No. 12-1172

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

Petition for Review from the Federal Trade Commission

BRIEF FOR *AMICI CURIAE*, THE AMERICAN MEDICAL ASSOCIATION AND THE MEDICAL ASSOCIATIONS FOR THE STATES OF NORTH CAROLINA, SOUTH CAROLINA, VIRGINIA, AND WEST VIRGINIA SUPPORTING PETITIONER AND REVERSAL

Leonard A. Nelson
American Medical Association
515 N. State Street
Chicago, Illinois 60654
312-464-5532

Stephen W. Keene
North Carolina Medical Society
222 N. Person St.
PO Box 27167
Raleigh, North Carolina 27611
919-833-3836

J. Mitchell Armbruster*
SMITH, ANDERSON, BLOUNT
DORSETT, MITCHELL &
JERNIGAN, L.L.P.
150 Fayetteville St, Suite 2300
P.O. Box 2611
Raleigh, North Carolina 27602
919-821-6707
* Counsel of Record

May 17, 2012

Counsel for Amici Curiae

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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No. 12-1172 Caption: The North Carolina State Board of Dental Examiners v. FTC

Pursuant to FRAP 26.1 and Local Rule 26.1,

American Medical Association, North Carolina Medical Society, South Carolina Medical Association,
(name of party/amicus)

Medical Society of Virginia, and West Virginia State Medical Association

who is amici, makes the following disclosure:
(appellant/appellee/amicus)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☑ NO
If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation (Local Rule 26.1(b))? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐ YES ☐ NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐ YES ☑ NO
If yes, identify any trustee and the members of any creditors' committee:

CERTIFICATE OF SERVICE

****

I certify that on May 17, 2012 the foregoing document was served on all parties or their counsel of record through the CM/ECF system if they are registered users or, if they are not, by serving a true and correct copy at the addresses listed below:

/s/ J. Mitchell Armbruster
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May 17, 2012
(date)

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INTERESTS OF *AMICI CURIAE*

The AMA is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all United States physicians, residents and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including North Carolina.

In addition to the AMA, the North Carolina Medical Society, the South Carolina Medical Association, the Medical Society of Virginia, and the West Virginia State Medical Association join this brief as *amici*. Each of these additional *amici* have a purpose similar to that of the AMA in serving their members and their members' patients in their respective states.[1]

Although the FTC order is geared toward providers of teeth whitening services in North Carolina (and those who provide facilities for those providers) and purports to address only a minor procedural practice of a dental board, the

[1] *Amici* appear herein in their own capacities and as representatives of the Litigation Center of the AMA and the State Medical Societies. The Litigation Center is a coalition of the AMA and state medical societies to represent the views of organized medicine in the courts, in accordance with AMA policies and objectives.

practical effect of the order, if sustained, would be anything but minor. That effect would reach far beyond providers of teeth whitening services, far beyond dental boards, and far beyond North Carolina. In fact, as this brief will demonstrate, affirming the FTC order would greatly impede state regulation of the practice of medicine, with a devastating impact on public health, at least within the Fourth Circuit and perhaps nationally.

Pursuant to Fed. R. App. P. 29(c)(4), both parties have consented to the filing of this brief.

SUMMARY OF FACTS AND OF AGENCY PROCEEDINGS[2]

Under the North Carolina Dental Practice Act, N.C.G.S. §§ 90-22, *et seq.* ("DPA"), the North Carolina State Board of Dental Examiners ("NCSBDE"), an agency of the State of North Carolina, is tasked with regulating the practice of dentistry in that state. The NCSBDE is composed of eight board members, six of whom must be practicing dentists. DPA § 90-22(b). It is illegal to practice dentistry in North Carolina without a license issued by the NCSBDE. DPA § 90-29(a).

The practice of dentistry by an unlicensed person, "or the doing … of any of the acts prohibited by [the DPA] … whether licensed dentists or not, is [deemed]

[2] *Amici* here summarize only those facts and agency proceedings pertinent to this brief.

inimical to public health and welfare and to constitute a public nuisance." DPA § 90-40.1(a). A person is "deemed to be practicing dentistry" if that person "[r]emoves stains … from the human teeth." DPA § 90-29(b)(2).

The DPA is to be liberally construed to carry out its objects and purposes. DPA § 90-22(a). The NCSBDE can bring court actions to enjoin the unlawful practice of dentistry, or it may refer such cases to the District Attorney for criminal prosecution. DPA § 90-40.1(a).

Starting in approximately 2003, non-dentists began offering teeth whitening services at locations such as mall kiosks. In response, the NCSBDE issued "cease and desist letters" to non-dentist teeth whitening service providers and distributors of teeth whitening products and equipment in North Carolina and to mall owners and operators. These letters alleged that the providing of teeth whitening services by non-dentists violated the DPA. FTC Opinion of Dec. 2, 2011 in Docket no. 9343 ("12/2/11 FTC Opinion"), at 1-2.

Following receipt of these letters, some of the non-dentists stopped providing teeth whitening services, and several marketers of teeth whitening systems stopped selling their products and equipment in North Carolina. Also, some mall operators refused to lease space to, or cancelled existing leases with, non-dentist teeth whitening providers. *Id.* at 2.

On June 17, 2010, the FTC enforcement staff brought an administrative action against the NCSBDE, claiming that the NCSBDE, through its issuance of the cease and desist letters, was violating § 5 of the FTC Act. *Id.* at 5. A threshold issue in the FTC enforcement action was whether the NCSBDE should be exempt from the federal antitrust laws under the "state action doctrine" enunciated in *Parker v. Brown*, 317 U.S. 341 (1943).[3]

By summary judgment entered on February 3, 2011, the FTC found that, because a majority of the members of the NCSBDE were practicing dentists, as required under the DPA, for purposes of the state action doctrine the NCSBDE should be deemed a private person, rather than a part of state government. Citing *California Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the FTC held that, since the NCSBDE was to be deemed a private person, it would be unable to rely on the state action doctrine unless it were actively supervised by a "sovereign" arm of "the state." Because the FTC found insufficient evidence of active state supervision, it held that the state action

[3] *Parker* observed that the constitution creates "a dual system of government in which … the states are sovereign." As such, with "nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," the Supreme Court concluded that when "[t]he state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application," it is exempt from the prohibitions of the Sherman Act. 317 U.S. at 350-352. Thus, anticompetitive regulation is allowed to withstand antitrust challenge as long as a court is satisfied that the restraint at issue is truly state action.

doctrine did not apply. *NCSBDE*, 151 F.T.C. 607 (2011).[4] In reaching its decision, the FTC acknowledged that the active supervision requirement "may impose additional costs on states." *Id.* at 623.

During the ensuing trial, the NCSBDE submitted evidence that patient health was endangered when non-dentists provided teeth whitening services. NCSBDE Brief, at 8-11. However, the FTC enforcement staff disputed this assertion and submitted contradictory evidence.

On December 2, 2011, the FTC issued its final order against the NCSBDE. It found that NCSBDE members were actual or potential competitors and were separate economic actors. They were thus capable of conspiring (and in fact had conspired) to exclude non-dentist teeth whitening providers from the market. 12/2/11 FTC Opinion, at 14-18. This conduct, the FTC held, was anticompetitive. *Id.* at 24-25.

The FTC also found that the NCSBDE had been acting outside its authority under North Carolina law by issuing the cease and desist letters. To support this finding, it cited DPA §§ 90-27,-29, -40, and -41. *Id.* at 3, 26. Further, it determined that it was immaterial whether or under what circumstances teeth whitening constituted the practice of dentistry, whether there is a valid public

[4] In a footnote, the FTC indicated that it did not need to consider the "clear articulation" prong of *Midcal* in making its summary judgment ruling, as the supposed failure of the NCSBDE to satisfy the active supervision requirement by itself justified the ruling. *NCSBDE*, n. 8.

health or safety interest in the NCSBDE's prohibiting non-dentists from whitening teeth, or whether the actions of the NCSBDE had been taken to further the goals of the DPA; it deemed such issues inapplicable to analysis under federal antitrust law. *Id.* at 23-26, 33.

Based on these findings and on its earlier determination that state action immunity was inapplicable, the FTC ruled that the NCSBDE had violated Sherman Act § 1 (and hence § 5 of the FTC Act) by issuing the ceases and desist letters. *Id.* at 2, 10.

The FTC order prohibited the NCSBDE from directing non-dentists to stop providing teeth whitening services, unless the NCSBDE communications included language the FTC had pre-approved. In crafting its remedy, the FTC noted that it was "clothed with wide discretion" in fulfilling its statutory mission. 12/2/11 FTC Opinion, at 33-34.

On February 10, 2012, the NCSBDE appealed the FTC order of December 2, 2011 to this Court.

ARGUMENT

The FTC held that the NCSBDE fell outside the state action doctrine because it was composed of market participants and was not actively supervised by a "sovereign" part of the government of North Carolina. This holding contravenes Supreme Court precedent. The Supreme Court has said, while ruling that the

actions of municipalities need not be actively supervised, that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required," *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, n.10 (1985). Moreover, the Supreme Court has explained the underlying rationales for when the doctrine of *Parker* should – and should not – apply. When those rationales are considered in the context of professional licensure board actions, it is evident that the justification for dispensing with the active state supervision requirement is more compelling than for municipalities, regardless of the "market participant" status of board members.

In the case of professional licensure boards that supervise health care professionals, such as the NCSBDE and state medical boards, a state supervision requirement would affirmatively defeat important state policies. Particularly, if the FTC ruling against the NCSBDE were to be affirmed, it would impede state regulation of the health care professions, thus imperiling public health.

This brief will explain both of these points: (1) why the active supervision requirement should not, as a general matter, apply to professional licensure boards, and (2) why the FTC ruling, if affirmed, would disrupt the regulation of health care professionals, particularly physicians, and thereby endanger public health and safety.

I. The Active State Supervision Requirement Should not Apply to State Agency Professional Licensure Boards, Regardless of the Composition of Those Boards.

It is undisputed that the NCSBDE, a professional licensure board, is an agency of the State of North Carolina. In its summary judgment order, the FTC found that, because a majority of the members of the NCSBDE were practicing dentists, per the DPA mandate, it should be deemed a private body under the *Parker* state action doctrine, unless its decisions were "actively supervised" by another branch of state government, which they were not. Aside from the impracticality of this result and the offense it carries to our federalist system of government, the FTC decision contravenes United States Supreme Court precedent.[5]

A. The Rationales for Exempting Municipalities from the Active State Supervision Requirement Apply at Least as Compellingly to Professional Licensure Boards.

In *Hallie*, a neighboring town alleged that a much larger municipality had acted in its own individual interest by allegedly leveraging the market power it had in one market (sewage collection and transportation services) to obtain market power in another (sewage treatment services), thus violating the Sherman Act. Despite these allegations, the Supreme Court found that the district court had properly dismissed the lawsuit. The Court held that municipalities need not satisfy

[5] *Amici* will not repeat the numerous lower court precedents on this point, cited in the NCSBDE brief, which the FTC decision violates.

the active supervision requirement to qualify for federal antitrust immunity under the state action doctrine.

The basic rationales for exempting municipalities from the active supervision requirement were: (1) it is unlikely that the individuals who run municipal governments will act in their own economic interests, rather than in the public interest as articulated by the state, *see, e.g.*, *Hallie*, at 45 ("We may presume, absent a showing to the contrary that the municipality acts in the public interest"), and (2) if a municipality fails to do so, it is accountable to its public through the political process. *Id*. at n. 9 ("Municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct"). The only real danger, reasoned the *Hallie* Court, was that the municipality might "seek to further purely parochial public interests at the expense of more overriding state goals." *Id*. at 47.

Hallie further indicated that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." *Id*. at n. 10. Close analysis shows that, for professional licensure boards, the justifications for dispensing with the active state supervision requirement are at least as compelling as they are for municipalities.

Professional licensure boards articulate policy for the state as a whole, and their members bear a fiduciary responsibility to act in the public's interest, rather

than their own. *See, e.g.*, the numerous provisions of North Carolina law cited at pp. 7 and 43-45 of the NCSBDE brief. The purpose of the active state supervision requirement is to ensure implementation of state regulatory policies. *See Patrick v. Burget*, 486 U.S. 94, 100-101 (1988). But professional licensing boards may actually create these polices, so requiring some other state entity to actively supervise a board's execution of its delegated functions would, in essence, be requiring the state to supervise itself. As one scholar has observed:

> State agencies occupy a dual role with respect to the articulation and implementation of state policy. Unlike municipalities, they may, within the scope of their delegated state law authority, adopt anticompetitive regulatory policies for the state as a whole. Because those actions by definition constitute state policy, they should be entitled to antitrust immunity under the *Parker* doctrine without any further requirement for clear articulation or active supervision by the state legislature.

C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Immunity*, 41 B.C. L. Rev. 1059, 1112 (2000).

Professional boards are also subject to the political process: if it chooses, the legislature can pass a law overturning a board action or even eliminate the board entirely. In fact, a professional licensure board is no less subject to the public will of the state than is a municipality, particularly if that municipality enjoys home rule powers. For example, the North Carolina Occupational Licensing Boards Act, N.C.G.S., Chap. 93B, establishes numerous requirements to subject the occupational licensing boards in that state to scrutiny by other

governmental agencies and by the general public. These include the submission of reports on their activities and finances to the Secretary of State and the Attorney General, which reports are then open to the general public, and the submission of these boards to auditing and oversight by the Auditor General. N.C.G.S. §§ 93B-2, 93B-4. In addition, and unlike private actors, professional licensure boards are subject to judicial review, and their meetings must be open to the public. N.C.G.S., Chap. 150B (Administrative Procedure Act); N.C.G.S. § 143-318.9 (Open Meetings Act). All of these requirements are typical from state to state, and all of these requirements keep professional licensure boards "in the public eye" and thus insulated from antitrust abuses. *Hallie*, n. 9.

By contrast, and as the Supreme Court has observed, municipalities are largely free to make economic choices "counseled solely by their own parochial interests." *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1977). This latter point is nowhere better illustrated than in *Hallie* itself, where a larger city allegedly sought an unfair advantage over its smaller neighbor.

B. There Is no Reason to Create a Market Participation Exception for Professional Licensure Boards.

The FTC maintains that the state action doctrine should not apply to the NCSBDE because a majority of NCSBDE members participate in the regulated market. This conclusion, too, contradicts the *Hallie* rationale. The municipality in *Hallie* was itself the provider of a regulated, and allegedly monopolized, service.

Clearly, it – and its city council members – stood to benefit in the marketplace by its regulatory decisions, at the possible expense of state residents who lived outside the municipality. Yet, the Supreme Court ruled that the city's anticompetitive action required no active state supervision to maintain antitrust immunity. Self-interest by the decision makers was not a relevant consideration. There is no reason market participation by a state agency should be treated differently and require active state supervision.

The FTC made no attempt to reconcile the Supreme Court's statement in *Hallie* that the active supervision requirement likely does not apply to state agencies with its own decision to the contrary, except to suggest that the *Hallie* statement was off-the-cuff dicta and without precedential value. *NCSBDE*, 151 F.T.C. 607, at 619. As the NCSBDE brief demonstrates, though, (and as the FTC itself acknowledged, *NCSBDE*, 151 F.T.C., at 619), numerous lower courts have followed the *Hallie* footnote in carefully reasoned decisions, which find that state agencies do fall within the state action doctrine.

Moreover, as *amici* will now explain, an active supervision requirement of licensure boards in the health care professions, based on the composition of the board members, would disrupt state efforts to protect the health and safety of their citizens. Thus, however strongly the above arguments apply to professional

licensing boards generally, they apply even more strongly to licensing boards in the health care professions, and they apply most strongly to state medical boards.

II. In the Context of State Agencies that License Health Care Professionals, the States' Interest in Protecting the Health of Their Citizens Justifies Dispensing with the Active State Supervision Requirement.

The FTC decision, if sustained, would obviously affect all state boards that license health care professionals, including, of course, state medical boards. The FTC's reasoning would thus not only upset the balance between the state and federal governments, but it would severely imperil state regulation of the practice of medicine for purposes of protecting public health – an essential function of every state medical board.

A. If State Agency Licensing Board Decisions Are Subject to Judicial Review Under the Antitrust Laws, Then Ill-Equipped Antitrust Tribunals Will be Compelled To Review State Agency Safety Concerns In Determining Whether A Restraint Is Lawful

Professional licensure is "at the core of the state's power to protect the public." *Bates v. State Bar of Arizona*, 433 U.S. 350, 361 (1977). If, as in the instant case, state licensure decisions are subject to invalidation by antitrust tribunals, then antitrust tribunals will become the final arbiters of matters of public safety, tasks they would be ill-equipped – and yet required – to perform.

The NCSBDE brief, at pp. 8-11, summarizes the evidence of the health and safety risks that arise when teeth whitening is performed by a non-dentist.

Notwithstanding this legitimate public safety concern, the FTC, citing *National Society of Professional Engineers v. United States* 435 U.S. 679 (1978) and *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), erroneously held that public safety is not a cognizable justification for restraints on competition. These cases, however, arose in contexts having nothing to do with state agency licensure of health care professionals. In *Professional Engineers*, a private association asserted that a total ban on competitive bidding was justified by the potential threat that competition itself posed to public safety. Similarly, in *Indiana Federation* a professional society argued that withholding information from dental insurers was necessary to avoid a reduction of costs through the selection of inadequate treatment. *Indiana Federation*, 476 U.S. at 463. Such vague general welfare justifications, found illegitimate in *Professional Engineers* and *Indiana Federation*, are quite different from the instant case of a licensing board's specific determination that allowing non-dentists to perform teeth whitening services poses a safety risk.

That protecting patients can be credited as a legitimate procompetitive benefit (or justification) within an antitrust analysis is illustrated by *California Dental Assoc. v. FTC*, 526 U.S. 756 (1999). There, the Supreme Court was confronted by a state dental society's credentialing policy, which denied or revoked memberships of dentists who engaged in advertising the quality of their

services or their fees. The Court recognized that the market for dental services is "characterized by striking disparities between the information available to the professional and the patient." *Id.* at 771. The Court further observed that:

> [T]he quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required to evaluate the services…

Id. at 772. Accordingly, the Court concluded that the dental society could argue on remand that its professional advertising restrictions did not violate the Sherman Act if those restrictions were "protecting patients from misleading or irrelevant advertising," *id.* at 773, and the FTC should consider the validity of this justification. This same sort of protection, offered in health care markets characterized by information asymmetry, is at the core of state professional licensure board decisions that restrict certain procedures to licensed professionals. This protection can justify the restraint.

Moreover, the FTC's recognition that cognizable justifications include "product quality" (12/11/11 FTC Opinion at 24) cannot be reconciled with its position that patient safety is an illegitimate concern in antitrust analysis. Patient safety is an obvious subset of quality concerns. Numerous antitrust cases justify the exclusion of health care practitioners because of patient safety considerations. *See, e.g.*, *County of Toulumne v. Sonora Community Hospital*, 236 F.3d 1148 (9th Cir. 2001) (approving a hospital's credentialing rule that excluded family

practitioners from performing caesarean sections because of concerns for patient safety); *Ostrzenski v. Columbia Hosp. for Women*, 158 F.3d 1289, 1291 (D.C. Cir. 1998) (exclusion because of concerns about medical competence); *Willman v. Heartland Hosp.*, 34 F.3d 605, 610-11 (8th Cir. 1994) (exclusion because of substandard care). Although antitrust tribunals should always hesitate to interfere in the professional licensure decisions of state boards, if such review is nevertheless deemed necessary they should be prepared to credit patient safety justifications for licensure restraints, many of which save lives.

B. It Would be Impractical for States to Require Closer Supervision of State Medical Boards, Beyond the Present Measures Embodied in Licensing Acts and Judicial Review.

Pursuant to state statutes, most state professional boards, including state medical boards, are comprised primarily of members of the licensed profession. Furthermore, most, if not all, of the actions taken by state medical boards impact in some way the medical practices of physicians, including physicians who compete with each other. The FTC would mandate that state created professional licensure boards be actively supervised by the state "sovereign," but this idea would be thoroughly impractical.

In order to implement such active supervision, professional licensure boards would either need to be comprised of individuals not licensed to conduct the profession being regulated or state legislatures would be forced to amend their

laws in some undefined way to sustain the active supervision requirement. It takes no special insight, however, to recognize the danger to the public of placing lay persons in a position where they must assess the qualifications and competence of physicians and decide what services constitute the practice of medicine. The Supreme Court has recognized the "specialized knowledge required to evaluate [medical] services" and has acknowledged "the common view that the lay public is incapable of adequately evaluating the quality of medical services." *Cal. Dental Ass'n. v. FTC*, 526 U.S. 756, 772 (1999); *see Southern Motor Carriers Rate Conf. v. United States*, 471 U.S. 48, 64 (1985) (explaining that "[a]gencies are created because they are able to deal with problems unforeseeable to, or outside the competence of the legislature").

States intend that board members will apply their expertise to technical problems, which lay persons are ill equipped to handle. It is expected, too, that these agencies will exercise their discretion in addressing these problems. *See Rainey v. North Carolina Dep't. of Public Instruction*, 652 S.E.2d 251 (N.C. 2007) (holding that North Carolina courts must accord deference to agencies' interpretation of their authorizing statutes, even in those situations in which the courts are to conduct a *de novo* review); *Pharr v. Garibaldi*, 115 S.E.2d 18, 24 (N.C. 1960) (stating the basic proposition that "[c]ourts will not undertake to control the exercise of discretion and judgment on the part of the members of a

commission in performing the functions of a state agency"). Yet, a requirement of active state supervision is the very antithesis of a delegation of administrative discretion.[6] Thus, to require active supervision would undermine the scheme for professional licensure as determined by the states in accordance with their power to protect the public.

C. The Effectiveness of State Medical Boards Would Be Diminished If They Were Reorganized to Except Practicing Physicians from Making Decisions that Could Affect Their Personal Economic Interests.

In enacting a state's medical practice act, the state legislature determines the composition of the state's medical board, as well as its functions and responsibilities in protecting the public. The board members are appointed or otherwise selected in accordance with procedures mandated by the legislature.

The FTC decision hinges on the fact that a majority of NCSBDE members (as mandated by North Carolina law) are practicing dentists. Presumably, then, if licensure boards were to be reconstituted as urged by the FTC, they would be predominantly comprised of laymen or of state employees. While the infringement

[6] The 12/2/11 FTC Opinion, at 2 and 26, asserts that the sending of cease and desist letters under the DPA was unauthorized under the DPA, notwithstanding that the DPA nowhere suggests a lack of such authority and it was within the discretion of the NCSBDE to interpret and fulfill its statutory mandate through the sending of such letters. Not only does the FTC misconstrue North Carolina law, but it transgresses the holding of *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 US. 365, 371-372 (1991), that the federal antitrust laws are not to be employed to question state agencies' exercise of their delegated powers, regardless of whether those agencies may have exceeded those powers.

on state prerogatives arising from such reconstitution would be manifest for any profession, the disadvantages would be particularly acute for medical boards.

As already explained *supra*, lay supervision of the practice of medicine would diminish the effectiveness of the regulatory regimen, which would imperil public health. Although a medical board comprised solely of state-employed physicians would be less egregious than one dominated by non-physicians, such a regime would still be less effective than the present structure. Medical boards thrive when they can bring together physicians from different specialties and practice backgrounds. These physicians can contribute their expertise both in clinical knowledge and in the practical aspects of patient care. A requirement that physicians must be state employees, while it might satisfy the FTC mandate that decisions of board members could not benefit the financial interests of the individuals making those decisions, would lose the benefits arising from members' divergent experiences. It would also impose an unnecessary cost on state governments and their medical boards.

Perhaps other schemes for licensure board reorganizations might also eliminate the FTC's objection of individual board members' potential conflicts of interest. It is hard to visualize any alternative to the present system, though, that would provide effective regulation. Even if the FTC could devise such an

alternative, that alternative, being imposed by a federal agency, would infringe on the right of the states to determine their own form of government.

D. Private Physicians Would Refuse to Serve on State Medical Boards If Their Actions Were Subjected to Antitrust Scrutiny.

The web site of the North Carolina Medical Board includes a letter sent to prospective candidates for board membership. This letter includes the following language:

> Serving on the Board is both a responsibility and an honor. Many former Board members recall the importance of the work, the pride they felt in being part of it, and how serving on the Board made them better practitioners. While most Board members come to it as leaders of the profession, many North Carolina Medical Board members have gone on to leadership at the national level of medical regulation. With the ever-changing face of medicine in this country, it is good for our state to be represented in the national discussion on health care.

The letter continues –

> Board members are reimbursed $50 per hour (up to a maximum of $200 per day) for preparation and attending hearings and meetings. … Although most Board members find that service on the Board means a financial loss, the rewards from serving the public and the profession make it worthwhile.

http://www.ncmedboardreviewpanel.com/media/general_info_about_service_ltr_Spring_2012.pdf.

There is nothing unique about service on the North Carolina Medical Board. In every state, members serve largely out of altruistic motivations – for their personal growth, for their profession, and for the people of their state.

The FTC found that the members of the NCSBDE had violated § 1 of the Sherman Act. This statute, 15 U.S.C. § 1, includes the following provision:

> Every person who shall … engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

Violations of the antitrust laws also subject the perpetrators to treble damages and attorneys fees in private enforcement actions. 15 U.S.C. § 15. *See Hoover v. Ronwin*, 466 U.S. 558 (1984), where the antitrust plaintiff sued not only a state bar committee on examinations and admissions but also the individual members of the state committee and their spouses.

If the FTC decision is sustained, private physicians – indeed, practicing members of every profession – will be strongly discouraged from serving on any state licensure board.

CONCLUSION

The FTC decision is a bureaucratic overreach. It is premised on a misunderstanding of state law and of federal antitrust law. While the issue before this Court is couched as a minor modification to the procedures of a dental practice board, in fact this case will impact all professions, especially including the medical profession. If sustained, the FTC decision will infringe on the states' powers, and it will undermine public health.

The NCSBDE is a professional regulatory board, organized as an agency of the State of North Carolina. Its challenged actions were undertaken pursuant to a power that the state had vested in it. Those facts mandate application of the state action doctrine when considering the impact of actions brought under the federal antitrust laws. It is for the State of North Carolina, not the FTC, to consider the desirability of having practicing dentists serve on the NCSBDE.

Amici therefore urge this Court to reverse the FTC determinations that the state action doctrine does not apply to the NCSBDE and that the NCSBDE has violated § 5 of the Federal Trade Commission Act.

Respectfully submitted, this the 17th day of May, 2012.

/s/ J. Mitchell Armbruster

Leonard A. Nelson
American Medical Association
515 N. State Street
Chicago, Illinois 60654
312-464-5532

Stephen W. Keene
North Carolina Medical Society
222 N. Person St.
PO Box 27167
Raleigh, North Carolina 27611
919-833-3836

J. Mitchell Armbruster*
SMITH, ANDERSON, BLOUNT DORSETT, MITCHELL & JERNIGAN, L.L.P.
150 Fayetteville St, Suite 2300
P.O. Box 2611
Raleigh, North Carolina 27602
919-821-6707
* Counsel of Record

Counsel for Amici Curiae

RULE 29(c)(5) STATEMENT

Pursuant to Fed. R. App. P. 29(c)(5), *amici* state:

- No party's counsel authored this brief in whole or in part.
- No party or party's counsel contributed money that was intended to fund preparing or submitting this brief.
- No person other than *amici* contributed money that was intended to fund preparing or submitting this brief.

/s/ J. Mitchell Armbruster
J. Mitchell Armbruster
Counsel for Amici Curiae

CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), I certify that this brief was produced in Times New Roman 14 point typeface using Microsoft Word 2003 and contains 5,286 words, excluding the Corporate Disclosure Statements, Table of Contents, Table of Authorities, Rule 29(c)(5) Statement, this Certificate of Compliance, and Certificate of Service.

/s/ J. Mitchell Armbruster
J. Mitchell Armbruster
Counsel for Amici Curiae

CERTIFICATE OF SERVICE

I, hereby certify that on this 17th day of May, 2012, a copy of the foregoing Brief of *Amici Curiae* the American Medical Association *et al.* was served on all counsel of record by electronically filing it with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Appellate CM/ECF system.

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.

This the 17th day of May, 2012.

/s/ J. Mitchell Armbruster
J. Mitchell Armbruster
Counsel for Amici Curiae