RECORD NO. 12-1172

In The
United States Court Of Appeals
For The Fourth Circuit

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF THE FEDERAL TRADE COMMISSION

BRIEF OF *AMICI CURIAE*
THE NATIONAL ASSOCIATION OF BOARDS OF PHARMACY AND THE NORTH CAROLINA BOARD OF PHARMACY IN SUPPORT OF PETITIONER AND REVERSAL

Matthew W. Sawchak
Stephen D. Feldman
ELLIS & WINTERS LLP
Post Office Box 33550
Raleigh, North Carolina 27636
(919) 865-7000

Counsel for Amici Curiae

Gibson Moore Appellate Services, LLC
421 East Franklin Street ♦ Suite 230 ♦ Richmond, VA 23219
804-249-7770 ♦ www.gibsonmoore.net

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 12-1172 Caption: N.C. State Board of Dental Examiners v. Federal Trade Commission

Pursuant to FRAP 26.1 and Local Rule 26.1,

The National Association of Boards of Pharmacy
(name of party/amicus)

who is amicus, 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:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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 17th of May, 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:

Noel L. Allen, Esq.: nallen@allen-pinnix.com
Alfred P. Carlton, Jr., Esq.:
acarlton@allen-pinix.com
M. Jackson Nichols, Esq.: mjn@allen-pinnix.com
Catherine E. Lee, Esq.: clee@allen-pinnix.com
Nathan E. Standley, Esq.:
nstandley@allen-pinnix.com
Brenner A. Allen, Esq.: ballen@allen-pinnix.com
Attorneys for Petitioner

John F. Daly, Esq.: jdaly@ftc.gov
Imad D. Abyad, Esq.: iabyad@ftc.gov
Attorneys for Respondent

/s/ Matthew W. Sawchak (signature)

May 17, 2012 (date)

11/17/2011
SCC

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
DISCLOSURE OF CORPORATE AFFILIATIONS AND OTHER INTERESTS

Only one form needs to be completed for a party even if the party is represented by more than one attorney. Disclosures must be filed on behalf of all parties to a civil, agency, bankruptcy or mandamus case. Corporate defendants in a criminal or post-conviction case and corporate amici curiae are required to file disclosure statements. Counsel has a continuing duty to update this information.

No. 12-1172 Caption: N.C. State Board of Dental Examiners v. Federal Trade Commission

Pursuant to FRAP 26.1 and Local Rule 26.1,

The North Carolina Board of Pharmacy
(name of party/amicus)

who is amicus, 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:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
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 17th of May, 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:

Noel L. Allen, Esq.: nallen@allen-pinnix.com
Alfred P. Carlton, Jr., Esq.:
acarlton@allen-pinix.com
M. Jackson Nichols, Esq.: mjn@allen-pinnix.com
Catherine E. Lee, Esq.: clee@allen-pinnix.com
Nathan E. Standley, Esq.:
nstandley@allen-pinnix.com
Brenner A. Allen, Esq.: ballen@allen-pinnix.com
Attorneys for Petitioner

John F. Daly, Esq.: jdaly@ftc.gov
Imad D. Abyad, Esq.: iabyad@ftc.gov
Attorneys for Respondent

/s/ Matthew W. Sawchak
(signature)

May 17, 2012
(date)

TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES iii

STATEMENT OF AMICI CURIAE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. REQUIRING STATE REGULATORY AGENCIES TO SHOW ACTIVE SUPERVISION WOULD SLIGHT THE FEDERALISM CONCERNS THAT UNDERLIE THE STATE ACTION DOCTRINE 5

A. Requiring State Regulatory Agencies to Show Active Supervision Would Undermine Federalism 6

B. The Antitrust Concerns That Support an Active-Supervision Requirement for Private Conduct Do Not Apply to State Regulatory Boards 11

1. State Agencies Are Not Private Parties 11

2. Concerns over Accountability Do Not Justify Imposing an Active-Supervision Requirement on State Agencies 13

3. An Active-Supervision Requirement Would Not Ensure That a State Regulatory Agency Is Following State Policy 14

II. THE FTC'S THEORY OF AN INTRA-BOARD CONSPIRACY IS MISTAKEN AS A MATTER OF ANTITRUST LAW AND AS A MATTER OF ADMINISTRATIVE LAW 16

A. The Members of the Dental Board Lack the Capacity to Conspire 16

B. Omni Contradicts the FTC's Theory of Conspiracy....................20

III. STATE REGULATION OF DENTISTS AND OTHER HEALTH PROFESSIONALS PROMOTES CONSUMER WELFARE 23

A. State Regulation of Health Professions Gives Consumers Needed Information on Providers' Qualifications....................23

B. Empirical Evidence Shows That Regulation Improves the Quality of Services in Health Professions 25

C. Real-life Examples Show the Dangers Posed by Unlicensed Health Care 27

CONCLUSION....................29

CERTIFICATE OF COMPLIANCE WITH RULE 32(a) 30

CERTIFICATE OF SERVICE 31

TABLE OF AUTHORITIES

PAGE(S)

CASES:

Adams v. N.C. Dep't of Natural & Econ. Res.,
249 S.E.2d 402 (N.C. 1978) 6

Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.,
367 F.3d 212 (4th Cir. 2004) 22

Am. Needle, Inc. v. NFL,
130 S. Ct. 2201 (2010)..16, 17, 18, 22

Armstrong v. N.C. State Bd. of Dental Exam'rs,
499 S.E.2d 462 (N.C. Ct. App. 1998)..7, 15

Asheville Tobacco Bd. of Trade, Inc. v. FTC,
263 F.2d 502 (4th Cir. 1959) 12

Barsky v. Bd. of Regents,
347 U.S. 442 (1954)..7

Bell v. Fur Breeders Agric. Coop.,
348 F.3d 1224 (10th Cir. 2003) 17, 18

City of Columbia v. Omni Outdoor Adver., Inc.,
499 U.S. 365 (1991)...passim

City of Lafayette v. La. Power & Light Co.,
435 U.S. 389 (1978)..13

Conner v. N.C. Council of State,
716 S.E.2d 836 (N.C. 2011) 6

Copperweld Corp. v. Independence Tube Co.,
467 U.S. 752 (1984)..16, 17, 18, 22

DeGregorio v. Am. Bd. of Internal Med.,
No. 92-4924, 1993 WL 719564 (D.N.J. Oct. 1, 1993) 17

Dickson v. Microsoft Corp.,
309 F.3d 193 (4th Cir. 2002) 19

ePlus Tech., Inc. v. Aboud,
313 F.3d 166 (4th Cir. 2002) 18

FTC v. Ticor Title Ins. Co.,
504 U.S. 621 (1992) 11, 12

Hoover v. Ronwin,
466 U.S. 558 (1984) 21

In re Guess,
393 S.E.2d 833 (N.C. 1990) 14

Kachian v. Optometry Examining Bd.,
170 N.W.2d 743 (Wis. 1969) 21

N.C. Bd. of Dental Exam'rs,
151 F.T.C. 607 (2011) ....passim

N.C. Bd. of Dental Exam'rs,
No. 9343, slip op. (F.T.C. Dec. 7, 2011), available at
http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf ....passim

Neblett v. Carpenter,
305 U.S. 297 (1938) 6

Oksanen v. Page Mem'l Hosp.,
945 F.2d 696 (4th Cir. 1991) 22

Parker v. Brown,
317 U.S. 341 (1943) 2

Podiatrist Ass'n, Inc. v. La Cruz Azul de P.R., Inc.,
332 F.3d 6 (1st Cir. 2003) 17, 18

Ray v. United Family Life Ins. Co.,
430 F. Supp. 1353 (W.D.N.C. 1977) 17

Robertson v. Sea Pines Real Estate,
No. 11-1538, 2012 WL 1672487 (4th Cir. May 14, 2012) 17, 18

S. Motor Carriers Rate Conf., Inc. v. United States,
471 U.S. 48 (1985) 14

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985) .... passim

Williams v. 5300 Columbia Pike Corp.,
891 F. Supp. 1169 (E.D. Va. 1995) 17, 18

STATUTES:

N.C. Gen. Stat. § 90-22 12

N.C. Gen. Stat. §§ 90-22 to 90-48.3 8

N.C. Gen. Stat. § 90-22(a) 7, 15

N.C. Gen. Stat. § 90-22(b) .... passim

N.C. Gen. Stat. § 90-29(b) 8

N.C. Gen. Stat. § 90-30 8

N.C. Gen. Stat. § 90-36 8

N.C. Gen. Stat. § 90-38 8

N.C. Gen. Stat. § 90-40 .... 8, 12

N.C. Gen. Stat. § 90-40.1 12

N.C. Gen. Stat. § 90-41 12

N.C. Gen. Stat. § 90-41(a) 8

N.C. Gen. Stat. § 90-48 12

N.C. Gen. Stat. § 90-85.2 1

N.C. Gen. Stat. § 90-85.6(a) 1

N.C. Gen. Stat. § 90-85.6(b) 14

N.C. Gen. Stat. §§ 138A-1 to -45 13

N.C. Gen. Stat. § 138A-2 9

N.C. Gen. Stat. § 138A-3 9

N.C. Gen. Stat. § 138A-12(i)(3) 10

N.C. Gen. Stat. § 138A-12(n) 10

N.C. Gen. Stat. § 138A-21 9

N.C. Gen. Stat. § 138A-22 9

N.C. Gen. Stat. § 138A-23 10

N.C. Gen. Stat. § 138A-24 9

N.C. Gen. Stat. § 138A-25 10

N.C. Gen. Stat. § 138A-26 10

N.C. Gen. Stat. § 138A-27 10

N.C. Gen. Stat. § 138A-31 9

N.C. Gen. Stat. § 138A-32 9

N.C. Gen. Stat. § 138A-33 9

N.C. Gen. Stat. § 138A-34 9

N.C. Gen. Stat. § 138A-35 9

N.C. Gen. Stat. § 138A-36 9

N.C. Gen. Stat. § 138A-37 9

N.C. Gen. Stat. § 138A-39 10

N.C. Gen. Stat. § 138A-40 9

N.C. Gen. Stat. § 138A-45 10

N.C. Gen. Stat. § 132-1 9

N.C. Gen. Stat. § 132-1(a) 13

N.C. Gen. Stat. § 143-318.10 9

N.C. Gen. Stat. § 143-318.10(b) 13

RULE:

Fed. R. App. P. 29(a) 1

BOOKS:

James W. Begun, Professionalism and the Public Interest (1981) 26

Carolyn Cox & Susan Foster, Economic Issues: The Costs and Benefits of Occupational Regulation (1990) 24, 27

Arlene Holen, Pub. Research Inst., The Economics of Dental Licensing (1978) 25

Samuel C. Martin, An Examination of the Economic Side Effects of State Licensing of Pharmacists (1982) 26

JOURNAL ARTICLES:

Yeon-Koo Che, Revolving Doors and the Optimal Tolerance for Agency Collusion, 26 Rand J. Econ. 378 (1995) 22

Frank H. Easterbrook, Antitrust and the Economics of Federalism, 26 J.L. & Econ. 23 (1983)..7, 10, 11, 15

C. Douglas Floyd, Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies, 41 B.C. L. Rev. 1059 (2000)..8, 10, 13

Herbert Hovenkamp, Federalism and Antitrust Reform, 40 U.S.F. L. Rev. 627 (2006)..11, 13

Thomas M. Jorde, Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism, 75 Cal. L. Rev. 227 (1987) 5, 8, 13, 15

Morris M. Kleiner, Occupational Licensing, 14 J. Econ. Perspectives 189 (2000) 26

Marc T. Law & Sukkoo Kim, Specialization and Regulation: The Rise of Professionals and the Emergence of Occupational Licensing Regulation, 65 J. Econ. Hist. 723 (2005)............................. 23-24, 25, 26

Hayne E. Leland, Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards, 87 J. Pol. Econ. 1328 (1979)....................................24

William H. Page, Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption After Midcal Aluminum, 61 B.U. L. Rev. 1099 (1981).. 8-9, 10

Carl Shapiro, Investment, Moral Hazard, and Occupational Licensing, 53 Rev. Econ. Stud. 843 (1986)...25

Richard B. Stewart, Administrative Law in the Twenty-First Century, 78 N.Y.U. L. Rev. 437 (2003). 10

John Shepard Wiley Jr., A Capture Theory of Antitrust Federalism,
99 Harv. L. Rev. 713 (1986) 10, 14

INTERNET ARTICLES:

Jaie Avila, Hidden Camera Investigation:
Unlicensed Dentists in San Antonio, WOAI.com (Sept. 22, 2010),
http://www.woai.com/content/troubleshooters/story/Hidden-Camera-
Investigation-Unlicensed-dentists/P0XVdN0MmEOb0PWBd_3Tfw.cspx............27

Emery P. Dalesio, NC Woman Charged with Buttocks Injection Gone Bad,
The Huffington Post (Dec. 8, 2011),
http://www.huffingtonpost.com/2011/12/08/nc-woman- charged-
with-but_0_n_1137933.html..28

Alexi Friedman, N.J. Authorities Crack Down on Unlicensed Dentists,
NJ.com (Aug. 23, 2009),
http://www.nj.com/news/index.ssf/2009/08/nj_authorities_
crack_down_on_u.html...27

Vivian Ho, S.F. Man Charged with Acting Like Cosmetic Surgeon,
S.F. Chron. (Dec. 23, 2011),
http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/12/23/
BAFO1MG3LN.DTL 28

Courtney Hutchison, Plastic Surgery Scam? Brit Dies in Philly
After Butt Injection, ABC News (Feb. 10, 2011),
http://abcnews.go.com/Health/WomensHealth/death-butt-injection-
prompts-warnings-plastic-surgeons/story?id=12878427#.T3XkOGEgd2A...........28

Rheanna Murray, More Possible Victims in Fix-A-Flat Butt Operations
Come Forward: Cops, N.Y. Daily News (Nov. 23, 2011),
http://www.nydailynews.com/news/national/victims-fix-a-flat-
butt-operations-cops-article-1.981646..28

U.S. Food & Drug Admin., The Possible Dangers of Buying Medicines
over the Internet (Nov. 2010),
http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/
UCM204943.pdf 29

STATEMENT OF AMICI CURIAE

The National Association of Boards of Pharmacy (the NABP) and the North Carolina Board of Pharmacy (the Pharmacy Board) respectfully file this brief as amici curiae. The NABP and the Pharmacy Board request that the Court reverse the decision of the Federal Trade Commission (FTC) in this case. Counsel for the FTC and counsel for the North Carolina State Board of Dental Examiners (the Dental Board) have consented to the filing of this amicus brief. See Fed. R. App. P. 29(a).

The NABP is an independent organization that supports state boards of pharmacy as these state agencies develop, implement, and enforce regulations of pharmacy practice. The NABP's members include the boards of pharmacy of all fifty U.S. states, the District of Columbia, Guam, Puerto Rico, and the Virgin Islands.

The Pharmacy Board is an agency created by the North Carolina General Assembly. N.C. Gen. Stat. § 90-85.6(a) (2011). The Pharmacy Board regulates the practice of pharmacy "to insure minimum standards of competency and to protect the public from those who might otherwise present a danger to the public health, safety and welfare." Id. § 90-85.2.

This appeal raises legal issues of significant concern to the NABP and the Pharmacy Board. Nearly seventy years ago, the U.S. Supreme Court held in

Parker v. Brown, 317 U.S. 341 (1943), that federal antitrust law does not apply to states' governmental conduct. This federalism limit on antitrust is often called state action immunity.

Here, the FTC is arguing that state agencies' regulatory actions enjoy state action immunity only if those actions satisfy a heightened test — a test that usually applies only when private parties seek state action immunity.

The FTC's arguments would subject pharmacy boards across the country, as well as other state regulatory agencies, to increased litigation with uncertain outcomes. The antitrust plaintiffs are likely to include regulated parties who seek to defeat or deter state regulators' enforcement efforts. Expanded antitrust litigation against these state agencies would undermine the agencies' ability to protect the public.

As noted above, all parties to this appeal have consented to the filing of this amicus brief. No part of this brief was composed by counsel for any party to this case. Likewise, only the Pharmacy Board and the NABP paid for the preparation of this brief. No party, no party's counsel, nor any other person contributed money intended for the brief's preparation and/or filing.

SUMMARY OF ARGUMENT

This brief presents three key reasons to reverse the FTC's decision in this case.

First, the FTC's decision violates the federalism interests that the state action doctrine exists to protect. The North Carolina General Assembly has expressly delegated to the Dental Board the authority to protect the public from unsafe dental services. This authority does not lose its sovereign character, as the FTC argues, simply because the State of North Carolina has chosen the Dental Board to exercise the authority.

The FTC's reasoning conflicts with the Supreme Court's decision that municipalities, another component of state governments, need not show active supervision of their conduct to receive state action immunity. For purposes of state action immunity, a statewide regulatory agency like the Dental Board fares at least as well as a municipality does. Both, after all, are bound by the limitations created by a state legislature. Only private parties, which have no governmental essence and no organic statutory limitations, are subject to the active-supervision requirement under the state action doctrine.

Second, the FTC's decision relies on a flawed analysis of who can conspire in violation of the antitrust laws. The "conspiracy" that underlies the FTC charges here is an alleged agreement within the Dental Board. For antitrust purposes, any

such agreement would be as meaningless as an agreement between members of a corporation's board of directors. The actions that the FTC challenges were taken in the name of the Dental Board, North Carolina's only regulator of dentistry, as an exercise of the state's sovereign power. The FTC itself emphasizes the sovereign power that the Dental Board exercised here. The members of the Dental Board "conspired" only by serving in state government.

The FTC answers that the Dental Board members are dentists, so they might have had mixed motives when they acted within the board. The Supreme Court has already concluded, however, that there can be no intragovernmental conspiracy even if a public official acts with private interests in mind. If such a conspiracy theory were valid, every state licensing board would be subject to antitrust liability. Because these boards need subject-matter expertise to carry out their public protection duties, they nearly always include professionals in the field being regulated. Inferences about the motives of government officials are no basis for antitrust liability.

Third, the FTC's decision slights the consumer protection role of state boards that regulate the health professions. Most citizens lack the expertise to choose dentists and other professionals without the assistance of regulation. Professional regulatory boards fill this information gap. Studies show that

licensing of health professionals correlates with increased safety. Undermining this licensing can lead to dangerous consequences.

ARGUMENT

I. REQUIRING STATE REGULATORY AGENCIES TO SHOW ACTIVE SUPERVISION WOULD SLIGHT THE FEDERALISM CONCERNS THAT UNDERLIE THE STATE ACTION DOCTRINE.

Under our system of federalism, each state generally has the right to decide how to exercise its sovereign powers. This right includes deciding which parts of the state government should exercise the state's powers. See, e.g., Thomas M. Jorde, Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism, 75 Cal. L. Rev. 227, 230-31 (1987).

Here, when the FTC applied the state action doctrine, it treated a statewide regulatory agency as something different from — and more suspect than — a state. See N.C. Bd. of Dental Exam'rs, 151 F.T.C. 607, 626 (2011) [hereinafter State Action Opinion] (questioning whether the Dental Board's actions "represent a sovereign policy choice").

The FTC also used the composition of the Dental Board — a composition decided by the North Carolina General Assembly — as a reason to subject the board to heightened antitrust scrutiny. The FTC reasoned that "because the Board is controlled by practicing dentists, the board's challenged conduct must be actively supervised by the state for it to claim state action exemption from the

antitrust laws." Id. at 633; see N.C. Gen. Stat. § 90-22(b) (specifying the composition of the Dental Board).

This second-guessing of a state government's structure overlooks the main point of the state action doctrine: upholding states' sovereign choices.

A. Requiring State Regulatory Agencies to Show Active Supervision Would Undermine Federalism.

Under the FTC's theory, the North Carolina General Assembly's choice to delegate powers to a statewide agency, the Dental Board, heightens the antitrust scrutiny of the state's regulatory decisions. See State Action Opinion, 151 F.T.C. at 626. This theory slights a state government's authority to decide its own structure.

State governments' authority to delegate has deep roots in federalism. For example, as the Supreme Court has recognized, a state's delegation of its legislative functions is generally immune from a federal constitutional challenge. Neblett v. Carpenter, 305 U.S. 297, 302 (1938). Likewise, the North Carolina judiciary has carefully protected the General Assembly's powers to delegate state government functions. See, e.g., Conner v. N.C. Council of State, 716 S.E.2d 836, 842 (N.C. 2011); Adams v. N.C. Dep't of Natural & Econ. Res., 249 S.E.2d 402, 410 (N.C. 1978).

Here, the North Carolina General Assembly has expressly delegated to the Dental Board the responsibility to protect the public from unsafe dental services. N.C. Gen. Stat. § 90-22(a)-(b); Armstrong v. N.C. State Bd. of Dental Exam'rs, 499 S.E.2d 462, 465 (N.C. Ct. App. 1998). In this delegation, the state has exercised its authority to protect the public, as well as its authority to organize that protection in the way the state finds most effective. See Barsky v. Bd. of Regents, 347 U.S. 442, 449 (1954) (explaining that the right to regulate professionals is "a vital part of a state's police power").

A state's exercise of its police power does not become less sovereign just because a state uses one of its arms to exercise the power. For example, the mere fact that a state regulatory board is not the state legislature itself is no reason to put the board in a disfavored category under the state action doctrine. See, e.g., Frank H. Easterbrook, Antitrust and the Economics of Federalism, 26 J.L. & Econ. 23, 36 (1983) ("There is no very good reason why the constitutional location of 'sovereignty' should be dispositive in common law adjudication under the Sherman Act.").

The Supreme Court's treatment of municipalities under the state action doctrine shows that the FTC erred by treating the Dental Board — a statewide agency — as something less than a state actor. In Town of Hallie v. City of Eau Claire, 471 U.S. 34 (1985), the Supreme Court held that municipalities, to qualify

for state action immunity, need not show that other bodies have supervised the municipalities' actions. Id. at 45-46. Because the law already requires that a municipality act under a clearly articulated state policy, the Court explained, a municipality is unlikely to act out of parochial interests. Id. at 47.

The Dental Board, like a municipality, is bound by clearly articulated state policies: the policies stated in its enabling statute. See N.C. Gen. Stat. §§ 90-22 to -48.3; State Action Opinion, 151 F.T.C. at 617 n.8 (making the assumption that this case involves a clearly articulated state policy to displace competition with regulation). The Dental Board's enabling statute defines all of the following:

- the practice of dentistry, N.C. Gen. Stat. § 90-29(b);
- the qualifications required of a licensed dentist, e.g., id. §§ 90-30, -36, -38;
- the penalty for the unauthorized practice of dentistry, id. § 90-40; and
- the Dental Board's disciplinary authority, id. § 90-41(a).

Given the governmental nature of the Dental Board, these statutory limitations on its powers already address the goals of any active-supervision requirement. See Jorde, supra, at 248; C. Douglas Floyd, Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies, 41 B.C. L. Rev. 1059, 1081 (2000); William H. Page, Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the

State Action Exemption After Midcal Aluminum, 61 B.U. L. Rev. 1099, 1101, 1129 (1981).

Statewide regulatory boards also satisfy another part of the state action analysis that the Supreme Court has applied to municipalities. In Hallie, the Supreme Court presumed that a municipality acts in the public interest. 471 U.S. at 45. To justify that presumption, the Court emphasized that open-government laws and other disclosure requirements make a municipality "more likely to be exposed to public scrutiny than is private conduct." Id. at 45 n.9.

The Court's reasoning also describes North Carolina's licensing agencies, including the Pharmacy Board and the Dental Board. These agencies, unlike private parties, are subject to the state's vigorous public-records and open-meetings statutes. See N.C. Gen. Stat. § 132-1 (2011) (making public "all documents, . . . electronic data-processing records, artifacts, or other documentary material, regardless of physical form or characteristics, made or received pursuant to law or ordinance in connection with the transaction of public business"); id. § 143-318.10 (requiring official agency meetings to "be open to the public, and any person is entitled to attend such a meeting").

North Carolina agencies are also subject to the State Government Ethics Act, a statute that requires board members to adhere to high ethical standards. See id. §§ 138A-2, -3, -21, -22, -24, -31, -32, -33, -34, -35, -36, -37, -40. If board

members fail to follow these standards, they are subject to fines, removal from office, and even criminal penalties. Id. §§ 138A-25, -26, -27, -39, -45. In addition, most of the information that agencies must provide to the State Ethics Commission, including information on board members' economic interests, is available for public review. Id. §§ 138A-12(i)(3), (n), -23.

In sum, North Carolina regulatory boards and their members operate under multiple forms of public scrutiny. As the Supreme Court has recognized, this "position in the public eye may provide some greater protection against antitrust abuses than exists for private parties." Hallie, 471 U.S. at 45 n.9.

Finally, municipalities and state regulatory boards exist for the same basic reason: to provide more efficient government. Requiring these arms of government to show active supervision to qualify for state action immunity would undermine the efficiency that they exist to provide. See, e.g., Easterbrook, supra, at 37-38; Floyd, supra, at 1091; John Shepard Wiley Jr., A Capture Theory of Antitrust Federalism, 99 Harv. L. Rev. 713, 734-35 (1986). Such a requirement would "impose[ ] a costly system of centralized 'command and control' regulation on the states." Floyd, supra, at 1077 (quoting Page, supra, at 1129). Command-and-control regulation, in general, is "simultaneously more burdensome and less effective." Richard B. Stewart, Administrative Law in the Twenty-First Century, 78 N.Y.U. L. Rev. 437, 447 (2003).

Imposing an active-supervision requirement would also reduce the policy output of state governments. As Judge Easterbrook has explained, "to require states [themselves] to make all important choices is to limit to fifty the maximum number of mixtures of policy." Easterbrook, supra, at 37.

In sum, the FTC's position slights an important aspect of state sovereignty and the state action doctrine: states' authority to delegate within themselves.

B. The Antitrust Concerns That Support an Active-Supervision Requirement for Private Conduct Do Not Apply to State Regulatory Boards.

The active-supervision requirement does not apply here for an additional reason. The concerns that have generated that requirement do not apply to state regulatory agencies, as opposed to private parties.

1. State Agencies Are Not Private Parties.

The active-supervision requirement exists to avoid immunizing private parties who act under color of state law. Hallie, 471 U.S. at 46-47; City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365, 388 (1991); Herbert Hovenkamp, Federalism and Antitrust Reform, 40 U.S.F. L. Rev. 627, 632 (2006). It ensures "that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." FTC v. Ticor Title Ins. Co., 504 U.S. 621, 634-35 (1992).

An example of the type of party that requires active supervision is the respondent in Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959). See State Action Opinion, 151 F.T.C. at 621 (relying on Asheville Tobacco, 263 F.2d at 509). Asheville Tobacco, unlike this case, did not involve a state government agency to which the General Assembly had entrusted the police power. Instead, the case involved a private trade association: a "non-stock corporation" that was "open to warehousemen and purchasers of leaf tobacco." 263 F.2d at 506. Because the tobacco trade association was nongovernmental, the Court rightly noted that the association was "not supervised in any manner by State officials." Id. at 510.

Here, in contrast, the Dental Board is an agency of the State of North Carolina. See, e.g., N.C. Gen. Stat. § 90-22(b). The state legislature has created the Dental Board and has defined the scope of its enforcement activities. See, e.g., id. §§ 90-22, -40, -40.1, -41, -48. In addition, the legislature has given the Dental Board the same obligations that other state agencies have. See supra pp. 9-10. Given the governmental nature and governmental duties of the Dental Board, the board's enforcement activities are by definition "the State's own." Ticor, 504 U.S. at 635.

The active-supervision requirement "asks whether the State has played a substantial role in determining the specifics of the economic policy" at issue. Id.

Because the Dental Board is an arm of state government, the state's "role in determining" the specifics of the Dental Board's enforcement policies is to determine them.

2. Concerns over Accountability Do Not Justify Imposing an Active-Supervision Requirement on State Agencies.

The FTC seeks to justify an active-supervision requirement by arguing that state regulatory agencies are not accountable directly to the public. State Action Opinion, 151 F.T.C. at 621-22. The Supreme Court, however, has never suggested that state action immunity hinges exclusively on political accountability. Floyd, supra, at 1089; see City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 405-06 (1978). To the contrary, it is not the goal of antitrust law to optimize state political processes. Hovenkamp, supra, at 632.

Even if one did focus on accountability, "considerable evidence refutes the conclusion that agencies are not politically accountable." Floyd, supra, at 1091. North Carolina's licensing boards, for example, are subject to open-government laws and stringent ethics rules. Those laws and rules expose the boards to public scrutiny and disciplinary action. See N.C. Gen. Stat. §§ 132-1(a), 143-318.10(b), 138A-1 to -45; see also Jorde, supra, at 250; Floyd, supra, at 1090-91. In addition, North Carolina's licensing boards, including the Dental Board and the Pharmacy Board, include board members from the general public. See N.C. Gen. Stat. §§ 90-

22(b), -85.6(b). As these points illustrate, when boards make law and policy through rulemaking and adjudication, the boards work under public scrutiny.

Finally, direct citizen participation is less of a concern for state regulatory boards than it is for other government bodies. These regulatory boards, after all, were created to strengthen regulation of the professions by including subject-matter experts among the regulators. See, e.g., S. Motor Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 64 (1985) ("Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature."); In re Guess, 393 S.E.2d 833, 837 (N.C. 1990) ("Certain aspects of regulating the medical profession plainly require expertise beyond that of a layman. Our legislature recognized that need for expertise when it created a Board of Medical Examiners composed of seven licensed physicians and one additional member."). There is no evidence that agency members are more likely than legislators to be "captured" by private-interest groups. Wiley, supra, at 733.

3. An Active-Supervision Requirement Would Not Ensure That a State Regulatory Agency Is Following State Policy.

The FTC also argues that active supervision provides evidence that an agency's conduct reflects a state's policy. State Action Opinion, 151 F.T.C. at 616. For agencies like the Dental Board, however, an active-supervision

requirement would offer no more evidence of faithfulness to state policy than the "clear articulation" requirement already offers.

Active supervision of a state regulatory agency would offer no additional information on a state's intent to limit competition with regulation in a given field. Here, for example, the North Carolina General Assembly has expressly found that "[t]he practice of dentistry in the State of North Carolina . . . affect[s] the public health, safety and welfare and [is] subject to regulation and control in the public interest." N.C. Gen. Stat. § 90-22(a). The legislature has also decided "that only qualified persons [will] be permitted to practice dentistry in the State of North Carolina." Id.; accord Armstrong, 499 S.E.2d at 467. In view of these legislative findings, the state's policy of limiting competition in dentistry with regulation is already out in the open. Evidence that an outside body supervised the Dental Board would not make the state's decision any clearer.

In addition, an active-supervision requirement would show nothing on whether a state agency has been captured by interest groups. Easterbrook, supra, at 28; Jorde, supra, at 236. Capture, after all, might also extend to the alleged supervisor and to the legislature that created the supervision scheme.

In sum, demanding that agencies like the Dental Board show active supervision would overlook federalism concerns. Such a requirement, moreover, would add no value.

II. THE FTC'S THEORY OF AN INTRA-BOARD CONSPIRACY IS MISTAKEN AS A MATTER OF ANTITRUST LAW AND AS A MATTER OF ADMINISTRATIVE LAW.

The FTC's decision should be reversed for a second, independent reason: The Dental Board's members cannot conspire in any way that is meaningful under the Sherman Act or the FTC Act.[1] The FTC's counterargument — an argument that a public official engages in a conspiracy by acting publicly when he has overlapping private interests — has already been rejected by the Supreme Court. See Omni, 499 U.S. at 376-78; see also N.C. Bd. of Dental Exam'rs, No. 9343, slip op. at 14-16 (F.T.C. Dec. 7, 2011) (stating the FTC's "private interest" arguments), available at http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf [hereinafter Merits Opinion]. It would make no sense to attempt to revive the government/private conspiracy theory here.

A. The Members of the Dental Board Lack the Capacity to Conspire.

In Copperweld Corp. v. Independence Tube Co., 467 U.S. 752 (1984), the Supreme Court created the modern analysis of capacity to conspire. The Court held that a parent corporation and its wholly owned subsidiary "are incapable of

---

[1] In the FTC's analysis under section 5 of the FTC Act, the FTC "follow[ed] the standards of Section 1 [of the Sherman Act]." N.C. Bd. of Dental Exam'rs, No. 9343, slip op. at 10 (F.T.C. Dec. 7, 2011), available at http://www.ftc.gov/os/adjpro/d9343/111207ncdentalopinion.pdf. Under section 1 standards, the FTC had to show an agreement between parties who had the capacity to conspire. See Am. Needle, Inc. v. NFL, 130 S. Ct. 2201, 2208 (2010).

conspiring with each other for purposes of § 1 of the Sherman Act." Id. at 777. The Court explained that capacity to conspire turns on whether the interaction of "separate economic actors" "deprives the marketplace of independent centers of decisionmaking." Id. at 769; accord American Needle, 130 S. Ct. at 2212; Robertson v. Sea Pines Real Estate, No. 11-1538, 2012 WL 1672487, at *3 (4th Cir. May 14, 2012).

Based on this reasoning, multiple courts have decided that board members of the same private firm lack the capacity to conspire. See Bell v. Fur Breeders Agric. Coop., 348 F.3d 1224, 1233-34 (10th Cir. 2003); Podiatrist Ass'n, Inc. v. La Cruz Azul de P.R., Inc., 332 F.3d 6, 13 (1st Cir. 2003); Williams v. 5300 Columbia Pike Corp., 891 F. Supp. 1169, 1174 (E.D. Va. 1995); DeGregorio v. Am. Bd. of Internal Med., No. 92-4924, 1993 WL 719564, at *7 (D.N.J. Oct. 1, 1993); Ray v. United Family Life Ins. Co., 430 F. Supp. 1353, 1358 (W.D.N.C. 1977). These courts have explained that when board members act, they are acting as a single enterprise — the single company on whose board they serve — even though the board members might otherwise be considered separate economic actors. Because the board members are serving one entity, their interaction does not count as

concerted action. See Bell, 348 F.3d at 1234-35; Podiatrist Ass'n, 332 F.3d at 13; Williams, 891 F. Supp. at 1174.[2]

Here, likewise, the actions in question are not private dentists' activities. They are enforcement actions of a state agency, the Dental Board. See Merits Opinion, slip op. at 30. When the members of the Dental Board participated in these actions, they acted in the name of the Dental Board. When the Dental Board acts, it does not deprive the market of independent centers of decisionmaking. Copperweld, 467 U.S. at 769-71. North Carolina, after all, has only one regulator of dentistry — the Dental Board. See N.C. Gen. Stat. § 90-22(b). Because the board members acted in service of that one regulator, this case does not involve concerted action.[3]

The FTC argues that because most of the members of the Dental Board were practicing dentists, they had "distinct and potentially competing economic

---

[2] In American Needle, likewise, the Supreme Court agreed that an agreement between corporate officers "generally is not the sort of 'combination' that § 1 is intended to cover." 130 S. Ct. at 2212; accord ePlus Tech., Inc. v. Aboud, 313 F.3d 166, 179 (4th Cir. 2002) ("[A]cts of corporate agents are acts of the corporation itself, and corporate employees cannot conspire with each other or with the corporation."). As the American Needle Court went on to explain, agreements within a single firm are presumed, except in rare cases, to fail the requirement of concerted action. 130 S. Ct. at 2215.

[3] By contrast, the defendant brokerage firms in Robertson engaged in collective decisionmaking that — in the absence of concerted action — they would have carried out independently. Robertson, 2012 WL 1672487, at *4.

interests." Merits Opinion, slip op. at 14. This reasoning, however, overlooks the setting in which the board members acted. When the Dental Board took enforcement action regarding teeth whitening, it was the board as a state agency, not individual dentists, that acted. The FTC itself found that the board's members share a unity of interest in "regulating the practice of dentistry in the interest of public health, safety, and welfare of the citizens of North Carolina." Id. at 2.

The FTC underscored this conclusion — to its own litigation advantage — when it found that the enforcement efforts in question were sovereign acts of the Dental Board. To show market power (an element of antitrust analysis under the rule of reason), the FTC emphasized that this case involves sovereign action. The FTC stated that "[t]he Board . . . has the authority to regulate and discipline dentists in North Carolina." Id. at 30. It cited the Dental Board's ability to exclude competitors and to create barriers to entry. Id. If this case really involved the individual actions of the dentists on the Dental Board — six dentists who make up no more than 0.2% of the licensed dentists in North Carolina — the case would have failed for lack of market power. See Dickson v. Microsoft Corp., 309 F.3d 193, 207 n.17 (4th Cir. 2002) (explaining that market share is a measure of market power).

Thus, the FTC's own reasoning on market power contradicts its reasoning on capacity to conspire. At least the latter reasoning is erroneous. This case involves the enforcement actions of a single entity.

B. Omni Contradicts the FTC's Theory of Conspiracy.

The FTC's conspiracy analysis is faulty for a second reason. As noted above, the FTC reasoned that the dentists on the Dental Board were considering their "separate economic interests" when they authorized the board's enforcement actions. Merits Opinion, slip op. at 16. The Supreme Court, however, has already rejected the theory that a public official commits an antitrust violation when he considers private interests in the course of his public decisionmaking. Omni, 499 U.S. at 376-78.

In Omni, the plaintiff alleged that a city's restrictions on billboards were the product of an unlawful conspiracy between the city council and a favored billboard company. Id. at 369. The Supreme Court, however, disagreed with the argument that government officials can become parties to antitrust conspiracies. Id. at 374. If government officials could conspire simply by considering private interests, "[a]ll anticompetitive regulation would be vulnerable to a 'conspiracy' charge." Id. at 375. The Court rejected such a theory of government conspiracy as contrary to the aims of the state action doctrine. Id. at 377-79. In the end, the Court "reaffirmed [its] rejection of any interpretation of the Sherman Act that would

allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" Id. at 379 (quoting Hoover v. Ronwin, 466 U.S. 558, 580 (1984)).

The FTC's reasoning here on capacity to conspire rests on the same notions that the Supreme Court rejected in Omni. The FTC found that each dentist on the Dental Board allowed private interests — his own financial interests and those of dentists like him — to infect his public decisionmaking. Merits Opinion, slip op. at 14-16. Omni, however, holds that an allegation of private influence on government action does not state an antitrust claim. After all, "[f]ew governmental actions are immune from the charge that they are 'not in the public interest' or in some sense 'corrupt.'" Omni, 499 U.S. at 377.

As Omni shows, the FTC's theory of government conspiracy sweeps too far to be accepted. Every professional licensing agency is subject to the charge that its members — who often include professionals from the same field being regulated — have overlapping private interests. See, e.g., Kachian v. Optometry Examining Bd., 170 N.W.2d 743, 747-48 (Wis. 1969) (considering and rejecting such a challenge to a state licensing board's action). Likewise, "there is a revolving door connecting government regulatory agencies with the firms that they regulate."

Yeon-Koo Che, Revolving Doors and the Optimal Tolerance for Agency Collusion, 26 Rand J. Econ. 378, 378 (1995).[4]

If the FTC's view of capacity to conspire became law, these ever-present features of modern government would fuel tomorrow's antitrust cases.

Further, even if the FTC's reasoning could be limited in theory, it could not be implemented in practice. The FTC does not explain, nor could it explain, how a court could parse the subjective motives behind individual board members' votes. See Omni, 499 U.S. at 376-77 (noting the difficulty of distinguishing government officials' "selfish or corrupt motives" from their legitimate interest in the public

---

[4] Because private influence on government is ubiquitous, the FTC's "independent personal stake" theory of capacity to conspire makes no sense in the context of government action. See Merits Opinion, slip op. at 14 (relying on the "independent personal stake" theory); cf. Am. Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc., 367 F.3d 212, 224 (4th Cir. 2004) (declining to apply the "independent personal stake" theory in a particular health care context); Oksanen v. Page Mem'l Hosp., 945 F.2d 696, 705 (4th Cir. 1991) (declining to extend this theory and noting that the theory has been criticized for threatening to engulf the Copperweld rule).

In American Needle, the Supreme Court did leave some room for a similar theory of capacity to conspire, but it did so in a nongovernmental context (the trademark licensing practices of the NFL). See 130 S. Ct. at 2215. The Court also wrote that an "independent stake" theory might apply when a firm is a mere "formalistic shell for ongoing concerted action." Id. Here, the FTC did not even attempt to show that the Dental Board — a government agency created by the North Carolina General Assembly in 1879 — is a mere "shell" for a private conspiracy. See Merits Opinion, slip op. at 2 (acknowledging that the board "is an agency of the State of North Carolina and is charged with regulating the practice of dentistry in the interest of public health, safety, and welfare of the citizens of North Carolina").

welfare). In addition, if the law allowed mixed motives to support antitrust claims, agencies would be less likely to act, because they could never predict the outcome of motive-based antitrust litigation. Based on similar concerns, the Supreme Court in Omni rejected "deconstruction of the governmental process and probing of the official 'intent'" in antitrust cases. Id. at 377.

For these reasons, the FTC's theory of an intra-board conspiracy is unsound.

III. STATE REGULATION OF DENTISTS AND OTHER HEALTH PROFESSIONALS PROMOTES CONSUMER WELFARE.

Finally, the antitrust analysis in this case should not overlook the reasons why state governments regulate dentistry and other health professions. The states license the health professions to help regular citizens — most of whom lack technical expertise — select dentists, doctors, pharmacists, and other professionals who will competently serve them. This consumer benefit from licensing is supported by economic theory, empirical evidence, and human experience.

A. State Regulation of Health Professions Gives Consumers Needed Information on Providers' Qualifications.

Information asymmetries, a well-known market failure, are prevalent in markets for health services. Most consumers lack the expertise to predict the quality of services that a doctor, dentist, or pharmacist will offer them. See Marc T. Law & Sukkoo Kim, Specialization and Regulation: The Rise of Professionals

and the Emergence of Occupational Licensing Regulation, 65 J. Econ. Hist. 723, 724-25 (2005).

Without objective information on the quality of health professionals, consumers know only that the market contains a spectrum of quality, but they do not know where any particular provider falls on that spectrum. Hayne E. Leland, Quacks, Lemons, and Licensing: A Theory of Minimum Quality Standards, 87 J. Pol. Econ. 1328, 1329 (1979). A consumer who does not know what level of quality to expect will assume that all providers are of average quality. Id.

That common assumption has a key consequence. If consumers assume that all providers offer average quality, then consumers will pay no more than the price associated with average quality. High-quality providers, in turn, will not get paid for the incremental costs of providing high-quality service. As a result, those high-quality providers will either leave the market or lower their quality of service to meet consumers' willingness to pay. Carolyn Cox & Susan Foster, Economic Issues: The Costs and Benefits of Occupational Regulation 6 (1990). For these reasons, the absence of information on provider quality will cause society as a whole to receive a suboptimal quality of service.

State regulation of professionals tackles this problem by giving consumers information on providers' quality. Leland, supra, at 1330. Regulation also forces providers to invest in training to make themselves more able to provide higher-

quality service. Carl Shapiro, Investment, Moral Hazard, and Occupational Licensing, 53 Rev. Econ. Stud. 843, 844 (1986).

In sum, professional regulatory boards serve the important task of informing the public on which service providers can be trusted to provide safe services of the appropriate quality.

B. Empirical Evidence Shows That Regulation Improves the Quality of Services in Health Professions.

Empirical studies support the economic theory that regulation of health professions improves service quality. One study, in fact, directly examined the consumer benefits from licensing requirements for dentists. See Arlene Holen, Pub. Research Inst., The Economics of Dental Licensing 54 (1978). The study showed that higher licensing standards reduced the probability of adverse outcomes. Id. The study also concluded that dental health increased in states that adopted stricter licensing of dentists. Id.

These conclusions match the analysis of a more recent study on the effects of occupational licensing regulation during the period that gave rise to modern-day professional licensure. Law & Kim, supra, at 723. That study found that:

- greater information asymmetries in a profession resulted in more rigorous regulations;

- consumers were most concerned about information asymmetries for professional services — including dentistry and medicine — for which the consequences of poor quality would be severe; and
- the regulations that created the greatest barriers to entry, including regulations that lengthened medical education, were the ones most likely to increase the quality of services.

Id. at 727-28, 736, 743.

Other research on the effects of licensing on pharmacists and optometrists similarly suggests that regulation can benefit consumers of these services. One study, for example, concluded that licensing requirements for pharmacists were correlated with greater consumer satisfaction. Samuel C. Martin, An Examination of the Economic Side Effects of State Licensing of Pharmacists (1982). In another study, stronger licensing standards for optometrists were correlated with higher service quality. James W. Begun, Professionalism and the Public Interest (1981).

As with any area of academic inquiry, the empirical evidence is not uniform. But even those studies that conclude that more stringent licensing does not always improve quality of service accept that, in general, licensing requirements are associated with greater levels of provider competence for new entrants. See, e.g., Morris M. Kleiner, Occupational Licensing, 14 J. Econ. Perspectives 189, 197 (2000). In addition, researchers have not concluded that the increased prices

associated with licensing exceed the benefits of licensing to consumers, especially when consumers cannot evaluate the quality of a health professional's services. See Cox & Foster, supra, at 41.

C. Real-life Examples Show the Dangers Posed by Unlicensed Health Care.

The benefits of professional regulation are shown not only by economic theory and empirical studies, but also by the disturbing results that can occur when dental services and other health care is provided by unregulated practitioners.

In one recent incident, for example, unlicensed dentists failed to treat the wounds that they created, causing serious infections. Jaie Avila, Hidden Camera Investigation: Unlicensed Dentists in San Antonio, WOAI.com (Sept. 22, 2010), http://www.woai.com/content/troubleshooters/story/Hidden-Camera-Investigation-Unlicensed-dentists/P0XVdN0MmEOb0PWBd_3Tfw.cspx.

In another series of incidents, unlicensed dentists in New Jersey used rusty tools on their patients, causing injuries and infections. Alexi Friedman, N.J. Authorities Crack Down on Unlicensed Dentists, NJ.com (Aug. 23, 2009), http://www.nj.com/news/index.ssf/2009/08/nj_authorities_crack_down_on_u.html.

Cosmetic medical procedures are no exception to these dangers:

- One provider smoked a cigar while performing liposuction on a victim who was only locally anesthetized. The victim developed a serious

infection in her abdomen. Vivian Ho, S.F. Man Charged with Acting Like Cosmetic Surgeon, S.F. Chron. (Dec. 23, 2011), http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2011/12/23/BAFO1MG3LN.DTL.

- Another provider injected a mixture of cement, glue, mineral oil, and tire sealant into a victim, who then developed serious pain, pneumonia, and an infection. Rheanna Murray, More Possible Victims in Fix-A-Flat Butt Operations Come Forward: Cops, N.Y. Daily News (Nov. 23, 2011), http://www.nydailynews.com/news/national/victims-fix-a-flat-butt-operations-cops-article-1.981646.
- A similar incident occurred in North Carolina. Emery P. Dalesio, NC Woman Charged with Buttocks Injection Gone Bad, The Huffington Post (Dec. 8, 2011), http://www.huffingtonpost.com/2011/12/08/nc-woman- charged-with-but_0_n_1137933.html.
- One woman died after receiving cosmetic injections from an unlicensed provider. Courtney Hutchison, Plastic Surgery Scam? Brit Dies in Philly After Butt Injection, ABC News (Feb. 10, 2011), http://abcnews.go.com/Health/WomensHealth/death-butt-injection-prompts-warnings-plastic-surgeons/story?id=12878427#.T3XkOGEgd2A.

These same dangers are prevalent for unlicensed pharmacists, who are likely to dispense unapproved drugs and to dispense drugs that contain the wrong active ingredients. See, e.g., U.S. Food & Drug Admin., The Possible Dangers of Buying Medicines over the Internet (Nov. 2010), http://www.fda.gov/downloads/ForConsumers/ConsumerUpdates/UCM204943.pdf. As these examples illustrate, undermining states' efforts to regulate dentistry and other health care can lead to severe human consequences.

CONCLUSION

The NABP and the Pharmacy Board respectfully request that this Court reverse the FTC's decision.

This 17th day of May, 2012.

/s/ Matthew W. Sawchak
Matthew W. Sawchak (N.C. Bar No. 17059)
Stephen D. Feldman (N.C. Bar No. 34940)
Ellis & Winters LLP
Post Office Box 33550
Raleigh, North Carolina 27636
(919) 865-7000; fax (919) 865-7010
matt.sawchak@elliswinters.com

Attorneys for Amici Curiae
National Association of Boards of Pharmacy and
North Carolina Board of Pharmacy

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)

Certificate of Compliance with Type-Volume Limitation,
Typeface Requirements, and Type Style Requirements

A. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because:

this brief contains fewer than 7,000 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

B. 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 14 Point Times New Roman in Microsoft Word 2010.

This 17th day of May, 2012.

/s/ Matthew W. Sawchak
Matthew W. Sawchak

CERTIFICATE OF SERVICE

I certify that on this the17th day of May, 2012, I filed the foregoing brief with the Clerk of Court using the CM/ECF System, which will send notice of the filing to the following registered CM/ECF users:

Noel L. Allen, Esq.: nallen@allen-pinnix.com
Alfred P. Carlton, Jr., Esq.: acarlton@allen-pinix.com
M. Jackson Nichols, Esq.: mjn@allen-pinnix.com
Catherine E. Lee, Esq.: clee@allen-pinnix.com
Nathan E. Standley, Esq.: nstandley@allen-pinnix.com
Brenner A. Allen, Esq.: ballen@allen-pinnix.com

Attorneys for Petitioner

John F. Daly, Esq.: jdaly@ftc.gov
Imad D. Abyad, Esq.: iabyad@ftc.gov

Attorneys for Respondent

This 17th day of May, 2012.

/s/ Matthew W. Sawchak
Matthew W. Sawchak