OFFICIAL TRANSCRIPT

PROCEEDINGS BEFORE

THE SUPREME COURT OF THE UNITED STATES

DKT/CASE NO. No. 82-1832

TITLE TOWN OF HALLIE, ET AL., Petitioners, v. CITY OF EAU CLAIRE

PLACE Washington, D. C.

DATE Monday, November 26, 1984

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IN THE SUPREME COURT OF THE UNITED STATES

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TOWN OF HALLIE, ET AL., :

Petitioners, :

v. : No. 82-1832

CITY OF EAU CLAIRE :

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Washington, D.C.

Monday, November 26, 1984

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 12:59 o'clock p.m.

APPEARANCES:

CLAUDE J. COVELLI, ESQ., Madison, Wisconsin; on behalf of Petitioners.

FREDERICK W. FISCHER, ESQ., City Attorney for Eau Claire, Eau Claire, Wisconsin; on behalf of Respondent.

C O N T E N T S

P R O C E E D I N G S

CHIEF JUSTICE BURGER: We'll hear argument next in Town of Hallie v. City of Eau Claire.

Mr. Covelli, you may proceed whenever you're ready.

ORAL ARGUMENT OF CLAUDE J. COVELLI, ESQ.

ON BEHALF OF PETITIONERS

MR. COVELLI: Mr. Chief Justice, and may it please the Court, this action arises from the complaint filed by four Towns who are adjacent to the City of Eau Claire. That complaint alleged that the City was using its monopoly power over sewage treatment services in the relevant geographic market to monopolize another product market, sewage collection and transportation services.

Originally, other than the Sherman Act, other claims were made at the trial court level. The relief requested in the complaint was strictly injunctive relief; in other words, to stop the City from engaging in this anticompetitive conduct.

At the trial court level, the City, pursuant to rule 12(b)(6) moved to dismiss. That motion was granted. As to the antitrust claims, it was granted on Parker v. Brown exemption grounds.

Only the antitrust claim was appealed to the Seventh Circuit. The Seventh Circuit affirmed again on

Parker v. Brown exemption grounds.

There are three issues that are presented in this case. The threshold issue is what showing is sufficient to establish that the sovereign State has clearly articulated and affirmatively expressed the State policy that the competition in question be displaced with monopoly service or regulation.

If that requisite State policy is determined to exist, the next issue is what showing is sufficient to establish the State selected the City to implement that State policy with the particular anticompetitive conduct in question.

If these first two tests are met, the next question is whether active State supervision is necessary to assure the City's anticompetitive conduct is attributable to the State.

The parties disagree on the showings under all three issues. However, the disagreement is fundamental and, I believe, determinative as to the first issue. The Town's position that the requirement that the State clearly articulate and affirmatively express its policy decision to displace competition means just that.

It means, number one, that the evidence of that policy must be gleaned from the State's statutes. It means, number two, that these statutes must clearly

evidence that the State has addressed the displacement of competition.

QUESTION: Mr. Covelli, you say "from the State's statutes. Do you mean by that in contradistinction to authoritative decisions of the Supreme Court of Wisconsin?

MR. COVELLI: No, I do not, Your Honor. I mean this; that the statutes define it. The legislative statement defines it. The decisions of the Supreme Court, to the extent they apply the appropriate test -- and that is the test determined by this Court -- may be informative to the Court, but if the State court applies a different standard and does not determine that these statutes do, in fact, clearly articulate this matter, this is still a federal question and it is something to be decided by the Federal Courts.

QUESTION: No, I didn't mean that the Supreme Court of Wisconsin's decision on whether the Parker v. Brown exemption applies would be at all conclusive in this litigation, but as to whether there is a State policy, could not one look as well to the Supreme Court of Wisconsin's decisions construing statutes, as well as to the statutes themselves?

MR. COVELLI: I think that if the State of Wisconsin through its court declared that we find that

the State of Wisconsin has clearly articulated and affirmatively expressed its particular policy, the one in question, that may be of some guidance to this Court, but it is not bound by that decision.

QUESTION: But supposing the State court decision didn't arise in an antitrust context, but in some other context, so the State court wouldn't have any occasion to use the language of the City of Boulder case.

Don't you look to State court decision as well as to statute to decide what the policy is?

MR. COVELLI: Well, I think it is very unlikely that the State court would ever address the issue of the displacement of competition and replacing it with monopoly service or regulation other than in an antitrust situation.

I think also in this case, for example, although the Wisconsin Supreme Court addressed this type of conduct, it is clear from the decision in Chippewa Falls case that the Supreme Court, number one, expressly said we are not applying the Parker test.

The Wisconsin Supreme Court also had its own rule, that although not as stringent as the Parker test, approached it. The Wisconsin Supreme Court said we are not applying that test either. When you look at the

Wisconsin Supreme Court's decision, what they said was, relying on Home Rule power, not completely, almost completely, this conduct is not prohibited by State law; this conduct is not prohibited by Wisconsin's mini-Sherman Act.

We submit that that is the same as in Boulder; that that is State neutrality; that the State court, the State law does not have to prohibit the anticompetitive conduct. This Court has decided that the federal antitrust laws apply to municipalities and the federal antitrust laws prohibit anticompetitive conduct of these municipalities.

So I guess if the State court hit and applied the exact test by this Court, this Court would not be bound by it. But on the other hand, I would not say that the Court should totally disregard it. I think the Court has to make its own decision, based on its own tests, and what the legislature has said and what the legislature has intended.

So I think the statute must, number one, evidence that the State legislature has clearly addressed the displacement of competition, and then, two, under the test has clearly articulated its policy decision -- that is, the State's -- to displace that competition with monopoly service or regulation.

After outlining the facts of the case, the thrust of our argument will simply be this: that the clear articulation test is the correct test; that it serves the purpose and goal of protecting State sovereignty that the Parker exemption was intended for; that in this case this test has not been met. It has not been met because the State of Wisconsin has not addressed the displacement of the competition defined in our complaint. It has not expressly articulated its policy decision to do so.

In this case, the City of Eau Claire made the policy decision to displace compeititon, and then implemented their own policy decision. This is not exempt.

Now, this --

QUESTION: But surely it was authorized to do so, wasn't it?

MR. COVELLI: No, Your Honor.

QUESTION: You don't think so?

MR. COVELLI: Your Honor, you have to look at the complaint and what is the actionable conduct here. The actionable conduct here is not a refusal to provide sewage services in the unincorporated areas constituting the Towns.

What is the gravamen of our complaint is,

number one, that the City has acquired a monopoly in sewage treatment services that extends into these unincorporated territories; that they are a monopolist in sewage treatment services in the Towns.

Number two, we are saying that their anticompetitive conduct is the use of that monopoloy power in the Towns in that geographic market to moncpolize sewage collection services, which we say is a different product market.

We submit that the State of Wisconsin has never, in any way or form, said to the City you are authorized to monopolize competition in sewage services in the Town.

QUESTION: Well, here's what the Court of Appeals said: Our conclusion that the State policy authorizes the City to do so and so.

Now, you disagree with that.

MR. COVELLI: Yes, Your Honor, and --

QUESTION: Well, doesn't that depend on a reading of the State statutes?

MR. COVELLI: Yes, it did. It did and it didn't, because let me --

QUESTION: Should we try to second-guess the Court of Appeals for the Seventh Circuit on how the State statute should be read?

MR. COVELLI: Well, Your Honor, when you look at the tests that the Seventh Circuit applied, the Seventh Circuit did not determine from reading the statutes that the State of Wisconsin, through its legislature, ever contemplated this displacement of competition.

QUESTION: Well, I know, but that isn't what I asked you. I asked you if they authorized the City to do it. Perhaps the State didn't declare a State policy that the municipalities had to follow. But didn't they -- as I read the Court of Appeals, they at least authorized the City to displace competition if they wanted to.

MR. COVELLI: And this, I think, was a mistake for this reason: The City has consistently attempted to characterize our complaint as complaining against the City's refusal to provide sewage services in these unincorporated areas.

As our reply brief points out, this is just the opposite of what we are claiming. We are not claiming that the City refuses to provide service in this area. We are claiming that they are monopolizing sewage collection services.

And if I might describe the situation. Competition -- once service is in place, it's provided

on a monopoly basis. The competition relevant and the competition defined in our complaint is in the geographic market of the unincorporated areas constituting the Towns. It isn't in the area where people are not yet receiving sewage collection services.

Both the City and the Towns, under the statutes, the Wisconsin statutes, may provide sewage collection services in this unincorporated territory. Just like the electric utilities, the competition between the City and the Towns is for people not yet receiving service.

What we are saying is, the City through it monopoly power in sewage treatment services, which we need -- we cannot provide collection services without treatment services -- it is the bottleneck theory of an anticompetitive conduct.

QUESTION: Suppose we disagree with you on this particular point, and what if we agreed with the Court of Appeals that the State has authorized the Cities to do that?

Would you say that you lose the case, or do you think that the State must compel all the Cities to do it?

MR. COVEILI: Well, if you're saying -- the

Court of Appeals said the City was authorized to refuse to provide service. I think that that we would not lose, because that is not germane to our complaint.

Our complaint and our claim is that the City is monopolizing service.

QUESTION: I know, but the City was also authorized, certainly, to provide the service if they annexed the property.

MR. COVELLI: This is true. And we are not asking for any relief from annexation. None of the statutes relied on by the Seventh Circuit or the City deal with annexation.

The State of Wisconsin has annexation statutes that define when annexation may occur.

QUESTION: Well, did you make this argument in the Court of Appeals?

MR. COVELLI: Yes, I did.

QUESTION: Why didn't they address it?

MR. COVELLI: Because they took the City's construction of our complaint and decided that our claim was something that we said it wasn't.

QUESTION: Well, Mr. Covelli, let me read you the first five lines of the Court of Appeals' opinion, which I think purports -- it's in the Appendix to the Petition.

"Four Towns allege that a City is using a monopoly over sewage treatment services in the relevant geographic market to gain a monopoly in the markets for sewage collection and sewage transportation, in violation of the Sherman Act."

Is that a reasonably correct statement of what you are complaining about?

MR. COVELLI: Yes, it is.

QUESTION: So the Court of Appeals at least understood the nature of your complaint.

MR. COVELLI: Yes, they did. And I think that the point, in answering your question, they said that the City was authorized to engage in particular conduct. They said that we don't care, we do not need to make a finding as to whether the State, when they told the City they could do this, desired to displace competition.

QUESTION: That's right.

MR. COVELLI: And I say that that --

QUESTION: You say the State must express an affirmative policy that it wants followed.

MR. COVELLI: That's correct.

QUESTION: So you really think the municipality has to be, in effect, ordered to institute this policy.

MR. COVEILI: No. I think the first question is: Has the sovereign State acted? Has the sovereign State, in its sovereignty, decided to displace competition?

The second issue of whether the City must be compelled or whether it has some discretion deals with whether the State has selected the City to be its instrument to implement that policy.

My position is that if the State of Wisconsin hasn't decided to displace competition, if the State of Wisconsin is neutral, how can the City claim to be implementing that policy?

QUESTION: Well, you just -- you not only disagree with your opponent, but with the Solicitor General in this regard.

MR. COVELLI: This is true.

QUESTION: May I ask a question, because this is sort of an unusual case. The relevant market, as I understand it, the market in which there's competition that you say has been displaced is the market for the transportation and -- collection and transportation of sewage. Is that right?

MR. COVELLI: That's correct.

QUESTION: Now, would you tell me who the competitors are in that market and what the nature of

the competition is that's been displaced?

MR. COVELLI: Yes, I will. Our position is that, just like electric generation is one product market and electric distribution is another product market, as that's been recognized --

QUESTION: Well, I'm not interested in comparisons; I'm interested in who are the competitors in this market.

MR. COVELLI: The competitors here for the provision of collection and transportation services -- and by that, I mean putting the pipe in the ground and receiving the sewage from the ultimate users -- are the City and the Towns within their respective unincorporated territories.

QUESTION: Is the City seeking to get that business in your Towns?

MR. COVELLI: Yes. We have alleged that they --

QUESTION: Are they refusing to do it?

MR. COVELLI: We have alleged that they are monopolizing it; that they have, through their use of monopoly power, have foreclosed the Towns from providing sewage collection services in the Towns while they are offering to provide those same services to the people located in these unincorporated areas.

QUESTION: Are they only offering to do that if they would be annexed to the City?

MR. COVELLI: But my point is that that's a by-product. By the time the annexation occurs, the Towns have already been eliminated as competitors by the City's anticompetitive conduct. In other words, a person in the Town, if he wishes to receive collection --

QUESTION: Is it not correct that the Towns are just potential competitors? Have they ever provided this service?

MR. COVELLI: Yes. The Town of Washington, when this suit was commenced, had a Town sanitary district, was buying treatment services from the City of Eau Claire.

QUESTION: From this supplier?

MR. COVELLI: That's correct. And since then has been bought by the City of Eau Claire. Obviously, that is not in the record. That wasn't alleged in the complaint in any detail.

Our position is very simple. We say that the City is characterizing it as a refusal to sell to anybody. We're saying -- our complaint is just the opposite. We're saying that our complaint says they are, in fact, monopolizing this service.

To prove that, we would have to prove, number one, that this is trade or commerce. We would have to prove that, just like electric municipal electric services, there is a price here. In other words, unlike police and fire, when you get sewage service, that service is measured and you are charged a price.

Number two, it requires that the City have monopoly power in one market, here sewage treatment, extending beyond its city limits into the unincorporated areas of the Towns. The reason that exists is because there are, number one, regulatory barriers. This is a regional facility. Due to environmental impact, that facility is the only one that can treat the area.

There are also economic barriers. The costs, the investment costs of building such a facility are prohibitive.

So they have this monopoly that they have acquired with federal funds and now are saying we will not let you buy the service so you can compete with us. So what they do is, if I am in the Town and I want sewage collection service, I have but one source. That is the City, because the City will not provide or sell to the Towns the treatment service so the Towns can compete with them in these unincorporated areas in the other market, the collection market.

So our complaint, regardless of what the City says, is just the opposite of what the City says. It is that they are monopolizing these services in the unincorporated territories.

Now, getting to the --

QUESTION: What would happen if we rule with you, and then the following month, the legislature of Wisconsin said we meant to give a monopoly, and if we didn't, we are doing it now.

MR. COVELLI: Then I would be done, Your Honor. If the State of Wisconsin --

QUESTION: You would be done in.

MR. COVELLI: I would. If the State of Wisconsin said, we --

QUESTION: That's the only thing this case is about is whether Wisconsin meant to do it or not.

MR. COVELLI: That's right.

QUESTION: That's all we are interested in this case.

MR. COVELLI: The question is simply this: Has the State of Wisconsin made the decision to displace competition? Has the State of Wisconsin decided that the City should provide service on a monopoly basis, displacing this competition between the Towns and the City, or has the City made that decision?

And I submit that --

QUESTION: Am I correct, Mr. Covelli, that in effect they have defined the market to include their own taxpayers?

MR. COVELLI: No. No, that's not true.

QUESTION: They won't serve anybody unless he's a resident of the municipality; isn't that what it boils down to?

MR. COVELLI: Well, that is --

QUESTION: Because they've got to become annexed in order to get the service.

MR. COVELLI: Well, as I've indicated, that isn't factually true. They are serving this section of the Town of Washington that is still in the Town of Washington.

The point that I'm making is, you are correct; the general policy is, if you want treatment services and collection services, we will annex you.

QUESTION: It seems to me they're monopolizing the business, providing fire and police services as well. Am I wrong on that?

MR. COVELLI: We haven't alleged that.

QUESTION: But you see, logically it's the same sort of thing, isn't it?

MR. COVELLI: No, it isn't. It really isn't,

because, number one, police and fire services, for example, are not services capable of gaining a monopoly power. There are not those economic or regulatory barriers to create a monopoly in that area, nor is there a price for those services in the trade or commerce sense.

In other words, I do not -- if the police officer comes to my house, I'm not sent a bill for that. Unlike in Lafayette, where the municipal electric utilities send a bill, measured on how much service is received.

So, no, our point is --

QUESTION: Yes, but there you have a public agency regulating the price. You don't have any public agency in Wisconsin, or do you, that regulates the price of sewage services?

MR. COVELLI: Not in this instance.

QUESTION: What if they said we'll hook you up, but we'll charge you $1,000 a gallon or something? Would that comply with the --

MR. COVELLI: Well, then our argument would be that they have to sell a service at a fair and non-discriminatory price; otherwise, they're violating the antitrust laws.

QUESTION: In other words, the antitrust laws

are sort of a price regulation statute?

MR. COVEILI: No. Well, you can't have a price squeeze to force our competitors. In other words, saying I won't sell to you at all so you can't compete with me is no different from saying I'm going to sell to you at such a high price that you can't compete with me at all.

So, no. Our position is simply this: that under the Wisconsin statutes -- the remedy we seek is under the Wisconsin statutes. That statute provides for a contract between the City selling us these services. We would pay them a price for these services. They already, because they have a monopoly, have the capacity to serve this whole region.

We would put the pipe in the ground. The City would not do anything in the Towns. We would run our pipe and abut it into the City's. They would measure the flow. We would pay them the cost of transporting the sewage through the pipe to the treatment facility, and we would pay them a fair price for treating that sewage. We are basically buying a wholesale service so we can retail that service to the users in the Towns.

What we're saying is we just want the opportunity to compete with you. We want the opportunity to offer to people sewage collection services. We think

we can do it cheaper; we think we can do it better; but you're stopping us by your anticompetitive conduct. You're stopping us by refusing to give us sewage treatment services that we must have to get into this market.

So our position is no, this is not an annexation case. This is not a political case. If we are to go to court, we will have to prove that this is commerce; that there is monopoly power; that there are two separate products; that there is competition; that this competition is being restrained by the City anticompetitive conduct.

The relief we are seeking does not address annexation. The relief we are seeking does not address police or fire service. It simply addresses the right to buy at a fair and reasonable price sewage treatment services.

And I think that brings us back to the question, and that question is: Can the Court select two unrelated statutes and ignore the rest of the statutes in the statute books and determine that there is a clearly articulated policy when there is none?

The Wisconsin statutes form the basis for this competition. They say both the City and the Towns may provide service in this unincorporated territory. So

the very basis for this competition is created by the Wisconsin statutes.

There is nothing, we submit, in the decision or in the statutes that indicate the State of Wisconsin ever decided that this competition should be displaced and that the City should provide monopoly service. And I think the best evidence of that is Judge Wisdom's opinion, and that's the reasonable and foreseeable test.

If, in fact, the State of Wisconsin -- there was evidence that the State of Wisconsin had affirmatively addressed the displacement of competition, the reasonable and foreseeable test would not be necessary.

Under the test, instead of determining from reading the statutes, that the State has addresed the issue, the Court assumes it. If the Court assumes that the State has addressed it, that's not a test; that's an elimination of the test.

So the Seventh Circuit said we need to find no evidence that the State of Wisconsin has affirmatively addressed this displacement of competition. We're going to assume it. Now, they are assuming it, I presume, because the City has found a way to use its delegated power in an anticompetitive fashion.

Now, the Court, on the other hand, must also

assume that the State of Wisconsin contemplated that that conduct would be used in a pro-competitive fashion. And there's no question that this conduct that they have done, or this delegated authority can be used both pro-competitively and anti-competitively.

But I think the point is, instead of finding evidence that the State really affirmatively addressed it, where they can look at the statutes and say yes, this State thought about this, they have assumed it without any statutory evidence that that's true.

That assumes that every time the State delegates some authority, that they have in mind all the possible uses of that authority.

QUESTION: Mr. Covelli, the Seventh Circuit described the policy it thought the State of Wisconsin had articulated in Appendix XIV of the petition. It says: "Clearly articulated and affirmatively expressed State policy not to burden municipalities with providing services unless they can annex the territory that they service."

Now, do you disagree that that has been enunciated as Wisconsin state policy?

MR. COVELLI: No. I do disagree, and I will say what I believe the State has said. The State of Wisconsin, through 14407, has said the State will not

compel, will not compel the City to extend monopoly service against the City's wishes.

This is quite different from saying to the City that our policy is that you may monopolize these services in this area.

QUESTION: Well, the Seventh Circuit, after having quoted the language in the Chippewa Falls case, which refers to 14407, says here is how we read it. You say, no, I read it differently.

Ordinarily, we defer to the judgement of the circuit courts as to their State law within their States.

MR. COVELLI: I think what the Seventh Circuit -- when you boil it down, what the Seventh Circuit said is that the City's conduct is not prohibited by Wisconsin law, its law.

QUESTION: Well, I don't read that as -- that language I just quoted doesn't say anything like that.

MR. COVELLI: Well, if you look at the test when they apply it, they say, number one, we assume the State contemplated it; number two, we infer that they condone it. They didn't say "intended," but "condone" it.

And I say that all that the Seventh Circuit said is, having assumed they thought about it without

proof, we're going to infer that they condone it because they didn't prohibit it.

Now, from there they make the quantum leap that, because they condone it, they intended it. And I submit that under the Boulder decision, that's precise neutrality. In other words, the State says we're not going to make the decision, City; you make the decision. You can use this authority to compete or not to compete. You make the decision.

So this isn't a case where the State of Wisconsin has displaced competiton. Instead, they have refused to make that decision and said to the Cities, you make that decision.

And what we have here, under the delegated authority, the City of Eau Claire can engage in anticompetitive conduct. The next City to it can use that same delegated authority in a pro-competitive fashion. So each City is free to make its own policy decision.

And that's the question. Under the Seventh Circuit's test, we drop exemption from a policy decision made at the State level to a policy decision made at the municipal level. And the result of the Seventh Circuit's test is that municipal policy decisions to displace competition are exempt; whereas I believe,

under this Court's rulings, it's only when the State has made that decision.

I see that my time is almost up, and I would like to reserve the rest for rebuttal.

CHIEF JUSTICE BURGER: Mr. Fischer, you may raise the lectern if you'd like.

ORAL ARGUMENT OF FREDERICK W. FISCHER, ESQ.

ON BEHALF OF RESPONDENTS

MR. FISCHER: Mr. Chief Justice, and may it please the Court, of all the problems faced by Cities today, one of the greatest is the question of antitrust exposure.

The ultimate question, I believe, that we have here is what standard will the Court and should the Court establish for immunity?

So far we know, under City of Lafayette, that Home Rule authority, or that Cities are not automatically exempt by virute of their governmental status. Boulder tells us that Home Rule authority is insufficient to confer immunity.

I would suggest to the Court that there is an urgent need to clarify this entire area. There is a great uncertainty arising out of the Parker exemption as it has been construed, and Lafayette, Boulder, and then then the Midcal case as well.

QUESTION: Has the recent congressional legislation relieved your worries any?

MR. FISCHER: It has, to a certain extent, Your Honor. And I will agree with my worthy opponent that it does not moot this case.

QUESTION: Because all you have here is injunctive relief.

MR. FISCHER: That's true. The legislation would not affect our case here, nor would it affect, necessarily, the pending cases that are presently existing. And I think the Appendix of the National Institute of Municipal Law Officers Brief indicates 148 cases, many of those involving substantial damages.

Those would not necessarily be involved. As I understand it, the new legislation requires a consideration of the equities in granting relief or not from damages.

Furthermore, it would not eliminate the availability of non-monetary relief, such as we have here, which I would suggest may have equal or greater consequences for municipalities.

QUESTION: You claim you want us to settle this problem for you. And do you admit that you could settle it right there in Wisconsin?

MR. FISCHER: We would hope that --

QUESTION: In your legislature?

MR. FISCHER: We would hope that we would not have to seek legislative --

QUESTION: But you could, couldn't you?

MR. FISCHER: I suppose, theoretically, that would be possible, Your Honor.

QUESTION: Theoretically? Couldn't -- is there anything to stop your legislature from passing a bill saying that the counties have this right?

MR. FISCHER: No, there is not. There is not.

QUESTION: So it could be done without bothering us with it.

MR. FISCHER: This is true. The legislature could pass legislation saying that the muncipality may have a monopoly and may deal with sewer. The question then is what happens with police and fire, water, ambulance service?

QUESTION: The State could get to that, too, couldn't they?

MR. FISCHER: They could. We feel that this would be an onerous burden on municipalities to have t seek State legislation in each and every instance.

QUESTION: And then we'll have the States jumping on us for legislating.

MR. FISCHER: I guess that could be one possible result. However --

QUESTION: Well, I assume there's no way out for us. We're just in bad shape.

MR. FISCHER: We submit that to require the Cities to seek legislation in all possible instances would be a burden which Cities should not bear. And I think this position is supported as well by the amicus curiae briefs filed on our behalf by nine States who similarly feel the same way.

The situation then, I believe, is one of really a chilling effect on municipal activities. There is a great concern over liabilities and the responsibilities under the antitrust laws which are uncertain at the present time.

I will agree that the main issue is how specific must a grant of authority be to a municipality in order to confer immunity. And we submit that the Seventh Circuit test is a valid and a proper test.

Contrary to the allegations of the Towns, we are not asking for a repudiation of Lafayette and Boulder. In fact, we ask the Court to apply these cases through the standard established by the Seventh Circuit. And we submit that the Seventh Circuit test is derived directly from those cases.

It follows the requirement that there be a clear articulation and affirmative expression of State policy. And contrary to the Towns' position, the cases have held that specific and detailed authorization is not necessary.

They, I believe, take the opposite position that there has to be specific and detailed authorization. Your precedents say that this is not required.

The test, I believe, and I think has been indicated during prior questioning is that -- did the legislature contemplate and intend the anticompetitive activity? How do you do this? You take a look at the State law. And I will grant Justice Marshall's position that if you had a specific legislative mandate or a specific legislative act that said that the municipality may monopolize, that would be sufficient.

However, this Court's precedents do not require that. The say that if there is articulation and expression of a policy, that this is adequate.

QUESTION: Well, Mr. Fischer, I think your opponent says that even if the Wisconsin legislature passed laws saying that Cities may monopolize, that's not enough, because Chippewa Falls might be pro-competitive and Eau Claire might be monopolistic.

So he says then it's just up to -- that sort of a statute would just leave it up to the City.

MR. FISCHER: Yes. And I think the result of that position, Your Honor, is that the alternative would be to have a compulsion test.

I think the natural result of that, the logical conclusion is that Cities would have to be compelled by the legislature to take whatever action they are to take to become immune.

I don't read Lafayette and Boulder as saying that you have to require activity by a municipality for it to be immune or exempt. And I think that mere authorization of a municipal activity is sufficient and adequate.

Merely because a municipality may have the option of acting pro-competitively or not at all does not necessarily mean that the City cannot deal with the matter.

QUESTION: Well, how does your test then differ from just blanket Home Rule which was held inadequate in Boulder?

MR. FISCHER: Well, the answer to that is that in Boulder, the legislature had not acted specifically. All that we dealt with there was a grant of Home Rule authority.

The issue there was whether a cable television moratorium was authorized. The Colorado Constitution said that municipalities have Home Rule authority to act in general areas of concern. There was no specific addressing of the issue of cable television.

In that case, I think the Court was entitled, and logically so, to find that there was no specific grant of authority. There was no authorization, there was no contemplation, nor could there be said to be one.

In this case, it's entirely different because the statutes that the Court has before you, the Wisconsin law, has addressed the issue. The legislature has adopted these regulations. And they specifically address the conduct of the City which is in question here.

Despite the Town's characterization of the matter at hand, I think the issue is simply, their position is based entirely upon the City's policy not to extend its utility services outside of its boundaries without annexation.

I would submit that if we did not have such a policy, we would not be here today.

So the Seventh Circuit test, we would submit, balances and accommodates both State sovereignty and the

antitrust laws, and we submit that it should be upheld. We feel that it fulfills the Parker test. It accommodates State sovereignty in that it gives recognition and viability to the State laws that are adopted in the area.

Now, again, the Colorado and Wisconsin situations are entirely different. Under the Parker rationale, the rationale of that is to preserve State sovereignty. And this is preserved. The State action is immunized from antitrust exposure.

The Town, however, I think, assumes that immunization is available only of activity which is compelled and not authorized. They are concerned only with State mandates and not authorizations.

Again, here, the State authorizes but does not compel the City to undertake its policy. And I would suggest that it would be peculiar for a State to take an action mandating and directing a municipality to take an action in an area of special traditional activity such as this.

If the City is prevented under the antitrust laws from fixing its limits of utility service, then we would suggest the State law authorizing this limitation is nullifed and has a direct impact on the Parker v. Brown exemption and the theory underlying that

exemption.

I think as evidence of this is the Town's claim in their reply brief that the City can comply with the Sherman Act only by ignoring State law. They say that we can avoid Sherman Act liability by agreeing to extend our utility services outside of our boundary or divesting ourselves of our utility.

This, of course, would nullify the State law authorizing the Cities to take this position, and I think indicates that it's contrary to Parker.

The Seventh Circuit test, on the other hand, upholds this and recognizes this requirement.

Now, addressing the specific State statutes which have been mentioned, again the basis of the Town's claim is that the City has no authority to adopt the policy which it has. Again, we limit our sewer service to our boundaries. We are not trying to monopolize anything in the Township. We confine it to the boundaries alone, and we extend only upon annexation, in which case the area in question becomes a part of the City, and the City then serves it.

QUESTION: Does the annexation have to be contiguous? Suppose somebody five lots beyond the City limits was willing to come in, but the intervening owners were not?

MR. FISCHER: No. It has to be contiguous to the City, Your Honor. And it also has to be approved by the majority of the owners of property or the electors in the area.

The Town's complaint mainly is that the City has decided not to share its treatment service with them and therefore annexation results. And I think this is evident from the complaint. We are here on a motion to dismiss, I understand, but the complaint, I think, in itself does concede this point, paragraph 14 of the complaint specifically.

So we have the basic statute, 66.069(2)(c) which explicitly states that the City may fix the limits of its service to the City boundaries, and it goes further than that to say that it has no obligation to serve beyond this area. This again is plain language, and it answers precisely the Town's complaint.

Also, as evidence of State authorization contemplation are 14407(1) and (1)(m). Under sub (1), the State, through its DNR, may direct the City to extend its utility service outside the boundaries to the adjacent Town. Under (1)(m), if the City initiates annexation and the Town members refuse this annexation, ther the DNR order is voided and the City has no obligation to serve.

Both the District Court and the Seventh Circuit Court of Appeals viewed this as explicit authority for the City's policy and evidence of legislative contemplation and intent.

Under Boulder, the statement is made that a district judge should look at all evidence of contemplation. This is indeed evidence of contemplation.

The Town of Hallie v. City of Chippewa Falls has been mentioned. And again, although I will concur that this is not determinative here, because we are dealing with federal antitrust laws, it does provide further indication as to State contemplation. There, that case had the same fact situation as here, involved the same Township, the Town of Hallie; given a different City, but the same Township, and it was held that there was no liability under the State antitrust laws.

The Towns nevertheless take issue with that case, saying there really was no finding that Wisconsin expressed any policy that competition be displaced. But the case did say things like a sewer monopoly was more appropriate than competition. They held that annexation is a reasonable quid pro quo to extending service.

They found that the legislature intended that sewer service may be tied to other City services, and

they found that the legislature did not intend that the City be required to extend sewer service extra-territorially.

As Justice Powell said in the Midcal case, respectful consideration and great weight must be given to the views of the State courts on matters of State law. We submit that the Chippewa Falls case adds a great deal of interpretation and fleshes out the statutes that are already in existence.

The Town's argument goes further, to say that the State must approve a specific anticompetitive effect. They say that the State law is neutral if the City has discretion to limit or not to limit its sewer service.

In essence, their argument is that no matter what the legislature may have intended or contemplated, the State cannot confer discretion on its local governments in these areas. They say, and I think the logical conclusion of their argument is that the State must direct the anticompetive conduct specifically.

We submit that under this Court's precedence, that is error because the City of Layfayette and the City of Boulder have set a legislative contemplation standard for local governments. Those cases have held that you must look at the authority granted to a

municipality to operate in a particular area. From that, you can glean legislative intention and contemplation.

We submit that the statutes in existence here show this authorization to operate and to formulate the basis for the City's policies.

The Towns have said that they are really not asking for a compulsion or compelling standard. However, I think their sole test that they put forth for this Court to adopt, the so-called "necessarily follows" test indicates that that is precisely what they are asking for.

This is not appropriate, we submit, because it's contrary to Lafayette and Boulder. They claim in their brief, in their initia brief, that the "necessarily follows" case was adopted in the Ninth Circit in the case of Parks v. Watson. An examination of that shows that that is the only case that applies such a test, if indeed it did apply it in that case.

The Towns would formulate the "necessarily follows" test to mean that the City's action must necessarily or automatically follow from the exercise of City discretion.

There are cases after Parks v. Watson, however, that indicate the Ninth Circuit did not adopt

and has not adopted any such test. The case of Golden State Transit followed Parks v. Watson, making no mention to the case of Parks v. Watson or the "necessarily follows" test. And a month ago, three recent cases were decided in the Ninth Circuit, again making no mention of Parks v. Watson or the "necessarily follows" test. And those three cases are Springs Ambulance v. Rancho Mirage; Hudson & Associates v. Cielo Vista; and Catalina Cable Vision Associates v. City of Tucson.

Interestingly enough, the Springs Ambulance and the Catalina Cable Vision cases specifically refer to the Town of Hallie decision in the Seventh Circuit and all apply a legislative contemplation test.

We submit that a compulsion or direction test is inappropriate. First of all, it would nullify local autonomy; if the State has to direct a municipality, then local autonomy really goes out the window.

In addition, to require the State to direct its municipalities would be an intrusion upon the sovereign State, again contrary to Parker v. Brown. Furthermore, the State could not delegate discretion if it wished to do so under that particular test. And again, that's an infringement on State sovereignty, we submit.

The Towns also claim that Cantor v. Detroit Edison should apply here. Again, trying to bring a case from the private sector into the public sector, again to require that the City's action be compelled and not merely authorized.

However, the example here that we have before us is strictly public governmental activities in an area of traditional, basic governmental power. The Towns, nevertheless, claim that there really should be no difference between public activity and private activity and that the same standards should apply to both.

However, even the Towns acknowledge a distinction for the purpose of applying the active State supervision requirement of Midcal, and they do seem to acknowledge that there is a distinction between private and public activity for that purpose.

In the remaining time, I would like to address the issue of active State supervision which was developed in Midcal and is claimed to have application here. The Seventh Circuit did not require active State supervision in order to gain exemption in this case. And this, I would submit, is consistent with the other circuit courts that have considered this issue. These are shown on pages 41 and 42 of the City's brief.

The Seventh Circuit did not require this prong

of -- the second prong of Midcal here because it found it was unnecessary and unwise. Again, even the Towns would relax this requirement where a local government is involved.

First of all, it is unnecessary to have this requirement. In Midcal where the requirement was enunciated, that involved a private price-fixing scheme involving private wine dealers. There was a need to have continued compliance with the initial grant of State authority in order to determine whether or not State action as opposed to private action was being authorized.

Here, we have a totally different situation. We have a public local government which is a creature of the State. Indeed, in cases involving sewer utility services in Wisconsin, the State Supreme Court has characterized it that the City is actually acting as an arm of the State.

The City in this context is always subject to State scrutiny and to State restraints. If the State sees something that should not be occurring, it can always step in and take action to stop that. This is not like a public business.

More pointedly, a City involved in a traditional function such as we are here is not

motivated by profit, unlike the wine merchants in the Midcal case. The City engages in providing sewer service to provide a public needed service to its residents. It is not motivated by trying to gain profit by doing so.

Therefore, a pointed reexamination of municipal conduct is not necessary in this situation.

Furthermore, local governments are subject to inherent restraints and limitations. One general concept is that public powers can be exercised only for public purposes. This again distinguishes public and private conduct in a material fashion.

To require active State supervision over municipalities would conflict with the ability of the State to delegate discretionary authority to its municipalities. We would become, in effect, de facto State Agencies. This again is agreed to by the nine amici States who agree that the second prong of Midcal should not be applied to the municipalities, especially when the City is undertaking a traditional municipal function. So such a requirement is unnecessary.

The Seventh Circuit also found that it was unwise. It would require Federal Courts to determine not only whether supervision of municipal activity exists, but whether active State supervision exists.

This would require the Courts to involve themselves in considerable feats of interpretation which should not be required.

Furthermore, it would require the State to actively supervise all activities of a myriad of local governments, keeping in mind that we're not only dealing here with sewer service, but the impact of this case will have an effect on all types of municipal services.

The State could either do that, supervise, or it could undertake the function by itself. The States are reluctant to do either, as evidenced again by the amicus briefs of the nine States, including Wisconsin I might add.

Finally, and I think most importantly, if active State supervision were required, this would result in the erosion, if not the outright discretion of local autonomy and delegated authority which has been historically enjoyed by municipalities.

Finally, in conclusion, I would submit that the only thing the City is guilty of here is following State law. The State authorized the City to adopt the policy it has adopted. Despite the Town's contention, this is the basis of the action here, and we suggest that the City should be exempt from the antitrust laws for doing so.

We ask the Court to affirm the decision of the Seventh Circuit.

Thank you.

CHIEF JUSTICE BURGER: Very well. Mr. Covelli, do you have anything further?

ORAL ARGUMENT OF CLAUDE J. COVELLI, ESQ.

ON BEHALF OF THE PETITIONERS - REBUTTAL

MR. COVELLI: Yes, Your Honor. The word "local autonomy" kept coming up in the City's argument. The City is saying we want the autonomy to make anticompetitive decisions and implement them because we are creatures of the State, free of the federal antitrust laws.

This issue was addressed in Lafayette. This Court said Cities are not sovereign. Cities, unlike States, are subject to the federal antitrust laws. Their status does not elevate them above the federal antitrust laws.

I submit that the question is who decided to displace competition. And when the statutes are looked at, it's clear the Seventh Circuit did not decide that the State of Wisconsin decided to displace this competition. In fact, the Town's position was that was the issue. The Seventh Circuit said no, that is not the issue; the issue is not whether the State of Wisconsin

decided to displace this competition with monopoly service. Instead, we're going to look at whether they delegated some authority, which the City then could make its own policy decision to use in an anticompetitive fashion.

This case flies in the face of the Boulder decision. In Boulder, this Court assumed that the City of Boulder was authorized by the State to regulate cable TV under its Home Rule powers. Now, does it make any difference if the State would have listed in its Home Rule powers that cable TV is one of the things listed?

But in Boulder, the Court said no; the State is neutral, because the State didn't say use that power to displace competition with monopoly service or regulation. All it said is --

QUESTION: Well, what if in listing the powers it had said a Home Rule City may, if it wants to -- but it doesn't have to -- monopolize sewer services?

MR. COVELLI: Well, I think under those circumstances, unless it laid out some criteria for the City to decide when it will and will not monopolize, I think that is simply saying to the Cities, we hereby authorize you to violate the antitrust laws.

In Parker v. Brown, it was stated a State does not give immunity to those who violate the Sherman Act

by authorizing them to violate it or declaring that their action is lawful.

QUESTION: We say there's no real difference between municipalities and non-governmental units.

MR. COVELLI: Yes. I think that's what you said in Lafayette. They are both controlled by parochial interests. They both have their own interests at heart, which do not necessarily coincide with the State's statewide interest.

Thank you.

CHIEF JUSTICE BURGER: Very well. Thank you, gentlemen. The case is submitted.

We'll hear arguments next in Southern Motor Carriers v. the United States.

(Whereupon, at 1:56 o'clock p.m., the case in the above-entitled matter was submitted.)

CERTIFICATION

Alderson Reporting Company, Inc., hereby certifies that the attached pages represents an accurate transcription of electronic sound recording of the oral argument before the Supreme Court of The United States in the Matter of:

No. 82-1832 - TOWN OF HALLIE, ET AL., Petitioners, V. CITY OF EAU CLAIRE

and that these attached pages constitutes the original transcript of the proceedings for the records of the court.

BY Paul A Richardson

(REPORTER)