No. 13-534

In the Supreme Court of the United States

NORTH CAROLINA STATE BOARD
OF DENTAL EXAMINERS,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF CALIFORNIA OPTOMETRIC ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

William A. Gould, Jr.
Counsel of Record
Daniel L. Baxter
WILKE, FLEURY, HOFFELT,
GOULD & BIRNEY, LLP
400 Capitol Mall, 22nd Floor
Sacramento, CA 95814
(916) 441.2430
wgould@wilkefleury.com

Attorneys for Amicus Curiae California Optometric Association

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

OTHER AUTHORITY

THE CALIFORNIA OPTOMETRIC ASSOCIATION'S INTEREST IN THE INSTANT MATTER[1]

The California Optometric Association ("COA") is the statewide optometric association for the State of California, with a membership of over 2,600 optometrists. COA's service to California practitioners spans more than 100 years. During that time, COA has been a leader in advocating for the rights of licensed professionals in the State of California, and a principal force in developing and providing input on relevant legislation and optometric standards of practice, sponsoring educational programs, and issuing professional publications to improve the quality of services provided by the optometric profession.

As one of the largest organizations of associated optometrists in the United States and the primary organization representing the interests of California optometrists, COA has a keen interest in the outcome of these proceedings. A quarter century ago, COA was a party to California State Board of Optometry v. Federal Trade Commission, 910 F.2d 976 (D.C. Cir. 1990), in which the D.C. Circuit held that "state regulation of the practice of optometry is a quintessentially sovereign act." Id. at 982. COA believes that the same sentiment applies in this case,

---

[1] No attorney for any party authored this brief in whole or in part, and no person or entity other than the California Optometric Association or its counsel have made a monetary contribution to the preparation or submission of this brief. All parties to this action have given blanket consents to the filing of amicus briefs, which consents are on file with the Clerk of the Supreme Court.

which is why it is submitting this brief in support of the Petitioner.

SUMMARY OF ARGUMENT

Affirmance of the United States Court of Appeals for the Fourth Circuit's decision in this matter would significantly undercut 70 years of "state action" jurisprudence developed since this Court's decision in Parker v. Brown, 317 U.S. 341, 350-351 (1943). Prior to the Fourth Circuit's disposition below, no court had held that a state regulatory board was a "private" actor simply because, under state law, a majority of the board's members were "market participants" elected by other "market participants." Should the Fourth Circuit's decision be affirmed herein, long-held protocols blessed by this and other courts would be set aside in favor of a framework that would gravely threaten the States' ability to regulate licensed professionals within their borders. Neither law nor sound policy supports such an outcome.

ARGUMENT

I. AFFIRMANCE OF THE FOURTH CIRCUIT'S DECISION WOULD FUNDAMENTALLY ALTER THE WAY THAT LICENSED PROFESSIONALS ARE REGULATED

The FTC's attempts to increase its sphere of regulatory influence within and among the various States have been rather like Russia's historical efforts to acquire a warm water port—repeated and persistent. Twenty-five years ago, the FTC promulgated a series of ophthalmic practice rules known as "Eyeglasses II." 54 Fed.Reg. 10,285 (1989). Eyeglasses II revised Title 16,

Part 456 of the Code of Federal Regulations to include a new provision, entitled "State Bans on Commercial Practice." That provision barred state and local governmental entities from implementing or enforcing laws the FTC found to be "unfair," including, *inter alia*, laws that (a) prohibited laypersons from employing optometrists to provide optometric services, (b) limited the number of offices that may be owned or operated by optometrists, and (c) prohibited optometrists from practicing under any name other than their own. Id. at 10,306; see, also, California State Board of Optometry, 910 F.2d at 979.

Following the FTC's promulgation of Eyeglasses II, a group of petitioners, including COA, challenged the FTC's actions on statutory and constitutional grounds. The D.C. Circuit presented the questions under review as including "whether a State acting in its sovereign capacity is a 'person' within the FTC's enforcement jurisdiction under section 5(a) of the [Federal Trade Commission Act]." Ibid.[2] To address and resolve that question, the D.C. Circuit described its charge as first requiring a determination of Congress's intention in promulgating the FTC Act. Ibid. As to that issue, the court quickly concluded that "[t]here is nothing in the language of [the FTC Act] to indicate that Congress intended to authorize the FTC to reach the 'acts or practices' of States acting in their sovereign capacities," and additionally found nothing in the FTC Act's legislative history or otherwise that would alter that conclusion. Id. at 980. Citing the "state action"

---

[2] As this Court well knows, that jurisdiction includes the power to prevent "unfair or deceptive acts or practices," as well as unfair methods of competition. 15 U.S.C. § 45(a) (1988).

doctrine enunciated by this Court in Parker v. Brown, 317 U.S. at 350-351,[3] the D.C. Circuit observed that "properly framed, the question before us is not simply whether a State is a person under section 5(a)(2) of the Act, but whether a State acting in its sovereign capacity is subject to the Act." California State Board of Optometry, 910 F.2d at 980. After determining that the state action doctrine does serve to limit the FTC's rulemaking authority (id. at 981), the court answered the question as follows:

> An agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it. When one applies this rule of construction to [the pertinent provisions of the FTC Act], it becomes clear that the FTC had no authority to promulgate Eyeglasses II.
>
> First, state regulation of the practice of optometry is a quintessentially sovereign act. Second, there can be little question that accepting an interpretation of the Act that sanctions [Eyeglasses II] would alter the usual balance between the Federal Government and the States. [Eyeglasses II] subjects States to direct FTC regulation by declaring that certain state laws constitute unfair acts or practices. It thus empowers the FTC directly to "prevent"

---

[3] Under that doctrine, when a State acts in a sovereign rather than proprietary capacity, it is exempt from the antitrust laws even though those laws may restrain trade. Ibid.; see, also, City of Lafayette v. Louisiana Power & Light Co., 435 U.S. 389, 391, 408-413 (1978).

> States from imposing certain restrictions on the practice of optometry. *See* 15 U.S.C. § 45(a)(3). Third, nothing in either the language of the Act or its legislative history evidences a congressional intent to alter the state-federal balance as [Eyeglasses II] would . . . As nothing in the language of the Act clearly expresses a congressional intent to empower the FTC to regulate state action, we must reject [Eyeglasses II].

Id. at 982.

The FTC's actions in the present case—which are the product of a decade-long germination period (see, e.g., Brief for Petitioner, at p. 5)—are merely an attempt to achieve the aim rejected in California State Board of Optometry by means of the back door. Indeed, by characterizing the North Carolina State Board of Dental Examiners ("NCSBDE") as a "private" actor rather than a sovereign governmental body, the FTC not only seeks to bypass the analytical framework described above, but significantly hobble the state action doctrine as a whole. In the years since Parker v. Brown, state legislatures have seen fit to assign rulemaking and enforcement authority to dedicated, profession-specific boards and similar agencies, *not* to delegate regulatory responsibility away from "the state," but to ensure that—in an age of ever-increasing specialization—that responsibility is being exercised by those best equipped to do so. In California alone, there are 31 professional boards or commissions governing licensed professionals, from accountants to pharmacists, from court reporters to optometrists. It invokes no unrealistic parade of horribles to suggest

that, were the FTC and Fourth Circuit's novel formulation of "state action" to be accepted by this Court, the States' ability to regulate licensed professionals would be seriously threatened.

To be sure, should the result below be affirmed, States would be given a Hobson's choice between (1) "re-centralizing" regulatory authority in an attempt to avoid the reach of the Court's finding that board-based regulation of licensed professionals is "private" conduct, rather than "state action," or (2) ceding supervisory authority to the FTC and its sister agencies at the federal level. Neither outcome is acceptable. The former would divest the States of the ability to utilize the skills and expertise of "market participants" in regulating licensed professions. The latter would not only "alter the usual constitutional balance between the States and the Federal Government" in absence of any congressional intent to do so (Will v. Michigan Department of State Police, 491 U.S. 58, 64 (1989)), but place that authority in the hands of bodies in an inferior position to review and address the specific concerns faced by each licensed profession within each State. In either case, "[w]ise and efficient federalism calls for no such result." Phillip E. Areeda, Antitrust Law ¶ 212.3b (Supp. 1982), at pp. 56-67.

II. AFFIRMANCE OF THE FOURTH CIRCUIT'S DECISION COULD NOT BE CONFINED TO A LIMITED SCOPE

Nor would the reach of an order affirming the Fourth Circuit's decision be limited to the facts of this case, or to the acts of boards whose authorities or compositions mirror that of the NCSBDE. In that vein,

and in the proceedings below, the FTC attempted to contrast the NCSBDE with other States' boards that have, for instance, (a) less independent rulemaking power, or (b) fewer licensee members, or (c) more members directly appointed by the governor. However, the fact of the matter is that there is not a single case on the books—until now—in which a state agency acting pursuant to state law has been subjected to federal antitrust strictures, *regardless* of whether the agency is a majority licensee board, or elected by market participants, et cetera. Moreover, not only would inventing criteria that distinguishes one state agency from another for purposes of state action immunity be a byzantine and unwieldy task, but one that would practically invite confusion and conflict:

> [T]he real question is whether a jury can tell the difference . . . between municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *lawful* and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with-private-parties that is *unlawful*. The dissent does not tell us how to put this question coherently, much less how to answer it intelligently.

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 375 n. 5 (1991) (emphasis in original).

The D.C. Circuit in California State Board of Optometry, just like this Court in Parker v. Brown, arrived at the right decision. For federalism as we know it to work, the state action doctrine must be observed in a way which ensures that States' sovereign interests are legitimately and adequately protected.

Were this Court to defer to the Fourth Circuit's construction and uphold the FTC's actions in this matter, it would "short-circuit the protection offered States by the political process." California State Board of Optometry, 910 F.2d at 981. Such a result cannot and should not obtain.

CONCLUSION

For the reasons set forth above and in Petitioner's Brief, COA urges this Court to reverse the judgment of the Fourth Circuit, and to grant the NCSBDE's petition for review of the FTC's final order.

Respectfully submitted,

William A. Gould, Jr.
Counsel of Record
Daniel L. Baxter
WILKE, FLEURY, HOFFELT,
GOULD & BIRNEY, LLP
400 Capitol Mall, 22nd Floor
Sacramento, CA 95814
(916) 441.2430
wgould@wilkefleury.com

Attorneys for Amicus Curiae
California Optometric Association

DATED: May 30, 2014