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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

In its opening brief, the Board demonstrated that a *bona fide* state agency's enforcement of clearly articulated state policy to displace competition is a sovereign act of state regulation that federal antitrust law does not restrain. The Board further demonstrated that this well-established legal rule of state-action antitrust immunity fully applies where, as here, a State decides that the regulatory agency shall be led by part-time public officials who are also market participants in their private capacities.

In response, the FTC argues that public officials who are also market participants should receive immunity only if their regulatory conduct has been actively supervised by "disinterested" superiors. The FTC reasons that there is too much risk that such "self-interested" regulatory officials will subordinate the public interest to their own private interests, no differently than private businesspeople might. But that argument contravenes this Court's precedents and the principles of federalism that informed them.

Specifically, the state-action antitrust doctrine:

(1) adopts legal precepts that render irrelevant the private interests of public officials;

(2) grants immunity in factual situations where public officials have financial self-interests;

(3) emphasizes that federalism gives States the freedom to choose whether and how to bear the risk that conflicts of interest might affect their officials' regulatory actions; and

(4) requires States to actively supervise only private business conduct, not public regulatory conduct.

This Court should reaffirm those settled propositions and reject the FTC's radical departure from 70 years of precedent.

I. A STATE'S PUBLIC OFFICIALS NEED NOT BE "DISINTERESTED" TO CLAIM STATE-ACTION ANTITRUST IMMUNITY FOR THEIR REGULATORY ACTS

The FTC argues (Br. 27) that the state-action "exemption is granted only if the particular restraints on competition have been approved by disinterested public officials." But two of this Court's precedents are directly to the contrary. Moreover, the FTC misunderstands why this Court has required active state supervision of private actors. No decision of this Court justifies the FTC's position.

A. The FTC's Position Is Irreconcilable With *Parker* And *Omni*

Parker v. Brown, 317 U.S. 341 (1943), and *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), articulated federalism-based rules of state-action immunity that render the "self-interest" of public officials legally irrelevant. Moreover, the cases granted immunity to public officials who were not factually "disinterested."

1. *Parker's* legal reasoning. *Parker* concluded that the Sherman Act does not "restrain a state or its officers or agents from activities directed by its legislature": (a) the Act "gives no hint" that it was intended to extend beyond "business combinations … by individuals and corporations" to reach "state action or official action directed by a state"; and (b) courts should "not … lightly attribute[ ] to Congress" such "an unexpressed purpose" given that "the states are sovereign." 317 U.S. at 350-51; *see also* Pet. Br.

19-21. Importantly, *Parker* did not include any qualification that the State's "officers" who are enforcing anticompetitive regulatory programs "directed by its legislature" must be *disinterested*. Such a condition would have contradicted *Parker's* federalism-based rationale. Pet. Br. 23-25, 33-34.

Remarkably, the FTC's short (and belated) discussion of *Parker* (Br. 41-44) never tries to reconcile the FTC's "disinterested official" argument with *Parker's* core precept that federal antitrust law does not restrain a State's officers when they enforce a state policy to displace competition with regulation. Rather, the FTC suggests that *Parker* was modified by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), which supposedly "refined and clarified" *Parker* "to strike an appropriate balance" between state sovereignty and free markets. *See* Br. 2-3. But *Parker's* central holding was not limited by *Midcal*, which merely synthesized "decisions [that] ha[d] applied *Parker's* analysis." 445 U.S. at 104-05.

Specifically, *Midcal* involved "private parties" whom the State had "simply authorize[d]" to engage in legally-enforceable price fixing. *Id.* at 105-06. In adopting the active-supervision standard for such state-sanctioned *business conduct by private actors*, *Midcal* implemented the admonition in *Parker* and its progeny that States cannot simply "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Id.* at 106 (quoting *Parker*, 317 U.S. at 351). *Midcal* did not in any way modify the conclusion in *Parker* and its progeny that, where instead *sovereign regulatory conduct by public officials* is at issue, the Sherman Act simply does not apply. *Id.* at 103-04 (citing *Parker*, 317 U.S. at 351). In short, *Midcal* does not exclude "self-interested" officers from *Parker's* protection of state sovereignty.

2. *Parker's* factual context. A super-majority of the state commission's public officials were also private producers of agricultural commodities. Pet. Br. 21-22. They were thus hardly "disinterested" when approving marketing programs that were proposed by producers of agricultural commodities to increase prices. *Id.* 39-40.

The FTC responds (Br. 42) that *Parker* did not expressly address the commission's composition. But the opinion did cite the statutory section mandating that composition. Pet. Br. 21-22. Moreover, the FTC's suggestion that the *Parker* Court sloppily overlooked the commission's composition is especially unlikely given that the Court exclusively relied on the commission when holding that the marketing program there was "state action" rather than the "individual … action" of "producers." 317 U.S. at 352. Thus, the better understanding of *Parker's* lack of reference to the commission's composition is that this factual issue was (and is) legally irrelevant under the decision's federalism-based rationale.

The FTC also asserts (Br. 43) that "only a minority" of the commission "would [have] be[en] financially interested" in the "particular" marketing program for raisins, given that the statute provided that "no two of [the producer-members] shall be appointed as representing the same commodity." But the FTC ignores the structural self-interest to back-scratch: each producer-member had a financial interest to approve the marketing programs for the commodities of his fellow producer-members in order to encourage them to do likewise for his own commodity. More fundamentally, it is implausible that this landmark decision, with its broadly stated legal rationale, rested on a narrow, unstated, and questionable factual premise—*i.e.*, that the raisin program did not sufficiently implicate the financial interests of the producer-members of other represented agricultural commodities that were potentially "substitute" goods or otherwise economically intertwined. *See* Antitrust Scholars *Amicus* Br. 13-14 & n.9 (listing the other products: grapes, prunes and apricots, peaches, citrus fruit, and vegetables). In sum, the FTC's "disinterested official" argument cannot be reconciled with *Parker*.

3. *Omni's* legal reasoning. *Omni* rejected the proposition that "government *regulatory* action may be deemed private … when it is taken pursuant to a conspiracy with private parties": principles of federalism preclude either (a) questioning whether conspiratorial state regulatory action is "not in the public interest," or (b) invalidating such action based on "principles of good government," which are "unrelated" to the Sherman Act's purposes. 499 U.S. at 374-79; *see also* Pet. Br. 30-31. Importantly, *Omni* did not include any qualification that the "government regulator[s]" in a "conspiracy" to benefit "private parties" cannot have *financial self-interests*. Such a condition would have contradicted *Omni's* federalism-based rationale. Pet. Br. 39-40, 45-47.

Yet again, the FTC's short discussion of *Omni* (Br. 44-46) never tries to reconcile the FTC's "disinterested official" argument with *Omni's* core precept that public regulatory action may not be treated as private action simply because the public officials involved also have private interests at stake. Rather, the FTC principally suggests (*see id.* 44-45) that *Omni* was limited to the question whether public officials in a conspiracy "forfeit[ ] otherwise-available state-action protection," which the FTC proclaims is an "entirely different" question from whether public officials in a conspiracy must be actively supervised to "invoke the state-action doctrine in the first instance." But this doctrinal hair-splitting is untenable.

Omni's federalism-based rationale for why a private "conspiracy" by public officials does not justify creating an "exception" to immunity equally controls why such a conspiracy does not justify requiring active supervision as a predicate to immunity. Regardless of doctrinal labels, it is substantively improper to question whether public officials' potential conflicts of interest caused them to take state regulatory action that was "not in the public interest"; and it is also substantively improper to invalidate state regulatory action solely because public officials' potential conflicts of interest may violate "principles of good government," which are "unrelated" to the purposes of federal antitrust law. *Omni*, 499 U.S. at 374-79; *see also* Pet. Br. 39-40, 45-47. In short, *Omni's* substantive conclusions equally foreclose imposing the active-supervision standard on regulatory action taken by public officials who may be conspiring to further their private "self-interests."

4. <u>*Omni's* factual context.</u> The conspiracy alleged was a *quid pro quo* bribery "agreement," with public officials receiving campaign contributions "in return for" restraining competition against a private business. Pet. Br. 54. Those officials were thus the antithesis of "disinterested." *Id.* 45-46.

The FTC responds (Br. 44-45) that *Omni* immunized bribery only because it deemed a "subjective" inquiry into officials' motives to be "impractical," whereas the FTC here supposedly advances an "objective" approach to identify "a *structural* risk of self-interested behavior." But *Omni* does not permit this proposed distinction. While *Omni* criticized "a subjective test" as "arguably even worse," 499 U.S. at 377, it also condemned any other test of whether "the public interest" is being subordinated to a private conspiracy, because it "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,'" *id.* at 377, 379 (emphasis added). The proposed distinction also is itself "impractical," because allegations about "subjective" motives can always be reframed to allege "objective" "structural risks." Indeed, the *Omni* plaintiffs themselves could have asserted an objective, structural risk of self-interested behavior where public officials take anticompetitive regulatory actions that favor private parties who make large campaign contributions. *See id.* at 367-68.

The FTC also contends (Br. 45-46) that, whereas *Omni* deemed bribery of public officials by market participants to be a form of "corruption" that is "unrelated" to the purposes of federal antitrust law, those purposes are supposedly implicated by the potential for private gain by public officials who are themselves also market participants. But the whole point of *Omni's* bribery holding is that federal antitrust law is *indifferent* to the "ethics" of whether public officials are financially disinterested when they displace competition, 499 U.S. at 378-79, as long as they do so "in their governmental capacities as sovereign regulators," *id.* at 374.

Finally, as *amici* supporting the FTC, Professor Elhauge and other academics err when positing that being bribed by market participants is a type of financial interest somehow distinguishable from being a market participant oneself. *See* Antitrust Scholars *Amicus* Br. 16-17. Drawing such illusory distinctions, much like distinguishing among the financial interests of the agricultural producers in *Parker*, would turn the "disinterested official" inquiry into a quasi-empirical, quasi-legal approach, which would be unpredictable for the States, unworkable for the courts, and burdensome for all. Indeed, *amici* later contradict themselves when they argue that non-market-participants who are elected to public office by market participants must be treated as private actors just because they "surely know[ ] which side [their] bread is buttered on and will act to advance th[ose] interests." *See id.* 29. That, of course, was equally true for *Omni's* bribed officials and *Parker's* producer-members.

In sum, as other scholars have recognized (Pet. Br. 54-55), *Omni* forecloses the "disinterested official" argument, because a public official's financial self-interest from bribe-taking is "unrelated" to the Sherman Act's purposes, and because distinguishing bribery from other types of allegedly relevant financial self-interests is so "impractical" as to drain the word "disinterested" of all meaning. *See* 499 U.S. at 377-79.

B. The FTC's Position Misunderstands *Hallie* And The Active-Supervision Standard

Beyond conflicting with *Parker* and *Omni*, the FTC's "disinterested official" argument is flawed on its own terms. Neither of the FTC's two related rationales is consistent with the active-supervision standard's limited role in our federalist system, and each one is grounded in a mistaken reading of *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

1. The FTC's primary rationale (*see* Br. 24-25, 29-30) is that, because enforcing even a clearly articulated anticompetitive state policy may "require[ ] significant interstitial choices," there supposedly is too much "risk" that public officials who are also market participants will exercise such gap-filling authority "to further their own private interests" rather than the State's public interests. But this rationale is fundamentally flawed.

a. This Court has explained that a State's legislature need not "describe … in detail" the implementation of a clearly articulated policy to displace competition because doing so would make "it difficult to implement [the policy] through regulatory agencies … th[at] are able to deal with problems unforeseeable to, or outside the competence of, the legislature." *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64-65 (1985). Moreover, contrary to the FTC's argument, this Court has held that how a State's public officials exercise their delegated discretion to regulate anticompetitively is not a legitimate concern of federal antitrust law.

First, insofar as public officials' private interests might lead them to exceed their state-law authority, *Omni* held that redressing "substantive[ ] or …

procedural[ ] defect[s]" is not "a federal antitrust job," but rather the role of "state administrative review." 499 U.S. at 371-72.

Second, insofar as public officials' private interests might influence their permissible state-law choices, *Omni* held that federal antitrust law does not "set[ ] up a code of ethics." *Id.* at 378-79. A public official's self-interest bears "no necessary relationship to whether [his] governmental action is in the public interest." *Id.* at 378. Indeed, "the 'public' interest" that motivated the Legislature to authorize the anticompetitive regulatory regime may *itself* have been an unvarnished desire to benefit "the 'private' interest" of market participants. *Id.* at 377.

Finally, *Parker* held that federal antitrust law does not interfere with "a state's control over its officers and agents." 317 U.S. at 351. And it would "undermin[e] the very interests of federalism [that *Parker*] is designed to protect" if immunity turned on a State's sovereign decisions about whether and how to bear the risk that its officials may have conflicts of interest that could influence their regulatory actions. *See Omni*, 499 U.S. at 372; *see also* Pet. Br. 48-49.

b. The FTC's contrary argument rests on a misinterpretation of certain language from *Hallie* concerning the active-supervision standard. Specifically, *Hallie* noted (and later cases repeated) that, whereas "a private party" must be actively supervised since "there is a real danger that he is acting to further his own interests[ ] rather than the governmental interests of the State," "a municipality" need not be actively supervised since "there is little or no danger that it is involved in a *private* [anticompetitive] arrangement." 471 U.S. at

47; *accord Patrick v. Burget*, 486 U.S. 94, 100-01 (1988); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633-34 (1992). The FTC construes (Br. 33-34) *Hallie's* "danger" language to create a "link between the active-supervision requirement and the risk of self-interested behavior in the implementation of state policy." But that construction of *Hallie* is unsound.

Rather than focusing on whether the state-authorized actor at issue poses too great a risk of *flouting* state policy, *Hallie's* "danger" language is focused on whether the "state policy" *itself* poses too great a risk of "circumventing the Sherman Act's proscriptions 'by casting … a gauzy cloak of state involvement over what is essentially a private [anti-competitive] arrangement.'" *See* 471 U.S. at 46-47 (quoting *Midcal*, 445 U.S. at 106). Namely, where the State clearly authorizes a *private actor* to engage in anticompetitive *business* activity, there is a "real danger" that the State seeks only "to further his [private] interests, rather than [any] governmental interests" other than the illegitimate desire to "give immunity to those who violate the Sherman Act by authorizing them to violate it." *See id.* at 47; *Parker*, 317 U.S. at 351. Active supervision of clearly-authorized private business activity is therefore necessary for "the State effectively [to] ma[ke] th[e] conduct its own." *See Patrick*, 486 U.S. at 105-06. Conversely, where the State clearly authorizes a *public entity* to engage in anticompetitive *regulatory* activity, "there is little or no danger" that the entity is a sham created to immunize "a *private* [anti-competitive] arrangement." *See Hallie*, 471 U.S. at 47. Active supervision of any clearly-authorized public regulatory activity is thus unnecessary because there is no realistic doubt that "the anticompetitive scheme is the State's own." *See Ticor*, 504 U.S. at 635.

To be sure, *Hallie's* "danger" language is susceptible to misinterpretation, especially if read in isolation. *See FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 (2013) (in *dicta*, describing *Hallie* as focusing on an actor's "incentive[s]"). But the "risk of self-interest" interpretation of *Hallie* is untenable when considered in light of this Court's entire state-action antitrust jurisprudence. The FTC's position openly requires reading *Midcal* to have "refined" *Parker* by imposing an active-supervision standard for all actors, and reading *Hallie* then to have "modified" *Midcal* based on an intuitive judgment about the relative incentives of public officials. FTC Br. 2-4. Furthermore, the FTC's position ultimately requires ignoring the unambiguous holdings in *Parker* and *Omni* that federalism forecloses construing the Sherman Act to restrain how a State's public officials exercise their discretion when (disinterested or not) they enforce a clearly articulated sovereign policy to displace competition. By contrast, the Board's interpretation of *Hallie* is consistent with the results, and faithful to the reasoning, of all this Court's precedents.

2. The FTC's secondary rationale (*see* Br. 29-31, 35-38) is that a public regulatory agency run by officials who are also market participants is supposedly most "closely analogous" to a "private trade association" whose conduct is sanctioned by the State, and therefore the former should be actively supervised just as the latter must be. But the two entities are treated differently because they are fundamentally different.

a. The two entities differ in kind from the perspective of federalism. A private trade association engages in "business" that is subject to the Sherman Act, and the State cannot "give immunity to [it]" merely "by authorizing [it] to violate [the Act]." *See Parker*, 317 U.S. at 351. By contrast, part-time officials of a public regulatory agency who are also market participants are still the State's "officers," whom the Sherman Act does not "restrain … from activities directed" by clearly articulated sovereign policy. *See id.* at 350-51.

The two entities also differ in kind even from the perspective of "self-interest." A private trade association "may be presumed to be acting primarily on … its own behalf." *See Hallie*, 471 U.S. at 45. And that remains true where the State clearly authorizes it to act anticompetitively, because it is still conducting private business activity. *See Ticor*, 504 U.S. at 628; *Midcal*, 445 U.S. at 105-06. By contrast, a public agency's part-time officials who are also market participants "may [be] presume[d]"—like all other public officials—to "act[ ] in the public interest" when conducting regulatory activity. *See Hallie*, 471 U.S. at 45; *see also Filarsky v. Delia*, 132 S. Ct. 1657, 1667 (2012) ("[I]individuals working [part-time] for the government in pursuit of government objectives are 'principally concerned with enhancing the public good.'").

Notwithstanding such officials' personal interests, they too have sworn an oath to faithfully enforce the law, *e.g.*, *Parker*, 317 U.S. at 346; N.C. Gen. Stat. § 11-7, and are "assumed to be men of conscience and intellectual discipline," *Withrow v. Larkin*, 421 U.S. 35, 55 (1975), whose motives are not to be questioned under federal antitrust law, *Omni*, 499 U.S. at 378-79. Furthermore, their *bona fide* regulatory conduct "is invariably more likely to be exposed to public scrutiny" than is private business conduct, given judicial review of administrative action, legislative and executive oversight, and ethics and disclosure rules. *See Hallie*, 471 U.S. at 45 n.9; *Omni*, 499 U.S. at 371-72, 378-79; Pet. Br. 6-7.[1]

In nevertheless accusing market-participant officials of prioritizing their private interests over state regulatory policy, the FTC invokes an unduly narrow conception of the legitimate public interests that state regulatory policy may pursue. The FTC suggests (*see* Br. 31-32) that market-participant officials are obviously subordinating the public interest if their enforcement of a clearly articulated state policy to displace competition is intended to protect the profits of regulated businesses rather than the welfare of consumers. But such profit-protecting regulation "is not universally considered contrary to the public good," *Omni*, 499 U.S. at 377, and States (as well as Congress) often adopt such regulatory policies, *see, e.g.*, *Parker*, 317 U.S. at 346 ("maintain[ing] prices" of agricultural commodities); *Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) ("devis[ing] a grading formula … to limit the number

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[1] In the FTC's unrealistic hypothetical (Br. 37) where a State labels private entities as "state agencies" without also substantively requiring them to enforce a regulatory standard and to follow the traditional duties of public officials, this Court could disregard the state-law nomenclature as an *objectively baseless sham* that seeks to immunize rather than regulate private business conduct. *Cf. Omni*, 499 U.S. at 379-80 (similar "sham" exception for *Noerr-Pennington* immunity).

of lawyers"). Indeed, the FTC's own *amici* observe that a state agency's structure at most "exacerbates" the "rent seeking" dynamic that affects *all* governmental entities, including legislatures. *See* Public Choice Scholars *Amicus* Br. 11-12; *see also id.* 12-15, 18-20; Pet. Br. 47.

In sum, public agencies run by market-participant officials are not more "analogous" to state-sanctioned private trade associations than to public agencies run by "disinterested officials." *All* public officials are fundamentally different from private actors, and thus they are treated distinctly.

b. The FTC's refusal to accept that critical distinction likewise explains its erroneous reliance (*see* Br. 4, 18-19, 37-38) on a sentence in *Hallie* reaffirming that "active state supervision must be shown" "[w]here state or municipal regulation by a private party is involved." 471 U.S. at 46 n.10. *Hallie* was referencing cases like *Southern Motor Carriers*, where market participants act *in their capacities as private businesses* and yet their actions are given *regulatory effect* by the State. *See id.* (citing 471 U.S. at 62). *Hallie* was not referencing cases like this one (and *Parker*), where instead market participants act *in their capacities as public regulatory officials* of the State. Indeed, the prior sentence in *Hallie* provided that active supervision "likely … [would] not be required" where "the actor is a state agency." *Id.*

Justice Powell, who authored the *Hallie* opinion, recognized the inherent difference between a private actor and a public official who is also a market participant. He (along with three other Justices who joined *Hallie*) had previously joined the plurality opinion in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), which found it "obvious" that a "State Bar's official actions" "cannot [be] transmute[d] … into those of a private organization" just because they "benefited [the Bar's] member-lawyers." *Id.* at 411 n.41.

In sum, the FTC draws a false dichotomy (Br. 27) between "interested private parties acting alone" and "disinterested public officials." There also exist public officials with private interests, and their "governmental *regulatory* action may [not] be deemed private" even if it reflects a "conspiracy" to benefit their own interests. *Omni*, 499 U.S. at 375.

C. The FTC's Position Is Not Supported By Any Of This Court's Other Decisions

Beyond misunderstanding *Hallie*, the FTC and its *amici* erroneously contend that their "disinterested official" argument finds support in a few other precedents.

1. The FTC emphasizes (Br. 39-40) the statement in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), that "[t]he fact that the State Bar is a state agency for some limited purposes does not … allow[ ] it to foster anticompetitive practices for the benefit of its members." *Id.* at 791. But the opinion nowhere says that the State Bar was acting as a "private party" for the "purpose" at issue. Rather, *Goldfarb* said that the Bar was not "acting as sovereign," "because it [could not] fairly be said that … [the] Supreme Court Rules required [the Bar's] anticompetitive activities," *id.* at 790; the Bar instead "ha[d] voluntarily joined in what [was] essentially a private anticompetitive activity" by issuing ethical opinions that coerced compliance with a private bar association's minimum-fee schedules, *id.* at 791-92. That analysis is a pre-*Midcal* no-clear-articulation holding, as this Court has repeatedly recognized. Pet. Br. 50.

The FTC responds (Br. 40) that "lack of clear articulation was [not] the *sole* basis" in *Goldfarb*, which purportedly withheld immunity "for a number of reasons," including "the lack of adequate supervision." In actuality, though, *Goldfarb* said that it "need not inquire further" than "[t]he threshold inquiry" whether a "sovereign" anti-competitive policy existed. *See* 421 U.S. at 790. While *Goldfarb* did reference the lack of active supervision by the Virginia Supreme Court, *id.* at 791, that reference was "relevant to the inquiry" (*Hoover*, 466 U.S. at 569) only insofar as *ex post* supervision by the sovereign might have been *sufficient* to warrant immunity, *see id.* at 572-73, even though it would not have been *necessary* if *ex ante* sovereign articulation had been present.

The FTC also observes (Br. 40) that *Hallie* described *Goldfarb* (and another earlier decision) as cases that "concerned private parties." But that comment in *Hallie* appears to have been referencing a sentence in *Goldfarb* focused on the *private bar association*. Namely, *Goldfarb* suggested that the conduct of "the County Bar" "must be compelled" by the sovereign, *see* 421 U.S. at 791, and *Hallie* distinguished that suggestion when holding that public officials' conduct need not be "compelled," *see* 471 U.S. at 45. *Hallie* did not characterize *the State Bar* in *Goldfarb* as a "private party"; indeed, Justice Powell and three other Justices in *Hallie* had *refuted* that characterization in *Lafayette*, *supra* at 15-16.

2. The FTC likewise errs (Br. 40-41) in invoking *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977). *Bates* granted immunity to the State Bar because "the challenged restraint [was] the affirmative command of the Arizona Supreme Court" through its disciplinary rules, which "reflect[ed] a clear articulation of the State's policy." *Id.* at 359-60, 362.

While *Bates* noted that, "[m]oreover," the Bar's enforcement of the rules was actively supervised by the Supreme Court, that observation *bolstering* the Bar's immunity does not suggest that active supervision was *necessary*. *Id.* at 362. Nor did *Bates* describe the State Bar as a "private party." As for the FTC's observation (Br. 41) that *Patrick* included *Bates* in a sentence that referenced "prior cases concerning state supervision over private parties," the focus of that sentence was on the types of entities *performing* the supervision, not on the types of entities being supervised. *See* 486 U.S. at 103-04.

3. Finally, Professor Elhauge and his fellow academics accuse the Board of "ignor[ing]" *Continental Ore Co. v. Union Carbide*, 370 U.S. 690 (1962), and *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492 (1988). Antitrust Scholars *Amicus* Br. 6-8. But those cases are indisputably inapposite.

Continental Ore expressly *declined* to consider the *Parker* immunity "question of the liability of the Canadian Government's agent"; instead, it held only that private corporations could be found "liable for actions which they themselves jointly took," as they were "not insulated by the fact that their conspiracy involved some acts by the agent." 370 U.S. at 706. Even further afield, *Allied Tube* held that *Noerr-*

Pennington immunity was unavailable to a private company that influenced the "standard-setting process of a private association" that had been conferred "no official authority … by any government." 486 U.S. at 495, 501. These points likely explain why the FTC also "ignored" these cases, as did Elhauge's *co-counsel* in their law-review article's discussion of precedent, *see* Pet. Br. 58.

II. REQUIRING STATE OFFICIALS TO BE "DISINTERESTED" WOULD HARM STATE REGULATORY REGIMES

Beyond failing to reconcile the "disinterested official" argument with this Court's precedents, the FTC fails to reconcile its argument with established federalism principles or settled state practice.

A. The FTC's Position Would Seriously Undermine Federalism

The FTC claims (Br. 46) that its position "furthers the principles of federalism underlying the state-action doctrine." The State *amici* resoundingly reject that claim: 23 States and the national associations of governors and state legislatures support the Board, WV *Amicus* Br.; NGA *Amicus* Br., while *no* state entity supports the FTC (unlike in *Phoebe Putney* and *Ticor*). This is because the FTC's position is a grave affront to state sovereign dignity.

1. The FTC argues (Br. 46-47) that the general "presumption that Congress does not intend to intrude on the State's prerogatives" is inapplicable, because that presumption applies only to "claims that federal statutes *prohibited* States from taking particular actions related to their own governmental structures." But the FTC's "claim" here is *precisely* that the Sherman Act prohibits States from using public officials who are also market participants to enforce anticompetitive state policies without active supervision by other state officials. Nor does the Sherman Act provide the clear statement needed (Pet. Br. 19, 33-34) to overcome the presumption that Congress leaves such sovereign structuring decisions to the States. *Parker*, 317 U.S. at 350-51.

Compounding its error, the FTC contends (Br. 47) that "the presumption runs in the opposite direction," because this Court has observed that "state-action immunity is disfavored, much as are repeals by implication." *Phoebe Putney*, 133 S. Ct. at 1010 (quoting *Ticor*, 504 U.S. at 636). But that observation was made in entirely different contexts. *Ticor* involved private businesses, 504 U.S. at 628, and *Phoebe Putney* involved a local government acting without clear anticompetitive authorization from the State, 133 S. Ct. at 1007. In those contexts, granting state-action immunity would have functioned as a "repeal by implication" because the Sherman Act's broad text presumptively applies to *non-sovereign* actors, including both private "individuals and corporations" and public officials who are not performing "activities directed by [the] legislature." *Parker*, 317 U.S. at 350-51. By contrast, where, as here, a State's "officers" are performing "activities directed by its legislature," the Sherman Act's broad text was never intended to apply in the first place, because "the states are sovereign." *Id.*; *accord Omni*, 499 U.S. at 374.

2. The FTC further observes (Br. 48) that its position "leave[s] States free to choose among a variety of regulatory structures." But, absent a clear statement, federal statutes should not be construed to constrain a State's right to choose the *particular* regulatory structure that will "define[ ]" it "as a sovereign," even if various structures remain available. *See, e.g.*, *Gregory v. Ashcroft*, 501 U.S. 452, 460-61, 467 (1991).

Moreover, as 23 States emphasize, the FTC's position deprives them of the "ability to use a method of governance that they have found desirable and beneficial," and forces them to choose among alternatives that they believe will have "significant negative consequences." WV *Amicus* Br. 3-4, 7; *see also id.* 8-17; Pet. Br. 34-36. Even worse, the FTC imposes these sovereign injuries for the insulting reason that it does not trust State officials to honor their oaths and does not favor the States' methods for addressing any conflicts of interest. NGA *Amicus* Br. 14-18; Pet. Br. 48-49.

3. The FTC also objects (Br. 49) that "no official of North Carolina can be held politically accountable" for the Board's conduct here because the Board's dentist-members are elected by other dentists. This objection is triply flawed.

First, the FTC's "disinterested official" argument applies to *all* agencies run by market-participant officials, and "the vast majority" of those officials are "appointed by the Governor or another disinterested state official." *Id.* 35.

Second, even for agencies structured like the Board, the FTC ignores the public's ability to hold legislative and executive officials accountable for insufficient oversight. Pet. Br. 6-7.

Third, and most fundamentally, *Parker* immunity is not conditioned on whether the relevant actor is politically accountable. *See, e.g.*, *Hoover*, 466

U.S. at 568 (state supreme court justices are "ipso facto" immune). Contrary to the FTC's suggestion, *Ticor* was not concerned about guaranteeing that the anticompetitive actor can be held "politically accountable" by the voting public, but rather about merely *clarifying* which actor properly bears "political responsibility" for anticompetitive conduct. 504 U.S. at 636. In *Ticor*, "responsibility" was "obscure[d]" because consumers would not know whether to blame high insurance rates on private companies or state agencies. *See id.* at 629, 636. By contrast, "responsibility" is clearly "assign[ed]" (*id.* at 636) where, as here, a state agency openly takes regulatory action—whether or not its officials are also market participants elected by other market participants. Indeed, the Board's "orders appeared on official letterhead." FTC Br. 9; J.A. 10.

4. The FTC finally emphasizes (Br. 49-51) that the Board's "claim of an intrusion on state prerogatives rings particularly hollow" because the Board's "cease-and-desist orders … exceeded its state-law authority." But the FTC's "disinterested official" argument applies whether or not state law authorized those orders. More importantly, policing the Board's state-law compliance is not a "federal antitrust job," but rather the role of "state administrative review," *Omni*, 499 U.S. at 372, which was available here through judicial and political avenues, Pet. Br. 6-7. By raising such state-law issues, the FTC flouts *Omni* and "undermin[es] the very interests of federalism [that *Parker*] is designed to protect." 499 U.S. at 372.

B. The FTC's Position Would Massively Disrupt The Status Quo

The FTC claims (Br. 52) that its position "will not unduly disrupt state regulation." But the FTC inaccurately describes the status quo.

1. The FTC contends (*id.* 52-53) that there is no widespread "consensus" in the courts of appeals that the active-supervision standard is inapplicable to agencies run by market-participant officials. But that contention—in addition to ignoring the States' reasonable reliance directly on *Parker*, *Hallie*, and *Omni*—fails to refute the critical fact that "no court in the 70 years since *Parker* has ever held otherwise …, even though there are countless [such] state agencies." Pet. Br. 13, 58.

To be sure, the FTC argues (Br. 53) that a few circuit court decisions "strongly indicat[ed]" that active supervision of such agencies was required. But the FTC's own academic *amici* previously acknowledged that those cases were weak "dicta" at best. Pet. Br. 4; *see also* Cert. Pet. 17-18. Indeed, they admitted that the FTC's position "would upset the balance between state and federal power struck in *Parker* and its progeny." Pet. Br. 58.

2. The FTC further asserts (Br. 53-55) that it is not "typical" for state agencies with market-participant officials to be "unsupervised." But the FTC shows only that *some* acts of *some* state dental boards are supervised to *some* extent.

That meager showing hardly refutes the concerns of the Board's *amici* that *many* state agencies with market-participant officials perform *many* acts that are not necessarily *actively* supervised, and that many of those acts *should not* be actively supervised by non-market participants. NGA *Amicus* Br. 12-14, 29-30; WV *Amicus* Br. 13-17. Indeed, the FTC's own *amici* previously admitted that the FTC's position would "alter the equilibrium of a complex system of regulation" by "put[ting] thousands of boards under the Sherman Act's microscope." Pet. Br. 58.

3. The FTC finally suggests (Br. 55-56) that this Court in *Patrick* "rejected … arguments" "similar" to the representation by the Board's *amici* that professionals will be deterred from serving on state regulatory boards if active supervision is required, ADA *Amicus* Br. 5, 23-25; WV *Amicus* Br. 11. But *Patrick* rejected only the argument that private doctors would be chilled from participating in a hospital's "*private* peer-review decisions." 486 U.S. at 102, 105 (emphasis added). That objection was wholly dissimilar from the accepted concern that antitrust liability should not "deter 'able citizens' from performing … essential public service" on state regulatory bodies. *Hoover*, 466 U.S. at 580 n.34; *see also Filarsky*, 132 S. Ct. at 1665-66 ("[T]he most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts."). The FTC again misses the fundamental distinction between private business conduct and public regulatory conduct.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted,

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