United States Court of Appeals
for the First Circuit

NO. 02-2710

WAL-MART STORES, INC.; WAL-MART PUERTO RICO, INC.;
SUPERMERCADOS AMIGO, INC.,
Plaintiffs-Appellees,
v.

ANABELLE RODRÍGUEZ, IN HER PERSONAL AND OFFICIAL CAPACITY
AS SECRETARY OF JUSTICE OF THE COMMONWEALTH OF PUERTO RICO,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF PUERTO RICO

BRIEF OF COMMONWEALTH OF MASSACHUSETTS AND THE STATES OF ALASKA, ARIZONA, CALIFORNIA, CONNECTICUT, IDAHO, IOWA, KANSAS, LOUISIANA, MAINE, MARYLAND, MISSOURI, NEVADA, NEW HAMPSHIRE, NEW MEXICO, NORTH DAKOTA, OREGON, PENNSYLVANIA, RHODE ISLAND AND UTAH AS *AMICI CURIAE* IN SUPPORT OF DEFENDANT-APPELLANT ANABELLE RODRÍGUEZ

THOMAS F. REILLY
Attorney General of Massachusetts

Glenn S. Kaplan, 1st Cir. No. [Application Pending]
Jesse M. Caplan
Timothy E. Moran
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

GREGG D. RENKES
Attorney General of Alaska

TERRY GODDARD
Attorney General of Arizona

BILL LOCKYER
Attorney General of California

RICHARD BLUMENTHAL
Attorney General of Connecticut

LAWRENCE G. WASDEN
Attorney General of Idaho

THOMAS J. MILLER
Attorney General of Iowa

PHILL KLINE
Attorney General of Kansas

RICHARD P. IEYOUB
Attorney General of Louisiana

G. STEVEN ROWE
Attorney General of Maine

J. JOSEPH CURRAN, JR.
Attorney General of Maryland

JEREMIAH W. (Jay) NIXON
Attorney General of Missouri

BRIAN SANDOVAL
Attorney General of Nevada

STEPHEN J. JUDGE
Acting Attorney General of New Hampshire

PATRICIA A. MADRID
Attorney General of New Mexico

WAYNE STENEHJEM
Attorney General of North Dakota

HARDY MYERS
Attorney General of Oregon

D. MICHAEL FISHER
Attorney General of Pennsylvania

PATRICK C. LYNCH
Attorney General of Rhode Island

MARK L. SHURTLEFF
Attorney General of Utah

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

INTRODUCTION 1

INTEREST OF THE AMICI STATES 1

ARGUMENT

I. STATES ARE ENTITLED TO ENFORCE STATE ANTITRUST LAWS REGARDLESS OF THE ENFORCEMENT DECISIONS OF FEDERAL ANTITRUST AUTHORITIES 4

II. PUERTO RICO'S ENFORCEMENT OF ITS STATE ANTITRUST LAWS DOES NOT VIOLATE THE COMMERCE CLAUSE 11

CONCLUSION 16

TABLE OF AUTHORITIES

Cases

California v. American Stores Co., 872 F.2d 837 (9th Cir. 1989) 7

California v. American Stores Co., 495 U.S. 271 (1990) 6, 7

California v. ARC America Corp., 490 U.S. 93 (1989) 2, 3, 4, 13

City of Pittsburgh v. May Dep't Stores, 1986-2 Trade Cas. (CCH) ¶ 67,340 (W.D. Pa. 1986) 10

Connecticut v. Wyco New Haven, Inc., 1990-1 Trade Cas. (CCH) ¶ 69,024 (D. Conn. 1990) 10

Dennis v. Higgins, 498 U.S. 439 (1991) 15

D.H. Holmes Co. v. McNamara, 486 U.S. 24 (1988) 12

Exxon Corp. v. Governor of Maryland, 437 U.S. 117 (1978) 3, 13, 14

Gibbons v. Ogden, 22 U.S. (9 Wheat) 1 (1824) 12

Giffiths v. Blue Cross and Blue Shield of Alabama, 147 F. Supp. 2d 1203 (N.D. Ala. 2001) 13

Gonzalez-Morales v. Hernandez-Arencibia, 221 F.3d 45 (1st Cir. 2000) 12

Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993) 7

Healy v. Beer Inst., 491 U.S. 324 (1989) 13

In re Stericycle, Inc., No. 03-124 (Mass. Super. Ct. Jan. 7, 2003) 9

Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979 (9th Cir. 2000) 2, 3, 13

Lewis v. BT Inv. Managers, Inc., 447 U.S. 27 (1980) 13

Maine v. Key Bank of Maine, Inc., 1991-2 Trade Cas. (CCH) ¶ 69, 649 (D. Me. 1991) 10

Massachusetts v. Campeau Corp., 1988-1 Trade Cas. (CCH) ¶ 68,093 (D. Mass. 1988) 9

Massachusetts v. Doane Beal & Ames, Inc., 1994-1 Trade Cas. (CCH) ¶ 70,516 (D. Mass. 1994) 10

Massachusetts v. J. Sainsbury, PLC, No. 99-3574A (Mass. Super. Ct. Nov. 16, 2000) 9

Massachusetts v. Suiza Foods Corp., No. 01-11097 (D. Mass. July 6, 2001) 9

National Pharmacies, Inc. v. de Melecio, 51 F. Supp. 2d 45 (D.P.R. 1999) 1

New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) 15

New York v. Microsoft Corp., 209 F. Supp. 2d 132 (D.D.C. 2002) 8

New York v. St. Francis Hospital, 94 F. Supp. 2d 399 (S.D.N.Y. 2000) 7

New York ex rel. Abrams v. Primestar Partners L.P., 1993-2 Trade Cas. (CCH) ¶ 70, 403 (S.D.N.Y. 1993) 8

Pike v. Bruce Church, Inc., 397 U.S. 137 (1970) 13

Puerto Rico v. Shell Co., 302 U.S. 253 (1937) 5

Sporhase v. Nebraska ex rel. Douglas, 458 U.S. 941 (1982) 13

Texas v. Coca-Cola Bottling Co. of the Southwest, 1986-1 Trade Cas. (CCH) ¶ 67,169 (Tex. Dist. Ct. 1986) 10

Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F.2d 1 (1st Cir. 1992) 1

United States v. Borden, 347 U.S. 514 (1954) 7

Watson v. Buck, 313 U.S. 387 (1941) 5

Statutes

Mass. Gen. Laws. ch. 93 § §1-14A 4

Me. Rev. Stat. Ann. tit. 10, § 1101 et seq. 4

N.H. Rev. Stat. Ann. § 356 et seq. 4

10 P.R. Laws Ann. § 257 et seq. 4

Constitutional Provisions

U.S. Const. art. I, § 8, cl. 3 12

Other

A.B.A. Antitrust Section, State Merger Enforcement, Monograph No. 21 (1995) 10

Blumenthal, Langer and Rubenstein, Antitrust Review of Mergers By State Attorneys General: The New Cop on the Beat, 67 Conn. Bar J. 1 (1993) 10

Brockmeyer, State Antitrust Enforcement, 57Antitrust L.J. 169 (1988) 7

Flexner and Racanelli, State and Federal Antitrust Enforcement in the United States: Collision or Harmony?, 9 Conn. J. Int'l L. 501 (1994) 6, 8, 9

Horizontal Merger Guidelines of the National Association of Attorneys General (1993) 5, 6

Hovenkamp, State Antitrust in the Federal Scheme, 58 Ind. L.J. 378 (1984) 15

Introduction

Pursuant to Federal Rule of Appellate Procedure 29(a), the Commonwealth of Massachusetts on behalf of itself and the States of Alaska, Arizona, California, Connecticut, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Missouri, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island and Utah ("Amici States"), submits this brief as *amici curiae*. This brief addresses the trial court's errors of law regarding the authority of the states to enforce their own antitrust laws and the application of the Commerce Clause to these laws. The District Court, in enjoining Puerto Rico's prosecution of its state law antitrust claim in state court, unlawfully preempted the power of the state to enforce its own laws. Puerto Rico's state law claim should have been allowed to proceed in state court.[1]

Interest of the Amici States

The Attorney General of the Commonwealth of Massachusetts, and the Attorneys General of other states, are charged by their state legislatures with the duty of enforcing state antitrust law. This is not a new role for Attorneys General. Indeed, state law was the genesis of antitrust law in the United States, and more

---

[1] Puerto Rico is not a state, but Puerto Rico's own antitrust statutes have a status equivalent to state antitrust laws for purposes of our analysis. Trailer Marine Transport Corp. v. Rivera Vazquez, 977 F.2d 1, 7 (1st Cir. 1992); National Pharmacies, Inc. v. de Melecio, 51 F. Supp. 2d 45, 56 (D.P.R. 1999).

than twenty states enacted antitrust laws before the enactment of the federal Sherman Act. See California v. ARC America Corp., 490 U.S. 93, 101 n.4 (1989). As the Supreme Court has recognized, antitrust is an area "traditionally regulated by the states," and "Congress intended the federal antitrust laws to supplement, not displace, state antitrust remedies." Id., 490 U.S. at 101. See also Knevelbaard Dairies v. Kraft Foods, Inc., 232 F.3d 979, 993 (9th Cir. 2000) ("[T]he Supreme Court has made clear that neither the Sherman Act nor the Commerce Clause preempts state antitrust laws").

State antitrust enforcement is critically important to the maintenance of competitive conditions in the states' marketplaces. Despite enforcement efforts by federal authorities, it is state antitrust enforcement that often deals with matters of significant local concern, and it is state antitrust enforcement that usually brings a more familiar and nuanced understanding of the practical workings of local markets. Without state enforcement, competition, and thus consumers, would clearly suffer.

Moreover, states have a vital interest in maintaining their right to enforce their own state laws in the antitrust arena. Under a federal system, the states retain sovereignty to enforce their own state laws in their own court systems to address

violations within their borders.[2] Absent a contrary national statute which lawfully occupies the field, the states are not required to cede this right to a federal enforcer. See Exxon Corp. v. Governor of Maryland, 437 U.S. 117, 133 (1978). With respect to antitrust laws, federal enforcement jurisdiction by the Federal Trade Commission ("FTC") or Department of Justice ("DOJ") is concurrent with, but not superior to, that of state antitrust enforcers. See ARC America Corp., 490 U.S. at 101-02. Similarly, the Commerce Clause does not bar a state from enforcing its own antitrust laws. See Knevelbaard, 232 F.3d at 993. States, therefore, have the right to have their well pleaded state law antitrust complaints heard in their own courts for the benefit of their own citizens. When a federal district court enjoins this process, claiming Commerce Clause interests and relying on enforcement decisions by federal agencies, it significantly threatens these important state interests.

---

[2] The scope of state law is not limited to violations that take place physically within the territory of the state. Most relevant state antitrust enforcement, however, as in this case, involves anticompetitive activity taking place directly within state territory to the detriment of state consumers.

Argument

I. STATES ARE ENTITLED TO ENFORCE STATE ANTITRUST LAWS REGARDLESS OF THE ENFORCEMENT DECISIONS OF FEDERAL ANTITRUST AUTHORITIES.

Key portions of the District Court's analysis in this case are based on a fundamental misunderstanding of federalism and its application to antitrust law. The District Court ignored the historic and ongoing critical role that states play in antitrust enforcement, and the basic jurisprudence of federal and state lawmaking authority, when it held:

> It is in the best interest of the people of Puerto Rico that under circumstances such as this one, where a federal and a state agency are conducting parallel investigations and one has more resources available to it than the other, their government recognizes with full faith and credit the decisions of a federal agency such as the FTC when there is no indication that such decision was incorrect or unjust.

Opinion at 52.

The District Court has fundamentally misinterpreted the relevant law. States are entitled to enforce their antitrust laws[3] in state courts, regardless of how federal enforcers have resolved or settled federal law antitrust claims. "Congress

---

[3] See, e.g., 10 P.R. Laws Ann. § 257 et seq.; Mass. Gen. Laws ch. 93 §§ 1-14A; Me. Rev. Stat. Ann. tit. 10, § 1101 et seq.; N.H. Rev. Stat. Ann. § 356 et seq.

intended the federal antitrust laws to supplement, not displace, state antitrust remedies." ARC America Corp., 490 U.S. at 102.[4]

The District Court erred by failing to recognize this basic principle. Indeed, the District Court specifically chastised Puerto Rico for pursuing its state claim when purportedly "all . . . concerns had been resolved by the FTC under the appropriate and applicable divestiture guidelines which were lacking in the PRDOJ." Opinion at 17. Despite the action by the FTC, Puerto Rico is entitled and, arguably, obligated under its state laws to examine the anticompetitive conduct at issue under *state* standards and make its own determinations about the legality of the conduct under *state* law.[5] Whether and how federal enforcers settle their federal claims is irrelevant to the state law question. Puerto Rico has the right to examine conduct that allegedly violates state law and to make its own determinations. A federal court may not give estoppel or preemptive effect to the

---

[4] Similarly, the Supreme Court has long held that federal antitrust laws do not pre-empt state antitrust laws. See Watson v. Buck, 313 U.S. 387, 403 (1941); Puerto Rico v. Shell Co., 302 U.S. 253, 259-60 (1937).

[5] The District Court is simply wrong in stating that Puerto Rico has no standards for antitrust merger review. Puerto Rico's enforcement agency is a member of the National Association of Attorneys General, which publishes its own Horizontal Merger Guidelines. These guidelines are similar, but not identical, to the guidelines federal enforcement agencies use. See www.naag.org/issues/pdf/at-hmerger_guidelines.pdf.

judgment of the FTC.

The District Court ignored a long history of parallel enforcement of state and federal antitrust laws. States commonly bring antitrust actions and seek remedies when federal enforcers take no action. State enforcers also often obtain relief significantly in excess of that sought by and obtained by federal enforcers under their federal claim actions. Indeed, the ability of state enforcers to seek and obtain more expansive relief is not limited to cases where they bring state law claims, but also applies when the states bring actions under the federal statutes themselves. As a former U.S. Deputy Assistant Attorney General for Antitrust has opined:

> The states have not hesitated to investigate and challenge transactions and conduct that have passed federal muster, or otherwise have received prior federal review. The divergent philosophies of the states and the federal government, as exemplified by the different enforcement approaches of the NAAG and DOJ/FTC Horizontal Merger Guidelines, are also reflected in specific cases.

Flexner and Racanelli, State and Federal Antitrust Enforcement in the United States: Collision or Harmony?, 9 Conn. J. Int'l L. 501, 523 (1994).

This history is well recognized by the Supreme Court and other federal courts. The Supreme Court, in California v. American Stores Co., 495 U.S. 271 (1990), upheld California's right to seek more wide ranging and effective relief in

a supermarket merger review than the FTC obtained. California determined that the FTC resolution was insufficient to prevent harm to competition, and sought to force divestiture of all of the acquired chain's 252 grocery stores throughout the state. Id. at 274-76. The merging parties claimed, as the District Court opined here, that the FTC resolution barred the state from seeking a greater remedy. The Supreme Court upheld California's right to seek much broader relief than the FTC obtained. Id. at 295-96.[6]

Similarly, in Hartford Fire Ins. Co. v. California, 509 U.S. 764 (1993), nineteen States sought relief against allegedly colluding national insurers, despite DOJ's failure to take any action.[7] See also New York v. St. Francis Hospital, 94 F.

---

[6] On appeal, defendants argued that the FTC consent order resolved all antitrust concerns and that, therefore, California had little chance of success on the merits in pursuing any further antitrust action. The Ninth Circuit specifically rejected that argument, quoting the United States Supreme Court in United States v. Borden, 347 U.S. 514, 518 (1954), that "private and public [Clayton Act] actions were designed to be cumulative not mutually exclusive." The Ninth Circuit applied that reasoning in holding that "California may have different interests than the FTC in protecting its citizens from antitrust violations." California v. American Stores Co., 872 F.2d 837, 843 (9th Cir. 1989).

[7] See Michael F. Brockmeyer, State Antitrust Enforcement, 57 Antitrust L.J. 169, 170 (1988) (footnote omitted), quoting letter from Assistant Attorney General Douglas H. Ginsburg to Jay Angoff (Apr. 22, 1986) ("The Justice Department declined even to investigate this industry purportedly because the Federal Trade Commission, during a brief investigation, failed to uncover any evidence of collusion and because 'collusion is highly unlikely in unconcentrated industries like the property and casualty industry.'")

Supp. 2d 399, 418 (S.D.N.Y. 2000) (New York successfully brought an action against two colluding hospitals, even though the DOJ's Antitrust Division had reviewed and did not challenge the hospitals' earlier plans).[8]

Another straightforward example of this independent right of states to seek resolution of their antitrust claims can be found in New York v. Microsoft Corp., 209 F. Supp. 2d 132, 154 (D.D.C. 2002). In Microsoft, the court permitted Massachusetts, California and several other states to seek more rigorous antitrust relief than that provided for in a DOJ settlement. As the court noted in Microsoft, "the well-established rights of the states to sue as *parens patriae* under federal law, along with the similarly well-established right of the states to supplement federal antitrust regulation with state antitrust laws" made clear that they had the right to proceed. Id. (citations omitted).

Applying this principle is most important where the anticompetitive impact at issue is entirely local. State decisions on whether to challenge local mergers under state law should not be hampered by some misplaced deference to

---

[8] Cf. New York ex rel. Abrams v. Primestar Partners L.P., 1993-2 Trade Cas. (CCH) ¶ 70, 403 (S.D.N.Y. 1993), where the states obtained a very different resolution from the Department of Justice, even though the state and federal enforcers conducted parallel investigations. As noted by Flexner and Rocanelli, "The [two Primestar] settlements [by the States and the Antitrust Division] . . . are as different as the complaints." 9 Conn. J. Int'l L. at 528.

analogous, but separate, federal enforcement decisions. In the local context, state enforcers will have more longstanding familiarity with the market, and likely a better insight into the competitive conditions than their federal counterparts. Based on such long term experience, and on a more vested interest in maintaining thriving competition in the local marketplace, states will often seek and obtain additional divestitures or other relief in local merger cases beyond those negotiated by federal enforcers. See, e.g., Massachusetts v. Campeau Corp., 1988-1 Trade Cas. (CCH) ¶ 68,093 (1988) (department store chain merger challenged by states but not by the FTC);[9] Massachusetts v. J. Sainsbury, PLC, No. 99-3574A (Mass. Super. Ct. Nov. 16, 2000) (order entering consent decree requiring supermarket divestitures); Massachusetts v. Suiza Foods Corp., No. 01-11097 (D. Mass. July 6, 2001) (final judgment by consent and order addressing competition issues in milk processing industry); In re Stericycle, Inc., No. 03-124 (Mass. Super. Ct. Jan. 7, 2003) (assurance of discontinuance and voluntary compliance requiring divestiture of transfer stations).[10] In such circumstances, state enforcers are often in the best position to assess and then actively pursue an

---

[9] See also Flexner and Rocanelli, supra, at 523.

[10] These are all cases prosecuted by the Attorney General of Massachusetts after the FTC and DOJ sought and obtained lesser or no relief.

antitrust claim in the interests of consumers.[11]

Thus, both general competition policy and the clear case law regarding federalism in antitrust enforcement show the error of the District Court in this case. To perform their antitrust enforcement duties effectively, states must be free to enforce their statutes without the risk of injunctions of this type. The District Court erred in relying upon the enforcement decision of the FTC to block any enforcement by Puerto Rico. Puerto Rico must be allowed to pursue its state law

---

[11] See also Texas v. Coca-Cola Bottling Co. of the Southwest, 1986-1 Trade Cas. (CCH) ¶ 67,169 (Tex. Dist. Ct. 1986) (soft drink vending assets in Texas); City of Pittsburgh v. May Dep't Stores, 1986-2 Trade Cas. (CCH) ¶ 67,340 (W.D. Pa. 1986) (department stores in Pennsylvania); Maine v. Key Bank of Maine, Inc., 1991-2 Trade Cas. (CCH) ¶ 69, 649 (D. Me. 1991) (banks in Maine); Massachusetts v. Doane Beal & Ames, Inc., 1994-1 Trade Cas. (CCH) ¶ 70,516 (D. Mass. 1994) (funeral homes in Massachusetts); Connecticut v. Wyco New Haven, Inc., 1990-1 Trade Cas. (CCH) ¶ 69,024 (D. Conn. 1990) (oil terminals in Connecticut). In Wyco, Connecticut did not start its investigation until after the merger was completed and federal enforcers had provided an early waiver to the parties indicating that no federal enforcement challenge would occur. See Blumenthal, Langer and Rubenstein, Antitrust Review of Mergers By State Attorneys General: The New Cop on the Beat, 67 Conn. Bar J. 1, 11 (1993). Many of these examples are collected in A.B.A. Antitrust Section, State Merger Enforcement, Monograph No. 21 (1995), 30-38.

claim in its own state court.[12]

II. PUERTO RICO'S ENFORCEMENT OF ITS STATE ANTITRUST LAWS DOES NOT VIOLATE THE COMMERCE CLAUSE.

The District Court also erred in holding that enforcement of Puerto Rico's state antitrust laws in this instance would violate Wal-Mart's rights under the Commerce Clause. Based on its assessment that Puerto Rico brought an antitrust action to punish Wal-Mart,[13] the District Court determined that Puerto Rico had violated Wal-Mart's "rights under the Commerce Clause to be market participants

---

[12] The District Court also raised concerns that Puerto Rico was unfairly using a potential antitrust claim as leverage to obtain relief unrelated to promoting competition. We take no position on whether the specific items Puerto Rico sought in its negotiations were likely to improve the competitive situation in the relevant local markets. A focus on this back and forth negotiation, however, misses the point. If Puerto Rico has a facially valid antitrust claim under state law, it must be able to bring that case in state court and let the state court decide what remedies are and are not appropriate under state law. The trial court enjoined Puerto Rico from pursuing its antitrust case entirely. There is no justification for such a decision.

[13] The District Court noted that Puerto Rico sought certain non-antitrust related components as part of a potential settlement. In the Court's assessment, Puerto Rico's suit was triggered by Walmart's rejection of these terms. Opinion at 29.

free from imposition of state protectionism." Opinion, at 46.[14] This position is insupportable, because Puerto Rico's application of a facially valid state antitrust law here is not a Commerce Clause violation.

The Commerce Clause gives Congress the "Power . . . [t]o regulate Commerce with foreign Nations, and among the several States." U.S. Const. art. I, § 8, cl. 3. This affirmative grant of authority contains an implicit, "dormant," limitation on the states' power in the area of interstate commerce. See Gibbons v. Ogden, 22 U.S. (9 Wheat) 1, 209 (1824). The dormant Commerce Clause doctrine prohibits states from interfering with interstate commerce in certain circumstances, even when Congress has not regulated in an area. See D.H. Holmes Co. v. McNamara, 486 U.S. 24, 29 (1988).

The Commerce Clause does not bar states from even-handedly regulating businesses within their borders. In the absence of a preemptive federal statutory framework, states may continue to exercise their own police powers and set standards for business conduct. The major restriction on this power is that states may not facially discriminate against out-of-state companies in favor of local

[14] Wal-Mart raised below a section 1983 claim against Puerto Rico. To prevail on such a claim, Wal-Mart must show both the deprivation of a federal right and that the deprivation was taken under the color of state law. See Gonzalez-Morales v. Hernandez-Arencibia, 221 F.3d 45, 49 (1st Cir. 2000).

interests. See Healy v. Beer Inst., 491 U.S. 324, 1336 (1989); Sporhase v. Nebraska *ex rel.* Douglas, 458 U.S. 941, 954 (1982); Lewis v. BT Inv. Managers, Inc., 447 U.S. 27, 136 (1980). Facially neutral statutes violate the Commerce Clause in these circumstances only when they impose burdens on interstate commerce "clearly excessive in relation to the putative local benefit" obtained by the state law. Pike v. Bruce Church, Inc., 397 U.S. 137, 142 (1970).[15] Such a "burden" is not shown merely by demonstrating that a specific out-of-state company may be at a disadvantage. The relevant party must show that it is

---

[15] There is no question here of the state statute imposing a generalized "burden" on interstate commerce outweighing its local benefits. The Court never made such a finding directly, and indeed, never even performed this Pike analysis. Moreover, it is well settled that state antitrust laws serve a significant local need, and do not impose an impermissible burden on interstate commerce. Antitrust is an "area traditionally regulated by the states." ARC America Corp., 490 U.S. at 101. See also Knevelbaard, 232 F.3d at 993 ("[T]he Supreme Court has made clear that neither the Sherman Act nor the Commerce Clause preempts state antitrust laws" (quotation omitted)); Giffiths v. Blue Cross and Blue Shield of Alabama, 147 F. Supp. 2d 1203, 1220 (N.D. Ala. 2001) ("Alabama's antitrust statutes regulate monopolistic activities that occur within this state ...even if such activities fall within the scope of the Commerce Clause of the Constitution of the United States."). In areas of traditional state regulation, states are accorded wide latitude under the Commerce Clause in setting standards for business conduct under state law. This latitude applies to both the existence of the antitrust statutes and to their enforcement. See Exxon Corp., 437 U.S. at 128-129. Thus, state enforcement of facially neutral antitrust laws without regard to the defendant's domestic or foreign status does not create a Commerce Clause issue. Indeed, state enforcement of such local police power functions is both anticipated and expected under Commerce Clause jurisprudence. See ARC America Corp., 490 U.S. at 101.

disadvantaged because it is foreign and not for some other reason. For instance, a company claiming such discrimination would need to show that an in-state company, with similar attributes, would not face similar barriers. See Exxon Corp., 437 U.S. at 128-129 ("in the absence of a relevant congressional declaration of policy, or a showing of a specific discrimination against, or burdening of, interstate commerce, we cannot conclude that the States are without power to regulate in this area.").

Here nothing in the Puerto Rico statute disadvantages Wal-Mart *because* it is an out of state entity. Indeed, under antitrust standards, a large player like Wal-Mart might well be even less likely to obtain approval of a merger if it were a "home grown" company (a "home grown" Wal-Mart would probably have an even larger market presence than the real "outsider" Wal-Mart does, raising further questions about market consolidation).

A similar analysis applies to any argument that Puerto Rico violated the Commerce clause in its *application* of its antitrust laws. The District Court's determination that Puerto Rico made excessive settlement demands on Wal-Mart is irrelevant to the Commerce Clause issue. Only if Puerto Rico sought to enjoin the merger because Wal-Mart is foreign, rather than for some other reason, would

a Commerce Clause issue arise. There was no such finding in this case.[16]

In these circumstances, the trial court's reliance on a Commerce Clause violation as the basis for a section 1983 claim necessarily fails.[17] Puerto Rico simply seeks to apply its antitrust statute to Wal-Mart's conduct, in the same way that the standard is applied to all market participants. Such application violates no

---

[16] The District Court relies on New Energy Co. of Indiana v. Limbach, 486 U.S. 269 (1988) and Dennis v. Higgins, 498 U.S. 439 (1991), as support for the Court's conclusion that Puerto Rico's enforcement discriminates against interstate commerce. Opinion at 37-38. These cases are inapposite. Both Limbach and Higgins involve facially discriminatory statutes. The Puerto Rico statute is facially valid, and there is no finding here that Wal-Mart was singled out because it was a foreign based corporation.

The District Court found that Puerto Rico sought assurances from Wal-Mart regarding the continued use of local suppliers, but did not find that Puerto Rico made these requests because Wal-Mart was a foreign company. Indeed, the District Court's findings imply that the same types of assurances would have been sought from any purchaser. In any event, such actions do not warrant an injunction against a facially valid state law prosecution. Puerto Rico pled, in state court, a valid claim for violation of its antitrust statute by an allegedly unlawful merger. Regardless of what issues Puerto Rico discussed with Wal-Mart regarding local growers, it is not a violation of the Commerce Clause for Puerto Rico to pursue this suit in its own court.

[17] Under modern Commerce Clause case law, it is hard to envision any viable challenge to state antitrust laws. See Herbert Hovenkamp, State Antitrust in the Federal Scheme, 58 Ind. L.J. 375, 387 (1984) ("nearly all cases that did condemn [the application of state antitrust laws on Commerce Clause grounds] were decided before 1935, when judges had a much more restrictive view of the power of the states to regulate in interstate commerce, or to exercise jurisdiction over persons outside the state.").

right of Wal-Mart. Thus, there can be no section 1983 action based on Commerce Clause issues, and there is no Commerce Clause basis for forestalling the civil prosecution of the facially valid state law antitrust claims in this case.

CONCLUSION

For these reasons, Puerto Rico is entitled to an adjudication on the merits in state court of its antitrust claims, and the District Court's decision should be reversed.

Respectfully submitted,

THOMAS F. REILLY
Attorney General of Massachusetts

____
Glenn S. Kaplan, 1st Cir. No. [Application Pending]
Jesse M. Caplan
Timothy E. Moran
Assistant Attorneys General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Dated: February 25, 2003

CERTIFICATE OF COMPLIANCE

Pursuant to F.R.A.P. 32(a)(7)(B) and (C), Glenn S. Kaplan, Assistant Attorney General, whose application to practice before the United States Court of Appeals for the First Circuit is pending, hereby certifies that:

1. The Brief of the Commonwealth of Massachusetts, *et al.* as *Amici Curiae* in Support of Defendant-Appellant Puerto Rico, in this appeal complies with the type and volume limitations of F.R.A.P. 32(a)(7); it has been prepared using 14 point proportionally spaced Times New Roman typeface, using WordPerfect 9.

2. The Brief of the Commonwealth of Massachusetts, *et al.* as *Amici Curiae* in Support of Defendant-Appellant Anabelle Rodríguez contains 4,614 words as measured by the word-processing system used to prepare the brief.

____
Glenn S. Kaplan
Assistant Attorney General
One Ashburton Place
Boston, Massachusetts 02108
(617) 727-2200

Dated: February 25, 2003

CERTIFICATE OF SERVICE

I hereby certify that on February 25, 2003, a true and exact copy of the foregoing Brief of the Commonwealth of Massachusetts and the States of Alaska, Arizona, California, Connecticut, Idaho, Iowa, Kansas, Louisiana, Maine, Maryland, Missouri, Nevada, New Hampshire, New Mexico, North Dakota, Oregon, Pennsylvania, Rhode Island and Utah as *Amici Curiae* in Support of Defendant-Appellant Anabelle Rodríguez, is being served overnight mail to:

Bernard W. Nussbaum
Michael H. Byowitz
George T. Conway, III
WATCHELL, LIPTON, ROSEN & KATZ
51 West 52nd Street
New York, New York 10019

Rubén T. Nigaglioni
Raúl M. Arias
Veronica Ferraiuoli-Hornedo
MCCONNELL VALDÉS
270 Avenida Muñoz Rivera
Hato Rey, Puerto Rico 00918

Attorneys for plaintiff Wal-Mart Stores, Inc.
And Supermercados Amigo, Inc.

and via first-class mail to:

Roberto J. Sánchez Ramos
Vanessa Lugo Flores
Hiram A. Meléndez-Juarbe
Jaime Mercado-Almodóvar
Department of Justice Puerto Rico
P.O. Box 9020192
San Juan, Puerto Rico 00902-0192

Attorneys for Defendant-Appellant
Anabelle Rodríguez

By ______________________