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 ANTITRUST SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF RESPONDENT

REBECCA HAW ALLENSWORTH
VANDERBILT LAW SCHOOL
131 21st Avenue South
Nashville, TN 37203

AARON EDLIN
LAW SCHOOL & DEPARTMENT OF ECONOMICS
Evans Hall #3880
UC BERKELEY
Berkeley, CA 94720

EINER ELHAUGE
Counsel of Record
HARVARD LAW SCHOOL
1575 Mass. Ave.
Cambridge, MA 02138
(617) 496-0860
elhauge@law.harvard.edu

Counsel for Amici Curiae

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

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INTEREST OF THE *AMICI CURIAE*

Amici are more than 50 scholars who teach and write about antitrust law and economics at leading universities throughout the country. While having a diverse range of antitrust views, they all share the position taken in this brief. A complete list of signatories is attached as Appendix A. We are interested in the sound development of antitrust law.[1]

SUMMARY OF ARGUMENT

Petitioner advocates a radical change in this Court's precedent on antitrust state action immunity, which has consistently held that financially-interested market participants must be treated as private actors, regardless of whether the state makes them a state agency. Under Petitioner's logic, a state instead can, by the simple expedient of calling market actors a state agency and giving them authority to enforce their cartel, immunize that private cartel and effectively repeal the operation of federal antitrust law. This sort of inverse preemption of federal antitrust law by states has never been permitted by this Court. Petitioner mischaracterizes the cases it claims support its position, which in fact have never given state action immunity to financially-interested market participants unless they are actively supervised by disinterested government actors, and ignores or mischaracterizes other cases that plainly hold the contrary.

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[1]*Amici* have no financial interest in the outcome of this matter. No counsel for a party authored this brief in whole or in part, and no person or entity, other than the *amici curiae,* has made a monetary contribution to the preparation or submission of this brief. All parties have consented in writing to the filing of this brief.

In recent decades, the states have created a host of new licensing boards made up of market participants with strong incentives to restrain trade. *See* Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* 162 U. PENN. L. REV. 1093 (2014). Occupational licensing, once limited to a few licensed professions, is widespread and growing — from 5% of the U.S. workforce in the 1950s, to 15% in the 1970s, to 30% today. Occupational licensing has been abused by incumbent market participants to exclude rivals, often in unreasonable ways, and to raise prices. This disturbing trend already costs consumers billions of dollars every year and impedes job growth, and the trend would get much worse if the Court were to accept Petitioner's argument and hold that financially-interested market participants enjoy antitrust immunity whenever the state empowers them as a state agency.

Even if the North Carolina board members were not themselves financially-interested market participants, the fact that they were all elected to their positions by financially-interested market participants should suffice to treat the board as private. After all, if a private cartel paid an employee a flat salary to fix prices for it, the fixed prices would predictably reflect the cartel's financial interests even though the employee was not a market participant and had no direct financial interest in the prices set. Thus, election by financially-interested market participants should always be treated as sufficient to treat a board as private, although such election is not necessary for such treatment when (as here) the board members are themselves financially-interested market participants.

Sufficiency should not, however be confused with necessity. Because state boards dominated by financially-interested market participants are almost always appointed, if the Court changed current law to make election by market participants necessary to lose immunity, it would leave the foxes to guard the henhouse for a large fraction of the workforce.

ARGUMENT

I. FINANCIALLY-INTERESTED MARKET PARTICIPANTS ARE PRIVATE REGARDLESS OF WHETHER THEY ARE STATE AGENTS

We agree with Petitioner that private actors require both clear authorization and active supervision for antitrust state action immunity, whereas "public" agencies of the state require only clear authorization. Pet'r Brief at 3.[2] What Petitioner misses is that whether an actor is private or public for purposes of antitrust state-action immunity is determined by federal antitrust law, not state law. Federal antitrust law deems financially-interested market participants to be private regardless of whether the state treats

[2] However, Petitioner misleadingly omits that the reason Areeda and Hovenkamp refer to "government's 'public' agencies" and "'public' departments and agencies of the state" with "public" in quotes and modifying "state" and "government," is to make clear that not all state agencies are public for antitrust purposes, stressing that antitrust law only dispenses with the supervision requirement if the agency is "sufficiently 'public'" and that an actor should be deemed "private" if a decisive coalition is made up of market participants. See Phillip Areeda & Herbert Hovenkamp, 1A *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 226b, at 181-83, ¶ 227b, at 226 (4th ed. 2013).

them as a state agency.[3] Were it otherwise, the doctrine would conflict with what Petitioner concedes is the law: that a "state does not give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker v. Brown,* 317 U.S. 341, 351 (1943); Pet'r Brief at 19-20, 25.

Suppose, for example, that California decided it wanted to allow Hollywood movie producers to fix prices or to exclude TV movie producers contrary to federal antitrust law. Under Petitioner's approach, California could do so by simply appointing their CEOs to a state agency that sets movie prices or that decides who can make movies and giving it the sorts of enforcement authority, duties, and oversight that North Carolina gave its dental board. This is because Petitioner makes state agency status turn on whether the actor was (1) made a state agency, (2) given enforcement powers, and (3) required to submit annual reports and be subject to legislative oversight and judicial review. Pet'r Brief at 6-7, 37-38. All three factors would be equally met in this hypothetical.

All three factors also lack substantive relevance. The first factor, that this movie cartel would be labeled a "state agency," would change nothing substantively because a state could always apply that label to private

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[3] The term "financially-interested market participants" includes competitors, like the dentists here, who regulate competition in their own market. "Market participants" is a broad enough term to also include buyers. The modifier "financially-interested" is added because everyone participates in some market and to the extent that market participants regulate another market or pass regulations in which they have no financial interest, the concerns in this brief do not arise.

businesses if it wanted to authorize antitrust violations. The second factor, that this cartel would have enforcement powers beyond the property rights possessed by ordinary businesses, would make the cartel an even *greater* threat to competition: allowing it to enforce cartel prices or denying licenses to those who might compete with the cartel.

Petitioner's third factor is most telling. If that sort of after-the-fact "oversight" amounted to active state supervision under Supreme Court precedent, then the dental board would get immunity even if it were deemed private. But the whole question presented in this case is whether the board is private enough to require active supervision because the lower court finding that active supervision has not been shown is not here challenged. Perhaps Petitioner is trying to create a lesser novel standard of "oversight" that allows financially-interested market participants to be treated as public in order to avoid the active supervision requirement. Unfortunately for Petitioner, the Court has made clear that "[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc*., 445 U.S. 97, 106 (1980).

A. This Court's Precedents Hold that Actors Are Private Whenever They Are Market Participants Who Are Financially Interested in the Restraints at Issue

This Court's antitrust precedents embrace the proposition that financially-interested market participants must always be treated as private actors for purposes of state-action immunity, regardless of whether the state makes them an agency. This was made clear in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which held that even though the State Bar was made a state agency by state statute and given governmental powers, it must be treated as a private actor for purposes of antitrust state action immunity. *Id.* at 776 & n.2, 789-90. Petitioner argues *Goldfarb* denied immunity to the State Bar because it lacked clear authorization, not active supervision. Pet'r Brief at 49-50. But *Goldfarb* could not have had that distinction in mind since it came before *Midcal* created the distinction between clear authorization and active supervision. Indeed, *Goldfarb* held that state action immunity applied only if the Virginia Supreme Court *compelled* the State Bar's actions, 421 U.S. at 790-91, which goes *beyond* what the modern active supervision prong now requires. In any event, the relevant point about *Goldfarb* is that it concluded the State Bar was, despite being a state agency, joining in "essentially a *private* anticompetitive activity" because it was fostering "anticompetitive practices for *the benefit of its members*." 421 U.S. at 791-92 (emphasis added). *Goldfarb* thus supports the proposition that financially-interested market participants are necessarily private as a matter of federal antitrust law.

Petitioner also ignores many other precedents that support the same proposition. In support of its state action analysis, *Goldfarb*, 421 U.S. at 790, cited *Continental Ore Co. v. Union Carbide*, 370 U.S. 690, 706-707 (1962). On those pages, *Continental Ore* considered whether *Parker v. Brown*'s state action immunity applied to agency actions taken by a business corporation that Canada state officials had appointed to be an official government agent. *Id.* at 695, 702 n.11. The Court denied immunity because the agent's use of its government power to exclude its business rivals had not been approved by "any other official within the structure of the Canadian Government." *Id.* at 707. The Court thus did not treat this financially-interested market participant as a government agent despite its official title and governmental powers, but rather characterized its acts as "private commercial activity." *Id.* Petitioner simply ignores *Continental Ore.*

Petitioner also ignores *Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492 (1988), which cited *Goldfarb* and *Continental Ore* for the proposition that a certain Association should not be treated as a government actor because "the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade." *Id.* at 501.[4] *Allied Tube* thus confirms that this Court understands

[4] *Allied Tube* also noted that "no official authority has been conferred on [the Association] by any government," 486 U.S. at 501, but given that official authority *was* conferred by a government in *Goldfarb* and *Continental Ore*, that could not have been the proposition for which *Allied Tube* was citing those two cases.

Goldfarb and *Continental Ore* to have denied state action immunity to state agencies based on their financial interest in restraining trade.

Likewise, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), explained that "*Goldfarb* concerned *private* parties—not municipalities—claiming the state action exemption.... We may presume, absent a showing to the contrary, that the municipality acts in the public interest. A *private* party, on the other hand, may be presumed to be acting primarily *on his or its own behalf*." *Id.* at 45 (emphasis added). This again confirms that the Court understands *Goldfarb* to hold that, despite being an official state agency with enforcement authority, the State Bar was private for antitrust purposes. It also confirms that the defining characteristic of a private party is that it has self-interests that create the presumption it acts on "its own behalf." *Hallie* again equated self-interested action with private action by holding that active supervision of a municipality was unnecessary because it was not a "private party," for whom "there is a real danger that he is acting to further *his own interests*, rather than the governmental interests of the State." *Id.* at 47 (emphasis added).

To be sure, *Hallie* also said that, "In cases in which the actor is a state agency, it is likely that active state supervision would also not be required..." *Id.* at 46 n.10. But this sentence did not imply *Hallie* meant to overrule all the prior precedents holding that whether an actor was a state agency for antitrust purposes turned not on formal labels, agency status, or otherwise on state law, but rather on whether it was a financially-interested market participant. To the

contrary, *Hallie* stated immediately after that sentence that: "Where state or municipal regulation by a private party is involved, however, active state supervision must be shown…" *Id.* Thus, *Hallie* expressly acknowledged that "state or municipal regulation" *could* constitute conduct by a "private party," which directly contradicts Petitioner's claim that official state regulation cannot be private action. Further, *Hallie* had just reaffirmed both that the state agency in *Goldfarb* was a private actor and that private actors needed active supervision. *Id.* at 45-46. Moreover, *Hallie* also expressly rejected Petitioner's formalistic approach to what constitutes a state agency, stating: "The determination that a[n actor's] activities constitute state action is not a purely formalistic inquiry." *Id.* at 39.

Other state action immunity precedents likewise equate financial interest with being private. *Patrick v. Burget*, 486 U.S. 94 (1988), held that highly active supervision was necessary because otherwise "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's *individual interests*." *Id.* at 101 (emphasis added). Just last year, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013), stated that "unlike *private* parties, [local governmental] entities are not subject to the 'active state supervision requirement' because they have less of an *incentive to pursue their own self-interest* under the guise of implementing state policies." *Id.* at 1011 (emphasis

added).[5] The language of these cases clearly equates self-interested action with private action.

Treating conduct by a state agent that is a market participant as private would also be consistent with federal statutes that deny sovereign immunity to foreign states when they engage in "commercial activity." 28 U.S.C. § 1605(a)(2).

Thus, this Court's precedents have consistently held that, regardless of state labels and treatment under state law, financially-interested market participants are private actors subject to federal antitrust review. *See* Einer Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 682-729 (1991) (showing that these and many other cases are consistent with this proposition and that it is also supported by legislative history and federal antitrust policy). Accordingly, when a nominal state agency has a "decisive coalition" consisting of financially-interested market participants, it is a private actor that requires active supervision to enjoy state action immunity. Areeda & Hovenkamp, *supra*, ¶ 227b, at 226.

Here, it is clear that financially-interested market participants were a decisive coalition of the North Carolina Dental Board that imposed the challenged restraints of trade. By statute, not only are six of the eight board members practicing dentists, but those six dentists are the only members allowed to vote on the

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[5] Although the substate governmental entity in *Phoebe Putney* was a market participant, the Court pointedly stressed that the parties had not raised the issue of whether that meant it should be treated as private rather than a state agency for purposes of antitrust state action immunity. 133 S.Ct. at 1100-1101 nn.4-5.

"issuance, renewal or revocation of the license to practice dentistry." N.C. Gen. Stat. § 90–22(b). Moreover, the two non-dental board members "did not participate in teeth whitening investigations" even though they could have.[6] Pet. App. 75a. Five of the six dentist members provided teeth whitening services and thus would directly benefit financially if lower-priced non-dentist suppliers of those services were excluded from the market. Pet. App. 60a.

B. The Rationale Underlying the Active Supervision Requirement Argues For Imposing It

The basic rationale underlying the active supervision requirement was made clear in *Patrick*. Active supervision of private parties is required because otherwise, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick,* 486 U.S. at 101.

Adam Smith set down the consensus among economists long ago: "People of the same trade seldom meet together, even for merriment and diversion, but the conversation ends in a conspiracy against the

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[6] The reality that all board members do not participate in all state board decisions is one reason antitrust state action doctrine should focus on whether a board's market-participant members were a decisive coalition necessary to adopt the restraint at issue, rather than only on whether a formal majority of the board consisted of market participants.

public, or in some contrivance to raise prices."[7] Smith did not envisage anything would change if the competitors were granted state power to enforce their conspiracy. Consumers certainly cannot count on an unsupervised group of competitors appointed to regulate their own market to neglect their selfish interests in favor of the public's. Thus, when market participants regulate their own market and have a financial interest in those regulations, disinterested state supervision should be required for antitrust immunity not only under this Court's precedents but also as a matter of the federal antitrust policy adopted by Congress.

Petitioner incorrectly argues that the anticompetitive goals of the state and the market participant board members are aligned in a way that means the active supervision requirement adds nothing but bureaucracy. Pet'r Brief at 35-36, 42-43. However, a state legislature's willingness to displace competition with dental safety regulation leaves a host of judgment calls that the state legislature has not made about a particular topic like teeth whitening: such as just how much safer it is when done by dentists and whether any safety gains exceed the increased prices. Those judgment calls are instead made by the board, whose market participation makes it financially interested in exaggerating safety concerns and in perversely weighing increased prices as a positive rather than a negative. Thus, while a state legislature that allows regulation of unsafe dental practices clearly authorizes displacements of competition, the lack of clear

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[7] 1 ADAM SMITH, THE WEALTH OF NATIONS, bk. I, at 134 (George Bell & Sons 1908) (1776).

supervision means we can have no assurance that disinterested state officials concluded the specific restraint at issue was warranted.

C. *Parker* and *Omni* Support Denying State Action Immunity to Financially-Interested Market Participants

Petitioner claims *Parker* granted immunity to an unsupervised state commission "even though *a super-majority of the Commission's members were also market participants*." Pet'r Brief at 21 (emphasis in original). But this is simply untrue. Although Petitioner states that the state statute in *Parker* required six of nine commission members to be engaged "in the production of agricultural commodities as their principal occupation," Petitioner omits that the rest of that statutory sentence specified "but no two of these shall be appointed as representing the same commodity." 1939 Cal. Stat. ch. 894, § 3, p. 2488. Thus, the statute made clear that for any particular commodity being regulated, a supra-majority of the commission could *not* be financially-interested participants in the commodity market at issue. Moreover, in *Parker* the only challenge was to the raisin marketing program,[8] and only *one* of the eight commissioners was a raisin farmer

[8] 317 U.S. at 344 ("The questions for our consideration are whether the marketing program adopted for the 1940 raisin crop under the California Agricultural Prorate Act is rendered invalid (1) by the Sherman Act, or (2) by the Agricultural Marketing Agreement Act of 1937, or (3) by the Commerce Clause"); Supplemental Brief for Appellants in *Parker v. Brown* at 2 ("We assume that no attack is intended upon the state statute itself but only as implemented by the particular 1940-41 Seasonal Marketing Program for Raisins here involved.")

who participated in the relevant raisin market and had a financial interest in restraining raisin competition.[9] Because all eight commissioners were named defendants, they presumably all voted to approve the raisin program, and thus there was no evidence that the one raisin farmer cast a decisive vote. Nor did any of the briefs claim that the raisin farmer's vote was decisive to the commission vote to approve the raisin program.

Petitioner also claims that treating state agents as private when they are market participants conflicts with *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991). But *Omni* itself interpreted *Parker* to hold that "immunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market." *Id.* at 374-75; *see also Phoebe Putney*, 133 S. Ct. at 1100 (describing *Omni* as "leaving open the possibility of a market participant exception"). This language directly refutes Petitioner's claim that *Parker* and *Omni* conflict with treating state agents that are market participants as private for antitrust state action immunity. *Omni* also expressly reaffirmed the point that States may not

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[9] *See* "Liberal Prorate Board Named," The Rural Observer at 2 (April 10, 1940) (stating that the commission consisted of "Lyman Lantz, San Jose, prunes and apricots; Ira Redfern, Selma, raisins; James Langford, Lodi, grapes; Mark G. Johnson, Rio Oso, peaches; C. M. Brown, Redlands, citrus fruit; William P. Darsie, Walnut Grove, vegetables; Dr. Dean McHenry, UCLA, consumers; Preston McKinney, San Francisco, commercial handlers."); Transcript of Record in *Parker v. Brown* at 1-2, 5 (identifying those same persons as on the commission that approved the 1940 raisin program).

"exempt *private* action from the scope of the Sherman Act." 499 U.S. at 379 (emphasis in original).

Petitioner argues to the contrary because *Omni* rejected a co-conspirator exception. Pet'r Brief at 14, 30-31, 39-40, 45. But *Omni*'s rationale for rejecting this exception was that it would apply whenever a public official agreed to do what some private citizens urge, which would swallow up all regulation. 499 U.S. at 375. This reasoning hardly conflicts with denying immunity when the state agents are themselves market participants. Indeed, in support of its rejection of the co-conspirator exception, *Omni* cited the works of Areeda, Hovenkamp and Elhauge, *id.* at 375, precisely the same scholars who conclude that state agents who are financially-interested market participants must be treated as private. Moreover, *Omni* took pains to distinguish the rejected co-conspirator exception from the market participant exception that *Omni* concluded *Parker* was referencing. *Id.* at 374-75.

Omni also rejected the argument that state action immunity should be denied whenever an otherwise-immune state agency acts contrary to state law. *Id.* at 370-72, 378-79. But its reasoning was that such state law violations were better policed by state administrative law. *Id.* Again, this hardly conflicts with denying immunity to market participants, who Congress has decided are best policed by market discipline and cannot conspire to avoid such discipline under the antitrust law. Indeed, in support of its rejection of the claim that state law violations always vitiated state action immunity, *Omni* again cited Areeda and Hovenkamp, *id.* at 371-72, and Elhauge

took the same position, *see* 104 HARV. L. REV. at 692. There is thus plainly no conflict between that rejection and denying immunity to market participants.

Petitioner stresses that one of the state law violations mentioned by *Omni* was bribery, which Petitioner notes would give the public officials a strong financial interest. Pet'r Brief at 14-16, 40, 43, 45. But *Omni* was simply rejecting the general claim that state law violations should vitiate immunity, of which bribery was listed as just one example, not making any general determination of whether financial interest should affect whether an actor is treated as private rather than a state actor in the first place. Any discussion of bribery was also dicta since actual bribery was not alleged.[10] In any event, even if being bribed

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[10] Although Petitioner repeatedly asserts that the public officials in *Omni* were allegedly bribed, Pet'r Brief at 14-16, 40, in fact: "*No limiting factors, such as* evidence of illegal acts like *bribery* or kickbacks or evidence of a selfish or corrupt motive, *were included* in the description of the conspiracy exception in order to guide the jury." *Omni Outdoor Adver. v. Columbia Outdoor Adver.*, 891 F.2d 1127, 1146 (4th Cir. 1989) (Wilkins, J., dissenting) (emphasis added). Instead, the claim was that the public officials were influenced by campaign contributions. 499 U.S. at 367. That is not the same as bribery unless we are to condemn our whole campaign finance system as bribery. Nor do such campaign contributions constitute the sort of personal financial interest that triggers antitrust review because: "First, such contributions do not so much redound to the personal financial interest of the official as help that official stay in office. Since most legislators could earn far more outside office, presumably their desire to stay in office reflects their desire to exercise their political judgment on other issues, not a desire for financial gain. Second, campaign contributions are a thoroughly legal (indeed constitutionally protected) method of influencing the governmental process." Einer

does not automatically deprive a state official of state action immunity, that does not dictate the same answer for state agents who are financially-interested market participants exercising powers delegated to them by the state. First, state law provides an alternative remedy for bribery by making it illegal, but provides no remedy for agency decisions by market participants that are authorized by state law. Second, although the Sherman Act may not have been intended as a code of political ethics, 499 U.S. at 378-39, it was definitely intended to impose competitive market discipline when the relevant financial interest arises from market participation.

In short, even if the state officials in *Omni* were financially interested because of bribery, they were clearly not market participants, and *Omni* itself interpreted *Parker* to say that such market participation would deprive the actor of state action immunity. *Omni* thus supports the conclusion that financially-interested market participants should be treated as private, even if financial interest alone does not suffice to do so.

D. The Opposing Policy Arguments for Over-ruling this Court's Precedents Are Unpersuasive

Petitioner and its *amici* raise several policy arguments against treating state agents as private when they are financially-interested market participants, but none provide any persuasive reason to

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Elhauge, *Making Sense of Antitrust Petitioning Immunity,* 80 CALIF. L. REV. 1177, 1243 n.314 (1992).

overrule the above-described line of precedents that contradict their position. First, Petitioner and its *amici* argue that treating market participants as private requires judicially inadministrable inquiries into officials' independence and intent and whether their acts are in the public interest. Pet'r Brief at 45-47. But the market participant test requires no such inquiry. It simply asks whether the state agents participate in the relevant market in a way that *objectively* gives them a financial interest to restrain trade. True, without such a financial interest, officials are more likely to act independently and in the public interest, but whether they actually do so is not part of the market participant test. Petitioner also argues state actors may be biased for many other reasons like regulatory capture or the prospect of future employment, *id.* at 46-47, but that is irrelevant because what triggers antitrust review is not any form of bias but only the sort of financially-interested market participation that can be usefully subjected to competitive market discipline.

Second, Petitioner and its *amici* argue that appointing financially-interested market participants to state agencies provides necessary expertise. Pet'r Brief at 34, 48. But the state could obtain dental expertise without losing immunity by (1) hiring dentists as full-time employees, (2) appointing part-time agents who are retired dentists, dental academics, or otherwise not participating in the relevant market being restrained, or (3) as this Court held in *Allied Tube*, having boards of market participants submit their expert recommendations to disinterested state officials or courts that substantively review and approve those recommendations before they restrain

trade. Moreover, even state boards made up of market participants would have state action immunity as long as they are regulating matters in which they have no financial interest, such as when medical boards prohibit the use of ineffective drugs. And states can even have unsupervised boards dominated by those with financial interest so long as these boards limit their regulations to what antitrust law considers reasonable. These same alternatives rebut the claim by *amici* for Petitioner that denying state action immunity to financially-interested market participants would require states to subordinate public health concerns or choose structures that discourage involvement by conscientious experts.

Finally, Petitioner and its *amici* argue that applying antitrust to market participants that were delegated state authority violates federalism by interfering with the states' ability to staff their agencies how they want. Pet'r Brief at 13-14, 17, 33-36, 48-49. But Petitioner itself admits that a "general precept of federalism … is that Congress clearly does not intend in the ordinary course to allow States to nullify federal regulation of private actors and thereby invert the Supremacy Clause." *Id.* at 20. States thus cannot overturn the fundamental premise of the Sherman Act that financially-interested market participants must be subject to the competitive market discipline that is policed by antitrust law. *See* Elhauge, *supra,* 104 HARV. L. REV. at 708-712. States may choose whoever they want to serve on state agencies, but if states choose to delegate the power to restrain trade to market participants, those actors must exercise that power in a way that complies with federal antitrust law.

If Petitioner's view of state immunity were adopted, then a state would be free to repeal the antitrust laws and substitute for competition in market after market the judgment of cartels such as the hypothetical Hollywood cartel with which we began. Such inverse preemption of federal antitrust law by state law is not allowed by existing Court precedent.

II. OCCUPATIONAL LICENSING BY FINANCIALLY-INTERESTED BOARDS IS BECOMING UBIQUITOUS AT GREAT COST TO CONSUMERS AND EXCLUDED WORKERS

It is particularly important for the Court to reaffirm its long line of authority applying antitrust law to financially-interested market participants, regardless of whether they are made state agents, because in recent decades the states have created a host of new licensing boards made up of market participants that restrain trade. The expansion of occupational licensing is dramatic, and in the vast majority of cases the regulation is self-regulation. A recent study of licensing boards in two sample states, revealed that licensed market participants constitute a majority of the members for over 90% of the boards in Florida and Tennessee. Edlin & Haw, *supra,* at 1157-64. This is typical of anecdotal accounts of licensing boards nationwide. *Id.* at 1103 n.50.

If this Court were to overrule its precedent and confer state action immunity on such boards even when they are unsupervised, then they would become free to undertake anticompetitive actions with no fear of antitrust suits.

A. Financially-Interested Occupational Licensing Is Rapidly Expanding

Once limited to a few learned professions, licensing is now required in over 800 occupations. MORRIS M. KLEINER, LICENSING OCCUPATIONS: ENSURING QUALITY OR RESTRICTING COMPETITION? 5 (2006). And once limited to minimum educational requirements and entry exams, licensing board restrictions are now a vast, complex web of anticompetitive rules and regulations. The explosion of licensing and the tangle of restrictions it has created should worry anyone who believes that fair competition is essential to national economic health.

In the 1950s, only about 5% of American workers needed a government-issued license to lawfully perform their jobs; by the 1970s, the figure was 15% and now it is roughly 30%. Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 Journal of Labor Economics 1, 3-5 (2013). This trend is continuing both because the service sector of the economy—the most likely to be covered by licensing—continues to grow enormously, and because new "professions" continue to be added to the list requiring licensing. Recent examples include locksmiths, beekeepers, auctioneers, interior designers, tour guides, shampooers, and fortune tellers. Edlin & Haw, *supra,* at 1096.

The practitioner-dominated state boards that typically set license requirements have abused their power to set disproportionate requirements that serve to insulate incumbents from competition. Cosmetologists, for example, are required on average to have ten times as many days of training as Emergency

Medical Technicians, and hair braiders in many states must undertake such training, even though it is largely irrelevant to their occupation. *Id.* at 1096-97. In Alabama, unlicensed practice of interior design was a criminal offense until 2007. *Id.* at 1097. In Oklahoma, one must take a year of coursework on funeral service (including embalming and grief counseling) just to sell a casket, while burial without a casket at all is perfectly legal. *Id*.

Even traditionally licensed occupations, the so-called learned professions, use licensing restrictions to repress competition. In many states, dentists cannot legally employ more than two hygienists each, a restriction that raises demand for dentists. *Id.* And in some states, nurse practitioners must be supervised by a physician, even though studies show that nurse practitioners and physicians provide equivalent quality of care where their practices overlap. *Id.*

B. Economic Studies Show that Licensing Requirements Tend to Raise Prices without Much, If Any, Quality Improvement

Given that the lion's share of licensing boards are stacked with financially-interested market participants, it is not surprising that the licensing requirements they adopt have tended to increase prices without much, if any, improvement in quality. Economists have studied extensively the effects of these occupational licensing requirements on price. Where the studies have the statistical power to identify an effect, they tend to show an increase in price and a reduction in quantity. A 2000 study showed that tougher licensing, in the form of lower pass rates on the

qualifying exam, increased prices for dental services by 11%. Morris M. Kleiner & Robert T. Kudrle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & ECON. 547, 572-73 (2000). Another recent study estimated that licensing requirements raise wages by 18%. Morris M. Kleiner, *Regulating Occupations: Quality or Monopoly?*, EMP'T RES. (W.E. Upjohn Inst., Kalamazoo, Mich.), Jan. 2006, at 2 tbl.1.

Similarly, most studies examining practice restrictions show that when a licensing board is more heavy-handed in dictating hours, advertising, or levels of supervision within a profession, the consumer prices are higher. For example, one team of researchers estimated that restricting the number of hygienists a dentist may employ increased the cost of a dental visit by 7%, resulting in an estimated $700 million annual cost to consumers ($1.7 billion after converting 1982 dollars to 2014 dollars). J. Nellie Liang & Jonathan D. Ogur, BUREAU OF ECON. STAFF REP. TO THE F.T.C., RESTRICTIONS ON DENTAL AUXILIARIES: AN ECONOMIC POLICY ANALYSIS 47 (1987). Restrictions on advertising by lawyers is associated with an increase in price, and in optometry, restrictions on advertising have been shown to inflate prices by at least 20%. John E. Kwoka, Jr., *Advertising and the Price and Quality of Optometric Services*, 74 AM. ECON. REV. 211, 216 (1984).

Of course, higher prices for services do not by themselves show that licensing is bad for consumers. The economic justification for licensing, that without it a free market for services is dysfunctional, suggests that if licensing is working to reduce market failures associated with information asymmetry and

externalities, it will increase the price *and* quality of services.

But while economists have shown that licensing significantly raises consumer prices, studies of licensing's effect on service quality paint a murky picture. Some studies show modest increases in quality, at least for some kinds of consumers, but other studies do not find that same effect. Edlin & Haw, *supra*, 1116-17. A few studies even claim to show that licensing reduces quality, perhaps because licensing protects incumbents from full exposure to market penalties from poor performance. *Id.* at 1117.

This research indicates that occupational licensing in the U.S. fails to appropriately trade off quality benefits and harm to competition. This should not surprise anyone, given that most licensing restrictions are created by practitioner-dominated boards with financial incentives to restrain competition even when it does not improve quality. *Id*. at 1103. It is entirely predictable that when competitors make up their own rules about who can compete and how, they will serve their own interests at the expense of the consumer and excluded workers.

C. Financially-Interested State Licensing Boards Resemble Traditional Cartels, But Are Even More Powerful

Antitrust review is entirely appropriate for curbing the excesses of occupational licensing because the anticompetitive effect has a similar effect on the market—and in particular consumers—as does traditional cartel activity. *Id*. at 1132-33. This close fit between the Sherman Act's intended target and the

economic harm of excessive licensing can be seen in the functional equivalence of the restrictions promulgated by occupational boards and the business practices held unlawful under § 1. For example, the Sherman Act has been used to condemn combinations of competitors using written tests to exclude competitors, imposing advertising restrictions, and predicating membership in a trade association on having a "favorable business reputation." *Id.* Boards use these very same techniques to suppress competition in the name of occupational licensing.

Thus, licensing schemes can be similar to many cartel agreements in substance, which alone may justify antitrust liability. Licensing boards need not fix prices directly. They may, as in this case, limit supply by excluding competitors or they may limit the intensity of competition among market participants.

Making matters even worse for consumers, licensing schemes come in a particularly durable form. *Id.* at 1133. Licensing boards, by their very nature, face few of the cartel problems that can erode price and output agreements between competitors. By centralizing decision-making in a board and endowing it with rulemaking authority through majority voting, competitors overcome the hurdle of agreement that ordinarily inhibits cartel formation. Cheating is prevented by imposing legal and often criminal sanctions—backed by the police power of the state—on those who break the rules. Finally, most cartels must fend off new market entrants from outside the cartel that hope to steal a portion of its monopoly rents. For licensed occupations, licensing deters entry and

ensures that all market participants (at least those practicing legally) are held to its restrictions. *Id*.

The similarities between cartel activity and licensing restrictions suggest that licensing is a natural target for Sherman Act scrutiny. This does not mean that per se condemnation of self-interested board activity is necessarily appropriate. It simply means that antitrust review is triggered, and this Court has developed nuanced antitrust standards for assessing professional self-regulation. *See California Dental Ass'n v. FTC*, 526 U.S. 756 (1999). Even unsupervised boards dominated by competitors are free to enact regulations deemed reasonable under the antitrust laws.

To be sure, for states that don't actively supervise boards, clarifying the threat of antitrust liability may encourage them to alter board membership to make their decisions less self-interested, but that is exactly what antitrust should seek. States wishing to regulate professions without having to answer to an antitrust suit have several options. Active supervision is one obvious option. Another way in which a state could immunize an unsupervised licensing board from antitrust liability would be to change its composition. A state could limit a board's exposure to antitrust liability by appointing experts who are full-time state employees or are part-time but are retired, academics, or otherwise not currently participating in the market being regulated. Or a state could appoint market participants but limit them to regulating matters on which they have no financial interest. Finally, states could reduce practitioner representation and fill the rest of the board seats with members representing

other interests. Having a diverse membership that includes consumers, civil servants, labor economists, and members from adjoining professions would not only serve as a prophylactic against liability, but also make it more likely the board considered and resolved any anticompetitive concerns.

These sorts of changes would not require abandoning sensible regulation in the public interest, but would require reversing the recent trend of using state boards dominated by financially-interested market participants to promulgate rules and regulations—and thus would be a important step toward politically accountable, procompetitive regulation. Contrary to the claims of *amici* supporting Petitioner, such changes would not disrupt tradition because the vast expansion of financially-interested occupational licensing is a recent phenomenon. Nor is Petitioner right that denying state action immunity to financially-interested market participants would undermine legitimate reliance interests, Pet'r Brief at 58, because this Court's precedents clearly deny immunity to such boards, so states allowing such financially-interested occupational licensing must, if anything, have been relying on antitrust to serve as a constraint on unsupervised boards.

III. ELECTION BY MARKET PARTICIPANTS SUFFICES TO TREAT THE BOARD AS PRIVATE, BUT IS NOT NECESSARY WHERE THE BOARD MEMBERS THEMSELVES ARE MARKET PARTICIPANTS

In this case, not only were the dentist board members financially-interested market participants,

but they were also elected by all dentists in the market. Pet. App. 40a. Contrary to the concurrence below, such selection by market participants should not be deemed necessary to make the board private where, as here, a decisive coalition of the board were financially-interested market participants.

Limiting antitrust exposure to boards elected by market participants would conflict with this Court's precedent, which instead makes clear that it is the relevant actor's financial interest as market participant that requires treating it as private. *See supra* Part I. Indeed, limiting the doctrine in that way would require overruling both *Goldfarb,* which treated the State Bar as private even though the legislature had by statute appointed it to be an administrative agency, 421 U.S. at 776 n.2, and *Continental Ore*, which treated a financially-interested state agent as private even though it had been appointed by a disinterested executive official, 370 U.S. at 695, 702 n.11. This Court has not made manner of selection essential to the "private" inquiry because a board of competitors remains self-interested and in need of market discipline even if is appointed by the governor. Indeed, if appointment by the governor or state legislature sufficed to confer state action immunity, then any state could do precisely what this Court's precedent prohibits—authorize private businesses to violate the antitrust laws—by simply appointing those businesses to be state agents.

If the Court were to limit antitrust review to boards selected by market participants, that would drastically narrow its precedent because financially-interested state licensing boards are usually not elected by fellow

industry members. *See* Edlin & Haw, *supra*, at 1157-64 (finding that the vast majority of occupational licensing boards, 93% in Tennessee and 95% in Florida, are governor-appointed). A holding that limited antitrust exposure to peer-elected boards would thus have very little effect on the anticompetitive abuses of licensing boards in this country. Further, for those few boards that would be covered by such a rule, like the North Carolina Dental Board, antitrust liability could be avoided simply by altering the manner of selection. This would make little difference to the self-interest of the board, since governors are usually required *by statute* to select industry members for a majority of board seats. *Id.* at 1157-64.

While being elected by market participants is not *necessary* to treat a board as private, it should *suffice* to do so. After all, if board members are elected not by the public at large, but only by market participants, they will naturally represent the interests of those market participants in restraining trade. Indeed, even an ordinary private cartel might pick an employee with a flat salary to fix prices for it. The employee would not itself be a market participant and would have no direct financial interest in restraining trade, but he surely knows which side his bread is buttered on and will act to advance the interests of the firms that put him in office. Indeed, if this Court were to hold that state agencies could be treated as private *only* when board members were themselves financially-interested market participants, then a state could easily authorize private cartels by simply creating state agencies full of salaried employees who are elected by the cartel businesses.

In short, a state agent should be treated as private if he *either* is a financially-interested market participant *or* is elected by such market participants. Either should suffice, and thus neither is necessary to treat the state agent as private when the other is present. State action immunity requires that an actor who is both financially disinterested *and* politically accountable to the general electorate substantively control the terms of the relevant restraint before it is imposed on the market. Elhauge, *supra,* 104 HARV. L. REV at 671, 696, 707, 715. When either factor is absent, immunity should be denied.

CONCLUSION

The judgment of the court of appeals should be affirmed, with the clarification that restraints of trade imposed by state agencies are private (and thus require not only clear authorization but also active supervision for state action immunity) if a decisive coalition on that agency either comprised or was elected by market participants financially interested in the restraint at issue.

Respectfully submitted,

EINER ELHAUGE
Counsel of Record
HARVARD LAW SCHOOL
1575 Mass. Ave.
Cambridge, MA 02138
(617) 496-0860
elhauge@law.harvard.edu

REBECCA HAW ALLENSWORTH
VANDERBILT LAW SCHOOL
131 21st Avenue South
Nashville, TN 37203

AARON EDLIN
LAW SCHOOL & DEPARTMENT
OF ECONOMICS
Evans Hall #3880
UC BERKELEY
Berkeley, CA 94720

Counsel for Amici Curiae

August 6, 2014

APPENDIX

APPENDIX

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APPENDIX A

List of Signatories[1]

Prof. Rebecca Haw Allensworth
Vanderbilt University School of Law

Prof. Thomas Arthur
Emory University School of Law

Prof. Ian Ayres
Yale Law School

Prof. Joseph Bauer
Notre Dame Law School

Prof. Anu Bradford
Columbia Law School

Prof. Darren Bush
University of Houston Law Center

Prof. Michael A. Carrier
Rutgers Law School

Prof. Peter Carstensen
Univ. of Wisconsin Law School

Prof. Daniel Crane
University of Michigan Law School

Assoc. Dean Joshua Davis
USF School of Law

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[1] Institutions are listed for identification purposes only. The views expressed here are those of the *amici curiae*, and may not reflect the views of their schools, none of which is a signatory to this brief.

Prof. Nicholas Economides
Stern School of Business, NYU

Prof. Aaron Edlin
UC Berkeley

Prof. Einer Elhauge
Harvard Law School

Prof. Kenneth G. Elzinga
University of Virginia

Prof. Harry First
NYU Law School

Prof. Eleanor Fox
NYU Law School

Prof. H. E. Frech III
UC Santa Barbara

Prof. Charles J. Goetz
University of Virginia School of Law

Prof. Thomas (Tim) Greaney
Saint Louis University School of Law

Prof. Jeffrey L. Harrison
University of Florida Law School

Prof. Clark Havighurst
Duke Law School

Prof. Scott Hemphill
Columbia Law School

Prof. Herbert Hovenkamp
University of Iowa Law School

Prof. David Hyman
Univ. of Illinois College of Law

Prof. John Kirkwood
Seattle University Law School

Prof. Prasad Krisnamurthy
Berkeley Law School

Prof. Thom Lambert
University of Missouri School of Law

Prof. Robert H. Lande
University of Baltimore School of Law

Prof. Marina Lao
Seton Hall University School of Law

Prof. Christopher R. Leslie
School of Law, University of California - Irvine

Prof. Phil Malone
Stanford Law School

Executive Director Geoffrey Manne
International Center for Law & Economics

Prof. Thomas D. Morgan
George Washington University Law School

Assoc. Dean Alan B. Morrison
George Washington University Law School

Prof. Roger Noll
Stanford University

Prof. Barak Orbach
Univ. of Arizona Law School

Prof. Mark R. Patterson
Fordham Law School

Prof. Richard J. Pierce, Jr.
George Washington University

Prof. Barak Richman
Duke Law School

Prof. Stephen Ross
Penn State Dickinson Law School

Prof. Jim Rossi
Vanderbilt University Law School

Prof. Paul Rubin
Emory University

Prof. William M. Sage
University of Texas at Austin School of Law

Prof. Christopher L. Sagers
Cleveland State University Law School

Prof. Steven C. Salop
Georgetown University Law Center

Prof. Richard Schmalensee
Massachusetts Institute of Technology

Prof. Steve Semeraro
Thomas Jefferson School of Law

Prof. Carl Shapiro
UC Berkeley

Prof. Matthew Spitzer
Northwestern Univ. Law School

Prof. Maurice Stucke
University of Tennessee College of Law

E. Thomas Sullivan
University of Vermont

Prof. Avishalom Tor
Notre Dame Law School

Prof. Alexander Volokh
Emory Law School

Prof. Spencer Waller
Loyalty University Chicago School of Law

Prof. Abraham Wickelgren
Univ. of Texas Law School