No. 13-534

IN THE
Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
Petitioner,
v.
FEDERAL TRADE COMMISSION,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE NATIONAL GOVERNORS ASSOCIATION, THE NATIONAL CONFERENCE OF STATE LEGISLATURES, AND THE COUNCIL OF STATE GOVERNMENTS AS AMICI CURIAE SUPPORTING PETITIONER

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INTEREST OF AMICI CURIAE[1]

Amici are organizations whose members include state governments and officials from across the country. Amici regularly file briefs in matters like this one, which raise issues of concern to the Nation's States.

The National Governors Association ("NGA"), founded in 1908, is the collective voice of the Nation's governors. NGA's members are the governors of the fifty States, three Territories, and two Commonwealths.

The National Conference of State Legislatures ("NCSL") is a bipartisan organization that serves the legislators and staffs of the Nation's fifty States, its Commonwealths, and Territories. NCSL provides research, technical assistance, and opportunities for policymakers to exchange ideas on the most pressing state issues. NCSL advocates for the interests of state governments before Congress and federal agencies, and regularly submits amicus briefs to this Court in cases, like this one, that raise issues of vital state concern.

The Council of State Governments ("CSG") is the Nation's only organization serving all three branches of state government. CSG is a region-based forum that fosters the exchange of insights and ideas to help state officials shape public policy. This offers unparalleled regional, national, and international opportunities to network, develop leaders, collaborate, and create problem-solving partnerships.

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[1] Letters consenting to the filing of amicus briefs have been filed by the parties with the Clerk of Court. No counsel for a party authored this brief in whole or in part, and no person, other than amici, their members, or their counsel, made a monetary contribution to the preparation or submission of this brief.

This case implicates an issue of singular importance for state governments—whether state boards and commissions receive immunity from prosecution under the federal antitrust laws when they take purportedly anticompetitive actions pursuant to a clearly articulated state policy to displace competition, but without the active supervision of the State. Many of amici's members use boards and commissions to implement public policy. Their interest in the proper application of federal antitrust law to the States and their agents, and thus the proper resolution of this case, is manifest.

INTRODUCTION

In framing the federal antitrust laws, Congress did not seek "to restrain a state or its officers or agents from activities directed by its legislature." *Parker* v. *Brown*, 317 U.S. 341, 350-351 (1943). As a consequence, this Court has held that acts of substate governmental entities are fairly attributable to the State—and thus not subject to federal antitrust scrutiny—if any alleged anticompetitive effect is a "'foreseeable result' of what [a state] statute authorizes." *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991) (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 42 (1985)). "Once it is clear that state authorization exists, there is no need to require the State to supervise actively the [public entity's] execution of what is a properly delegated function." *Town of Hallie*, 471 U.S. at 47.

The clear and administrable rules that effectuate the *Parker* doctrine are grounded in "principles of federalism and state sovereignty." *Town of Hallie*, 471 U.S. at 38. These rules permit States, working against the backdrop of scarce state resources and limited state personnel, to delegate regulatory and policy-making duties over a wide array of state functions to semi-autonomous boards and commissions. Today, States

regularly use such boards and commissions to carry on their day-to-day business. Indeed, States rely on hundreds of unique boards and commissions that oversee everything from professional licensing to the resolution of workplace disputes to environmental policy.

The Fourth Circuit's decision below calls into question whether this well-established method of delegating state authority can continue. In a significant departure from *Parker* and its progeny, the Fourth Circuit treated members of state boards and commissions who are also market participants like private individuals who must demonstrate both clearly articulated authority to displace competition *and* active supervision by the State before receiving antitrust immunity. *See North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 717 F.3d 359, 370 (4th Cir. 2013); *see also California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980) (articulating two-step test for whether a "*private* price-fixing arrangement" receives federal antitrust immunity (emphasis added)). The decision will negatively affect *all* agencies, for the two principal reasons that amici explain below.

SUMMARY OF ARGUMENT

I. The Fourth Circuit's decision overlooked the federalism and governance concerns that animate this Court's "state action immunity" case law by ignoring the tremendous reliance that States place on boards and commissions to carry out day-to-day functions. Every State uses boards and commissions, including entities structured like the North Carolina State Board of Dental Examiners. These state agents carry out a wide variety of tasks that extend far beyond simply regulating professions, and their members are generally held to high standards of conduct that prevent self-dealing or favoritism. The Fourth Circuit's blithe im-

position of an unwarranted "active supervision" requirement for these entities runs roughshod over this Court's federalism-inflected "state action immunity" doctrine.

II. The Fourth Circuit's decision disregarded this Court's precedent holding that the inquiry into whether a substate entity is entitled to *Parker* immunity ends when the entity demonstrates that it is acting pursuant to a clearly articulated state policy to displace competition. In particular, this Court's decision in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), exemplifies this rule. There, the Court refused to create a test that would look beyond the clear-articulation requirement if a party establishes that the state official may be biased. The rule announced in *Omni* is the only workable test that successfully balances the dangers of self-interested decision making with deference to the States and the practical realities of day-to-day governance.

ARGUMENT

I. EVERY STATE RELIES ON BOARDS AND COMMISSIONS TO IMPLEMENT A WIDE VARIETY OF FUNCTIONS

Substate entities like state boards and commissions have long been shielded from federal antitrust law, without regard to their composition. Indeed, *Parker* v. *Brown* itself granted antitrust immunity to a state agency made up of market participants—California's Agricultural Prorate Advisory Commission. *See* 317 U.S. 341, 344-346 (1943); Pet. 22-23. What has traditionally mattered for the analysis is whether the substate entity has carried out its business at the State's direction. *Parker*'s progeny have thus been respectful of the authority of substate governmental actors to be-

have in an anticompetitive manner when the State deems such regulation to be appropriate.

For example, in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), all nine Justices agreed that substate actors receive greater protection from federal antitrust law than private actors. Specifically, the plurality opinion held that *Parker*'s reasoning extended to certain government entities within a State, based on the degree to which a decision to permit the use of potentially anticompetitive measures in pursuit of public goals could fairly be attributed to the State itself. *Id.* at 416-417 (so long as "the State itself has … directed or authorized an anticompetitive practice, the State's subdivisions" receive immunity). That decision struck a balance that permitted the States "to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws without at the same time permitting purely parochial interests to disrupt the Nation's free-market goals." *Id.* at 415-416.[2] The dissenting Justices would have gone even further, holding that the substate entity merited *Parker* immunity regardless of whether the State had clearly articulated its authority to act in an anticompetitive manner. *Id.* at 426-427 (Stewart, J., dissenting); *id.* at 438 (imposing antitrust liability on municipal government actors would "greatly … impair the ability of a State to delegate government power broadly").

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[2] *See also* 435 U.S. at 417 (Marshall, J., concurring) (acknowledging that there is a "'state action' exemption from the antitrust laws" and agreeing that the plurality's test is appropriate); *id.* at 425 n.6 (Burger, C.J., concurring in part and concurring in the judgment) ("I agree with the plurality that a State may cause certain activities to be exempt from the federal antitrust laws by virtue of an articulated policy to displace competition with regulation[.]").

Later "state action immunity" decisions were similarly cognizant and respectful of the role that substate entities play in the efficient and sound administration of the States' day-to-day business. In *Town of Hallie* v. *City of Eau Claire*, the Court specifically rejected the position that "a legislature must expressly state in a statute or legislative history that the legislature intends for the delegated action to have anticompetitive effects." 471 U.S. 34, 43 (1985). The Court reasoned that such a high standard—which would require "a close examination of a state legislature's intent"—would risk "detrimental side effects upon municipalities' local autonomy and authority to govern themselves," and "would embroil the federal courts in the unnecessary interpretation of state statutes," thereby "undercut[ting] the fundamental policy of *Parker*." *Id.* at 44 & n.7.

In a separate decision issued the same day as *Town of Hallie*, the Court remarked on the critical role that state agencies play in enacting state policy and the importance of policing the *Parker* doctrine so as not to interfere with their proliferation: "Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness." *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 64 (1985); *see also id.* at 57 n.21 (rejecting rule that "would prompt the 'kind of interference with state sovereignty … that … *Parker* was intended to prevent'" (alterations in original)).

This Court's "state action immunity" doctrine has thus developed against the backdrop of a robust understanding of the many ways in which substate boards and commissions effectuate state policy, and with a

sensitivity for how the imposition of potential federal antitrust liability distorts state decision making in this regard. If the Fourth Circuit's ruling stands, the conditions under which boards and commissions receive antitrust immunity may vary based on the professional experience of individual members and the manner in which they are selected to serve. This unpredictability would diminish substate entities' usefulness in carrying out critical state functions that may, and often do, have anticompetitive effects. Given the likely deleterious effects of upholding the Federal Trade Commission's position in this case, it is worth surveying the vast number and types of state boards and commissions, as well as the existing restrictions on their members that prevent self-dealing or favoritism.

Boards and commissions are pervasive, with States as diverse in size and geographical location as Arizona, Illinois, Utah, Hawaii, Texas, New Jersey, Wyoming, California, Massachusetts, Arkansas, and Indiana each maintaining well over a hundred boards and commissions to help carry out vital state functions.[3] Many of

[3] *See* National Conference of State Legislatures, *Examples of Boards and Commissions—Statutorily Created* (Feb. 11, 2013) (on file with State & Local Legal Center) (discussing Arizona, Utah, and Wyoming); State of Hawaii, *Boards and Commissions*, http://governor.hawaii.gov/about/boards-and-commissions/ (last visited May 29, 2014); Texas State Directory, *Agencies, Boards and Commissions*, http://www.txdirectory.com/online/abc/ (last visited May 29, 2014); State of New Jersey, *Find Boards, Commissions and Authorities*, http://nj.gov/governor/admin/search.html (last visited May 29, 2014); State of California, *State Agencies*, http://www.ca.gov/Apps/Agencies.aspx (last visited May 29, 2014); Commonwealth of Massachusetts, *Boards and Commissions*, http://appointments.state.ma.us/ (last visited May 29, 2014); State of Arkansas, *Agencies*, http://www.arkansas.gov/government/agencies/ (last visited May 29, 2014); State of Indiana, *Boards & Commissions Master Sheet*, http://www.in.gov/gov/files/

these boards and commissions are composed—either by statutory directive or simply as a practical matter—of market participants in the relevant field.

As the National Governors Association explains to its members, a "governor's authority to select and nominate persons to positions" such as those on "state boards and commissions, is one of the [governor's] most important responsibilities," as these "individuals … will carry out a much broader range of management and policymaking functions" than the "limited number" the governor can personally manage.[4] Indeed, *all* the States, as well as the District of Columbia and a number of U.S. Territories, rely on boards and commissions made up of elected or appointed members.

State governments depend upon boards and commissions to carry out a wide range of essential functions. Among other things, States often use them to regulate professionals ranging from accountants to barbers, from nurses to lawyers, from physical therapists to real estate appraisers, and from veterinarians to pharmacists.[5]

Alphabetical_Board_Listing_Jan_2013_UPDATED.pdf (last visited May 29, 2014).

[4] National Governors Ass'n, *Governor's Office Guide: Appointments* (2012), *available at* http://www.nga.org/files/live/sites/NGA/files/pdf/GOVOFFICEGUIDEAPPOINTMENTS.PDF.

[5] *E.g.*, State of California, *California Board of Accountancy*, http://www.dca.ca.gov/cba/board_info/mission.shtml (last visited May 29, 2014); Commonwealth of Massachusetts, *Board of Registration of Barbers*, http://www.mass.gov/ocabr/licensee/dpl-boards/br/ (last visited May 29, 2014); Commonwealth of Virginia, *Virginia Board of Nursing*, http://www.dhp.virginia.gov/nursing/ (last visited May 29, 2014); State Bar of Michigan, *Admissions, Ethics, & Regulation*, http://www.michbar.org/professional/ (last visited

California, for example, is dependent upon twenty-five regulatory boards responsible for "licensing and oversight of various professions." These boards "make important decisions on [state] policies and on disciplinary actions against professionals who violate state consumer protection laws." They also "approve regulations and help guide licensing, enforcement, public education and consumer protection activities."[6]

May 29, 2014); Ohio Occupational Therapy, Physical Therapy, and Athletic Trainers Board, *Physical Therapy Section Information*, http://otptat.ohio.gov/PhysicalTherapySection.aspx (last visited May 29, 2014); State of Arkansas, *Arkansas Appraiser Licensing & Certification Board*, http://www.arkansas.gov/alcb/ (last visited May 29, 2014); State of Oregon, *Veterinary Medical Examining Board*, http://www.oregon.gov/OVMEB/Pages/index.aspx (last visited May 29, 2014); State of Missouri, Div. of Prof'l Registration, *Board of Pharmacy*, http://www.pr.mo.gov/pharmacists.asp (last visited May 29, 2014).

Notable for present purposes, every State, the District of Columbia, and two Territories have a dental board charged with regulating the profession. *See* American Dental Ass'n, *State Dental Boards*, http://www.ada.org/en/education-careers/dental-student-resources/dental-examinations-and-licensure-for-students/understanding-licensure/support-and-resources/state-dental-boards (last visited May 29, 2014). Likewise, each State, the District of Columbia, and three Territories have a board that oversees optometrists. *See* National Bd. of Exam'rs in Optometry, *State Board Offices*, http://www.optometry.org/state_board.cfm (last visited May 29, 2014). The States also rely on substate entities to regulate attorneys and medical doctors. *See* American Bar Ass'n, *State & Local Bar Associations*, http://www.americanbar.org/groups/bar_services/resources/state_local_bar_associations.html (last visited May 29, 2014); Federation of State Med. Bds., *Directory of State Medical and Osteopathic Boards*, http://www.fsmb.org/directory_smb.html (last visited May 29, 2014).

[6] *See generally* California Dep't of Consumer Affairs, *DCA Board Member Resource Center*, http://www.dcaboardmembers.ca.gov/ (last visited May 29, 2014).

Similarly, the Illinois Department of Financial and Professional Regulation relies on "more than 50 boards and committees" in order to adequately oversee "more than 1 million professionals in nearly 100 industries." The Illinois boards regulate professions related to areas that are traditionally under the sovereign control of the States such as family law—for example, the Marriage & Family Therapy Licensing & Disciplinary Board—and offer expertise in areas that the typical civil servant knows little about—for example, the Private Detective, Private Alarm, Private Security, Fingerprint Vendor, and Locksmith Board.[7]

Some States also use boards and commissions to provide resolution for workplace issues. California, for instance, uses its Occupational Safety & Health Appeals Board to resolve disputes over citations issued by the state agency responsible for protecting workers from job-related health and safety hazards.[8] Relatedly, Massachusetts' Civil Service Commission hears and decides appeals of public employees regarding their rights under the State's civil service laws.[9] The Arkansas Workers' Compensation Commission enforces the

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[7] *See generally* Illinois Dep't of Fin. & Prof'l Regulation, *Serve Illinois: A Guide to the Boards and Committees Under the Illinois Department of Financial & Professional Regulation* (Nov. 15, 2012), *available at* http://www.idfpr.com/News/2010/IDFPRBoardsFlyer.pdf.

[8] *See* California Dep't of Indus. Relations, *Occupational Safety & Health Appeals Board (OSHAB)*, http://www.dir.ca.gov/oshab/oshab.html (last visited on May 29, 2014).

[9] *See* Massachusetts Exec. Office For Admin. & Fin., *Civil Service Commission*, http://www.mass.gov/anf/hearings-and-appeals/oversight-agencies/csc/ (last visited on May 29, 2014).

State's workers' compensation laws.[10] And the Illinois Labor Relations Board oversees collective bargaining matters involving public employees.[11]

Boards and commissions in some States shape environmental policy, whether by regulating carbon emissions (*e.g.*, the California Air Resources Board, the Arkansas Pollution Control and Ecology Commission, and the Illinois Pollution Control Board), overseeing public lands (*e.g.*, the Washington Parks and Recreation Commission and the Nebraska Board of Educational Lands and Funds), or supervising the use and conservation of natural resources like oil and gas (*e.g.*, the Oklahoma Energy Resources Board and the Nebraska Oil and Gas Conservation Commission).[12] Among many other things, boards and commissions in some States also regulate public utilities that provide state residents with electricity, natural gas, water, and telephone landlines (*e.g.*, the Oregon Public Utility Com-

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[10] *See* Arkansas Workers' Comp. Comm'n, *About Us*, http://www.awcc.state.ar.us/intro.html (last visited May 29, 2014).

[11] *See* Illinois Labor Relations Bd., *Welcome*, http://www2.state.il.us/ilrb/index.asp (last visited May 29, 2014).

[12] *See* California Air Res. Bd., *Introduction to the Air Resources Board*, http://www.arb.ca.gov/html/brochure/arb.htm (last updated Feb. 5, 2013); State of Arkansas, *Arkansas Pollution Control & Ecology Commission*, http://www.adeq.state.ar.us/commission/default.htm (last visited May 29, 2014); Illinois Pollution Control Bd., *Citizens Guide To the IPCB*, http://www.ipcb.state.il.us/AboutTheBoard/CitizensGuidetotheBoard.asp?Section=Act (last visited May 29, 2014); Washington Parks & Recreation Comm'n, *About Us*, http://www.parks.wa.gov/9/About-Us (last visited May 29, 2014); Nebraska Bd. of Educ. Lands & Funds, *Welcome*, http://belf.nebraska.gov/ (last visited May 29, 2014); Oklahoma Energy Res. Bd., *About Us*, http://www.oerb.com/Default.aspx?tabid=142 (last visited May 29, 2014); State of Nebraska, *Nebraska Oil & Gas Conservation Commission*, http://www.nogcc.ne.gov/ (last visited May 29, 2014).

mission), enforce state alcohol and tobacco laws (*e.g.*, the Oklahoma Alcoholic Beverage Laws Enforcement Commission), and coordinate library services (*e.g.*, the Massachusetts Board of Library Commissioners).[13]

In short, boards and commissions carry out numerous vital state functions that they are uniquely qualified, in the judgment of the States' executive and legislative branches, to perform. Many of these boards and commissions are composed of market participants. In some instances, this is statutorily required.[14] But other

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[13] *See* State of Oregon, *Public Utility Commission*, http://www.puc.state.or.us/Pages/Index.aspx (last visited May 29, 2014); Oklahoma Dep't of Libraries, *ABC: Oklahoma Agencies, Boards, and Commissions* 63-64 (Sept. 1, 2013), *available at* http://www.odl.state.ok.us/sginfo/abc/abcs.pdf; Massachusetts Bd. of Library Comm'rs, *About the Massachusetts Board of Library Commissioners*, http://mblc.state.ma.us/mblc/index.php (last updated Dec. 9, 2008).

[14] *See, e.g.*, Edlin & Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1103 & n.50 (2014); Kleiner, *Occupational Licensing*, 14 J. Econ. Persp. 189, 191 (2000). For example, market participants are statutorily required to make up a majority of the membership of 90% of the Florida boards that regulate professions and 93% of such boards in Tennessee. *See* Edlin & Haw, 162 U. Pa. L. Rev. at 1103, 1157-1161. While the Fourth Circuit's decision placed some emphasis on the fact that Board members are dentists who are elected by their professional peers, *e.g.*, *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 717 F.3d 359, 370 (4th Cir. 2013), North Carolina is far from the only State that mandates that some of its boards and commissions be composed of market participants selected by members of their own profession.

For example, a sizeable majority of the members of Oklahoma's Board of Dentistry are dentists who are elected to their positions by their fellow dentists, as is also the case with South Carolina's Board of Dentistry and Alabama's Board of Dental Examiners. *See* Okla. Stat. tit. 59, § 328.7; S.C. Code Ann. § 40-15-20(B); Ala. Code § 34-9-40. Similarly, a number of the members of the

boards and commissions may be staffed by members who are market participants, or who are affiliated with market participants, simply because such individuals are among the most qualified to serve given their experience. Amici, which are composed of state governments and officials, can attest to the proliferation of boards and commissions which, of necessity, are composed of market participants. The Fourth Circuit's rule, while ostensibly concentrating on boards and commissions whose members are by statute elected by market participants, is not so limited, and introduces remarkable complications to the *Parker* analysis: Identifying which of the hundreds of existing boards and commissions have such members (and thus place a State at risk of an antitrust suit) will be a difficult and time-consuming task for the State to undertake.[15]

And such members will not easily be replaced. Federal employees are ill-suited to step into their shoes.

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governing bodies of state bars in States such as Idaho, Florida, Alaska, Washington, Georgia, Mississippi, and California are attorneys elected by other local lawyers. Idaho State Bar, *Idaho State Bar Board of Commissioners*, http://www.isb.idaho.gov/general/boc.html (last visited May 29, 2014); Fla. State Bar Rule 1-4.1; Alaska Bar Ass'n, *Board of Governors*, https://www.alaskabar.org/servlet/content/board_of_governors.html (last visited May 29, 2014); Washington State Bar Ass'n, *Bylaws* 23 http://www.wsba.org/~/media/Files/About%20WSBA/Governance/WSBA%20Bylaws/Current%20Bylaws.ashx (last visited May 29, 2014); State Bar of Georgia, *Bar Rule 1-302. Composition*, http://www.gabar.org/barrules/handbookdetail.cfm?what=rule&id=21 (last visited May 29, 2014); Mississippi Bar, *Bylaws*, http://www.msbar.org/media/602671/MB%20Bylaws%20Amended%20July%2013,%202013.pdf (last visited May 29, 2014); Cal. Bus. & Prof. Code § 6013.2(a).

[15] Additionally, States would be faced with the prospect of prospectively screening market participants from joining boards, adding additional bureaucratic hassle and artificially decreasing the pool of citizens qualified to serve.

See Garcia v. *San Antonio Metro. Transit Auth.*, 469 U.S. 528, 577 (1985) (Powell, J., dissenting) ("[M]embers of the immense federal bureaucracy … know less about the services traditionally rendered by States and localities, and are inevitably less responsible to recipients of such services, than are … state and local commissions, boards, and agencies."). Nor can typical state or municipal employees, who also lack subject matter expertise, easily carry out these tasks. Indeed, because of the sheer breadth of subject matter for which boards and commissions are responsible, state governments would have difficulty maintaining their ordinary-course activity if they were required to find, hire, and pay state employees qualified to either replace the board and commission members or to thoroughly scrutinize each of the entities' day-to-day workings.

States are no doubt cognizant of the potential for self-dealing among these boards and commissions. More broadly, they are certainly aware of the potential for any person delegated with a modicum of state power to abuse that position of trust. Yet many States, in an exercise of their sovereign authority over an array of critical state functions, choose to carry out their business through boards and commissions, including those composed of market participants. And where they do so, those States ensure that board members and commissioners are held to high standards of conduct, similar to state employees. Established disclosure and other ethical rules offer safeguards against board and commission members engaging in favoritism and self-dealing.

The North Carolina Board of Dental Examiners, for example, is regulated under North Carolina's State

Government Ethics Act.[16] This means that the Board's members—like North Carolina legislators, judicial officers, and other public servants—are subject to requirements like "monitor[ing] & avoid[ing] conflicts of interest" and are prohibited from behavior such as "[u]sing their public position for private gain" and "[h]iring & supervising family members."[17] North Carolina has thus already placed 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. *See also North Carolina State Bd. of Dental Exam'rs*, 717 F.3d at 370 (acknowledging that the Board's members are subject "to certain reporting requirements and 'good government' provisions in North Carolina law"); *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 630 (2011) (observing that "each Board member submit[s] detailed financial disclosures to the Ethics Commission; the Board submit[s] an annual report to [various State officials]; and the Board submit[s] an annual audited financial report").

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[16] *See* North Carolina Ethics Comm'n, *Coverage: Covered Boards*, http://www.ethicscommission.nc.gov/coverage/coveredBoards.aspx (last visited May 29, 2014)

[17] North Carolina Ethics Comm'n, *Code of Conduct*, http://www.ethicscommission.nc.gov/coveredperson.aspx (last visited May 29, 2014); *see, e.g.*, N.C. Gen. Stat. § 138A-35(a) ("A public servant shall make a due and diligent effort before taking any action, *including voting or participating in discussions with other public servants on a board on which the public servant also serves*, to determine whether the public servant has a conflict of interest." (emphasis added)); *id.* §138A-35(b) ("A public servant shall continually monitor, evaluate, and manage the public servant's personal, financial, and professional affairs to ensure the absence of conflicts of interest."); *id.* § 138A-31 (prohibiting "[u]se of public position for private gain); *id.* §138A-40 (prohibiting "[e]mployment and supervision of members of covered person's or legislative employee's extended family").

North Carolina is hardly unique in holding its board and commission members to high standards. Ohio board and commission members, for example, are required to sign a fourteen-point agreement requiring the member promise, among other things, that he "will not use [his] position to obtain improper benefits for myself, my family, or business associates."[18] Alaska's rules similarly make clear that "[s]ervice on a state board or commission is a public trust" and that consequently "board or commission members, and their immediate family, may not improperly benefit, financially or personally, from their actions" while serving.[19] Kentucky prohibits "members of policy-making and regulatory boards and commissions" from "self dealing," obligates them to disclose any "direct or indirect interest" in issues before the board, and places limits on the gifts they may accept.[20] As one last example, Louisiana's Code of Public

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[18] *See* State of Ohio, *Pledge of Ethical Conduct* (on file with State & Local Legal Center); *see also* Ohio Exec. Order No. 2007-01S, *available at* http://ohiohighwaysafetyoffice.ohio.gov/Grantees/ExecOrder_Ethics.pdf (last visited May 29, 2014) (establishing special ethics rules for members of the governor's staff and cabinet, "[s]tate employees in those Cabinet agencies, and those employed at or appointed to State of Ohio boards and commissions").

[19] *See* State of Alaska, Dep't of Law, *Ethics Information for Members of Boards & Commissions (AS 39.52)*, http://www.law.alaska.gov/doclibrary/ethics/EthicsInfoBC.html (last visited May 29, 2014) ("The Ethics Act applies to all current and former executive branch public employees and *members of statutorily created boards and commissions*."); *see also* Alaska Stat. § 39.52 ("Alaska Executive Branch Ethics Act").

[20] *See* Commonwealth of Kentucky, Exec. Branch Ethics Comm'n, *Ethical Guidelines for Boards and Commissions*, http://ethics.ky.gov/Pages/boardsCommissionsGuidelines.aspx (last visited May 29, 2014); *see also* Kentucky Exec. Order 2008-454, *available at* http://ethics.ky.gov/SiteCollectionDocuments/Executive Order2008-454.pdf (last visited May 29, 2014) (entitled "Relating

Ethics—which governs the conduct of "all state and local public employees" and "elected officials other than judges"—covers members of boards and commissions.[21] The Code prevents board and commission members from engaging in behavior like "participat[ing] … in a transaction involving" the board in which the members, their immediate families, or their investments "have a substantial economic interest."[22]

It is not necessary to use federal antitrust law to police these standards. (Nor is it appropriate, *see infra* pp. 28-30). The States are equipped to deal with ethical lapses by state board and commission members. While "the scope and procedures for handling ethics complaints or violations vary," *every* State oversees its officials to ensure that its ethics laws are respected.[23] Forty-two States "provide external oversight of their ethics laws through an ethics commission established in statute or in the constitution."[24] The remaining eight provide oversight via "other state agencies such as the Of-

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To Standards Of Ethical Conduct In The Executive Branch Of State Government").

[21] *See* Louisiana Ethics Admin. Program, *The Louisiana Code of Governmental Ethics* (July 2013), http://ethics.la.gov/Pub/Laws/ethsum.pdf; *see also* La. Rev. Stat. Ann. §§ 42:1101-1170 (entitled "Code of Governmental Ethics").

[22] *See* Louisiana Ethics Administration Program, *The Louisiana Code of Governmental Ethics*.

[23] *See* Huntley & Kerns, *Tough Calls: States Tailor Ethics Oversight*, 15 Legisbrief, no.2, at 1 (Jan. 2007), *available at* http://www.ncsl.org/documents/legisbriefs/Tough_Calls_Jan07.pdf; Nat'l Conf. of State Legislatures, *Ethics: State Ethics Commissions*, http://www.ncsl.org/research/ethics/state-ethics-commissions.aspx (last updated Jan. 2014).

[24] Nat'l Conf. of State Legislatures, *Ethics: State Ethics Commissions*.

fice of the Secretary of State or Office of Attorney General or a legislative ethics committee."[25] These oversight entities help ensure that the "comprehensive ethics laws" enacted across the Nation are followed.[26] While "no consensus exists" among the States "as to which punishment fits the crime" of an ethical lapse, every State considers at least some violations of its ethics laws to be criminal offenses punishable with substantial fines or prison time.[27] For example, States like Arizona, Pennsylvania, and Utah "penalize general conflict of interest violations"—such as "when [a public] official reaps a monetary or other reward from a decision made in his or her public capacity"—as felonies.[28] The States thus have adequate tools to ensure that board and commission members perform their duties appropriately and in a manner that upholds the public trust.

II. THE CLEAR ARTICULATION TEST IS THE ONLY WORKABLE RULE FOR DETERMINING WHETHER TO GRANT A SUBSTATE ENTITY IMMUNITY UNDER *PARKER*

As shown, every State relies on substate boards and commissions to carry on the day-to-day business of governance and regulation. These entities are acutely vulnerable to antitrust allegations because they use the

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[25] Nat'l Conf. of State Legislatures, *Ethics: State Ethics Commissions*.

[26] Kirsch, *Does Punishment Fit the Crime? State Penalties and Prosecutions for Ethics Violations*, 22 Legisbrief, no. 14, at 1-2 (Apr. 2014).

[27] *Id.*; National Conf. of State Legislatures, *Penalties For Violations Of State Ethics And Public Corruption Laws* (Nov. 7, 2013), http://www.ncsl.org/research/ethics/50-state-chart-criminal-penalties-for-public-corr.aspx

[28] Kirsch, *Does Punishment Fit the Crime?*, at 1.

power of the state to regulate entire industries or regions and "virtually all regulation benefits some segments of the society and harms others." *Omni*, 499 U.S. at 377. While "it is not universally considered contrary to the public good if the net economic loss to the losers exceeds the net economic gain to the winners," *id.*, federal antitrust laws provide a convenient vehicle for litigious "losers" to take a second bite at the apple. That a number of boards and commissions that regulate the professions have members who have expertise in, and are therefore affiliated in some manner with, the field that they regulate, *see, e.g.*, *supra* pp. 12-13 & n.14, makes those entities particularly susceptible to allegations of self-dealing and antitrust violations.[29] But this problem is hardly limited to the narrow category of substate entities that oversee professionals. Any time a substate entity makes a decision that favors one private party over another, it may be accused of an antitrust violation.[30]

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[29] *See, e.g.*, *Earles* v. *State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1042 (5th Cir. 1998) (discussing allegations of an antitrust violation directed toward a "Board … composed entirely of CPAs who compete in the profession they regulate"); *Hass* v. *Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989) (discussing allegations of an antitrust violation directed toward a state bar that had only "three of fifteen members [that were required to be] nonlawyer members of the public").

[30] *E.g.*, *Automated Salvage Transp., Inc.* v. *Wheelabrator Envtl. Sys., Inc.*, 155 F.3d 59, 62-63, 71, 74 (2d Cir. 1998) (granting immunity to the Connecticut Resources Recovery Authority—charged with overseeing the state's "waste-to-energy" plants—that was accused of entering into an agreement that "maintain[ed] [its] alleged monopoly over Connecticut waste disposal"); *Four T's, Inc.* v. *Little Rock Mun. Airport Comm'n*, 108 F.3d 909, 913-915 (8th Cir. 1997) (granting immunity to a local Airport Commission—charged with "operating and managing [Little Rock's] air-

Importantly, even the threat of a prolonged antitrust suit can have deleterious consequences on the ability of a board or commission to carry out its ordinary duties. As this Court has explained in the absolute immunity context, immunity from suit—even if the suit is entirely meritless—is important because it prevents officials from being "'under an apprehension that the motives that control [their] official conduct may, at any time, become the subject of inquiry in a civil suit … . It would seriously cripple the proper and effective administration of public affairs as entrusted to the executive branch of the government, if [they] were subject to any such restraint.'" *Nixon* v. *Fitzgerald*, 457 U.S. 731, 745 (1982) (quoting *Spalding* v. *Vilas*, 161 U.S. 483, 498 (1896)); *see also Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (failing to grant public officers qualified immunity leads to "social costs [such as] the expenses of litigation, the diversion of official energy from pressing public issues, and the deterrence of able citizens from acceptance of public office"). And "state action immunity shares the same essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances.'" *Martin* v. *Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996) (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985)).[31]

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port and its relative properties and facilities"—that was accused of "formulat[ing] and … impos[ing] concession fees on rental car companies that operate from the airport terminal" in an anticompetitive manner (internal quotation marks omitted)).

[31] *See also Segni* v. *Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (recognizing that the *Parker* doctrine has "been interpreted to create an immunity from suit and not just from judgment—to spare state officials the burdens and uncertainties of the litigation itself as well as the cost of an adverse judgment");

Given these entities' susceptibility to charges of anticompetitive conduct, and the negative impact that even the specter of such liability has on their functioning, the rules governing application of the *Parker* doctrine to state boards and commissions must be crystal clear. As this Court has long held, the *Parker* doctrine applies to substate entities once the "clear articulation" test is met. Any further, invasive inquiry into the arrangements between the state government and its agencies and commissions is both untoward and unworkable.

A. Where State Boards And Commissions Are Concerned, The Court's *Parker* Inquiry Ends Once The Court Concludes That The Clear Articulation Requirement Is Met

1. Respect for "principles of federalism and state sovereignty" led this Court to hold in *Parker* that the federal antitrust laws do not prohibit a State from adopting an anticompetitive economic policy if the State does so "as an act of government." *Omni*, 499 U.S. at 370 (internal quotation marks omitted). Subsequent decisions clarified that this immunity extends to actions taken by state and local government officials

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Commuter Transp. Sys., Inc. v. *Hillsborough Cnty. Aviation Auth.*, 801 F.2d 1286, 1289-1290 (11th Cir. 1986) (similar); *cf.* North Carolina Bar Cert Stage Br. 9-11 (discussing detrimental effect that Fourth Circuit's ruling will have on the North Carolina state bar and similar entities); American Dental Ass'n Cert Stage Br. 15-16 (if the Fourth Circuit's ruling stands, "many highly qualified practitioners who would otherwise be willing to serve on boards will either resign or refuse to accept office lest they face significant personal antitrust exposure"); State of West Virginia Cert Stage Br. 13 ("In West Virginia, the decision has already hobbled the State's Board of Dental Examiners to the detriment of West Virginia citizens.").

when they are acting pursuant to "clear articulation of a state policy to authorize anticompetitive conduct." *See Town of Hallie*, 471 U.S. at 38-40, 46 & n.10; *see also FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) ("[S]ubstate governmental entities do receive immunity from antitrust scrutiny when they act pursuant to state policy to displace competition with regulation or monopoly public service." (internal quotation marks omitted)). "This rule preserves to the States their freedom … to administer state regulatory policies free of the inhibitions of the federal antitrust laws[.]" *Phoebe Putney*, 133 S. Ct. at 1010-1011 (internal quotation marks omitted).

The *Parker* doctrine is simply one concrete instantiation of the broader principle repeatedly affirmed by this Court: State sovereignty is to be respected and the federal government will therefore not be presumed to encroach upon a State's sphere of authority, particularly a State's right to control its own officers. "As Madison expressed it: '[T]he local or municipal authorities form distinct and independent portions of the supremacy, no more subject, within their respective spheres, to the general authority than the general authority is subject to them, within its own sphere.'" *Printz* v. *United States*, 521 U.S. 898, 920-921 (1997) (quoting The Federalist No. 39, at 245 (Clinton Rossiter ed., 1961)); *see also Gregory* v. *Ashcroft*, 501 U.S. 452, 457 (1991) ("[T]he people of each State compose a State, having its own government, and endowed with all the functions essential to separate and independent existence[.]" (internal quotation marks omitted)); *id.* at 460 ("[It is t]hrough the structure of its government, and the character of those who exercise government authority [that] a State defines itself as a sovereign."); *New York* v. *United States*, 505 U.S. 144, 167 (1992) ("[T]he Framers explic-

itly chose a Constitution that confers upon Congress the power to regulate individuals, not States."). Indeed, because "the States retain substantial sovereign powers under our constitutional scheme," this Court has even required Congress to make its intent to infringe upon a State's sphere of power "unmistakably clear in the language of the statute" before it will alter "the usual constitutional balance between the States and the Federal Government." *Gregory*, 501 U.S. at 460-461 (internal quotation marks omitted).

Of course, respecting "'Our Federalism' … does not mean blind deference to 'States Rights,'" but it does represent "the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger* v. *Harris*, 401 U.S. 37, 44 (1971).

2. In keeping with these basic federalism principles, this Court has made clear that once *Parker*'s clear articulation requirement is satisfied, it will not inquire into whether state actors' purportedly anti-competitive actions are motivated by self-interest. *See Omni*, 499 U.S. at 374, 379; *cf. Parker*, 317 U.S. at 351 ("In a dual system of government in which … the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

In *Omni*, the city of Columbia, South Carolina passed an "ordinance restricting the size, location, and spacing of [new] billboards." 499 U.S. at 368. The provision "obviously benefited" a local, well-established billboard company, while making it difficult for Omni, its new-in-town rival, to compete. *Id.* Omni alleged corruption, arguing that Columbia's city council had

passed the ordinance to fulfill its part of a "longstanding secret anticompetitive agreement" between the well-established billboard company and the city's political leaders. *Id.* at 367 (internal quotation marks omitted). Essentially, the city council's members were accused of a quid pro quo bribery scheme under which they received campaign contributions and other support "in return for" favorable legislation and other preferential treatment. *Id.*; *see also id.* at 378; Pet. 55.

Despite Omni's allegations of wrongdoing, the Court ended its inquiry once it concluded that South Carolina had clearly articulated that Columbia had the authority to enact the ordinance (and therefore that the city was "prima facie entitled to *Parker* immunity"). 499 U.S. at 372-374; *see also id.* at 372 (considering only whether South Carolina granted Columbia the *authority* "to regulate" and "to suppress competition"). This Court firmly rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns." *Id.* at 379.

Notably, the *Omni* Court considered and refused to establish additional requirements limiting the ability of local officials to claim *Parker* immunity. The Court rejected a broad "conspiracy" exception to the one-step test on the grounds that requiring an entity to make a showing beyond having the authority to regulate in an anti-competitive manner "would virtually swallow up the *Parker* rule." *Omni*, 499 U.S. at 375 & n.5. Indeed, the Court refused to adopt even a narrowly tailored conspiracy exception that would apply only where a party could show, for example, that the substate entity acted with "'selfish or corrupt motives.'" *Id.* at 376-377. Such a rule, this Court explained, would "go[] far 'to compromise the States' ability to regulate their domestic commerce' and, "arguably even worse[, would] …

require … deconstruction of the governmental process." *Id.* at 377 (quoting *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 56 (1985)).

Importantly, the Court expressly considered—and declined to create—an objective test that examines whether actions taken by individual state actors are in the "'public' interest." 499 U.S. at 377. The Court refused to create such a test because *Parker* "was not meant to shift … judgment [in the manifold areas of government regulation] from elected officials to judges and juries." *Id.* This reasoning indicates that the Court intended to leave the determination of what constitutes the public interest in the hands of state and local officials regardless of whether their actions ultimately might serve special interests, such as those of a prominent billboard company. More broadly, this refusal demonstrates that the Court will not peer into the inner workings of local government or use generic concerns about process—such as favoritism arising from the way that local policymakers are selected—as an excuse to deny *Parker* immunity to a state actor.

If anything, the facts of *Omni* presented a more compelling reason than this case to create an exception to the rule that a finding of clearly articulated authority ends the *Parker* inquiry. *See Omni*, 499 U.S. at 367-370; *cf.* Pet. 30-31. There, the Court explained that the city officials who enacted the anti-competitive ordinance had "close relations" with the beneficiary billboard company. *Omni*, 499 U.S. at 367. The "mayor and other members of the city council were personal friends" with the company's majority owner and "the company and its officers occasionally contributed funds and free billboard space to their campaigns." *Id.* Furthermore, there were allegations that the city's leaders had a longstanding practice of using their "'power and resources'" to benefit the

billboard company. *Id.*; *see also id.* at 386 (Stevens, J., dissenting) ("After a 3-week jury trial, a jury composed of citizens of the vicinage found that … there was indeed such an [anticompetitive] agreement, presumably motivated in part by past favors in the form of political advertising, in part by friendship, and in part by the expectation of a beneficial future relationship[.]"). Indeed, the Court clearly believed that the allegations amounted to accusing individual city council members of bribery. *See id.* at 378 (majority opinion).

In contrast, there are no similar allegations of individual misconduct in this case. "[T]he Board opened an investigation into teeth-whitening services performed by non-dentists" only after receiving formal complaints about the practice. *See State Bd. of Dental Exam'rs*, 717 F.3d at 365. The FTC determined, and the Fourth Circuit agreed, that active supervision was required because *the structure* of the Board—largely made up of practicing dentists who are elected by fellow dentists—raised the specter of self-dealing or favoritism. *See id.* at 368-370; *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 619, 626-627 ("[T]he determinative factor in requiring supervision is not the extent to which individual members may benefit … but rather the fact that the Board is controlled by participants in the dental market.").[32] In other words, the articulated concern on

[32] Indeed, Judge Keenan made clear in her separate concurrence that the Board had reasonable grounds to act as it did. *See* 717 F.3d at 377 ("[T]he record supports the Board's argument that there is a safety risk inherent in allowing certain individuals who are not licensed dentists, particularly mall-kiosk employees, to perform teeth-whitening services."); *see also id.* at 365 (majority opinion) (noting that although whitening services provided by non-dentists "cost far less," they are less effective and "may require multiple applications to achieve results").

which the decisions below are based is a general fear that Board members who are also dentists *might* be self-interested in the Board's enforcement actions.[33] If specific allegations of misconduct were insufficient in *Omni* to trigger a requirement that government officials' actions be subject to active state supervision in order to receive *Parker* immunity, it follows *a fortiori* that there should be no active supervision requirement in this case.

3. The Fourth Circuit's decision is an end run around the core principle of *Omni*—that, when examining the actions of a state actor, the inquiry into whether the *Parker* doctrine is applicable ends once the clear articulation requirement is met. If permitted to stand, the ruling will circumvent this Court's attempt to prevent lower courts from "deconstructi[ng] the governmental process" every time a litigant accuses a substate governmental entity of anticompetitive actions. 499 U.S. at 377.

Omni makes clear that requiring a State to clearly articulate the authority of substate political entities to

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[33] Both the FTC and the Fourth Circuit suggested in passing that the Board may have exceeded its authority by issuing cease-and-desist letters. *E.g.*, 151 F.T.C. at 618, 632-633 n.17; 717 F.3d at 371, 373. But such an accusation—that the Board as an entity arguably went beyond the bounds of its statutory authorization—is not comparable to the allegations in *Omni* that individual members of the city council had acted in an anticompetitive manner due to bribes. Regardless, *Omni* makes clear that the *Parker* doctrine does not require this Court to police whether a state agency stays within the precise metes and bounds of its authority to act: "[I]n order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the [state actor's] action under state law." *Omni*, 499 U.S. at 372.

take actions with possible anticompetitive effect solves concerns about potential corrupt motives. By requiring the State to spell out the metes and bounds of its grant of authority, the Court's rule gives voters sufficient information to hold the State accountable at the polls for grants of authority that go too far, in the judgment of that State's citizenry. Moreover, as this Court has explained, the ultimate purpose of the Sherman Act (and its *Parker* exception) is not to "vindicate[] … principles of good government." 499 U.S. at 378-379. Other statutes, such as the Hobbs Act, play that role. *Id.* at 379. A judge-created rule that contorts federal antitrust law into a method of ensuring ethical conduct by state actors does not further the statute's purpose. *See id.*; *see also Eastern R.R. Presidents Conf.* v. *Noerr Motor Freight, Inc.*, 365 U.S. 127, 140 (1961) (the Sherman Act does not "set[] up a code of ethics … that condemns … political activity").

B. The Clear Articulation Standard Is The Only Workable Rule, Given The Proliferation Of Boards And Commissions Carrying Out The Daily Workings Of State Government

Given the universal use of boards and commissions, and the significant role they play in carrying out the States' day-to-day functions, the *Omni* test is the only workable standard that balances both deference to the States and concerns about over-reaching by self-interested entities. Active state supervision over boards and commissions whose actions could raise antitrust concerns is simply not practicable.

Because state boards and commissions often operate as state agents, it makes good sense to require a showing that they are acting pursuant to expressly granted state authority before they may receive im-

munity from liability. Indeed, failing to impose a clear articulation requirement would be inconsistent with the spirit of *Parker*, which construed the Sherman Act as being inapplicable to "state action or *official action directed by a state*." *Parker*, 317 U.S. at 351 (emphasis added); *cf. Town of Hallie*, 471 U.S. at 38 ("Municipalities … are not beyond the reach of the antitrust laws by virtue of their status because they are not themselves sovereign. Rather, to obtain exemption, municipalities must demonstrate that their activities were authorized by the State[.]").

However, imposing an active supervision requirement is not workable, particularly as the requirement is conceived by the court below. The Fourth Circuit rejected the notion that holding individual board members to a high standard of conduct that prohibits self-dealing or favoritism is adequate to fulfill the active supervision requirement. Specifically, it concluded that the "good government provisions in North Carolina law" and the various "reporting provisions" constraining the actions of the Board's members are too "generic" to meet the requirement. *North Carolina State Bd. of Dental Exam'rs*, 717 F.3d at 370 (internal quotation marks omitted); *supra* pp. 14-18 (discussing existing state-law limits). The panel apparently envisioned that the Board would seek state review, and approval, of each of the cease-and-desist letters that the Board sent to entities that were engaging in unlicensed practice of dentistry. *See State Bd. Of Dental Exam'rs*, 717 F.3d at 370 (rejecting Board's argument that there was active supervision because "the cease-and-desist letters were sent without state oversight and without the required judicial authorization"); *see also In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 629 (FTC determines whether active supervision requirement is met by,

among other things, considering whether the State provided "a written decision on the merits" of the action and "a specific assessment—both quantitative and qualitative—of how the private action comports with the substantive standards established by the legislature.").

The level of supervision required by the Fourth Circuit and the FTC places an impracticable burden on States that depend on hundreds of boards to carry out regulatory and policymaking functions. To be sure, not every state board or commission takes actions that implicate federal antitrust laws, but identifying which do and requiring the boards and commissions to run each action by a (presumably high-ranking) state employee will be both prohibitively time consuming and a drain on state resources. If forced to conform to the Fourth Circuit's rule, the States will have no choice but to reduce their reliance on boards and commissions. Effectively requiring the States to give up the accompanying practical benefits that such entities provide impinges upon the very principles of federalism that the *Parker* doctrine was intended to protect.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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