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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 AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION AND CATO INSTITUTE IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

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Atlantic Richfield Co. v. USA Petroleum Co.,
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Bates v. State Bar of Arizona,
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Bethlehem Steel Corp. v. Gorsuch,
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Brooke Group Ltd. v. Brown & Williamson Tobacco Corp., 509 U.S. 209 (1993) 7

Brown Shoe Co. v. United States,
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Bruner v. Zawacki,
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California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,
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Cantor v. Detroit Edison Co.,
428 U.S. 579 (1976) 15

TABLE OF AUTHORITIES—Continued

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City of Columbia v. Omni Outdoor Adver., Inc., 499 U.S. 365 (1991) 20

City of Lafayette, La. v. Louisiana Power & Light Co., 435 U.S. 389 (1978) 3, 13, 20-21, 31

Cmty. Commc'ns Co., Inc. v. City of Boulder, 455 U.S. 40 (1982) 19

Craig v. Boren, 429 U.S. 190 (1976) 29

Craigmiles v. Giles, 312 F.3d 220 (6th Cir. 2002) 1, 26

D.C. v. Heller, 554 U.S. 570 (2008) 29

Dent v. West Virginia, 129 U.S. 114 (1889) 6

Evans v. Newton, 382 U.S. 296 (1966) 27

FTC v. Phoebe Putney Health Sys., Inc., 133 S. Ct. 1003 (2013) 8, 13, 19

FTC v. Ticor Title Ins. Co., 504 U.S. 621 (1992) 17, 19-21, 25, 27

Gibson v. Berryhill, 411 U.S. 564 (1973) 17

Goldfarb v. Virginia State Bar, 421 U.S. 773 (1975) 15-16

Greene v. McElroy, 360 U.S. 474 (1959) 4

Hallie v. City of Eau Claire, 471 U.S. 34 (1985) 3, 12, 22, 26

Hoover v. Ronwin, 466 U.S. 558 (1984) 4, 26

TABLE OF AUTHORITIES—Continued

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In re Kentucky Household Goods Carriers Ass'n, Inc., 139 F.T.C. 404 (2005), *aff'd*, 199 Fed. Appx. 410 (6th Cir. 2006) 12

In re N.C. Bd. of Dental Exam'rs, No. 9343, 2011 WL 6229615 (F.T.C. Dec. 7, 2011) 22

Lebron v. Nat'l R.R. Passenger Corp., 513 U.S. 374 (1995) 27

Lingle v. Chevron U.S.A. Inc., 544 U.S. 528 (2005) 29

Lochner v. New York, 198 U.S. 45 (1905) 31

Lowe v. SEC, 472 U.S. 181 (1985) 26

Merrifield v. Lockyer, 547 F.3d 978 (9th Cir. 2008) 1, 26

Munie v. Koster, No. 4:10-cv-01096 AGF (E.D. Mo. filed June 18, 2010) 11

N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359 (2013) 22

New State Ice Co. v. Liebmann, 285 U.S. 262 (1932) 6

New York v. United States, 505 U.S. 144 (1992) 27-28

NFIB v. Sebelius, 132 S. Ct. 2566 (2012) 31

Parker v. Brown, 317 U.S. 341 (1943) . . . . . passim

Patrick v. Burget, 486 U.S. 94 (1988) 24

TABLE OF AUTHORITIES—Continued

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Penn-Cent. Merger & N & W Inclusion Cases, 389 U.S. 486 (1968) 29, 31

Perry v. Thomas, 482 U.S. 483 (1987) 29-30

Powers v. Harris, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005) 1

Preston v. Ferrer, 552 U.S. 346 (2008) 30

San Antonio Indep. Sch. Dist. v. Rodriguez, 411 U.S. 1 (1973) 32

Schware v. Bd. of Bar Exam'rs, 353 U.S. 232 (1957) 6

Skinner v. Ry. Labor Executives' Ass'n, 489 U.S. 602 (1989) 27

Sola Elec. Co. v. Jefferson Elec. Co., 317 U.S. 173 (1942) 20

Southern Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48 (1985) 15-21, 31-32

St. Joseph Abbey v. Castille, 712 F.3d 215 (5th Cir. 2013) 26

The Case of the Bricklayers, (1624) 81 Eng. Rep. 871 (K.B.) 5

The City of London's Case, (1610) 77 Eng. Rep. 658 (K.B.) 5

The Ipswich Tailors' Case, (1615) 77 Eng. Rep. 1218 (K.B.) 5

TABLE OF AUTHORITIES—Continued

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U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd., 540 U.S. 736 (2004) 13

Washington v. Glucksberg, 521 U.S. 702 (1997) 4

United States Statute

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United Kingdom Statute

British Statute of Monopolies, 1623, 21 Jac. 1, c. 3 (Eng.) 5

Rules of Court

Sup. Ct. R. 37.3(a) 1

Sup. Ct. R. 37.6 1

Miscellaneous

Armentano, Dominick T., *Antitrust and Monopoly: Anatomy of a Policy Failure* (2d ed. 1990) 6

Armentano, Dominick T., *Antitrust Policy: Reform or Repeal?* (Cato Policy Analysis No. 21, Jan. 18, 1983) 2

Breyer, Stephen, *Regulation and Its Reform* (1982) 7

Broome, Stephen A., *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39 (2006) 30

TABLE OF AUTHORITIES—Continued

Page

Carpenter, Dick M., II, Institute for Justice, *Designing Cartels: How Industry Insiders Cut Out Competition* (2007), *available at* http://www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf (last visited June 25, 2014) 9

Coase, R.H., *The Firm, the Market, and the Law* (1988) 8

Easterbrook, Frank H., *Predatory Strategies and Counterstrategies*, 48 U Chi. L. Rev. 263 (1981) 7

Edlin, Aaron & Haw, Rebecca, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093 (2014) 5-6, 14, 23, 25, 32

Erickson, Angela C., *White Out: How Dental Industry Insiders Thwart Competition from Teeth-whitening Entrepreneurs* (2013), *available at* http://www.ij.org/images/pdf_folder/other_pubs/white-out.pdf (last visited June 25, 2014) 24

Floyd, C. Douglas, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. Rev. 1059 (2000) 18

Friedman, Milton & Rose, *Free to Choose* (rev. ed. 1980) 7-8

TABLE OF AUTHORITIES—Continued

Page

Harrington, David E. & Treber, Jaret, Institute for Justice, *Designed to Exclude: How Interior Design Insiders Use Government Power to Exclude Minorities & Burden Consumers* (2009), *available at* https://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf (last visited June 25, 2014) 10

Hart, John F., *"Sovereign" State Policy and State Action Antitrust Immunity*, 56 Fordham L. Rev. 535 (1988) 18

Hettich, Peter, *Mere Refinement of the State Action Doctrine Will Not Work*, 5 DePaul Bus. & Com. L.J. 105 (2006) 15, 25, 31-32

Jorde, Thomas M., *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Cal. L. Rev. 227 (1987) 19

Letwin, William, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (University of Chicago Press 1981) (1965) 5

Minda, Gary, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 Hastings L.J. 905 (1990) 9

TABLE OF AUTHORITIES—Continued

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Move to License Interior Designers, N.Y. Times, Jan. 23, 1986, at C3, *available at* 1986 WLNR 825327 9

Rockefeller, Edwin S., *The Antitrust Religion* (2007) 2

Sandefur, Timothy, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 Geo. Mason U. C.R. L.J. 159 (2014) 1, 10-11, 24

Sandefur, Timothy, *The Right to Earn a Living* (2010) 1

Sullivan, E. Thomas, *Antitrust Regulation of Land Use: Federalism's Triumph Over Competition, the Last Fifty Years*, 3 Wash. U. J.L. & Pol'y 473 (2000) 21

Weiser, Philip J., *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663 (2001) 28

Wiley, John Shepard, Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713 (1986) 25

INTEREST AND INTEREST OF AMICI CURIAE[1]

Pursuant to Supreme Court Rule 37.3(a), Pacific Legal Foundation (PLF) and the Cato Institute respectfully submit this brief amicus curiae in support of Respondent. PLF is widely recognized as the largest and most experienced non-profit legal foundation representing the views of thousands of supporters nationwide who believe in limited government, individual rights, and economic liberty. PLF has litigated cases and appeared as amicus curiae in many lawsuits involving the abuse of licensing laws to restrict the right to engage in a common occupation. *See, e.g., Merrifield v. Lockyer*, 547 F.3d 978 (9th Cir. 2008); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004), *cert. denied*, 544 U.S. 920 (2005); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002). PLF attorneys have also published scholarly research on issues relating to occupational licensing abuse and government immunities from antitrust laws. *See, e.g.,* Timothy Sandefur, *The Right to Earn a Living* 50-63 (2010); Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 Geo. Mason U. C.R. L.J. 159 (2014).

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amici Curiae affirm that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amici Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

The Cato Institute was established in 1977 as a nonpartisan public policy research foundation dedicated to advancing the principles of individual liberty, free markets, and limited government. Cato has published extensive scholarly research on antitrust law and the constitution's protections for economic liberty. *See*, *e.g.*, Edwin S. Rockefeller, *The Antitrust Religion* (2007); Dominick T. Armentano, *Antitrust Policy: Reform or Repeal?* (Cato Policy Analysis No. 21, Jan. 18, 1983). Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of limited constitutional government that are the foundation of liberty.

This case is of central concern to PLF and Cato because regulatory agencies so frequently exercise their powers to exclude legitimate economic competition for the benefit of politically well-connected insiders, thereby infringing on constitutional protections for the right to compete. PLF and Cato believe their legal and public policy experience will assist this Court in its consideration of the merits of this case.

SUMMARY OF ARGUMENT

This Court should presume strongly against granting state-action immunity in antitrust cases. It makes little sense to impose powerful civil and criminal punishments on private parties who are deemed to have engaged in anti-competitive conduct, while exempting government entities—or, worse, private parties acting under the government's aegis—when they engage in the exact same conduct. As Chief Justice Burger observed, if the antitrust laws were "'meant to deal comprehensively and effectively with the evils resulting from contracts, combinations

and conspiracies in restraint of trade,'" then it is "wholly arbitrary" to treat government-imposed restraints of trade as "beyond the purview of federal law." *City of Lafayette, La. v. Louisiana Power & Light Co.*, 435 U.S. 389, 419 (1978) (opinion of Burger, C.J.) (citation omitted).

This Court has declared that the antitrust laws are concerned with "the result[s]" and not "the form of the combination or the particular means used," so that it is "not of importance whether the means used to accomplish the unlawful objective are in themselves lawful or unlawful." *American Tobacco Co. v. United States*, 328 U.S. 781, 809 (1946). Thus there can only rarely be any justification for treating a state-approved restraint of trade differently from one that lacks government's imprimatur.

Antitrust immunity for private parties who act under color of state law is especially problematic, given that anticompetitive conduct is *most* likely to occur when private parties are in a position to exploit government's regulatory powers. *See Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) ("[w]here 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."). And where, as here, private parties have an explicit conflict of interest when put in charge of state policy, the Court should be especially wary of according those parties immunity. The Board of Dental Examiners is made up of members of the trade who privately benefit from excluding potential competitors from the market, and who answer to other members of the trade who share that interest. For the state to empower them to restrict entry into the trade

obviously brings about the danger Justice Stevens warned about in *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting): it empowers private parties to exploit licensing laws "to advance their own interests in restraining competition at the expense of the public interest."

In light of these dangers, this Court should only apply *Parker* immunity to private parties acting under color of state law (1) where the state itself has commanded the restraint of trade in question, (2) where the state actively supervises the private parties applying that restraint, and (3) where the restraint substantially advances an important state interest.

ARGUMENT

I

LICENSING LAWS ARE FREQUENTLY ABUSED BY EXISTING INDUSTRIES IN VIOLATION OF THE CONSTITUTIONAL RIGHT TO EARN A LIVING

Among the essential rights guaranteed under the Constitution is the right to earn a living at a trade or profession without unreasonable interference from the government. *Greene v. McElroy*, 360 U.S. 474, 492 (1959).

This right is "objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997). As long ago as the early seventeenth century, English courts were confronted with the exact problem presented in this case: existing practitioners using the power of the state to prohibit new competition from entering the

marketplace. This barred entrepreneurs from earning a living and forced consumers to pay more, for fewer options. English courts regularly struck down these cartels, holding that licensing regulations were valid only if they protected public, and not private, interests. *See*, *e.g.*, *The Case of the Bricklayers*, (1624) 81 Eng. Rep. 871, 872 (K.B.); *The Ipswich Tailors' Case*, (1615) 77 Eng. Rep. 1218, 1219 (K.B.).

"[T]he King," declared the court in *The City of London's Case*, (1610) 77 Eng. Rep. 658, 663 (K.B.), "may erect *guildam mercatoriam, i.e.*, a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, *and not for the hindrance of it*." (emphasis added). These decisions formed the basis of the Whig anti-monopoly tradition, and led to the enactment of the British Statute of Monopolies, 1623, 21 Jac. 1, c. 3 (Eng.), an early model for American antitrust legislation. *See further* William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* 22-32 (University of Chicago Press 1981) (1965).

Sadly, as this case demonstrates, cartels of existing business still use licensing laws to protect themselves against competition by newcomers. By staffing licensing and regulatory agencies with established practitioners who have a vested private interest in excluding competition, states routinely enable those firms to use government power to restrict entrepreneurs' right to earn a living, increase prices, and limit consumer choice. While Professors Aaron Edlin and Rebecca Haw call these entities "the new cartels," *Cartels by Another Name: Should Licensed*

Occupations Face Antitrust Scrutiny? 162 U. Pa. L. Rev. 1093 (2014), there is nothing new about it: the actions at issue in this case are actually among the oldest abuses of government power known to our constitutional tradition.

This Court has repeatedly held that the Constitution forbids states from blocking people from earning a living pursuant to licensing restrictions that lack a reasonable connection to the person's fitness or capacity to engage in that trade. *See Schware v. Bd. of Bar Exam'rs*, 353 U.S. 232, 238-39 (1957); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932). But because trade cartels that operate under the aegis of the state are often granted antitrust immunity under *Parker v. Brown*, 317 U.S. 341 (1943), the very entities most likely to create monopolies and engage in the most harmful forms of anticompetitive behavior are shielded from antitrust scrutiny.

To emphasize: *the state's sovereign power is an essential tool by which private actors restrain trade.* Existing firms only invest time and resources in obtaining and enforcing barriers to entry because they stand to recoup those costs through above-market prices that are made possible only by government's power to prohibit new firms from competing against them. Without that power to exclude, new firms could enter the market whenever existing firms fixed prices, reduced quality, or tried to limit consumer choices. *See* Dominick T. Armentano, *Antitrust and Monopoly: Anatomy of a Policy Failure* 42 (2d ed. 1990) ("Government franchises, certificates of public convenience, licenses . . . are all instances of monopoly power for the firms protected from open

competition . . . . [G]overnment, and not the free market, would be the actual source of resource-misallocating monopoly.”).

By way of analogy, this Court held in *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), that predatory pricing schemes are exceedingly unlikely to work unless some barrier to entry enables the alleged predator to prevent new firms from entering the industry as soon as the predator tries to raise prices above market rates. *Id.* at 227-28. If “new entry is easy,” *id.* at 226, new firms will start up and prevent the predator from recouping its losses, thus defeating the predatory pricing scheme. *See also* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U Chi. L. Rev. 263, 272 (1981) (“barriers to entry and postpredation monopoly are necessary to recoupment.”); Stephen Breyer, *Regulation and Its Reform* 32 (1982) (“regulation can make predatory pricing easier, since it often provides the barriers to entry necessary for a potential predatory pricer to succeed.”). In the same way, barriers to entry are an invaluable tool in the hands of established firms seeking to exclude rivals for self-interested purposes.

Exempting private actors from antitrust liability whenever they enlist the power of the state in their anticompetitive efforts is simply unreasonable. Economists long ago recognized that existing firms try to persuade government to raise barriers to entry in a trade so as to protect themselves against competition. “The *justification*” for such laws, wrote Milton and Rose Friedman,

> is always the same: to protect the consumer. However, the *reason* is demonstrated by observing who lobbies . . . for the imposition or strengthening of licensure. The lobbyists are invariably representatives of the occupation in question rather than of the customers . . . . [I]t is hard to regard altruistic concern for their customers as the primary motive behind their determined efforts to get legal power to decide who may be a plumber.

Free to Choose 240 (rev. ed. 1980). Or, as Sir Edward Coke put the point four centuries ago, businesses seeking licensure are frequently like a man rowing a boat: "they look one way, and row another: they pretend public profit, intend private." Quoted in R.H. Coase, *The Firm, The Market, and The Law* 196 (1988) (spelling modernized). Thus allowing states to immunize private conduct from antitrust liability whenever that conduct involves the use of state regulatory power makes no sense.

If "[t]he antitrust laws were enacted for 'the protection of *competition*, not *competitors*," *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 352 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (emphasis in original)), and were meant to "embod[y]" the "fundamental national values of free enterprise and economic competition," *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013), then private parties acting with state authority should be particularly suspect. It is precisely by exploiting state power that existing firms engage in anticompetitive behavior. "When a group of competitors or a single firm influence governmental

process for the purpose of restraining trade or monopolizing the market, the statutory objectives of the [antitrust laws] are placed in serious jeopardy." Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 Hastings L.J. 905, 909 (1990).

Examples of trade associations using state laws to restrict their own competition—for no genuine consumer benefit—abound. For example, in the 1980s, the American Society of Interior Designers (ASID) began a campaign to obtain regulations in various states which would require a government license to engage in the trade of interior design—*i.e.*, advising clients on how to decorate their homes or businesses more attractively. There is, of course, no realistic danger to the public from unlicensed persons advising clients on where to place tables and what color drapes to buy. Yet ASID spent some $275,000 on the effort to obtain licensing laws in 1986, *see Move to License Interior Designers*, N.Y. Times, Jan. 23, 1986, at C3, *available at* 1986 WLNR 825327, and since then, it has continued to spend handsomely in its push for licensing laws. *See generally* Dick M. Carpenter II, Institute for Justice, *Designing Cartels: How Industry Insiders Cut Out Competition* 9-24 (2007).[2] Today, 19 states prohibit people from calling themselves "interior designers" without government permission, *id.* at 7, and three states and the District of Columbia forbid a person from advising clients on how to decorate a home or business without first holding a license. *Id.* Obtaining such a license is expensive and time-consuming, so licensing laws typically block economic

[2] *Available at* http://www.ij.org/images/pdf_folder/economic_liberty/Interior-Design-Study.pdf (last visited June 25, 2014).

opportunity to precisely those middle- or lower-income applicants most in need of such opportunity. *See* David E. Harrington & Jaret Treber, Institute for Justice, *Designed to Exclude: How Interior Design Insiders Use Government Power to Exclude Minorities & Burden Consumers* (2009).[3]

Another example is Certificate of Public Convenience and Necessity (CPCN) laws, which bar competition in such industries as household goods moving, solely to protect established insiders against competition. *See generally* Sandefur, *Public Convenience*, *supra*, at 159. Under a typical CPCN law, anyone wishing to enter a trade must first notify existing firms and give them the opportunity to object to the opening of a new business. When an objection is filed, the applicant must prove to a government agency that new competition is warranted—an obstacle that is usually extremely difficult to overcome, in no small part due to the fact that most such laws provide no criteria or only extremely vague criteria for proving this. Existing firms use their objection power as a "competitor's veto" to bar new firms from entering the trade—without any concern for public health and safety, or an applicant's skills, qualifications, or experience.

For instance, Missouri's CPCN law was systematically exploited by existing moving companies to block competition against them between 2005 and 2010. *See id.* at 180.[4] Of the 17 persons who sought

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[3] *Available at* https://www.ij.org/images/pdf_folder/economic_liberty/designed-to-exclude.pdf (last visited June 25, 2014).

[4] Missouri's law was the target of a 42 U.S.C. § 1983 lawsuit, (continued...)

permission to operate a statewide moving company during those years, all were protested by one or more existing firms, who stated as the sole basis for objection that allowing a new moving company would cause "diversion of traffic or revenue" from them. *Id.* at 181. None ever identified any concern relating to public safety, and no objection was ever filed by a consumer. *Id.* Yet the state's Transportation Department routinely denied even fully qualified applicants the right to start moving businesses, solely because existing firms did not desire competition. *See id.* at 183-84. The state repealed its CPCN law in 2012, but this history demonstrates how empowering existing firms to prohibit potential competition established a cartel that harmed entrepreneurs by denying them the right to earn a living, and harmed consumers by raising prices and restricting the availability of services—all for exclusively private benefit.

The District Court for the Eastern District of Kentucky made almost identical findings recently in a case involving that state's CPCN requirement for moving companies. *Bruner v. Zawacki*, No. 3:12-57-DCR, 2014 WL 375601 (E.D. Ky. Feb. 3, 2014). Between 2007 and 2012, 39 persons applied for permission to operate moving companies. *Id.* at *2. Existing companies collectively filed 114 protests against those applications, *id.*, but no protest ever identified any concerns relating to an applicant's safety, honesty, or consumer service record, *id.* at *6,

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[4] (...continued)
Munie v. Koster, No. 4:10-cv-01096 AGF (E.D. Mo. filed June 18, 2010), which was dismissed as moot when the state repealed the law after oral argument on the summary judgment motion.

and no protest was ever filed by a consumer. *Id.* at *2. The state routinely denied Certificates to experienced, fully-qualified movers, simply because existing firms used their veto power to block competition. *Id.* at *7. As the District Court explained when declaring the law unconstitutional, the government was "providing an umbrella of protection for preferred private businesses while blocking others from competing, even if they satisfy all other regulatory requirements." *Id.* at *6.[5]

Given that private parties "may be presumed to be acting primarily" for self-interested reasons even when wielding state regulatory powers, *Hallie*, 471 U.S. at 45, extending state-action antitrust immunity to those parties is likely to exempt precisely those actions *most* likely to constitute monopolistic behavior.

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[5] The Federal Trade Commission has taken antitrust action against some of these state-established cartels on grounds other than licensing. For example, in *In re. Kentucky Household Goods Carriers Ass'n, Inc.*, 139 F.T.C. 404, 405 (2005), *aff'd*, 199 Fed. Appx. 410 (6th Cir. 2006), the FTC found that the state's household goods movers had engaged in "unlawful horizontal price fixing," notwithstanding the Association's effort to claim *Parker* immunity. The FTC found that although the state did regulate prices to ensure that they are "just and reasonable," the state did not actively supervise the prices that were established, never required submission of data supporting the set prices, and had established no standard for determining what rates would be permissible. *Id.* at 408. The FTC therefore found that state supervision over rate setting was "exceedingly limited," *id.* at 421, and that the state's moving companies were exploiting the statutory framework to engage in cartel behavior. Indeed, the state was literally "rubber-stamping" the private association's decision to set prices in the industry. *Id.* at 428; *see also id.* at 435 ("year after year, the [state] has allowed the [private movers] . . . to raise [legally imposed] rates with virtually no examination of the merits of these rates. The brunt of these anticompetitive practices is being borne by consumers in Kentucky.").

This Court should continue to presume strongly against such immunity. *Phoebe Putney*, 133 S. Ct. at 1016-17 (rejecting invitation to presume in favor of immunity).

II

THIS COURT SHOULD REFUSE STATES THE POWER TO IMMUNIZE ANTICOMPETITIVE ACTIONS FROM ANTITRUST LIABILITY BY MERE FIAT

To permitting states to extend antitrust exemptions at will to private parties would violate the Supremacy Clause, by allowing states to essentially veto the applicability of a federal statute—the text of which does not give states any such power. *Parker*, 317 U.S. at 351 (states cannot "give immunity to those who violate the Sherman Act by authorizing them to violate it."). It would also contradict the broad wording of the antitrust laws themselves, which apply to "any" and "all" restraints of trade, presumptively including those imposed by government bodies. *See U.S. Postal Serv. v. Flamingo Indus. (USA) Ltd.*, 540 U.S. 736, 744-45 (2004).

Allowing states expansive power to exempt private actors from antitrust laws would also disrupt national economic policy by encouraging a patchwork of state-established entities licensed to engage in cartel behavior. This would disrupt interstate investment and consumer expectations, and would have spillover effects across state lines. *See Lafayette*, 435 U.S. at 408 (plurality opinion) ("If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects, a serious chink in the armor of

antitrust protection would be introduced at odds with . . . comprehensive national policy.”).

Finally, broad state power to grant antitrust immunity risks rewarding the harmful, private exploitation of the legislative process. Just those private actors who *succeed* in capturing the state’s regulatory system and abusing it to create anticompetitive cartels would enjoy immunity for activities that are contrary to the public interest. As Professors Edlin & Haw observe, *supra*, at 1143,

> [s]ound public policy requires that any consortium of competitors be supervised by disinterested state agents, be subject to antitrust laws, or both. That the consortium of competitors is called a state board and given power by the state to regulate its profession does not make it more trustworthy. The grant simply makes the board more powerful and therefore more dangerous.

That is precisely why this Court has declared that state governments may not “thwart[]” the “national policy in favor of competition” by “casting . . . a gauzy cloak of state involvement” over the self-interested cartel behavior of private actors. *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980).

This Court has sought to prevent a too-liberal application of *Parker* immunity by employing the “clear articulation of state policy” and “active supervision” tests. But these are “purely procedural requirements” which are too easily satisfied by self-serving ipse dixits by the very entities to which immunity should only rarely be granted. Peter Hettich, *Mere Refinement of*

the State Action Doctrine Will Not Work, 5 DePaul Bus. & Com. L.J. 105, 118-34 (2006). Instead, this Court should extend *Parker* immunity to private entities only (a) where the state compels the restraint in question, (b) where the private parties are actively supervised by the state, and (c) where the restraint substantially advances an important government interest.

A. *Southern Motor Carriers* Should Be Overruled and Antitrust Immunity Granted Only Where State Law Compels the Restraint in Question

Parker and its progeny are premised on the understanding that there is "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker*, 317 U.S. at 350-51. Such immunity is therefore a narrow exception to the overall national policy declared in the antitrust laws.

Prior to this Court's decision in *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), this and other courts understood *Parker* to mean that only where state law specifically compelled the restraint in question, could a private party be exempt from the antitrust laws for imposing or engaging in that restraint. *See*, *e.g.*, *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976) ("state authorization, approval, encouragement, or participation in restrictive private conduct confers no antitrust immunity."). In *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), for example, the Court held that antitrust liability would apply to a private entity that imposed dues assessments on attorneys which

constituted a price-fixing arrangement, because "the threshold inquiry in determining if an anticompetitive activity is state action . . . is whether the activity is required by the State acting as sovereign." *Id.* at 790. Since no statute or regulation imposed a restraint on trade, the state bar could not use state sovereignty to immunize itself from antitrust liability. "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." *Id.* at 791.

But *Southern Motor Carriers* declared that a state command displacing competition was *not* required before this Court would grant antitrust immunity to private parties. Instead, private parties could act with impunity in ways that would otherwise violate federal antitrust laws so long as state law "expressly *permits*, [even if it does] not compel, anticompetitive conduct." 471 U.S. at 61. In other words, states can allow private parties to engage in price fixing and other illegal activities so long as the state "intends to adopt a permissive policy" which allows such conduct. *Id.* at 62.

This holding grants states far broader power to confer immunity than either federal statutes or *Parker* warrants. A "permissive policy" simply means that a state can proclaim private parties immune from statutes that purport to set national economic policy, by a *pro forma* declaration—precisely what *Parker* declared impermissible when it held that states could not "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." 317 U.S. at 351.

Limiting antitrust immunity to cases where states *require* anticompetitive conduct would encourage transparency and accountability to voters: that is, states would only be able to grant immunity to private parties when they express anticompetitive policies in the clearest terms. "Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). If states "choose to displace the free market," antitrust law should at least ensure that it is "clear that the State is responsible for the price fixing it has sanctioned and undertaken to control." *Id.* *Southern Motor Carriers*, by contrast, dilutes *Parker* immunity so as to allow states to grant it to private parties by simply gesturing in the direction of anticompetitive policy. This encourages states to couch their economic policies in vague terms, which give regulatory agencies the broadest possible power—and enable elected officials to take credit for the successes those agencies achieve, while plausibly disclaiming their failures. This reduces transparency and accountability, and creates an incentive for government to delegate its power to private entities—always a dangerous prospect. *Cf. Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes.").

Nor does a state's vague "permissive policy" give clear instructions to the private parties who wield the power to impose anticompetitive restrictions contrary to federal antitrust policy. A "permissive policy" does not specify what acts the private party is empowered to take; thus the party can devise its own policies without concern for whether they reflect precisely the aspect of

competition the state meant to cut short. *See* John F. Hart, *"Sovereign" State Policy and State Action Antitrust Immunity*, 56 Fordham L. Rev. 535, 571 (1988) ("The displacement-of-competition standard, in supporting immunity for a substantial class of restraints instituted by state agencies or local government that cannot plausibly be said to implement state policy, defeats the Court's objective of confining immunity to those restraints that implement state policy."). Where a state grants only a general authorization to engage in anticompetitive conduct, its agencies—or private parties claiming to act in the state's name—can exercise "unguided discretion" to choose the extent to which competition ought to be displaced in an industry. C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. Rev. 1059, 1106 (2000). In such a case, "it is illusory to view the state legislature as the 'politically accountable' source of a state policy that in fact has been adopted by the agency itself." *Id.*

The *Southern Motor Carriers* Court sought to deflect this problem by requiring "evidence [that] *conclusively shows* that a State intends to adopt a permissive policy," 471 U.S. at 62 (emphasis added), thus apparently preserving a clear-articulation requirement. But this does little to diminish the broad power that the case gave to states to nullify federal antitrust law. Vague "permissive policies" are not made less vague by the fact that the law "conclusively shows" that the state intends to adopt a vague policy. An instruction like "engage in whatever anticompetitive conduct you choose" would conclusively delegate broad power to a private party, but would not

define the contours of the policy itself. It would only "conclusively show" that the state intends to cast its "gauzy cloak" over the anticompetitive conduct of private parties. *Midcal*, 445 U.S. at 106.

Worse, the "permissive policy" rule is irreconcilable with the strong presumption against antitrust immunity that has been a mainstay of this Court's jurisprudence from the beginning. The "permissive policy" rule encourages courts to "use [their] imagination liberally in determining whether particular anticompetitive conduct was a foreseeable or logical result of the regulatory delegation," and grant immunity when it concludes in the affirmative. Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 Cal. L. Rev. 227, 244 (1987). Yet this Court has emphasized that "state-action immunity is disfavored, much as are repeals by implication." *Ticor*, 504 U.S. at 636; *accord, Phoebe Putney*, 133 S. Ct. at 1010. Allowing private parties to assert immunity from the antitrust laws on the grounds that the state intends to permit violation of those laws is just the sort of immunity-by-implication that this Court has foresworn. In *Cmty. Commc'ns Co., Inc. v. City of Boulder*, 455 U.S. 40, 55 (1982), this Court rejected an almost identical effort by municipalities to assert immunity in cases where the state had adopted a permissive policy with regard to cities. For the same reason, this Court should require more than a mere "permissive policy" before allowing self-interested private parties to engage in anticompetitive conduct under color of state law.

Finally, *Southern Motor Carriers* justified its broader authorization of immunity on the grounds that

limiting immunity to cases where state laws actually compel the anticompetitive conduct would "reduce[] the range of regulatory alternatives available to the State." 471 U.S. at 61. But this is surely insufficient reason, given that many federal laws reduce the states' range of regulatory alternatives, and, as this Court has asserted, "[t]he antitrust laws reflect a basic *national* policy favoring free markets over regulated markets." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 388 (1991) (emphasis added); *see also Lafayette*, 435 U.S. at 413 (plurality opinion) (antitrust laws "reflect[]" the "Nation's economic goals."). "When a federal statute condemns an act as unlawful," any "conflicting state law and policy must yield" to "the federal statute and policy." *Sola Elec. Co. v. Jefferson Elec. Co.*, 317 U.S. 173, 176 (1942). And as this Court concluded in *Ticor*, 504 U.S. at 636, a consistent presumption against immunity from the antitrust laws actually *helps* states to craft economic policies: "By adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws, we increase the States' regulatory flexibility."

To the extent that *Parker* immunity is meant to reflect federalism concerns, those considerations are sufficiently addressed by a rule that allows immunity to private parties only where their anticompetitive conduct is compelled by the state. Such a rule would accommodate state autonomy while more effectively ensuring compliance with federal law and preventing the private abuse of state regulatory powers.

The lenient rule of *Southern Motor Carriers* warrants one critic's conclusion in that "the ideology of federalism has displaced a national model of

competition for one favoring state-based resolutions." E. Thomas Sullivan, *Antitrust Regulation of Land Use: Federalism's Triumph Over Competition, the Last Fifty Years*, 3 Wash. U. J.L. & Pol'y 473, 511 (2000). Whatever one's opinion of antitrust law in general, there is no justification for allowing states broad latitude to disregard federal law and erect private cartels with only vague instructions and loose oversight. *Parker* immunity should be extended to private parties acting under color of state law only where state law requires the restraint of trade in question. To the extent that *Southern Motor Carriers* is to the contrary, it should be overruled.

B. Private Parties Should Be Held Immune Only Where the State Actively Supervises Their Application of the Restraint in Question

This Court has long held that private parties can assert *Parker* immunity only where their anticompetitive actions are not only on behalf of the state, but are actively supervised by state officials. This active supervision requirement is intended to prevent "purely parochial interests" from "disrupt[ing] the Nation's free-market goals" under the color of state law. *Lafayette*, 435 U.S. at 416 (plurality opinion). State supervision cannot be purely formalistic, but must be genuine—states must exercise "sufficient independent judgment and control" that the anticompetitive acts in question are the "product of *deliberate* state intervention," *Ticor*, 504 U.S. at 634 (emphasis added), instead of the private self-interest of existing firms.

The Petitioners argued below that the active supervision requirement should not apply to them

because North Carolina law requires that the Dental Board be made up of practicing dentists; thus as a state agency, it should be treated like a municipality, which need not prove active supervision to establish immunity.

But the reason municipalities are not required to demonstrate active supervision before being granted immunity is that there is less danger that a municipality will engage in self-interested conduct under the color of state policy in violation of antitrust law. *Hallie*, 471 U.S. at 47. The opposite is obviously the case here: not only is the Board made up almost entirely of licensees who have a substantial private interest in excluding competition from teeth-whiteners, but as the court below noted, the agency acted not on complaints of consumers, but of other existing dentists, concerned primarily about economic competition against them. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 374 n.12 (4th Cir. 2013). *See also In re N.C. Bd. of Dental Exam'rs*, No. 9343, 2011 WL 6229615, at *9 (F.T.C. Dec. 7, 2011) (FTC finding that complaints were primarily from existing dentists opposed to competition).

In their brief in support of the petition for certiorari, amici curiae West Virginia, *et al.*, argue that states regularly staff their regulatory agencies with practicing members of trades and professions that they are charged with regulating. Br. Amicus W. Va., et al., at 11-12. According to the states, this is because "state legislators have [good] reason[] to choose to rely on the specialized knowledge of professionals to regulate their own market." *Id.* at 11. Yet the brief makes no mention of the obvious conflict of interest involved in such a situation, and says nothing about the danger of

state authority being exercised in the service of parochial interests.

Nor is the argument in favor of stacking such boards with existing licensees particularly compelling. State regulatory agencies can obtain the "specialized knowledge of professionals" without establishing a system that merely rubber-stamps the often self-interested assertions of these professionals. One can easily imagine such alternatives. *See* Edlin & Haw, *supra*, at 1155. The agency could be staffed by independent state agencies who invite comment and input from professionals while retaining final decision-making authority in official hands. (Agencies already routinely do this.) Or, agencies could be made up of retired members of the profession, or could include existing members without their making up the majority of the board. States could adopt private certification requirements, an alternative to statutory licensing that allows *consumers* to choose what services to purchase and what practitioners to patronize. These and other "active supervision" alternatives would easily accommodate the state's legitimate interests in obtaining specialized knowledge while also resisting the danger of private exploitation of public power.

By ignoring the obvious conflict of interest in vesting existing market participants with the power to veto potential competitors, the states essentially seek a rule that would give states *carte blanche* to erect cartels in any number of industries. The Missouri and Kentucky mover licensing laws discussed above, Section I, are again instructive here. In those cases, states also claimed that allowing existing firms the power to essentially veto their own competition was a necessary means of obtaining the specialized

knowledge of industry professionals. But these professionals far more often exploited their role in the process to block competition, rather than to supply information to the regulatory agency. *See*, *e.g.*, *Bruner*, 2014 WL 375601, at *7 ("As the statute is applied, the only 'information' supplied . . . is that no new competition is wanted."); Sandefur, *Public Convenience*, *supra*, at 181. The recent history of the dental industry's efforts to block teeth whiteners from competing economically reveals that the same anticompetitive dynamics are at work here. *See generally* Angela C. Erickson, *White Out: How Dental Industry Insiders Thwart Competition from Teeth-whitening Entrepreneurs* (2013).[6]

One need not deny that states may have an interest in obtaining the "specialized knowledge of professionals" to see that the danger of self-interested action by regulatory agencies dominated by private actors is a real one—and that the active supervision requirement allows states to obtain needed knowledge while ensuring compliance with the antitrust statutes. As this Court explained in *Patrick v. Burget*, 486 U.S. 94, 101 (1988), the active supervision requirement is designed to allow states flexibility in their regulatory policies within the boundaries of federal law: it

> requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's

[6] *Available at* http://www.ij.org/images/pdf_folder/other_pubs/white-out.pdf (last visited June 25, 2014).

> anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

In short, the states' interest in obtaining information from industry insiders does not warrant blanket immunity from the antitrust laws.

C. Antitrust Immunity Should Apply Only to Restraints That Substantially Advance an Important State Interest

The compulsion and active supervision elements are necessary, but not sufficient, to ensure that private parties do not use *Parker* immunity to shield themselves while they restrict trade for private purposes. The Court should also apply a *substantive* standard to ensure that restraints of trade under *Parker* immunity are not imposed for purely private interests. Edlin & Haw, *supra*, at 1145-50, propose that the Court apply a Rule of Reason requirement in such cases. Earlier writers suggested that the Court require some evidence of market failure that the restraint would redress. John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 756 (1986). *See also* Hettich, *supra*, at 147-50 (proposing a "reasonableness" inquiry).

If, as this Court has declared, "[t]he preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom," *Ticor*, 504 U.S. at 632, there can be no justification for granting such immunity whenever the state takes merely *procedural* steps—which it might do by a *pro forma* declaration. While the active supervision requirement helps prevent the immunity inquiry from becoming "purely formalistic," *Hallie*, 471

U.S. at 39, that element still allows states to authorize private parties to block their own competitors from the market—contrary to national policy and to the detriment of consumers—whenever officials retain some general supervisory authority. *See*, *e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977).

This is problematic not merely as a matter of economic policy but because state licensing entities frequently violate the *constitutional* rights of entrepreneurs by barring them from the market solely to protect existing firms from competition. *See*, *e.g.*, *Bruner*, 2014 WL 375601, at *7; *see also Merrifield*, 547 F.3d 978; *Craigmiles*, 312 F.3d 220; *St. Joseph Abbey v. Castille*, 712 F.3d 215 (5th Cir. 2013). As Justice Stevens warned, "[t]he risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public" is particularly acute when "whenever government delegates licensing power to private parties whose economic interests may be served by limiting the number of competitors." *Hoover*, 466 U.S. at 584 (Stevens, J., dissenting). That is not merely a financial concern; it also endangers "'the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose . . . [subject to] conditions imposed . . . for the protection of society,'" *Lowe v. SEC*, 472 U.S. 181, 228 (1985) (White, J., concurring) (citation omitted)—a right Justice Douglas called "the most precious liberty that man possesses." *Barsky v. Bd. of Regents of the Univ. of State of N.Y.*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting).

Courts should be especially wary when states put federal constitutional rights at the mercy of private

parties who have a private interest in blocking the exercise of those rights.[7] This Court should therefore ensure that the "national policy in favor of competition," *Midcal*, 445 U.S. at 106, serves as a meaningful baseline from which states may deviate only when substantially justified. *Parker* immunity should apply only where the restraint on trade substantially furthers an important government interest.

If state immunity from the antitrust laws is granted "out of respect for . . . the State, not out of respect for the economics of price restraint," *Ticor*, 504 U.S. at 633, then the flexibility accorded to states under the antitrust laws should mirror the flexibility accorded to states when they deviate from other federal legal or constitutional baselines. A rule that in some sense parallels the notion of "cooperative federalism" would best reconcile state and federal interests in this area. That phrase typically refers to federal laws that "offer States the choice of regulating that activity according to federal standards or having state law pre-empted by federal regulation." *New York v. United States*, 505 U.S. 144, 167 (1992). In the antitrust realm, the Court should apply the converse rule: federal antitrust liability will presumptively apply, unless the state's restriction on competition is

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[7] This Court has long recognized that where a private actor serves as an instrument of the state, it may be required to comply with constitutional standards. *Evans v. Newton*, 382 U.S. 296, 299 (1966). Thus private parties acting as instruments of the government must obtain a warrant when conducting a search, *Skinner v. Ry. Labor Executives' Ass'n*, 489 U.S. 602, 614 (1989), and a government-created private corporation must comply with the First Amendment in its dealings with citizens. *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 399 (1995).

necessary to accomplish an important end. Such a rule would "encourag[e] a State to conform to federal policy choices," while allowing "the residents of the State [to] retain the ultimate decision as to whether or not the State will comply," and "[i]f a State's citizens view federal policy as sufficiently contrary to local interests," the state could deviate. *Id.* at 168.

Usually, cooperative federalism schemes are expressly provided for in federal statutes and are administered by federal agencies that retain power to accept or reject a state's proposed program. *See generally* Philip J. Weiser, *Towards a Constitutional Architecture for Cooperative Federalism*, 79 N.C. L. Rev. 663, 669-73 (2001). For example, the Clean Air Act sets a federal clean air standard, but allows the states flexibility in accomplishing that goal. *See Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). The antitrust statutes do not include any such provision—but they do not include any explicit immunity for state action, either. That immunity is the creature of common law, and this Court retains authority to determine its contours. Because unlike the ordinary cooperative federalism model, *Parker* immunity allows states to act *contrary to* the federal antitrust baseline, some sort of oversight by the courts is warranted to ensure that states do not inflict the sort of anticompetitive harms that the antitrust laws were meant to proscribe.

The proper test should be that the restraint on trade that the state commands and actively supervises must substantially advance an important interest.

A rational basis test would be excessively deferential, and would permit a state to grant immunity essentially whenever it chooses to, contrary

to national policy. This Court is rightly reluctant to lower the standard of scrutiny to the minimal rational basis level, particularly where the applicable law is more than a mere prohibition on irrationality. *See D.C. v. Heller*, 554 U.S. 570, 629 n.27 (2008). Here, there *is* more: the "national policy, reflected in the antitrust laws, of insisting upon the primacy of competition as the touchstone of economic regulation." *Penn-Cent. Merger & N & W Inclusion Cases*, 389 U.S. 486, 500 (1968).

This Court should therefore apply an intermediate form of means-ends scrutiny which would require a state to articulate an important goal to be accomplished by exempting private parties from federal antitrust laws, and require that the exemption serve that end in reality. *Cf. Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528, 542 (2005) ("substantial advancement" test "asks, in essence, whether a regulation of private property is effective in achieving some legitimate public purpose."); *Craig v. Boren*, 429 U.S. 190, 198 (1976) (substantial advancement test not satisfied by "administrative ease and convenience" or other weak justifications).

An analogy to this Court's jurisprudence under the Federal Arbitration Act is instructive. That Act—which, like the antitrust laws, was passed under Congress's power to regulate commerce among the several states—provides that an arbitration agreement is valid as a matter of federal law, except where the agreement is invalid, for reasons of state law. *Perry v. Thomas*, 482 U.S. 483, 492 n.9 (1987). Some states—notably, California—have adopted various strategies trying to exploit this exception and invalidate arbitration agreements, contrary to federal policy. *See*

generally Stephen A. Broome, *An Unconscionable Application of the Unconscionability Doctrine: How the California Courts Are Circumventing the Federal Arbitration Act*, 3 Hastings Bus. L.J. 39 (2006). This Court has repeatedly reversed attempts to devise state common law rules that contradict the federal law. *See, e.g.*, *AT&T Mobility LLC v. Concepcion*, 131 S. Ct. 1740 (2011); *Preston v. Ferrer*, 552 U.S. 346 (2008). In doing so, it has not been satisfied by a state's mere assertions that it is applying ordinary contract law, but has scrutinized the *substance* of state court decisions to enforce the federal rule that arbitration agreements may be held invalid as a matter of state law only where that state law "arose to govern issues concerning the validity, revocability, and enforceability of contracts generally." *Perry*, 482 U.S. at 492 n.9. This prohibits state courts from applying different interpretive devices to arbitration contracts than to other contracts, regardless of the *procedural* formalities they employ; otherwise state courts could "effect what . . . the state legislature cannot," namely, a violation of federal law. *Id.* A similar rule should apply here: while states may, for certain limited reasons, act in ways that would otherwise violate federal law, courts must apply a *substantive* test to determining when such acts are valid, so as to ensure that states do not use procedural devices to evade the federal antitrust law. In short, the state law restraining trade should substantially advance an important government interest.

One possible objection to this approach is that it would involve the Court in reviewing state economic policies, and thus would "reduce[] the range of regulatory alternatives available to the State."

Southern Motor Carriers, 471 U.S. at 61. But this objection fails for three reasons.

First, antitrust law has already deeply enmeshed the courts in national economic policy. Major elements of antitrust law are the products of court rulings, not of legislative or even administrative decision-making. A substantive limit on *Parker* immunity would therefore not implicate concerns about "[striking] down economic regulation enacted by the peoples' representatives," *NFIB v. Sebelius*, 132 S. Ct. 2566, 2628-29 (2012) (Ginsburg, J., dissenting) (citing *Lochner v. New York*, 198 U.S. 45, 64 (1905)). Indeed, courts already apply—and must apply—*some* form of means-ends scrutiny in cases involving purported state antitrust immunity. The only alternative would be to declare that *all* state regulations preempt the antitrust laws, which is not an acceptable conclusion. Hettich, *supra*, at 142.

Second, as this Court has repeatedly asserted, the federal antitrust laws *already* proclaim national economic policy—that policy being one opposed to cartel behavior by private parties excluding their rivals from the marketplace. *Penn-Cent. Merger & N & W Inclusion Cases*, 389 U.S. at 500; *Lafayette*, 435 U.S. at 408 (plurality opinion); *Midcal*, 445 U.S. at 106. Applying a substantial advancement test would simply *enforce* policies articulated in existing statutes—and would not create a subjective, judicially-created policy.

Finally, the extreme forms of judicial deference are usually applied only where the political process is believed to be a sufficient safeguard for the individual rights at issue. But the political process is certainly not enough to prevent private parties vested with state

authority from engaging in anticompetitive and self-interested behavior. Hettich, *supra*, at 143. The general public is typically unaware of anticompetitive conduct—especially where state law establishes only a vague "permissive policy," *Southern Motor Carriers*, 471 U.S. at 61—and although the public genuinely suffers from such conduct, the rewards for those who benefit from it are great enough to ensure that beneficiaries can prevent any serious reform efforts by offended taxpayers. Edlin & Haw, *supra*, at 1140 ("Individual consumers lack the incentive to participate in the process of licensing regulation; rarely would it be rational for a consumer to take the time and effort to try to change a licensing rule in the hopes of getting a cheaper haircut.").

In fact, in many cases, including this one, neither the general public nor the legislature has any direct control over those engaged in the anticompetitive conduct. Instead, the Board is directly elected to fixed terms by those who benefit from such conduct—not by the general public or by their elected officials, and certainly not by the entrepreneurs who need protection from the Board, and whose right to earn a living is sacrificed by barriers to entry. Such entrepreneurs are "relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process." *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 28 (1973). Also, restraints of trade under the color of state law often have spillover effects in other states, where those who suffer from the conduct again have no power to take political action against it. Hettich, *supra*, at 143.

Simply put, a substantive, and not merely procedural, test is needed to protect the constitutional

rights of entrepreneurs, who have no realistic political protection against vested interests who exploit *Parker* immunity and state power to block newcomers from exercising their right to earn a living in the occupation of their choice. A substantial advancement test would leave states with flexibility to authorize private parties to restrain trade where doing so is important, and would ensure that entrepreneurs are not wholly at the mercy of the very firms who have the strongest interest in barring them from the marketplace.

CONCLUSION

The decision below should be *affirmed*. This Court should accord *Parker* immunity to private parties acting under color of state law only where (a) the restraint of trade in question is commanded by state law, (b) the private actors act under the state's active supervision, and (c) the restraint substantially advances an important state interest.

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Respectfully submitted,

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