No. 12–1172

In the United States Court of Appeals For the Fourth Circuit

North Carolina State Board of Dental Examiners,

Petitioner,

v.

Federal Trade Commission,

Respondent,

On Petition for Review from the Federal Trade Commission

Brief of American Antitrust Institute as Amicus Curiae in Support of Respondent and Affirmance

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UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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INTEREST OF AMICUS CURIAE

All parties consent to the filing of this brief. The American Antitrust Institute ("AAI") is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. The AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 130 prominent antitrust lawyers, law professors, economists, and business leaders.[1] *See* http://www.antitrustinstitute.org. The AAI frequently submits amicus briefs in antitrust cases raising significant policy concerns, including the scope of the state action defense. *See, e.g.*, *Shames v.*

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[1] The AAI's Board of Directors alone has approved the filing of this brief. The individual views of members of the Advisory Board may differ from the AAI's positions. Pursuant to Fed. R. App. P. 29(c)(5), amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity—other than the AAI or its counsel—has contributed money that was intended to fund preparing or submitting this brief. The Advisory Board includes John Kwoka, who served as an expert witness for the FTC in this matter. Professor Kwoka took no part in the preparation of this brief, and the AAI does not directly address the opinions he rendered in this matter.

Cal. Travel & Tourism Comm'n, 626 F.3d 1079 (9th Cir. 2010) (following position urged by the AAI on rehearing).

The AAI submits this brief in support of affirming the decision of the Federal Trade Commission ("FTC") because Petitioner's expansive interpretation of the state action defense, if adopted, would encourage the misuse of state licensing boards to exclude competitors without any assurance that it was the State's policy to do so, in conflict with both federalism concerns and our fundamental national policy in favor of free and open competitive markets. In addition, Petitioner's argument that members of state licensing boards are incapable of engaging in concerted action, if adopted, would call into question long-standing precedent that prevents competitors from evading antitrust liability merely by acting through a third-party intermediary.[2]

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[2] This brief does not address every issue raised by the Petitioner and its amici, only the most salient ones as to which the AAI believes it has something to add to the FTC's excellent brief. In particular, this brief does not address the AMA's jurisdictional argument, which would effectively adopt a more expansive state action defense under the Federal Trade Commission Act than under the Sherman Act by limiting the term "persons" in § 5(a)(2) of the FTC Act to "natural persons." 15 U.S.C. § 45(a)(2). The FTC's brief convincingly shows

INTRODUCTION AND SUMMARY OF ARGUMENT

The North Carolina Board of Dental Examiners ("Board") is a North Carolina state agency charged with regulating the practice of dentistry in the State. N.C. Gen. Stat. § 90–22(b). Of the eight individuals on the Board, six are required by law to be active, practicing dentists, who are selected by vote of all other licensed dentists in North Carolina.[3] *Id.* North Carolina dentists, including a majority of the members of the Board, earn revenue by providing teeth whitening services and products in competition with non-dentists. *See* Opinion of the Commission at 14–15 (Dec. 7, 2011) ("Merits Op.").

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why there is no basis in the text or legislative history for such a limiting construction. In addition, where, as here, a board serves as an agent of natural persons (competitors) who are obviously subject to the FTC's jurisdiction, it would exalt form over substance to exempt the board itself from the strictures of the statute.

[3] The remaining members are a licensed dental hygienist, who is elected by licensed hygienists, and a "consumer member," who is appointed by the Governor. N.C. Gen. Stat. § 90-22(b). Board members serve three-year, renewable terms, *id.*, and elect the President of the Board. *Id.* § 90-23.

The unauthorized practice of dentistry under North Carolina law is a Class 1 criminal misdemeanor. N.C. Gen. Stat. § 90–40. North Carolina law authorizes the Board to prevent the unauthorized practice of dentistry only by initiating appropriate legal proceedings or referring the matter to the district attorney for prosecution. *Id.* § 90-40.1; Merits Op. at 3. Rather than follow the prescribed procedures, however, the Board members enforced their interpretation of the law—that teeth whitening constitutes the practice of dentistry—by summarily issuing cease-and-desist orders. As participants in the very industry to be regulated, the Board members carried out a policy to exclude non-dentists from the market for teeth-whitening services, harming competition and consumers without state sanction and without any legitimate public-safety justification.

The FTC's state action ruling is narrow and breaks no new ground. It respects state authority to regulate the professions by using boards comprised largely of professionals themselves. It requires no restructuring of board governance. It does not second guess or undermine state boards' ability to protect public health and

safety. The FTC merely requires the Board here to follow the oversight procedures prescribed by North Carolina law when it seeks to exclude non-dentist competitors. In short, the FTC's ruling respects the sovereign prerogatives of the State of North Carolina to regulate dental services.

The overriding theme of the Board's challenge to the FTC's decision is that the Board should be immune from antitrust liability because "[it] never attempted to prohibit lawful activity." Pet. Br. at 14. The Board insists that inclusion of the phrase—"[r]emoves stains, accretions or deposits from the human teeth"—in the definition of dentistry under the statute means that teeth whitening is illegal unless it is done under a dentist's supervision. *Id*. at 6. (citing N.C. Gen. Stat. § 90–29(b)(2)). Yet the Board cites no judicial authority nor any conventional statutory-interpretation argument (legislative history, opinion of the attorney general, etc.) supporting its position. Nor do any of its *amici* support such an interpretation. This is no surprise given that, today, teeth whitening by non-dentists involves: (1) an active ingredient (hydrogen peroxide) available over the counter and classified by the FDA as a cosmetic

rather than a drug, (2) a process under which the operator never touches the customer's mouth, and (3) no clinical or empirical evidence that non-dentist teeth whitening is unsafe.[4] Thus, there is at least significant doubt that non-dentist teeth whitening constitutes the practice of dentistry in North Carolina, which may explain why the Board chose to bypass the courts in excluding non-dentists from the market. *See* Opinion of the Commission at 13 (Feb. 3, 2011) ("State Action Op."); *cf. North Carolina Board of Dental Examiners v. Brunson*, No. 04–CVS 4267, N.C. Superior Court (Guilford County 2005) (Ex. CX0159) (rejecting Board's claim that sale of cosmetic crown "fang" constituted unauthorized practice of dentistry). The absence of clear direction from the State reinforces the need for active state supervision to ensure "that particular anticompetitive mechanisms operate because of a deliberate and

[4] Expert testimony in the record suggested that, "in terms of both a scientific and historical context, the reference to 'removal of stain' as the practice of dentistry in the Dental Practices Act, enacted in the 1930s, most likely referred to physical removal of stains with a scaler or abrasive rather than clinical bleaching" which "does not actually result in the removal of stains." Complaint Counsel's Post Trial Brief and [Proposed] Order at 6-11 (Apr. 25, 2011) (citing record evidence).

intended state policy." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).[5]

The FTC also properly rejected the Board's "conspiracy" and "public safety" arguments. The same reason that the Board members must be actively supervised by the State—that they are market participants with personal financial stakes in excluding competitors—establishes their capacity to conspire. Further, regardless of whether the Board's public-safety arguments are cognizable, substantial evidence supports the FTC's conclusion that the record as a whole did not support the Board's claims.

ARGUMENT

I. THE BOARD'S CONDUCT IS NOT ENTITLED TO STATE ACTION IMMUNITY

The FTC properly rejected the Board's state action immunity defense. The FTC explained that because the Board is made up of,

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[5] The FTC assumed for purposes of argument that the Board satisfied *Midcal*'s "clear articulation" prong. *See* State Action Op. at 7 n.8. Plainly, the North Carolina legislature has a clearly articulated policy of displacing competition in dental services by restricting the practice of dentistry to dentists, but whether that policy applies to teeth-whitening services is not left to the Board to decide on its own.

controlled by, and elected by practicing dentists, the Board's challenged conduct—*i.e.*, its action to enforce its decision to classify teeth whitening as the practice of dentistry with cease-and-desist orders—must be actively supervised by the State for it to be exempt from scrutiny under the antitrust laws. State Action Op. at 6–14. Since there was no active state supervision of these activities—and the Board essentially concedes this point[6]—the antitrust laws apply to the Board's conduct. *Id.* at 14–17.

A. A Licensing Board Dominated by Industry Representatives Must Satisfy the Active-Supervision Requirement When Excluding Competition

Parker v. Brown established that the federal antitrust laws do not apply to the acts of sovereign states. 317 U.S. 341, 352 (1943). The State as sovereign includes the legislature, the supreme court when acting in a legislative capacity, and perhaps the governor, but other state officials are subject to the Sherman Act even when they are full-time state employees. *Hoover v. Ronwin*, 466 U.S. 558, 568–69 (1984). Under certain circumstances, the state action doctrine may

[6] *See* Pet. Br. at 38-39 (arguing only that "[t]he active supervision argument is met when a state agency acts pursuant to state law, within the powers legislatively granted to it").

protect the actions of non-sovereign entities. But such entities must satisfy additional requirements to avoid antitrust liability. "[S]tate action immunity is disfavored, much as are repeals by implication." *Ticor*, 504 U.S. at 636.

Under the *Midcal* test, private parties that engage in anticompetitive conduct can avail themselves of state action immunity by satisfying a "rigorous" two-prong test: (i) the challenged restraint must be one "clearly articulated and affirmatively expressed" as state policy to displace competition; and (ii) the policy must be "actively supervised" by the State itself. *Patrick v. Burget*, 486 U.S. 94, 100 (1988); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The two prongs of the *Midcal* test have "a close relation." *Ticor*, 504 U.S. at 636. "Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Id.* The "active supervision" requirement serves to ensure that "the State has exercised sufficient independent judgment and control so that the details of the [challenged restraint on competition] have been established as a product of deliberate

state intervention." *Id.* at 634. The requirement is a "way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). As the Supreme Court has repeatedly emphasized, the active-supervision requirement stems from recognition that "[w]here a private party is engaging in the anticompetitive activity, there is a real danger that [it] is acting to further [its] own interests," rather than the State's. *Burget*, 486 U.S. at 100 (quoting *Hallie*, 471 U.S. at 47).

The active-supervision requirement applies to private parties (*e.g.*, *Midcal*, *Burget*, and *Ticor*) and does not apply to political subdivisions of the State such as municipalities (*e.g.*, *Hallie*). As the FTC correctly recognized, although the Supreme Court has never ruled directly on the question of whether the active-supervision requirement applies to state agencies generally,[7] "the Court has

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[7] The Court has noted that "[i]n 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." *Hallie*, 471 U.S. at 46 n.10. Notably, in a separate opinion issued on the same day as *Hallie*, the Court stated that the "circumstances in which *Parker* immunity is available to . . . state agencies . . . regulating the conduct

been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants." State Action Op. at 9.

1. Precedent Supports an Active-Supervision Requirement

The leading case treating a state agency as a private actor when it is comprised of market participants is *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). In *Goldfarb*, the Virginia State Bar Association issued an ethical opinion requiring attorneys to adhere to a minimum fee schedule. The Bar was "a state agency by law" and had been "granted the power to issue ethical opinions." *Id.* at 790. Nonetheless, the Court denied state action immunity, reasoning that the Bar's quasi-state powers do not insulate it from antitrust liability:

> The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members. The State Bar . . . has voluntarily joined in what is essentially a private anticompetitive activity, and in that

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of private parties, are defined *most specifically* by our decision in [*Midcal*]." *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 57 (1985) (emphasis added).

> posture cannot claim it is beyond the reach of the Sherman Act.

Id. at 791–92 (internal citation omitted). As the FTC correctly recognized, *Goldfarb* strongly suggests that "active supervision is crucial, even for a state agency, in circumstances where the state agency's decisions are not sufficiently independent from the entities that the agency regulates." State Action Op. at 9; *cf. Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501, 509–10 & n.11 (1988) (efforts to influence standard-setting association that set electrical code for many state and local governments not immune under *Noerr* when "the decisionmaking body of the Association is composed, at least in part, of persons with economic incentives to restrain trade").[8]

The FTC also correctly observed, "there is ample support [in the courts of appeals] for the proposition that financially interested government bodies must meet the active supervision prong of

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[8] In *Allied Tube*, the Court conceded that the National Fire Protection Association may have "de facto [regulatory] authority," but held that *Noerr* immunity was inappropriate, at least in the absence of safeguards ensuring that the decisionmaking was not biased by market participants. 486 U.S. at 509-10 & n. 11.

Midcal." State Action Op. at 9. For example, in *Washington State Elec. Contractors Ass'n, Inc. v. Forrest*, the Ninth Circuit concluded that a state regulatory council "may not qualify as state agency" for state action purposes, and therefore would have to satisfy the active-supervision test, because it "has both public and private members, and the private members have their own agenda which may or may not be responsive to the state labor policy." 930 F.2d 736, 737 (9th Cir. 1991).[9] Likewise, in *FTC v. Monahan*, then-Judge Breyer held that a state pharmacy board might be subject to the active-supervision requirement, "depend[ing] upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists."[10] 832 F.2d 688, 689–90 (1st

[9] This was true even though the private members (who were in the majority) were appointed by a state official, and the statutory scheme granted the council "broad regulatory powers." *Wash. State Elec. Contractors Ass'n v. Forrest*, 839 F.2d 547, 549, 552 (9th Cir. 1988), *vacated*, 488 U.S. 806 (1988). In its vacated decision, the Ninth Circuit had determined that the defendants satisfied both *Midcal* prongs, but the Supreme Court vacated and remanded after elaborating on the requirements for active supervision in *Patrick v. Burget*, 486 U.S. at 100-01. The Court must have assumed that the supervision requirement applied to the council.

[10] At that time, the pharmacy board was comprised of a majority of practicing pharmacists. *See* Mass. Gen. Laws Ann. c. 13, § 22.

Cir. 1987); *see also Asheville Tobacco Board of Trade, Inc. v. FTC*, 263 F.2d 502, 509 (4th Cir. 1959) (conduct of boards of trade authorized by the legislature to make reasonable rules and regulations was not state action; state "may . . . permit [market participants] to participate in the regulation, provided their activities are adequately supervised by independent state officials"); *Fuchs v. Rural Elec. Convenience Co-Operative Inc.*, 858 F.2d 1210, 1217–18 (7th Cir. 1988) (requiring some level of supervision for rural electric cooperative with public and private attributes).

The Board attempts to distinguish (a) *Goldfarb* because "[n]o state statute authorized the Virginia Bar's conduct," and (b) *Monahan* because "[t]he First Circuit concluded that an examination was necessary to determine whether the rule was enacted in accordance with a clearly-articulated law." Pet. Br. at 35 (emphasis omitted). More fundamentally, the Board argues that the fact that it was acting "pursuant to state law" (or "clearly articulated state law" or "state policy expressed via clear state statutes") excuses any requirement that it separately satisfy an active-supervision requirement. *See* Pet. Br. at 31–41.

The Board's attempt to distinguish *Goldfarb* and *Monahan* is flawed. While it is true that the minimum fee schedules in *Goldfarb* were not compelled—or specifically approved—by the Virginia Supreme Court (the sovereign), state action immunity was lacking precisely because discretion was left to a state agency "to foster anticompetitive practices for the benefit of its members." *Goldfarb*, 421 U.S. at 791; *see also* Phillip E. Areeda & Herbert Hovenkamp, IA *Antitrust Law* ¶ 221e1, at 64 (3d ed. 2006) ("While immunity was withheld for a number of reasons, one of the most significant was the lack of adequate supervision by the relevant state body."). And in *Monahan,* although the First Circuit raised questions of whether the pharmacy board satisfied the first prong of *Midcal*, it did not rest on this consideration alone, but stated that additional facts as to the operation and composition of the board were necessary to determine "whether or not [the] *additional* 'state supervision' condition will apply." 832 F.2d at 690 (emphasis added).

Moreover, the Board's premise that it was "acting pursuant to state law" is not correct, even if it satisfied the "clear articulation" prong of *Midcal*, as the FTC assumed. State law plainly did not

authorize the Board's method of implementing its decision. Indeed, the Board does not challenge the FTC's conclusion that "[t]he Board had no authority to issue cease and desist orders under its enabling statute."[11] Merits Op. at 2. The FTC also correctly recognized that "North Carolina courts have never concluded that teeth whitening services provided by non-dentists are unlawful." Merits Op. at 28. Notably, none of the Board's *amici*, including the American Dental Association, argues that the Board is correct to assume that teeth whitening is stain removal and that non-dentist teeth whitening necessarily constitutes the unauthorized practice of dentistry.[12] This confirms that, at a minimum, there is significant doubt whether non-dentist teeth-whitening is illegal conduct under North Carolina law.

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[11] Rather, the Board acknowledges that the cease and desist letters were "heavy handed." Pet. Br. at 14.

[12] *See* ADA Br. at 2 n.3 ("*Amici* take no position on the merits of the actions of the [Board] with respect to tooth whitening clinics"). Perhaps that is because the ADA recognizes, "Whether tooth whitening is performed under the care and supervision of a dentist, self-applied at home or in non-dental setting, whitening materials are generally well tolerated when used appropriately and according to directions." *See* American Dental Ass'n, Frequently Asked Questions on Tooth Whitening Safety (July 2010), *available at* http://www.smileflorida.org/care/Whitening-bleaching-FAQ.pdf.

To be sure, in limited instances, satisfying the clear-articulation requirement could obviate the need for active supervision if the applicable statute leaves little discretion to interested actors in implementing state policy. Thus, in *Gambrel v. Kentucky Board of Dentistry*, relied on by the Board, the court held in effect that the State actively supervised the conduct at issue by virtue of the State law compelling it. 689 F.2d 612, 619–20 (6th Cir. 1982). In that case, however, the Kentucky Board of Dentistry was enforcing a "clear and unambiguous" legislative prohibition, not an "interpretation of an ambiguous or open-ended regulatory statute." *Id.* at 619 n.3. "Here, by contrast, the Board has exercised *discretion* to implement a policy [by unauthorized means] to exclude non-dentists from a market in which they compete against North Carolina dentists." State Action Op. at 12 (emphasis added).

Finally, the arguments of the Board's amici that the Board resembles a municipality for purposes of state action immunity lack merit. *See, e.g.*, AMA Br. at 8–11; NABP Br. at 8–10. In particular, the AMA's brief suggests that the Board, like a municipality, is run by individuals who are "unlikely" to "act in their own economic

interests" and are "accountable to [the] public through the political process." AMA Br. at 9. But municipal officials, unlike the Board members in the present case, have no private interest in competitive outcomes in the marketplace. At worst, municipal officials "will seek to further purely parochial *public* interests at the expense of more overriding state goals." *Hallie*, 471 U.S. at 47 (emphasis added). Moreover, unlike municipal officers, who are presumed to act in the public interest because they are "checked to some degree through the electoral process," *id.* at 45 & n.9, the Board members here are elected by the very industry they regulate. Accordingly, at least when addressing what they deem to be illegitimate competition to their profession, Board members are not analogous to municipal officials.[13]

[13] One amicus curiae argues that FTC's decision is inconsistent with *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379 (1991), which rejected "any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns." *See* FSBPT Br. at 8-14. But *City of Columbia* addressed the question of whether there is a "conspiracy exception" to *Parker,* even for state sovereigns. That is different from determining whether non-sovereign entities (like the Board) should be considered "private" for purposes of the active-supervision requirement. Moreover, while the Court was concerned about the

Earles and *Hass* are not to the contrary. In *Earles*, members of the state accounting board, although accountants, were appointed by and served at the pleasure of the governor, not, as here, elected by the profession by itself. *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1035 (5th Cir. 1998). Moreover, although the court thought there was no active supervision because the board's rules could be adopted without legislative oversight, the rule in question had been affirmed by the Louisiana court of appeals. *Id.* at 1035, 1041 n.10. In *Hass*, most of the members of the bar's board of governors were elected by the members of the bar, but the rule at issue (requiring lawyers to purchase professional liability insurance from the bar's malpractice fund) did not implicate competition with the regulators themselves. *Hass v. Oregon State Bar,* 883 F.2d 1453, 1460 n.3 (9th Cir. 1989).

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impracticality of an exception to *Parker* based on determining whether elected officials acted "in the public interest," no such difficulty arises in categorizing regulators as private when they make their living in the industry they regulate.

2. Sound Policy and Leading Commentators Support an Active-Supervision Requirement

Leading antitrust commentators support the FTC's view that state boards composed of self-interested members and dominated by an industry they are supposed to regulate should be subject to the active-supervision requirement. Professors Areeda and Hovenkamp "would presumably classify as 'private' any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market." Areeda & Hovenkamp, ¶ 227b, at 209. This presumption is "virtually conclusive" when "the organization's members making the challenged decision are in direct competition with the plaintiff and stand to gain from the plaintiff's discipline or exclusion." *Id.*; *see also* Phillip Areeda & Donald F. Turner, I *Antitrust Law* ¶ 213b, at 74 (1978) (same); Herbert Hovenkamp, *Federal Antitrust Policy* 807 (4th ed. 2011) (same); *accord* Antitrust Modernization Commission, *Report and Recommendations* 373–74 (2007) (quoting Areeda & Hovenkamp treatise in support of recommendation that courts require a heightened level of state supervision when there is an

"appreciable risk that the challenged conduct results from private actors pursuing private interests").

Similarly, Professor Elhauge argues, "conferring 'official' authority on otherwise 'private' actors does not render their exercise of that authority 'state action' immune from antitrust review." Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 690 (1991). "[T]he only real test is whether the actor controlling the terms of the restraint had a financial incentive to restrain competition." *Id.*; *see also* James C. Cooper & William E. Kovacic, *U.S. Convergence with International Competition Norms: Antitrust Law and Public Restraints on Competition*, 90 B.U. L. Rev. 1555, 1595–96 (2010) ("Much anticompetitive conduct . . . emanates from regulatory boards made up of decision makers who wear their regulatory hat at the board's monthly meetings, but earn a living in the very profession that they have been charged to regulate the other 353 days of the year. Given their financial self interest, there seems to be no principled reason to consider these actors anything but private.").

The Board asks this Court to distinguish state action from private action by treating the actions of a state agency as those of the State itself regardless of whether the agency is controlled by participants in the very industry it regulates. But "antitrust law embraces the principle that financially interested parties cannot be trusted to restrain trade in ways that further the public interest." Elhauge, 104 Harv. L. Rev. at 696.

The active-supervision requirement should be applied to state regulatory agencies controlled by members of the regulated industry for another reason: the clear-articulation requirement may be applied so liberally as to leave significant doubt that the state has in fact sanctioned the anticompetitive restraint. Here, for example, the Board argues that it satisfies the clear-articulation requirement because the dental statute "creates a reasonably anticipated and foreseeable result of displacing competition by clearly articulating a policy to displace competition." Pet. Br. at 27. If the clear-articulation prong is satisfied by so ambiguous a delegation of authority, then, absent state supervision, it would be hard to conclude that any "*particular* anticompetitive conduct has been

approved by the State." *Ticor*, 504 U.S. at 637 (emphasis added). To be sure, an undemanding clear-articulation test may be problematic even when independent state officials staff a regulatory body, but the high degree of discretion that may be afforded vastly increases the risk that unsupervised financially interested regulators are restricting competition to further their own interests rather than the State's.

Amici's concerns regarding the supposed effect of the FTC's decision on state sovereignty and the effectiveness of regulatory boards are overblown and unfounded. Neither the FTC in this case nor the rule requiring active supervision of financially interested decisionmakers requires North Carolina to change the way it operates. On the contrary, all the FTC has required is that the Board *follow* North Carolina law if it believes that teeth whitening by non-dentists constitutes the unauthorized practice of dentistry, by seeking an injunction or referring the matter to the district attorney for prosecution. In either case, the determination would be subject to independent, disinterested review. Financially interested professionals may still serve on boards and be entitled to state

action immunity provided that decisions to exclude competitors are subject to judicial review *in advance of exclusion*.[14]

Finally, the AMA's suggestion that upholding the FTC's decision will discourage practicing members of every profession from serving on state licensure boards is unfounded. *See* AMA Br. at 21. State boards, regardless of their composition, have long been unambiguously subject to the Sherman Act, *see, e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 568–69 (1984), and the FTC has long taken the position that financially interested boards are subject to *Midcal*'s active-supervision requirement, *see, e.g.*, *FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987). Yet there is no evidence that potential liability for antitrust violations has impacted states' recruitment of

[14] Although the FTC did not expressly decide whether "ex-post" judicial review would constitute adequate state supervision (because "the Board evaded judicial review," State Action Op. at 17), its Order permits the Board to enforce its interpretation of the Act by going to court first. *See* Merits Op. at 33; *see generally* Elhauge, 104 Harv. L. Rev. at 715 (cases support "the proposition that a disinterested politically accountable actor can immunize a restraint only by approving it before it inflicts any market injury"). Notably, the degree of independent supervision required for interested state boards is not necessarily the same as that required for purely private actors. *See* Areeda & Hovenkamp, ¶ 227a, at 197; *Fuchs*, 858 F.2d at 1217.

board members. And, of course, board members that do not exclude competitors without state authorization and review have nothing to worry about.

II. MEMBERS OF THE BOARD COULD AND DID CONSPIRE

The Board argues that it is not capable of engaging in concerted action for purposes of § 1. Pet. Br. at 43–46.[15] In support of this argument, the Board asserts that certain state statutes "divest" its members of "potential financial interests," and that, as a result, the "members are guided only by their obligation to enforce [the statute]." *Id.* at 44–45. The Board further emphasizes that only some of its dentist members actually engaged in teeth-whitening services. *Id.* at 45–46. These arguments miss the mark.

A. A Licensing Board Consisting of Market Participants and Elected by Licensed Members of the Profession Has the Capacity to Conspire

Courts examine substance rather than form when determining whether an entity consisting of multiple actors has the capacity to

[15] Of course, it is not the Board that is accused of conspiring, but the dentist members of the Board who have used the Board as instrument of their conspiracy.

conspire. *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2211 (2010). The proper inquiry is whether an agreement exists "amongst 'separate economic actors pursuing separate economic interests.'" *Id*. at 2212 (citations omitted). Even "[a]greements made within a firm can constitute concerted action covered by § 1 when the parties to the agreement act on interests separate from those of the firm itself." *Id.* at 2215.

When determining an organization's conspiratorial capacity, the organization's governance structure is critically important. Thus, *American Needle* relied on cases in which members of organizations conspired by electing boards to carry out their anticompetitive ends. *See id*. at 2212, 2214–15 (citing *Sealy*, *Topco*, and *Rothery*). In *Sealy*, for example, 30 licensees of Sealy mattresses conspired for purposes of § 1 by electing a board of directors, which in turn imposed exclusive territories on the licensees. *United States v. Sealy, Inc.*, 388 U.S. 350, 352–53 (1967). Similarly, in *Rothery*, the D.C. Circuit held that the board of a national moving-van line—selected by the line's carrier agents—was subject to § 1 when it enacted policies that restricted the agents' freedom to compete with the national line. *Rothery*

Storage & Van Co. v. Atlas Van Lines, Inc., 792 F.2d 210, 214–15 (D.C. Cir. 1986) (Bork, J.). More recently, the Second Circuit held that the Visa and MasterCard networks—associations of 20,000 banks—engaged in concerted activity when the bank-elected board imposed a rule that prevented member banks from issuing American Express or Discover cards. *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 242 (2d Cir. 2003). When governing bodies are selected in this matter, the boards are "instrumentalit[ies]" of the competitors that selected them. *Am. Needle*, 130 S. Ct. at 2215; *Sealy*, 388 U.S. at 352–53; *see also United States v. Topco Assocs., Inc.*, 405 U.S. 596, 609 (1972).

The Board argues that it cannot conspire because only some of the Board members perform teeth-whitening services and thus presumably have a personal stake in excluding non-dentist teeth whitening. However, all of the dentists on the Board are at least potential competitors to non-dentist teeth whiteners.[16] In any event,

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[16] It is not clear why the Board thinks that members who earn revenue from teeth whitening kits are not actual competitors of non-dentist teeth whitening providers, particularly when the FTC defined the relevant market to include such kits. *See* Merits Op. at 15 & n.11 (finding that majority of board members had a personal financial interest in excluding non-dentist teeth whitening).

when the competing members of an association or profession elect their governing body, it is immaterial that the individual members of the governing body do not all compete with each other. In *Rothery*, for example, only a portion of the board members competed in the restrained interstate-moving market and some were not movers at all. 792 F.2d at 214–15. In *Visa*, the networks' boards consisted of issuing banks and merchant banks that do not compete with each other, as well as some foreign banks with no direct interest in the restraints adopted for the U.S. market. *See United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 333 (S.D.N.Y. 2001). And in *Sealy*, the licensee board members had localized operations that did not necessarily overlap with those of other board members. *See* 388 U.S. at 355–57; *see also N. Tex. Specialty Physicians v. FTC,* 528 F.3d 346, 357 (5th Cir. 2008) (rejecting as immaterial physician group's contention that it could not conspire because its board consisted of physicians with different specialties).

Without citation, the Board suggests that state statutes that "divest board members of potential financial interests" remove the

Board's capacity to conspire.[17] This amounts to an argument that when board members of an organization have a fiduciary duty to that organization—a virtually universal feature of any public or private board—the board loses all capacity to conspire or facilitate a conspiracy among its members. But this contention was clearly rejected in *American Needle*, in which the Court reasoned that "competitors cannot simply get around antitrust liability by acting through a third-party intermediary." 130 S. Ct. at 2215–16 (internal quotations omitted).

The Court rejected a similar argument in *Sealy* that no conspiracy existed because the directors wore their "Sealy hat" when operating on behalf of Sealy. *Sealy*, 388 U.S. at 353. Courts have also rejected an argument that competitors sitting on a joint venture's board could not conspire because they owed a fiduciary duty to the venture. *See Visa U.S.A. Inc. v. First Data Corp.*, 2006 U.S. Dist. LEXIS 18482, at *10–12 (N.D. Cal. Mar. 2, 2006) (rejecting Visa's

[17] For example, the Board claims that North Carolina conflict-of-interest law removes the risk that members will act on their personal financial interests. Pet. Br. at 44. But such law does not recognize conflicts of interest when the action affects the decisionmaker "as a member of a profession." N.C. Gen. Stat. § 138A-38(a)(1).

single-entity defense based on bank directors' fiduciary duties to Visa).

In short, the same reason that the Board members must be actively supervised by the State—that they are market participants with personal financial stakes in excluding competitors—establishes their capacity to conspire. *See* Areeda & Hovenkamp, ¶ 227a, at 205–06 (personal financial interests justifies treating decisionmakers as distinct entities for *Copperweld* purposes and requiring active state supervision).[18]

III. THE BOARD'S "HEALTH AND SAFETY" JUSTIFICATION IS NOT SUPPORTED IN THE RECORD

The Board faults the FTC for rejecting as a matter of law its proffered justification that its conduct promoted health and safety

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[18] The Board's argument that there is no substantial evidence to support the FTC's finding that Board members actually conspired borders on the frivolous in light of the facts that the Board *voted* to send out some of the cease and desist letters and does not deny that the other letters were authorized by the Board. The supposed benign motivation of the board members is hardly dispositive of whether they engaged in a concerted conduct. *See FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 465 (1986); *see also* Merits Op. at 17-18. In any event, the FTC found the Board's motive was not so benign. *See* FTC Br. at 49-51.

by preventing dangerous practices. Pet. Br. at 59–60. Regardless of whether health-and-safety justifications are cognizable, however, the FTC found that the "record as a whole fails to substantiate [the Board's] public safety claims," Merits Op. at 28, *and the Board does not challenge that conclusion*. At most, the Board merely cites to the evidence in the record that purportedly supports its safety concerns, *see* Pet. Br. at 8–11, but the FTC found this evidence unvalidated by any clinical or empirical evidence and unconvincing in light of the "wealth of evidence presented at trial suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." Merits Op. at 28.

Among the evidence that the FTC considered was an admission by the Board's expert witness that he was unaware of any scientific evidence that linked consumer injury to teeth whitening performed by non-dentists. Merits Op. at 27. The FTC also considered four alleged instances of consumer injury caused by non-dentist tooth whitening but concluded based on the full record that they were medically undocumented or unrelated to teeth whitening. The FTC's evaluation of the supposed harm from non-

dentist teeth whitening is further supported by the fact the teeth-whitening products in question "are generally considered to be 'safe' when used as directed," *see* ADA Frequently Asked Questions *supra*, at 1, and there are no studies suggesting any health risks (other than transient sensitivity) despite the fact that the procedures have been performed millions of times, *see* Merits Op. at 28. When the FTC considers the full record and comes to a reasonable conclusion, that conclusion may not be attacked simply because the Board disagrees with it. *See Ind. Fed'n of Dentists*, 476 U.S. at 464.

Moreover, the contemporaneous evidence suggests that the Board was more concerned with low-priced competition than patient health. *See* Merits Op. at 1 (explaining how complaints leading to the Board's cease-and-desist orders "often noted that these new providers charged less than dentists but rarely mentioned any public health or safety concerns"); *see also id.* at 27 (citing lack of contemporaneous evidence that the challenged conduct was motivated by health and safety concerns). And even if the Board members were concerned with health and safety, it cannot explain how that concern justified issuing unauthorized cease and desist

letters rather than initiating legal proceedings in court, as North Carolina law contemplated.

Nothing in the federal antitrust laws prevents the State of North Carolina from choosing to give dentists a monopoly on teeth whitening because it believes—contrary to the evidence here—non-dentist teeth whitening does pose safety hazards. And it may delegate authority to implement such a policy to dentists. But to do so consistently with the Sherman Act, it must satisfy the requirements of the *Parker* doctrine, which means clearly articulating its policy to restrict competition from non-dentists and providing active supervision to ensure that the exclusion is consistent with state policy.

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In *Ticor*, the Court emphasized that a broad state action defense without an active supervision requirement was *inconsistent* with federalism concerns and tended to undercut states' regulatory flexibility because "States regulate their economies in many ways not inconsistent with the antitrust laws." *Ticor*, 504 U.S. at 635-36. That is particularly true in the context of regulation of the

professions in North Carolina. The North Carolina Constitution declares that "monopolies are contrary to the genius of a free state and shall not be allowed," Art. I, § 34, and that "[n]o person or set of persons is entitled to exclusive or separate emoluments or privileges from the community but in consideration of public services," *id.*, § 32. Applying these provisions, the Supreme Court of North Carolina has struck down laws reserving certain services to licensed professionals when the laws are not sufficiently justified by public safety concerns, and expressed skepticism about leaving such exclusionary decisions to the professionals themselves. *See, e.g.*, *State v. Biggs*, 46 S.E. 401, 403 (N.C. 1903) (requirement that all treatment of disease, real or imaginary, be provided by doctors, with certain narrow exceptions: "[S]ome M.D.'s doubtless believe that all treatment of disease, except by their own system, is quackery. Is this point to be decided by the M.D.'s themselves through an examining committee of five of their own number, or is the public the tribunal to decide, by employing whom each man prefers . . . ?"); *Roller v. Allen*, 96 S.E.2d 851, 857 (N.C. 1957) (licensure requirement for tile contractors; finding it significant that

"all members of the licensing board must come from the industry"). Thus, requiring active supervision here reinforces North Carolina's own judgment that its commitment to open, competitive markets should not be sacrificed to the self-interested judgment of industry participants rather than the legitimate demands of public safety.

CONCLUSION

The AAI respectfully requests this Court to reject the Board's expansive interpretation of the state action defense and its narrow view of concerted action, and to affirm the decision of the FTC.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(a)(7)(C), the undersigned certifies that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because the brief contains 6,871 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2010 and using 14-point Book Antiqua.

Dated: July 5, 2012 s/Ryan W. Marth

CERTIFICATE OF SERVICE

The undersigned certifies that on July 5, 2012, a copy of the foregoing Brief of American Antitrust Institute as Amicus Curiae in Support of Respondent and Affirmance was served to the Counsel of Record via the Court's ECF system.

s/Ryan W. Marth

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