

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**

SUPPLEMENTAL BRIEF OF APPELLANT

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PROCEDURAL BACKGROUND

On February 1, 2011, the N.C. State Board of Dental Examiners (“NCSBDE”) filed its Complaint for Declaratory Judgment and Preliminary and Permanent Injunction against the Federal Trade Commission (“FTC”) in the U.S. District Court for the Eastern District of North Carolina. *See* JA8 *et seq.* In its Complaint, NCSBDE prayed for declaratory relief as to the ongoing constitutional violations by the FTC.¹ NCSBDE also sought temporary and permanent injunctive relief to stop the FTC’s unconstitutional assertion of jurisdiction.² JA 44-45.

On May 3, 2011, the District Court granted the FTC’s motion to dismiss for lack of subject matter jurisdiction and denied NCSBDE’s motion for preliminary injunction. JA158. NCSBDE noticed this appeal on June 27, 2011. JA160. On appeal, NCSBDE sought both reversal of the District Court’s judgment and dismissal of the administrative proceeding. Opening Brief at 49-50. On December 2, 2011, the FTC issued its opinion and final order (“Order”) in the proceeding,

¹ The declaratory claims asserted include declaratory judgment that: 1) the FTC lacks jurisdiction over NCSBDE on constitutional and statutory grounds; 2) the FTC lacks the authority to adjudicate a claim against NCSBDE in an administrative tribunal; 3) North Carolina’s statutory regulation of dentistry by a majority licensee state board is not subject to FTC jurisdiction; 4) the FTC violated NCSBDE’s right to due process; and 5) the FTC violated NCSBDE’s rights under the Administrative Procedure Act.

² Such claims sought to: 1) stay or restrain and enjoin the FTC from illegally asserting jurisdiction over NCSBDE; and 2) order the FTC to remove from its website all false, derogatory, and unsubstantiated assertions against NCSBDE, its members, and North Carolina dentists.

and on February 10, 2012, the FTC stayed the Order pending review by this Court. *See* FTC Order on Respondent's Application for Stay, Docket No. 9343, 2012 FTC LEXIS 28 (F.T.C. Feb. 10, 2012) ("Stay").

SUMMARY OF ARGUMENT

This appeal is not moot as a matter of fact or law. The violation of NCSBDE's constitutional rights and the availability of redress in the courts remain ongoing and unresolved issues. Even if this Court determines that a dismissal of the FTC's proceedings is an unavailable remedy, other requested relief remains undiminished.

ARGUMENT

I. THERE IS A LIVE CONTROVERSY THAT ONLY A COURT HAS AUTHORITY TO ADDRESS.

In considering mootness, this Court examines "whether the facts alleged, under all the circumstances, show that there is a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Md. Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). The threshold constitutional issues before the District Court are unresolved controversies presenting ongoing questions.

If the Court does not address the constitutional issues in the context of this appeal, NCSBDE's constitutional challenges will not be resolved. *Powell v. McCormack*, 395 U.S. 486, 496 (1969) ("[A] case is moot when the issues

presented are no longer ‘live’ or the parties lack a legally cognizable interest in the outcome.”) (internal citation omitted). The Petition for Review before this Court of the FTC’s Order challenges the FTC’s decision based upon questions within the scope of an administrative appeal. In contrast, this suit focuses on the right of a state agency to pursue a direct suit against a federal agency exceeding its constitutional and statutory mandate. The relief sought in this appeal cannot be addressed in the administrative proceeding and, therefore, cannot be reviewed on administrative appeal. *See Cavalier Tel., LLC v. Va. Elec. & Power Co.*, 303 F.3d 316, 323 (4th Cir. 2002) (exhaustion balanced against party’s interest in prompt access to federal judicial forum).

A. The Ongoing Enforcement Proceeding Should Be Dismissed *Ab Initio*.

The key issue on appeal is whether the District Court erred in holding that it lacks jurisdiction to redress constitutional violations against NCSBDE. Only an Article III court has the ability to adjudicate these issues that arise from federalism principles. NCSBDE has suffered, and continues to suffer, constitutional injuries that cannot be adjudicated by appealing the Order. That the FTC temporarily stayed the enforcement of its Order does not terminate the ongoing enforcement action. Since the issuance of the Stay, the FTC itself has described its administrative enforcement action against NCSBDE as “ongoing.” *See, e.g., Ken Ortolon, Doctors Targeted, FTC Aims at Scope Limits*, Tex. Med. Ass’n (Aug.

2012), available at <http://content.yudu.com/A1xp7x/August2012/resources/25.htm> (last visited Nov. 16, 2012). Thus, the FTC continues to exercise jurisdiction over NCSBDE without the constitutional or statutory authority to do so.

B. No Intervening Events Prevent This Court from Affording Effective Relief.

To dismiss a case for constitutional mootness, events must have occurred to make it impossible to grant relief. *See Church of Scientology of Cal. v. United States*, 506 U.S. 9, 12 (1992). Here, no intervening events have impaired this Court's ability to adjudicate the issues raised by NCSBDE. The key inquiry is whether this Court may "grant any effectual relief whatever to a prevailing party." *Id.* at 12 (internal quotation omitted). In *Church of Scientology*, the Supreme Court held that it could still grant relief regarding a constitutional privacy claim, even though one component of the relief sought was rendered unavailable by intervening events. *See id.* at 13. By contrast, NCSBDE's requested relief remains available. The FTC continues to exert jurisdiction via its Stay and Order; thus, NCSBDE may still seek relief regarding the FTC's assertion of jurisdiction over a state agency enforcing state law.³

³ The FTC argues that "any declaratory relief would be without force or effect" citing *Suarez v. Rooney*, 53 Fed. Appx. 703 (4th Cir. 2003) (unpublished). *Suarez* is distinguishable because the appellant advanced the *exact same* challenge that he sought in separate proceedings. *Id.* at 703. NCSBDE asserts two distinct constitutional challenges. *See* Petitioner's Reply Brief, DE 77 in Appeal 12-1172, filed July 19, 2012 for a discussion of this argument.

NCSBDE's Complaint contains nine unfulfilled prayers for relief that remain beyond the adjudicative capability of the FTC's narrow, congressionally-delegated authority. These claims are "still hotly contested by clearly adverse parties." *Powell*, 395 U.S. at 499 (mootness of one component of relief does not render other "claims not worthy of judicial consideration").

II. ONLY FEDERAL COURTS CAN AND MUST DECIDE THE CONSTITUTIONAL ISSUES RAISED BY NCSBDE.

As set forth above, the relief sought in this action was not possible before the administrative proceeding and cannot be afforded in the administrative appeal. The FTC lacks both the authority and the expertise to rule on the threshold constitutional issue of its own jurisdiction; this determination can only be made by a federal court. *See Free Enter. Fund v. Pub. Co. Accounting Oversight Bd.*, 130 S. Ct. 3138 (2010). The broader relief sought by NCSBDE—declaratory relief regarding threshold constitutional issues—would not be addressed in the separate agency appeal.

"State sovereignty is not just an end in itself [. . . .] Because the police power is controlled by 50 different States instead of one national sovereign, the facets of governing that touch on citizens' daily lives are normally administered by smaller governments closer to the governed." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 132 S. Ct. 2566, 2578 (2012) (internal citations and quotations omitted). This is particularly true for the "quintessentially sovereign" state prerogative of

regulating professions. *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 982 (D.C. Cir. 1990).

Recent rulings in *Free Enterprise* and *Sebelius* indicate that it is doubtful that even a clear congressional act—which is not present here—could give the FTC a preemptive power to: parse and overstep the Tenth Amendment, alter the balance of federalism, strain the Commerce Clause, ignore long-standing jurisprudence, flaunt its own prior decisions, and foreclose a state’s resort to the third branch.

To address whether the District Court has jurisdiction over NCSBDE’s claims, this Court must determine whether it is “fairly discernible” under the FTC Act (“FTCA”) that Congress intended to preclude district court jurisdiction of such constitutional claims. *Free Enter.*, 130 S. Ct. at 3150; *see also Elgin v. Dep’t of the Treasury*, 132 S. Ct. 2126, 2132-33 (2012). Where preclusion is not fairly discernible, jurisdiction exists, and continues to exist beyond both the pendency of the challenged administrative hearing so long as the agency retains the power to enforce the final agency decision. *See Skinner & Eddy Corp. v. United States*, 249 U.S. 557, 562 (1919) (where it is alleged that an agency “exceeded its statutory powers . . . courts have jurisdiction of suits to enjoin the enforcement of an order”).

Recently, in *Elgin*, the Supreme Court held that Congress intended to preclude district court jurisdiction over challenges to the constitutionality of the

Civil Service Reform Act (“CSRA”)—but only because those challenges were brought by employees covered under the CSRA who were complaining about adverse actions covered by the CSRA. 132 S. Ct. at 2134. Here, by contrast, neither of those jurisdictional conditions is met because (1) NCSBDE is not covered by the FTCA; and (2) the FTC’s attempt to assert jurisdiction over NCSBDE is constitutionally prohibited.

First, NCSBDE is not an entity covered by the FTCA because it is not a “person, partnership, or corporation” under the judicial review provisions of the FTCA. 15 U.S.C. § 45(c). “As the Supreme Court has noted, when the issue presented is one of statutory interpretation ‘judicial review would not be significantly aided by an additional administrative decision.’” *Athlone Indus., Inc. v. Consumer Prod. Safety Comm’n*, 707 F.2d 1485, 1489 (D.C. Cir. 1983) (internal citation omitted); *see also Atl. Richfield Co. v. U.S. Dep’t of Energy*, 769 F.2d 771, 795 (D.C. Cir. 1984) (authorizing challenges to agency action that are unrelated to the merits of the dispute but concern the assertion of agency jurisdiction).

Second, NCSBDE claims that the FTC violated its constitutional rights by asserting jurisdiction to conduct its administrative proceeding. This type of complaint is not covered under the provisions of the FTCA. *See Latif v. Holder*, 686 F.2d 1122, 1129 (9th Cir. 2012) (allowing constitutional challenges in district

court when the statute did not provide redress mechanism). Therefore, it is not “fairly discernible” that Congress intended to preclude district court jurisdiction.

Three additional factors show that NCSBDE’s claims are not the type intended by Congress to be reviewed within the FTCA judicial review procedures. First, NCSBDE’s challenges to the FTC’s administrative proceeding are wholly collateral to any challenges based on the substance of the Order. *See Free Enter.*, 130 S. Ct. at 3150 (finding a constitutional challenge to the PCAOB’s existence collateral to any challenge of a final Commission order); *Mathews v. Eldridge*, 424 U.S. 319, 331 n.11 (1976) (finding constitutional procedural challenges to termination of benefits collateral to a substantive claim for entitlement to benefits). As noted in *Mathews*, “statutorily-created finality requirements should, if possible, be construed so as not to cause crucial collateral claims to be lost and potentially irreparable injuries to be suffered.” *Id.* at 330-31.

Second, a finding of preclusion would foreclose all meaningful judicial review. *See Free Enter.*, 130 S. Ct. at 3150; *Deering Milliken, Inc. v. Johnston*, 295 F.2d 856, 866 (4th Cir. 1961) (if no adequate administrative remedy for the right is asserted, district court jurisdiction may be invoked). NCSBDE’s claims in the District Court were deemed interlocutory. If NCSBDE’s appeal is now deemed moot because the Order was issued, when will its constitutional concerns be addressed? As noted in *Jewel Cos. v. FTC*, postponing such issues until this

Court's review of an administrative appeal will subject these claims to a different standard of review. 432 F.2d 1155, 1159 (7th Cir. 1970). "At that point, the court of appeals would only decide whether the final order is supported by the evidence and would not question the authority of the Commission in issuing the complaint." *Id.* (allowing independent suit to challenge commissioner's exercise of statutory discretion) (internal citation omitted). The relief sought by NCSBDE is not contemplated by the judicial review provisions of the FTCA, and will be forever foreclosed if this action is dismissed for mootness.

Third, adjudication of these claims is outside the FTC's expertise. *Free Enter.*, 130 S. Ct. at 3150. Whether the FTC can exercise jurisdiction over NCSBDE acting in its sovereign capacity is a threshold issue. A number of courts recognize that the FTC is not entitled to deference on its jurisdiction arguments in similar situations. *See, e.g., ABA v. FTC*, 430 F.3d 457, 467-68 (D.C. Cir. 2005) (rejecting deference to the FTC's "attempted turf expansion" over the legal profession simply because "the Act did not provide for an exemption"); *Cal. State Bd. of Optometry*, 910 F.2d at 981-82 (rejecting FTC's jurisdiction over state board, holding that "were we to defer to this construction . . . we would short-circuit the protections offered States by the political process"); *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1071-72 (1st Cir. 1990) (FTC has no expertise or fact-finding authority on state action immunity).

Jurisdiction is properly before this Court because it is not fairly discernible that Congress intended to preclude NCSBDE from bringing this action before the District Court and because Article III of the Constitution establishes that it is the role of the courts to adjudicate constitutional claims.⁴

III. THE FTC'S CONDUCT CONSTITUTES UNLAWFUL ACTIONS CAPABLE OF REPETITION YET EVADING REVIEW.

Assuming *arguendo* that any portion of this suit is to be considered moot, the FTC's unlawful exercise of jurisdiction over NCSBDE still falls within the exception allowing jurisdiction for conduct capable of repetition, yet evading review. This exception "applies when (1) the challenged action is in its duration too short to be fully litigated prior to cessation or expiration; and (2) there is a reasonable expectation that the same complaining party will be subject to the same action again." *Lux v. Judd*, 651 F.3d 396, 401 (4th Cir. 2011).

The exception applies because the FTC's administrative proceedings resulted in its Order before NCSBDE could obtain judicial review of the FTC's unlawful exercise of jurisdiction. Federal courts routinely hold that actions ceasing or controversies expiring within a short time period "ordinarily evade review." *See*

⁴ Indeed, members of Congress take issue with the FTC's over-reaching jurisdiction in this case. *See* Letter from Five Members of Congress to FTC Chairman Jon Leibowitz (Mar. 2, 2012), *available at* http://burgess.house.gov/uploadedfiles/03.02.2012_letter_leibowitz_ftc_interference_with_state_regulation.pdf ("We strongly urge you to cease any further intrusion in the state regulation of medicine and dentistry and withdraw from the actions you have already taken.").

FEC v. Wis. Right to Life, Inc., 551 U.S. 449 (2007) (“despite . . . command that the cases be expedited to the greatest possible extent,” a four-year period is too short for issue to be fully litigated); *Va. Soc’y for Human Life, Inc. v. FEC*, 263 F.3d 379 (4th Cir. 2001) (holding that suit initiated 15 months before election held every two years evaded review), *overruled on separate grounds by Real Truth About Abortion, Inc. v. FEC*, 681 F.3d 544 (4th Cir. 2012).

NCSBDE filed suit in February 2011 seeking a judicial determination of constitutional challenges to the FTC’s jurisdiction, and the FTC issued its Order in December 2011. This 10-month period is within the period that evades review.

If the Court does not rule on these constitutional challenges to the FTC’s jurisdiction, there is a reasonable likelihood that NCSBDE will be subject to the same action again. *See Lux*, 651 F.3d at 401. This “standard is not ‘mathematically precise’ and requires only a ‘reasonable likelihood’ of repetition.” *Slade v. Hampton Rds. Reg’l Jail*, 407 F.3d 243, 249 (4th Cir. 2005) (citations omitted). NCSBDE continues to be affected by the FTC’s unlawful exercise of jurisdiction by an FTC Order for thirty years. *See Order* at 6.

Governmental action that continues to affect the rights of parties is sufficient to require court intervention even in the absence of a live controversy. *See, e.g., Super Tire Eng’g Co. v. McCorkle*, 416 U.S. 115, 125-26 (1974) (“capable of repetition exception” applied to employer’s suit to invalidate state regulations

despite strike termination because employer showed “existence of an immediate and definite governmental action or policy that has adversely affected and continues to affect a present interest”).

The exception should apply even more when an independent federal agency such as the FTC repeatedly has used its administrative proceedings to bludgeon state agencies into submission to a self-serving theory of jurisdiction without clear congressional authorization or court precedent. The Order, stayed pending the administrative appeal, subjects a state agency to thirty years of federal micro-governance by the FTC. There is a reasonable likelihood that not only the NCSBDE but any other state licensing board will be the target of the FTC’s illegal exercise of jurisdiction in the future as it has repeatedly demonstrated.

CONCLUSION

For the foregoing reasons, Appellant respectfully requests this Honorable Court to hold this case is not moot.

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CERTIFICATE OF COMPLIANCE

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

1. This brief complies with the page limitation of this Court's order of November 2, 2012.
2. This brief complies with the typeface 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 a proportionally spaced typeface using Microsoft Word 2010 in 14-point Times New Roman typeface.

Executed this 19th day of November, 2012.

/s/ Noel L. Allen

Attorney for Appellant

CERTIFICATE OF SERVICE

This is to certify I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the CM/ECF System on November 19th, 2012. 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 19th day of November, 2012.

/s/ Noel L. Allen