No. 13-534

In the Supreme Court of the United States

NORTH CAROLINA BOARD OF DENTAL EXAMINERS,
PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

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

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

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-33a) is reported at 717 F.3d 359. An opinion of the Federal Trade Commission (Pet. App. 34a-68a) is reported at 151 F.T.C. 607. Another opinion and order of the Federal Trade Commission (Pet. App. 69a-155a) is not yet published in the *Federal Trade Commission Decisions* but is available at 2011 WL 6229615. The initial decision of the administrative law judge is not reproduced in the appendix to the petition for a writ of certiorari and is not yet published in the *Federal Trade Commission Decisions* but is available at 2011 WL 3152198.

JURISDICTION

The judgment of the court of appeals was entered on May 31, 2013. A petition for rehearing was denied on July 30, 2013 (Pet. App. 156a-157a). The petition for a

writ of certiorari was filed on October 25, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. Petitioner, the North Carolina State Board of Dental Examiners, is denominated an "agency of the state" under North Carolina law and is tasked with enforcing North Carolina's Dental Practice Act (DPA), N.C. Gen. Stat. §§ 90-22 *et seq.* The DPA governs, *inter alia*, the licensing of dentists and their professional conduct. N.C. Gen. Stat. § 90-30; Pet. App. 40a. Petitioner is funded exclusively by private licensees' dues and fees. *Id.* at 5a, 72a.

Petitioner's constituent members are private actors. Those members include six licensed dentists, who are elected directly by other licensed dentists to three-year renewable terms; one licensed dental hygienist, who is elected by other licensed hygienists to a three-year renewable term; and one consumer member, who is appointed by the Governor of North Carolina to a three-year renewable term. N.C. Gen. Stat. § 90-22(b); Pet. App. 40a. Because the six dentist-members must be active practitioners while they serve, each has a significant financial interest in the business of the profession. *Id.* at 72a.

Petitioner's principal activity is the licensing and disciplining of dentists and other dental professionals in the practice of dentistry. Pet. App. 5a, 72a.[1] In contrast to its authority over licensees and license applicants, see

[1] The DPA provides that a person "shall be deemed to be practicing dentistry" by undertaking, or attempting, any of the actions listed in the statute. See N.C. Gen. Stat. § 90-29(b)(1)-(13); see *id.* § 90-29-(c)(1)-(14) (listing acts that "shall not constitute the unlawful practice of dentistry").

N.C. Gen. Stat. §§ 90-27, 90-41.1, petitioner is not authorized under state law to discipline unlicensed persons directly, or to order non-licensees to cease alleged violations of the DPA, such as the unlawful practice of dentistry. Pet. App. 5a-6a, 73a; see *In re North Carolina Board of Dental Examiners* 2011 WL 3152198, at *13 (FTC ALJ Jul. 14, 2011) (*Initial Decision Findings*). Rather, petitioner must institute in state court "an action * * * to perpetually enjoin any person from so unlawfully practicing dentistry." N.C. Gen. Stat. § 90-40.1(a); Pet. App. 5a. State prosecutors and private citizens may also institute such actions. *Ibid.*

Each of petitioner's dentist-members must submit an annual disclosure listing his assets, liabilities, professional affiliations, and business engagements (other than dentistry) and certifying that he is currently practicing dentistry. N.C. Gen. Stat. § 138A-22(a); Pet. App. 41a. Petitioner must submit to certain state executive officials and a state legislative body an annual report providing, *inter alia*, aggregate information on the number and disposition of its investigations. N.C. Gen. Stat. § 93B-2; Pet. App. 41a. The legislative body, North Carolina's Joint Legislative Administrative Procedure Oversight Committee, has the power to "review the activities of the State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements." N.C. Gen. Stat. § 120-70.101(3a); Pet. App. 41a. Petitioner must also comply with North Carolina's Public Records Act (N.C. Gen. Stat. §§ 132-1 *et seq.*), Administrative Procedure Act (*id.* §§ 150B-1 *et seq.*), and open meetings law (*id.* §§ 143-318.9 *et seq.*). Pet. App. 41a.

b. Peroxide-based teeth whitening is one of the most popular cosmetic dental services in North Carolina. It is

available from dentists as an in-office treatment or take-home kit; from retail stores selling over-the-counter products directly to consumers; and from non-dentists at salons, malls, and similar locations. Although all these methods employ peroxide, they vary in their price, the immediacy of their results, their ease of use, the necessity of repeated application, and their need for technical or professional support. Dentists' in-office services are generally quick and effective, typically providing results in a single visit, but are the most costly alternative. Over-the-counter products are the least expensive, but their efficacy can vary because they require diligent and repeated application by consumers. The services of non-dentist providers generally occupy an intermediate level—in terms of cost, convenience, and efficacy—between dentists' in-office services and over-the-counter products. Pet. App. 6a, 70a, 73a-74a.

In approximately 2003, growing demand for teeth-whitening services led non-dentist providers to enter the North Carolina market for such services. Pet. App. 6a, 70a. Soon thereafter, petitioner began to receive complaints from its dentist licensees regarding teeth-whitening service offerings by non-dentists at spas, salons, and trade shows. *Id.* at 6a, 75a. Many complainants noted that the prices of those offerings undercut the prices of the services they offered; few complainants referred to any consumer harm. *Id.* at 70a, 75a.

In response to the dentists' complaints, petitioner sent dozens of cease-and-desist orders to non-dentist providers of teeth-whitening services. Pet. App. 6a-7a, 42a, 76a. Those orders induced many of the providers who received them to leave that market. *Id.* at 7a, 42a, 77a. Petitioner's campaign also targeted entities that did business with non-dentist providers of teeth-whitening

services, such as shopping malls that leased space to teeth-whitening kiosks, and manufacturers and distributors of teeth-whitening products used by non-dentists. *Id.* at 7a, 77a.

2. The Federal Trade Commission (FTC or Commission) filed an administrative complaint that charged petitioner with violating Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45, by anticompetitively excluding non-dentist providers from the market for teeth-whitening services in North Carolina.

a. Petitioner moved to dismiss the complaint, asserting that its actions were exempt from federal competition law under the state action doctrine. The FTC denied that motion, applying the two-part test announced in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Under *Midcal*, private actors are exempt from federal antitrust laws if (1) they are implementing a policy judgment that is "clearly articulated and affirmatively expressed as state policy" and (2) their conduct is "actively supervised by the State itself." *Id.* at 105 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). Those requirements are "close[ly] relat[ed]" in that both seek assurance that "particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). Although the FTC found that substantial questions existed here under the "clear articulation" element of the test—such as whether petitioner was authorized to issue extra-judicial cease-and-desist orders and whether the teeth-whitening methods at issue constitute the practice of dentistry—the Commission assumed without deciding that petitioner's conduct satisfied the "clear articulation" element.

Pet. App. 47a n.8. The FTC focused instead on the "active state supervision" requirement.

The FTC first rejected petitioner's contention that petitioner need not show active supervision at all. Pet. App. 49a-50a. The Commission acknowledged this Court's holding that "the active supervision requirement * * * does not apply to political subdivisions of the State such as municipalities." *Id.* at 49a (citing *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34 (1985) (*Hallie*)). The FTC noted, however, that the Court "has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants." *Id.* at 49a-50a (citing *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975)). Surveying this Court's decisions, the FTC stated that "the operative factor" in determining whether the active-supervision requirement applies to a particular regulatory body is the "tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated" by the entity. *Id.* at 49a. The FTC further noted that decisions of several courts of appeals supported the view that governmental bodies composed of financially interested members must satisfy the active-supervision requirement to qualify for the state action exemption. *Id.* at 51a-52a.

The FTC found that petitioner has an "obvious interest in the challenged restraint," Pet. App. 36a, because "the decisive majority of [petitioner's members] * * * earns a living by practicing dentistry," *id.* at 35a.[2] The

[2] Petitioner's own expert economist later adopted this view during the trial on the merits, Pet. App. 97a & n.12, and the Commission ultimately found that at least eight of the ten Board members who served between 2005 and 2010 provided teeth-whitening

FTC concluded on that basis that "the state must actively supervise [petitioner] in order for [petitioner] to claim state action protection." *Id.* at 36a.

The FTC found the necessary supervision lacking. Pet. App. 65a. It explained that, under this Court's decisions, the State must actually "*exercise* ultimate control over the challenged anticompetitive conduct," and the "mere presence of some state involvement or monitoring does not suffice." *Id.* at 62a (quoting *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988)) (emphasis added by FTC). The Commission found no evidence that any arm of the State had developed a record or rendered a decision on whether petitioner's challenged conduct comported with state policy. *Id.* at 63a. Petitioner had relied in part on statutory reporting obligations and ethical requirements, but the FTC found those to be insufficient "generic oversight." *Id.* at 64a. The Commission reasoned that none of those provisions "suggest[s] that a state actor was even aware of [petitioner's] policy toward non-dentist teeth whitening, let alone reviewed or approved it in fulfillment of the active supervision requirement." *Id.* at 65a.

b. After petitioner's motion to dismiss on state action grounds was denied, an administrative law judge (ALJ) conducted a hearing to address the merits of the FTC's administrative complaint. The ALJ concluded that concerted action by petitioner to exclude non-dentists from the market for teeth-whitening services in North Carolina constituted an unreasonable restraint of trade and an unfair method of competition in violation of the FTC Act. *Initial Decision Findings*, 2011 WL 3152198, at *7. The ALJ determined, *inter alia*, that, although state law

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services in their private practices, sometimes earning substantial revenues from such services, see *id.* at 96a-97a.

authorizes petitioner to seek appropriate judicial relief (see pp. 2-3, *supra*), petitioner "has no authority over non-dentists" and "does not have the legal authority to order anyone to stop" practicing dentistry. *Id.* at *13.

Petitioner appealed, and the FTC reviewed the record *de novo*. In a ruling on the merits not challenged in this Court, the FTC agreed with the ALJ that petitioner had violated Section 5 of the FTC Act. Pet. App. 87a, 104a. The FTC ordered petitioner not to unilaterally issue extra-judicial cease-and-desist orders against non-dentist providers of teeth-whitening services. *Id.* at 145a-148a. The FTC's order, however, expressly preserves petitioner's authority to threaten litigation and to file court actions for suspected violations of the DPA. *Id.* at 147a-148a.[3]

3. The court of appeals denied petitioner's petition for review. Pet. App. 1a-33a. As relevant here, the court agreed with the FTC that, given the composition of petitioner's membership, petitioner must satisfy both the clear-articulation and active-supervision requirements of *Midcal* in order to establish its exemption from federal competition law. *Id.* at 17a. The court began with this Court's recent reaffirmation that, even in the absence of active supervision, "municipalities and 'substate governmental entities do receive immunity from antitrust scrutiny when they act pursuant to state policy to displace competition with regulation or monopoly public

[3] The distinction between petitioner's "orders" and mere threats of litigation is critical here, as in many contexts. In *Sackett* v. *EPA*, 132 S. Ct. 1367, 1371-1372 (2012), for example, this Court recognized that the issuance of an administrative "order" generally connotes the imposition of some "legal obligation" in a way the mere articulation of a legal position in a demand letter sent as a prelude to judicial action would not.

service.'" *Id.* at 10a-11a (quoting *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013))

The court of appeals noted this Court's statement in *Hallie* that a state agency "likely" would not be required to show active supervision, but that "[w]here state or municipal regulation by a private party is involved * * * , active state supervision must be shown, even where a clearly articulated state policy exists." Pet. App. 11a n.4 (quoting 471 U.S. at 46 n.10). Relying on the first half of that statement, petitioner argued that, because North Carolina law characterizes petitioner as an "agency of the state," petitioner need not show active supervision. *Ibid.* The court of appeals rejected that argument. The court explained that, under *Hallie*, *supra*; *Goldfarb*, *supra*; and *Southern Motor Carriers Rate Conference, Inc.* v. *United* States, 471 U.S. 48, 57 (1985), a particular entity designated as a "state agency" may still be required to show active supervision "where the 'state agency' is composed entirely of private market participants." Pet. App. 11a n.4; see *id.* at 14a-15a.

The court of appeals agreed with the FTC's determination that, because petitioner's membership is dominated by actors competing in the relevant market, it should be treated as a private actor for purposes of the state action doctrine, and therefore must satisfy both *Midcal* elements. Pet. App. 14a-17a (citing *Goldfarb*, *supra*; *Asheville Tobacco Bd. of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959)). The court rejected petitioner's reliance on various appellate decisions holding that particular state agencies resemble municipalities and therefore are not subject to the active-supervision requirement. Such cases, the court explained, did not establish the "bright-line rule that [petitioner] requests" because each depended on the particular features of the state

agency at issue. *Id.* at 16a-17a n.6. The court of appeals also emphasized that "more quintessential state agencies" may not need to satisfy the active-supervision requirement. *Id.* at 11a n.4.

Judge Keenan concurred "to emphasize the narrow scope of [the court's] holding * * * and to discuss the practical implications of [the court's] decision." Pet. App. 29a. Judge Keenan explained that "the fact that [petitioner] is comprised of private dentists elected by other private dentists, along with North Carolina's lack of active supervision of the Board's activities," left the court "with little confidence that the state itself, rather than a private consortium of dentists, chose to regulate dental health in this manner." *Id.* at 32a-33a.

ARGUMENT

The court of appeals correctly applied this Court's precedents in sustaining the FTC's determination that, because petitioner's members compete in the market for teeth-whitening services, petitioner's conduct with respect to that market would be exempt from antitrust scrutiny only if actively supervised by the State. Petitioner does not contend in this Court that it can demonstrate such active supervision, or that its campaign to exclude its members' would-be competitors from that market was otherwise lawful. Although some variation exists in the reasoning of older appellate decisions regarding the applicability of the active-supervision requirement to certain state agencies, petitioner identifies no sound reason to conclude that any other court of appeals would have reached a different outcome on the facts of this case. Further review is not warranted.

1. a. Under this Court's precedents, the State, acting as sovereign, may regulate its economy and impose market restraints "as an act of government." *Parker* v.

Brown, 317 U.S. 341, 350, 352 (1943). The exemption of anticompetitive conduct under the state action doctrine "is disfavored," *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), however, "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013). Thus, the Court recognizes "state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" *Ibid.* (quoting *Ticor*, 504 U.S. at 635).

Restraints on trade that are directed by a State's legislature or the State's highest court acting in a legislative capacity are sovereign acts and on that basis alone are exempt from challenge under the federal antitrust laws. *Parker*, 317 U.S. at 350-351; *Bates* v. *State Bar*, 433 U.S. 350, 359-360 (1977). But when a challenged restraint is not directed by the State in its sovereign capacity and is instead "carried out by others pursuant to state authorization," "[c]loser analysis is required." *Hoover* v. *Ronwin*, 466 U.S. 558, 568 (1984). That analysis considers (1) whether "the challenged restraint" is "clearly articulated and affirmatively expressed as state policy," and (2) whether that "policy" is "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (internal quotation marks omitted). There is a "close relation between *Midcal*'s two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. "Th[e] active supervision requirement ensures that a State's actions will immunize the anticompetitive conduct of private parties only when

the 'state has demonstrated its commitment to a program through its exercise of regulatory oversight.'" *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 62 n.23 (1985) (quoting 1 Phillip E. Areeda & Donald F. Turner, *Antitrust Law* § 213a, at 73 (1978)).

The rule is different for certain sub-state entities, such as municipalities and other political subdivisions. Because those entities "are not themselves sovereign," "state-action immunity under *Parker* does not apply to them directly." *Phoebe Putney*, 133 S. Ct. at 1010. Such entities are, however, exempt from federal competition law "when they act 'pursuant to state policy to displace competition with regulation or monopoly public service.'" *Ibid.* (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 413 (1978) (opinion of Brennan, J.)). Unlike private entities, sub-state entities generally may claim that exemption even if they are not "actively supervised by the State," *Midcal*, 445 U.S. at 105, "because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011 (citing *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46-47 (1985)).

This Court has cautioned, however, that some cases require close analysis to decide whether an entity is subject to *Midcal*'s two-part test or *Hallie*'s one-part test. In *Hallie* itself, the Court observed (without deciding) that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." 471 U.S. at 46 n.10. The Court went on, however, to contrast that situation with one involving "state or municipal regulation by a private party." *Ibid.* (citing *Southern Motor Carriers*, 471 U.S. at 62). In the latter case, "active state supervision must be shown, even

where a clearly articulated state policy exists." *Ibid.* (citing *Southern Motor Carriers*, 471 U.S. at 62).

b. Under that analysis, petitioner may claim an exemption from federal competition law only for conduct that is actively supervised by North Carolina. Petitioner's membership, and thus petitioner itself, is dominated by private actors who participate in the very market in which petitioner acted anticompetitively. That structural feature, in turn, precludes any assurance that petitioner's conduct reflects the State's sovereign will. See *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988) ("Where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.") (quoting *Hallie*, 471 U.S. at 47).

The court of appeals was thus correct to recognize that a body dominated by market participants can be expected to "foster anticompetitive practices for the benefit of its members." Pet. App. 14a (quoting *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791-792 (1975)). A showing of active supervision would ensure that "the State has exercised sufficient independent judgment and control so that the details of the [challenged action] have been established as a product of deliberate state intervention." *Id.* at 15a (brackets in original) (quoting *Ticor*, 504 U.S. at 634). But petitioner does not contend in this Court that it is subject to such supervision.

Contrary to petitioner's suggestions (Pet. 31-32), *Goldfarb* provides particularly strong support for the decision below. In that case, the Virginia State Bar Association, like petitioner here, was a "state agency by law," 421 U.S. at 790, and it invoked the state action doctrine when it was sued for imposing an exclusionary minimum-fee schedule for attorneys. In rejecting the

Bar's claim to an exemption from federal competition law, this Court observed that the Bar's enforcement of the fee schedule (through its ethics opinions) was undertaken "for the benefit of its members," and that "there [wa]s no indication * * * that the Virginia Supreme Court approve[d] the [ethics] opinions." *Id.* at 790-791. Of particular significance here, the Court intimated that the state action exemption would have been available if the Virginia Supreme Court had exercised a more active supervisory role—for example, by itself approving and adopting the ethics opinions. See *id.* at 791; see also *Hoover*, 466 U.S. at 569 ("[T]he degree to which the state legislature or supreme court supervises its representative [is] relevant to the inquiry.") (citing, *inter alia*, *Goldfarb*, 421 U.S. at 791).

Like the Virginia State Bar, petitioner is formally denominated an "agency of the state," and it consists chiefly of active market participants who are economically affected by competitive threats from new entrants into the markets they serve (such as non-dentists who offer teeth-whitening services). Under *Goldfarb* and its progeny, petitioner's constituent members are thus "persons with economic incentives to restrain trade," *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 501 (1988), and are the natural and proper subjects of *Midcal*'s active-supervision requirement.[4]

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[4] Petitioner suggests that this Court's decision in *Ticor* foreclosed the court of appeals from considering whether petitioner's members participate in the relevant market or are instead "*disinterested*." Pet. 32 (citing 504 U.S. at 634-635). The cited discussion in *Ticor* explains that courts applying the state action doctrine do not inquire into the wisdom of the economic policies actually adopted by the State itself. 504 U.S. at 634. Here, by contrast, questions about petitioner's members' private participation in the relevant market go to the antecedent question—at the heart of the

The leading antitrust treatise concurs. It recommends that courts "presum[e] * * * as 'private' [for state action purposes] any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 227b, at 226 (4th ed. 2013). It also urges that the presumption of private action "become virtually conclusive where the organization's members making the challenged decision are in direct competition with the [affected rival] and stand to gain from the [rival's] discipline or exclusion." *Ibid.* That precisely describes the situation here.

c. Petitioner repeatedly refers to itself as "an official state entity" that carries out "sovereign acts of Government." Pet. 3, 10, 19, 27, 28, 32; see Am. Dental Ass'n (ADA) Amicus Br. 7 (asserting that the dispositive question is whether petitioner is a state agency as a matter of state law). Those labels do not control the relevant federal-law inquiry. This Court does not generally resolve substantive questions of federal antitrust law on the basis of state-law labels. Cf. *American Needle, Inc.* v. *National Football League*, 560 U.S. 183, 191-192 (2010) (emphasizing that antitrust courts must "seek the central substance of the situation' and therefore * * * 'are moved by the identity of the persons who act, rather than by the label of their hats'") (quoting *United States* v. *Sealy, Inc.*, 388 U.S. 350, 353 (1967)); *Hallie*, 471 U.S. at 39 ("The determination that a[n actor's] activities constitute state action is not a purely formalistic inquiry.").

That focus on substance rather than form underlies this Court's holdings that municipalities generally need

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state action doctrine—whether the relevant anticompetitive conduct is properly understood as the *State's* action at all.

not prove active supervision by the State in order to invoke the state action doctrine. The justification for that rule is not that municipalities possess formal public charters. Rather, it is that municipalities "have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011; see *Hallie*, 471 U.S. at 47 ("Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement."). Here, by contrast, where petitioner's members have an evident "incentive to pursue their own self-interest," *Phoebe Putney*, 133 S. Ct. at 1011, petitioner's formal designation as a state agency does not assure that its regulatory actions accurately reflect state policy.

Thus, with respect to the substantive characteristics that are crucial to the state action doctrine, petitioner is more closely analogous to a typical private trade association than to a municipality or traditional state regulatory agency. A dominant group of petitioner's members are economically self-interested private actors—dentists competing in the same market they regulate. And, like the board members of a private trade association that may govern its members' conduct to some extent, petitioner's members are largely accountable to their fellow market participants rather than to the State.

This Court in *Hallie* foresaw the need to draw such distinctions when it contrasted an ordinary "state agency" (which "likely" would not require active supervision) with "state or municipal regulation by a private party" (which would). 471 U.S. at 46 n.10. The latter category presumes the existence of hybrid entities that are properly viewed (for these purposes) as "private part[ies]" even though they participate in "state or municipal regulation." *Ibid.* As an example of such an

entity, the Court in *Hallie* referred, see *ibid.* (citing 471 U.S. at 62), to the "rate bureaus" at issue in *Southern Motor Carriers*, which were associations of competitors that formed an established part of the States' schemes for regulating motor carriage rates, *Southern Motor Carriers*, 471 U.S. at 50-52. The Court's decisions thus recognize a category of actors that, despite bearing something of the State's imprimatur, nonetheless require active supervision to qualify for an exemption from federal competition law. The court of appeals correctly held that petitioner fits within that category.

The manner in which petitioner's members are selected reinforces the need for active supervision by the State. See Pet. App. 59a. When members of a regulatory body are elected by the public, or when they are appointed by the governor or other high-level state official, their mode of selection may place at least some check on the natural tendency of the competitor-members to act in their own self-interest because it arguably introduces an element of political accountability. Cf. *Ticor*, 504 U.S. at 636 ("States must accept political responsibility for actions they intend to undertake."); *Hallie*, 471 U.S. at 45 n.9 ("[M]unicipal officers * * * are checked to some degree through the electoral process."). Petitioner's members, by contrast, are elected by and accountable to no one but other dentists, who share the interest of petitioner's members in suppressing competition from non-dentists.[5] Under these circumstances, petitioner's ar-

[5] Petitioner correctly surmises that, under the approach taken by the FTC in this case, executive appointment or legislative confirmation of members who nonetheless remain market participants does not eliminate the need to show active supervision. See Pet. 23-24 & n.2 (citing Pet. App. 35a-36a, 58a, 81a). Nevertheless, although it is unclear whether the manner in which petitioner's

gument logically depends on the proposition that active supervision is *never* required if state law declares the relevant entity to be a "state agency." But the principle that "a State may not confer antitrust immunity on private persons by fiat," *Ticor*, 504 U.S. at 633, would be easily subverted if the active-supervision requirement could be avoided through the use of such nomenclature.

2. As the court of appeals (Pet. App. 15a-16a & n.6) and the FTC (*id.* at 51a-56a) recognized, the bulk of the relevant case law in the courts of appeals either directly supports the conclusion that petitioner must show active supervision to qualify for the state action exemption, or is factually distinguishable. Petitioner largely confines its claim of a circuit conflict (Pet. 13-17) to a discussion of *Earles* v. *State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998), and *Haas* v. *Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990). See also Pet. 17-18 & n.1 (identifying some decisions as "inapposite," and observing with little elaboration that other decisions reflect "similar results as *Hass* and *Earles*"). Contrary to petitioner's contention, the ruling below does not conflict with either *Earles* or *Haas*.

a. The courts in *Earles* and *Haas* rejected antitrust claims brought against regulatory boards controlled by members of a profession (accountants and lawyers, respectively). Without requiring proof of active supervision by the State, the courts held that the boards could

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members were selected was essential to the Fourth Circuit's decision (see Pet. App. 15a-16a), the court of appeals noted the members' selection by fellow dentists as one reason among several to view petitioner's actions with antitrust concern (*id.* at 14a), and Judge Keenan's concurring opinion highlighted that factor (see *id.* at 30a).

invoke the state action doctrine, based in part on the boards' possession of some formal features under state law that roughly resembled those of a municipality. See *Earles*, 139 F.3d at 1041; *Haas*, 883 F.2d at 1460. In neither case, however, did the court regard the challenged board action as responding to a competitive threat facing the existing market participants who dominated the board, a salient feature of petitioner's action here.

Although the board in *Haas* was dominated by bar members, see 883 F.2d at 1460, the challenged rule—which required Oregon attorneys to participate in the state bar's own professional liability fund—did not implicate competition among bar members or between bar members and non-attorneys, because board members were not themselves engaged in the business of liability insurance. See *id.* at 1455-1456. Similarly, although the board in *Earles* was "composed entirely of [accountants] who compete in the profession they regulate," 139 F.3d at 1041, the court concluded that the challenged rule—which forbade accountants from simultaneously practicing "incompatible occupations" (such as selling securities), *id.* at 1035—was not a "cozy arrangement to restrict competition." *Id.* at 1041.

By contrast, petitioner's exclusionary conduct directly affected competition between dental and non-dental providers of teeth-whitening services, *i.e.*, competition in the very market in which petitioner's members participate. The court of appeals correctly sustained the FTC's determination that those facts properly controlled the state action analysis, notwithstanding features of state law that standing alone (as in *Earles* and *Haas*) might have suggested that the active-supervision inquiry was unnecessary. Nothing in *Earles* or *Haas* would foreclose

the Fifth or the Ninth Circuit from reaching the same conclusion as the court below in a case, like this one, that involves self-interested regulatory conduct by a similarly constituted body.

b. Each of the decisions petitioner cites has an additional feature that further undermines petitioner's claim that a live circuit conflict exists.

The membership of the board at issue in *Earles* was "chosen by the governor from a slate of candidates proposed by [members of the profession] and * * * confirmed by the state senate." 139 F.3d at 1035. In this case, by contrast, the court of appeals attached at least some weight to the fact that petitioner's members are elected by other dentists. See pp. 17-18 & note 5, *supra*; see also Pet. App. 57a n.12. That difference reinforces the conclusion that, if the Fifth Circuit ever confronts a case that involves a regulatory body similar to petitioner, that court's decision in *Earles* will not be controlling.

As for *Haas*, it is unclear whether that decision remains authoritative within the Ninth Circuit. After *Haas*, this Court emphasized in *Patrick* v. *Burget* the importance of ultimate state control over the challenged anticompetitive conduct. 486 U.S. at 100-101. The Ninth Circuit subsequently concluded, in light of *Patrick*, that a labor council created under state law and filled with members appointed by state officials may not qualify as a "state agency" for purposes of the state action doctrine if it is controlled by "private members [who] have their own agenda which may or may not be responsive to state labor policy." *Washington State Elec. Contractors Ass'n* v. *Forrest*, 930 F.2d 736, 737 (per curiam), cert. denied, 502 U.S. 968 (1991); see *Washington State Elec. Contractors Ass'n* v. *Forrest*, 839 F.2d 547, 549-550, 553-554 (9th Cir.) (describing council's status under state law), cert.

granted, vacated, and remanded, 488 U.S. 806 (1988). The Ninth Circuit in *Forrest* acknowledged *Haas* but made no effort to distinguish it, relying instead on this Court's "key language in *Patrick*," which required application of "the rigorous two pronged test" of *Midcal*. 930 F.3d at 737 (internal quotation marks omitted).

3. Petitioner argues that the court of appeals' decision conflicts with this Court's decisions in *Parker*, *supra*; *Hallie*, *supra*; and *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374-375, 399 (1991). Pet. 19-31. No conflict exists.

a. Petitioner emphasizes (Pet. 19-22) that this Court in *Parker* did not discuss the role of active supervision of the raisin marketing program challenged there. Petitioner notes in particular that six of the nine members of the California Agricultural Prorate Advisory Commission were required "to be engaged 'in the production of agricultural commodities.'" Pet. 21 (quoting 1939 Cal. Stat. ch. 894, § 3). Petitioner suggests (Pet. 21-22) that, if the composition of the Advisory Commission was of no moment in *Parker*, petitioner's own membership should likewise be of no concern here.

The inference that petitioner would draw is unwarranted. As an initial matter, the compatibility of California's law with the Sherman Act was "a query raised by th[is] Court and not by [the] respondent" in *Parker*, see Supplemental Appellant Br. at 35, *Parker*, *supra* (No. 46), and the lower court had not passed on the matter (see *Brown* v. *Parker*, 39 F. Supp. 895 (S.D. Cal. 1941), rev'd, 317 U.S. 341 (1943)). Thus, this Court apparently did not have before it (a) a meaningful record regarding the actual operation of the statute; (b) details of the precise relationship among the Advisory Commission, the "Program Committee," and the "State Director of

Agriculture" as it related to the challenged restraint, 317 U.S. at 344; or (c) evidence on whether the members of the Advisory Commission were participants in the raisin market (as opposed to the market for any number of other "agricultural commodities" produced in California).

In any event, the question presented here concerns the proper application of *Midcal* and later decisions to petitioner's conduct. This Court's 1943 opinion in *Parker* cannot reasonably be viewed as addressing a feature of the state action doctrine that this Court did not make explicit until nearly four decades later in *Midcal*. Moreover, if the Court had already held in *Parker* that no "official state entity" need satisfy the active-supervision element, see Pet. 19-20, it would have had no reason to identify and reserve the issue in *Hallie*, 471 U.S. at 46 n.10.

b. Petitioner argues that the Court in *Hallie* dispensed with the active-supervision element for municipalities because no "private arrangement" was involved there. Pet. 27. Petitioner further asserts (*ibid.*) that private action is similarly absent here "because the only conduct involved is [petitioner's] unquestionably official conduct." As explained above, see pp. 12-13, 15-17, *supra*, that argument both misstates *Hallie*'s rationale and improperly elevates formal labels over actual substance.

c. Petitioner contends that, by treating the economic self-interest of petitioner's members as a ground for applying the active-supervision requirement, the court of appeals contravened this Court's holding in *Omni Outdoor* that the unsavory motives of local officials cannot forfeit a municipality's state action exemption. Pet. 30. Petitioner advanced no such argument before the FTC

or in the court of appeals. In any event, petitioner's argument misconceives *Omni Outdoor*'s reasoning.

In *Omni Outdoor*, this Court considered whether anticompetitive municipal conduct that otherwise qualified for a state action exemption could lose that exemption if the relevant public officials' motives were illicit—if, for example, those officials had conspired with private actors to further private ends. 499 U.S. at 374-379. The Court held it improper to look behind such official actions to determine whether they reflect "perceived conspiracies to restrain trade." *Id.* at 379 (quoting *Hoover*, 466 U.S. at 580)). The Court explained, however, that its decision "in no way qualif[ied] the well-established principle that 'a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.'" *Ibid.* (quoting *Parker*, 317 U.S. at 351).

Omni Outdoor indicates that, if a particular governmental body (there, a municipality) is otherwise entitled to invoke the state action doctrine, its entitlement to that protection does not depend on a judicial inquiry into its officers' motives for particular conduct. Here, by contrast, the dispute concerns the antecedent question whether petitioner is entitled to invoke the state action doctrine at all. The court of appeals' decision, moreover, does not turn upon any judicial or FTC finding about the actual motives of petitioner's members for issuing the cease-and-desist orders. Rather, it reflects the more general conclusion that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" for purposes of federal competition law. Pet. App. 17a. That approach does not entail "the sort of deconstruction of the governmen-

tal process and probing of the official 'intent'" that the Court in *Omni Outdoor* rejected. 499 U.S. at 377.

4. Petitioner and its amici argue that the court of appeals' "holding radically overrides a State's sovereign choices concerning who shall serve as its officers and how it shall exercise control over them." Pet. 33 (internal quotation marks omitted); see W. Va. Amicus Br. 10-16; ADA Amicus Br. 13-17; N.C. State Bar Amicus Br. 7-14. That mischaracterizes the decision below and its context within the state action doctrine.

Midcal's active-supervision element is not a diktat to the States. Rather, it describes part of the conditions under which federal law—ordinarily supreme in our system, see U.S. Const. Art. VI, Cl. 2—will subordinate itself to a State's sovereign policy choice. Nothing in the decision below suggests that North Carolina is legally obligated to exercise any particular degree of supervision over petitioner or its members. Rather, if a State fails to supervise the conduct of particular private actors, including self-interested individuals vested with a degree of government power, the only consequence is that those actors' conduct will be subject to the same federal competition-law requirements and prohibitions that apply to private conduct generally.

The court of appeals' decision also does not make the availability of the state action doctrine contingent on a State's adoption of any particular regulatory model. See *Ticor*, 504 U.S. at 639 ("We do not imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices."). If a State constitutes entities like petitioner in the way that most traditional state agencies are constituted—with disinterested state officials who are either elected by the public or appointed by higher-level

state officers—such boards will likely be exempt from antitrust scrutiny without needing to satisfy the second (*i.e.*, active-supervision) *Midcal* prong. See *Hallie*, 471 U.S. at 46 n.10. Alternatively, the State may staff such boards with self-interested participants and empower them to exclude rivals, while providing appropriate supervision to ensure that such anticompetitive exclusion indeed reflects state policy.[6] That sort of supervision supports, rather than frustrates, both political accountability and the execution of state regulatory programs without distortion from private economic interests. See *Ticor*, 504 U.S. at 635-637.

For similar reasons, faithful application of the *Midcal* analysis does not threaten the States' ability to involve learned professionals in the regulation of health and safety. See Pet. 34; W. Va. Amicus Br. 11-12. Regulation of a learned profession need not entail a departure from federal law's "assumption that competition is the best method of allocating resources." *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 695 (1978). And even when States conclude that particular departures from that policy are appropriate, many States have established regulatory bodies that include representatives of learned professions yet ensure, through mechanisms for independent review and approval, that the

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[6] Contrary to amici's claims (ADA Amicus Br. 9; N.C. State Bar Amicus Br. 11), there is nothing anomalous about active state supervision of a regulatory board. In *Bates*, for example, this Court explained that, "[a]lthough the [Arizona] State Bar plays a part in the enforcement of [state disciplinary] rules, its role is completely defined by the [Arizona Supreme Court]; the [Bar] acts as the agent of the court under its continuous supervision." 433 U.S. at 361; see *id.* at 353 n.3 (noting the establishment of the Bar as an agency of the state supreme court).

ultimate decisions are the State's own.[7] Indeed, this Court's decisions in *Bates*, *Hoover*, and *Patrick* illustrate that a variety of state mechanisms are available to oversee the conduct of regulatory entities established under state law.

Petitioner's claim of substantial intrusion on state prerogatives rings particularly hollow on the facts of this case. The FTC's administrative order allows petitioner to file court actions against non-dentists who offer teeth-whitening services, while prohibiting petitioner from unilaterally issuing extra-judicial cease-and-desist orders against such providers. See Pet. App. 145a-148a. The court of appeals concluded, however, that even as a matter of North Carolina law, petitioner "does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the [DPA]." *Id.* at 5a-6a. Because the practical effect of the FTC's order was to bar petitioner from employing coercive measures that it lacked state-law authority to undertake, that

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[7] In West Virginia, for example, the dental board can only propose rules, which can then be adopted by the legislature. See W. Va. Code Ann. § 30-4-6 (LexisNexis). Likewise, in Connecticut, Illinois, and Utah, the dental board has authority only to make recommendations to another (independent) state official. See Conn. Gen. Stat. Ann. § 20-103a (West); 225 Ill. Comp. Stat. 25/7 (West); Utah Code Ann. § 58-1-202 (LexisNexis); see also, *e.g.*, Colo. Rev. Stat. Ann. § 12-35-104 (LexisNexis) (Colorado dental board under supervision and control of state division of professions and occupations in the department of regulatory agencies); Mass. Ann. Laws ch. 112, § 1 (LexisNexis) (Massachusetts public health commissioner supervises work of dental board). In North Carolina, the great majority of state regulatory boards (51 of 57) are *not* constituted as petitioner is, with members accountable only to its regulated market participants. See Compl. Counsel's Proposed Findings of Fact ¶¶ 46-47 (summarizing composition of the 57 North Carolina regulatory boards).

order effected no significant intrusion on state prerogatives.[8]

Finally, petitioner and its amici argue that the decision below might make market-participant members of state regulatory boards more reluctant to serve on such bodies. See Pet. 35; ADA Amicus Br. 15; N.C. State Bar Amicus Br. 9. That objection has not moved this Court in the past, and it should not here. See, *e.g.*, *Patrick*, 486 U.S. at 105 (explaining that such a concern "essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch").

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[8] An amicus asserts that, in light of the decision below, the dental board in West Virginia "has declined to take action in response to complaints received concerning the unauthorized practice of dentistry by unlicensed individuals performing teeth-whitening services within the State." W. Va. Amicus Br. 13. That is perplexing. As the FTC's order here recognizes, Pet. App. 147a-148a, an entity like petitioner would not violate the law by bringing judicial enforcement actions or by sending letters threatening litigation (in contrast to the cease-and-desist orders that petitioner issued). And petitioner's chief executive officer "testified that [petitioner's] ability to enforce the [DPA] would not be affected if it sent litigation warning letters instead of cease and desist letters." *Id.* at 139a.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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