



**PUBLIC COMMENTS OF THE AMERICAN ANTITRUST INSTITUTE
PREPARED FOR THE ANTITRUST DIVISION ROUNDTABLE
EXAMINING EXEMPTIONS AND IMMUNITIES FROM THE ANTITRUST LAWS**

The American Antitrust Institute (AAI) is pleased to participate in the Antitrust Division’s Public Roundtable Discussion Series on Regulation & Antitrust Law, to be held in Washington, D.C. on March 14, 2018. AAI is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. We serve the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy.¹

AAI’s 20-year history of research, education, and advocacy highlights the position that many exemptions and immunities from the antitrust laws are unnecessary or harmful to competition. AAI has therefore consistently supported and defended the Supreme Court’s admonition that exemptions and immunities should be “strictly construed” and “disfavored.” *Southern Motor Carriers Rate Conference, Inc. v. U.S.*, 471 U.S. 48, 68 (1985); see *Union Labor Life Ins. Co. v. Pireno*, 458 U.S. 119, 126 (1982) (narrow construction principle “applies not only to implicit exemptions . . . but also to express statutory exemptions”). As the Court has explained, “These ‘canon[s] of construction . . . reflec[t] the felt indispensable role of antitrust policy in the maintenance of a free economy.” *Southern Motor Carriers*, 471 U.S. at 68 (quoting *United States v. Phila. Nat’l Bank*, 374 U.S. 321, 348 (1963)).

The debate over antitrust immunities and exemptions is often complex and nuanced. Outlined below are major topic areas that highlight AAI’s positions and areas of focus. Each is followed by selected AAI research, education, and advocacy materials that elaborate on AAI’s views regarding exemptions and immunities. These items have been selected based on topics identified for discussion during this roundtable. These comments do not reflect the entirety of AAI’s views on the subject of antitrust exemptions and immunities.²

I. The Impact of Express Statutory Exemptions and Implied Immunities from the Antitrust Laws

A. Exemptions and immunities from the antitrust laws may shield anticompetitive conduct that has exclusionary or collusive effects, without adequately promoting the other values the exemption or immunity may be designed to foster.

¹ For more information please see <http://www.antitrustinstitute.org>.

² Individual views of members of AAI’s Board of Directors or Advisory Board may differ from AAI’s positions.

- Diana Moss, Revisiting Antitrust Immunity for International Airline Alliances: Consolidation and U.S. Consumers (AAI White Paper, forthcoming March 2018).
- [Br. of the American Antitrust Institute as Amicus Curiae in Support of Neither Party, Teladoc v. Texas Medical Board](#), No. 16-50017 (5th Cir. filed June 27, 2016).
- [Br. for the American Antitrust Institute as Amicus Curiae in Support of Respondents, Oneok v. Learjet](#), No. 13-271 (filed Nov. 26, 2014) [hereinafter AAI Oneok Br].
- [Br. for the American Antitrust Institute as Amicus Curiae in Support of Respondent, North Carolina State Bd. of Dental Exam'rs v. FTC](#), No. 13-534 (S. Ct. filed Aug. 6, 2014) [hereinafter AAI Dental Exam'rs Br.].
- [Br. of the American Antitrust Institute as Amicus Curiae in Support of Plaintiff-Appellant, United Nat'l Maintenance v. San Diego Convention Center Corp.](#), No. 56809 (9th Cir. filed June 4, 2013).
- [Br. of the American Antitrust Institute as Amicus Curiae in Support of Petitioner, FTC v. Phoebe Putney Health System](#), No. 11-1160 (filed Aug. 27, 2012) [hereinafter AAI Phoebe Putney Br.].
- [Br. for Amicus Curiae American Antitrust Institute Supporting Plaintiffs-Appellants, Shames v. Cal. Travel and Tourism Comm.](#), No. 08-56750 (9th Cir. filed July 9, 2010).
- [Comments of the American Antitrust Institute, Working Group on Immunities and Exemptions](#), Prepared for the Antitrust Modernization Commission (2005).

B. When applied expansively and inappropriately, exemptions and immunities can contribute to the creation of regulatory gaps.

- [Am. Antitrust Inst., Repeal of Network Neutrality Eliminates Important Antitrust-Regulation Partnership, Deprives Competition and Consumers of Needed Safeguards](#) (Dec. 22, 2017) (discussing common-carrier exemption).
- [Br. for the American Antitrust Institute as Amicus Curiae in Support of Appellant, Simon v. Keyspan](#), No. 11-2265 (2d Cir. filed Sept. 21, 2011).
- [Br. for the American Antitrust Institute as Amicus Curiae in Support of Appellants, *In re* Hawaiian & Guatamanian Cabotage Antitrust Litig.](#), No. 10-361-65 (filed Apr. 11, 2011).

C. When applied inconsistently, exemptions and immunities can create anomalous conflicts in the law that lead to disparate treatment of factually similar scenarios.

- [Amici Curiae Br. of Antitrust and Economics Professors and of The American Antitrust Institute in Support of Petition for Certiorari, McCray v. Fidelity Nat'l Title Ins. Co.](#), No. 12-527 (S. Ct. filed Nov. 28, 2012).

D. Exemptions and immunities can undermine cartel deterrence. Empirical research suggests that international cartels, in particular, have been proliferating, yet deterrence remains insufficient.

- [Br. for the American Antitrust Institute as Amicus Curiae in Support of Petitioners, Animal Science Products v. Hebei Welcome Pharmaceutical](#), No. 16-1220 (filed Mar. 5, 2018).

- [Br. for the American Antitrust Institute as Amicus Curiae in Support of Appellant, Motorola Mobility v. AU Optronics Corp.](#), No. 14-8003 (filed Apr. 24, 2014).

II. How Implied Immunities and Exemptions Have Affected Antitrust Enforcement

A. Exemptions and immunities can deter plaintiffs from bringing meritorious claims, including by raising the cost and increasing the risk of such claims.

- [Br. for the American Antitrust Institute as Amicus Curiae in Support of Respondent, Salt River Project Agricultural Improvement and Power District v. Tesla Energy Operations](#), No. 17-368 (filed Feb. 20, 2018).

B. Exemptions and immunities can interfere unnecessarily with the harmonious working relationship between antitrust enforcement and sectoral regulation.

- [Br. for American Antitrust Institute as Amicus Curiae Supporting Respondents, Credit Suisse v. Billing](#), No. 05-1157 (S. Ct. filed Feb. 27, 2007).
- AAI Oneok Br.
- [Prepared Remarks of Diana L. Moss](#), Hearings on Regulated Industries Before the Antitrust Modernization Comm’n (2005).

III. Whether the State Action Doctrine in Its Current Form Strikes the Appropriate Balance Between State Sovereignty and the Federal Policy Favoring Competition in Interstate Commerce

AAI believes the Supreme Court’s recent Dental Examiners and Phoebe Putney decisions go a long way toward striking the appropriate balance between State sovereignty and the federal policy favoring competition by helping to ensure “real compliance with both parts of the Midcal test” so that States “accept political responsibility” for anticompetitive actions they intend to undertake. FTC v. Ticor Title Ins. Co., 504 U.S. 621, 635-36 (1992); see AAI Dental Exam’rs Br.; AAI Phoebe Putney Br. Among other things, AAI has also argued specifically that:

- *Calls to soften or eliminate the state-action doctrine’s active-supervision requirement should be rejected.*
- *Calls to immunize state entities subject to the active-supervision requirement that are (or are controlled by) active market participants should be rejected.*
- *Policymakers should aspire to reduce ex ante uncertainty as to whether inferior sub-state entities may enjoy immunity, without sacrificing political accountability.*
- *The merits of state regulations should not ordinarily factor into the immunity determination, but this fact need not prevent state and federal legislative compromise aimed at reducing the harmful effects of anticompetitive state regulation.*
- [Randy M. Stutz, State Occupational Licensing Reform and the Federal Antitrust Laws: Making Sense of the Post-Dental Examiners Landscape](#) (AAI White Paper, Nov. 6, 2017).