *See infra* Part IV.B.1.

89. 435 U.S. 389 (1978).

90. *Id.* at 415 (quoting City of Lafayette v. Louisiana Power & Light Co., 532 F.2d 431, 434 (5th Cir. 1976)).

91. *See id.* at 412.

articulation in qualifying for antitrust immunity on municipal actors "[i]n light of the serious economic dislocation which could result if cities were free to place their own parochial interests above the Nation's economic goals reflected in the antitrust laws."[92]

Confusion exists about how this holding applies to state agencies because the Court was examining a municipality's actions rather than those of a state agency. Moreover, it remains unclear whether the Court meant to include state agencies in the "subordinate governmental unit" category.

The Sixth Circuit noted that the difficulty in interpreting the *Lafayette* decision and how it relates to state agencies stems from the fact that the plurality and dissenting opinions in *Lafayette* are both supported by four justices.[93] In *Hybud Equipment Corp. v. City of Akron*,[94] the Sixth Circuit attempted to interpret *Lafayette*'s application to state agencies. The Sixth Circuit reasoned that the plurality's fear of economic dislocation within a state motivated the clear articulation requirement and suggested that a different standard might apply to agencies with state-wide jurisdiction.[95] The *Hybud* court reasoned that this economic dislocation theory might have meant that an agency with state-wide powers "should not be required to show that its conduct was 'pursuant to an affirmatively expressed and clearly articulated policy' to displace competition."[96] In the end, the Sixth Circuit avoided the issue and applied the clear articulation requirement to actions taken by the Ohio Water Development Agency

92. *Id.* at 412–13.

93. *See* Hybud Equip. Corp. v. City of Akron, 742 F.2d 949, 955 n.5 (6th Cir. 1984) (quoting Hybud Equip. Corp. v. City of Akron, 654 F.2d 1187, 1195 (6th Cir. 1981)).

94. 742 F.2d 949 (6th Cir. 1984).

95. *See id.* at 956.

96. *Id.* at 957. The court used the following logic from Phillip Areeda to justify its position:

> Although the *Lafayette* requirement of state authorization clearly applies to cities and other subordinate local units, its application to state agencies is uncertain. On the one hand, the majority's belief that 'authorization' helps ensure that governmental activity is truly *state* action could logically be extended to state executive departments and administrative agencies. On the other hand, Justice Brennan's reasoning was predicated on the existence of a large number of municipalities and other subordinate governmental units, each pursuing parochial and perhaps conflicting policies. Their ordinances are locally formulated, with a possible anticompetitive impact beyond city or district limits. . . . State agencies, by contrast, formulate statewide rules and policies.

Id. at 956–57 n.8 (quoting Phillip Areeda, *Antitrust Immunity for "State Action" After Lafayette*, 95 HARV. L. REV. 435, 444 (1981)).

because the parties never argued that the agency's actions could be directly attributed to the state acting as sovereign.[97]

Regardless of any difficulties courts have experienced in interpreting *Lafayette*, the *Lafayette* Court explicitly noted that the clear articulation requirement has been applied to one type of state agency. The Court explained in *Lafayette* that *Goldfarb v. Virginia State Bar*[98] "made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign."[99] In *Goldfarb*, the state bar, "though acting within its broad powers, had 'voluntarily joined in what [was] essentially a private anticompetitive activity' and was not executing the mandate of the State."[100]

The problem with this "clear" holding on state agencies is that state bars are rather unique state agencies, and it is difficult to apply this holding to actions of other state agencies. Both state legislation creating state bar associations and case law involving bar associations generally identify the state bar as a "state administrative agency."[101] However, the bar is also identified as an arm of the state supreme court, and its power is strictly limited to actions given actual approval by the state supreme court.[102] Because state supreme courts retain inherent power over the regulation of the legal practice, the clear articulation requirement is already established for state bars in a way not required for other state agencies. If a state bar were to take any action not clearly approved by the state supreme court, it would definitely not be entitled to antitrust immunity because the statute or rule creating the state bar generally requires state supreme court approval.

In contrast, state agencies do not require the explicit approval of the governmental branch above them in order to act. They possess much greater independent decisionmaking power than state bar associations. Because of the differences between state bar associations

97. *See Hybud*, 742 F.2d. at 957.

98. 421 U.S. 773 (1975).

99. City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 410 (1978).

100. *Id.* (quoting *Goldfarb*, 421 U.S. at 792).

101. *See* 42 PA. CONS. STAT. ANN. § 725 (West Supp. 2000); TEX. GOV'T CODE ANN. § 81.011(a) (West 1998); Keller v. State Bar of Cal., 767 P.2d 1020, 1025 (1989), *rev'd*, 496 U.S. 1 (1990).

102. *See* CAL. BUS. & PROF. CODE §§ 6064, 6077, 6078, 6100 (West 1990); TEX. GOV'T CODE ANN. § 81.011(c) (West 1998); Brotsky v. State Bar of Cal., 368 P.2d 697 (Cal. 1962); Saleeby v. State Bar of Cal., 702 P.2d 525, 557 (Cal. 1985); FLORIDA BAR RULE 1-4.2(a) (West 1994).

and other state agencies, the Supreme Court's statements about state bars as administrative agencies should not be applied to all state agencies.

2. Court interpretations of the Eleventh Amendment support placing state agencies within a different category than municipalities

Because state agencies are treated differently than municipalities for Eleventh Amendment purposes, they should also be treated differently for antitrust liability purposes. One of the reasons the *Lafayette* Court gives for holding cities to a different standard than state legislatures is that cities are not themselves sovereign and do not receive the same federal deference.[103] For example, the Eleventh Amendment precludes a suit against a state in federal court but fails to provide that same immunity to cities.[104] While this reasoning justifies holding cities to a different standard than states, it does not support imposing the clear articulation requirement on state agencies. Unlike cities, state agencies can receive Eleventh Amendment immunity from suits in federal court where the agency is deemed to be an arm of the state.[105]

The Second Circuit used the Eleventh Amendment to propose that the clear articulation standard should not apply to state agencies in *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*[106] The court explained that if the state agency's lines of oversight were clear and substantial enough for the entity to be deemed an arm of the state for Eleventh Amendment purposes then the agency's actions should also be viewed as that of the state itself rather than a political subdivision such as a municipality for antitrust purposes.[107] The court noted that there were compelling reasons for concluding that the state agency "should be treated as the State itself rather than as a municipality."[108] However, the court ended up applying the clear articulation requirement to the agency's actions anyway because it found that the requirement had been met.[109]

103. *See Lafayette*, 435 U.S. at 412.
104. *See* Old Colony Trust Co. v. City of Seattle, 271 U.S. 426 (1926).
105. *See* Brennan v. University of Kan., 451 F.2d 1287 (10th Cir. 1971).
106. 155 F.3d 59 (2d Cir. 1998).
107. *See id.* at 70.
108. *Id.*
109. *See id.* at 71–72.

In *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc.*,[110] the Ninth Circuit used the Eleventh Amendment to justify its holding that state agencies could be found immune from antitrust liability "regardless of whether these particular actions or their anti-competitive effects were contemplated by the legislature."[111] The court justified treating state agencies differently than cities for antitrust purposes because "cities are treated differently from branches of the state governments for purposes of the [E]leventh [A]mendment . . . but state agencies and departments are protected in some circumstances from suit in federal court by the [E]leventh [A]mendment's bar against 'one of the United States.'"[112]

3. State agencies should be treated differently than municipalities for antitrust liability purposes

Based on what has actually been said (or not said) by the Supreme Court concerning antitrust immunity for actions taken by state agencies, it appears that there is still room for interpretation. There does not appear to be a definite statement one way or the other about whether state agencies should be held to the clear articulation standard or given ipso facto immunity. When the state action antitrust immunity categories are compared with the same group of actors in Eleventh Amendment cases, it becomes evident that state agencies should be treated differently than municipalities and the clear articulation requirement should not be applied.

B. Commentator Discussions Support the View That the Clear Articulation Requirement Should Not Be Applied to State Agencies

In order to determine the reasonableness of the First Circuit's holding in *Neo Gen*, the next step in the analysis is to examine what commentators have said about applying the clear articulation requirement to state agencies. Even though the Supreme Court has not specifically addressed whether the clear articulation requirement should apply to state agencies, some scholars have been fairly vocal about the reasons the clear articulation requirement should or should

110. 810 F.2d 869 (9th Cir. 1987).

111. *Id.* at 876.

112. *Id.* at 876 n.6 (citing Lake Country Estates, Inc. v. Tahoe Reg'l Planning Agency, 440 U.S. 391, 401 (1979); Pennhurst State Sch. and Hosp. v. Halderman, 465 U.S. 89, 100 (1984)).

not apply to state agencies. Some writers argue that the clear articulation requirement is necessary to overcome the threat of industries taking control of the regulation process.[113] Other authors have argued against this position, explaining either that industry capture is not a legitimate problem or that there is not a big enough difference between the susceptibility of state legislatures and state agencies to justify the more onerous requirement for agencies.[114]

Because industry capture does not appear to be a legitimate threat to agency decision making, the threat of industry capture is not a justifiable reason for imposing the clear articulation requirement. The advantages that state agencies give to government decision making and their legitimacy as state actors justify placing state agencies within the same category as state legislatures and state supreme courts and granting ipso facto immunity.

1. Commentators in favor of the clear articulation requirement are worried about industry capture of state agency policies

William H. Page, of the Mississippi College School of Law, is one of the strongest supporters of applying the clear articulation requirement to state agency action. He justifies the different antitrust immunity requirements for state legislatures and state agencies by explaining that

> [l]egislation presumptively embodies the sovereign choice of the state and is therefore worthy of deference. The policies adopted by an administrative body, by contrast, do not necessarily reflect the same reconciliation of interests as in the Madisonian model, and must therefore fall if not specifically authorized by the enabling legislation.[115]

Page thus reasons that the extra clear articulation requirement is justified because state agencies are staffed by bureaucrats who are not politically responsible to the electorate like legislators are.

Additionally, Page argues that the basis of the Parker Doctrine is that states can depart from the competitive model only when the

113. See *infra* Part IV.B.1.

114. See *infra* Part IV.B.2.

115. William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After* Midcal Aluminum, 61 B.U. L. REV. 1099, 1126 (1981).

citizens elect to do so.[116] Because state agencies are capable of departing from the competitive model without authorization from a referendum by the people, the clear articulation requirement is seen as ensuring that the people are in favor of such a policy. The clear articulation requirement, he argues, is a necessary burden upon state agencies because it "reinforces representative political processes by ensuring that the decision to displace antitrust is made only after competing interest groups have survived the traditional Madisonian gauntlet of legislative procedures."[117]

Because state agency decisions sidestep the "traditional Madisonian gauntlet," Page argues that agency decision making lacks the balancing of interests that would occur in a democratic legislature.[118] This nature of agency decision making makes it "easier for 'factional interests that have acquired a supportive public bureaucracy to rule without submitting their interests to the effective scrutiny and modification of other interests.'"[119] Because regulated industries are the most interested and organized group, Page argues that they are able to wield disproportionate weight and "capture" agency policy making.[120]

Legislators are less likely to have their decisions captured by factional interests because they "have a far larger number of decision makers; this fact by itself makes them more costly to influence [than administrative agencies]."[121] Because state agency policy is more likely to be captured, according to Page, the clear articulation requirement is necessary to ensure that decisions that depart from the competitive model are authorized only when the people choose to do so through their elected state representatives.

However, in developing his argument that the Parker Doctrine was based on political accountability, Page does not address the issue of why state supreme courts are given ipso facto immunity regardless of whether the justices are subject to election. If judges who are not popularly elected are not subjected to a clear articulation require-

116. *See id*. at 1106.

117. William H. Page, *Interest Groups, Antitrust, and State Regulation:* Parker v. Brown *in the Economic Theory of Legislation*, 1987 DUKE L.J. 618, 619 (1987).

118. *See* Page, *supra* note 115, at 1112.

119. *Id*. (quoting James Q. Wilson, *The Rise of the Bureaucratic State*, *in* PERSPECTIVES ON THE ADMINISTRATIVE PROCESS 16, 28 (Robert L. Rabin ed., 1979)).

120. *See id*.

121. Page, *supra* note 117, at 634.

ment, then it would seem unfair to argue that state agencies should have the clear articulation requirement imposed upon them merely because agency officers are not popularly elected.

2. The clear articulation requirement is unnecessary for state agencies

Various authors have argued that state agencies should not be subject to the clear articulation requirement for different reasons. Some argue that state legislators are just as subject to capture as state agencies and that capture is not enough of a legitimate threat to justify the added burden. Others explain that the clear articulation requirement would lead to wasted resources and inefficiency. They agree, however, that the clear articulation requirement is unnecessary for state agencies.

a. Legislators are just as subject to capture as state agencies. In an article responding to Page, one critic argues that legislators are actually even more subject to capture than are state agency officials. The author explains that "a straightforward way for an industry to capture the benefits of anticompetitive state policy is to pay state policymakers for the favor, as part of a great American tradition called campaign contributions. Yet contributing to state bureaucrats is typically a felony."[122] This critic also disputes Page's theory that the greater number of decision makers in legislatures make agencies easier to capture. Since legislatures usually internally delegate a great degree of authority, "it is not clear that, on any given issue, committee members or informed and influential legislators in fact do outnumber the board members of a typical agency."[123]

Page's answer to these arguments is that the number theory alone is not the only factor that makes legislators less subject to capture. Page explains that bicameralism and the executive veto also serve to establish controls on factions.[124] However, historical examples raise serious questions about whether legislatures are really any more immune to capture than agencies. One author explains that there have been "several instances in recent years of relatively independent and farsighted agency action blocked by a Congress acting

122. John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism: Reply to Professors Page and Spitzer*, 61 S. CAL. L. REV. 1327, 1331 (1988).

123. *Id.* at 1332.

124. *See* Page, *supra* note 117, at 631.

in the service of special interests."[125] Examples of these instances include congressional use of the budget to control Securities and Exchange Commission and Federal Petroleum Commission enforcement activities in a way favorable to industries. The ability of the cigarette lobby to convince Congress to prevent the Federal Trade Commission from requiring proper disclosure of the hazards of cigarette smoking is another example of a legislative body bending to industry pressure more than the agency involved.[126] Another author argues that since the safeguards of public hearings and judicial review that apply to administrative agencies do not apply to Congress or its subcommittees the legislature should not be viewed as being less subject to capture than regulatory agencies.[127] These arguments, taken together, suggest that there does not appear to be enough difference between legislatures' and agencies' susceptibility to capture to justify the extra burden of a clear articulation requirement for agency action before immunity can be applied.

Agencies are not any more susceptible to capture by industry interests than legislatures. In fact, history appears to suggest that industries have chosen to capture legislative behavior in order to influence agency decision making rather than working directly with the agencies. Campaign contributions and lobbying efforts appear to be more effective means of industry capture than risking felony indictments for attempting to sway state bureaucrats. Therefore, the fear of possible industry capture of industry decision making does not justify subjecting agencies to the clear articulation requirement.

b. Capture is not a real danger to agency decision making. Not only is there no real difference between agencies and legislatures when it comes to capture, a legitimate argument can be made that capture is not even a legitimate problem. Capture theory is "still popular with pseudosophisticates, but the more instructed . . . see it as grossly exaggerating the germ of truth which it does indeed embody."[128] This germ of truth indicates that the interests of regulated industries do play a significant role in the power complex of agency

125. *See* Abraham D. Sofaer, *Judicial Control of Informal Discretionary Adjudication and Enforcement*, 72 COLUM. L. REV. 1293, 1306 (1972).

126. *See id.* at 1306–07 & n.63 (1972) (citing WILLIAM L. CARY, POLITICS AND THE REGULATORY AGENCIES ch. 2 (1967)).

127. *See* Richard B. Stewart, *Madison's Nightmare*, 57 U. CHI. L. REV. 335, 351 (1990).

128. Louis L. Jaffe, *The Illusion of the Ideal Administration*, 86 HARV. L. REV. 1183, 1187–88 (1973).

decision making but that capture theory focuses too much on the industries while excluding other components such as expertise, stability, and a rationalized exercise of power.[129]

Other important components that tend to cancel out the capture theory include agency interaction with the governor and the legislature.[130] Procedural requirements such as public hearings and judicial review also help to provide the political safeguards that Page argues are lacking.[131] A logistical analysis of state agency decisions about utility rate structures revealed that regulatory resources, ideology, and legislative party control all had greater influences on state regulation than any pressure by interest groups.[132] Because industry capture of agency decisions does not appear to be a legitimate threat, it cannot be used to justify the clear articulation requirement.

c. Applying the clear articulation requirement to state agencies leads to wasted resources and inefficiency. The clear articulation requirement is not only unjustified, it also appears to place an undue burden on state administration. Agencies perform a valuable function in today's society in being able to focus their policymaking efforts in specialized areas where agency officials have developed expertise. One policymaking advantage that agencies hold over legislatures is that legislators lack expertise and must tend a broader field than any single person can master.[133] Legislators are often incapable of setting out detailed specifications in their delegations of power because delegation requires "intensive and continuous investigation, decision, and revision of specialized and complex issues."[134] These tasks require resources that legislators are usually unable or unwilling to muster.[135]

129. *See id.* at 1188.

130. *See* GLENN ABNEY & THOMAS P. LAUTH, THE POLITICS OF STATE AND CITY ADMINISTRATION 100 (1986).

131. *See* Richard B. Stewart, *The Reformation of American Administrative Law*, 88 HARV. L. REV. 1669, 1679–81 (1975).

132. *See* Paul Teske, *Interests and Institutions in State Regulation*, 35 AM. J. POL. SCI. 139, 139 (1991).

133. *See* Ira Sharkansky, *State Administrators in the Political Process*, *in* POLITICS IN THE AMERICAN STATES: A COMPARATIVE ANALYSIS 238, 251 (Herbert Jacob & Kenneth N. Vines eds., 2d ed. 1971).

134. Stewart, *supra* note 131, at 1695.

135. *See id.*

State reliance on agency decision making in this century has been "vastly common and commonly vast."[136] State governments need agencies in order to efficiently carry out regulating duties. Applying the clear articulation requirement is costly because it is likely to discourage delegation, which permits greater governmental efficiency. The clear statement doctrine penalizes delegation because it "incurs costs by making the process of state government more difficult and time consuming."[137] If state governments are forced to be more specific in delegating power to agencies, then they will be forced to stop delegating such power and will develop rules and regulations without the specific expertise agency officers are able to employ. As more time is devoted to detailed regulation previously taken care of by agencies, state governments will be unable, and sometimes unwilling, to take the time to deal with difficult issues.

Imposing the clear articulation rule on state agencies will also lead to inefficiency because state agencies will have to spend more time seeking approval from state legislatures rather than making decisions. Moreover, enforcing the clear articulation rule will lead to efficiency problems in the judicial branch. Enforcement of the clear articulation rule "will prompt state agents to waste resources obtaining authorization, will imperil agents' actions that lack such authorization, . . . and will involve federal courts in state law issues."[138] Using the rule set out in *Neo Gen* would overcome these costs and inefficiencies and allow continued delegation to state agencies where state officers could put their expertise to use.

V. CONCLUSION

The First Circuit in *Neo Gen Screening, Inc. v. New England Newborn Screening Program*[139] correctly held that state agency action can be viewed as action taken by the state itself and is therefore entitled to state action antitrust immunity without applying the same clear articulation requirement used for examining actions taken by municipalities. Applying the clear articulation requirement to state agencies would likely mean that state legislators would be forced to

136. Wiley, *supra* note 122, at 1331.

137. John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 733–34 (1986).

138. *Id.* at 738–39.

139. 187 F.3d 24 (1st Cir. 1999).

spend more time regulating specialized areas better suited to experts. The nebulous threat of industry capture of state agency decisions does not justify this damaging loss in efficiency.

The Supreme Court has not "clearly articulated" what type of analysis should be applied to state agencies in order to grant state action antitrust immunity. The First Circuit's ruling in *Neo Gen* is important because it provides a legitimate framework to balance the competing interests of political responsibility against the efficiency of utilizing expertise for regulatory decision making. The actions of agencies that exercise statewide jurisdiction deserve antitrust immunity without a search for a clear articulation from the state legislature. State agencies should be viewed as legitimate representatives of the state acting as sovereign because agencies are more similar to state legislative, executive, and judicial branches than municipalities or private actors. Because state agencies are not subject to a greater threat of industry capture than these governmental branches and because agencies promote greater governmental efficiency, they should not be held to the higher clear articulation standard.

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