No. 13-534

In the Supreme Court of the United States

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE RESPONDENT

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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 conduct 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. The opinion of the Federal Trade Commission (FTC or Commission) addressing state-action issues (Pet. App. 34a-68a) is reported at 151 F.T.C. 607. The subsequent merits opinion of the FTC (Pet. App. 69a-155a) is reported at 152 F.T.C. 640. The initial decision of the administrative law judge (ALJ) is reported at 152 F.T.C. 75.

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, and was granted on March 3, 2014. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case concerns the application of the "state-action doctrine," an implied exception to the federal antitrust laws. Petitioner contends that the doctrine shields from antitrust scrutiny anticompetitive conduct undertaken by a state board controlled by private market participants who are elected to their positions by other private market participants. The FTC and the court of appeals held that such a board can claim protection under the state-action doctrine only if its conduct is actively supervised by disinterested state officials. The FTC and the court further concluded that such active supervision was lacking here, and that petitioner's conduct violated federal competition law.

1. In a series of decisions beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has held that, in appropriate circumstances, the national policy of free competition embodied in the federal antitrust laws gives way to a State's decision to govern a particular market by alternative regulatory means. In *Parker*, the Court concluded that Congress did not intend the Sherman Act, 15 U.S.C. 1 *et seq.*, to reach an agricultural marketing program created pursuant to a California statute that "authorize[d] the establishment, through action of state officials, of programs for the marketing of agricultural commodities produced in the state." 317 U.S. at 346. This Court found "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." *Id.* at 350-351.

Decisions of this Court since *Parker* have refined and clarified the state-action doctrine to strike an

appropriate balance between deference to the States' regulatory choices and "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) (*Phoebe Putney*). Restraints on trade directed by a State's legislature or its highest court acting in a legislative capacity are sovereign acts and on that basis alone are exempt from antitrust scrutiny. *Parker*, 317 U.S. at 350-352; *Bates* v. *State Bar of Ariz.*, 433 U.S. 350, 359-360 (1977).[1] "Closer analysis is required," however, "when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization." *Hoover* v. *Ronwin*, 466 U.S. 558, 568 (1984). This Court articulated the general rule for such cases in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*). The Court in *Midcal* held that the actions of a non-sovereign are shielded by the state-action doctrine only if they are both (1) taken pursuant to a "clearly articulated and affirmatively expressed * * * state policy" to displace competition, and (2) "actively supervised by the State itself." *Id.* at 105 (citation and internal quotation marks omitted).

This Court has since modified the *Midcal* test for cases involving local governmental entities. Because local governments "are not themselves sovereign, state-action immunity under *Parker* does not apply to them directly." *Phoebe Putney*, 133 S. Ct. at 1010.

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[1] This Court has left open the question "whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine." *Hoover*, 466 U.S. at 568 n.17.

"As with private parties," therefore, "immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *Id.* at 1011 (quoting *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 52 (1982)). But "because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies," local governments "are not subject to the 'active state supervision requirement.'" *Ibid.* (quoting *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46 (1985) (*Hallie*)).

Like municipalities, most state agencies can ordinarily be presumed to pursue public rather than private interests when they carry out state policies. Accordingly, this Court has stated that, "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." *Hallie*, 471 U.S. at 46 n.10. The Court observed in the same decision, however, that this relaxation of the *Midcal* standard would not extend to any circumstance involving "state or municipal regulation by a private party." *Ibid.* In such cases, "active state supervision must be shown, even where a clearly articulated state policy exists." *Ibid.*

The Court's insistence on active supervision in any case involving "state or municipal regulation by a private party" reflects a fundamental limitation on the state-action doctrine. No matter how clearly a State speaks, it may not "give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351; accord, *e.g.*, *Hallie*, 471 U.S. at 39; *Midcal*, 445 U.S. at 104. Thus, while a State has "sig-

nificant power to displace the federal antitrust laws and substitute *its own* regulatory judgments," a State may not "displace the federal antitrust laws and then abandon the market at issue to the unsupervised discretion of private participants." 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 226a, at 180 (4th ed. 2013) (Areeda & Hovenkamp); see *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) ("[A] State may not confer antitrust immunity on private persons by fiat.").

2. Petitioner, the North Carolina State Board of Dental Examiners, is authorized to regulate the practice of dentistry under North Carolina's Dental Practice Act (DPA), N.C. Gen. Stat. §§ 90-22 *et seq.* (2013). Petitioner is designated by North Carolina law as an "agency of the State." *Id.* § 90-22(b). It is required to comply with the State's Public Records Act (*id.* §§ 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. Petitioner's members must take an oath of office and submit financial disclosure forms. N.C. Gen. Stat. § 138A-22(a) (2013); Pet. App. 41a. Petitioner is also required to submit an annual report to the Governor, and it is subject to general oversight by a committee of the state legislature. N.C. Gen. Stat. §§ 90-44, 93B-2, 120-70.101(3a) (2013); Pet. App. 41a.

Although petitioner thus possesses some of the formal characteristics of a typical state agency, in other respects it more closely resembles a private trade association. Most significantly, petitioner's constituent members are private actors, a controlling majority of whom are practicing dentists chosen by

other dentists rather than by the public or by any politically accountable state official. Six of petitioner's eight seats are reserved for licensed dentists, who must be "actually engaged in the practice of dentistry." N.C. Gen. Stat. § 90-22(b) (2013); Pet. App. 4a-5a. Because they must be active practitioners while they serve, each dentist-member has a significant financial interest in the business of the profession. Pet. App. 72a. Those dentist-members are nominated and elected by the State's licensed dentists to three-year renewable terms. N.C. Gen. Stat. § 90-22(b) (2013); Pet. App. 4a-5a, 40a. The DPA provides no mechanism for the dentist-members' removal by the Governor or by any other state official.[2] In addition, petitioner is funded exclusively by dues and fees paid by its private licensees. Pet. App. 5a, 72a.

Petitioner's principal activity is the licensing and disciplining of dentists. N.C. Gen. Stat. §§ 90-29, 90-41 (2013); Pet. App. 5a, 72a. Petitioner is authorized to set licensing standards, to examine applicants, and to issue licenses. N.C. Gen. Stat. § 90-30(a) (2013); Pet. App. 5a. If petitioner determines that a dentist has engaged in misconduct or is unfit to practice dentistry, it may suspend, revoke, or refuse to renew the dentist's license, or "[i]nvoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper." N.C. Gen. Stat. § 90-41 (2013).

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[2] Petitioner's other two members are a licensed dental hygienist, who is elected by the State's other licensed hygienists to a three-year renewable term, and a consumer member appointed by the Governor to a three-year renewable term. N.C. Gen. Stat. 90-22(b) (2013); Pet. App. 4a-5a, 40a.

In addition to regulating the conduct of licensed dentists, the DPA also prohibits unlicensed persons from engaging in specified acts that are deemed to constitute "the practice of dentistry." N.C. Gen. Stat. § 90-29 (2013). In contrast to petitioner's broad authority over its own licensees, however, petitioner has limited power to enforce the DPA's prohibition on unlicensed practice. Under North Carolina law, petitioner "does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the [DPA]." Pet. App. 5a-6a, 73a. Instead, petitioner may proceed against non-licensees only by instituting in state court "an action * * * to perpetually enjoin any person from so unlawfully practicing dentistry." N.C. Gen. Stat. § 90-40.1(a) (2013); see Pet. App. 5a. That power is not unique to petitioner; such suits may also be brought by state prosecutors or by "any resident citizen." N.C. Gen. Stat. § 90-40.1(a) (2013).

Finally, petitioner has general authority to promulgate "rules and regulations governing the practice of dentistry within the State." N.C. Gen. Stat. § 90-48 (2013). Those regulations, however, cannot become effective until they are approved by the North Carolina Rules Review Commission. *Id.* § 150B-21.8. The Rules Review Commission is a state agency whose members are appointed by the state legislature. *Id.* § 143B-30.1. It is authorized to reject any rule that exceeds the proposing agency's authority or that is not reasonably necessary to implement the relevant statute. *Id.* § 150B-21.9(a).

3. This case involves petitioner's efforts to exclude non-dentists from the market for teeth-whitening services. Pet. App. 6a-8a.

a. Teeth whitening is a popular cosmetic service generally 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. Pet. App. 6a. Although all of those methods rely on peroxide, they vary in their price, the immediacy of their results, and their ease of use. Dentists' in-office services are generally quick and effective, but are the most costly alternative. *Ibid.* Over-the-counter products are the least expensive, but their efficacy can vary because they require diligent and repeated application by consumers. *Ibid.* 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. *Id.* at 74a. All of these methods of teeth whitening constitute a single market, with providers competing for customers based on price and other qualities. *Id.* at 74a-75a, 126a-127a.

Dentists in North Carolina began providing teeth-whitening services in the 1990s. Pet. App. 6a. Those services became a substantial source of revenue for many dentists, including petitioner's members. *Id.* at 96a-97a. At least eight of petitioner's ten dentist-members who served during the period at issue here provided teeth-whitening services in their private practices, in some cases earning tens of thousands of dollars. *Ibid.*

In approximately 2003, growing demand for teeth whitening led non-dentist providers to enter the North Carolina market by offering the service at salons, spas, and other venues. Pet. App. 6a, 70a. Those providers "charged significantly less than den-

tists despite achieving similar results." *Id.* at 106a. "Dentists soon began complaining to [petitioner] about the lower prices offered by non-dentists," and petitioner's members "likewise recognized that proliferation of non-dentist teeth whitening operations would adversely affect the income of dentists." *Ibid.*

b. Petitioner responded to dentists' complaints by sending dozens of cease-and-desist orders to non-dentist providers of teeth-whitening services. Pet. App. 6a-7a, 42a, 76a. The orders appeared on official letterhead, stated that teeth whitening constitutes the practice of dentistry under North Carolina law, and "order[ed]" the recipients to cease offering teeth-whitening services. *Id.* at 76a; see, *e.g.*, J.A. 10 ("You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry."). Although petitioner had no state-law authority to issue orders to non-dentists, Pet. App. 5a-6a, it "viewed these letters as having the force of law[,] and recipients of these communications had a similar understanding," *id.* at 107a. In many cases, petitioner's letters also warned that the unauthorized practice of dentistry is a misdemeanor subject to criminal prosecution. *Id.* at 76a; see, *e.g.*, J.A. 12. In addition, petitioner sent letters to shopping malls that leased space to teeth-whitening kiosks and to manufacturers and distributors of teeth-whitening products used by non-dentists. Pet. App. 7a, 77a. Those letters asserted that the provision of teeth-whitening services by non-dentists was unlawful, and they urged the third-party recipients to stop doing business with non-dentist providers. *Ibid.*; see, *e.g.*, J.A. 22-23.

Petitioner's actions "successfully expelled non-dentist providers from the North Carolina teeth-

whitening market." Pet. App. 7a-8a; see *id.* at 42a, 77a. That was petitioner's intended result. When it received complaints from dentists, petitioner responded with assurances "that [it] was attempting to shut down * * * non-dentist providers." *Id.* at 7a; see *id.* at 103a-104a (statement by petitioner's Chief Operations Officer that petitioner was "going forth to do battle" with non-dentist providers). Petitioner's two non-dentist members did not participate in any of its actions against non-dentist providers of teeth-whitening services. *Id.* at 75a.

c. The asserted legal basis for petitioner's actions was its determination that teeth-whitening services constitute the practice of dentistry under the DPA. At various times, petitioner's orders relied on some or all of three separate statutory provisions, which defined the practice of dentistry to include "[r]emov[ing] stains, accretions, or deposits from the human teeth," "[t]ak[ing] or mak[ing] an impression of the human teeth," and performing "any of the clinical practices included in the curricula of recognized dental schools." N.C. Gen. Stat. § 90-29(b)(2), (7) and (10) (2013); see, *e.g.*, J.A. 12, 16, 20. All of those provisions were enacted before the development of peroxide-based teeth-whitening in the early 1990s. See N.C. Gen. Stat. § 90-29(b)(2), (7) and (10) (1985); 152 F.T.C. at 106, 162.

Some States have banned or regulated the provision of teeth-whitening services by non-dentists through legislation specifically directed at the practice. See, *e.g.*, Ala. Code § 34-9-6(12) (LexisNexis 2013) ("bleaching of the human teeth"); 225 Ill. Comp. Stat. Ann. § 25/17(11) (West 2014) ("applying teeth whitening materials"); Iowa Code Ann. § 153.13(3)

(West 2014) ("tooth whitening"); Ky. Rev. Stat. Ann. § 313.010(11) (LexisNexis 2011) ("whitening of natural or manufactured teeth"); Mo. Rev. Stat. § 332.366 (2014) ("teeth whitening"); Nev. Rev. Stat. Ann. § 631.215(1)(m) (LexisNexis 2014) ("undertakes to whiten or bleach teeth"); N.H. Rev. Stat. Ann. § 317-A:20(I)(h) (LexisNexis 2013) (same). North Carolina law does not impose any comparably specific prohibition, however, and "North Carolina courts have never concluded that teeth whitening services provided by non-dentists are unlawful." Pet. App. 123a. The determination whether non-dentists in North Carolina may lawfully provide teeth-whitening services therefore requires the interpretation of more generally-worded statutory provisions. By proceeding through unilateral cease-and-desist orders rather than by filing suit as authorized by N.C. Gen. Stat. § 90-40.1(a) (2013), petitioner enforced its interpretation of the statute—and effectively excluded non-dentist competitors from the market—without the involvement of the courts or any disinterested agency of the North Carolina government. Pet. App. 65a-67a.

4. On June 17, 2010, the FTC filed an administrative complaint charging 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. Pet. App. 8a, 36a.

a. The FTC denied petitioner's motion to dismiss the complaint under the state-action doctrine. Pet. App. 34a-68a. The FTC's complaint counsel argued that petitioner could not satisfy either prong of the *Midcal* test because it lacked state-law authority to issue cease-and-desist orders to non-dentists and

because its actions were not actively supervised by state officials. *Id.* at 48a. For purposes of resolving petitioner's motion, the Commission "assumed" without deciding that petitioner satisfied the clear-articulation requirement. *Id.* at 47a n.8. The FTC concluded, however, that petitioner "must meet both prongs of the *Midcal* test and that it has failed to show sufficient state supervision." *Id.* at 46a-47a.

The FTC first rejected petitioner's contention that, as a "state agency" under North Carolina law, it was not required to show active supervision. Pet. App. 47a-61a. The Commission acknowledged that, in *Hallie*, this Court had suggested that state agencies are not subject to the active-supervision requirement. *Id.* at 49a. The Commission explained, however, that this Court "has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants." *Ibid.* In particular, the FTC relied on the holding in *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773 (1975), that a state bar's status as "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; see Pet. App. 50a-51a.

Rather than relying on petitioner's formal status under state law, the FTC concluded that "the operative factor" in determining whether active supervision is required for a particular entity to claim the state-action exemption is the "degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated." Pet. App. 49a. The Commission thus held that where, as here, "a state regulatory body" is "controlled by participants in the very industry it purports to regu-

late," it must "satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny." *Id.* at 58a. The Commission further found that the need for active supervision in this case is reinforced by petitioner's "accountability to North Carolina's licensed dentists," who elect petitioner's dentist-members without any involvement by the public or by politically accountable state officials. *Id.* at 59a.

Having found that petitioner was required to satisfy both prongs of the *Midcal* test, the FTC concluded that the requisite active supervision was lacking. Pet. App. 61a-68a. Under this Court's decisions, "the active supervision requirement 'mandates that the State *exercise* ultimate control over the challenged anticompetitive conduct.'" *Id.* at 62a (emphasis added by the FTC) (quoting *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988)). In this case, the Commission found no indication "that a state actor was even aware of [petitioner's] policy toward non-dentist teeth whitening, let alone reviewed or approved it." *Id.* at 65a.

b. After the FTC denied petitioner's motion to dismiss, an ALJ conducted a hearing on the merits. Applying standards from Section 1 of the Sherman Act, 15 U.S.C. 1, as incorporated by Section 5 of the FTC Act, 15 U.S.C. 45, the ALJ concluded that petitioner's concerted action to exclude non-dentists from the market for teeth-whitening services constituted an unreasonable restraint of trade and an unfair method of competition. 152 F.T.C. 75.

c. The FTC upheld the ALJ's decision based on its de novo review of the record. Pet. App. 69a-155a.[3]

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[3] The Commission also declined to reconsider its determination that petitioner's conduct was not exempted by the state-action doctrine. Pet. App. 86a.

The Commission explained that petitioner's conduct consisted of "concerted action excluding a lower-cost and popular group of competitors" from the market for teeth-whitening services. *Id.* at 106a. Applying the rule of reason, the Commission concluded that petitioner's actions harmed competition by "depriv[ing] consumers of choice" and causing "higher prices" for teeth-whitening services. *Id.* at 131a.

The Commission also concluded that petitioner had failed to advance a legitimate procompetitive justification for its actions. Pet. App. 114a-125a. *Inter alia*, the FTC rejected petitioner's contention that its actions were justified by public-safety concerns. The Commission explained that, even if such concerns could legitimize anticompetitive actions that would otherwise violate the antitrust laws, there was no "contemporaneous evidence that the challenged conduct [in this case] was motivated by health or safety concerns" rather than by petitioner's desire to eliminate competition from non-dentist providers. *Id.* at 122a. To the contrary, the FTC observed, petitioner "began issuing cease and desist letters two years before it received any reports of consumer injury" attributable to a non-dentist provider of teeth-whitening services, and it received only a handful of consumer complaints at any point. *Id.* at 122a-123a; see *id.* at 75a. The Commission found that the full record "fail[ed] to substantiate [petitioner's] public safety claims," and it viewed the evidence as indicating instead that "non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.* at 123a.

To remedy petitioner's violation of the FTC Act, the Commission ordered it not to unilaterally issue cease-and-desist orders to non-dentist providers of

teeth-whitening services. Pet. App. 145a-148a. The FTC's order expressly preserved petitioner's ability to threaten litigation and to file court actions for suspected violations of the DPA. *Id.* at 147a-148a.

5. The court of appeals denied petitioner's petition for review. Pet. App. 1a-33a.

a. The court of appeals agreed with the FTC that where, as here, "a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" for purposes of the state-action doctrine and is therefore "required to satisfy both *Midcal* prongs." Pet. App. 17a. The court explained that active supervision is not required "[w]hen a state agency and its members have the attributes of a public body—such as a municipality—and are subject to public scrutiny." *Id.* at 15a. In such cases, "there is little or no danger that [the agency is] involved in a private [anticompetitive] arrangement." *Ibid.* (quoting *Hallie*, 471 U.S. at 47). The court concluded, however, that "when a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership," then "both parts of *Midcal* must be satisfied." *Ibid.*

The court of appeals explained that its decision was consistent with *Goldfarb*, and with the Fourth Circuit's own precedent requiring "that a state agency operated by market participants must show active state involvement" to invoke the state-action exemption. Pet. App. 14a-15a (citing *Goldfarb*, 421 U.S. at 791-792, and *Asheville Tobacco Bd. of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509 (4th Cir. 1959)). The court rejected petitioner's reliance on decisions from other circuits holding that particular state agencies were not subject to the active-supervision requirement.

Such decisions, the court explained, did not establish the "bright-line rule that [petitioner] requests" because each depended on a finding that particular features of the state agency at issue made it more analogous to a municipality than to a private party. *Id.* at 16a-17a n.6.

b. On the merits, the court of appeals upheld the Commission's determination that petitioner's conduct violated the FTC Act. Pet. App. 18a-29a. The court explained that it was "hesitant to quickly condemn the actions of professional organizations because 'certain practices by members of a learned profession might survive scrutiny . . . even though they would be viewed as a violation of the Sherman Act in another context.'" *Id.* at 27a (quoting *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 686 (1978)). On the facts of this case, however, the court held that substantial evidence supported the Commission's finding that petitioner's exclusion of non-dentists from the market for teeth-whitening services constituted concerted anticompetitive action in violation of the FTC Act. *Id.* at 28a.

c. Judge Keenan concurred. Pet. App. 29a-33a. She stressed that petitioner's members "are elected by other private participants in the market" and suggested that the result might well have been different if petitioner's members were instead "appointed or elected by state government officials." *Id.* at 30a. She also emphasized that, under the state-action doctrine, North Carolina is entitled to prohibit non-dentists from providing teeth-whitening services despite the resulting harms to competition. *Id.* at 32a. She explained, however, that when a State makes such a determination, it "must act as the state itself." *Ibid.*

Where, as here, a restraint on competition is instead imposed by a board of "private dentists elected by other private dentists," a court can have "little confidence that the state itself, rather than a private consortium of dentists, chose to regulate dental health in this manner at the expense of robust competition." *Id.* at 32a-33a.

SUMMARY OF ARGUMENT

The state-action doctrine does not shield petitioner's unsupervised anticompetitive conduct from antitrust scrutiny. That doctrine permits a State to supersede the antitrust laws' fundamental national policy of free competition with an alternative scheme of regulation in the public interest. This Court has long held, however, that a State may not displace the antitrust laws by providing that a particular market will be governed by the unsupervised decisions of private market participants acting with the State's imprimatur. Under these principles, the anticompetitive conduct of a state board controlled by private market participants who are selected by other market participants is exempt from the antitrust laws only if it is supervised by disinterested public officials.

A. Under the first prong of the test established in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*), a State can displace the antitrust laws only if it clearly articulates its intent to establish an anticompetitive regulatory program. *Midcal*'s first prong can be satisfied, however, even if the State leaves unresolved important questions about *how* and *to what extent* the free market should be restrained. *Midcal*'s active-supervision requirement ensures that the antitrust laws will give way only if those crucial policy choices

are supervised by disinterested public officials, thereby ensuring "that *particular* anticompetitive conduct has been approved by the State." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 637 (1992) (*Ticor*) (emphasis added).

B. The FTC and the court of appeals correctly concluded that petitioner is subject to the active-supervision requirement.

1. This Court has held that municipalities are exempt from the active-supervision requirement because, as compared to private parties, they "have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 (2013). The same logic applies to typical state agencies composed of disinterested public officials. But it does not extend to entities like petitioner, a hybrid board vested with state authority yet dominated by private market participants. Instead, common sense suggests—and experience confirms—that such boards have powerful incentives to restrain competition to benefit their members. And in this case, the need for active supervision is reinforced by the fact that petitioner's dentist-members are elected by, and solely accountable to, other practicing dentists.

2. Neither petitioner's status as a "state agency" under North Carolina law nor its state-law powers and duties provide any sound reason to exempt it from the active-supervision requirement. North Carolina is of course free to classify petitioner as a state agency and to grant it regulatory authority. But those matters of state law do not control the federal antitrust inquiry, which instead turns on the substantive factors relevant to the state-action doctrine. Indeed, this Court

has emphasized that "active state supervision must be shown" in any case involving "state or municipal regulation by a private party." *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985).

3. This Court's decisions addressing agencies controlled by market participants confirm that the active-supervision requirement applies here. The fact that an entity controlled by market participants 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." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975). Instead, the Court's decisions addressing such hybrid entities have treated them as essentially private, with the availability of the state-action exemption turning on the presence of active supervision. Contrary to petitioner's contention, *Parker* v. *Brown*, 317 U.S. 341 (1943), did not implicitly establish a contrary rule. This Court's opinion in *Parker* did not even mention the composition of the state commission at issue there, much less address its significance for antitrust purposes. And that commission was in any event far less dominated by participants in the relevant market than is petitioner.

4. This Court's decision in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), does not support petitioner's position. The Court there held that a governmental body otherwise entitled to the state-action exemption does not lose the exemption based on a case-by-case inquiry into officials' subjective motives or the possibility of misconduct unrelated to the purposes of the antitrust laws. Here, in contrast, the question is whether petitioner is entitled to the state-action exemption in the first in-

stance, and the FTC and the court of appeals correctly focused on the *structural* risk of self-interested behavior by private market participants—the core concern of the Sherman Act.

C. Requiring petitioner to demonstrate active supervision furthers the federalism principles underlying the state-action doctrine. The decisions below do not compel North Carolina to adopt any particular regulatory structure—they merely prescribe the circumstances under which federal law will subordinate itself to a State's sovereign policy choice. Allowing a State to supplant federal law if, but only if, it satisfies specified conditions is an inherent feature of the state-action doctrine, and poses no affront to federalism or state sovereignty. To the contrary, it is petitioner's position that would disserve the federalism principles underlying the state-action doctrine. "Federalism serves to assign political responsibility, not to obscure it." *Ticor*, 504 U.S. at 636. Because petitioner's dentist-members are chosen by other dentists rather than by the public or by any elected official, no official of North Carolina can be held politically accountable for petitioner's unsupervised anticompetitive conduct.

D. Contrary to petitioner's claims, faithful application of *Midcal* in this context will not unduly disrupt state regulatory schemes. The decisions below did not upset any settled understanding on which States could have relied in structuring their regulation of dentistry and other professions. Moreover, although state regulatory boards often include market participants, many States have adopted a variety of structures to provide for supervision of their actions by disinterested state officials.

ARGUMENT

THE STATE-ACTION DOCTRINE DOES NOT SHIELD PETITIONER'S UNSUPERVISED ANTICOMPETITIVE CONDUCT FROM ANTITRUST SCRUTINY

Through the federal antitrust laws, the "Magna Carta of free enterprise," Congress "sought to establish a regime of competition as the fundamental principle governing commerce in this country." *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 398 & n.16 (1978) (*Lafayette*) (citation and internal quotation marks omitted); see *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972). Under the state-action doctrine established in *Parker* v. *Brown*, 317 U.S. 341 (1943), and its progeny, this vital national policy is "subject to supersession by state regulatory programs." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 632-633 (1992) (*Ticor*). "But given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored, much as are repeals by implication.'" *FTC* v. *Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (*Phoebe Putney*) (quoting *Ticor*, 504 U.S. at 636); accord *Lafayette*, 435 U.S. at 398-400.

The two-part test articulated in *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97 (1980) (*Midcal*), reflects the balance this Court has struck between the national policy of free competition and deference to state regulation. Under *Midcal* and its progeny, a private actor may claim an exemption from antitrust scrutiny only if its actions are both (1) taken pursuant to a "clearly articulated and affirmatively expressed * * * state policy" to displace competition, and (2) "actively supervised by

the State itself." *Id.* at 105 (citation and internal quotation marks omitted). That standard allows a State to displace market competition with regulation in the public interest, but demands that the State "exercise[] sufficient independent judgment and control so that the details of the [anticompetitive conduct] have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Ticor*, 504 U.S. at 634-635.

Midcal's active-supervision requirement unquestionably applies when a State delegates regulatory authority to an industry association or other private body. See, *e.g.*, *Ticor*, 504 U.S. at 638 (state law authorizing private bureaus to set joint insurance rates for their members); *Midcal*, 445 U.S. at 99-100, 105-106 (state law enforcing prices set by wine producers and distributors). In contrast, this Court has held that active supervision is unnecessary when the relevant actor is a municipality, and it has indicated that the same rule "likely" applies to state agencies. *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46-47 & n.10 (1985) (*Hallie*).

The question presented here is whether the active-supervision requirement applies to a "hybrid" state board that possesses some of the formal characteristics of a state agency, but is dominated by private participants in the regulated market who are elected by other market participants. The Commission and the court of appeals correctly held that such entities cannot claim protection under *Parker* unless their anticompetitive actions are supervised by disinterested state officials. That conclusion follows directly from this Court's decisions holding that private market participants cannot invoke the state-action exemp-

tion unless their anticompetitive conduct is actively supervised by disinterested state officials.

Requiring active supervision in this context ensures that, when a State clearly articulates a policy choice to displace competition in a particular field, but leaves unresolved significant questions regarding the details of that policy's implementation, those interstitial decisions will be made (or at least actively supervised) by persons committed to serving the public interest. It is also the only result consistent with the fundamental principle that the state-action doctrine does not authorize a State to "displace the federal antitrust laws and then abandon the market at issue to the unsupervised discretion of private participants." Areeda & Hovenkamp ¶ 226a, at 180. And by providing that a State may supersede the federal competition laws if, but only if, the implementation of its alternative regulatory policy is actively superintended by disinterested public officials, the decisions below further the principles of federalism and political accountability on which the state-action doctrine is based.

A. The Active-Supervision Requirement Ensures That The State-Action Doctrine Protects Only Conduct Approved By Disinterested Public Officials

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," and not merely through private agreement. *Ticor*, 504 U.S. at 636.

1. *Midcal*'s first (clear-articulation) element ensures that a State's actions will supersede the antitrust laws only if the State has unambiguously expressed its intent to displace competition. Under this

standard, the mere fact that state law authorizes the challenged conduct "is insufficient." *Phoebe Putney*, 133 S. Ct. at 1012. Instead, "the State must have affirmatively contemplated" that its grant of authority will effect "the displacement of competition." *Ibid.* That test is satisfied only "where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Id.* at 1013.

The clear-articulation requirement thus demands that a State speak clearly when it intends to displace the federal antitrust laws. But once "the State's intent to establish an anticompetitive regulatory program is clear," *Midcal*'s first element is satisfied even if the State "fail[s] to describe the implementation of its policy in detail." *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 65 (1985) (*Southern Motor Carriers*). In *Southern Motor Carriers*, for example, the Court held that a state agency's policy allowing motor carriers to submit collective rate proposals satisfied the clear-articulation requirement because a state statute directed the agency to set "just and reasonable rates." *Id.* at 63 (internal quotation marks omitted). The Court explained that, "[a]s long as the State as sovereign clearly intends to displace competition in a particular field with a regulatory structure, the first prong of the *Midcal* test is satisfied," even if the details of the anticompetitive scheme are left to the administering agency. *Id.* at 64.

Similarly in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991) (*Omni Outdoor*), this Court held that a State's grant of zoning authority to a municipality satisfied the clear-

articulation requirement because the suppression of competition was a "'foreseeable result' of what the statute authorize[d]." *Id.* at 373 (citation omitted). The State had neither mandated nor approved the particular zoning regulations adopted by the city. *Id.* at 371. Nonetheless, because the State had empowered the city to enact zoning regulations, and because such regulations have foreseeable anticompetitive effects, the Court found the clear-articulation requirement satisfied. *Id.* at 372-373.

As those decisions illustrate, a state policy to displace competition may be "clearly articulated," for purposes of *Midcal*'s first prong, even though it is phrased in somewhat general terms and its implementation requires significant interstitial choices. *Midcal*'s clear-articulation requirement therefore "cannot alone ensure, as required by [this Court's] precedents, that *particular* anticompetitive conduct has been approved by the State." *Ticor*, 504 U.S. at 637 (emphasis added). To the contrary, a clearly articulated state policy to displace competition may leave open critical questions regarding *how* and *to what extent* the free market should be restrained. Here, for example, the North Carolina legislature clearly articulated its intent to displace competition at least to a degree, by prohibiting persons other than licensed dentists from engaging in specified acts that are deemed to constitute "the practice of dentistry." N.C. Gen. Stat. § 90-29(a) (2013). That state policy choice provides no assurance, however, that either the North Carolina legislature or any other disinterested state official approved (or would approve) petitioner's application of the statute to teeth-whitening services.

2. *Midcal*'s second element complements and supplements the clear-articulation requirement by "mandat[ing] that the State exercise ultimate control over the challenged anticompetitive conduct" before that conduct will be protected by the state-action doctrine. *Patrick* v. *Burget*, 486 U.S. 94, 101 (1988). That standard is satisfied when "state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Ibid.* Actual state involvement is required; "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." *Ticor*, 504 U.S. at 638. In *Ticor*, for example, the Court found an absence of adequate supervision in two statutory schemes under which insurance rates proposed by private parties "became effective unless they were rejected within a set time" by state agencies. *Ibid.* The Court explained that, although the agencies had the authority to supervise the filed rates, they had failed to exercise that authority by actually reviewing the proposed rates and disapproving those that were inconsistent with state policy. *Ibid.*

By requiring state approval of the details of an anticompetitive regulatory scheme, the active-supervision requirement polices the basic distinction drawn by the state-action doctrine. A State may supplant the federal antitrust laws with a program of regulation in the public interest, but it may not "frustrat[e] the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *Southern Motor Carriers*, 471 U.S. at 57 (quoting *Midcal*, 445 U.S. at 106)). "Actual state involvement,

not deference to private [anticompetitive] arrangements under the general auspices of state law, is the precondition for immunity." *Ticor*, 504 U.S. at 633. This distinction furthers "the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." *Omni Outdoor*, 499 U.S. at 378.

In protecting only regulation in the "public interest," the state-action doctrine does not require a State to meet "some normative standard, such as efficiency, in its regulatory practices." *Ticor*, 504 U.S. at 634. Instead, this Court's precedents constrain the *process* by which the State may regulate if it wishes to displace federal competition law. An exemption is granted only if the particular restraints on competition have been approved by disinterested public officials rather than by interested private parties acting alone. "[T]he analysis asks whether the State has played a substantial role in determining the specifics of the economic policy. The question is not how well state regulation works but whether the anticompetitive scheme is the State's own." *Id.* at 635.

3. Consistent with this understanding, this Court has held that the active-supervision requirement is inapplicable when a municipality is alleged to have engaged in anticompetitive conduct. *Hallie*, 471 U.S. at 46. The Court explained that "the requirement of active supervision serves essentially an evidentiary function" by "ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Ibid.* "Where a private party is engaging in the anticompetitive activity," active supervision is required because "there is a real danger that he is acting to

further his own interests, rather than the governmental interests of the State." *Id.* at 47. In contrast, when a municipality acts to restrain competition, "there is little or no danger that it is involved in a *private* [anticompetitive] arrangement." *Ibid.*

Although this Court has not definitively resolved the issue, it has indicated that state agencies are also "likely" exempt from the active-supervision requirement. *Hallie*, 471 U.S. at 46 n.10. In most of its applications, such a rule would be consistent with the *Hallie* Court's rationale for exempting municipalities. When (as is typically the case) a state agency is controlled by disinterested officials who are accountable to the public, its actions presumptively reflect a good-faith effort to further the public interest rather than an attempt to advance the officials' private interests. See *id.* at 47. In addition, requiring that a traditional state agency be actively supervised by some *other* state entity would diminish the States' ability to use agency expertise "to deal with problems unforeseeable to, or outside the competence of, the legislature." *Southern Motor Carriers*, 471 U.S. at 64.

B. The FTC And The Court Of Appeals Correctly Held That Petitioner Is Subject To *Midcal*'s Active-Supervision Requirement

In finding the active-supervision requirement applicable to petitioner's anticompetitive conduct, the FTC did not adopt a general rule that state agencies must be actively supervised in order to claim the state-action exemption. Rather, the Commission stated that, "[w]hatever the case may be with respect to state agencies generally, * * * th[is] Court has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies

consisting of market participants." Pet. App. 49a. The reasons for exempting municipalities and ordinary state agencies from *Midcal*'s active-supervision requirement do not apply to petitioner, which is controlled by market participants who are accountable to other market participants rather than to the public. Because boards controlled by market participants are prone to restrain competition in furtherance of their members' private interests, the anticompetitive conduct of such entities is not exempt from antitrust scrutiny unless it is actively supervised by disinterested state officials.

Petitioner's status as a state agency for purposes of North Carolina law does not alter that conclusion. Petitioner's classification under the antitrust laws is a question of federal law that turns on the substantive characteristics relevant to the state-action doctrine, not on state-law labels. And this Court's cases addressing similar hybrid entities confirm that petitioner's conduct is exempt from antitrust scrutiny only if it is actively supervised. No decision of this Court supports petitioner's contrary argument.

1. State boards controlled by market participants are subject to the active-supervision requirement because they have strong incentives to restrict competition for the benefit of their members

a. In holding that the active-supervision requirement does not apply to municipalities, the Court in *Hallie* did not rely on the facts that municipalities possess formal public charters and are considered governmental bodies under state law. Rather, the Court found active supervision to be unnecessary because it saw "little or no danger" that municipal officials would restrict competition in order to further

their own private interests "rather than the governmental interests of the State." 471 U.S. at 47. By contrast, petitioner's membership, and thus petitioner itself, is dominated by private actors who participate in the very market in which petitioner acted anticompetitively. Pet. App. 58a-59a. Petitioner's members, moreover, are elected by and accountable to no one but other dentists, who share their interest in suppressing competition from non-dentists. *Id.* at 59a. Thus, with respect to the degree of risk that anticompetitive conduct will be undertaken to serve private ends, petitioner is more closely analogous to a typical private trade association than to a municipality or traditional state regulatory agency.

Those structural features preclude any assurance that petitioner's conduct reflects the State's sovereign will rather than its members' private interests. Numerous cases bear out the commonsense proposition that professional and industry associations "often have economic incentives to restrain competition" that threatens their members' interests. *Allied Tube & Conduit Corp.* v. *Indian Head, Inc.*, 486 U.S. 492, 500 (1988).[4] State boards dominated by private market participants can likewise be expected to "foster anticompetitive practices for the benefit of [their] members." *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791 (1975); see, *e.g.*, *id.* at 791-792 & n.21 (minimum

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[4] See also, *e.g.*, *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 465-466 (1986); *Arizona* v. *Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 356-357 (1982*); American Soc'y of Mech. Eng'rs, Inc.* v. *Hydrolevel Corp.*, 456 U.S. 556, 571-572 (1982); *National Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692-693 (1978); *Fashion Originators' Guild of Am., Inc.* v. *FTC*, 312 U.S. 457, 463-465 (1941).

fee schedule enforced by state bar); *In re Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549, 579 (1988) (advertising restrictions adopted by state board "controlled by practicing optometrists who benefit financially from this trade restraint").[5] Indeed, petitioner's own expert acknowledged that "state licensing boards, including dental boards, have a history of enforcing restrictions designed to enhance the income of their licensees at the expense of consumers." Pet. App. 113a; see *id.* at 113a n.14 ("[Petitioner] is concerned about the financial interests of North Carolina dentists.").

The facts of this case illustrate the danger that state boards dominated by market participants will "pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011. As the FTC determined in findings upheld by the court of appeals and not challenged here, petitioner successfully excluded rivals from the market for teeth-whitening services provided by its members and dentist constituents. Pet. App. 7a-8a, 129a-130a. The FTC found no credible evidence supporting petitioner's post hoc claim that its actions were justified by concern for consumers' health and safety, and

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[5] See also, *e.g.*, *In re South Carolina State Bd. of Dentistry*, No. 9311, 2007 WL 2763994 (F.T.C. Sept. 11, 2007) (consent order regarding board's restrictions on the provision of certain services by dental hygienists); *In re Texas Bd. of Chiropractic Exam'rs*, 115 F.T.C. 470 (1992) (consent order prohibiting board from adopting anticompetitive advertising restrictions); *In re Wyoming State Bd. of Chiropractic Exam'rs*, 110 F.T.C. 145 (1988) (same); *In re Louisiana State Bd. of Dentistry*, 106 F.T.C. 65 (1985) (same); see generally Aaron Edlin & Rebecca Haw, *Cartels By Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1107-1110 (2014) (collecting examples).

there was no "contemporaneous evidence that the challenged conduct was motivated by health or safety concerns." *Id.* at 122a. "Almost all" of the complaints that gave rise to petitioner's cease-and-desist orders came from licensed dentists, "many of whom derived income from teeth whitening services" and "noted [in their complaints] that these non-dentist providers offered low prices." *Id.* at 75a. Indeed, petitioner first sent cease-and-desist orders two years before it became aware of any claim of consumer injury. *Id.* at 122a. And in its efforts to exclude non-dentist rivals from the market, petitioner eventually abandoned any attempt to conduct independent investigations, instead issuing cease-and-desist orders based solely on the complaints it received from dentists. See J.A. 30 ("[W]e would generally just send a cease and desist letter and then have them explain to us the reason why they weren't practicing dentistry.").

b. Because a board dominated by market participants who are accountable to other market participants has strong incentives to take anticompetitive actions to benefit its members, its conduct must be actively supervised in order to qualify for the state-action exemption. That conclusion follows directly from *Hallie*, which explained that the need for active supervision turns on the degree of risk that the actor in question "is acting to further [its] own interests, rather than the governmental interests of the State." 471 U.S. at 47. It is also consistent with the basic purpose of the active-supervision requirement as articulated in *Midcal* and this Court's subsequent decisions. Where, as here, a state policy to displace competition is carried out through a board composed of "private actors only loosely affiliated with the

state," Pet. App. 32a, there can be no assurance that "the details of the [anticompetitive conduct] have been established as a product of deliberate state intervention, not simply by agreement among private parties," *Ticor*, 504 U.S. at 634-635.

Leading commentators agree. They recommend 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." Areeda & Hovenkamp ¶ 227b, at 226. They also urge that the presumption of private action should "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.*; see *id.* ¶ 227a, at 225 ("[B]odies engaged in self-regulation of their members' commercial activities need active supervision by a more public body to satisfy the *Midcal* requirements."); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 689 (1991) (explaining that "financially interested action is always 'private action' subject to antitrust review").

c. Petitioner does not deny that state boards dominated by market participants predictably act in their own financial interests. Instead, petitioner asserts (Br. 41-44) that the FTC and the court of appeals erred in relying on this "risk of self-interest" rationale in determining that the active-supervision requirement applies. But the rationale that petitioner describes (Br. 41) as "novel and radical" is drawn directly from this Court's decisions.

In *Patrick*, for example, the Court explained that "[t]he active supervision requirement stems from the

recognition that '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.'" 486 U.S. at 100 (brackets omitted) (quoting *Hallie*, 471 U.S. at 47); see *Ticor*, 504 U.S. at 634 (same). In exempting municipalities from the active-supervision requirement, the Court observed that the applicability of that requirement depends on the "danger that [the entity] is involved in a *private* [anticompetitive] arrangement." *Hallie*, 471 U.S. at 47. And just two Terms ago, the Court reiterated that municipalities are exempt from the active-supervision requirement "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. The link between the active-supervision requirement and the risk of self-interested behavior in the implementation of state policy is thus firmly rooted in this Court's decisions—indeed, the very point of the active-supervision requirement is to guard against that risk. It is petitioner's claim that the inquiry is instead controlled by formal state-law labels that is "novel" and unsupported by precedent.

d. In this case, a decisive coalition of petitioner's members consists of participants in the market petitioner regulates. Pet. App. 4a-5a; N.C. Gen. Stat. 90-22(b) (2013). Indeed, *all* of the members involved in the decisions to exclude non-dentist teeth-whitening providers were practicing dentists—petitioner's two non-dentist members did not participate in the conduct at issue here. Pet. App. 75a. Under this Court's decisions, the inherent risk of self-interested behavior created by this structure provides a sufficient reason

to apply the active-supervision requirement to petitioner's conduct.

As the Commission explained, moreover, the need for active supervision is further reinforced by the fact that, by statute, petitioner's members are elected by and therefore solely accountable to their professional colleagues, most or all of whom potentially benefit from petitioner's anticompetitive policies. Pet. App. 58a-60a; cf. *Printz* v. *United States*, 521 U.S. 898, 922 (1997) (emphasizing the importance of "meaningful Presidential control"—including "the power to appoint and remove"—in ensuring the political accountability of the Executive Branch). That feature distinguishes petitioner from the vast majority of its counterparts in other States, whose members are appointed by the Governor or another disinterested state official.[6]

2. Petitioner's status under North Carolina law does not exempt it from the active-supervision requirement

Petitioner's core argument is that the active-supervision requirement does not apply to a "*bona fide* state agency" that is "charged with state-law powers and duties." Pet. Br. 2, 12, 13, 14, 17, 38, 44, 52, 59. Neither of these attributes provides a sound reason for allowing petitioner to invoke the state-

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[6] In only three other States (Alabama, Oklahoma, and South Carolina) is the state dental board controlled by market participants who are elected by their peers. See Ala. Code § 34-9-40 (LexisNexis 2013); Okla. Stat. Ann. tit. 59, § 328.7(B)-(C) (West 2013); S.C. Code Ann. § 40-15-20 (2013). In North Carolina itself, the great majority of state regulatory boards (51 of 57) are likewise *not* constituted as petitioner is, with the majority of its members accountable only to its regulated market participants. See J.A. 34-108 (collecting North Carolina statutes).

action exemption for conduct that is not actively supervised by disinterested state officials.

a. Petitioner's formal status as a state agency under North Carolina law does not control its treatment under the state-action doctrine. "[F]ederal law determines which bodies require further supervision in order to gain *Parker* immunity," and that inquiry cannot be resolved by "state legislative declarations." Areeda & Hovenkamp ¶ 227a, at 225; see *Hallie*, 471 U.S. at 39 ("The determination that [an entity's] activities constitute state action is not a purely formalistic inquiry."). Therefore, while North Carolina may of course classify petitioner as a "state agency" for any and all state-law purposes for which such a classification is relevant, that designation does not govern the federal antitrust inquiry. Cf. *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 391-392 (1995) (holding that a statute providing that Amtrak is not "an agency or establishment of the United States Government" is "assuredly dispositive" as to "matters that are within Congress's control," but that "it is not for Congress to make the final determination of Amtrak's status as a Government entity" for constitutional purposes).

Petitioner's contrary argument rests on the premise that conduct undertaken by an entity labeled a state agency "is inherently the State's own action" for purposes of the active-supervision requirement. Pet. Br. 25. But that premise cannot be reconciled with this Court's decisions holding that the need for active supervision turns not on whether the State has given its formal imprimatur to the relevant conduct—a requirement that is satisfied whenever a State authorizes and enforces anticompetitive determinations by private parties—but rather on whether the relevant

actor has "an incentive to pursue [its] own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011.

Petitioner's position is also inconsistent with the fundamental principle that "a State may not confer antitrust immunity on private persons by fiat." *Ticor*, 504 U.S. at 633. That rule would be easily subverted if the active-supervision requirement could be avoided through nomenclature. In *Midcal*, for example, the State could have avoided antitrust scrutiny for what was "essentially a private price-fixing arrangement" by deeming wine producers and distributors to be state agencies when they set minimum prices. 445 U.S. at 106. Similarly, the States could have reversed the result in *Ticor* by deeming the private "rating bureaus" to be state agencies for rate-setting purposes. 504 U.S. at 637-638. This Court should reject an understanding of the active-supervision requirement that can be so easily evaded.

b. In addition to its formal status as a state agency, petitioner relies (Br. 14) on its possession of "state-law powers and duties," such as the authority to issue regulations and the obligation to submit annual reports and financial disclosure forms. Those features likewise do not justify exempting petitioner from the active-supervision requirement.

The Court in *Hallie* emphasized that, in any case involving "state or municipal regulation by a private party," "active state supervision must be shown, even where a clearly articulated state policy exists." 471 U.S. at 46 n.10. The Court's reference to "state or municipal regulation by a private party" would be an oxymoron if the legislature's conferral of regulatory powers were sufficient by itself to render an entity

"public" for purposes of the active-supervision requirement. The *Hallie* Court's analysis makes clear that an entity's possession of state-law regulatory authority is insufficient to negate its otherwise-private character or to obviate the need for active supervision by disinterested state officials.

The relatively limited constraints imposed by petitioner's ethics and reporting requirements are no substitute for the active supervision required by *Midcal*. As the Commission explained, petitioner's annual reports "provide only aggregate information on the number and disposition of investigations by type, providing no hint as to the underlying substance of any of these matters." Pet. App. 64a. The state ethics commission's review for financial conflicts of interest likewise "does not include an examination of substantive Dental Board policies." *Id.* at 60a n.14. Indeed, it appears that no "state actor was even aware of [petitioner's] policy toward non-dentist teeth whitening." *Id.* at 65a.[7]

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[7] The fact that state officials were not even aware of the conduct at issue here demonstrates the error of petitioner's claim (Br. 15, 43-44) that state administrative law is sufficient to ensure that the anticompetitive activities of self-interested regulatory boards further state policies rather than board members' private interests. Moreover, even if administrative-law constraints were adequate to prevent such boards from violating state law, they still would not serve the purpose of the active-supervision requirement: ensuring that disinterested state officials have "exercised sufficient independent judgment and control" over matters of implementation left open by the state legislature. *Ticor*, 504 U.S. at 634.

3. This Court's decisions addressing agencies controlled by market participants confirm that active supervision is required

This Court's precedents reinforce the conclusion that state agencies controlled by private market participants must satisfy *Midcal*'s active-supervision requirement in order to claim the state-action exemption.

a. This Court's decision in *Goldfarb* provides particularly strong support for the decisions below. Like petitioner, the defendant in *Goldfarb* (the Virginia State Bar) was a "state agency by law," and it invoked the state-action doctrine when it was sued for imposing a minimum-fee schedule for attorneys. 421 U.S. at 790. In rejecting the Bar's claim to an exemption from federal competition law, this Court emphasized that "[t]he 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. Of particular significance here, the Court noted that "there [wa]s no indication * * * that the Virginia Supreme Court approve[d] the [ethics] opinions" through which the Bar enforced the fee schedule, and the Court suggested that the state-action exemption would have applied if the Virginia Supreme Court had exercised a more active supervisory role. *Ibid.*

Petitioner contends (Br. 49-51) that the denial of the state-action exemption in *Goldfarb* rested exclusively on the absence of what *Midcal* would later characterize as a clearly articulated policy of displacing competition. Petitioner is correct that this Court has since described *Goldfarb* as a case in which clear articulation was lacking. See *Southern Motor Carri-*

ers, 471 U.S. at 60-61. Petitioner is wrong, however, to suggest that a lack of clear articulation was the *sole* basis for this Court's decision. Instead, "immunity was withheld for a number of reasons," and "one of the most significant was the lack of adequate supervision by the relevant state body." Areeda & Hovenkamp, ¶ 221e, at 68; see *Hoover* v. *Ronwin*, 466 U.S. 558, 569 (1984) (citing *Goldfarb* for the proposition that "the degree to which the state legislature or supreme court supervises its representative [is] relevant to the inquiry").

Even more to the point, *Goldfarb* establishes that an entity's status as a state agency "for some limited purposes" does not control its treatment under the state-action doctrine. 421 U.S. at 791. The Court confirmed that understanding in *Hallie*, describing *Goldfarb* as a case that "concerned *private parties*," which "may be presumed to be acting primarily on [their] own behalf." 471 U.S. at 45 (emphasis added). That characterization of the state bar in *Goldfarb*—which is in relevant respects similar to petitioner—confirms that an entity deemed to be a state agency for purposes of state law may nonetheless be treated as a "private" actor for purposes of state-action analysis under the federal antitrust laws.

b. This Court's decision in *Bates* v. *State Bar of Arizona*, 433 U.S. 350 (1977), further confirms those principles. Like *Goldfarb*, that case involved a state-action defense asserted by a bar that was a state agency under state law. *Id.* at 353 & n.3 (explaining that the Arizona Bar was "create[d] and continue[d] under the direction and control of [the Arizona Supreme] Court" (quoting 17A Ariz. Rev. Stat. Ann. Sup. Ct. R. 27(a) (1973))). The Court held that the Arizona

Bar's conduct in promulgating a disciplinary rule was exempt from the federal antitrust laws under *Parker*. *Id.* at 362-363.

Foreshadowing *Midcal*'s formulation of the requirements for exemption, the Court in *Bates* noted that the Arizona Bar's "disciplinary rules reflect a clear articulation of the State's policy with regard to professional behavior," and that "the rules are subject to pointed re-examination by the policymaker—the Arizona Supreme Court—in enforcement proceedings." 433 U.S. at 362. The Court emphasized that the Bar had acted under the "continuous supervision" of the Arizona Supreme Court, and it stressed the "significan[ce]" of the fact that "the State's supervision [wa]s so active." *Id.* at 361-362. The Court thus treated active supervision as central to the state-action inquiry, notwithstanding the Bar's state-law status as a governmental body. As with *Goldfarb*, moreover, this Court's subsequent decisions have referred to *Bates* as a case "concerning state supervision over *private* parties." *Patrick*, 486 U.S. at 103-104 (emphasis added); see *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 51 n.14 (1982) (stating that "the 'active state supervision' criterion" was the basis for the decision in *Bates*). Particularly in combination, *Goldfarb* and *Bates* confirm that state agencies dominated by private market participants are properly treated as private parties, for which the availability of the state-action exemption turns on the presence (or absence) of active supervision by disinterested state officials.

c. Petitioner contends (Br. 21) that the state agency involved in *Parker*—the California Agricultural Prorate Advisory Commission—was controlled by

market participants. Petitioner argues (Br. 21-22) that, because the Court in *Parker* found the state-action doctrine applicable without requiring active supervision of the Advisory Commission by any other state entity, this Court should do the same here. That argument is misconceived.

As petitioner recognizes (Br. 22), the composition of the Advisory Commission was "not even discussed in this Court's opinion" in *Parker*. The Sherman Act issue in *Parker*, moreover, was raised for the first time in this Court and was not addressed by the court below. See *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 585-586 (1976) (opinion of Stevens, J.). Accordingly, this Court apparently did not have before it a meaningful record regarding the operation of the California statute. And because no litigant argued that the Advisory Commission's membership was significant for antitrust purposes, the Court offered no views on that topic. Under these circumstances, there is no merit to petitioner's suggestion that *Parker* implicitly resolved the question presented here more than 70 years ago. See *Webster* v. *Fall*, 266 U.S. 507, 511 (1925) ("Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.").

In any event, petitioner's argument rests on a misunderstanding of the statutory scheme in *Parker*. Petitioner notes that, under the relevant California statute, six of the nine members of the Advisory Commission were required "to be engaged 'in the production of agricultural commodities as their principal occupation.'" Pet. Br. 21-22 (citing 1939 Cal. Stat. 2488, ch. 894 § 3). Relying on that feature of the stat-

ute, petitioner asserts that "a super-majority of the Commission's members were also market participants." *Id.* at 21 (emphasis omitted).

Contrary to petitioner's implication, however, the Advisory Commission was not controlled by participants in the regulated market—in that case, the market for raisins. The California statute provided for separate regulation of each agricultural commodity, see *Parker*, 317 U.S. at 346-347, and further provided that, of the six Advisory Commission members required to be engaged in the production of agricultural commodities, "no two of these shall be appointed as representing the same commodity," 1939 Cal. Stat. 2488, ch. 894 § 3; see John E. Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 948 & n.21 (1986). The statute thus ensured that only a minority of the members of the Advisory Commission would be financially interested in any particular regulated market. In addition, the statute assigned to the California Director of Agriculture, a disinterested state official and an ex officio member of the Advisory Commission, the significant powers of "administering and enforcing the provisions of this act," including the appointment and management of Advisory Commission personnel; the adoption of rules and regulations; the undertaking of investigations and conduct of hearings on the Advisory Commission's behalf; and the supervision of the administration of the marketing programs adopted under the act. 1939 Cal. Stat. 2488-2489, 2500, ch. 894 §§ 3, 4, 6, 22. In light of those protections, the Advisory Commission was far less subject than is petitioner to domination by financially-interested parties. And these features of the scheme at issue in *Parker*

further undermine petitioner's suggestion that this Court's decision implicitly exempted state agencies controlled by market participants from the active-supervision requirement.

4. This Court's decision in Omni Outdoor *does not support petitioner's position*

Petitioner contends (Br. 39-40) that this Court's decision in *Omni Outdoor* "squarely forecloses" any rule that treats a state agency's control by private market participants as a ground for holding the state-action doctrine inapplicable. Petitioner's reliance on *Omni Outdoor* is misplaced. That decision addressed an issue entirely different from the one presented here, and the Court's reasoning supports rather than undermines the Fourth Circuit's ruling in this case.

In *Omni Outdoor*, this Court considered whether anticompetitive municipal conduct that otherwise qualified for a state-action exemption could lose that exemption based on various forms of alleged misconduct by the relevant city officials. *Inter alia*, the Court rejected a proposed exception for cases of "corruption," defined as "encompassing any governmental act 'not in the public interest.'" 499 U.S. at 376 (citation omitted). The Court acknowledged that this approach would have "draw[n] the line of impermissible action in a manner relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." *Id.* at 378. The Court rejected the proposal, however, as too "vague" and "impractical" to be administrable. *Id.* at 377. The Court also rejected a proposed rule that would have denied the *Parker* exemption in cases of "bribery or some other violation of state or federal

law" because such a rule was "unrelated to th[e] purposes" of the Sherman Act. *Id.* at 378. The Court explained that an exception to the state-action doctrine in cases of "unlawful political influence" might in some sense vindicate "principles of good government," but that the antitrust laws are aimed at "condemn[ing] trade restraints" rather than at "combating corruption in state and local governments." *Id.* at 378-379.

Omni Outdoor thus holds that, if a particular governmental body (there, a municipality) is otherwise entitled to invoke the state-action doctrine, its entitlement to that exemption does not depend on a case-by-case judicial inquiry into its officers' subjective motives for particular conduct or into the possibility of misconduct unrelated to the ends of the Sherman Act. In the present case, by contrast, the disputed question is whether petitioner can invoke the state-action doctrine in the first instance, not whether it has forfeited otherwise-available state-action protection through misconduct in a particular case.

In determining that petitioner could not invoke the state-action exemption for conduct that was unsupervised by disinterested North Carolina officials, both the FTC and the Fourth Circuit conducted an objective inquiry into the incentives created by petitioner's composition and its members' method of selection—features established by petitioner's governing statute. They concluded that petitioner's control by practicing dentists, as well as its dentist-members' dependence for election on the votes of other practicing dentists, created a *structural* risk of self-interested behavior. That approach avoided the difficulties of administration that an ex post inquiry into officials' subjective motivations for a particular decision would entail, and

it focused on structural attributes "relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest." *Omni Outdoor*, 499 U.S. at 378.

C. Requiring Petitioner To Demonstrate Active Supervision Furthers The Principles Of Federalism Underlying The State-Action Doctrine

Echoed by its amici, petitioner contends (Br. 33-36, 48-49) that the court of appeals' decision improperly interferes with "a State's sovereign choices concerning how to staff and structure its regulatory arms." See Nat'l Governors Ass'n (NGA) Amicus Br. 21-23; W. Va. Amicus Br. 7. That contention lacks merit for several reasons.

1. Most fundamentally, petitioner's reliance (Br. 33-34, 48-49) on precedents such as *Gregory* v. *Ashcroft*, 501 U.S. 452 (1991), and *Nixon* v. *Missouri Municipal League*, 541 U.S. 125 (2004), reflects a misunderstanding of the state-action doctrine. In those cases, the Court considered claims that federal statutes *prohibited* States from taking particular actions related to their own governmental structures. See *Nixon*, 541 U.S. at 128-130 (claim that a federal statute preempted a state law barring municipalities from offering telecommunications services); *Gregory*, 501 U.S. at 455 (claim that a mandatory retirement age for state judges violated the Age Discrimination in Employment Act of 1967, 29 U.S.C. 621 *et seq.*). In that context, the Court has applied a presumption that Congress does not intend to intrude on the State's prerogatives. See *Nixon*, 541 U.S. at 140-141; *Gregory*, 501 U.S. at 460-461. But *Midcal*'s active-supervision component imposes no comparable legal

obligation or prohibition on the States. Rather, *Midcal* simply establishes 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. See *Ticor*, 504 U.S. at 632-633 (the state-action doctrine renders the antitrust laws "subject to supersession by state regulatory programs"). And in this context, the presumption runs in the opposite direction: this Court has repeatedly held that "'state-action immunity is disfavored, much as are repeals by implication.'" *Phoebe Putney*, 133 S. Ct. at 1010 (quoting *Ticor*, 504 U.S. at 636).

Nothing in the decisions below suggests that North Carolina is required to exercise any particular degree of supervision over petitioner or its members. Rather, if a State chooses not 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. Allowing a State to supplant federal law if, but only if, it satisfies specified conditions is not an affront to federalism; it is an example of federalism in action.

Indeed, the *Parker* doctrine necessarily conditions the availability of the state-action exemption on a State's use of certain procedures. Under *Midcal*'s first prong, a state legislature or supreme court can displace competition only if it clearly articulates its intent to do so—the State cannot leave that basic policy choice to state agencies or its political subdivisions. See *Southern Motor Carriers*, 471 U.S. at 63. It is similarly uncontested that, under *Midcal*'s active-

supervision requirement, a State may not displace federal antitrust law if it delegates regulatory authority to unsupervised private parties, or if it fails to exercise its authority to supervise private conduct. See *Ticor*, 504 U.S. at 638-639. Just as those aspects of the state-action doctrine create no affront to state sovereignty or to federalism values, there is nothing improper about requiring, as a prerequisite to the state-action exemption, that the State actively supervise a hybrid board of self-interested market participants.

2. The decisions below leave States free to choose among a variety of regulatory structures according to their judgment about sound governance. If a State constitutes regulatory entities in the way that most traditional state agencies are constituted—with disinterested state officials who are accountable to the public—such entities will "likely" be exempt from federal antitrust law whether or not they are actively supervised by other state officials. See *Hallie*, 471 U.S. at 46 n.10. Alternatively, a State may staff such entities with self-interested market participants and empower them to exclude rivals, while providing appropriate supervision by disinterested officials to ensure that such anticompetitive exclusion indeed reflects state policy. Finally, a State may endow competitor-controlled boards with substantial discretion to administer its broadly articulated policies, and still opt *not* to provide any active supervision, on the understanding that federal antitrust law will provide the necessary deterrent to anticompetitive conduct. Cf. *Ticor*, 504 U.S. at 635-636 ("States regulate their economies in many ways not inconsistent with the antitrust laws.").

3. Petitioner's argument also ignores one of the defining characteristics of our federal system: an appropriate allocation of political accountability. "Federalism serves to assign political responsibility, not to obscure it." *Ticor*, 504 U.S. at 636. Accordingly, this Court has emphasized that, when States "choose to displace the free market with regulation," "insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the [anticompetitive conduct] it has sanctioned and undertaken to control." *Ibid.* Petitioner's argument would achieve exactly the opposite result, in derogation of the very federalism principles on which it purports to rely. Because petitioner's dentist-members are chosen by dentists alone, rather than by the general public or by elected officials, no official of North Carolina can be held politically accountable for the anticompetitive conduct at issue here. As the Commission explained, "absent antitrust to police their actions, unsupervised self-interested boards would be subject to neither political nor market discipline to serve consumers' best interests." Pet. App. 54a.

4. Petitioner's claim of an intrusion on state prerogatives rings particularly hollow in this case, where petitioner ran afoul of the federal antitrust laws by issuing cease-and-desist orders that exceeded its state-law authority. See Pet. App. 5a-6a, 71a, 73a. Under North Carolina law, petitioner could have proceeded against non-dentist providers of teeth-whitening services by seeking injunctions from the North Carolina courts. N.C. Gen. Stat. § 90-40.1(a) (2013); Pet. App. 5a. Had it done so, petitioner would have been shielded from antitrust liability under the *Noerr-Pennington* doctrine, which provides that

"[t]hose who petition the government for redress"—including by instituting legal proceedings—"are generally immune from antitrust liability." *Professional Real Estate Investors, Inc.* v. *Columbia Pictures Indus., Inc.*, 508 U.S. 49, 56 (1993). That approach would have left to disinterested judicial officials the ultimate determination whether North Carolina law actually prohibits non-dentists from providing teeth-whitening services. Petitioner "did not choose this path," however, but instead "evaded judicial review of its decision to classify teeth whitening as the practice of dentistry by proceeding directly to issue cease and desist orders purporting to enforce that unsupervised decision." Pet. App. 67a.

Alternatively, petitioner could have promulgated a rule that defined, at a finer level of detail than does the DPA itself, the categories of services that constitute the "practice of dentistry" under North Carolina law. N.C. Gen. Stat. § 90-29 (2013). If petitioner had pursued that course, its action would have been subject to review and approval by the disinterested officials of the Rules Review Commission—a form of supervision that "might constitute adequate supervision for state action purposes." Pet. App. 67a. But petitioner "chose to forgo these formal means to address non-dentist teeth whitening." *Ibid.*

Application of the active-supervision requirement to petitioner's activities thus reflects no disrespect for any sovereign decision of the State of North Carolina. With respect to enforcement of state-law restrictions on the practice of dentistry by unlicensed persons, the North Carolina legislature conferred on petitioner limited powers, the exercise of which is subject to review by disinterested state officials. The active-

supervision requirement thus would likely have been satisfied if petitioner had exercised one of the powers that state law actually grants it. No North Carolina statute provides for analogous review by disinterested officials of cease-and-desist orders issued by petitioner unilaterally. The obvious explanation for that omission, however, is that petitioner lacks state-law authority to issue such orders in the first place. See Pet. App. 5a-6a (petitioner "does not have the authority to discipline unlicensed individuals or to order nondentists to stop violating the [DPA]"); *id.* at 71a, 73a (same).

Petitioner was thus subject to antitrust scrutiny only because it chose not to exercise the powers granted to it under North Carolina law, and instead utilized coercive measures that state law did not authorize. And because the practical effect of the FTC's order was simply to bar petitioner from taking actions that were ultra vires under state law, that order effected no intrusion on state prerogatives. To the contrary, North Carolina's policy choices would be frustrated rather than furthered if the State's decision to vest market participants with limited governmental authority, subject to review by disinterested state officials, were construed to insulate petitioner's unauthorized and unsupervised conduct from federal antitrust scrutiny. Cf. *Phoebe Putney*, 133 S. Ct. at 1016 ("[F]ederalism and state sovereignty are poorly served by a rule of construction that would allow 'essential national policies' embodied in the antitrust laws to be displaced by state delegations of authority 'intended to achieve more limited ends.'") (quoting *Ticor*, 504 U.S. at 636)).

D. Faithful Application Of *Midcal* To State Boards Controlled By Market Participants Will Not Unduly Disrupt State Regulation

Petitioner and its amici contend that affirming the decisions below would have disruptive consequences. They argue that the States have relied on the purported absence of an active-supervision requirement to create regulatory bodies dominated by market participants. See Pet. Br. 3-5, 17, 58; Am. Dental Ass'n Amicus Br. 19-29; Cal. Optometric Ass'n Amicus Br. 2-6; Nat'l Council of Exam'rs for Eng'g & Surveying Amicus Br. 15-21; Fed'n of State Bds. of Physical Therapy Amicus Br. 10-16; N.C. Bar Amicus Br. 11-23; NGA Amicus Br. 12-15, 28-30; W. Va. Amicus Br. 12-17. Both the premise and the conclusion of that argument are mistaken.

1. Petitioner and its amici portray the decision below as a departure from a settled understanding that state agencies composed of market participants may claim an exemption under *Parker* without demonstrating active supervision. As evidence of this supposed consensus, petitioner principally relies (Br. 3-5, 32, 58) on two decisions, *Earles* v. *State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir.), cert. denied, 525 U.S. 982 (1998), and *Hass* v. *Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), cert. denied, 494 U.S. 1081 (1990). As the court below explained, however, the Fifth and Ninth Circuits in those cases relied on the particular features of the regulatory boards at issue and did not establish any "bright-line rule." Pet. App. 16a-17a n.6; see *Earles*, 139 F.3d at 1041; *Hass*, 883 F.2d at 1460. More fundamentally, even if *Earles* and *Hass* had endorsed the sweeping proposition that petitioner advocates, two

appellate decisions would scarcely justify the degree of reliance that petitioner and its amici claim.

Any such reliance would have been particularly unjustified given the existence of other authorities—including this Court's decisions in *Goldfarb* and *Bates*—strongly indicating that regulatory boards controlled by market participants are subject to the active-supervision requirement. See, *e.g.*, *Washington State Elec. Contractors Ass'n, Inc.* v. *Forrest*, 930 F.2d 736, 737 (9th Cir.) (per curiam) (state council "may not qualify as a state agency" because it had "both public and private members"), cert. denied, 502 U.S. 968 (1991); *FTC* v. *Monahan*, 832 F.2d 688, 689-690 (1st Cir. 1987) (applicability of active-supervision requirement to state pharmacy board "depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists"), cert. denied, 485 U.S. 987 (1988); *Asheville Tobacco Bd. of Trade, Inc.* v. *FTC*, 263 F.2d 502, 509-510 (4th Cir. 1959) (*Parker* allows States to grant regulatory authority to market participants only if "their activities are adequately supervised by independent state officials"). That has long been the position of the leading antitrust treatise. See Areeda & Hovenkamp ¶ 227b, at 226. And even where state agencies are controlled by disinterested officials rather than by market participants, this Court has not definitively held that the active-supervision requirement is inapplicable. See *Hallie*, 471 U.S. at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

2. Petitioner and its amici are also mistaken in implying that petitioner's unsupervised conduct in this

case is typical of the activities of state regulatory boards. In fact, most States have established schemes to supervise some or all of the conduct of self-interested dental boards. In at least 16 States, either the dental regulatory board is housed within an umbrella state agency that has supervisory authority over dental and other occupational licensing boards, or else the dental board performs primarily advisory functions, with decisions concerning the regulation of dentistry assigned to independent state officials.[8] In at least 15 of the remaining States—including North Carolina—regulations adopted by the dental board must be approved by another state body to become effective or are subject to review and disapproval by disinterested officials.[9] And in at least nine additional

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[8] See Colo. Rev. Stat. § 12-35-104(1)(a) (2013); Conn. Gen. Stat. Ann. § 19a-14(a)(4) (West 2014); Conn. Gen. Stat. Ann. § 20-103a(a) (West 2008); Del. Code Ann. tit. 29, § 8735 (2012); Fla. Stat. Ann. § 466.004 (West 2014); Fla. Stat. Ann. §§ 456.004, 456.012 (West 2013); Haw. Rev. Stat. Ann. § 26-9(c) (LexisNexis 2013); 225 Ill. Comp. Stat. Ann. § 25/7 (West 2014); Mass. Ann. Laws ch. 13, § 9 (LexisNexis 2012); Mass. Ann. Laws ch. 112, § 1 (LexisNexis 2004); Mich. Comp. Laws Ann. § 333.16621 (West 2008); Neb. Rev. Stat. Ann. § 38-167(1)(g) (LexisNexis 2013); Neb. Rev. Stat. Ann. §§ 38-126, 38-161(2) (LexisNexis 2008); N.J. Stat. Ann. §§ 45:1-14, 45:1-17(b) (West 2004); N.Y. Educ. Laws §§ 6504, 6508, 6603 (McKinney 2010); R.I. Gen. Laws § 5-31.1-2(a) (2013); S.C. Code Ann. § 40-1-40 (2011); S.D. Codified Laws §§ 1-26-4(2), 36-6A-6 (2004); Utah Code Ann. §§ 58-1-202, 58-1-203, 58-69-201(3)(a) (LexisNexis 2012); Va. Code Ann. §§ 54.1-2503, 54.1-2505 (2013).

[9] See Ariz. Rev. Stat. Ann. § 41-1052 (2013); Cal. Gov't Code § 11349.1 (West 2014); Ind. Code Ann. §§ 4-22-2-31 to 4-22-2-34 (LexisNexis 2008); Kan. Stat. Ann. §§ 77-420, 77-421 (1997); La. Rev. Stat. Ann. § 49:968 (2014); La. Rev. Stat. Ann. §§ 49:969, 49:970 (2003); Md. Code Ann., Health-Gen. §§ 2-104(b)(3)(ii), 2-106(a) (LexisNexis 2009); Minn. Stat. Ann. § 14.05(6) (West 2013); Nev. Rev. Stat. Ann.

States, legislative committees or other officials are empowered to review regulations, to recommend that the legislature override them, and in some cases to suspend the operation of such regulations pending the legislature's action.[10]

Whether a particular regulatory board's actions require supervision will depend on the features of that board, and whether adequate supervision has actually been provided in a given case will depend on the practical operation of the relevant legal scheme. But the existence of myriad ways in which the States can—and do—structure their regulatory regimes to provide supervision for boards composed of market participants suggests that petitioner and its amici greatly overstate the disruptive effect of the decisions below.

3. Some amici also argue that the decisions below might make professionals reluctant to serve on state regulatory boards because of the increased threat of antitrust suits. See, *e.g.*, Am. Dental Ass'n Amicus Br. 23-25; NGA Amicus Br. 18-21. This Court has heard and rejected similar arguments before. In *Patrick*, various medical associations argued that the state-action doctrine should shield hospital peer-review

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§§ 233B.067, 233B.0675 (LexisNexis 2013); N.C. Gen. Stat. §§ 150B-21.8(b), 150B-21.9(a) (2013); N.D. Cent. Code § 28-32-14 (2006); Okla. Stat. Ann. tit. 75, § 308 (West 2013); Tenn. Code Ann. § 4-5-211 (2011); Wash. Rev. Code Ann. § 18.130.065 (West 2005); W. Va. Code Ann. §§ 29A-3-12 to 29A-3-13 (LexisNexis 2012); Wis. Stat. Ann. § 227.185 (West 2013).

[10] Ala. Code §§ 41-22-23, 41-22-24 (LexisNexis 2013); Alaska Stat. § 24.20.460 (2012); Ga. Code Ann. § 50-13-4(f) (2013); Idaho Code Ann. §§ 67-454, 67-5223, 67-5291 (2014); Iowa Code Ann. § 17A.4 (West 2014); Me. Rev. Stat. Ann. tit. 5, §§ 8071-8072 (2013); Ohio Rev. Code Ann. § 119.03(H)-(I) (LexisNexis 2014); 71 Pa. Cons. Stat. Ann. §§ 745.6, 745.7 (West 2012); Vt. Stat. Ann. tit. 3, § 842 (2010).

boards from antitrust scrutiny, on the grounds "that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings." 486 U.S. at 105. The Court responded that "[t]his argument * * * 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." *Ibid.* The policy arguments presented in this case are similarly misdirected.

In addition, petitioners' amici likely exaggerate the threat of antitrust liability for members of professional boards. Boards that are merely advisory or that are adequately supervised will typically enjoy state-action protection. Even where the prerequisites for an exemption are absent, "finding lack of 'state action' immunity does not prove the violation." Areeda & Hovenkamp ¶ 221a, at 48. "Indeed, the great majority of practices found non-immune are undoubtedly not antitrust violations to begin with." *Ibid.* And because this case does not involve any question of damages, the Court need not address the circumstances under which a state board or board member found liable for an antitrust violation might be immune from damages liability. Cf. *Goldfarb*, 421 U.S. at 792 n.22 (declining to decide whether the Virginia State Bar could assert sovereign immunity under the Eleventh Amendment); *Affiliated Capital Corp.* v. *City of Hous.*, 735 F.2d 1555, 1568-1570 (5th Cir. 1984) (applying qualified immunity to a private antitrust claim against a government official), cert. denied, 474 U.S. 1053 (1986).[11]

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[11] Some amici argue that state agencies are not "persons, partnerships or corporations" under Section 5(a)(2) of the FTC Act, 15

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Far from disrupting established understandings, the decision below simply applied the well-settled rule that private market participants cannot invoke the state-action exemption unless their anticompetitive conduct is actively supervised by disinterested state officials. Petitioner contends that this rule should give way when the market participants in question have been designated as a state agency and have been vested with a degree of governmental power. That argument is not supported by any holding of this Court, and it is inconsistent with the Court's stated rationales for requiring active supervision of private but not public actors. Petitioner's claim of intrusion on state prerogatives rings particularly hollow in this case, where its dentist-members engaged in anticompetitive conduct that North Carolina law did not authorize, thereby evading the meaningful oversight by disinterested state officials that would have occurred if petitioner had exercised powers actually granted by the legislature.

U.S.C. 45(a)(2), and that the FTC therefore lacked authority to adjudicate a claim against petitioner. See Am. Dental Ass'n Br. 16-19. That argument, which petitioner has not pressed and which therefore is not properly before this Court, was rightly rejected by the court of appeals. Pet. App. 9a n.2.

CONCLUSION

The decision of the court of appeals should be affirmed.

Respectfully submitted.

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