No. 11-1679

In the United States Court of Appeals
for the Fourth Circuit

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,
Defendant-Appellee.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Western Division

REPLY BRIEF OF APPELLANT

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SUMMARY OF THE ARGUMENT

The District Court erred because it mischaracterized this direct suit as an interlocutory appeal of a non-final agency action and determined that it was appropriate to allow the Federal Trade Commission (the "Commission") of its own prerogative to preempt state statutes, decide constitutional issues beyond its expertise, and force a state agency, the North Carolina State Board of Dental Examiners (the "State Board"), through administrative proceedings that cannot afford remedies to the infringements of the state agency's constitutional rights. This case is not an interlocutory appeal of a Commission order. It is a direct suit challenging the constitutional violations perpetrated by the Commission. At the heart of this case is the Commission's attempt to rewrite its own enabling statute by asserting jurisdiction over a party that is outside of its ambit—a sovereign state. If allowed to proceed with framing this direct suit as an unripe interlocutory appeal of a non-final agency action, the Commission's unconstitutional acts will go unchecked.

Although the concept of ripeness does not apply to this case, it would be ripe under traditional test because it presents a purely legal question—whether an independent federal agency may trample a state's right to protect its citizens by enforcing a clearly-worded state statute. This issue is not capable of adjudication within the Commission's administrative review process. The Federal Trade

Commission Act ("FTC Act") does not provide for a review of whether the Commission may, without legal or judicial authority, displace state statutes or threaten the composition of state occupational licensing boards. The federal courts, not the federal executive branch agencies, are uniquely positioned in their exclusive role to adjudicate matters that concern the separation of powers, the Tenth Amendment, and the Commerce Clause.

The Commission has failed to demonstrate why the State Board is not entitled to invoke the jurisdiction of the District Court. Further, the Commission fails to refute some of the leading case law that expressly prohibits the Commission's actions in this situation. Thus, the Commission merely brushes aside its constitutional violations by portraying them as the State Board's attempt to appeal its denial of state action immunity. This maneuver is ineffective, and it highlights the clear and present harms that the State Board is seeking to redress in the District Court.

As the State Board has shown, the Commission may not preclude review in the District Court because its administrative proceedings are not capable of providing a meaningful opportunity for review. The Commission's technical expertise is not implicated when the issue before the Commission is its own acts. Moreover, these acts were taken in brazen defiance of the Constitution, Supreme Court precedent, and the Commission's own enabling statute. Therefore, the

District Court should be reversed and the administrative proceeding dismissed. Alternatively, the District Court should be reversed and the case remanded for further proceedings.

ARGUMENT

I. THE COMMISSION'S CONSTITUTIONAL VIOLATIONS CAN ONLY BE ADDRESSED BY THE DISTRICT COURT.

A. The District Court Failed to Acknowledge That This Case Is About an Independent Federal Agency Impermissibly Regulating a Sovereign State Entity.

The Commission contends that this is simply a straightforward case where the FTC Act should be applied to the acts of a sovereign entity and that the administrative review process is perfectly equipped to handle all of the constitutional issues raised by the State Board. Answering Brief at 11. This reflects the Commission's misunderstanding of the true nature of this case and the repercussions of its own constitutional violations. While the FTC Act serves an important regulatory function within our society, it simply cannot be leveraged to prevent a state agency from enforcing a clear state statute that protects the health and safety of a state's citizenry. The Commission has acted without any authority to displace state statutes and threaten the composition of a state agency. Therefore, the State Board must invoke the jurisdiction of a district court to redress the Commission's constitutional violations.

The Commission has leveled the naked allegations that solely because the majority of the members of the State Board are licensed dentists—as required by North Carolina statute—the State Board members "colluded" to restrain trade. To remedy this alleged "collusion," the Commission is attempting to control and dictate the actions of a state agency interpreting and enforcing a state statute. In essence, the Commission contends that a state agency comprised of public officials, sworn to enforce state law, is guilty of restraining trade by simply excluding services that are deemed illegal under state law.

The Commission asserts that it can force a state to suffer through an administrative tribunal at its sole behest, regardless of whether any evidence exists as to the allegations leveled and the fact that the actor involved is a sovereign entity by statute. In applying the principles embodied in Parker v. Brown, 317 U.S. 341 (1943), the District of Columbia Circuit has held (and acknowledged by the Commission) that "when a State acts in a sovereign rather than a proprietary capacity, it is exempt from the antitrust laws even though those actions may restrain trade." Cal. State Bd. of Optometry v. FTC, 910 F.2d 976, 981 (D.C. Cir. 1990). Moreover, the District of Columbia Circuit stated that the state regulation of the practice of optometry is "quintessentially sovereign." Id. at 982. Despite a bald contention that the State Board is not sovereign, the Commission has failed to

show how the State Board's regulation of the practice of dentistry is not "quintessentially sovereign."

There is a reason that the Commission did not refute the State Board's reliance on California Optometry. Id.; State Board Opening Brief at 35-38. That case declares that the FTC Act does not enable the Commission to regulate the acts of sovereign states, which includes the regulation of the optometry profession. Thus, where the Commission is foreclosed from rulemaking in California Optometry, it is now attempting to subvert this preclusion by unconstitutionally engaging in an enforcement action. The Commission does not point to any authority that authorizes its unconstitutional actions in this case.

There are hundreds of occupational licensing boards around the country that interpret and enforce state statutes. Many of these boards are mandated by state statute to be comprised of a majority of licensees, just like the State Board. Under the Commission's view, these boards are *ipso facto* conspiracies simply because they are made up of a majority of licensees. The Fifth Circuit has rejected this view in Earles v. State Board of Certified Public Accountants, 139 F.3d 1033, 1041 (5th Cir. 1998):

> Despite the fact that the Board is composed entirely of [licensees] who compete in the profession they regulate, the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition. So long as the Board is acting within its authority and pursuant to a clearly established state policy, there is no

> need for active supervision of the exercise of properly delegated authority.

The Commission would have the actions of these boards subjected to the oversight of an independent, unaccountable federal agency, irrespective of the fact that the boards' actions are taken pursuant to a clear state statute and for the purpose of public protection. This displays the Commission's blatant disregard for the separation of powers, the Tenth Amendment, the State Board's own enabling statute, and prevailing case law.

The Commission's *ultra vires* and unconstitutional actions have caused substantial harm to the State Board. According to the Commission, its actions have been limited to "the issuance of the administrative complaint, reject[ing] the Board's state action defense, and the ALJ's Initial Decision." Answering Brief at 25. The Commission overlooks the true harm it has caused in this case. This includes a chilling effect on the State Board's abilities to carry out day-to-day functions, including investigating the unauthorized practice of dentistry, as well as threatening the composition of the Board itself. Significantly, the harm in this case goes far beyond the impact on the State Board's operations. The constitutional rights of a sovereign state have been eviscerated and its ability to protect the public has been impeded. The Commission, an agency only authorized to enforce the nation's antitrust laws, has now determined that it, rather than a state, can decide who is or is not a sovereign actor. Furthermore, the Commission, rather than a

state, would determine whether state officials acting pursuant to state law, protecting the public, are properly interpreting a state statute. This is a determination that has no basis in law or logic, and the courts are the only avenue to redress these fundamental constitutional violations.

B. The District Court Erred Because the FTC Act Does Not Authorize the Commission to Adjudicate Constitutional Claims Through the Administrative Review Process.

As explained by the State Board and acknowledged by the Commission, federal courts hear direct challenges to federal agency actions when necessary to prevent and stop those agencies' constitutional violations and *ultra vires* actions. Answering Brief at 8; see Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138 (2010); Leedom v. Kyne, 358 U.S. 184 (1958); Baltimore v. Matthews, 562 F.2d 914 (4th Cir. 1977); Am. Gen. Ins. Co. v. FTC, 496 F.2d 197 (5th Cir. 1974); Fay v. Douds, 172 F.2d 720 (2d Cir. 1949). This is especially true in a case such as the State Board's, where the issues involved are substantial constitutional questions concerning the separation of powers and the Tenth Amendment.

The Commission argues that the State Board can only bring its complaints before a federal court through an appeal to a final agency decision by the Commission. Answering Brief at 23-24. The Commission's argument fails to recognize the applicability of the principles articulated recently in Free Enterprise

Fund to the State Board's claims. In Free Enterprise Fund, the Supreme Court acknowledged that claims arising outside of a federal agency's enforcement scheme are not subject to the administrative review process set forth within the agency's enabling statutes. Indeed, "[p]rovisions for agency review do not restrict judicial review unless the 'statutory scheme' displays a 'fairly discernible' intent to limit jurisdiction, and the claims at issue 'are of the type Congress intended to be reviewed within the statutory structure.'" Free Enter. Fund, 130 S. Ct. at 3150 (quoting Thunder Basin Coal Co. v. Reich, 510 U.S. 200, 207, 212 (1994)). To determine whether particular claims are the type Congress intended to be reviewed within this statutory structure, the courts must consider whether the claims are "wholly collateral" to the statute's review provisions and outside of the agency's expertise. Thunder Basin Coal Co., 510 U.S. at 212-13.

Contrary to the Commission's contentions on page 8 of its Answering Brief, the general rule is that there is a "presumption that Congress does not intend to limit jurisdiction.'" Free Enter. Fund, 130 S. Ct. at 3150; R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31, 41 (1st Cir. 2002). To overcome this presumption and require exhaustion, the Supreme Court outlined the factors to be evaluated by the court: (1) whether preclusion forecloses all meaningful judicial review; (2) whether the suit is wholly collateral to a statute's review provisions;

and (3) whether the claims are outside of the agency's expertise. Free Enter. Fund, 130 S. Ct. at 3150.

The State Board's suit fits squarely within the cases deemed by the Supreme Court to be outside of the purview of an administrative agency and, thus, the District Court had jurisdiction in this matter. First, prohibiting the District Court's review of the constitutional issues in this case forecloses all meaningful judicial review. Under the Commission's radical approach to the adjudication of constitutional grievances, unelected presidential designees, rather than Article III courts, would entertain and resolve constitutional challenges to their own authority. Answering Brief at 22. The Commission is not in a position to provide relief to the State Board through its administrative review process because it cannot rule on its own constitutional violations. To permit the Commission to do so would contravene Justice John Marshall's determination that "[i]t is emphatically the province and duty of the judicial department to say what the law is." Marbury v. Madison, 5 U.S. 137, 177 (1803). This case—presenting a constitutional challenge to the acts of an independent agency—is for the courts and the courts alone to resolve.

Since there is no redress available through the Commission's tribunal, the preclusion of district court review would foreclose all meaningful judicial review. The State Board's constitutional rights have been violated, and it is wholly

inadequate to force it to await an agency decision and then seek review of that decision in the circuit courts. This would permit the Commission to drag a state through its proceedings over the course of months, if not years, prior to having an Article III court weigh in to protect its sovereign rights. An administrative agency's review mechanism is designed to resolve disputes contemplated within an enabling statute. This mechanism is inherently ill-equipped to resolve fundamental questions about the balance of power between states and the federal government. It would therefore be illogical to rely on it as the exclusive means of resolving such issues. To do so would be to foreclose the district court action that is both effectively designed to, and the traditional method for, resolving such issues. It is impossible to infer that Congress intended to foreclose district court review where there is absolutely no legislative history suggesting a barrier to adjudication of fundamental constitutional issues. McCarthy v. Madigan, 503 U.S. 140, 144 (1992) (quoting McGee v. United States, 402 U.S. 479, 483 n.6 (1971)) ("where Congress has not clearly required exhaustion, sound judicial discretion governs"). To preclude review by the District Court forecloses all meaningful review in this situation and thereby perpetrates the constitutional violations of a state's rights.

Second, despite the fact that there is no statutory language expressly barring this direct action, the Commission contends that the administrative review system established by the FTC Act is sufficient to implicitly require all claims involving

the Commission to be resolved within that system. Answering Brief at 11-12. However, where a plaintiff brings claims against an agency that are wholly collateral to a statute's administrative review provisions and involve issues outside the agency's expertise, the plaintiff is not required to resort to the statutory review mechanism. Constitutional claims challenging the constitutionality of an agency's *ultra vires* actions—including separation-of-powers and Tenth Amendment claims like those asserted by the State Board here—constitute just such a collateral challenge. See Free Enter. Fund, 130 S. Ct. at 3150.

The judicial review provisions of the FTC Act address only appeals from findings about whether any unfair method of competition or unfair and deceptive act or practice in or affecting commerce exists. See 15 U.S.C. § 45(c). Furthermore, federal courts have suggested that claims like the ones raised by the State Board—*i.e.*, whether the Commission has overstepped its jurisdiction—are **not** the type Congress intended to be reviewed within the judicial review provisions. See, e.g. New England Motor Rate Bureau v. FTC, 908 F.2d 1064, 1071 (1st Cir. 1990) ("We do not agree with the FTC that the question of state action is one on which this court should defer to that agency, either because of its expertise or its statutory fact-finding authority. ... The FTC is not here interpreting the statute it has been charged with administering. ..."). The constitutional

violations raised by the State Board are wholly collateral to the FTC Act's administrative review procedures.

Third, an independent agency established to administer a particular regulatory regime and to apply its special expertise in carrying out a statutory mandate is, by definition, unequipped to resolve antecedent questions concerning its jurisdiction. The Commission asserts that it should be allowed to assert its discretion and expertise to fully develop an administrative record. Answering Brief at 31-32. This regime makes no sense, for requiring administrative review in a case like this would serve no logical purpose: the relevant administrative agency has no expertise over and, indeed, no authority to answer the constitutional questions posed by the State Board's claims; there is no factual record to be developed by agency review; and there are no non-constitutional grounds that might resolve the State Board's grievances and thereby moot its constitutional claims. See, e.g., N. C. State Bd. of Registration for Prof'l Eng'rs & Land Surveyors v. FTC, 615 F. Supp. 1155, 1160 (E.D.N.C. 1985) (noting that when the FTC's jurisdiction is questioned under the separation of powers doctrine, judicial review is not based on the administrative enforcement provisions but on 28 U.S.C. § 1331 and the Constitution). Thus, the Commission cannot overcome the presumption that Congress does not intend to restrict judicial review in this case.

As a result, the State Board is not required to pursue its constitutional claims through the agency's administrative proceedings.

The Free Enterprise Fund case also illustrates the flaws in the Commission's argument that its administrative proceeding is the proper forum for the State Board's constitutional claims. In that case, the Supreme Court was faced with the issue of whether a statute providing that the Securities and Exchange Commission can remove members of the Public Company Accounting Oversight Board ("PCAOB") from office only for cause was constitutional. After the PCAOB began conducting an investigation of one of the petitioner's auditing procedures (but before any final agency action was taken), the petitioners filed suit in district court seeking declaratory and injunctive relief. The petitioners claimed that the PCAOB's administrative proceeding offered no opportunity for a meaningful pursuit of petitioners' constitutional claims. 130 S. Ct. at 3150. The statute at issue, the Sarbanes-Oxley Act, provides that "[o]nce the [SEC] has acted, aggrieved parties may challenge 'a final order of the [SEC]'" ... in a court of appeals." Id. (quoting 15 U.S.C. § 78y). The SEC contended that this provision limited a district court's jurisdiction by providing an exclusive route to review in the courts of appeals. Id.

The Supreme Court held that "the statutes providing for judicial review of [SEC] action did not prevent the District Court from considering petitioners'

claims." Id. The Supreme Court drew an important distinction between agency actions contemplated by an enabling statute and those not "intended to be reviewed within the statutory structure." Id. The Court further found that the petitioners' constitutional claims were outside of the SEC's competence and expertise. Thus, "no [agency] expertise is required here, and the ... questions involved do not require 'technical considerations of [agency] policy.'" Id. at 3151 (internal citations omitted). As a result, the district court was permitted to consider the petitioner's constitutional claims.

Free Enterprise Fund is analogous to this case. First, the State Board is claiming that the Commission is acting without authority in an attempt to assert jurisdiction over a sovereign state agency. The issue in this case is not the Commission's final order but rather its constitutional violations of the separation of powers and the Tenth Amendment. Thus, the State Board's claims in this case are "wholly collateral" to the agency's statutory review provisions, or any final decision that the agency may reach. Id. Similar to the Sarbanes-Oxley Act, the FTC Act provides that a party subject to a Commission cease-and-desist order "may obtain a review of such order in the court of appeals." 15 U.S.C. § 45(c). These review procedures relate to the appeal of an order by the Commission. This case is not about appealing an order from the Commission. It is about an independent federal agency violating a state's rights in an attempt to expand its

own jurisdiction. Second, this is not a matter that requires agency expertise, falling within the Commission's technical purview. Rather, it is a constitutional challenge to the agency's actions that cannot be adjudicated by the agency itself. Therefore, the District Court erred by refusing to invoke its jurisdiction to vindicate the constitutional rights of the State Board.

II. THE COMMISSION HAS VIOLATED THE RIGHTS OF THE STATE BOARD GUARANTEED BY THE U.S. CONSTITUTION.

On pages 29-31 of its Answering Brief, the Commission claims that it has not clearly violated the constitutional rights of the State Board. The Commission ignores pages 35-37 in the State Board's Opening Brief, which address the Commission's *ultra vires* actions in excess of its limited statutory authority granted by Congress, and explain that the Commission can take no action beyond this limited statutory power. While the State Board will not repeat those arguments here, the State Board does note once again that the Commission failed to address the State Board's preemption arguments, which also address the Commission's actions without statutory authority. To subject the State Board to the Commission's overreaching enforcement of the FTC Act belies the U.S. Constitution, Supreme Court precedent, and—in this instance—the FTC's own enabling statute. Therefore, the State Board is entitled to invoke the jurisdiction of a district court to vindicate its constitutional rights and prevent further harm.

A. The Commission Has Violated the Separation of Powers Mandated by the U.S. Constitution.

Both in its Complaint and Opening Brief, the State Board asserted the Commission's failure to adhere to the proper balance of power between the federal government and the sovereignty of states, as required by the U.S. Constitution. Fundamentally, this case is about federalism and the constitutional principles safeguarding separation of governmental powers on two levels. First, the State Board complains of the Commission's failure to adhere to the proper balance of power between the federal government and the sovereignty of states, as required by the Tenth Amendment to the U.S. Constitution. Second, the State Board complains of the Commission's *ultra vires* actions in excess of its limited statutory authority granted by Congress. Indeed, the Commission can take no action beyond this limited statutory power. Thus, determining whether the Commission can exercise jurisdiction over the State Board's enforcement of a clear state statute does not require a "statutory" analysis under the FTC Act. Instead, it requires a judicial analysis of the separation of powers doctrine, as set forth in the Tenth Amendment and the Commerce Clause. See also U.S. Const. art. III, § 2, cl. 1.

B. The Commission Has Violated the Tenth Amendment Rights Guaranteed by the U.S. Constitution.

At the heart of this action is the FTC's violation of the State Board's rights under the Tenth Amendment to, and the Commerce Clause of, the U.S.

Constitution. By purporting to exercise personal and subject matter jurisdiction over the State Board—thereby subjecting the State Board to a 26-month long investigation and 12-month long administrative proceeding—the Commission has violated the State Board's Tenth Amendment rights guaranteed by the U.S. Constitution.

In response, the Commission only argues that the Tenth Amendment is not being violated because it is not claiming that: (1) the make-up of State Board is a violation of the antitrust laws; (2) North Carolina must change the Board's membership; or (3) North Carolina must provide additional oversight to the State Board's challenged acts. Actually, these requirements are exactly what the Commission is claiming. First, the Commission is claiming that, because the State Board is made up of licensed dentists, any agreement to prevent or eliminate non-dentist teeth whitening services in North Carolina is a concerted action in violation of the FTC Act. The only way the State Board would not be engaging in illegal concerted action is if the North Carolina statute requiring the State Board to be comprised of a majority of licensed dentists was changed.[1] Second, the Commission is claiming that, unless North Carolina provides additional oversight to the State Board's enforcement of the North Carolina Dental Practice Act, the Commission can prevent or require the State Board from taking particular actions

[1] Complaint Counsel's Answering Brief to Respondent's Appeal Brief to Commission, pp. 28-31.

when enforcing the North Carolina Dental Practice Act. For example, if successful in the litigation, the Commission would require the State Board to file annual reports for three years, setting forth, among other things, the identity of every person with whom the State Board communicates about teeth whitening goods or teeth whitening services.[2] More importantly, however, the parties' argument on these points is subsumed under a great question: does the Commission have the authority to decide whether its own actions have violated the rights guaranteed under the U.S. Constitution? For the reasons set forth in the State Board's Opening Brief and herein, the answer is "no."

C. The Commission Has Violated the Commerce Clause Rights Guaranteed by the U.S. Constitution.

On pages 38-44 of its Opening Brief, the State Board explains how the Commission is violating the prerogatives of the Commerce Clause. In response, the Commission asserts that constitutional precedents are inapplicable because the Commission has invoked the FTC Act and the State Board is trying to transform a "straightforward statutory question ... into a novel constitutional issue." Answering Brief at 29.

First, what is "novel" about this case is that no federal court has recognized the Commission's purported jurisdiction over a sovereign state agency acting pursuant to a clearly articulated state statute since the Parker decision. It has been

[2] ALJ's Initial Decision, p. 126.

sixty-eight years since the Supreme Court rendered its opinion in Parker, and there has been no subsequent Supreme Court decision modifying the ruling or any Congressional enactment overturning the case. Is it therefore so surprising that the State Board would assert constitutional claims upon violation of this long-standing law?

Second, the Commission's Answering Brief simply did not respond to the Commerce Clause arguments set forth in the State Board's Opening Brief. On pages 39-41 of that Brief, the State Board explained the Supreme Court's statement of limitation regarding the Commerce Clause, as set forth in United Haulers Ass'n v. Oneida-Herkimer Solid Waste Management Authority, 550 U.S. 330 (2007). The Commission's only response is that these arguments have "nothing to do with the present case." Answering Brief at 29. Furthermore, the Commission did not respond to the required analysis to determine preemption announced by the Supreme Court and this Court, which the State Board addressed in its Opening Brief on pages 42-44. Where is the legislative history to show preemption of the clear language directing the State Board to regulate the practice of dentistry, which includes stain removal? Instead, the Commission again uses a footnote to say that "the Board's authority to regulate dentistry is not contested. ... At issue instead, are the Board's actions." Answering Brief at 29. How else can the State Board regulate dentistry except through its actions?

D. The Commission Has Failed to Rebut the State Board's Showing of Constitutional Violations and the District Court's Jurisdiction to Adjudicate Said Constitutional Violations.

In its response to the State Board's position that this action is predicated on constitutional violations, the Commission argues two points. First, the Commission argues that the proper application of the state action doctrine is a "straightforward statutory" question—not a constitutional issue. Answering Brief at 29. Second, the Commission argues that, even if the State Board's constitutional rights **are** violated, the State Board does not have the right to prevent such violations until it can appeal the Commission's Order. Neither argument is persuasive, as set forth below.

1. The State Board's Claims Are Based on the U.S. Constitution and Not Federal Statute.

The Commission's argument that the state action involves a statutory analysis rather than a constitutional analysis is without merit. Indeed, it ignores the procedural posture of this case. Taking the allegations set forth in the State Board's complaint as true—which is the standard upon review for this case—the State Board's allegation and showing of constitutional violations is clearly sufficient to survive the Commission's Motion to Dismiss. Notably, rather than address the precedent of Parker v. Brown, the Commission relegates its arguments to a footnote on page 9 of its Answering Brief and equates the State Board—a

sovereign state agency—with a municipality and a non-governmental trade association.

The State Board's Opening Brief discusses Parker v. Brown, which provides that state action is grounded exclusively in rights afforded to states by the U.S. Constitution. As the court in Parker recognized with regard to the Sherman Act, the FTC Act "makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state." Parker, 317 U.S. at 351. Thus, determining whether the Commission can exercise jurisdiction over the State Board's enforcement of a state statute does not require a "statutory" analysis under the FTC Act. Instead, it requires a judicial analysis of the separation of powers doctrine, as set forth in the Tenth Amendment and the Commerce Clause.

The State Board explained at length in its Opening Brief how the Commission is violating the separation of powers doctrine and thus will not reassert those arguments here—particularly as the Commission has not cited any case precedent that would repudiate the State Board's position on these constitutional violations. Suffice it to say, the Commission cannot shelter its actions from the court's purview by claiming that the state action doctrine prevents the court from analyzing the complaint in light of the U.S. Constitution.

2. The State Board's Constitutional Claims Cannot Be Resolved by Any Commission Order.

The Commission also argues that, even if the State Board had raised constitutional challenges in its lawsuit, the State Board cannot assert such challenges until the Commission issues its final agency decision. The case upon which the Commission relies for this argument, Thetford Properties IV Ltd. Partnership v. HUD, 907 F.2d 445 (4th Cir. 1990), is entirely distinguishable from the case at bar. In Thetford, the plaintiffs alleged that the Emergency Low Income Housing Preservation Act of 1987 (the "ELIHPA") violated their constitutional due process rights because it abrogated their unconditional contractual right to prepay their federally-insured mortgages. Significantly, the plaintiffs did not allege that the Department of Housing and Urban Development ("HUD") had acted *ultra vires* by enforcing the ELIHPA against them.

The Fourth Circuit affirmed the district court's holding that the plaintiffs must exhaust their administrative remedies before raising their constitutional challenges to federal court because the Fourth Circuit wanted "to allow [HUD] the opportunity to use its discretion and expertise to resolve the dispute without premature judicial intervention and to allow the courts to have the benefit of [its] talents through a fully-developed administrative record." Thetford, 907 F.2d at 448. Furthermore, under the facts in that case, the Fourth Circuit reasoned that exhaustion of the plaintiffs' administrative remedies could "lead to a satisfactory

resolution of this controversy without having to reach [plaintiffs'] Constitutional challenge." Id.

Neither of the factors upon which the Fourth Circuit based its holding in Thetford are present in the case at bar. First, as previously explained in this brief, federal courts recognize that the determination of whether the Commission has overreached in its enforcement of the FTC Act against a state agency is not a determination that should be made first by the Commission. As held by the First Circuit in New England Motor Rate Bureau:

> We do not agree with the FTC that the question of state action is one on which this court should defer to that agency, either because of its expertise or its statutory fact-finding authority. ... How these facts meld into the state action concept—the issue now before us—is a legal issue which the courts have plenary authority to decide. To be sure, the FTC's experience may arguably give it some insight into the effectiveness of a state's regulatory apparatus. However, state action immunity is a threshold issue that must be decided before the FTC's own jurisdiction attaches.

908 F.2d at 1071. The controversy at bar is not the type that would benefit from the "discretion" or "expertise" of the Commission; indeed, it is the Commission's overzealous exercise of "discretion" that has given rise to this lawsuit.

Second, this controversy centers on the Commission's exercise of personal and subject matter jurisdiction over the State Board; there is no possibility that this controversy will be resolved through an exhaustion of administrative remedies. Indeed, as Thetford recognizes, the U.S. Supreme Court has held that a plaintiff is

not required to exhaust its administrative remedies where the question of the adequacy of the administrative remedy is "for all practical purposes identical" to the merits of the plaintiff's lawsuits. Thetford, 907 F.2d at 449 (quoting Gibson v. Berryhill, 411 U.S. 564, 574 (1973).

Gibson v. Berryhill is particularly instructive on this point. In Gibson, the Alabama Board of Optometry ("Alabama Board") pursued an administrative license revocation proceeding against the plaintiffs, after obtaining an injunction in state court to prevent plaintiffs from working for their employers. The plaintiffs, in response, filed a civil action in federal court, seeking to enjoin the administrative revocation proceedings on constitutional grounds. Specifically, the plaintiffs alleged that the Alabama Board was unconstitutionally constituted. The U.S. Supreme Court affirmed the lower courts' finding that the district court had jurisdiction to hear the case, even though the plaintiffs had not exhausted their state administrative remedies by going through the revocation proceeding. According to the U.S. Supreme Court, the "clear purport" of the plaintiffs' complaint was that the Alabama Board could not provide them with an adequate administrative remedy; therefore, no exhaustion of administrative remedies was required. 411 U.S. at 1696.

Likewise, in the case at bar, it is the Commission's exercise of jurisdiction itself about which the State Board complains. Specifically, the State Board is

complaining that the Commission does not have the Congressionally-delegated authority to require the State Board to go through the administrative proceedings; therefore, the adequacy of any remedy that could be fashioned by the Commission will inevitably be called into question. **If the Commission lacked jurisdiction in California Optometry or cases like Gibson v. Berryhill, why should the State Board wait until a Final Order or enforcement to challenge the Commission's authority?** The District Court had original jurisdiction and should have halted the Commission's efforts to assert power over the State Board's action in enforcing its clearly-worded statute regulating stain removal as part of the practice of dentistry.

III. THE COMMISSION'S PROCEDURAL DEFENSES LACK MERIT.

The Commission's Answering Brief attempts to portray this suit by the State Board as an appeal of an unfinished administrative proceeding. Contending that the State Board's action is not ripe, the Commission maintains that the Board must wait for a final agency decision to appeal. But, the comparisons between this case and interlocutory appeals of non-final federal agency decisions are unfounded. The State Board is not appealing the issuance of a complaint or the denial of immunity. It is challenging the unconstitutional and extra-statutory exercise of power.

Dozens of times throughout its argument, the Commission references the South Carolina dental board's interlocutory appeal to this court. S.C. State Bd. of

Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006). But that case and the instant case are easily distinguished. The South Carolina State Board of Dentistry deliberately flaunted a clearly articulated state law by enacting rules that directly and intentionally contradicted that law. 455 F.3d at 439-40. The South Carolina Board was subject to a Commission action because of its unauthorized measures. On appeal, the South Carolina Board sought a novel interpretation of state action immunity case law to excuse extra-legal rule making. Id. at 443-44. In contrast, the State Board acted pursuant to a clearly articulated state law. So in the instant case, the Commission has challenged North Carolina law on the composition of the State Board, its enforcement processes, its unauthorized practice restrictions, and its mandate to enforce state law. Thus, unlike in South Carolina, the Commission directly challenged a state and its laws; not just an agent of the state acting contrary to state intent.

The Commission also relies heavily on the interlocutory appeal case of FTC v. Standard Oil, 449 U.S. 232 (1980). But Standard Oil, like South Carolina, questions the right to interlocutory appeal, not the right to challenge an unconstitutional, extra-statutory exercise of power. 449 U.S. at 247-48. The Commission discusses other interlocutory appeals cases. Answering Brief at 11-12. However, the State Board's suit is not an appeal; it is a direct suit against a federal agency that is attempting to circumvent federal law to unconstitutionally

infringe on North Carolina's sovereignty. See Answering Brief at 9 (asserting that state action immunity "exempts only sovereign policy choices from federal antitrust scrutiny").

The Commission cited a number of cases that purportedly support its claim that it should first adjudicate the state action immunity issue before any court could hear the State Board's case. Answering Brief at 23. The Commission also claims that North Carolina State Board of Registration for Professional Engineers and Land Surveyors v. FTC supports its argument that the Commission's rejection of a state action immunity claim did not meet the standard for bringing a suit against a federal agency in district court. 615 F. Supp. 1155 (E.D.N.C. 1985); see also Answering Brief at 27 (citing Long Term Care Partners, LLC v. United States, 516 F.3d 225 (4th Cir. 2008) (requiring a demonstration that a clear and mandatory law be violated by the federal agency)). But, the issue in Professional Engineers was not a sovereign state's law mandating state action. At issue was a rule, not a statute. 615 F. Supp. at 1157.[3] Further, the right to hear a case in the first instance is only granted when a federal agency has jurisdiction to hear a dispute. If a federal agency is acting contrary to its authorizing statute and violating the plaintiff's constitutional rights, a direct suit in federal court is appropriate. Leedom v. Kyne, 358 U.S. 184 (1958); see also Answering Brief at 8

[3] The court in Professional Engineers even acknowledges that active supervision may not apply to state agencies. 615 F. Supp. at 1161.

(acknowledging that a departure from exhaustion standards is necessary when there are "actions in brazen defiance of the Commission's jurisdiction or actions in clear violation of the Board's constitutional rights"). The federal courts have jurisdiction to hear a dispute over whether an executive branch agency has "exceeded its statutory powers." Skinner & Eddy Corp. v. United States, 249 U.S. 557, 562 (1919). Therefore, the Commission's extensive explanation of why a Commission complaint is not immediately appealable is irrelevant. See Answering Brief at 16 *et seq*. The Commission's extensive reliance on case law cited in South Carolina State Board of Dentistry v. FTC as limiting the right to appeal a collateral order is also, therefore, irrelevant. See, e.g., Will v. Hallock, 546 U.S. 345 (2006); see also, e.g., Carefirst of Md., Inc. v. Carefirst Urgent Care Ctr., 305 F.3d 253 (4th Cir. 2002).

Citing interlocutory appeals, the Commission contends the State Board has failed to present a question for review that is not dependent on future agency action. Answering Brief at 22 (citing Pearson v. Leavitt, 189 F. App'x 161, 163 (4th Cir. 2006)). But, the State Board's challenge meets this standard because the question before the court in this case is purely legal: whether the Commission may review a state's right to pass and enforce laws protecting the public from the unauthorized practice of dentistry. The question is not whether the Commission should rule in the State Board's favor on the immunity issue; the question is

whether the Commission may exert jurisdiction over a state law and a sovereign state in the first place.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Honorable Court to reverse the judgment of the District Court, order the Commission to dismiss its administrative proceeding, and any further relief this Court deems appropriate. Alternatively, Appellant requests remand of this action for further proceedings.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellant affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. 29(d) and Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 6,610 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2010 in 14-point Times New Roman font.

Executed this 15th day of December, 2011.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Appellate CM/ECF System on December 15th, 2011.

I certify that all parties to this case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF System.

Executed this 15th day of December, 2011.

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ADDENDUM

U.S. Constitution Provisions

Article I, Section 8, Clause 3 (the Commerce Clause)

Power of Congress to regulate commerce:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article III, Section 2, Clause 1

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;

Tenth Amendment

Powers reserved to states or people:
The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Code

15 U.S.C. § 45. Unfair methods of competition unlawful; prevention by Commission

…

(c) Review of order; rehearing. Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the [circuit] court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of

> the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of title 28, United States Code. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgment to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 240 of the Judicial Code [28 USCS § 1254].

…

28 U.S.C. § 1331. Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.