01-7371

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

IN RE: STOCK EXCHANGES OPTIONS TRADING ANTITRUST LITIGATION

LYNN S. MILLER, Individually and on behalf of all others similarly situated, MARK STEINBERG, individually and on behalf of all others similarly situated, RAM YARIV, individually and on behalf of all others similarly situated, ALAN HAENEL, individually and on behalf of all others similarly situated, YAKOV PRAGER, individually and on behalf of all others similarly situated, THOMAS P. LYNCH, individually and on behalf of all others similarly situated, MARY CHIU, individually and on behalf of all others similarly situated, HARRY BINDER, individually and on behalf of all others similarly situated, ESTATE OF WANDA GRAHAM, on behalf of itself and all others similarly situated,

Consolidated-Plaintiff-Appellants,
(Caption continued on inside cover)

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE
IN SUPPORT OF PETITION FOR REHEARING EN BANC

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Plaintiff-Appellants,

v.

AMERICAN STOCK EXCHANGE, INC., a New York not for profit Corp., CHICAGO BOARD OPTIONS EXCHANGE, INC., a Delaware not for profit Corp. PHILADELPHIA STOCK EXCHANGE, INC., A Delaware not for profit Corp., PACIFIC EXCHANGE, INC., a California Corporation., NEW YORK STOCK EXCHANGE, INC., a New York not-for-profit corp., WOLVERINE TRADING, L.P., SUSQUEHANNA INVESTMENT GROUP INC., JOHN DOES 1-100, SPEAR, LEEDS & KELLOGG, L.P., a New York Limited Parternship., AMEX, CBOE, PHX, PCX, M.J.T. SECURITES LLC, COLE, ROESLER TRADING, L.P., ASSETS MONDIAL, LLC., KODIAK CAPITAL MANAGEMENT, LLC., CHIN OPTIONS LLC., OPPENHEIMER, NOONAN, WEISS, L.P., ARBITRADE LLC., TIMBER HILL L.L.C., PROFESSIONAL EDGE FUND, L.P. TAGUE SECURITES CORP., LAKOTA TRADING INC., REFCO SECURITIES, INC., BRIDGEPORT SECURITIES GROUP CO., JOHNSON TRADING CORP., GROUP ONE TRADING L.P., BEARTOOTH TRADING INC., CRANMER & CRANMER, INC. GOIN & CO., L.L.C., AGS SPECIALIST PARTNERS, LETCO, BEARHUNTER LLC., KALB, VOORSHI & CO., LLC. HIGHLAND SECURITIES CO., GHM, INC., D.A. DAVIDSON & CO., INC., CHARLTON, INC., HULL TRADING CO. L.L.C., BINARY TRADERS, INC.,

Defendants-Appellees.

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LYNN S. MILLER, et al.,
Plaintiffs-Appellants,

v.

AMERICAN STOCK EXCHANGE, INC., et al.,
Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES
AS AMICUS CURIAE IN SUPPORT OF PETITION
FOR REHEARING EN BANC

STATEMENT OF INTEREST

The United States has primary responsibility for enforcing the federal antitrust laws, which express the nation's fundamental economic policy in favor of free competition. The Antitrust Division of the Department of Justice worked with the Securities and Exchange Commission in conducting and resolving

parallel investigations into conduct related to that alleged in this case.[1] The United States filed amicus curiae briefs in the district court and in this Court, arguing that there is no implied repeal of the antitrust laws with respect to conduct prohibited by SEC rule.[2] This brief is accompanied by a motion, pursuant to Fed. R. App. P. 29(b), for leave to file.

QUESTION PRESENTED

Whether the federal antitrust laws are impliedly repealed with respect to conduct prohibited by a Securities and Exchange Commission rule.

STATEMENT

1. Plaintiffs in this private antitrust case alleged that five national securities exchanges and members of those exchanges "had conspired to restrict

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[1] *See* SEC, "SEC and Department of Justice Sanction Four Options Exchanges for Anticompetitive Conduct," Press Release No. 2000-126 (Sept. 11, 2000) (A-929); U.S. Dept. of Justice, "Justice Department Files Suit Challenging Anticompetitive Agreement Among Options Exchanges," Press Release No. 00-530 (Sept. 11, 2000) (A-932). *See also* Complaint, *United States v. American Stock Exchange, LLC* (D.D.C. No. 00-2174, filed Sept. 11, 2000) (A-938); Stipulated Final Judgment, *id.* (A-960).

[2] At the district court's request, the Securities and Exchange Commission filed a Statement in the district court indicating it "agrees with the conclusion reached in the memorandum amicus curiae of the United States that the federal antitrust laws are not impliedly repealed with respect to the conduct alleged in these cases." Statement of the Securities and Exchange Commission, as Amicus Curiae, on the Issue of Implied Repeal of the Antitrust Laws, at 2 (June 16, 2000) (A-311). The Commission did not file a brief amicus curiae in this Court.

the listing and trading of particular options to one exchange at a time, thereby restraining trade in such options in violation of Section 1 of the Sherman Act." *In re Stock Exchange Options Trading Antitrust Litigation*, 2003 WL 77100, at *1 (2d Cir. Jan. 9, 2003) ("*Panel Op.*"). SEC Rule 19c-5, adopted in 1989, and fully in effect since 1994, prohibits any exchange from adopting any "rule, stated policy, practice, or interpretation" that would "prohibit or condition, or be construed to prohibit or condition or otherwise limit, directly or indirectly, the ability of this exchange to list any stock options class because that options class is listed on another options exchange." 17 C.F.R. 240.19c-5(a)(3).[3]

Defendants moved to dismiss the complaint, pursuant to Rule 12(b)(6), Fed. R. Civ. P., on the ground that "Congress had impliedly repealed the antitrust laws with respect to the listing and trading of options by empowering the

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[3]As the Commission explained, the national securities exchanges "are prohibited from restricting the listing of any new stock options class to a single exchange." 54 Fed. Reg. 23963, 23963 (June 5, 1989). The SEC proposed Rule 19c-5 pursuant to statutory provisions that "codify a Congressional intent that the U.S. securities markets, including options markets, be free from competitive restraints to the furthest extent possible consistent with the other goals of the Act." *Id.* at 23970.

Defendants did not dispute that the alleged agreement — if proved — would violate Rule 19c-5. *See* Memorandum of Law in Support of Options Exchange Defendants' Motion to Dismiss the Consolidated Amended Complaint, at 7 (Jan. 28, 2000).

SEC to regulate those matters." *Panel Op.* *1. The court converted the motion to dismiss on implied repeal grounds to a motion for summary judgment and granted the motion. *Id.* *5.

2. A panel of this Court affirmed, holding that "[t]he appropriateness of an implied repeal does not turn on whether the antitrust laws conflict with the current view of a regulatory agency; rather it turns on whether the antitrust laws conflict with an overall regulatory scheme that empowers the agency to allow conduct that the antitrust laws would prohibit." *Panel Op.* *12. It found immunity because "[a]lthough the SEC's present stance is that agreements for exclusive listing are forbidden, the Commission has the power to alter that position if it concludes that other concerns within its domain outweigh the need to protect competition," and because it saw "no way to reconcile that SEC authority . . . with the antitrust laws." *Id.* *13.

SUMMARY OF ARGUMENT

The panel's holding that the antitrust laws have been repealed with respect to the conduct at issue in this case conflicts with a long line of Supreme Court decisions establishing that because "[t]he antitrust laws represent a fundamental national economic policy, . . . [i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the

antitrust laws and the regulatory system." *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 388 (1988) (internal quotations and citations omitted). The panel's decision is the first, to our knowledge, ever to hold the Sherman Act impliedly repealed as to alleged conduct that is not only unapproved — implicitly or expressly — but affirmatively *prohibited* by agency rule. Despite the absence of any conflict between the standards of the antitrust laws and the governing SEC rule, the panel focused on the possibility that the Commission could exercise its authority to permit future conduct of this nature. This was error.

Imposing liability under the Sherman Act for past conduct that was prohibited by the applicable SEC rule when it occurred would create no conflict with the regulatory scheme. And an injunction governing future conduct also would create no conflict since it could be conditioned or modified to conform to future regulatory authorizations if and when they occur. The mere existence of *unexercised* regulatory authority to approve conduct does not itself create a conflict. Thus, the panel's assumption that there is "no way to reconcile [the] SEC's authority . . . with the antitrust laws," *Panel Op.* *13, is plainly wrong. Neither the current parallel *prohibition* nor the SEC's unexercised authority to

permit, in the future, agreements similar to those now at issue creates the clear repugnancy necessary to justify implied repeal of the antitrust laws.

Nor does the Supreme Court's analysis in *Gordon v. New York Stock Exchange,* 422 U.S. 659 (1975), mandate a finding of implied repeal in this situation, as the panel believed. *Gordon* involved damage liability for past commission fixing that *was* authorized under the regulatory scheme when it occurred, although the SEC subsequently adopted a new policy prohibiting such conduct. Imposing antitrust liability for conduct authorized under the regulatory scheme would have interfered with the agency's ability to exercise its authority to permit such conduct in the future. *Gordon* is fully consistent with the long line of cases refusing immunity for conduct not approved – expressly or implicitly – under the regulatory scheme.

ARGUMENT

It is well established that "[t]he antitrust laws represent a fundamental national economic policy," and that, as a consequence, "[i]mplied antitrust immunity is not favored, and can be justified only by a convincing showing of clear repugnancy between the antitrust laws and the regulatory system." *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City,* 452 U.S. 378, 388 (1988) (internal quotations and citations omitted). Even

where there is conflict, repeal of the antitrust laws is implied "only if necessary to make the [regulatory law] work" and then "only to the minimum extent necessary." *Id*. at 389 (internal quotations and citations omitted). This demanding standard — which this Court has consistently acknowledged and applied[4] — forecloses the panel's holding that the mere possibility of future regulatory authorizations in conflict with the antitrust laws confers antitrust immunity on past conduct affirmatively prohibited under the regulatory scheme.

A. There is No Clear Repugnancy Between the Antitrust Laws and a Regulatory Scheme Prohibiting the Challenged Conduct

The panel recognized that "antitrust immunity is not to be presumed from the mere existence of overlapping authority." *Panel Op.* *11 (citing *Strobl v. New York Mercantile Exchange*, 768 F.2d 22, 27 (2d Cir. 1985)). What the panel failed to recognize is that the antitrust laws are impliedly repealed only when they "prohibit an action that a regulatory scheme permits." *Finnegan v.*

[4] *E.g.*, *Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 83 (2d Cir. 1981); *Strobl v. New York Mercantile Exchange*, 768 F.2d 22 (2d Cir. 1985); *Finnegan v. Campeau Corp.*, 915 F.2d 824 (2d Cir. 1990); *Law Offices of Curtis V. Trinko v. Bell Atlantic Corp.*, 294 F.3d 307 (2d Cir. 2002), *petition for cert. filed*, 71 U.S.L.W. 3352 (U.S. Nov. 1, 2002) (No. 02-682). *See also Friedman v. Solomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002).

Campeau Corp., 915 F.2d 824, 828 (2d Cir. 1990) (citing *Strobl*, 768 F.2d at 27).[5]

In *Strobl*, this Court properly found no antitrust immunity for conduct prohibited under both the Commodity Exchange Act itself and the antitrust laws. The panel distinguished *Strobl* and concluded that immunity existed here, despite parallel prohibitions. It noted that "[t]he Exchange Act itself does not prohibit agreements for exclusivity in options listing," that "the Commission has taken various positions" over time, that the SEC "is concerned with more than just the protection of competition," and that the SEC has authority to change its policy

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[5]The regulatory authorization need not take the form of an explicit approval. Conflict can also exist where the SEC "deliberately has chosen" not to exercise its authority to prohibit conduct. *Friedman*, 313 F.3d at 801. Thus, in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), for example, the fixed commission rates at issue had been approved, at the time, by the SEC through actions "having an effect equivalent to that of a formal order," 422 U.S. at 690 n.13. In *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975), the Court found immunity for activities expressly authorized by statute, for regulated activities "*approved* by the SEC," and for an alleged conspiracy "to encourage . . . precisely the restriction that the SEC consistently has approved pursuant to [statute] for nearly 35 years." 422 U.S. at 733 (emphasis added). Similarly, this Court, in *Finnegan v. Campeau*, found implied immunity for joint takeover bids "because the SEC has the power to regulate bidders' agreements under [the Williams Act] . . . *and has implicitly authorized them* by requiring their disclosure . . . as part of a takeover battle." 915 F.2d at 831 (emphasis added). It found immunity in *Friedman* where the SEC had made a "deliberate and significant" decision to not prohibit the challenged conduct. 313 F.3d at 802.

and approve exclusivity agreements in the future. *Panel Op.* *11. These factors, however, do not create a conflict or provide a basis for implied repeal in the absence of conflict.

Imposing antitrust liability for past conduct that was not approved does not foreclose the SEC from changing its rules for the future. Thus in *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), for example, the Supreme Court, drawing on *United States Navigation Co. v. Cunard Steamship Co.*, 284 U.S. 474 (1932), and *Far East Conference v. United States*, 342 U.S. 570 (1952), held that courts may "subject activities which are clearly unlawful under the Shipping Act," because not approved by the Federal Maritime Commission, "to antitrust sanctions so long as the courts refrain from taking action which might interfere with the Commission's exercise of its lawful powers." 383 U.S. at 221. It is clear that "[t]he award of treble damages for past and completed conduct which clearly violated the Shipping Act would certainly not interfere with any future action of the Commission." *Id.* at 222.

If injunctive relief is warranted, the injunction should make provision for a material change in SEC regulations. *See Carnation*, 383 U.S. at 221 ("the District Court should not be permitted to issue an unconditional injunction"). And in any event, under Fed. R. Civ. P. 60(b)(5) and "'[u]sing its equitable

power, a court may modify a decree in response to changed conditions,'" *United States v. Broadcast Music, Inc.*, 275 F.3d 168, 175 (2d Cir. 2001) (quoting *United States v. American Cyanamid Co.*, 719 F.2d 558, 564 (2d Cir. 1983)), including a change in governing law that "makes legal what the decree was designed to prevent," *Rufo v. Inmates of Suffolk County Jail*, 502 U.S. 367, 388 (1992) (citing *Railway Employees v. Wright*, 364 U.S. 642 (1961)). Accordingly, neither damages nor injunctive relief based on past unapproved conduct would limit the agency's authority to authorize future conduct to the extent of its authority under the regulatory statute.

Further, if the SEC chose at some time in the future to exercise its authority to approve the type of conduct previously held subject to the antitrust laws, conduct subsequent to that change would be immune from the antitrust laws to the extent of any conflict created by the new authorization. There, too, the regulatory authority would not be impaired.

Implied repeal of the antitrust laws with respect to past unapproved conduct, therefore, is not "necessary to make the [regulatory law] work," *National Gerimedical*, 452 U.S. at 388, even if the regulatory agency has authority to approve the conduct at issue. This Court's decision in *Northeastern Tel. Co. v. Am. Tel. & Tel. Co.*, 651 F.2d 76, 84 (2d Cir. 1981), cited by the

panel in support of its decision, *Panel Op.* *10, is instructive on this point. The FCC had authority to regulate AT&T's tariffs, but because it had never approved the allegedly anticompetitive tariff conditions at issue, "no conflict will arise between the Federal Communications Act and the antitrust laws if we hold that [AT&T is] subject to antitrust liability for" those conditions. Indeed, it is clear that even an express exemption for agency-approved conduct creates no implied immunity for conduct that has not been approved. *E.g.*, *United States v. Borden Co.*, 308 U.S. 188, 197-201 (1939); *Carnation*, 383 U.S. at 215-17.

The panel's mistaken focus on the scope of the agency's authority rather than on whether any statute or rule authorized the conduct at issue is squarely at odds with this well-established line of authority. Congress does not automatically confer broad antitrust immunity simply by authorizing an agency to permit conduct that would otherwise violate the antitrust laws. If the agency does not act, or if it also condemns the practice at issue, there is no conflict to reconcile, and the antitrust laws continue to apply.[6]

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[6]Other Supreme Court cases underscore the importance of distinguishing between conduct approved under a regulatory scheme and conduct that violates regulatory norms. In *Ricci v. Chicago Mercantile Exchange*, 409 U.S. 289 (1972), the Court affirmed a stay of antitrust litigation pending administrative proceedings to determine whether the conduct at issue violated Chicago Mercantile Exchange rules, reasoning that *if* the conduct "was pursuant to a valid

(continued...)

B. The Panel Misread *Gordon*, Which Rested on an Actual Conflict Between Regulatory and Antitrust Standards

Contrary to the panel's conclusion, *Panel Op*. *12, the Supreme Court's decision in *Gordon v. New York Stock Exchange*, 422 U.S. 659 (1975), does not establish a rule that unexercised regulatory authority to approve conduct that would otherwise violate the antitrust laws creates a conflict that requires implied repeal. *Gordon* rested on an actual conflict — not a potential future conflict — between regulatory and antitrust standards.

Gordon filed a class action seeking $1.5 billion in damages for defendants' alleged fixing of commissions. *See* 422 U.S. at 661 n.3.[7] The action was filed in 1971, years before the SEC prohibited such conduct. *Id*. at 660. Applying the antitrust laws would have subjected the defendants to antitrust liability for conduct approved by the SEC through actions that the Court concluded were "to

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[6](...continued)
rule," antitrust immunity might be implied. *Id*. at 303. If the conduct was contrary to the rules, however, the basis for an immunity argument "disappears entirely," *id*. at 307, and "the antitrust action should very likely take its normal course, absent more convincing indications of congressional intent than are present here that the jurisdictional and remedial powers of the [Commodities Exchange] Commission are exclusive," *id.* at 304.

[7]The plaintiff also sought an injunction, 422 U.S. at 661 n.3, but the injunction appears to relate to claims not pursued before the Supreme Court.

be viewed as having an effect equivalent to that of a formal order." 422 U.S. at 690 n.13.

The Court went on to consider whether the SEC's subsequent decision to prohibit fixed commissions undermined the conclusion that the past conduct was immune, holding that it did not. 422 U.S. at 690-91. "[F]ailure to imply repeal" with respect to conduct approved by the SEC when it occurred would mean that, if the SEC changed its policy again, future conduct approved by the SEC would also be subject to the antitrust laws, "render[ing] nugatory the legislative provision for regulatory agency supervision of exchange commission rates," and preventing the regulatory structure from working as Congress intended. *Id.* at 691.

The Court's companion decision in *United States v. National Ass'n of Securities Dealers*, 422 U.S. 694 (1975) ("*NASD*"), also turned on regulatory approval of the challenged conduct. The Court found that the regulatory statute authorized certain conduct, 422 U.S. at 721, 726, and that other conduct was implicitly approved by the SEC, *id.* at 733. This Court's recent decision in *Friedman v. Solomon/Smith Barney, Inc.*, 313 F.3d 796 (2d Cir. 2002), illustrates the same point, recognizing antitrust immunity because the SEC had

made a "deliberate and significant" decision not to prohibit the challenged conduct, *id*. at 802.

Gordon, *NASD*, and *Friedman* are thus fully consistent with the Supreme Court's instruction that implied repeal is to be recognized "only if necessary to make the [regulatory law] work" and then "only to the minimum extent necessary," *National Gerimedical*, 452 U.S. at 388. They do not establish broad immunity based on the mere possibility that regulatory approval could in the future create a conflict with the antitrust laws, when there is no such conflict as to the conduct before the court.

CONCLUSION

Antitrust and regulatory enforcement often serve complementary interests, and the Department of Justice Antitrust Division and the regulatory agencies frequently coordinate their enforcement efforts to protect the public interest.[8] The law is clear that implicit or explicit regulatory approval of conduct that would otherwise violate the antitrust laws, pursuant to a regulatory scheme established by Congress, may preclude application of the antitrust laws to that conduct. But the law is equally clear that, where there is no such conflict,

[8]Of course, most violations of regulatory statutes do not involve violations of the antitrust laws, and antitrust suits are not a proper vehicle for advancing complaints about violations of the securities laws under another label.

implied repeal is not "necessary to make the [regulatory law] work," *National Gerimedical*, 452 U.S. at 388, and the antitrust laws and the regulatory scheme must be permitted to co-exist.

The Court should grant rehearing en banc.

Respectfully submitted.

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February 10, 2003

CERTIFICATE OF SERVICE

I certify that on this 10th day of February, 2003, I caused two copies of this Brief for the United States as Amicus Curiae in Support of Petition for Rehearing en Banc to be served by first-class mail postage prepaid on counsel for the parties:

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