No. 08-56750

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MICHAEL SHAMES, *et al.*,

*Plaintiffs-Appellants*,

v.

THE HERTZ CORPORATION, *et al.*,

*Defendants-Appellees.*

On Appeal from the United States District Court
for the Southern District of California
(No. 3:07-cv-02174-H-WMC, Hon. Marilyn L. Huff, U.S.D.J.)

# BRIEF FOR AMICUS CURIAE PUBLIC CITIZEN, INC., SUPPORTING PLAINTIFFS-APELLANTS' PETITION FOR REHEARING OR REHEARING EN BANC

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July 6, 2010

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## CORPORATE DISCLOSURE STATEMENT

Public Citizen, Inc., is a nonprofit, nonstock corporation. It has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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## INTEREST OF AMICUS CURIAE

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, and regularly files amicus curiae briefs in cases in the United States Supreme Court and the federal appellate courts.

Public Citizen submits this brief because of its concern that the panel's decision in this case significantly expands the scope of the federal antitrust laws' state action exemption to encompass essentially private collusion among competitors — behavior neither authorized by the state nor carried out under its supervision. By giving greater scope for anticompetitive horizontal price-fixing agreements, the decision threatens the interests of consumers who pay monopoly rents when competitors agree about prices or other terms of transactions.

## INTRODUCTION AND SUMMARY OF ARGUMENT

The state action doctrine articulated in *Parker v. Brown*, 317 U.S. 341 (1943), and elaborated in a string of more recent decisions, has "produced more confusion than clarity in the lower federal courts and has engendered substantial and ongoing scholarly criticism." C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State*

*Agencies*, 41 B.C. L. Rev. 1059, 1060 (2000). As the Federal Trade Commission's State Action Task Force observed in its 2003 report, although the state action doctrine was intended to serve federalism by providing protection to actions and policies of state governments, "[s]ome lower courts … have applied the doctrine in a manner that could potentially endanger national competition goals." Federal Trade Commission, *Report of the State Action Task Force* 1 (2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf ("*State Action Report*"). "For example, some courts now apply the doctrine with little or no evidence that the state intended to restrain competition." *Id*. The panel's decision reflects exactly such a misapplication of state action immunity to conduct neither authorized nor supervised by the state.

The panel's decision rests on two errors meriting en banc review or reconsideration by the panel itself. The first is an overbroad conception of the "foreseeability" of anticompetitive conduct that threatens to swallow the rule that, to receive state action immunity, anticompetitive conduct must be authorized by a "clearly articulated and affirmatively expressed … state policy." *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation omitted). By reducing the clear articulation requirement to little more than an inquiry into whether it is foreseeable that private businesses might engage in collusion if given the opportunity, the panel's opinion effectively reads out of the

*Parker* doctrine the notion that it is *state* action, not private conduct, that the rule is intended to protect. "Foreseeability" plays some role in the analysis, but the panel's over-reliance on foreseeability conflicts with the narrower use of that concept in better-reasoned decisions of this Circuit and others.

Second, having watered down the requirement that anticompetitive conduct receive immunity only if it reflects clearly articulated state policy, the panel went on to excuse the defendant from meeting the second requirement for state action immunity — that the conduct be "'actively supervised' by the State itself." *Id.* (citation omitted). The panel did so by equating defendant California Travel and Tourism Commission (CTTC), a nonprofit corporation funded by and consisting mostly of privately appointed representatives of the industries whose interests it is tasked to promote, with a traditional government body such as a municipality or state agency. In so doing, the panel lost sight of the *reason* why the Supreme Court exempted municipal governments from the active-supervision requirement: "Where a private party is engaging 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. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985). Exactly the opposite is true here, where a supermajority of members of the CTTC "are appointed or elected to represent and

serve the economic interests of those tourism [industry] segments" that put them on the Commission. Cal. Gov't Code § 13995.40(p). In treating such a body as a governmental entity that may engage in anticompetitive conduct without state supervision, the panel went far beyond other courts' interpretations of *Town of Hallie* and substantially diminished the protection that the antitrust laws afford consumers against essentially *private* anticompetitive behavior.

The conflicts in principle between the panel's opinion and decisions of this Circuit and others that take a narrower view of state action immunity create a need for en banc review to "maintain the uniformity of the court's decisions." Fed. R. App. P. 35(a). And the panel's errors, if followed by other courts in this Circuit, would severely erode the limits on the state action doctrine, harming competition and consumers. Correction of the panel opinion is therefore a matter of "exceptional importance" meriting en banc review. *Id.*

## ARGUMENT

### I. The Panel's Oversimplified "Foreseeability" Analysis Guts the Clear Articulation Requirement and Conflicts with Decisions That Have Rigorously Enforced That Requirement.

According to the panel, the CTTC's anticompetitive action in compelling rental car companies to pass assessments on to customers, effectively enforcing a horizontal price-fixing agreement, was authorized by a clearly articulated state policy merely because it was foreseeable that rental car companies would use the

CTTC to implement their collusive arrangement. The panel viewed anticompetitive conduct as a foreseeable consequence of statutory provisions that (1) empowered the Commission to impose assessments on the rental car companies (*not* on their customers), and (2) permitted each individual rental car company to pass on "some or all" of an assessment to customers. Cal. Gov't Code § 13995.65(f). The panel found the anticompetitive conduct foreseeable even though the statute gave no hint that the Commission had authority to *force* companies to pass on the assessments. The panel provided little elaboration on why an anticompetitive arrangement was foreseeable, other than to point to indications that the legislature may have expected companies to pass on the assessments and was unwilling to prohibit them from doing so.[1] The leap to the conclusion that the legislature expected and intended to authorize enforcement of an anticompetitive agreement *requiring* the assessment to be passed on, however, seems to rest on little more than the syllogism that if private businesses are authorized to do something individually, then it is foreseeable that they may collude to do it and seize on an available means of making their collusive agreement stick.

[1] The panel cited Cal. Civ. Code § 1936.01(a), but that is merely a definition applicable to circumstances when a company *chooses* to pass on assessments, and it cannot in any event override Gov't Code § 13995.65(f), which provides "[n]otwithstanding any other provision of law" that the decision whether to pass on "some or all" of an assessment to customers is permissive, and further provides that a business that chooses to pass on assessments "shall not be required to" separately itemize that charge.

That reasoning, however, cannot be what the Supreme Court had in mind when it invoked "foreseeability" as part of the inquiry into the existence of a clearly articulated state policy in *Town of Hallie* and the later decision in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991). As the FTC's State Action Task Force put it:

> Once conduct is authorized, anticompetitive forms of that conduct arguably are foreseeable in the sense that they *could* occur. Yet something more is needed when the goal is to ensure that the anticompetitive conduct flows from a "deliberate and intended state policy."

*State Action Report* 26 (quoting *FTC v. Ticor Title Ins.* Co., 504 U.S. 621, 636 (1992)). Because an expansive notion of foreseeability threatens to gut the clear articulation requirement, courts applying the state action doctrine must recognize that "'foreseeability' is merely a useful tool in inquiring about state policy to displace competition. It is not an end in itself." *Id*. at 11.

The panel's broader use of mere foreseeability to shelter anticompetitive conduct in the absence of a true state policy clearly contemplating and authorizing such conduct reflects one persistent trend in state action case law. Some decisions have applied foreseeability analysis in such a way that it has "essentially no bite, leading to the conclusion that the broader the delegation of authority to act with respect to a particular subject matter, the more likely that anticompetitive conduct will be held to be the foreseeable result of that delegation," a result "utterly

inconsistent" with the clear articulation requirement. Floyd, *Plain Ambiguities*, 41 B.C. L. Rev. at 1076-77. In these cases, as the FTC Task Force observed, "[t]he clear articulation standard has repeatedly been interpreted too broadly." *State Action Report* 2.

> According to several appellate courts, once a state broadly authorizes certain acts or implements a general regulatory scheme for an industry, *any* anticompetitive effects flowing from the acts must have been foreseeable and are, therefore, a product of deliberate state policy. In other words, these courts equate a state's mere grant of general authority with a state's clear articulation of a policy to restrain competition. This focus on theoretical "foreseeability" leads some courts to apply the doctrine expansively, as many forms of anticompetitive conduct are arguably foreseeable in the sense that they could possibly occur. By ignoring the substance of the state's policy choice, however, this approach both contravenes Supreme Court precedent and undermines the purpose of the clear articulation standard. Making a meaningful determination of whether the state has deliberately adopted a policy to displace competition requires a court to look beyond the state's mere authorization of general regulation.

*Id.*; *see also id.* at 25-36 (citing cases). Such overly broad reliance on foreseeability "makes it impossible for [the clear articulation requirement] to achieve [its] goal" of ensuring that anticompetitive actions in fact reflect "sovereign state policy." Floyd, *Plain Ambiguities*, 41 B.C. L. Rev. at 1077.

The panel's decision, and similar decisions taking an extremely broad view of foreseeability, are not only inconsistent with the purposes and core requirements of the state action doctrine as articulated by the Supreme Court, but are also in conflict with the approach taken by other federal appellate decisions, including

other decisions of this Circuit. Despite the panel's attempt to reconcile it, the panel's decision cannot be squared with *Columbia Steel Casting Co. v. Portland General Electric Co.*, 111 F.3d 1427 (9th Cir. 1997), where the Court, on rehearing, held that its earlier opinion had "erred in allowing a foreseeability test to be substituted for the clear articulation test of *Midcal*." *Id.* at 1443. That is exactly the error infecting the panel opinion.

More specifically, *Columbia Steel* held that where a type of activity is expressly authorized under state law, the foreseeability that such activity would be carried out in an anticompetitive way is relevant to determining whether anticompetitive actions are within the scope of state action protection. But the Court held that foreseeability could *not* be used to determine whether the type of action taken was authorized to begin with. *Id*. at 1444. Here, the panel turned *Columbia Steel* on its head by using the alleged foreseeability of private anticompetitive conduct as the basis for finding authorization of the type of action in question, in the absence of any statutory language expressly or implicitly authorizing the Commission to regulate the terms of transactions between rental car companies and their customers. The panel decision cannot be reconciled with *Columbia Steel*.

Similarly, in *Lancaster Community Hospital v. Antelope Valley Hospital District*, 940 F.2d 397 (9th Cir. 1991), this Court rejected a "mechanistic"

application of a foreseeability test, and focused instead on whether anticompetitive conduct was a "logical consequence" of a grant of authority. *Id.* at 401. Notwithstanding the foreseeability that anyone permitted to do anything may attempt to do so anticompetitively, the Court held that a hospital's authorization to engage in hospital services did not, as a foreseeable, *logical* consequence, imply a grant of authority to engage in anticompetitive behavior. So, here, authority to bind rental car companies to an anticompetitive agreement to fix prices is not in any way a foreseeable, *logical* consequence of the authority to make assessments on rental car companies and the *permission* granted each individual company to pass *some or all* of such charges on. Cal. Gov't Code § 13995.65(f).

Other circuits, too, have rejected the very broad foreseeability analysis of the panel's opinion. In *First American Title Co. v. Devaugh*, 480 F.3d 438 (6th Cir. 2007), the Sixth Circuit held that though county registers of deeds had a monopoly over original property title documents and had statutory authorization to regulate access to records and charge fees for copies, they were not entitled to antitrust immunity when they imposed anticompetitive restrictions on reproduction or resale of copies purchased from them. Although it was obviously foreseeable as a factual matter that registers might seek to use their monopoly on originals as leverage to impose anticompetitive restrictions, the court held that such behavior was not foreseeable enough to satisfy *Midcal*'s requirement of a clearly articulated state

policy because anticompetitive conduct was not the "logical result" of powers granted the registers. *Id.* at 449.

Similarly, in *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999), the Fifth Circuit issued a unanimous en banc opinion to correct a panel that, like the panel here, took an unduly broad view of "foreseeability" that effectively nullified the requirement that a state clearly articulate a policy displacing competition in order to gain *Parker* immunity. Specifically, the court considered whether a state statute permitting a hospital district to enter into contracts and joint ventures authorized the hospital to leverage its monopoly power through contracts containing anticompetitive tying and exclusive dealing provisions. Rejecting a panel's holding that the hospital had *Parker* immunity because it was foreseeable that it would enter into such anticompetitive arrangements, the court emphasized that anticompetitive effects are "foreseeable" under *Town of Hallie* when they "logically would result" from the authority granted by the state. 171 F.3d at 235 (quoting *Town of Hallie*, 471 U.S. at 42). In other words, *Parker* immunity requires a showing that state policy "necessarily contemplates the anticompetitive activity." *Id.* The court concluded that it was not clear that the statutory scheme at issue authorized anticompetitive conduct: "Not all joint ventures are

anticompetitive. Thus, it is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct." *Id.*

Applying a similar analysis here would compel the conclusion that anticompetitive conduct was not clearly authorized by state policy. Requiring rental companies to pass on assessments to customers is not a logical consequence of giving the CTTC authority to impose the assessments on the companies. Nor does permitting a company to choose *unilaterally* to pass on some or all of an assessment, Cal. Gov't Code § 13995.65(f), logically imply that companies may *collude* to use the CTTC to enforce an anticompetitive horizontal agreement requiring assessments to be passed on in their entirety. Indeed, if anything, the logical implication of a statutory provision stating that a company *may* pass on assessments is that it is *not* required to do so. Thus, legislators would not have foreseen that they were clearly authorizing companies to collude to use the CTTC to enforce a requirement that they collect assessments from customers. This Court should, therefore, follow the example of the Fifth Circuit (and its own example in *Columbia Steel*) and grant rehearing to solidify the requirement that anticompetitive state policies be clearly articulated and restore "foreseeability" to its proper, limited role in determining whether state policy is clearly articulated.

## II. The Panel's Treatment of the CTTC as a Governmental Entity Exempt from Active State Supervision Undermines the Limits on the State Action Doctrine and Conflicts with Better-Reasoned Decisions.

The *Parker* doctrine exempts private anticompetitive conduct from antitrust liability only if it is both authorized by clearly articulated state policy *and* actively supervised by the state. The purpose of the active-supervision requirement is to "shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). Nominal oversight is not enough: "The mere presence of some state involvement or monitoring does not suffice." *Id*. The Supreme Court, however, has held that the active-supervision requirement is excused where the challenged action is taken by a municipal government, because such governments, unlike private actors, can be expected to pursue public interests rather than private ones. *Town of Hallie*, 471 U.S. at 47.

The panel fundamentally erred in extending *Hallie*'s exemption of municipal governments from the active- supervision requirement to an entity that lacks the characteristics justifying that treatment. The CTTC is not a conventional government agency, but a "separate, independent California nonprofit mutual benefit corporation" that is not subject to requirements of California's Administrative Procedure Act. Cal. Gov't Code § 13995.42(a). Two thirds of its members are selected by segments of the tourism industry and expressly tasked "to

represent and *serve the economic interests* of those tourism segments." *Id.* § 13995.40(p) (emphasis added). The remaining one third are appointed by the Governor but nonetheless must be professionals in the tourism industry, and neither these members nor the industry representatives receive compensation for membership over and above their earnings from business activities. *Id.* §§ 13995.40(b)(2), (n). The limited veto power the Secretary of Business, Transportation and Housing has over CTTC actions does not extend to the majority of the CTTC's activities, which are carried out with assessments on the tourism industry rather than state funds, *see id.* § 13995.51(b), and decisions of the Secretary can be overridden by a three-fifths vote of the CTTC — less than the two-thirds supermajority that represents private interests. *See id.* §§ 13995.44(a)(2), 13995.45(d). The Secretary can attempt to remove a member only for severe misconduct, and only after a hearing, and even then the industry will choose a replacement. *Id.* § 13995.40(e).

Such an entity is neither entirely private nor entirely governmental. What should be decisive is that the degree of actual governmental control over its actions is so limited, and the scope for the assertion of private interests so great, that it does not possess the basic characteristic of presumed devotion to the public interest that led the Court in *Town of Hallie* to excuse municipal governments from the active-supervision requirement. The sway that private interests hold within the

CTTC, and indeed the legal requirement that members of the CTTC pursue *private economic interests*, create what the Court in *Town of Hallie* called "a real danger that [it] is acting to further [its] own interests, rather than the governmental interests of the State." 471 U.S. at 42.

Contrary to the panel's assertion, this Court's decision in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), does not support granting the CTTC antitrust immunity absent active state supervision. In *Hass*, the panel majority recognized that *Town of Hallie*'s rationale only applies "[w]hen there is no danger that the party engaging in alleged anticompetitive activity is pursuing interests other than those of the state." *Id*. at 1459. The Court held that the Oregon State Bar, an instrumentality of the Oregon Supreme Court whose Board members were considered public officials and tasked to pursue the public interest, posed no such danger. *Id*. at 1460. The *Hass* majority's conclusion was itself debatable and represents, at best, the outer limits of *Town of Hallie*, *see id.* at 1464-67 (Ferguson, J., dissenting), but it has no application to an independent entity, a supermajority of whose members are selected by and specifically tasked to represent the economic interests of a private industry.

Much more relevant than *Hass* is this Court's later decision in *Washington State Electrical Contractors Ass'n v. Forrest*, 930 F.2d 736 (9th Cir. 1991), which reversed and remanded a district court decision that had held that the Washington

Apprenticeship Council was a state agency and thus need not demonstrate active state supervision to qualify for *Parker* immunity. This Court rejected the district court's analysis (which, like the panel opinion here, relied on *Hass*) because "[t]he council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy." *Id.* at 737. The Court therefore required the Council to demonstrate active state supervision on remand to obtain immunity. *Id. Forrest* is at odds with the panel's opinion here because the CTTC has exactly the same basic attributes that led the *Forrest* Court to hold *Hass* inapplicable and that create the danger that the CTTC serves private rather than state interests.

Other circuits, too, have struggled with the categorization of "hybrid" public-private entities under *Town of Hallie*. *See, e.g., Fuchs v. Rural Elec. Convenience Coop.*, 858 F.2d 1210 (7th Cir. 1988) (requiring some level of state supervision of the activities of a hybrid entity that, unlike the CTTC, did not represent private economic interests, but was not wholly public). As the Eleventh Circuit has noted, "[n]o simply stated rule draws the line between the two categories" of "political subdivision or private actor," but where an entity "represents purely private competitive interests" there is a greater need for "active state supervision to ensure that the entity's anticompetitive actions are indeed state actions and not those of an alliance of interests that properly should be competing."

*Bankers Ins. Co. v. Florida Residential Property & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293, 1296, 1297 (1998). Applying similar principles, the Sixth Circuit held in *Riverview Investments, Inc. v. Ottawa Community Improvement Corp.*, 899 F.2d 474 (1990), that a nonprofit community development corporation was not a governmental entity excused from the active-supervision requirement because its structure left it free to pursue essentially private interests. *See id*. at 479-82. Critical to that court's analysis was that the members of the corporation were privately appointed and only a minority were required to be public officials — features strikingly similar to those of the CTTC. *Id.* at 479-80. The panel's decision here is very hard to square with *Riverview Investments*.

The tensions between the panel's opinion in this case and prior decisions of this Court and others illustrate an important and persistent problem area within the *Parker* doctrine: defining the types of entities that are excused from the active-supervision requirement. As the FTC's State Action Task Force observed, "courts have not set forth adequate guidelines concerning the active supervision requirement," and the factors courts have examined in determining how to characterize hybrid entities "are not necessarily probative of whether the entity will pursue its own private interests rather than the state's interests." *State Action Report* 2. The Task Force favorably cited *Forrest* for the proposition that "state-level boards and similar entities may be subject to the active supervision

requirement if they involve the substantial participation of private actors under circumstances that may be particularly conducive to their pursuing private agendas," *id*. at 18-19 — a statement that neatly describes the circumstances of this case. At the same time, as if anticipating the holding in this case, the Task Force cautioned that judicial analysis does not always accurately identify such circumstances. *See id.* at 37-40. And it urged that "the criteria for identifying the quasi-governmental entities that should be subject to active supervision" be "clarif[ied] and rationalize[d]" to "include any situation with an appreciable risk that the challenged conduct results from private actors pursuing private interests, rather than from state policy." *State Action Report* 3.

This case provides an ideal opportunity to provide such clarity. The likelihood that the CTTC's anticompetitive action in mandating that rental car companies uniformly pass on assessments to the public rather than allowing price competition to determine the incidence of the assessments reflected private interests rather than state policy is apparent given the structure of the Commission. The panel's decision to grant the CTTC *Parker* immunity without a showing of active state supervision, like its holding that the CTTC's actions were authorized because of their mere "foreseeability," cannot be squared with the purposes of the state action doctrine or the better-reasoned decisions (including decisions of this Court) applying it. Rehearing this case would restore consistency to this Court's

precedents, help clarify a sometimes confused area of the law, and serve the substantial consumer protection interests that the federal antitrust laws were enacted to protect.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for rehearing or rehearing en banc and reverse the decision of the district court.

Respectfully submitted,

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July 6, 2010

**CERTIFICATE OF COMPLIANCE WITH RULE 32(A)(7)(C)**

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(C), I certify that the foregoing brief is proportionally-spaced, has a type-face of 14 points, and, as calculated by my word processing software (Microsoft Office Word 2007), contains 4,125 words.

July 6, 2010

/s/Scott L. Nelson
Scott L. Nelson

## CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on July 6, 2010.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have caused the foregoing document to be sent by First-Class Mail, postage prepaid, to the following non-CM/ECF participants:

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