No. 13-534

IN THE

Supreme Court of the United States

THE 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 FOR AMICUS CURIAE NATIONAL COUNCIL OF EXAMINERS FOR ENGINEERING AND SURVEYING IN SUPPORT OF PETITIONER

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INTEREST OF AMICUS CURIAE

Founded in 1920, the National Council of Examiners for Engineering and Surveying ("NCEES") is a national nonprofit organization dedicated to advancing professional licensure for engineers and surveyors.[1] NCEES's members

[1] No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the amicus curiae or its counsel made a

include 69 engineering and surveying licensure boards, from all 50 States, the District of Columbia, Guam, Puerto Rico, and the U.S. Virgin Islands. NCEES develops, administers, and scores the standardized examinations used for engineering and surveying in the United States. It maintains model laws and rules that States can use when enacting legislation. NCEES also facilitates professional mobility and promotes uniformity of the United States licensure processes through services for its member licensing boards and licensees, such as keeping records, providing exam preparation materials, and exam administration.

NCEES is concerned that the position adopted by the FTC and the Fourth Circuit in this case, if affirmed, will subject its member licensing boards to second-guessing by federal antitrust regulators, impeding the boards' ability to effectively carry out their state-appointed task of regulating the engineering and surveying professions and protecting the general public. By denying immunity to state licensing boards that employ market participants unless they show active supervision by other parts of state government, the decision directly interferes with the sovereign right of the States and their agencies to order their own affairs. And by exposing board members to the risk of federal antitrust lawsuits and liability for doing their jobs, the decision will make it harder to recruit and retain board members willing to make the difficult decisions that are sometimes necessary to regulate the professions. By requiring additional supervision as a matter of federal law, the decision would also

monetary contribution to its preparation or submission. The parties have consented to the filing of this brief.

interpose wasteful additional layers of bureaucracy and complicate the state decision-making process. In NCEES's view, federal regulators and courts should not be permitted to interfere in the sovereign, democratic determinations of States about how best to structure their own licensing boards in order to regulate professions in the public interest.

SUMMARY OF THE ARGUMENT

A state agency, even when directed by the legislature to fill positions with individuals who are market participants, is still a state agency, and therefore should receive antitrust immunity without having to satisfy the "active supervision" prong of *Cal. Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 104-05 (1980). The Fourth Circuit's holding that the involvement of market participants in operating a state agency renders the agency a "private actor" that must satisfy the supervision requirement impermissibly allows the FTC and courts to look behind the structure, staffing and operation of state-created licensing boards, to delve into the motives of State actors, and to deem licensing boards "private actors," simply because sovereign States chose to delegate duties and powers to boards whose members include market participants.

To lose immunity to federal antitrust law is to lose a basic protection that enables state licensing boards to fully function as delegated state agencies. If the Fourth Circuit is affirmed, these agencies will confront serious impediments to fulfilling their state-appointed duties. If affirmed, the decision below would press licensing boards into one of several paths, none of which reflects the outcome of the states' own democratic processes:

1. By retaining the status quo—*i.e.*, keeping market participants on their boards—states will expose the boards to the risk of antitrust liability for just doing their jobs. This would harm the ability of states to recruit and maintain well qualified members of the professions to serve part-time on licensing boards and would chill the boards' ability to make tough calls. Thus, States would lose many of the benefits they sought when they delegated legislative authority to licensing boards, and included on those boards the very people who were most qualified to understand the needs and concerns of the professions they are charged with regulating.

2. To the extent States can only preserve their boards' immunity by instituting "active supervision" that the FTC or federal courts may deem sufficient (but which the States had not deemed necessary), States would be forced to engage in expensive, wasteful institutional experiments, with little assurance that the supervision would reflect adequate subject-matter knowledge or satisfy any particular tribunal. Adding a layer of bureaucracy would complicate and alter the state-designed decision-making process while still subjecting boards and their members to a continued risk of liability.

3. States may feel it necessary to legislatively eliminate market participants from their licensing boards altogether in order to avoid antitrust liability. But when a decision has such coercive effect, it creates serious federalism concerns. The decision below substitutes the FTC or the courts' determination that action of a state agency is "private" over the State's own demonstrated intent to delegate regulation of professions as a sovereign state activity. This contravenes this Court's

pronouncements that antitrust law should not nullify the States' democratic processes for regulating their economies and protecting the public welfare.

ARGUMENT

I. STATE-CREATED LICENSING BOARDS ARE STATE ACTORS REGARDLESS OF WHETHER THEY INCLUDE MARKET PARTICIPANTS.

State professional licensing boards are state actors, even when their members are participants in the market regulated by the board. Acting with authority delegated from a sovereign State, the boards perform their duties as the State. The decision below erroneously holds that when an agency is operated by market participants elected by other market participants, the agency is a "private actor" that may only receive federal antitrust immunity by showing that its behavior is "actively supervised by the State itself." *Midcal*, 445 U.S. at 105. Under this Court's precedents, a sovereign State's policy is immune from federal antitrust attack, and that immunity should not be conditioned on whether the FTC thinks the agency's decision-making process is sufficiently independent from the interests of those being regulated. Pet. App. 13a. States generally employ market participants on licensing boards precisely ***because*** they have specialized knowledge and perspective gained by their participation in the regulated profession. The States should not be forced to change these sovereign legislative choices in order to satisfy the dictates of a federal regulatory agency.

In *Parker* v. *Brown*, 317 U.S. 341, 350-51 (1943), the Court concluded that "nothing in the language of the Sherman Act or in its history * * * suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." In a long line of cases stemming from *Parker*, the Court has upheld the rule that antitrust laws do "not apply to anticompetitive restraints imposed by the States 'as an act of government.'" *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991) (quoting *Parker*, 317 U.S. at 352). The "threshold inquiry in determining if an anticompetitive activity is state action of the type the Sherman Act was not meant to proscribe is whether the activity is required by the State acting as sovereign." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 790 (1975). The "power to make decisions and to set policy is what gives the State its sovereign nature." *FERC* v. *Mississippi*, 456 U.S. 742, 761 (1982).

When state legislatures exercise their power to create licensing boards, they make a sovereign decision to delegate to boards the authority to regulate a profession. *See id.* at 779 (O'Connor, J., concurring in part and dissenting in part) ("It is difficult to argue that a statute structuring the regulatory agenda of a state agency is not a regulation of the 'State.'"). When a state legislature adopts legislation—as North Carolina did in creating the Board of Dental Examiners, and legislatures routinely do across the Nation in creating other licensing boards—their "actions constitute those of the State * * * and *ipso facto* are exempt from the operation of the antitrust laws.'" *Hoover* v. *Ronwin*, 466 U.S. 558, 567-68 (1984).

The States have been using this sovereign power to delegate the regulation of professions to licensing boards such as NCEES's members for more than a century. *See*, *e.g.*, Douglas A. Wallace, *Occupational Licensing and Certification: Remedies for Denial*, 14 Wm. & Mary L. Rev. 46 & n.1 (1972) (noting that, in the United States, "the period from 1906-35 represented a peak in the enactment of new licensing legislation"). Today, it is not unusual for a State to license as many as 60 separate occupations. *Id.* NCEES traces its own history to the 1920s, when several States enacted laws requiring registration of engineers offering or performing professional services within their respective jurisdictions. Joana Acorn Corley, ed., *The History of the National Council of Examiners for Engineering and Surveying: 1920-2004* at ix (3d ed. 2004). NCEES's member boards "are delegated with the authority to and are charged with the responsibility of administering the provisions of the laws of their respective states/territories/jurisdictions, which is an exercise of the police powers reserved to the states by the U.S. Constitution." *Id.*

With regularity, sovereign States also direct that the boards include professionals who are market participants in order to obtain benefits that legislatures cannot readily obtain otherwise. *See 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."). Using market participants enables professionals to be regulated by other knowledgeable and experienced professionals, rather than laypersons or other more detached and likely less informed government employees. *See Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 772 (1999) (acknowledging "the common view that the lay public is incapable of adequately evaluating the quality of medical services").[2] States benefit from this expertise without having to take on the considerable expense of having members of all of the professional boards be full-time government employees. *See Filarsky* v. *Delia*, 132 S. Ct. 1657, 1662-63, 1665-66 (2012) (need to reduce size of bureaucracy, *inter alia*, is reason for the longstanding government tradition of employing "public servant[s]" who "temporarily or occasionally discharge[] public functions" in addition to carrying on regular business). Thus, all 69 NCEES member boards include individuals that are licensed and practice in the professions they are charged with regulating.

Until the Fourth Circuit's ruling, States could employ market participants on licensing boards in this manner with the expectation that the boards' actions would receive immunity from federal antitrust law as acts of the State. *See Hoover*, 466 U.S. at 574 ("The reason that state action is immune from Sherman Act liability is * * * that the State itself has chosen to act."). Because licensing boards act as state agencies themselves, no additional State entity was required to confirm that decisions of the boards bore the imprimatur of the State or adhered to State policy.

The decision below, however, has created a cloud of doubt for States that exercise their sovereignty to establish licensing boards that include market

[2] *See also 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.").

participants. In the FTC's view, the "operative factor" in determining whether antitrust immunity applies "is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated." Pet. App. 13a (citing FTC, *Interlocutory Order In re North Carolina State Bd. of Dental Exam'rs*, 151 F.T.C. 607, 619, 2011 WL 3568990 (Feb. 3, 2011), ("FTC Order"). The Fourth Circuit agreed, stating that *Midcal* applies "when a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership." Pet. App. 15a. Specifically, the court held that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor." Pet. App. 17a.

As a "private" actor, an agency is only entitled to immunity if it can show that its conduct is authorized by a "clearly articulated * * * state policy" to displace competition and the challenged conduct is "actively supervised" by state officials. *Midcal*, 445 U.S. at 104-05. The "clearly articulated" state policy prong applies equally to state agencies, municipalities, and private parties. *Hoover*, 466 U.S. at 568-69; *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46 (1985); *S. Motor Carriers*, 471 U.S. at 62-64 (agencies can only implement policies adopted by "the legislature"). But under the Court's prior decisions, the "actively supervised" prong has been reserved for situations in which the State "actively supervised" the conduct of ***private*** actors—rather than the State's own agencies or a municipality—so as to "ma[ke] the conduct its own." *Patrick* v. *Burget*, 486 U.S. 94, 105-06 (1988); *see also Hallie*, 471 U.S. at 47 ("Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.").[3] The Court has never imposed the supervision requirement on an agency where the actor ***is*** a state agency. *See Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue."); *see also* Pet. Br. 3-5.

By holding that agencies with market participants elected by other market participants are "private actors," the Fourth Circuit's decision collapses an essential distinction erected by the Court's precedents. "When the conduct is that of the sovereign itself * * * the danger of unauthorized restraint of trade does not arise." *Hoover*, 466 U.S. at 569. Therefore, federal antitrust law does not forbid States from imposing market restraints "'as an act of government.'" *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *Parker*, 317 U.S. at 352). The Fourth Circuit's decision portends that ***any*** state agency that is made up of market participants might end up as the target of a federal antitrust suit or agency enforcement action if the board cannot make a showing that it acted with state supervision deemed sufficient by the FTC or a court. Accordingly, if that decision is upheld, a vast number of boards and their members would be actively concerned on an ongoing basis as to whether

[3] *See*, *e.g.*, *Midcal*, 445 U.S. at 105-06 (state-authorized price setting by private parties in wine business); *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 634-35 (1992) (supervision requirement 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").

their day-to-day decisions might be second-guessed as a violation of federal antitrust law.

Given its important role in the operation of State licensing boards, antitrust immunity should not depend on a judicial tribunal or the FTC's fact-specific conclusions about whether a board's carrying out of sovereign functions are really serving "private" interests. The Court has specifically considered this problem with respect to alleged conspiracy between a regulatory entity and independent private actors, and "reject[ed] [ ] 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.'" *Omni*, 499 U.S. at 379 (quoting *Hoover*, 466 U.S. at 580).

In *Omni*, the Court rejected the view that "governmental *regulatory* action may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties." *Id*. at 375. As the Court reasoned:

> The impracticality of such a principle is evident if, for purposes of the exception, "conspiracy" means nothing more than an agreement to impose the regulation in question. Since it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule: All anticompetitive regulation would be vulnerable to a "conspiracy" charge.

Id.

Omni explained that immunity remains despite conspiracy between private actors and government officials, because "it [is] impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been infected by selfishly motivated agreement with private interests." *Id*. at 383. Instead, "where the action complained of * * * was that of the State itself, the action is exempt from anti-trust liability regardless of the State's motives in taking the action." *Id*. at 377-78.

Omni's refusal to inquire into the motives of state actors applies with even more force in the situation presented by this case, where there is no allegation that a board conspired with private, non-board members. The court below deemed the official board members themselves to be "private actors" because they are market participants elected by other market participants. App. 17a. But if the mere identity of board members as market participants is sufficient to render activity private and (without a further showing of supervision) potentially conspiratorial, then the exception would "virtually swallow up the *Parker* rule," *Omni*, 499 U.S. at 375, by allowing the FTC or courts to speculate about the motives of all state-authorized board officials.

As the Court stated in *Omni*, if a state entity's decision to regulate "is made subject to ex post facto judicial assessment" of factors such as whether the officials acted for private gain or public interest, "with personal liability of [public officials] a possible consequence, we will have gone far to 'compromise the States' ability to regulate their domestic commerce.'" *Id*. at 377 (quoting *S. Motor Carriers*, 471 U.S. at 56); *see also id*. at 378 (rejecting exception to immunity that "seeks (however impractically) to draw the line of impermissible action" as "prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest").

This issue is as important to NCEES as it is for petitioner. All 69 NCEES member licensing boards, like petitioner, include market participants as board members. To take one example, NCEES's member licensing board in North Carolina is authorized by the State's legislature to regulate the engineering and surveying professions in the public interest. The North Carolina Engineering and Land Surveying Act (the "Act") provides that engineering and land surveying, "[i]n order to safeguard life, health, and property, and to promote the public welfare" are "declared to be subject to regulation in the public interest." N.C. Gen. Stat. § 89C-2. No person may practice or offer to practice engineering or land surveying in North Carolina "unless the person has been duly licensed." *Id.*

Through the Act, the North Carolina General Assembly created a State Board of Examiners for Engineers and Surveyors ("E&S Board"), and assigned it the "duty * * * to administer the provisions" of the Act. *Id.* at § 89C-4. The E&S Board consists of four licensed professional engineers, three licensed professional land surveyors and two public members who are neither engineers nor land surveyors. *Id.* Each engineer and land surveyor member of the Board must be a licensed professional engineer or land surveyor, respectively, "engaged in the lawful practice of engineering in North Carolina for at least six years." *Id.* at § 89C-5. All members are appointed by the Governor, but the appointments are "preferably * * * made from a list of nominees submitted by the professional societies for engineers and land surveyors" in North Carolina." *Id.* at §

89C-4. Thus, the board includes market participants who, while not directly elected by other market participants (like petitioner), may be appointed from lists submitted by professional societies. Each member of the E&S Board receives a certified appointment from the Governor and must "file with the Secretary of State a written oath or affirmation for the faithful discharge of the duties." *Id.*

The legislature gives the E&S Board numerous powers binding on all licensees, including the right to adopt and amend rules of procedure reasonably necessary to perform its duties; to regulate its procedures, meetings and records; to administer exams; and to enforce rules of professional conduct. N.C. Gen. Stat. § 89C-10(a). The E&S Board is required to adopt an official seal, *id.* at § 89C-10(b), and may "in the name of the State" apply for injunctive relief to enforce or restrain violations of the Act, *id.* at § 89C-10(c). It may examine applicants for licenses, issue license certificates, investigate matters within its jurisdiction, establish and conduct instructional programs and refresher courses for licensees, license sponsors of continuing professional competency activities, and deal with real property in the same manner as a private person or corporation, subject only to approval of the Governor and the Council of State. *Id.* at § 89C-10(d)-(i).

The North Carolina E&S Board is illustrative of the ways that States, in an exercise of their sovereign authority, choose to organize such boards. North Carolina has chosen to delegate its authority to regulate a profession by employing market participants that are appointed by the governor from a slate of candidates presented by professional societies, rather than by an election. Charged and even sworn to faithfully carry out the board's duties, its officials are not "private" actors; they are empowered to exercise broad authority to create and enforce policies and to undertake a variety a means to regulate the profession in the public interest. Such boards possess all attributes of state sovereignty that have long entitled them to immunity from antitrust actions. Yet under the Fourth Circuit's decision, E&S Board members—like their counterparts in all other jurisdictions, who also have market participant members—would be subject to the continual specter of antitrust claims based on whether the FTC or a court might think them "sufficiently independent from the interests of those being regulated." Pet. App. 13a.

State action immunity is too integral to the States' regulation of the professions to make it subject to second-guessing by the FTC or the courts. Licensing boards are state actors, and inclusion of market participants as members does not require the boards to clear an additional hurdle of "supervision" in order to retain immunity from antitrust liability.

II. THE DECISION BELOW PREVENTS LICENSING BOARDS FROM PERFORMING THEIR DUTIES AS THE STATE LEGISLATURES INTENDED.

If the decision below is affirmed, States that have structured their licensing boards to include market participants would generally face three alternatives going forward. States can (1) maintain the status quo; (2) attempt to predict and then implement the kind of "active supervision" of their regulatory boards that would pass muster before the FTC or a court; or (3) legislatively change the structure of their regulatory boards to exclude market participants. All these alternatives, however, would be highly disruptive, and would make it more difficult, if not impossible, for licensing boards to carry out the duties they were created to perform. Moreover, when decisions of a federal agency and courts so radically alter a State's decision-making process through the compulsion of federal law, such coercion contravenes fundamental federalism principles.

A. By Keeping The Status Quo, States Risk Losing Their Boards' Immunity And The Intended Benefits Of Employing Market Participants.

By maintaining the status quo—keeping their licensing boards structured to include market participants—States risk exposing their boards and their board members to antitrust liability, and that threat is likely to change the way boards function, losing the benefits of the form of governance the States chose in the first place.

As discussed above, States employ market participants on licensing boards for a number of practical reasons, including their expertise, familiarity with current events, and the opportunity for them to serve as officials on boards without the expense of their having to be full-time state employees. The decision below disrupts these sensible and workable solutions by exposing officials of any board that is directed to seat market participants to the constant threat of antitrust liability. The Sherman Act bars "[u]nfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce * * *." 15 U.S.C. § 45(a)(1). The prohibition applies to "[e]very contract, combination * * *, or conspiracy, in restraint of trade." 15 U.S.C. § 1. The Sherman Act and Clayton Act authorize both the FTC and private individuals, respectively, to enforce their prohibitions. 15 U.S.C. §§ 15, 45. Under these broad standards, myriad acts of state licensing boards could be subject to allegations of anticompetitive activity—as petitioner's decisions were in this case—because one of the main functions of such boards is to prevent non-qualified actors from engaging in certain market activities.

Exposing boards and their members to antitrust liability for simply doing their jobs is likely to drain state professional regulatory agencies of expertise, and make it harder to recruit other qualified officers. Practicing professionals will obviously be concerned about incurring the significant liability created by exposure to federal antitrust laws, making them reluctant to serve in those positions. This Court has long recognized that affording immunity to state actors protects the "'government's ability to perform its traditional functions' by providing immunity where 'necessary to preserve' the ability of government officials 'to serve the public good or to ensure that talented candidates were not deterred by the threat of damages suits from entering public service.'" *Richardson* v. *McKnight*, 521 U.S. 399, 408 (1997) (quoting *Wyatt* v. *Cole*, 504 U.S. 158, 167 (1992)). And the threat of liability may also distract from performance as an agency official. *See Mitchell* v. *Forsyth*, 472 U.S. 511, 526 (1985) (lawsuits may "distrac[t] officials from their governmental duties"). As the Court has acknowledged, "[t]here can be no question that the threat of being sued for damages" under the Sherman Act "will deter 'able citizens' from performing th[e] essential public service" of serving in a regulatory agency. *Hoover*, 466 U.S. at 580 n.34.

Moreover, without immunity even those officials who are still willing to serve on licensing boards may be more hesitant to make the tough calls. Immunity "encourage[s] the vigorous exercise of official authority," *Butz* v. *Economou*, 438 U.S. 478, 506 (1978), by contributing to "'principled and fearless decision-making,'" *Wood* v. *Strickland*, 420 U.S. 308, 319 (1975) (quoting *Pierson* v. *Ray*, 386 U.S. 547, 554 (1967)), and by responding to the concern that threatened liability would "'dampen the ardour of all but the most resolute, or the most irresponsible'" public officials. *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949) (L. Hand, J.)). Thus, officials may hesitate to implement or enforce a policy, such as a licensing requirement, or institute a disciplinary proceeding, for fear that it may draw allegations of anticompetitive conduct by individuals prevented from participating in the market, or by the FTC.

NCEES and its member boards are deeply concerned about the risk of unwarranted liability as a result of the Fourth Circuit's decision. Even where officials are willing to brave the risk of lawsuits by the FTC or individuals who bring suits challenging agency action, it is reasonable to expect such exposure could have a chilling effect on the officials' willingness to take actions that may be necessary to protect the public. Members of state licensing boards should not have to contend with such concerns merely for choosing to devote a portion of their valuable time to serving the public interest.

B. Requiring Additional State Supervision Would Be Wasteful And Inefficient.

States that want to continue to use market participants on their boards could preemptively seek to satisfy the *Midcal* "active supervision" requirement by attempting to predict and then implement whatever kind of supervisory apparatus would pass muster before the FTC or a court. But the standards for doing so are unclear, and such supervision would be wasteful, inefficient, and contrary to what the States themselves have decided is the best way to exercise their sovereign regulatory authority.

Where true private activity is involved, the Court has stated that the interests of competition cannot be "thwarted by casting * * * a gauzy cloak of state involvement over" allegedly anticompetitive private activity. *See Midcal*, 445 U.S. at 105-06. "The mere presence of some state involvement or monitoring does not suffice," *Patrick*, 486 U.S. at 101, and the State must show it has "exercised sufficient independent judgment and control so that the details of the [challenged action] have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634. It is hard enough to apply that test when a State is supervising private acts. But it is even harder when the actor being supervised is an official state agency, because these agencies are already comprised of members exercising state power. Presumably, sufficient supervision would involve a State adding some additional bureaucracy that could review the decisions of its dozens of licensing boards "to assure fealty to state policy." Pet. App. 13a (citing FTC Order, *supra*, at 622). But because the board members are themselves state officials charged with formulating and implementing state policy pursuant to legislative directives, it is unclear what sort of further "supervision" would pass muster with the FTC or a court that does not have the effect of stripping the boards of their statutory functions or making them purely advisory.

Moreover, whether the supervision is adequate may not be known until after the conduct is complete. The Court has described the active supervision requirement as serving an "evidentiary function" as "one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie*, 471 U.S. at 46. But a state-created licensing board's decision is already itself state policy. Tight state budgets do not allow for continual experimentation to find an institution that will satisfy the unclear expectations of federal regulators or courts. And under the Fourth Circuit's rule, licensing boards are likely to be drawn into expensive litigation over whether supervision is adequate, further discouraging the participation of qualified members who would not know whether their acts are lawful until after those acts are taken.

The supervision requirement furthermore undermines the very goals of efficiency that the States sought to obtain by creating the boards in the first place. States create licensing boards to delegate their power to people whose greater skill and competence in an area can enable a faster response to new problems. *See S. Motor Carriers*, 471 U.S. at 64. But "requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." *Id.* States are entitled to flexibility in structuring their institutions in the manner they determine best takes advantage of the efficiencies state boards provide, *id.*, and that flexibility is undermined by requiring an additional layer of supervisory bureaucracy as a federal mandate.

There is also a risk that whatever state entity is deemed sufficient to supervise licensing boards would become, in effect, a proxy for the preferences of federal antitrust regulators. If the FTC suspects that certain anticompetitive acts or policies reflect the action of "private" actors, such as board members who are market participants, it is likely that the FTC would be equally suspicious of the supervisory body's approval of the action or policy as "a product of deliberate state intervention." *Ticor*, 504 U.S. at 634. Second-guessing this second supervisory body would, in all likelihood, run afoul of other basic principles of the immunity doctrine that "preclude[] inquiry into the question whether competition is good or bad." *Soc'y of Prof'l Engr's* v. *United States*, 435 U.S. 679, 695 (1978). *See*, *e.g.*, *Omni*, 499 U.S. at 375-77 (federal regulators cannot second guess whether "governmental actions" are "not in the public interest"); *id.* at 378-79 (federal antitrust law "not directed to * * * vindicat[ing]" alleged "principles of good government").

In sum, States have already delegated authority to their licensing boards to make policy determinations as an exercise of state authority. The addition of another state supervisory body to ensure what the FTC or a court would view as sufficient fealty with state policy would be wasteful and inefficient, and would invite further impermissible interference in the States' democratic and administrative processes for regulating professions.

C. Federalism Prevents The Federal Government From Coercing States Into Changing Their Chosen Methods For Regulating Professions.

Having concluded that neither the status quo nor added state supervision present viable options for licensing boards, a State could reasonably conclude that the only way to ensure its boards avoid antitrust suspicion under the Fourth Circuit's rule would be to change their structure and staffing to eliminate the use of market participants altogether. However, not only would such an outcome destroy the benefits that the States sought to achieve with that chosen structure, but such an intrusion on a State's democratic decision-making process would contravene principles of federalism.

The Fourth Circuit concluded that subjecting a state regulatory agency to liability under the Sherman Act presents "no federalism issue" because of its "conclusion that the Board is a private actor under the antitrust laws." Pet. App. 28a. However, the court's determination that a state agency is a private actor raises federalism concerns by itself because it coerces States into altering their chosen means of governance in order to suit the preferences of a federal agency. This Court has explained that, given the rationale of *Parker* and our "national commitment to federalism * * * the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374.

Although the Constitution grants Congress broad powers, "federalism requires that Congress treat the States in a manner consistent with their status as residuary sovereigns and joint participants in the governance of the Nation." *Alden* v. *Maine*, 527 U.S. 706, 748 (1999). *See also United States* v. *Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring). The Constitution contemplates that a State's government will represent and remain accountable to its own citizens. *See New York* v. *United States*, 505 U.S. 144, 168-169 (1992); *Lopez*, 514 U.S. at 576-577 (Kennedy, J., concurring). It is fundamental that the people of a State "may alter and change their form of government at their own pleasure." *Luther* v. *Borden*, 48 U.S. (7 How.) 1, 47 (1849). A State is accorded respect for its choices about "the character of those who exercise government authority" and "the structure of its government," and those choices are integral to how "a State defines itself as a sovereign." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). And "essential" to States' independence is "'their power to prescribe the qualifications of their own officers.'" *Id*. (internal quotation omitted). This is vitally true in the manner in which state legislatures exercise their authority to protect the public through the regulation of professions. *See, e.g.*, *Barsky* v. *Bd. of Regents*, 347 U.S. 442, 449 (1954) (explaining that the "broad power to establish and enforce standards of conduct within its borders relative to the health of everyone" is "a vital part of a state's police power").

The Court has therefore cautioned against interpreting the antitrust laws so as to encroach on the States' internal governance decisions. The dual system of government makes States sovereign, and "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Parker*, 317 U.S. at 351; *Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S.

389, 412 (1978). In *Parker*, the Court held that "nothing in the language of the Sherman Act or in its history" indicated that Congress intended to restrict the sovereign capacity of the States to regulate their economies. 317 U.S. at 350. The state-action antitrust exemption is intended to protect "principles of federalism and state sovereignty" out of a recognition of the "the role of sovereign States in a federal system." *Omni*, 499 U.S. at 370.

Licensing boards embody their respective States' chosen form of governance. The States' decisions to use market participants on their boards reflects a democratically-considered decision to regulate professions (and with it, the population's safety and economic welfare) in a certain manner. The Sherman Act is not intended to "nullify a state's control over its officers and agents in activities directed by the legislature." *Hallie,* 471 U.S. at 38 (quoting *Parker*, 317 U.S. at 351). Indeed, the state immunity doctrine is designed to "protect the result of the state's political process even if that result is fundamentally at odds with federal antitrust policy." 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, 1067 (2000). "*Parker* contains no hint that the Court intended to prescribe the forms of state government, or to pick and choose among anticompetitive policies validly adopted by the state as a whole for an authorized representative of state government." *Id*. at 1104.

Nonetheless, as discussed, the decision below effectively nullifies the States' power by compelling States that seat market participants to face a limited number of undesirable options—all different from what the States had originally chosen for themselves through their own democratic processes. When the States' immunity from private suits is removed, "the course of their public policy and the administration of their public affairs" may become "subject to and controlled by the mandates of judicial tribunals without their consent, and in favor of individual interests." *Alden*, 527 U.S. at 750. (citation omitted). With respect to the regulation of professions, state licensing boards with members who are market participants may be exposed to liability suits by individual antitrust plaintiffs (likely to be the same aggrieved persons who were disfavored by the boards' regulations), or by the FTC. Alternatively, such licensing boards may have their immunity conditioned under *Midcal* on the "active supervision" of another state agency that is deemed acceptable by the FTC or a federal court. Or States may simply decide to change their structure to avoid both of those alternatives.

In any of these scenarios, federal law would be favored over sovereign state governance decisions in an area of the law—regulation of professions—that is among the states' most traditional police powers. *See Barsky*, 347 U.S. at 449. Such action imposes the "plenary federal control of state governmental processes," which "denigrates the separate sovereignty of the States." *Alden*, 527 U.S. at 749; *see also Floyd*, *supra*, at 1061 (noting criticisms that supervision requirement "imposes a costly system of 'command and control' regulation on the states as the price of obtaining antitrust immunity for their regulatory programs").

As the Court has observed, "[t]oday, as at the time of the founding, the allocation of scarce resources among competing needs and interests lies at the heart of the political process," *Alden*, 527 U.S. at 751, and this is even more important in times of perennial state budget crises. Inevitably, the "difficult decisions involving the most sensitive and political of judgments must be made," and "[i]f the principle of representative government is to be preserved to the States, the balance between competing interests must be reached after deliberation by the political process established by the citizens of the State, not by judicial decree mandated by the Federal Government and invoked by the private citizen." *Id.* "When the Federal Government asserts authority over a State's most fundamental political processes, it strikes at the heart of the political accountability so essential to our liberty and republican form of government." *Id.* The decision below has effectively deprived States of one widely chosen, sensible and reasonable form of governing their professions and economies, in favor of another structure effectively mandated by federal antitrust law. Such disrespect runs contrary to principles of federalism.

CONCLUSION

For the foregoing reasons, the Court should reverse the judgment below.

Respectfully submitted,

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