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 FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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Dated: Aug. 6, 2014

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and nonprofit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1] The AAI submits this brief in support of affirming the decision of the Fourth Circuit and Federal Trade Commission (FTC) because petitioner's expansive interpretation of the state-action defense, if adopted, would encourage the misuse of financially interested state licensing boards to exclude competitors without any assurance that it was the State's policy to do so, in conflict with both federalism concerns and our fundamental

[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae has made a monetary contribution to its preparation or submission. The AAI's Board of Directors alone has approved of this filing for the AAI. Individual views of board members or members of the Advisory Board may differ from the AAI's positions. The Advisory Board includes John Kwoka, who served as an expert witness for the FTC in this matter. Professor Kwoka took no part in the preparation of this brief.

national policy in favor of free and open competitive markets.

INTRODUCTION

Antitrust law has long been concerned about the risk of members of professional and other occupational licensing boards using governmental power to restrict competition for the protection of private profit rather than the public interest. *See Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975) ("The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." (citing *Gibson v. Berryhill*, 411 U.S. 564, 578-79 (1973)); *Hoover v. Ronwin*, 466 U.S. 558, 583-84 (1984) (Stevens, J., dissenting) ("For centuries the common law of restraint of trade has been concerned with restrictions on entry into particular professions and occupations. . . . [P]rivate parties have used licensing to advance their own interests in restraining competition at the expense of the public interest."); *cf. Allied Tube & Conduit Corp. v. Indian Head, Inc.,* 486 U.S. 492, 501 (1988) (efforts to influence standard-setting association that set electrical code for many state and local governments not immune under the *Noerr-Pennington* doctrine when "the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade").

The concern about financially self-interested parties making regulatory policy is not unique to antitrust, as *Goldfarb*'s citation to *Gibson v. Berryhill* attests. *See Gibson*, 411 U.S. at 578-79 (holding that it would be violation of Due Process for the Alabama Board of Optometry, which was composed solely of optometrists in private practice, to adjudicate action that would have excluded salaried optometrists); *Carter v. Carter Coal Co.*, 298 U.S. 238, 311 (1936) ("This is a legislative delegation in its most obnoxious form; for it is not even delegation to an official or an official body, presumptively disinterested, but to private persons whose interests may be and often are adverse to the interests of others in the same business."). Indeed, the concern is the same as that reflected in "the maxim that '[n]o man is allowed to be a judge in his own cause; because his interest would certainly bias his judgment, and, not improbably, corrupt his integrity.'" *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting The Federalist No. 10, at 59 (James Madison) (J. Cooke ed., 1961)) (brackets in original). As Professor Jaffe aptly noted long ago, "The learned professions might be trusted in the majority of cases to regulate practice on principles of expertness, though here judgment will be subtly corroded by prejudice of various sorts aroused into action by the will to monopolize." Louis L. Jaffe, *Law Making by Private Groups*, 51 Harv. L. Rev. 201, 249 (1937).

Delegating unsupervised regulatory power to market participants who are elected by their peers

multiplies the risks of self-interested behavior. Treating such representatives as anything but "private" for purposes of the state-action exemption offends basic principles of democratic government and accountability as well as basic economic assumptions about rational behavior. But regardless of how licensing boards are selected, the FTC's conclusion that boards dominated by market participants must satisfy the active-supervision requirement to be exempt from the antitrust laws is fully in accord with this Court's state-action precedents, good public policy, and the weight of academic scholarship across the ideological spectrum.[2] This brief does not repeat the arguments made by the FTC and the academic amici, but rather responds to two of the themes raised by petitioner (the Board) and its amici, namely that the holding of the FTC and the Fourth Circuit "grossly

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[2] Petitioner's claim that the position of the FTC "lack[s] widespread approval among scholars" (Pet'r Br. 53) is belied by the Brief of Antitrust Scholars As Amicus Curiae in Support of Respondent, which expresses support by an unusually large and ideologically diverse group of leading antitrust scholars. In addition to the canonical authorities cited in that brief, see Phillip Areeda & Donald F. Turner, 1 *Antitrust Law* ¶ 213b, at 74-75 (1978). *See also* Antitrust Modernization Commission, *Report and Recommendations* 373-74 (2007) ("AMC Report") (supporting Areeda & Hovenkamp approach); Comments of ABA Section of Antitrust Law on FTC Report re State Action Doctrine 15 (May 2005) (suggesting that active supervision be required when "a majority of the decision-making entities with the hybrid entity are private market participants"), http://www.americanbar.org/content/dam/aba/administrative/antitrust_law/at_comments_ftc_doctrine05.authcheckdam.pdf.

disrespects" basic principles of federalism and will cause "significant disruption" of state occupational regulatory practices. Pet'r Br. 17, 36.

SUMMARY OF ARGUMENT

1. Applying federal antitrust laws to unsupervised financially self-interested state boards supports, rather than undermines, federalism because it "ensure[s] . . . that particular anticompetitive conduct has been approved by the State." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 637 (1992). Like purely private parties, state boards dominated by market participants have an incentive to implement state policy in ways that advance their own interests, rather than the State's. Petitioner's argument that the active-supervision requirement is not designed to address the "agency problem," i.e., that self-interested boards will deviate from state policy, is inconsistent with this Court's explicit reasoning in *Town of Hallie*, *Patrick*, and *Ticor* and the "evidentiary function" petitioner concedes the requirement serves. In this case, North Carolina intended to restrict competition in the dental services market, and so the FTC assumed the clear-articulation prong was satisfied. But North Carolina law was not clear that teeth whitening by bleaching constituted the practice of dentistry, and so the Board's exclusion of non-dentist teeth whiteners was an exercise of significant discretion that did not necessarily accord with state policy.

2. Petitioner's argument that potential "state administrative review" is sufficient to correct self-interested state boards that deviate from state policy misses the point that the anticompetitive conduct itself must be a deliberate product of state policy in order to warrant exemption. Moreover, "state administrative review" was plainly insufficient in this case because the Board inflicted market harm using ultra vires procedures that enabled it to evade judicial review. Likewise the argument that state ethics laws are sufficient to prevent market participants from acting on their financial interests to restrict competition is belied by the facts of this case. In any event, the arguments about the adequacy of potential state remedies are beside the point because petitioner's federalism argument is that the sovereign's choice to use market participants as regulators must be respected regardless of how (or if) the State chooses to supervise them.

3. In practice, "state administrative review" of financially self-interested boards may well constitute active state supervision, and so the hyperbolic arguments of petitioner and its amici that upholding the FTC here will require a radical restructuring of state regulatory regimes are simply false. Review by the courts of North Carolina *before* any exclusion occurs ordinarily would constitute active state supervision, provided that the reviewing court could disapprove those particular anticompetitive acts that fail to accord with state policy. Other common forms of review of self-interested boards may also be

sufficient. Moreover, the degree of supervision required will depend to some extent on the degree of independent discretion exercised by the board. Routine disciplinary proceedings generally do not implicate the competitive interests of state boards and thus are not likely to raise issues of antitrust immunity or liability.

4. Requiring independent supervision of financially self-interested boards as a condition for exemption reinforces North Carolina's constitutional ban against monopolies. The North Carolina Supreme Court has applied this ban to strike down laws reserving certain services to licensed professions or occupations when the laws are not sufficiently justified by public safety concerns, particularly when the exclusionary decisions are left to the professions or occupations themselves.

5. Finally, holding unsupervised market-participant boards potentially liable for violating the antitrust laws will not impair the public health or deter qualified professionals from serving on regulatory boards. Lack of state-action protection does not necessarily mean liability. Antitrust allows for reasonable professional self-regulation to protect against threats to public health and safety, which were absent here. Moreover, as long as decisions to exclude competition are adequately supervised in ways that States commonly do, the state-action exemption will attach. Finally, sovereign immunity may well bar damages claims against the Board;

States are free to provide for the defense of, and indemnify, board members for any liability in their official or individual capacities; and, as here, boards may obtain private liability insurance. The case law has long suggested that financially self-interested boards (which have always had to act under the risk of not satisfying the clear-articulation requirement) are subject to the active-supervision requirement, and there is no evidence that fear of antitrust liability has impacted States' recruitment of active practitioners to serve as board members.

ARGUMENT

I. APPLYING FEDERAL ANTITRUST LAWS TO UNSUPERVISED FINANCIALLY INTERESTED STATE BOARDS RESPECTS FEDERALISM

The Solicitor General points out that "[a]llowing a State to supplant federal law if, but only if, it satisfies specified conditions is not an affront to federalism; it is an example of federalism in action." Resp't Br. 47. In addition, applying the active-supervision requirement to financially self-interested state boards serves the interests of States because, as it does with purely private actors, the requirement ensures that the antitrust laws are not displaced when state regulatory policy is implemented in a way that restricts competition more than the State intends. As applied here, the active-supervision requirement is particularly consonant with state

sovereignty because the Board evaded state procedures that would have cabined its discretion to restrict competition. Moreover, the State itself, through its constitutional ban on monopolies, has evinced concern about allowing members of occupations and professions to use state power to exclude competition for their own benefit rather than to promote public health and welfare.

A. Active Supervision Complements Clear Articulation to Ensure that Restrictions on Competition Are Intended by the State

Simply stated, the logic of applying the active-supervision requirement to a state agency dominated by market participants is that merely satisfying the clear-articulation requirement may leave the agency with significant discretion in implementing a policy intended to displace competition, which market participants have an incentive to exercise in ways that benefit themselves rather than in furtherance of state policy.

This Court has emphasized "the close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. Even as recently tightened by this Court in *Phoebe Putney*, the clear-articulation test does not "require state legislatures to explicitly authorize specific anticompetitive effects

before state-action immunity could apply." *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1012 (2013). Rather, a more general authorization to displace competition may sometimes be sufficient. *See, e.g., City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991) (statute delegating zoning authority to city satisfied clear-articulation requirement for purposes of billboard restriction); *see* Resp't Br. 25 (noting that implementation of clearly articulated policy may require "significant interstitial choices," including "*how* and *to what extent* the free market should be restrained"). Thus, the clear-articulation requirement "cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State." *Ticor*, 505 U.S. at 637.

"[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws," *Phoebe Putney*, 133 S. Ct. at 1010, both prongs ensure that there is a real conflict between state regulatory policies and the antitrust laws before immunity is granted. *See* Phillip E. Areeda & Herbert Hovenkamp, 1A *Antitrust Law* ¶ 221, at 55 (4th ed. 2013) ("[E]ven the strongest concern[ ] for federalism requires federal law to yield to state law only when the state has declared its contrary interest."); *Phoebe Putney*, 133 S. Ct. at 1013 (explaining that in *Town of Hallie*, "[w]ithout immunity, federal antitrust law could have undermined [the State's] arrangement and taken completely off

the table the policy option that the State clearly intended for cities to have").

With respect to private parties, the active-supervision requirement is necessary because "'where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (quoting *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985)); *see also id.* at 101 ("[a]bsent . . . supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests"). But active supervision ordinarily does not apply to municipalities and other sub-state entities "because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011; *see Town of Hallie*, 471 U.S. at 45 ("We may presume, absent a showing to the contrary, that the municipality acts in the public interest.").[3]

Petitioner responds that the "active-supervision standard is not designed to address an alleged

[3] One of the distinguishing features of "municipal officers, unlike corporate heads, [is that they] are checked to some degree through the electoral process." *Town of Hallie*, 471 U.S. at 45 n.9. Where state boards are elected by the industry they regulate, the electoral process exacerbates, rather than checks, market participants' incentives to protect the industry's prerogatives.

'danger' of self-interested actors deviating from the State's interests." Pet'r Br. 44. Rather, according to petitioner, it is designed to protect against a state policy that "merely . . . allow[s] private actors to violate federal law." *Id.*; *see also id.* at 51. The argument is unconvincing. To be sure, the active-supervision requirement *does* prevent States from exempting private actors from the federal antitrust laws by fiat, as the state-action defense is reserved for the displacement of competition by regulation. *Parker v. Brown*, 317 U.S. 341, 351 (1943) ("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"); Areeda & Hovenkamp, ¶ 226, at 179 ("*Parker* allows the states to substitute state regulatory programs for the market but not to authorize (or even compel) private parties to displace market competition with their own unsupervised preferences."). But petitioner cannot explain away this Court's reasoning in *Town of Hallie*, *Patrick*, and *Ticor* that the active-supervision prong *also* serves as a complement to the clear-articulation requirement in ensuring that a State intends to restrict competition in the particular manner at issue.[4] Indeed, petitioner's

[4] Petitioner argues that the "risk of self-interest" rationale is irreconcilable with *Omni*'s rejection of a conspiracy exception even if state officials are bribed. Pet'r Br. 45-46. The FTC and amici antitrust scholars refute this point, noting among other things that treating regulators as private when they make their living in the industry they regulate requires no probing of

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acknowledgment (Pet'r Br. 26-27) that the active-supervision requirement "serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy," *Town of Hallie*, 471 U.S. at 46, refutes its own argument that the active-supervision requirement plays a wholly "distinct role" in the analysis.[5] Pet'r Br. 42, 44.

Petitioner also argues, "where [the clear articulation] standard is satisfied, the public interests of the State and any private interests of its market-participant officials are *both anticompetitive and presumptively aligned.*" *Id.* at 42. Thus, according to petitioner, "North Carolina and the Board's practicing dentists share the same interest in ensuring that 'only qualified persons be permitted to practice

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officials' subjective motives or other impracticalities that concerned the Court in *Omni*. Moreover, the proposed conspiracy exception would have applied to law making, even by state legislatures, and thus was inconsistent with the principle that the "antitrust laws regulate business, not politics." *Omni*, 499 U.S. at 378, 383. In contrast, the exercise of regulatory power by market participants is a traditional concern of antitrust, and one recognized by *Omni* itself in its acknowledgment of a possible market-participant exception to *Parker*. *See id.* at 374-75, 379.

[5] *Town of Hallie* likened the evidentiary function of the active-supervision requirement to that of state compulsion. 471 U.S. at 46. Rejecting the argument that clear articulation required a showing that the State compelled the City to act, this Court said, "[a]lthough compulsion affirmatively expressed may be the best evidence of state policy, it is by no means a prerequisite to a finding that a municipality acted pursuant to clearly articulated state policy." *Id.* at 45-46.

dentistry.'" *Id.* at 43 (quoting N.C. Gen. Stat. § 90-22(a)). However, North Carolina and the Board's practicing dentists do not necessarily share the same interest in ensuring that only dentists engage in teeth whitening.

North Carolina clearly articulated an intention that competition be restricted in the dental services market, which arguably satisfies the clear-articulation test. But it is at least an open question whether North Carolina more particularly intended to bar teeth whitening by non-dentists. The Commission did not reach that question, but explained, "Absent some form of state supervision, we lack assurance that the Board's efforts to exclude non-dentists from providing teeth whitening services in North Carolina represent a sovereign policy choice to supplant competition rather than an effort to benefit the dental profession." Pet. App. 59a; *see also id.* at 123a ("North Carolina courts have never concluded that teeth whitening services provided by non-dentists are unlawful.").[6]

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[6] The Board has insisted that teeth whitening is unlawful unless performed by a dentist because the Dental Practice Act provides, "A person shall be deemed to be practicing dentistry" if he "[r]emoves stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(2). However, expert testimony in the record suggested that, "in terms of both a scientific and historical context, the reference to 'removal of stain' as the practice of dentistry in the Dental Practice Act, enacted in the 1930s, most likely referred to physical removal of stains with a scaler or abrasive rather than clinical bleaching" which is at

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B. Potential State Remedies Provide No Basis for Immunity

Petitioner concedes "it is conceivable that officials who are also market participants could have incentives to *over-enforce* their States' anticompetitive policies," but contends that "the States are fully equipped to handle that concern themselves through, among other things, 'state administrative review.'" Pet'r Br. 43; *id.* at 44 ("[A]ny concern about the specific manner in which the Board enforced the statutory ban on the unlicensed practice of dentistry can be raised before North Carolina's courts or with the State's political branches that perform oversight of the Board."). There are two problems with this "adequate state remedies" argument. First, as this Court recognized in *Ticor*, "the purpose of the active supervision inquiry is not to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices." 504 U.S. at 634. Just as

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issue here and "does not actually result in the removal of stains." Complaint Counsel's Post Trial Brief and [Proposed] Order at 6 (Apr. 25, 2011) (citing record evidence); *see also* Complaint Counsel's Post Trial Proposed Findings of Fact and Conclusions of Law ¶¶ 159-173 (Apr. 25, 2011). By declining to choose the best interpretation of "[r]emoves stains," the Commission respected the prerogative of North Carolina's courts to determine the meaning of North Carolina law. *Cf. Town of Hallie*, 471 U.S. at 44 ("Requiring [too] close examination of a state legislature's intent to determine whether the federal antitrust laws apply [under the clear-articulation prong] would . . . embroil the federal courts in the unnecessary interpretation of state statutes.").

potential state remedies to rein in a rogue agency would not immunize the agency if it acted without any clear articulation, the existence of potential state remedies to protect against "over-enforcement" would not immunize it either. And that is because potential remedies are not dispositive of "whether the State has exercised sufficient independent judgment and control so that the details of the [restrictions on competition] have been established as a product of deliberate state intervention." *Id.* Thus, for example, the fact that the Supreme Court of Virginia *could* have rejected the State Bar's opinions condoning fee schedules did not warrant immunity because that did not make such schedules official state policy. *Goldfarb*, 421 U.S. 773.

Second, this is not a question of "'transform[ing] . . . state administrative review into a federal antitrust job.'" *Omni*, 499 U.S. at 372 (quoting P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 212.3b, at 145 (Supp. 1989)). In this case "the Board *evaded judicial review* of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue [unauthorized] cease and desist orders." Pet. App. 67a (emphasis added); *see N.C. State Bd. of Dental Examiners v. FTC*, 717 F.3d 359, 364, 366 (4th Cir. 2013) (describing Board's conduct as "extra-judicial" and noting that "the Board does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental

Practice Act"). This was no "ordinary" agency error[7] because it vitiated the very supervision designed by the State "to ensure that the Board's actions comply with state law," Pet'r Br. 7, and that would have determined whether excluding non-dentists from providing teeth whitening was in fact state policy.

Relatedly, the National Governors' Association (NGA) misses the mark with its argument that North Carolina's disclosure and ethics rules "already place restrictions on the actions of Board members that limit them from engaging in the self-interested behavior that concerned the FTC and the Fourth Circuit," NGA Amicus Br. 15, and that States in general "have adequate tools to ensure that board and commission members perform their duties appropriately and in a manner that upholds the public trust," *id.* at 18.

As an initial matter, the NGA's contention is belied by the facts of this case, in which North Carolina's ethics and disclosure laws did not stop the Board from engaging in anticompetitive self-interested behavior. *See Dental Examiners*, 717 F.3d

[7] *See FTC v. Monahan*, 832 F.2d 688, 690 (1st Cir. 1987) (Breyer, J.) (suggesting that state-action immunity may depend in part on whether board activity was "inside or outside that area of agency autonomy involving ordinary agency errors or abuses in the administration of powers conferred by the state") (internal quote marks and brackets omitted). The Board acknowledged below that the cease and desist letters may have been "heavy handed." Pet'r Opening Br. 14 (July 19, 2012), 2012 WL 2931297.

at 375 ("[T]his case is about a state board run by private actors in the marketplace taking action outside of the procedures mandated by state law to expel a competitor from the market."). And neither the NGA nor petitioner suggests that board members' participation in a matter that excludes a group of competitors violates the State Government Ethics Act. *See* N.C. Gen. Stat. § 138A-38(a)(1) (officials may participate in an action if they receive a benefit "no greater than that which could reasonably be foreseen to accrue to all members of [their] profession"). Indeed, the whole thrust of the federalism argument advanced by petitioner and its other amici is that a State's sovereign choice to use unsupervised market participants as regulators must be respected, *regardless of conflicts of interest*. Pet'r Br. 48 ("'risk of self-interest' rationale . . . improperly questions the sovereign decision that the benefits of expert regulators outweigh the costs of actual or potential conflicts of interest"). And to the extent that board members' actions here did violate state ethics laws because their actions benefitted their teeth whitening practices, applying federal antitrust laws would complement state-law objectives and address the harm to the market that the ethics laws do not. *See* Pet. App. 60a-61a (issue under antitrust laws is not "official misconduct or unethical behavior . . . but rather . . . the incumbent dentists' efforts to exclude their competitors from a particular economic market" which "lies at the heart of the federal antitrust laws"). It is a commonplace that "federal rights should be regarded as supplementing state-created rights unless

otherwise indicated." *Adams Fruit Co. v. Barrett*, 494 U.S. 638, 646 (1990). State remedies are "adequate" for state-action purposes only insofar as they satisfy the active-supervision requirement.

C. Active Supervision Does Not Require North Carolina to Alter Its Regulatory Structure

The argument of petitioner and amici that imposing an active-supervision requirement will require radical restructuring and "massive disruption" of state regulatory regimes is simply not true.[8] In this case, presumably it would have been sufficient for the Board to *follow* state law and refer the purported unauthorized practice of dentistry to the district attorney for prosecution or to initiate a civil suit seeking to enjoin the practice. *See* Resp't Br. 51 (active-supervision requirement "would likely have been satisfied if petitioner had exercised one of the powers that state law actually grants it"). Review by the courts of North Carolina *before* any exclusion

[8] Nor is it the case that "[t]here is no principled basis for cabining the [risk of self-interest] rationale to agencies like the Board with part-time officials who are also current market participants, because there are myriad other ways that state regulators may be biased towards, or otherwise not independent from, regulated interests." Pet'r Br. 46-47. The distinction is that bias attributable to market participation is an objective economic fact, while other forms of bias, including regulatory capture, are more attenuated and would require probing the motives of state regulators.

occurs ordinarily would constitute active state supervision, provided that the reviewing court could "disapprove those [particular anticompetitive acts] that fail to accord with state policy." *Patrick*, 486 U.S. at 101; *see* Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 715 (1991) (cases support "the proposition that a disinterested politically accountable actor can immunize a restraint only by approving it before it inflicts any market injury"); Areeda & Hovenkamp, ¶ 226b, at 206 ("if there is no judicial procedure for testing a rule without violating it, unsupervised rules could have an in terrorem effect on competition").

This Court has not previously decided "whether judicial review of private conduct ever can constitute active supervision," *Patrick*, 486 U.S. at 104, and the FTC did not expressly decide the issue because "the Board evaded judicial review." Pet. App. 67a. However, the FTC's order permits the Board to seek to enforce its interpretation of the Dental Practice Act by going to court first. *See* Pet. App. 133a. And, as the Solicitor General points out, "That approach would have left to disinterested judicial officials the ultimate determination whether North Carolina law actually prohibits non-dentists from providing teeth whitening services." Resp't Br. 50. Had the Board gone to court, its interpretation of law presumably would have been subject to *de novo* review. *See generally* N.C. Gen. Stat. § 150B-51(c); *e.g., N.C. Bd. of Dental Examiners v. Brunson*, No. 04-CVS-4267, slip op. at 6 (N.C. Super. Ct. Guilford Cnty. Mar. 7, 2005) (rejecting Board

contention that sale of cosmetic crown "fang" constituted unauthorized practice of dentistry, noting that the "[t]he extension of the definition of 'practice of dentistry' to include such devices . . . is best left to the legislature") (CX0159).[9]

Other common forms of review of interested boards may also be sufficient. In North Carolina, for example, agency rules generally must be approved by a legislatively appointed Rules Review Commission to ensure that, among other things, proposed rules are necessary to implement state law, N.C. Gen. Stat. §§ 143B-30.1, 150B-21.9; approved rules may be

[9] While judicial review before any market impact occurred likely would have been adequate state supervision here, as a general matter "limited" judicial review would not be sufficient. *Ticor*, 504 U.S. at 638-39; *Patrick*, 486 U.S. at 104-05 (judicial review of hospital peer review decisions would be inadequate state supervision if limited to making sure that procedure was reasonable and that there was evidence to support the decision). A court must be able "to determine whether [a board's] decisions comport with state regulatory policy and to correct abuses." *Patrick*, 486 at 101; *Ticor*, 504 U.S. at 634 ("sufficient independent judgment and control" must be exercised). Thus, review based on *Chevron* deference would be inadequate. However, like North Carolina, most states do not accord strong *Chevron* deference to their agencies' interpretations of state law. *See* D. Zachary Hudson, *Comment: A Case for Varying Interpretive Deference at the State Level*, 119 Yale L.J. 373, 374 (2009). And when an agency is financially interested in the result such deference would be dubious in any event under general principles of administrative law. *See Amalgamated Sugar Co. v. Vilsack*, 563 F.3d 822, 834 (9th Cir.), *cert. denied*, 558 U.S. 879 (2009); Timothy K. Armstrong, Chevron *Deference and Agency Self-Interest*, 13 Cornell J.L. & Pub. Pol'y 203 (2004).

further subject to judicial review under the State Administrative Procedure Act, *id.,* §§ 150B-4, -43.[10] Other States, including some of the state amici supporting the petitioner, have similar rules commissions. *See* Jerry L. Anderson & Christopher Poynor, *A Constitutional and Empirical Analysis of Iowa's Administrative Rules Review Committee Procedure*, 61 Drake L. Rev. 1, 16-26 (2012) (canvassing States).

The degree of supervision required will depend to some extent on the degree of discretion exercised by a board in implementing state law. A "clear and unambiguous" legislative restriction may not require any active supervision (or may *constitute* active supervision) because "[i]t is not left to the private sector to decide what the policy is or whether it is to be complied with." *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 618, 619 n.3 (6th Cir. 1982); Pet. App. 56a; Areeda & Hovenkamp ¶ 226e, at 211-12.[11] Accordingly, a board may avoid antitrust risk by seeking an advisory opinion from the Attorney General that

[10] Notably, North Carolina law bars agencies from adopting a rule that "[e]nlarges the scope of a profession, occupation, or field of endeavor for which an occupational license is required." N.C. Gen. Stat. § 150B-19(2).

[11] The Bar amici are thus plainly wrong when they say that state-action protection would be denied under the Fourth Circuit's ruling, "even had the General Assembly expressly required the Dental Board to send cease-and-desist letters with the very wording the Dental Board used." *See* N.C. State Bar Amicus Br. 7-8; *id.* at 11 (claiming that ruling means conduct that is mandated by state statute or the constitution would not be immune).

would clarify the law. *See* N.C. Gen. Stat. § 114-2; *e.g.* Office of the Attorney General of the State of N.C., Advisory Opinion: Dental Care and Business Services, 1999 WL 33265598 (Sept. 3, 1999) (responding to request of Dental Examiners as to whether particular business arrangement constitutes the unlawful practice of dentistry and for advice as to how such arrangements should be analyzed).[12]

In sum, no "redundant bureaucracy" need be added; no abandonment of using active professionals to staff licensing boards is required. Nor would "routine licensing decisions concerning professional competence" need to be subject to "pointed reexamination" for antitrust purposes. Pet'r Br. 35. Routine disciplinary decisions involving a local doctor, dentist or lawyer are unlikely to require active supervision because they ordinarily will not involve discretionary policy decisions or implicate the financial interests of board members. *See* Areeda & Hovenkamp, ¶ 227b, at 226 (presumption that market participants require active supervision is "rather weak . . . where the

[12] Other States that rely on boards with practicing members have different regulatory structures that may satisfy the active-supervision requirement. For example, Connecticut houses and supervises its occupational boards within its public health department, *see* Conn. Gen. Stat. § 19a-14 (2013), while Massachusetts places its health-related boards in the public health department and its other occupational boards in a division of professional licensure, Mass. Gen. L. c. 13, § 9; c. 112, § 1 (2014). *See* Resp't Br. 54-55 (canvassing various ways that States structure and supervise their dental boards).

competitive relationship between the decision maker . . . and the plaintiff is weak and the potential for anticompetitive effects not particularly strong"); *cf. Rite Aid Corp. v. Bd. of Pharmacy*, 421 F. Supp. 1161, 1170 (D. N.J. 1976) (three-judge panel) (no basis for disqualification of board members "just by reason of their sharing the same profession as plaintiffs").[13] On the other hand, disciplinary actions that involve novel procedures or methods of doing business that pose a direct competitive threat to incumbents are exactly those that implicate the pecuniary interests of board members, *see Gibson*, 411 U.S. 564, but which petitioner maintains should be immune from antitrust scrutiny regardless of *any* disinterested supervision.

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[13] The Bar amici argue that the Fourth Circuit's opinion means that the North Carolina Bar will no longer be able to send out "cease-and-desist letters to inform individuals that they are practicing law without a license or in an unauthorized manner without the State Bar taking the risk that it is exposing its Councilors to personal liability under the antitrust laws," and this will "require that the State Bar sue individuals engaging in the unauthorized practice of law without warning rather than writing a cease-and-desist letter that may resolve the matter and avoid the cost and expense of filing lawsuits." N.C. State Bar Amicus Br. 17. This is silly. As noted above, routine disciplinary matters are unlikely to need active supervision. Moreover, "letters of caution," which the State Bar *is* authorized to issue in certain circumstances, 27 N.C. Admin. Code § 1D.0206(4), would not restrain trade if they were merely cautionary and not coercive. *See* Pet. App. 139a (order permits Board "to send bona fide litigation warning letters to targets of investigations").

D. Requiring Active Supervision Is Consistent with North Carolina's Constitutional Prohibition on Monopolies

In addition to its antitrust law that mirrors the Sherman Act, *see* N.C. Gen. Stat. § 75-1, North Carolina's Declaration of Rights declares that "monopolies are contrary to the genius of a free state and shall not be allowed," N.C. Const. art. I, § 34, and that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services," *id.*, § 32. The North Carolina Supreme Court has interpreted these constitutional provisions to mean that "[t]he Legislature cannot forbid one man to practice a calling or profession for the benefit or profit of another." *State v. Biggs*, 46 S.E. 401, 403 (N.C. 1903); *see also State v. Harris*, 6 S.E.2d 854, 858-59 (N.C. 1940) (police power of the State cannot be "farmed out to a private group to be used in narrowing the field of competition"); *accord King v. Town of Chapel Hill*, 758 S.E.2d 364, 371 (N.C. 2014) (recognizing "fundamental right to 'earn a livelihood'" (quoting *Roller v. Allen*, 96 S.E.2d 851, 854 (N.C. 1957))).

In several instances, the North Carolina Supreme Court has applied these (and other) provisions of the Declaration of Rights to strike down laws reserving certain services to licensed professionals, finding the laws not sufficiently justified by public safety concerns, particularly when exclusionary decisions were left to the professionals themselves. For example, in *Biggs*, 46 S.E. 401, the court held that the legislature had unconstitutionally attempted

to confer a monopoly by requiring all treatment of disease, real or imaginary, be provided by doctors, with certain narrow exceptions. The court explained, "Some M.D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be decided by the M.D.'s themselves, through an examining committee of five of their own number, or is the public the tribunal to decide, by employing whom each man prefers . . . ?" *Id.* at 403. In *Roller*, the court held that the licensure of tile contractors created an unlawful monopoly, finding it "[s]ignificant[that] all members of the licensing board must come from the industry." 96 S.E.2d at 857. And in *Harris*, the court held that licensing the business of dry cleaning created an unlawful monopoly, noting that where "power [is] given to interested members of the group to control admission to the trade . . . [it] raises a suspicion as to its public purpose." 6 S.E.2d at 864.[14]

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[14] Professor Calabresi explains: "If a state licensing board is controlled by those who already work in the industry, the statute requiring occupational licensing is less likely to be upheld. This is because the board is more likely to promote a monopoly when the distribution of licenses is controlled by the same people who are already working in the industry. This rationale is the same as the rationale used in *Dr. Bonham's Case*," in which "the court struck down a patent granted by King Henry VIII, later confirmed by statute, which gave the Royal College of Physicians the power to impose fines on physicians who had not been licensed by the College to practice medicine," and to keep half of the fines. Steven G. Calabresi & Larissa C. Leibowitz, *Monopolies and the Constitution: A History of Crony Capitalism*, 36 Harv. J.L. & Pub. Pol'y 983, 1086-87 (2013).

Likewise, the North Carolina Supreme Court has rejected an expansive interpretation of the unauthorized practice of optometry to include the mere duplication of lenses without a prescription, in recognition that "the exercise of the police power will not be upheld where its use tends only to create a monopoly or special privilege and does not tend to preserve the public health, safety, or welfare." *Palmer v. Smith,* 51 S.E.2d 8, 11 (N.C. 1948); s*ee also LegalZoom.com, Inc. v. N.C. State Bar*, No. 11-CVS-15111 (N.C. Super. Ct. Wake Cnty. Mar. 24, 2014), 2014 NCBC LEXIS 9, *77 (insofar as document preparation service did not constitute unauthorized practice of law, State Bar's effort to exclude it could give rise to constitutional claim of unlawful monopoly).

Thus, requiring active supervision here reinforces North Carolina's own constitutionally based skepticism towards occupational licensing controlled by self-interested industry participants and concern that such control may be used to exclude competition for the benefit of the industry rather than to promote the public welfare.

II. CONDITIONING IMMUNITY ON ACTIVE SUPERVISION WILL NOT IMPAIR STATE REGULATION OF THE HEALTH PROFESSIONS

The medical associations claim that subjecting unsupervised state regulatory boards to antitrust scrutiny would come at the expense of public health and deter qualified professionals from serving on regulatory boards. Am. Dental Ass'n (ADA) Amicus Br. 20-25. The claim is entirely implausible. For one thing, there is nothing inconsistent between the application of the antitrust laws and the protection of public health that regulatory boards are supposed to provide. Even entirely private professional self-regulation that reasonably protects legitimate public health concerns ordinarily does not violate the antitrust laws. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999) (ethical rule simply banning false or misleading advertising presumably would be lawful); *Dental Examiners*, 717 F.3d at 375 ("'certain practices by members of a learned profession might survive scrutiny . . . even though they would be viewed as a violation of the Sherman Act in another context'" (quoting *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 686 (1978))) (ellipsis in original). The problem arises when professionals restrict competition to protect their wallets rather than to protect the public welfare, as the FTC found to be the case here, and the Fourth Circuit affirmed. *See* Pet. App. 120a-123a (finding that Board failed to establish public-safety defense and that there was no contemporaneous

evidence that the challenged conduct was motivated by health and safety concerns); 717 F.3d at 374 n.12.[15] And, as the FTC also found here, such exclusion has real costs, by unnecessarily raising prices to consumers and depriving them of choices they desire. *See* Pet. App. 131a; 717 F.3d at 374.

For another thing, the argument that the *risk* of being second-guessed by the FTC or an antitrust court will cause doctors or other professionals to allow competition where they otherwise believe it is harmful to public health or safety is far-fetched.[16] As

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[15] Judge Keenan disagreed on this point. *See* 717 F.3d at 377 (concluding that "the Board was motivated substantially by a desire to eliminate an unsafe medical practice," and that "the record supports the Board's argument that there is a safety risk inhering in allowing [non-dentists] to perform teeth-whitening services"). But petitioner failed to seek review of the Fourth Circuit's upholding the FTC's merits decision, so this Court must assume the FTC's findings as to the lack of a genuine safety risk are correct. *See Fort Stewart Schools v. Fed. Labor Rel. Auth.*, 495 U.S. 641, 652 (1990).

[16] The suggestion by some of the amici that board members would be exposed to criminal liability is even more outlandish. Not surprisingly, they do not cite any official who has ever suggested that professional self-regulation, whether by unsupervised boards or otherwise, could constitute the type of hard-core cartel activity that would warrant criminal prosecution. U.S. Dep't of Justice, Antitrust Division Manual III-12 (5th ed. 2014) ("Division policy is to proceed by criminal investigation and prosecution in cases involving horizontal, per se unlawful agreements such as price fixing, bid rigging, and customer and territorial allocations."), http://www.justice.gov/atr/public/divisionmanual/chapter3.pdf; *see* Pet. App. 104a (analyzing Board restraint under rule of reason).

long as the decision to exclude competition is adequately supervised, *see supra*, there is of course no risk of liability.[17] Moreover, if petitioner is correct, sovereign immunity would bar any damages claim against the Board.[18] *See* Pet'r Opening Br. 7 (July 19, 2012). And, as here, States are free to provide for the defense of, and indemnify, board members for any liability in their official or individual capacities. *See* N.C. Gen. Stat. §§ 143-300.3, -300.6. Finally, as here, boards may obtain private liability insurance "to cover all risks or potential liability of the board, its

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[17] The medical associations give the example of a state medical board that might adopt a rule that *permits* non-physician clinicians to perform certain services, even though it would pose significant risks to the public, out of fear that excluding such clinicians could expose the board and its members to antitrust charges. ADA Amicus Br. 20-21. They do not explain why, if the "recognized standing and integrity" of board members (*id.* at 24) will prevent them taking into account their own competitive financial interests in deciding what constitutes harm to the public, they would be swayed to compromise their integrity by the possible exposure to baseless antitrust charges.

[18] The medical associations argue, "Although the members of a state regulatory board may be immune from suit for their official actions under the Eleventh Amendment, they might reasonably fear that sovereign immunity will be denied." ADA Amicus Br. 23 n.9. However, they do not mention that the case they cite, *Versiglio v. Bd. of Dental Exam'rs of Ala.*, 651 F.3d 1272 (11th Cir. 2011), which denied sovereign immunity to a regulatory board, was subsequently vacated by the Eleventh Circuit. *See Versiglio v. Bd. of Dental Exam'rs of Ala.*, 686 F.3d 1290 (11th Cir. 2012). The Eleventh Circuit reversed itself because its original decision relied on an Alabama intermediate court's determination that the board was not "an arm of the state," which was reversed by the Alabama Supreme Court.

members, officers, employees, and agents."[19] N.C. Gen. Stat. § 93B-16(a). In short, state boards should have no reason to pull their legitimate punches for fear of personal liability.

Petitioner and its amici quote *Hoover*'s observation that "the threat of being sued for damages – particularly where the issue turns on subjective intent or motive – will deter 'able citizens' from performing this essential public service." *Hoover v. Ronwin*, 466 U.S. at 580. Yet there is no evidence that fear of liability for antitrust violations has impacted States' recruitment of board members even though the case law has long suggested that financially self-interested boards are subject to *Midcal*'s active-supervision requirement. *See, e.g., FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987); *see also* Br. for the U.S. as Amicus Curiae Supporting Respondent, *Town of Hallie*, 471 U.S. 34 (No. 82-1832), 1984 WL 564129, *21 n.18 ("[T]here may be a need for 'active supervision' where the subordinate state instrumentality is composed – as were the committees in *Bates* and

[19] The Bar amici argue that "liability insurance may not be available to mitigate the risks and defray the costs of defending these claims," but offer no support other than citing *Rose Acre Farms, Inc. v. Columbia Cas. Co.*, 662 F.3d 765, 769 (7th Cir. 2011), a case in which the court found that an antitrust claim was not covered as "advertising injury" under a commercial general liability policy. N.C. State Bar Amicus Br. 16. However, antitrust claims are often covered under other types of policies. *See, e.g., William Beaumont Hosp. v. Fed. Ins. Co.*, 552 Fed. Appx. 494 (6th Cir. 2014) (express coverage for antitrust claim not inconsistent with public policy).

Ronwin – of members of the regulated business."). Moreover, the absence of *any* potential liability, even for injunctive relief, may have a "liberating effect" in the other direction by encouraging unsupervised state boards to indulge their financial and professional interests to restrict competition in ways neither intended by the State nor supported by genuine public welfare concerns. That may be why *Hoover* did not offer state bars "absolute" state-action immunity. On the contrary, *Hoover* made clear that immunity rested on the control of the relevant decision by the State Supreme Court,[20] and that ordinarily "nonsovereign state representatives" qualify for the state-action defense only if they act "pursuant to a 'clearly articulated and affirmatively expressed state policy' to replace competition with regulation" *and* "the degree to which the state legislature or supreme court supervises its representative [is] relevant to the inquiry." 466 U.S. at 569 (citing *Midcal* and *Goldfarb*).

CONCLUSION

The decision of the Fourth Circuit and the FTC does not call into question the use of active professionals in regulating the professions. Their expertise no doubt redounds to the public benefit. But as

[20] The Court emphasized the limited effect of its decision, noting, "Our attention has not been drawn to any trade or other profession in which the licensing of its members is determined directly by the sovereign itself – here the State Supreme Court." *Hoover*, 466 U.S. at 580 n.34.

market participants, active professionals also have a financial interest at stake, particularly when it comes to deciding what services must be performed by the professionals themselves, and what services can safely (and more cheaply) be performed by unlicensed providers, such as the teeth whitening clinics at issue here. The only thing the Fourth Circuit and the FTC ruling calls into question is whether practicing members of a profession (or of other occupations) may restrict competition without any meaningful review by a disinterested public official to ensure that such restrictions comport with state policy, *and* nonetheless escape any scrutiny of the federal antitrust laws. The FTC's answer to that question should be affirmed. Antitrust exemption is appropriate only when a financially self-interested board's discretionary decision to restrict competition is subject to meaningful review before any market impact, regardless of how the board is selected.

Respectfully submitted,

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Dated: Aug. 6, 2014