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 OF *AMICUS CURIAE* NEIL AVERITT IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Petitioner is a multi-member board that exercises certain authority over the practice of dentistry in North Carolina. Most of its members are dentists who compete in the market for teeth-whitening services and who are elected by other dentists. In a determination upheld by the court of appeals and not challenged here, the Federal Trade Commission (FTC) concluded that the petitioner had engaged in concerted anticompetitive conduct that had the effect of expelling the dentists' would-be competitors from the market for teeth-whitening services. The question presented is as follows:

Whether the court of appeals correctly upheld the FTC's determination that the state-action doctrine did not exempt petitioner's conduct from federal antitrust scrutiny.

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INTEREST OF THE *AMICUS CURIAE*

Neil Averitt has practiced antitrust law for over forty years, thirty-seven of them on the career staff of the Federal Trade Commission. He worked on a number of state-action cases, and was a member of the agency's State Action Task Force, whose report provides part of the background for the present litigation. He retired from federal service in 2013 but retains an interest in seeing the law in the area applied efficiently and well.[1]

SUMMARY OF THE ARGUMENT

This brief discusses the practical mechanisms of active supervision. The Petitioner and its *amici* have argued that state regulatory boards cannot be supervised without introducing undesirable burdens and inefficiencies in the governmental process. But they are greatly overstating the difficulties. We will show this by examining the range of administrative arrangements, already in use in several states, which demonstrate that it is possible to provide effective supervision at moderate cost. States have further narrowed their tasks by devising principled lists of the particular topics that most require supervision.

[1] No attorney for any party authored this brief in whole or in part, and no person or entity other than the *amicus* has made a monetary contribution to the preparation or submission of this brief. All parties to this action have given blanket consents to the filing of *amicus* briefs.

As a result, state governments and the courts will be quite able to adapt to any holding that requires supervision of boards. Moreover, the Court has an opportunity to provide additional guidance on these issues if it wishes. It has latitude in doing so, because many of the prior decisions of the Court on standards of supervision arose in the context of supervising private rate-setting bureaus, which pose special and different questions. We therefore conclude that there are no practical obstacles to a requirement for active supervision of state boards.

ARGUMENT

NO MAJOR PRACTICAL OR ADMINISTRATIVE PROBLEMS STAND IN THE WAY OF REQUIRING ACTIVE SUPERVISION OF FINANCIALLY INTERESTED STATE BOARDS

This brief addresses just one single question. The Court may conclude that, in principle, financially interested boards should be subject to active supervision. However, it may be concerned about the practical consequences of such a principle. This brief therefore discusses that issue. It examines the administrative procedures that several different states have already put in place to provide active supervision, and shows that a number of workable and tested options are available. It also examines the legal principles that have already clarified just which particular kinds of a board's activities, out of

all the actions that a board takes, are most in need of supervision. The law on both these points is sufficiently developed to let the present case be decided without concern for unanticipated consequences. Moreover, the Court has the opportunity to provide further clarification if need be.

Throughout this case, the best approach to the practical mechanics of supervision will involve balancing valid but conflicting interests, rather than starkly choosing one interest over another. Certainly the fundamental dispute in the case involves such a conflict between valid truths. On the one hand, unsupervised, self-interested boards are always under a temptation to limit competition for the financial benefit of their profession. The public needs to be protected from those obvious risks. On the other hand, states need to have some discretion to organize their affairs as they please. In particular, they need to have the option of including active members of a profession on a regulatory board in order to take advantage of their expertise. The question is how to balance these goals. The answer is that once supervision is found necessary in principle, the best methods of supervision will try to find the least-cost, greatest-benefit accommodation between them. Fortunately, developments in individual states, and in individual litigations, have shown that there are many practical ways to go about this balancing.

A. States Have Identified Many Forms of Active Supervision, Which Shows That It Is Practical to Provide Sufficient Oversight of Interested Boards

First of all, there are a number of procedures that states can use to provide active supervision while still allowing the boards to provide the benefits of their expertise. The Dental Board and its *amici* have contended that supervision will lead to immense waste and paralysis. That is surely too dire a view. This is suggested by the approaches already being used:

1. A board might be supervised by a single employee of the state government, who possesses the necessary specialized knowledge of the profession involved. Something of this sort is done in Rhode Island, where a single "dental administrator" is named to supervise the investigatory and other activities of the board. This individual is named through a selection process that ensures that he or she is acceptable to a variety of stakeholders, including the dental profession, the governor, and the state department of health. *See* R.I. General Laws § 5-31.1-5(1).

2. A still simpler variant might also permit sufficient supervision. A single individual in the governor's office could be authorized to oversee the actions of a group of substantively related boards – for example, boards in the health professions – under a suitable standard of review. Even this simple measure

would serve to clarify the political responsibility for the board's actions, which is one of the chief goals of the state action doctrine. *See FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 636 (1992) (federalism "serves to assign political responsibility, not to obscure it").

3. A board might be housed in the relevant substantive state executive agency, and the head of that agency would need to review and sign off on its actions. This is the broader context of the Rhode Island approach. There the board, acting under the dental administrator, may develop proposed rules and regulations, but adopting them requires the approval of the director of the department of public health. *See* R.I. General Laws § 5-31.1-4(1), (9).

4. All of a state's boards could be housed within a single general umbrella agency, which provides common administrative support services, and also exercises some limited substantive supervision on important policy issues. This is the approach taken by California. There the Department of Consumer Affairs was established in 1970, building on predecessor organizations dating back to the 1920s. It is presently made up of most of the major professional boards in the state, including those regulating dentistry, medicine, optometry, accountancy, architecture, and barbering. Cal. Bus. & Prof. Code § 101. For the most part each of these boards continues to exist as a "separate unit." *Id.* at § 108. Their decisions on licensing standards are specifically not subject to review by the department's director. *Id.* § 109. Nonetheless, the

director has control or influence on certain topics. A board may not sue another agency of government without the permission of the director, *id.* at § 132 (subject to a limited override); and the director may review the disciplinary system of a board, and make recommendations for changes to the board or the legislature, *id.* at § 116.

5. A state's boards might be still more tightly consolidated, and folded into a central agency that oversees all the licensed occupations, where they will make recommendations to the agency, but where the agency head will be the one to take the formal action. Utah has adopted this model. There the Division of Occupational and Professional Licensing was established to "administer and enforce all licensing laws of Title 58." Utah Code Ann. § 58-1-103. The duties assigned to the division include adopting rules, investigating possible violations, initiating lawsuits, and seeking injunctions. *Id.* at § 58-1-106. The role of the boards is to make recommendations on these actions – on appropriate rules and suitable approaches on policy and budget matters. *Id.* at § 58-1-202.

In all these ways the state can take advantage of the knowledge of practicing members of the profession, but can exercise control of the resulting actions.

It is worth noting that any of these approaches could be put in place fairly easily through a single statute specifying the procedures applicable to all of a state's boards.

We do not yet know which if any of these approaches will be legally sufficient. But there are clearly many practical models to work from. And there are no doubt other forms of supervision that would also pass muster for state action purposes. All that is needed is a sufficient indication that the final decision that comes out of this process is truly the state's own.

B. Practical Supervision Does Not Require That All Actions of an Interested Board be Overseen

To keep supervision a practical exercise, there should also be limits on the number of board actions that must be reviewed. It is neither necessary nor practical for every routine action to be reviewed by an independent bureaucracy.

Some such limits already exist. To begin with, courts will reach the questions of supervision and sufficient review only as to board actions that are – or are alleged to be – violations of the antitrust law. Only then will the board need to defend itself. This fact sets an initial limit on the kinds of actions subject to the supervision requirement. Only actions that potentially raise antitrust issues will need to be supervised.

However, reliance on this one principle is not a fully satisfactory response to the question. Sometimes the scope of antitrust liability is unpredictable, and sometimes allegations of antitrust liability might be

made too broadly. Almost by definition, governmental actions control and limit the business conduct that would otherwise take place, and so almost by definition any governmental action is open to the charge that it has unduly lessened competition. That open-ended risk may have an inhibiting effect on board decisions, and may prompt the state to create an overly elaborate supervisory bureaucracy to compensate for it. It would be desirable to introduce greater clarity.

State legislation and federal case law have therefore already begun to identify more specific lists of topics to be supervised. These principles will at least provide useful guidance to the states, focusing the efforts of state supervisors on the areas most likely to produce antitrust problems, while in other respects limiting their intrusions on the boards:

1. A state might concentrate its supervision on certain named kinds of particularly important actions, such as regulations, lawsuits, or litigation threats. All of the states named above have made these kinds of distinctions. In California, the boards retain their discretion over licensing standards, but are supervised on the initiation of inter-agency lawsuits. Cal. Bus. & Prof. Code at §§ 109, 132. In Utah, boards retain their power to establish a passing score on examinations, even while they can only make recommendations on rules and budgets. Utah Code Ann. § 58-1-202. In Rhode Island, the dental board can direct the director of the department of health to issue licenses to qualified applicants, even while it

needs the director's approval to issue regulations. R.I. General Laws § 5-31.1-4.

2. Supervision might be required for actions that directly affect entry into the business that the board regulates. Supervision of this kind has been required, for example, for the actions of private physicians who participated in a state's peer review system, and who allegedly voted to deny hospital privileges to a doctor who had opened a competing practice. *See Patrick v. Burget*, 486 U.S. 94, 100-01 (1988).

3. Alternatively, affirmative approval might not be required for any defined set of actions, but instead the reviewing official might be routinely informed of all the board's actions by being given copies of minutes and agendas. He or she might review these under a "negative option," with the power to inquire more closely into any particular matter that raises questions. Because all board actions will be open to state scrutiny under a negative option plan, all will have been duly supervised in that sense. If the reviewing official selects a reasonable proportion of matters for further inquiry, that could be sufficient to show that all of them had been actively considered. *Cf. Ticor Title Insurance*, 504 U.S. at 638 (criticizing negative option programs only where it appeared that no critical review at all had taken place).

It is possible – not certain, but possible – that some robust forms of focused supervision will count as supervision of a board's activities overall. In other

words, they may let the board be counted as "supervised" even with respect to decisions on which specific active review is not shown. This is a novel issue, involving the question of just what it means to supervise a board, which in turn leads to fundamental questions of federalism and statutory construction. As the Court explained in *Parker*, Congress chose to exempt certain forms of state action from the Sherman Act, both as a matter of judgment that the risks to competition were less in that context, and in recognition of the fact that the federal structure of the country requires preserving certain areas of state discretion. *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). These same factors may tell us something about the likely intent of Congress with respect to state professional boards. Congress did not defer to private action, but it did give measured deference to state governments. Financially interested boards should be treated as private parties, and made subject to supervision, but their governmental aspects may still be relevant in determining the exact scope of the necessary supervision. If such an intent exists, it should be implemented in the kinds of simple practical terms that are appropriate to a quasi-constitutional principle. We can be confident that a financially-interested board acts for the state if it is sufficiently supervised. And it is arguably supervised closely enough to reflect state policy as long as certain key functions and decisions are overseen.

Here again, we cannot be sure which of these approaches to defining the relevant areas of supervision will be found sufficient in a particular case. But it is clear that there are a substantial number of options for states to choose among, including some safe ones that will suit those states that wish to avoid problems.

C. The Court Has the Opportunity to Further Clarify the Standards Applicable to the Two Previous Issues If It Wishes

This case can be decided without getting deeply into any of these complexities. The Dental Board's action here was completely unsupervised. Once the Court determines that supervision in some form was needed, then it can simply affirm the decision of the Fourth Circuit. Before doing so the Court may wish to satisfy itself that a supervision requirement will not create truly serious administrative problems. The precedents and experience recounted under the previous headings should provide the necessary level of assurance. They show that states and the lower courts will have sufficient tools and options available as they work through the implications of the decision here.

However, the Court might wish to do something more than that. This case touches on basic issues of national rights, legislative intent, and federalism. The Court may wish to provide guidance for the further development of the law, to provide greater

assurance that state oversight and lower court decisions will develop within a range that is both useful and legally sufficient.

The Court may wish to provide guidance, first of all, on the question of what forms of board supervision are sufficient. The Court might feel able to endorse one or more of the existing state approaches at the present time. Or it might prefer to leave the issue for further exploration. In that event it would still be helpful to identify certain elements that should be present in a plan of supervision, or to indicate the range of options that exists.

The Court may also wish to provide more guidance on the types of board actions that must be supervised. The law on this point will involve the construction of the Sherman Act, in light of the balance that Congress intended between the national public right to the benefits of Sherman Act competition on the one hand, and the rights of states to make use of certain problematic forms of organization, if they wish, on the other hand. The law here will be new, because financially-interested but nonetheless governmental boards present circumstances significantly different from the legislatures, municipalities, and purely private organizations that the Court has previously considered.

This and other aspects of the case involve a balancing of interests. Any guidance that the Court can give will help to make the results of that analysis more predictable.

D. The Standards for Supervising Interested Boards Are Different From the Standards Necessary for Supervising Private Rate-Setting Bureaus

The Court has latitude in providing this guidance because of a final point. Many prior cases on the standards of active supervision have involved the special context of private rate-setting organizations – associations of competitors that propose uniform rates to a state regulator. *See, e.g., Ticor Title Insurance, supra,* 504 U.S. at 628-29; *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 50 (1985). The standards to come out of those cases, while often providing helpful principles, are not the right standards for final judgment here. Where a professional board is set up as a state agency – even an agency that is made up of "private actors" for certain state action purposes – it is entitled to somewhat more latitude than a private rate bureau. This is true with respect to both the procedures of review and the subjects of review.

First of all, procedurally, the state board will not always need as much detail of oversight. The price agreements that come out of a rate bureau are subject to an especially searching review. At the very least they call for a "pointed reexamination" by the state. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 106 (1980) (in context of vertical price agreements). Ideally, the state review will also incorporate certain specified procedures that are known to support an independent judgment, such

as notice, hearings, and a written decision. *See Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404, 417 (2005), *aff'd per curiam*, 2006 U.S. App. LEXIS 21864 (6th Cir., Aug. 22, 2006). All this is appropriate because horizontal price fixing, and other price-determining agreements, are a fundamental concern of antitrust policy, and they need to be carefully controlled. "No antitrust offense is more pernicious than price fixing." *Ticor Title Insurance, supra,* 504 U.S. at 639. It is also practical to make use of even quite elaborate and time-consuming review procedures in that context, because a rate bureau makes proposals for new rates only at long intervals. A professional regulatory board, on the other hand, frequently deals with different, non-price issues, some of which will have more ambiguous welfare effects, and all of which are presented in much greater numbers. The review of its actions therefore neither can nor should always be as close.

Professional boards are also entitled to somewhat greater latitude as to the proportion of their actions that should be subject to review. Private rate bureaus are commonly focused just on the one subject of price agreements. It therefore makes sense for the state to closely monitor all of their initiatives. A professional regulatory board, by contrast, will be considering a much wider range of issues, many of them routine and recurring. In those circumstances a less comprehensive, more flexible selection of subjects for review will be more realistic and should still be "meet for the case." *Cf. California Dental Ass'n v. FTC*, 526 U.S.

756, 781 (1999) (discussing sliding scale in context of rule of reason).

CONCLUSION

State boards that are made up of members of the regulated profession are rife with the possibility of self-interested conduct, and should be subject to active supervision before a state action defense is available. If the Court reaches this conclusion on the merits, it should not hesitate to act out of concern that doing so may open the door to unforeseen or adverse practical consequences. Many different forms of active supervision are available, and many states are already experimenting with various approaches that could be used.

Not all of the state programs will necessarily provide fully adequate supervision under the standards that the Court may announce. But that is not the point. The point is that those state programs are models, demonstrating procedures that can be adapted without undue difficulty to provide whatever supervision the courts decide is needed, either now or in the future. And because cases in which "active supervision" is the deciding issue are likely to be fairly infrequent, states should be able to count on having sufficient time to select procedures appropriate to their own circumstances and to put them in place.

The decision of the Fourth Circuit should be affirmed.

Respectfully submitted,

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