No. 13-534

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

BRIEF FOR PETITIONER

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QUESTION PRESENTED

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

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BRIEF FOR PETITIONER

The North Carolina State Board of Dental Examiners ("the Board") respectfully submits this brief arguing for reversal of the judgment below.

OPINIONS

The opinion of the Court of Appeals for the Fourth Circuit (Pet.App. 1a) is reported at 717 F.3d 359. The opinion of the Federal Trade Commission ("FTC") entering summary decision against the Board on the issue of state-action antitrust immunity (Pet.App. 34a) is reported at 151 F.T.C. 607. The FTC's final opinion and order against the Board (Pet.App. 69a, 143a) are not yet reported, but are available at 2011 WL 6229615.

JURISDICTION

The Fourth Circuit entered judgment on May 31, 2013, and denied rehearing on July 30, 2013. The petition for writ of certiorari was filed on October 25, 2013, and granted on March 3, 2014. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix hereto reproduces in relevant part the Sherman Act and the FTC Act, 15 U.S.C. §§ 1, 45, as well as North Carolina laws that establish and govern the Board, *see generally*, N.C. Gen. Stat. §§ 90-22 *et seq.*, 93B-1 *et seq.*

STATEMENT OF THE CASE

This case presents a stark departure from the state-action antitrust immunity doctrine applied in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. Breaking from 70 years of precedent, the FTC and the Fourth Circuit held that a *bona fide* state regulatory board must be treated as a "private" actor simply because, under state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

A. Legal Background

1. The state-action doctrine provides that "the federal antitrust laws" "should not be read to bar States from imposing market restraints 'as an act of government.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *Parker*, 317 U.S. at 352). Allowing States to undertake "anticompetitive actions … in their governmental capacities as sovereign regulators" reflects "our national commitment to federalism." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991).

Under this doctrine, "when a state legislature adopts legislation" or "a state supreme court[ ] act[s] legislatively," their "actions constitute those of the State … and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984); *see also id.* at 568 n.17 (reserving whether a state Governor's actions are ever likewise *ipso facto* exempt). A "[c]loser analysis is required," though, "when the activity at issue is not directly that of the legislature or supreme court, … but is carried out by others." *Id.* at 568.

For example, private actors are exempt from federal antitrust law when two standards are satisfied: their conduct must (1) be authorized by a "clearly articulated … state policy" to displace competition, and (2) be "actively supervised" by state officials. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

In contrast, municipal actors need only satisfy the first of those standards: so long as a "municipality act[s] pursuant to a clearly articulated state policy[,] … there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985). In *Hallie*, this Court also noted, without deciding, that, "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." *Id.* at 46 n.10.

2. Until the decision below, "the courts uniformly agree[d]"—consistent with both *Hallie* and other decisions of this Court—that active supervision is not required "for the 'public' departments and agencies of the state itself." *See* Phillip Areeda & Herbert Hovenkamp, 1A *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 226b, at 166 (3d ed. 2006). Moreover, and of direct relevance here, courts treated state agencies as "public" actors who were not subject to the active-supervision standard even where their officers were also market participants whose selection for office was caused by other market participants.

For example, the Fifth Circuit held that a state agency regulating accountants was "exempt[ ] from the active-supervision prong" given that "the public

nature of [its] actions" rendered it "functionally similar to a municipality," "[d]espite the fact" that the agency was "composed entirely of [accountants] who compete in the profession they regulate," and who were chosen for office by the Governor from an exclusive "slate of candidates proposed by" the accountants' own professional association. *See Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1035, 1041-42 (5th Cir. 1998). Likewise, the Ninth Circuit held that a state agency regulating lawyers "need not satisfy the 'active supervision' requirement" given that it was "a public body[ ] akin to a municipality," notwithstanding that a super-majority of the agency's board of governors were practicing lawyers who were elected to office by their peers. *See Hass v. Oregon State Bar*, 883 F.2d 1453, 1460-61 & n.3 (9th Cir. 1989). And, while some have read a few cases to have "suggested … in dicta" that active supervision might be required for state agencies whose officers are also market participants, there was no "circuit decision squarely [so] holding" prior to this case, as even academic supporters of the FTC's position acknowledge. *See* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1125 (2014).

The absence of any such judicial decision is noteworthy background here because it demonstrates the novelty and disruptiveness of the decision below. Occupational licensing boards are "ubiquitous" in this country—regulating professions as diverse as "lawyers, doctors, … floral designers, … and taxidermists"—and such "boards are typically dominated by active members of the very profession that they are tasked with regulating." *See, e.g.*, *id.*

at 1102-03 (citing sources). Yet, in light of "*Parker* and its progeny," including cases "such as *Hass* and *Earles*," few antitrust plaintiffs have even tried to "pursue [active-supervision] suits" against such boards, and the States have continued to use such boards in reliance on "the balance between state and federal power [that has been] struck" under the case law. *See id.* at 1125-26, 1136.

3. In July 2001, however, the FTC's Office of Policy Planning convened a "State Action Task Force." *See* FTC Office of Policy Planning, *Report of the State Action Task Force* (Sept. 2003).[1] As the FTC's Chairman explained, the Task Force was created "[t]o address the concern that some courts ha[d] interpreted the state action doctrine too expansively." *See* Timothy J. Muris, *Clarifying the State Action and Noerr Exemptions*, 27 Harv. J.L. & Pub. Pol'y 443, 447 (2004).

The Task Force specifically criticized *Earles*, *Hass*, and similar cases. *See Report*, *supra*, at 38-39. It recommended that the FTC advance a new and different "approach[ ]," pursuant to which active supervision would be required for "any entity consisting in whole or in part of market participants," regardless of the entity's "governmental attributes." *See id.* at 55-56.

As demonstrated below, that Task Force recommendation is essentially the position that the FTC has now adopted, after it created the "opportunity" to do so (*see* Pet.App. 34a) by initiating this test case against the Board.

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[1] *Available at* http://www.ftc.gov/policy/policy-actions/advocacy-filings/2003/09/report-state-action-task-force.

B. Factual And Procedural Background

1. "The North Carolina State Board of Dental Examiners … [is] the agency of the State for the regulation of the practice of dentistry." N.C. Gen. Stat. § 90-22(b). The State Legislature has decided that the Board's membership shall consist of six practicing dentists elected by the State's licensed dentists, as well as one practicing hygienist elected by the State's licensed hygienists and one consumer member appointed by the Governor. *Id.*

a. As a state agency, the Board has traditional governmental powers that private actors typically do not have: It has quasi-legislative power "to enact rules and regulations governing the practice of dentistry," backed by criminal penalties. *Id.* § 90-48. It has quasi-executive power to issue licenses for dentistry, *id.* § 90-30(a), and to investigate "any practices committed in th[e] State that might violate" the laws that it enforces, *id.* § 90-41(d). And it has quasi-judicial power to "issue subpoenas requiring the attendance of persons and the production of papers and records … in any hearing, investigation or proceeding." *Id.* § 90-27.

Likewise, as a state agency, the Board has traditional governmental duties that private actors typically do not have: Its members must swear an oath of allegiance to the State, *id.* § 11-7, and must comply with the State's administrative procedure act as well as other restrictions concerning ethics, public records, and open meetings, *id.* § 93B-5(g). Moreover, the Board's conduct is subject to scrutiny by all three branches of state government. A legislative committee has oversight "to determine if [the Board is] operating in accordance with statutory

requirements." *Id.* § 120-70.101(3a). Executive-branch officials receive annual reports summarizing the Board's regulatory activities. *Id.* § 93B-2(a). And judicial review is available to ensure that the Board's actions comply with state law. *See, e.g.*, *Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n*, 443 S.E.2d 716, 721 (N.C. 1994).

b. One of the state laws that the Board is charged with enforcing is the legislative ban on "practic[ing] dentistry" without a license. N.C. Gen. Stat. § 90-40. As relevant here, "[a] person shall be deemed to be practicing dentistry" if he "[r]emoves stains, accretions or deposits from the human teeth" or "[t]akes or makes an impression of the human teeth, gums or jaws." *Id.* § 90-29(b)(2),(b)(7). If the Board concludes that these provisions have been violated, it may refer the matter for criminal prosecution, *id.* § 90-40, or itself bring a civil suit for injunctive relief, *id.* § 90-40.1(a).

In 2003, the Board started receiving complaints that non-dentists were practicing dentistry by providing "teeth whitening" services. Pet.App. 75a. As relevant here, such services entailed "the application of some form of peroxide to the teeth using a gel or strip," thereby "trigger[ing] a chemical reaction that results in whiter teeth." *Id.* 73a.

After investigation and discussion, the Board in 2006 enforced the state-law ban on unlicensed dental practice by sending "cease and desist letters" on its official letterhead to non-dentist teeth whitening providers. *Id.* 76a. It also sent letters to shopping mall operators, requesting that they stop leasing kiosks to non-dentist teeth whiteners. *Id.* 77a. It similarly persuaded the North Carolina Board of

Cosmetic Art Examiners to notify its licensed salons and spas that teeth whitening required a dental license. *Id.* 77a-78a. The Board's enforcement actions caused some non-dentists to stop providing teeth whitening services. *Id.*

2. In response to these events, the FTC issued an administrative complaint under the FTC Act against the Board. *Id.* 78a. The complaint charged that the Board had violated the FTC Act by violating the Sherman Act. *Id.* 86a-87a. It alleged that, through the "cease and desist letters" and other official communications discussed above, the Board had engaged in concerted action with the intent and effect of excluding competition from non-dentist providers of teeth whitening services. *Id.* 78a-79a.

a. The Board moved to dismiss under the state-action antitrust doctrine, and Complaint Counsel cross-moved for partial summary decision. *Id.* 36a. Pursuing the path previously recommended by the State Action Task Force, the FTC denied the Board's invocation of immunity. *Id.* 68a.

At the outset, the FTC expressly assumed that the Board's conduct was authorized by a "clear[ly] articulat[ed]" state policy to displace competition. *Id.* 47a n.8. The FTC declined to consider Complaint Counsel's contrary position, which was based on arguments that the anticompetitive state-law ban on unlicensed dental practice did not cover the specific teeth whitening services at issue and that the Board was not authorized to enforce that ban in the specific manner that it had. *See id.* 48a.

But the FTC then broke new ground by ruling that the Board's conduct also must be "'actively supervised' by the State itself," notwithstanding that

the Board is a state agency rather than a private actor. *See id.* 46a-47a. The FTC held that "a state regulatory body that is controlled by participants in the very industry it purports to regulate" must be actively supervised by a state entity that is not so constituted. *See id.* 58a. The FTC reasoned that, "when determining whether the state's active supervision is required, the operative factor is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated." *Id.* 49a. That factor is key, the FTC asserted, because active supervision addresses the "danger" that the entity's decisionmakers are "acting to further [their] own interests, rather than the governmental interests of the State." *Id.* 49a-50a. The FTC also noted that its decision was "reinforced" by the fact that the Board's members "are elected directly by … other licensed dentists" in the state, *id.* 59a; but that specific selection method was not necessary to the decision, which treated as sufficient that a majority of the Board's members are practicing dentists. *See id.* 35a-36a, 58a, 68a, 81a.

Finally, the FTC concluded that no other state entity had actively supervised the Board's official communications about teeth whitening. *Id.* 68a. The FTC reasoned that, while the Board was subject to "generic oversight" by various state actors, none of them had specifically "reviewed or approved" the Board's challenged conduct. *See id.* 61a-68a.

b. After a merits hearing, the FTC entered a final opinion and order against the Board. *Id.* 71a.

The FTC first ruled that the Board was legally capable of engaging in concerted action to restrain

trade because its members had separate economic interests, *id.* 93a-100a, and the FTC further found that the Board's members in fact had conspired with each other by collectively approving the Board's official actions regarding teeth whitening services, *id.* 100a-104a. The FTC then held that the Board had unreasonably restrained trade by using its official communications to deter teeth whitening by non-dentists. *Id.* 104a. In so holding, the FTC repeatedly noted that the Board's communications had the tendency and effect of excluding competition due to the Board's official status and apparent authority. *See id.* 107a, 112a-113a, 128a-129a. And the FTC rejected the Board's asserted procompetitive justifications, primarily on the ground that "public safety concerns" are not "cognizable justifications for restraints on competition" under federal antitrust law. *See id.* 114a-125a.

The FTC's final order prohibits the Board from directing non-dentists to cease their teeth whitening services and also from instructing non-dentists or their business partners that unlicensed teeth whitening is illegal. *See id.* 145a-147a. It further compels the Board to provide corrective notifications and to follow new reporting and inspection requirements. *See id.* 148a-151a, 153a-155a.

The FTC's final order disclaims any attempt to interfere with the Board's authority to investigate unlicensed dental practice or to initiate judicial proceedings. *See id.* 147a. The order also permits the Board to communicate its belief that unlicensed teeth whitening is illegal as well as its *bona fide* intent to initiate judicial proceedings, so long as the communications include an FTC-drafted disclosure

emphasizing that the Board itself lacks the authority to declare unlicensed teeth whitening unlawful or to enjoin that practice. *See id.* 147a-148a, 152a. These provisos in the order, however, do not purport to exempt any such compliant conduct from the FTC's state-action decision or to exempt such conduct from federal antitrust scrutiny (absent active state supervision) if it is later challenged by the FTC or private plaintiffs. *See id.* 35a-36a, 81a.

3. The Board filed a petition for review. *Id.* 4a. The Fourth Circuit denied the petition. *Id.*

As relevant here, the Fourth Circuit "agree[d] with the FTC" that state agencies must satisfy the active-supervision standard where "a decisive coalition" of the agency "is made up of participants in the regulated market[,] who are chosen by and accountable to their fellow market participants." *Id.* 14a. Like the FTC, the Fourth Circuit reasoned that the State must "exercise[ ] sufficient independent judgment and control" over such state agencies in order to address the "danger" that they are acting "to benefit [their] own membership," even where their conduct is authorized by a clearly articulated anti-competitive state policy. *See id.* 15a. In sum, the court held that, "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" for purposes of the state-action exemption. *Id.* 17a.

Judge Keenan wrote a brief concurrence, which emphasized that this case involved a state agency whose market-participant members were "elected by other private participants in the market," rather than "appointed or elected by state government officials." *Id.* 29a-31a.

SUMMARY OF ARGUMENT

I. The state-action doctrine of *Parker v. Brown, supra*, provides that sovereign state regulatory action falls outside the scope of federal antitrust law. The Board here is entitled to invoke that state-action immunity on the same terms as all other *bona fide* public agencies, regardless of the fact that the Board's public officials are also market participants.

A. Under *Parker* and its progeny, antitrust immunity is grounded in a basic presumption of federalism: Congress did not intend to restrain a State or its officers or agents from implementing an anticompetitive regulatory regime adopted by the State's sovereign lawmakers. Thus, when public actors assert state-action immunity, they must show that they are enforcing an anticompetitive policy that has been "clearly articulated" by a state lawmaking body. But they need not further show, as private actors must, that their clearly authorized anticompetitive conduct was "actively supervised" by another state entity. That additional showing is necessary for private actors only to ensure that the State is truly adopting their anticompetitive conduct as its own regulatory action, rather than just attempting by fiat to exempt their private business activities from federal antitrust law. This concern is entirely inapposite for *bona fide* public agencies, which are the State's own regulatory arms, not mere shams for immunizing private actors. Indeed, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, *supra*, this Court held that public officials may invoke state-action immunity even where they have misapplied an anticompetitive state law or have conspired to apply that law solely for private benefit.

In sum, the governing legal rule under *Parker* and its progeny—which was universally followed until the decision below—is that a *bona fide* state agency is entitled to state-action immunity so long as it is enforcing a clearly articulated anticompetitive state policy, whether or not its conduct is actively supervised by any other state entity.

B. The rule that active supervision is not required for state agencies fully applies when, under state law, a majority of an agency's public officials are also market participants. In fact, *Parker* itself granted immunity to an agency that was so constituted, without any active supervision by another state entity that was not so constituted. Moreover, several circuit courts have expressly held likewise, and no court in the 70 years since *Parker* has ever held otherwise besides the decision below, even though there are countless state agencies operated by public officials who are also market participants. Most fundamentally, all of the principles that inform and justify the general rule that state agencies need not be actively supervised are specifically applicable to those agencies whose public officials are also market participants.

First, a basic presumption of federalism is that Congress did not intend to interfere with the States' sovereign choices about staffing and structuring the agencies that implement their anticompetitive regulatory laws. In particular, States should be free to make the policy decision that the public officials who run their regulatory agencies will be market participants (*e.g.*, because they possess specialized knowledge and expertise), and that agencies run by such officials will not be actively supervised by any

other state entity (*e.g.*, because such review would be inefficient and ineffective). Denying immunity to such state agencies because state legislatures made these choices would turn federalism on its head.

Second, a state agency's enforcement of a clearly articulated anticompetitive state policy necessarily has been adopted by the State as its own regulatory conduct, even where the agency's officials are also market participants who are not actively supervised. Unlike private actors whom the State simply purports to allow to make anticompetitive business decisions despite federal law, public officials who are also market participants are executing state regulatory power that federal law does not purport to restrain. There is no realistic danger that a State is merely engaged in a pretextual sham to immunize private business activities when it chooses to use market-participant officials to operate *bona fide* regulatory agencies that are charged with state-law powers and duties that public actors traditionally have and that private actors typically do not have.

Third, the regulatory actions of public officials do not lose their public character just because the officials also may have private interests in those actions. *Omni* rejected an exception to state-action immunity that would have looked behind public actions in order to determine whether they were part of a "conspiracy" with private actors. Indeed, *Omni* granted immunity even though public officials were allegedly bribed by a private monopolist to enact favorable zoning ordinances, which was a far more direct private benefit than the indirect private benefit that may be received by officials who are also market participants.

II. In breaking from the judicial consensus that had developed over 70 years under *Parker* and its progeny, the FTC and the Fourth Circuit adopted a radical new approach. Those tribunals began with the premise that the function of the active-supervision standard is to address the "danger" that the entity involved is "acting to further its own interests" rather than the State's interests, and they ended with the conclusion that active supervision is required where a state agency is not "sufficiently independent" from the interests of those being regulated. This two-step theory—in essence, a "risk of self-interest" rationale—is fundamentally flawed.

A. The "risk of self-interest" rationale conflicts with the precedents and principles that underlie the general rule that state agencies are not required to be actively supervised by another state entity.

First, the rationale's premise is wrong, because the active-supervision standard has nothing to do with the "danger" that the State's interests are not being furthered. The clear-articulation standard and state administrative law fully protect the State from any such danger; the active-supervision standard instead prevents the State from exempting private actors' business decisions from federal law—a concern that is inapplicable to the regulatory decisions of the State's own *bona fide* officials.

Second, the rationale's conclusion is wrong too, because antitrust immunity does not depend on public officials being "sufficiently independent" from private actors. This point is dictated by *Omni*, which specifically granted immunity even though public officials allegedly had been bribed by a private actor, and which generally rejected all attempts to look

behind the public nature of the officials' actions due to their alleged "conspiracy" with that private actor.

Third, the rationale contradicts the core precepts of federalism that the state-action doctrine seeks to respect. It improperly second-guesses the States' sovereign policy choices concerning whether and how to bear the risk that their officials may have actual or potential conflicts of interest.

B. No decision of this Court supports the "risk of self-interest" rationale. As for the two decisions that the FTC and the Fourth Circuit principally relied upon, one involved a public agency that acted without a clearly articulated state policy to displace competition, and the other involved private actors who were not public officials at all. Those decisions did not in any way suggest that public officials enforcing a clearly articulated anticompetitive state policy must be actively supervised simply because their official regulatory actions may also affect their private interests.

C. The academic proposals invoked by the FTC and the Fourth Circuit cannot justify their position. Those proposals conflict with this Court's precedents and lack widespread approval among scholars.

III. Just as it does not matter that a state agency's officials are market participants, it also does not matter that those officials are elected to office by other market participants. For all the reasons discussed above, the particular state-law method of selecting a State's market-participant officials is completely irrelevant under the state-action doctrine.

ARGUMENT

It is undisputed here that the Board is a *bona fide* agency of the State of North Carolina, charged with regulating the practice of dentistry pursuant to state-law powers and state-law duties that public entities traditionally have and that private actors typically do not have. *See* Pet.App. 40a-41a. It also is not disputed here that the Board's enforcement efforts against non-dentist teeth whiteners were taken pursuant to a clearly articulated state policy to displace competition in dentistry. *See id.* 47a n.8.

Those undisputed points should have sufficed, under long-established precedent, to render the Board's conduct exempt from federal antitrust law. But the FTC and the Fourth Circuit starkly broke from precedent, holding instead that the Board must be treated as a "private" actor who must additionally show that its conduct was actively supervised by another state entity, simply because state law requires that a majority of the Board's members also must be practicing dentists who are elected to their official positions by other practicing dentists.

This novel and disruptive holding should be rejected. Most importantly, the holding grossly disrespects the basic principles of federalism that the state-action antitrust doctrine seeks to preserve, because it conditions the States' sovereign right to enforce anticompetitive state laws on how the States exercise their equally sovereign right to staff and structure the agencies that enforce those laws. Moreover, the holding radically undermines the fundamental distinction between public and private conduct that this Court's state-action antitrust decisions have consistently maintained.

I. THE ACTIVE-SUPERVISION STANDARD FOR STATE-ACTION ANTITRUST IMMUNITY DOES NOT APPLY TO STATE AGENCIES, INCLUDING AGENCIES WHOSE OFFICIALS ARE ALSO MARKET PARTICIPANTS

Under settled law, in order for a state agency's conduct to be deemed a sovereign act of State government that is not subject to federal antitrust law, the agency needs to show only that it is enforcing a clearly articulated anticompetitive state policy—neither active supervision by another state entity nor any other further inquiry is required or permitted. Importantly, all of the principles that underlie this general legal rule apply fully in the specific factual context of state agencies whose officials are also market participants.

A. A State Agency Is Immune From Federal Antitrust Scrutiny So Long As It Is Enforcing A Clearly Articulated Anticompetitive State Policy

As demonstrated below, three key aspects of this Court's state-action jurisprudence establish the rule that a *bona fide* state agency enforcing a clearly articulated anticompetitive state policy is entitled to state-action immunity without any further showing: (1) the federalism principles that led this Court to recognize the doctrine; (2) the standards that this Court has adopted over time to implement the doctrine; and (3) the factors that this Court has rejected as irrelevant under the doctrine.

1. Respect For Federalism Is Why State Regulatory Action Is Outside The Scope Of Federal Antitrust Law

Parker was the case that first squarely confronted the question whether federal antitrust law applies to anticompetitive state regulatory regimes—there, a state statute authorizing a state agency to restrict competition on terms proposed by market participants for the purpose of maintaining prices. *See* 317 U.S. at 344-47. This Court held that "the Sherman Act did not undertake to prohibit" the States from imposing such a regulatory restraint on competition as "an act of government." *Id.* at 352. In multiple ways, that holding was grounded in the principles of federalism that underlie our "dual system of government." *See id.* at 350-51.

a. *Parker* first emphasized that "nothing in the language of the Sherman Act or in its history … suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature," and that such "an unexpressed purpose … is not lightly to be attributed to Congress" because "the states are sovereign." *Id.* That specific interpretation of the antitrust laws' scope reflects a more general federalism-based principle of statutory interpretation, which is that Congress must clearly express its intent to regulate the States directly or otherwise to alter the traditional balance of powers between the sovereigns. *See, e.g.*, *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 65 (1989).

Parker also recognized that this respect for state sovereignty does not permit "a state [to] give immunity" to private actors who are violating federal antitrust law merely "by authorizing them to violate

it[ ] or by declaring that their action is lawful." 317 U.S. at 351. Again, that specific interpretation of the antitrust laws' scope reflects a more general precept of federalism, which is that Congress clearly does not intend in the ordinary course to allow States to nullify federal regulation of private actors and thereby invert the Supremacy Clause. *See, e.g.*, *Gonzales v. Raich*, 545 U.S. 1, 29 (2005).

In light of these two principles of federalism, *Parker* construed the federal antitrust laws to draw a fundamental line between "individual and … state action." 317 U.S. at 352. It held that Congress intended only to prevent anticompetitive conduct "by individuals and corporations" engaged in "business combinations," not to restrain "the state … in [its] execution of a governmental policy." *See id.* at 351-52. As this Court in *Omni* later put the point, States may not "exempt *private* action from the scope of the Sherman Act," but "*any* action that qualifies as state action is *ipso facto* … exempt from the operation of the antitrust laws." 499 U.S. at 379 (internal quotation marks omitted).

That different antitrust treatment of private and public conduct reflects this Court's cognizance of "the reality that … government regulation entails … value judgment," and that federal antitrust law's one-dimensional protection of competition should not supplant the States' sovereign ability to judge the "public interest" more broadly. *See id.* at 377; *see also Nat'l Soc'y of Prof'l Engr's v. United States*, 435 U.S. 679, 695 (1978) (federal antitrust law typically "precludes inquiry into the question whether [the restrained] competition is good or bad" with respect to public-welfare values like "safety" and "quality").

In sum, "[t]he rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Omni*, 499 U.S. at 374.

b. Turning to the state regulatory scheme before it, *Parker* concluded that the "restrict[ion] [of] competition" to "maintain prices" was, despite the pervasive involvement of market participants, ultimately a "sovereign … act of government" that was immune from federal antitrust scrutiny. *See* 317 U.S. at 346-47, 352. Although the statute at issue authorized a committee of private producers to formulate a program establishing the exclusive terms on which a commodity could be sold in an area, and further required the consent of a super-majority of the area's producers, the program became effective *only if* "approve[d]" by the State's "Agricultural Prorate Advisory Commission." *Id.* at 346-47.

It thus was "plain that the prorate program … was never intended to operate by force of individual agreement," but rather "derived its authority and its efficacy from the legislative command of the state." *Id.* at 350. As this Court emphasized, "it is the state, acting through the Commission, which adopts the program and which enforces it … in the execution of a governmental policy." *Id.* at 352.

Importantly, *Parker* treated "the Commission" as "the state" even though *a super-majority of the Commission's members were also market participants*. In particular, as was clear from the face of the state statute cited by this Court, six of the nine Commission members were required to be

engaged "in the production of agricultural commodities as their principal occupation." *See id.* at 346 (citing 1939 Cal. Stat. ch. 894, § 3, p. 2488); *see also* John Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 948 & n.21 (1986). Moreover, the state statute clearly did not provide for the Commission's members to be actively supervised by any other state entity. *See Parker*, 317 U.S. at 347, 352. These aspects of the statutory scheme did not affect this Court's conclusion as they plainly were not relevant under this Court's rationale (and, indeed, they were not even discussed in this Court's opinion). Regardless, the State was not improperly "giv[ing] immunity" to the "individual agreement" of the market participants who served on the Commission, because they were the State's own "officers," whom Congress did not intend "to restrain" when they were performing "activities directed by its legislature." *See id.* at 350-51.

2. The Clear-Articulation Standard And The Active-Supervision Standard Serve Different Functions, And Only The First Standard Applies To State Agencies

In light of *Parker's* emphasis on sovereignty, this Court has explained that the conduct of a state entity exercising sovereign lawmaking power qualifies as state action that is "*ipso facto*" immune from federal antitrust law without any further inquiry, but that "[c]loser analysis is required" to determine whether the conduct of a non-sovereign actor invoking sovereign authorization also qualifies as immune state action. *See Hoover*, 466 U.S. at 567-68. Specifically, as in *Parker* itself, this Court's

subsequent cases have identified two different questions that are relevant to whether principles of federalism justify treating as immune state action the anticompetitive conduct of an actor who is not itself a sovereign lawmaker: *First*, did the State actually intend to authorize the actor to engage in anticompetitive conduct (or instead has the actor unexpectedly employed general state-law authority in an anticompetitive way)? *Second*, did the State truly adopt the anticompetitive conduct as its own regulatory action (or instead has it just purported to shield private business activities from federal law)?

As synthesized by this Court's decision in *Midcal* and as elaborated in later cases, the doctrinal standard governing the first issue is whether the challenged conduct is authorized by a "clearly articulated … state policy" to displace competition; and the doctrinal standard governing the second issue is whether the challenged conduct is "actively supervised" by state officials. *See Midcal*, 445 U.S. at 104-05. This Court and the lower courts also have made it clear that, given the distinct roles played by each standard, state agencies need only satisfy the clear-articulation standard, not the active-supervision standard: so long as the State clearly intended for a *bona fide* state regulatory agency to displace competition, the agency's actions are unquestionably the State's own anticompetitive conduct, even without active supervision.

a. Clear Articulation. Because "*Parker* emphasized the role of sovereign *States* in a federal system," *Omni*, 499 U.S. at 370, it is always necessary "to ensure" that "anticompetitive conduct [by] a nonsovereign [actor]" purporting to act with

sovereign authorization was "contemplated by the State" itself, *Hoover*, 466 U.S. at 568-69. Accordingly, such conduct must "derive[ ] … from [a] legislative command of the state," *Parker*, 317 U.S. at 350, that "clearly articulate[s] … [a] state policy" to displace competition, *Midcal*, 445 U.S. at 105.

In *Hallie*, this Court held that the clear-articulation standard is satisfied where anti-competitive conduct by a nonsovereign actor was clearly "a foreseeable result" of state law. *See* 471 U.S. at 41-44. A State Legislature does not need to "expressly state" that it intends to authorize anti-competitive conduct. *Id.* at 43-44. So long as its "intent to establish an anticompetitive regulatory program is clear, … the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws." *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64-65 (1985).

In *Phoebe Putney*, this Court recently admonished that "the concept of 'foreseeability'" should not be applied "too loosely." 133 S. Ct. at 1012. *Phoebe Putney* explained that cases like *Hallie* had found States to "have foreseen and implicitly endorsed … anticompetitive effects" 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 1012-13. By rejecting a "loose[r] application of the clear-articulation test," this Court eliminated any risk that States might "inadvertently authoriz[e] anticompetitive conduct." *Id.* at 1016.

Finally, a State's agencies must satisfy the clear-articulation standard for the same reason as must all

other actors who lack the sovereign power to legislate for the State. "Acting alone," state agencies cannot establish the "policy of the State itself." *See S. Motor Carriers*, 471 U.S. at 62-63. They can only "implement" the policies adopted by "the legislature." *See id.* at 64. Showing clear articulation is what proves that their "state-law authority to act" was intended by the Legislature to include the "delegated authority to … regulate anticompetitively." *Phoebe Putney*, 133 S. Ct. at 1012.

b. Active Supervision. Under *Parker*, showing that the State clearly intended for a non-sovereign actor to engage in anticompetitive conduct is not necessarily sufficient to entitle that actor to the State's antitrust immunity, because a State cannot just "give immunity to those who violate the Sherman Act by authorizing them to violate it." *See Midcal*, 445 U.S. at 105-06 (quoting *Parker*, 317 U.S. at 351). Rather, the State also must "ma[ke] the conduct *its own*." *Patrick v. Burget*, 486 U.S. 94, 105-06 (1988) (emphasis added). As explained further below, where the conduct of a private actor is at issue, showing that the State "actively supervised" the conduct is necessary to prove the State's ownership, *see Midcal*, 445 U.S. at 105-06; but where the conduct of a public municipality or agency is at issue, showing active supervision is unnecessary because the clearly authorized conduct of public actors is inherently the State's own action, *see Hallie*, 471 U.S. at 46-47.

(i) With respect to the "anticompetitive acts of private parties," the active-supervision standard requires that the State "exercise ultimate control" in order to ensure that the conduct "actually further[s]

state regulatory policies" in a way that is "fairly attributable to the State." *See Patrick*, 486 U.S. at 100-01. "The mere presence of some state involvement or monitoring does not suffice," because that provides "no realistic assurance" that the State authorized the "private party's anticompetitive conduct" to "promote[ ] state policy, rather than merely the party's individual interests." *See id.*

For example, in *Midcal*, the State clearly "authorize[d] price setting … by private parties" in the wine business and "enforce[d] the prices [they] established," but the State, unlike in *Parker*, did not itself approve those prices after "review[ing] the[ir] reasonableness." *Compare Midcal*, 445 U.S. at 105-06, *with id.* at 104 (citing *Parker*, 317 U.S. at 347, 352). In circumstances like these where "a program of supervision" is "absent," the anticompetitive conduct of private actors is not "fairly attributable to the State" because it is not "truly the product of state regulation." *See Patrick*, 486 U.S. at 100-01. Even though such conduct is clearly intended by the State, it still operates "by force of individual agreement" rather than "in the execution of a governmental policy." *See Parker*, 317 U.S. at 350, 352.

In short, "the requirement of active state supervision serves essentially an evidentiary function." *Hallie*, 471 U.S. at 46. It shows that there is an affirmative "state policy" of anticompetitive *regulation* and thereby establishes that the State is not simply "circumventing the Sherman Act's proscriptions 'by casting … a gauzy cloak of state involvement over what is essentially a private [anti-competitive] arrangement.'" *See id.* at 46-47 (quoting

Midcal, 445 U.S. at 106); *accord S. Motor Carriers*, 471 U.S. at 57.

(ii) Precisely because the active-supervision standard serves only that narrow evidentiary function for "private parties," this Court in *Hallie* held that the standard does not apply where "the actor is a municipality." *See* 471 U.S. at 46-47. *Hallie* recognized that "there is little or no danger" that a State is immunizing "a *private* [anti-competitive] arrangement" when it clearly authorizes a *municipality* to act anticompetitively. *See id.* at 47. States "frequently choose to effect [their] policies through the instrumentality of [their] cities and towns." *See Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 51 (1982). And a "municipality's execution of … a properly delegated function" to displace competition is not remotely "a gauzy cloak of state involvement" that "circumvent[s] the Sherman Act's proscriptions" on private business activities. *See Hallie*, 471 U.S. at 46-47. Instead, a municipal actor in such circumstances essentially functions as one of the State's "officers [or] agents" to perform regulatory "activities directed by the legislature." *See id.* at 38 (citing *Parker*, 317 U.S. at 350-51).

To be sure, *Hallie* did not itself purport to resolve whether the active-supervision standard "would also not be required" where "the actor is a state agency." *Id.* at 46 n.10. This Court, though, has always treated state agencies as entities that *may engage in* active supervision of private actors, not as entities that *must submit to* active supervision by other state entities. *See, e.g.*, *Parker*, 317 U.S. at 347, 352; *S. Motor Carriers*, 471 U.S. at 50-51, 62. Moreover, *Hallie* observed that the rule for state agencies

"likely" would be the same as for municipal actors, 471 U.S. at 46 n.10, and that observation followed inexorably from *Hallie's* own reasoning: Just as with a municipality, "there is little or no danger" that a State is casting "a gauzy cloak of state involvement" over "a *private* [anticompetitive] arrangement" when it clearly authorizes a *state agency* to act anti-competitively. *See id.* at 46-47. Indeed, even more so than with municipalities, state agencies are the State's *bona fide* "officers and agents" that are created to perform regulatory "activities directed by the legislature," *see id.* at 38, "because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature," *see S. Motor Carriers*, 471 U.S. at 64.

It is therefore unsurprising that, as noted earlier about the state of the law prior to this case, "the courts uniformly agree[d] with th[e] conclusion" that "'public'" agencies are not subject to the active-supervision standard. *See* Areeda & Hovenkamp, *supra*, ¶ 226b, at 166. Under this Court's jurisprudence, the active-supervision standard applies where private actors seek to invoke the State's antitrust immunity for their clearly authorized anti-competitive business conduct; the standard is neither necessary nor proper where public officials seek to invoke the State's antitrust immunity for their clearly authorized anticompetitive regulatory conduct, as that conduct is unquestionably "the State's own" regardless.

3. Public Officials Enforcing A Clearly Articulated Anticompetitive State Policy Do Not Lose Their Antitrust Immunity Based On Alleged Misdeeds

This Court's decision in *Omni* confirms the conclusion that public officials are immune from federal antitrust law so long as they are enforcing a clearly articulated anticompetitive state policy. In *Omni*, state law clearly authorized municipal actors to displace competition by enacting zoning ordinances when certain conditions were met. *See* 499 U.S. at 370, 373. The questions that remained were whether the city there nevertheless could be stripped of its state-action immunity, either because (1) the zoning ordinances at issue were arguably "defective" under state law, *see id.* at 370-71, or because (2) those ordinances were allegedly enacted pursuant to an illicit "conspiracy" between the city's officials and a market participant, *see id.* at 367-69. This Court held that such asserted misdeeds are irrelevant to public officials' state-action immunity.

a. *Omni* first decided that it was immaterial whether the ordinances at issue were "substantively or … procedurally defective" under the state law that clearly authorized the city to displace competition through zoning. *See id.* at 371. This Court explained that considering such state-law "[e]rrors" as part of "the *Parker*-defense authorization requirement would have unacceptable consequences." *Id.* It would "transform[ ] … state administrative review into a federal antitrust job," thereby "undermining the very interests of federalism [*Parker*] is designed to protect." *Id.* at 372.

Accordingly, *Omni* held that, for purposes of the clear-articulation standard, "it is necessary to adopt a concept of authority broader than what is applied to determine the legality of … action under state law." *Id.* This Court had no occasion to resolve definitively the outer boundaries of federal antitrust immunity when public officials err in enforcing state laws that clearly displace competition, but it did analogize to the extremely deferential approach adopted in the context of judicial immunity. *See id.* (citing *Stump v. Sparkman*, 435 U.S. 349, 356-57 (1978) ("A judge will not be deprived of immunity because the action he took was in error, was done maliciously, or was in excess of his authority; rather, he will be subject to liability only when he has acted in the 'clear absence of all jurisdiction.'")).

b. *Omni* further concluded that it was immaterial whether the ordinances at issue were the product of a "secret anticompetitive agreement," under which the city would "protect [a company's] monopoly position" and "in return for which City Council members received advantages made possible by [the] monopoly," such as "contributed funds and free billboard space [for] their campaigns." *See id.* at 367 (internal quotation marks omitted). This Court ruled that "[t]here is no … conspiracy exception" to state-action immunity for cases where public officials and private actors agree to restrain trade. *Id.* at 374.

Omni forcefully rejected the "proposition that … governmental *regulatory* action may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties." *Id.* at 375. As this Court recognized, that proposition was irreconcilable with

"[t]he rationale of *Parker* … that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *See id.* at 374.

Omni emphasized that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them," and that federal antitrust enforcers have no business second-guessing whether "governmental actions" are "'not in the public interest' or [are] in some sense 'corrupt.'" *See id.* at 375-77. Indeed, *Omni* stressed that this Court "ha[s] consistently sought to avoid" "deconstruction of the governmental process and probing of the official 'intent'" that underlie public action. *See id.* at 377-78.

In sum, *Omni* refused to "allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" *Id.* at 379. This Court underscored that, instead, "*any* [regulatory] action that qualifies as state action"—*i.e.*, public action to enforce a clearly articulated anticompetitive state policy, *see id.* at 372-74—"is '*ipso facto* … exempt from the operation of the antitrust laws.'" *See id.* at 379 (quoting *Hoover*, 466 U.S. at 568).

B. The Fact That A State Agency's Officials Are Also Market Participants Does Not Require That They Be Actively Supervised When Enforcing Clearly Articulated Anti-competitive State Policy

The antitrust immunity that protects state agencies when they enforce a clearly articulated anti-competitive state policy fully applies to those particular state agencies that have a majority of officials who are also market participants—without any additional requirement that they be actively supervised by yet another state entity. This Court in *Parker* itself granted immunity to an agency run by officials who were also market participants and who were not actively supervised by any other state entity. *Supra* at 21-22. So did the Fifth Circuit in *Earles* and the Ninth Circuit in *Hass*; and no court has held to the contrary besides the Fourth Circuit below, despite the existence of countless state agencies operated by public officials who are also market participants. *Supra* at 3-5.

The conclusion that these state agencies are no more required to be actively supervised than any other *bona fide* state agency follows directly from the three key principles of this Court's state-action jurisprudence that were explained above and are applied further below: (1) the federalism-based commitment not to interfere with state officials who are enforcing anticompetitive state policy; (2) the limited role of the active-supervision standard, once the clear-articulation standard is satisfied; and (3) the irrelevance of whether public officials have a personal interest in using their public conduct to benefit either themselves or private actors.

1. Respect For Federalism Requires Deference To A State Legislature's Choice Of How To Staff And Structure Its Own Agencies

Principles of federalism strongly support recognizing state-action antitrust immunity even where the officials of a state agency who are enforcing clearly articulated anticompetitive state policy are also market participants and are not actively supervised by any other state entity. As discussed above, the foundational premise of the state-action doctrine is that, given our "dual system of government," the intent "to restrain a state or its officers or agents from activities directed by its legislature … is not lightly to be attributed to Congress." *See Parker*, 317 U.S. at 350-51. And the notion that Congress clearly intended to interfere with sovereign acts of State government is just as unwarranted where a State decides that the agency officials charged with enforcing its anticompetitive policies shall also be market participants.

That idea is equally unwarranted, of course, because federalism demands equal (if not greater) respect for a State's choices concerning "the character of those who exercise government authority" and "the structure of its government," given that those choices lie at the very core of how "a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). This is why "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon*

v. Missouri Mun. League, 541 U.S. 125, 140 (2004). Indeed, denying state-action immunity due to a State's sovereign choices concerning how to staff and structure its regulatory arms would "undermin[e] the very interests of federalism [the *Parker* doctrine] is designed to protect." *See Omni*, 499 U.S. at 372.

First, "[i]t is obviously essential to the independence of the States" that they retain "their power to prescribe the qualifications of their own officers." *See Gregory*, 501 U.S. at 460. Here, in particular, the benefits for the States in deciding that the public officials who run their regulatory agencies should also be market participants, and the corresponding costs to the States if federal antitrust law coerces them to make the contrary decision, are self-evident and significant.

Practicing professionals often have "the specialized knowledge required to evaluate" the regulated conduct. *See California Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999). Their "specialized knowledge or expertise," as well as the ordinary reasons to reduce the size of the full-time "bureaucracy," explains the longstanding government tradition of employing "public servant[s]" who only "temporarily or occasionally discharge[ ] public functions" and who are otherwise "permitted to carry on some other regular business." *See Filarsky v. Delia*, 132 S. Ct. 1657, 1662-63, 1665-66 (2012). In fact, because "[a]gencies are created … to deal with problems … outside the competence of[ ] the legislature" and the lay public, a reduction in the States' desired level of professional involvement in agencies might "diminish, if not destroy, [their] usefulness." *Cf. S. Motor Carriers*, 471 U.S. at 64.

Second, deciding which of the States' "agencies … may be entrusted" with "exercising [which] of the[ir] governmental powers" is likewise "central to state self-government." *See City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 437 (2002). Again, here in particular, the benefits for the States in deciding not to actively supervise regulatory agencies run by market-participant officials, and the corresponding costs to the States if federal antitrust law coerces them to make the contrary decision, are self-evident and significant.

Vesting final administrative authority in a single agency that is run by market-participant officials streamlines decisionmaking: it avoids a redundant bureaucracy in which all of the expert agency's anti-competitive decisions—including routine licensing decisions concerning professional competence—must undergo "pointed reexamination" by a second state entity "exercis[ing] ultimate control." *See Midcal*, 445 U.S. at 106; *Patrick*, 486 U.S. at 101. Moreover, the single-agency structure leaves regulatory decisions in the hands of the officials with specialized expertise. It also encourages market participants to "perform[ ] this essential public service" in the first place, both by providing them with meaningful responsibility and by eliminating the "deter[rrent]" "threat of being sued for damages" if the activeness of state supervision is *later* deemed insufficient by federal antitrust enforcers. *Cf. Hoover*, 466 U.S. at 580 n.34.

Notably, all of the foregoing reasons why the States long have chosen to regulate professionals in this manner were discussed, and will further be detailed, by the Board's *amici*, including numerous

States and national associations of both regulators and the regulated. More notably still, even academic supporters of the FTC's position acknowledge the significant disruption that will be caused by "put[ting] thousands of boards under the Sherman Act's microscope," thereby "alter[ing] the equilibrium of a complex system of regulation" and "pressur[ing]" the States to choose among "option[s] [that] will require a departure from the current practice of using practitioner-dominated administrative boards." *See* Edlin & Haw, *supra*, at 1144, 1154. Requiring active supervision of state agencies run by market-participant officials would thus undermine *Parker* and its progeny by failing to respect "the dignity … of sovereignty" retained by the States. *See Alden v. Maine*, 527 U.S. 706, 715 (1999).

2. A State's Use Of Market Participants As Agency Officials Poses No Real Danger That The State Is Merely Immunizing Private Agreements Rather Than Truly Enforcing Its Own Clearly Articulated Anticompetitive Policy

There is no doctrinal basis for requiring a state agency's enforcement of anticompetitive state policy to be actively supervised by another state entity simply because the agency's public officials are also market participants. As discussed above, "[o]nce it is clear that state authorization exists [to act anti-competitively], there is no need to require the State to supervise actively" unless that is "necessary to prevent a State from circumventing the Sherman Act's proscriptions 'by casting … a gauzy cloak of state involvement over what is essentially a private [anticompetitive] arrangement.'" *See Hallie*, 471

U.S. at 46-47 (quoting *Midcal*, 445 U.S. at 106). And there is no realistic danger that a State is engaged in such circumvention when it chooses to staff *bona fide* regulatory agencies with officials who are also market participants.

The States obviously have not gone to the trouble of creating the countless such agencies that exist all as an elaborate sham to "exempt *private* action from the scope of the Sherman Act." *See Omni*, 499 U.S. at 379. Instead, the States have created these public "regulatory agencies" to "implement … their anti-competitive policies," *see S. Motor Carriers*, 471 U.S. at 64, using the "specialized knowledge or expertise" of market participants, *see Filarsky*, 132 S. Ct. at 1665-66.

Simply put, just by establishing a *bona fide* state agency that is operated by public officials who are also market participants, a State *already* "has made [their official] conduct its own." *See Patrick*, 486 U.S. at 105-06. By definition, those official actions do not "operate by force of individual agreement," but only "in the execution of a governmental policy," which Congress lacked any "purpose … to restrain." *See Parker*, 317 U.S. at 350, 352.

Here, in particular, the Board is "the agency of [North Carolina] for the regulation of the practice of dentistry," charged with enforcing the State's clearly anticompetitive policy of restricting dental practice to licensed dentists. *See* N.C. Gen. Stat. §§ 90-22(b), 90-29, 90-40, 90-40.1(a), 90-41(d). It cannot seriously be claimed that, in vesting control over this agency with officials who are also market participants, North Carolina was just "casting … a gauzy cloak of state involvement" to "give immunity" to "private

[anticompetitive] arrangement[s]." *See Midcal*, 445 U.S. at 106. Instead, like all other States, North Carolina simply recognizes that public officials who are also practicing dentists are best positioned to fulfill the "public interest" in ensuring that "only qualified persons [are] permitted to practice dentistry." *See* N.C. Gen. Stat. § 90-22(a),(b).

The Board's *bona fide* status as a state agency is confirmed by the undisputed fact that it operates pursuant to state-law powers and state-law duties that public entities traditionally have and that private actors typically do not have. For starters, the State's full imprimatur lies behind the Board's various types of enforcement authority. *Supra* at 6. The FTC itself repeatedly emphasized that the Board's "cease and desist letters" had the tendency and effect of excluding competition *because* they were official communications from the State (not just private complaints from competitors). *See* Pet.App. 107a, 112a-113a, 128a-129a. More importantly, the State also subjects the Board to the usual litany of weighty responsibilities imposed on administrative agencies, such as requirements about procedures, ethics, and oversight, as well as judicial review of the Board's enforcement actions. *Supra* at 6-7. These obligations underscore that the State has done nothing remotely like slapping a formal public label on conduct that in substance remains "essentially a private [anticompetitive] arrangement." *See Midcal*, 445 U.S. at 106. Accordingly, "there is no need to require the State to supervise actively [this public entity's] execution of what is a properly delegated function," *see Hallie*, 471 U.S. at 46-47, because "state administrative review" is not "a federal antitrust job," *see Omni*, 499 U.S. at 372.

3. The Regulatory Acts Of A State Agency's Officials Retain Their Public Character Even When Those Officials Also Have Private Interests As Market Participants

It is entirely improper to equate a state agency's official enforcement of state law with mere private action based simply on the fact that the agency's public officials are also market participants. As discussed above, this Court has disavowed any notion that "governmental *regulatory* action may be deemed private … when it is taken pursuant to a conspiracy with private parties." *Omni*, 499 U.S. at 375. That decision squarely forecloses deeming the official actions of a state agency to be "private" conduct that must be actively supervised by another state entity just because the agency's officials are also market participants who may have an interest to "conspire" among themselves or with others.

Omni does not "allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" *Id.* at 379. Yet the FTC's merits claim here is precisely that the Board's members "conspired" to exclude competition by agreeing to enforce against non-dentist teeth whiteners the anticompetitive state prohibition on the unlicensed practice of dentistry. *See* Pet.App. 93a-104a, 112a-114a. Again, *Omni* held that "[t]here is no such conspiracy exception," *see* 499 U.S. at 374, because federal antitrust enforcers have no business second-guessing whether "governmental actions" are "'not in the public interest' or [are] in some sense 'corrupt,'" *see id.* at 375-77.

In this regard, *Parker* itself is factually on all fours. As *Omni* explained, that seminal case granted

immunity with full awareness that "[t]he California marketing scheme … [could] readily be viewed as the result of a 'conspiracy' to put the 'private' interest of the State's raisin growers above the 'public' interest of the State's consumers." *Id.* at 377. In fact, a super-majority of the Commission that approved the program in *Parker* were themselves also producers of agricultural commodities. *Supra* at 21-22. Yet, rather than treating the Commission's market-participant members as "private" "conspirators" who needed to be actively supervised by other state actors, *Parker* held that "the state [was] acting through the Commission" and that its members were "officers" who could not be "restrain[ed] … from activities directed by its legislature." *See* 317 U.S. at 350-51, 352; *see also Filarsky*, 132 S. Ct. at 1663 ("[T]he common law did not draw a distinction between public servants and private individuals engaged in public service in according protection to those carrying out government responsibilities.").

Indeed, *Omni* rejected a proposed "conspiracy exception" to state-action immunity where the "anticompetitive agreement" alleged was outright "bribery," because federal antitrust law "is not directed to th[e] end" of "vindicat[ing] … good government." *See* 499 U.S. at 367, 378-79. Given that even the direct financial benefit of bribes for their regulatory actions did not justify treating the City Council members in *Omni* as "private" actors who were disentitled to state-action immunity, there is no legitimate basis for treating in that manner public officials like the Board's members here just because their regulatory actions may also indirectly benefit them as market participants.

II. THE FTC AND THE FOURTH CIRCUIT EMPLOYED AN ERRONEOUS RATIONALE FOR REQUIRING ACTIVE SUPERVISION OF STATE AGENCIES WHOSE OFFICIALS ARE ALSO MARKET PARTICIPANTS

The FTC and the Fourth Circuit failed to recognize that the official enforcement of a clearly articulated anticompetitive state policy by a *bona fide* public actor legally retains its public character—and thus retains its state-action immunity—even where a majority of the public officials also may have private interests. In adopting a contrary rule, the tribunals below relied on a novel and radical rationale: (1) they started from the premise that the function of the active-supervision standard is to address the "danger" that the entity engaged in anti-competitive conduct is "acting to further [its] own interests, rather than the governmental interests of the State"; and (2) they then reached the conclusion that active supervision is required where a state agency is not "sufficiently independent from the interests of those being regulated." *See* Pet.App. 48a-50a; *see also id.* 14a-15a.

This two-step theory—in essence, a "risk of self-interest" rationale—is fundamentally flawed. In both its premise and its conclusion, the rationale is directly refuted by this Court's precedents. Nor do the decisions of this Court that were cited by the FTC and the Fourth Circuit even arguably suggest otherwise. As for the academic authorities that the tribunals below invoked as support on this question, they are neither well reasoned nor well accepted.

A. This Court's State-Action Jurisprudence Forecloses The "Risk Of Self-Interest" Rationale

The rationale's premise is wrong, because the active-supervision standard simply has nothing to do with the "danger" that the State's anticompetitive interests are not being furthered. The rationale's conclusion is wrong as well, because antitrust immunity never depends on the State's officials being "sufficiently independent" from private actors. And, as a result of these errors, the rationale also contravenes core principles of federalism.

1. To begin with, the premise of the "risk of self-interest" rationale misunderstands the distinct roles that this Court has assigned to the clear-articulation and active-supervision standards. Proving that a state agency is enforcing a clear state policy to displace competition is sufficient assurance for purposes of federal antitrust law that the agency's officials who are market participants are furthering the State's interests. Additionally requiring active supervision is neither necessary nor proper to deal with the alleged "danger" of self-interest.

First, given the clear-articulation standard, States cannot "inadvertently authoriz[e] anti-competitive conduct" by agencies with market-participant officials, because "the displacement of competition [must be] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *See Phoebe Putney*, 133 S. Ct. at 1013, 1016. Thus, where that standard is satisfied, the public interests of the State and any private interests of its market-participant officials are *both anticompetitive* and *presumptively aligned*.

For example, in *Parker*, California and the super-majority of agricultural producers on the Commission shared the same interest in "maintain[ing] prices" in agricultural commodities. *See supra* at 21-22. Similarly, here, North Carolina and the Board's practicing dentists share the same interest in ensuring that "only qualified persons be permitted to practice dentistry." N.C. Gen. Stat. § 90-22(a). As these examples illustrate, in the ordinary case where the clear-articulation standard is satisfied—*e.g.*, a depressed agricultural market in *Parker* or an incompetent dentist in North Carolina—anticompetitive regulatory action will further both the State's interests and the private interests of the State's officials who are market participants. It thus would be a gratuitous burden to require active supervision, as well as a nonsensical penalty to deny immunity absent such supervision.

Second, while it is conceivable that officials who are also market participants could have incentives to *over-enforce* their States' anticompetitive policies, the States are fully equipped to handle that concern themselves through, among other things, "state administrative review." *See Omni*, 499 U.S. at 371-72. It is not "a federal antitrust job" to sanction the States' officers for acting in a manner that is "substantively or … procedurally defective" under state law. *Id.*

For example, in *Omni*, there was certainly a danger that the City Council members who were allegedly being bribed to enact a zoning ordinance had not complied with all the relevant conditions of the state-law authorization to enact such anti-competitive restraints. *See id.* at 367, 371. Yet this

Court nevertheless granted federal antitrust immunity and held that it is up to the States to police their own subordinates for compliance with the particulars of their anticompetitive laws. *See id.* at 371-72, 378-79. Likewise, here, any concern about the specific manner in which the Board enforced the statutory ban on the unlicensed practice of dentistry can be raised before North Carolina's courts or with the State's political branches that perform oversight of the Board. *Supra* at 6-7.

Third, rather than redundantly "protecting" the State from unintended or excessive anticompetitive conduct, the distinct role of the active-supervision standard is "to prevent a State" from intentionally authorizing private parties to violate federal law under "a gauzy cloak of state involvement." *See Hallie*, 471 U.S. at 46-47; *accord S. Motor Carriers*, 471 U.S. at 57. In other words, the "danger" that *Hallie* and other cases analyzed was not whether "state policy" is being flouted by the persons purporting to enforce it, but rather whether the only "state policy" that exists is merely to allow private actors to violate federal law. *See Hallie*, 471 U.S. at 46-47; *accord Midcal*, 445 U.S. at 105-06. That danger simply is not present where, as here, a *bona fide* state agency is enforcing an anticompetitive regulatory regime. *Supra* at 36-38.

In sum, the premise of the "risk of self-interest" rationale is wholly mistaken. The active-supervision standard is not designed to address an alleged "danger" of self-interested actors deviating from the State's interests. That concern is instead the domain of the clear-articulation standard and state administrative law.

2. In addition, the conclusion of the "risk of self-interest" rationale is irreconcilable with *Omni's* rejection of a "conspiracy exception." Deciding if public officials are "sufficiently independent" from private actors is foreclosed both by *Omni's* holding and by its reasoning.

First, *Omni* held that it is improper for "governmental *regulatory* action [to] be deemed private … when it is taken pursuant to a conspiracy with private parties." *See* 499 U.S. at 374-75. By its plain terms, that unqualified holding bars any attempt to deem a state agency's enforcement actions to be "private" conduct that must be actively supervised based on supposition that the agency's officials are "not sufficiently independent" due to a "conspiracy" on behalf of market participants.

Omni's facts confirm this conclusion. The City Council members there, far from being "sufficiently independent" from regulated private interests, were allegedly being bribed by a private monopolist in a "conspiracy" to enact favorable zoning ordinances. *See id.* at 367. Yet this Court nevertheless granted immunity, as they were still public officials enforcing a clearly articulated state policy to displace competition. *See id.* at 370-374, 378-79.

Second, *Omni* reasoned in part that this Court "ha[s] consistently sought to avoid" "deconstruction of the governmental process and probing of the official 'intent'" that underlies public conduct. *Id.* at 377, 379. As *Omni* observed, *Parker* and its progeny provide that, "[w]here the action complained of … [is] that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." *Id.* at 377-78 (quoting *Hoover*,

466 U.S. at 579-80). *Omni* confirmed that motives are likewise irrelevant for the non-sovereign public officials who enforce the State's clearly articulated anticompetitive policies. *See id.* at 373-74, 379; *see also City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411 n.41 (1978) (plurality opinion) ("We think it obvious that the fact that the ancillary effect of [a state agency's] policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated, cannot transmute the [agency]'s official actions into those of a private organization.").

This unqualified reasoning forecloses imposition of the active-supervision standard on a state agency based on the theory that the agency's "insufficient independence" gives rise to the risk of conflicts of interest. Again, this Court in *Omni* "reaffirm[ed] [its] rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns to base their claims on 'perceived conspiracies to restrain trade.'" 499 U.S. at 379 (quoting *Hoover*, 466 U.S. at 580).

Third, *Omni* also reasoned in part that it would be "impractical" to determine whether a so-called "conspiracy" was "'not in the public interest,'" because "[f]ew governmental actions are immune from th[at] charge." *Id.* at 377. Yet it likewise would be "impractical" to assess the alleged "danger" that a state agency is "insufficiently independent" from regulated interests, because that rationale could extend to *all* agencies.

There is no principled basis for cabining the rationale to agencies like the Board with part-time officials who are also current market participants,

because there are myriad other ways that state regulators may be biased towards, or otherwise not independent from, regulated interests. For starters, even full-time officials are well aware that they can potentially benefit from their regulatory actions as *future* market participants. "[M]any people move between government regulatory positions, private industry, and private law firm jobs," so regulators often have "a significant and direct, albeit not immediate, interest in the work they do." *See* Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 Harv. J.L. & Pub. Pol'y 203, 252 (2000); *see also* Pet.App. 96a (FTC itself stressing that antitrust law extends to conspiracies between "potential competitors"). Furthermore, wholly apart from personal financial self-interest, the actions of regulators are hardly independent of regulated interests. To take one well-known example, public-choice theorists have long maintained that agencies are vulnerable to "regulatory capture" by special interests. *See, e.g.*, John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 Harv. L. Rev. 713, 723-26 (1986).

Accordingly, it is "impractical" to condition federal antitrust immunity on the "vague line[ ]" whether a state agency is sufficiently independent of regulated interests, because that line is not susceptible to judicially administrable (or even theoretically coherent) application. *See Omni*, 499 U.S. at 377. Instead, an "insufficient independence" inquiry would expose *every* state agency to an "*ex post facto*" assessment of its regulatory motives, and thus would "go[ ] far 'to compromise the States' ability to regulate their domestic commerce.'" *See id.* (quoting *S. Motor Carriers*, 471 U.S. at 56).

In sum, the conclusion of the "risk of self-interest" rationale is also wholly mistaken. *Omni's* holding, facts, and reasoning all repudiate the proposition that public officials must be "sufficiently independent" from regulated private interests in order to be immune from federal antitrust scrutiny.

3. Lastly, given the points made above, the "risk of self-interest" rationale is also a gross affront to federalism. At every turn, it unjustifiably denigrates "the States' arrangements for conducting their own governments." *See Nixon*, 541 U.S. at 140.

First, the rationale improperly questions the sovereign decision that the benefits of expert regulators outweigh the costs of actual or potential conflicts of interest. *See Gregory*, 501 U.S. at 460 ("It is obviously essential to the independence of the States" that they retain "their power to prescribe the qualifications of their own officers."); *Omni*, 499 U.S. at 378-79 (Federal antitrust law "is not directed to th[e] end" of "vindicat[ing]" alleged "principles of good government.").

Second, the rationale improperly questions the sovereign decision as to the nature and amount of oversight needed to address any risk of conflicts of interest. *See Ours Garage*, 536 U.S. at 437 (The States' choices concerning which of their "agencies … may be entrusted" with "exercising [which] of [their] governmental powers" is "central to state self-government."); *Omni*, 499 U.S. at 372 ("[S]tate administrative review" is not "a federal antitrust job.").

Third, adding insult to injury, the rationale improperly questions the integrity of State officials who have sworn an oath of allegiance to the State.

See Withrow v. Larkin, 421 U.S. 35, 55 (1975) ("[S]tate administrators 'are assumed to be men of conscience and intellectual discipline, capable of judging a particular controversy fairly on the basis of its own circumstances.'" (quoting *United States v. Morgan*, 313 U.S. 409, 421 (1941))); *Omni*, 499 U.S. at 377 (This Court "ha[s] consistently sought to avoid" "deconstruction of the governmental process and probing of the official 'intent'" that underlies public conduct.).

In sum, "a State defines itself as a sovereign" "[t]hrough … the character of those who exercise government authority" and "the structure of its government." *Gregory*, 501 U.S. at 460. By maligning how the States have chosen to define themselves, the FTC disrespects "the dignity … of sovereignty" retained by the States. *See Alden*, 527 U.S. at 715.

B. No Decision Of This Court Supports The "Risk Of Self-Interest" Rationale

Apart from misunderstanding the type of "danger" that was assessed in *Hallie* (and other cases), the FTC and the Fourth Circuit principally relied on two decisions from this Court as support for their position: *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), and *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992). *See* Pet.App. 14a-15a, 48a-51a. Neither case is apposite.

1. As for *Goldfarb*, although that case denied state-action immunity to a state agency whose officials were also market participants, it did not suggest in any way that the composition of such agencies required them to be actively supervised in order to obtain immunity. Rather, *Goldfarb* held

that the State Bar had not satisfied the "threshold inquiry … whether the activity [was] required by the State acting as sovereign," "because it [could not] fairly be said that the State of Virginia through its Supreme Court Rules required [the Bar's] anti-competitive activities." *See* 421 U.S. at 790. In other words, the 1975 decision in *Goldfarb* was applying what the 1980 decision in *Midcal* would later denominate the clear-articulation standard. *See S. Motor Carriers*, 471 U.S. at 60-61 (describing *Goldfarb* as a case where "Virginia 'as sovereign' did not have a 'clearly articulated policy' designed to displace price competition among lawyers"); *see also Phoebe Putney*, 133 S. Ct. at 1016; *Midcal*, 445 U.S. at 104-05.

Accordingly, the FTC and the Fourth Circuit entirely misconstrued the import of *Goldfarb's* statement 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." *See* 421 U.S. at 791. That statement simply meant that "a State Bar, *acting alone*, could not immunize … anticompetitive conduct," because "the State 'acting as sovereign' [must] intend[ ] to displace competition." *See S. Motor Carriers*, 471 U.S. at 60. The statement cannot properly be interpreted to mean—in conflict with *Parker* itself—that a state agency whose officers are also market participants must be actively supervised even when it is enforcing a clearly articulated anticompetitive state policy.

To be sure, *Goldfarb* did observe that "there [was] no indication in th[e] record that the Virginia

Supreme Court approve[d]" the State Bar's ethical opinions. *See* 421 U.S. at 791. But that observation just mooted any possible argument that *ex post* supervision of the agency by the sovereign might have been *sufficient* to cure the absence of *ex ante* articulation by the sovereign. *See id.*; *see also Hoover*, 466 U.S. at 572-73. Again, the observation cannot properly be interpreted to imply that *ex post* supervision of the agency is *necessary* even where *ex ante* articulation is already present.

2. As for *Ticor*, that case did not involve the acts of a state agency at all. Rather, the defendants there were "private entities organized by title insurance companies to establish uniform rates for their members." 504 U.S. at 628.

Accordingly, the FTC and the Fourth Circuit entirely misconstrued the import of *Ticor's* statement that "the purpose of the active supervision inquiry … is to determine whether the State has exercised 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." *See id.* at 634-35. That statement was just a reaffirmation of the settled distinction that "a State may not confer antitrust immunity on private persons by fiat," but may incorporate their conduct into "the State's own" "anticompetitive scheme." *See id.* at 633, 635 (citing *Midcal* and *Patrick*). The statement cannot properly be interpreted to sanction an unprecedented inquiry into whether "the State's own" officers are "sufficiently independent" from regulated interests. To the contrary, the very same passage in *Ticor* admonished that "the purpose of the

active supervision inquiry is not to determine whether the State has met some normative standard … in its regulatory practices." *See id.* at 634; *accord Omni*, 499 U.S. at 378-79 (federal antitrust law "is not directed to th[e] end" of "vindicat[ing]" alleged "principles of good government").

The private-actor context of *Ticor* likewise explains its conclusion that "principles of federalism" warranted a rigorous application of the active-supervision standard. *See* 504 U.S. at 635-37. This Court observed that "essential national policies [may be] displaced by state regulations" only where the State assumes "political responsibility" by making the anticompetitive conduct its own. *See id.* at 636. And this Court further recognized that the clear-articulation standard alone cannot prevent an "intended state policy" that delegates displacement of competition to private actors, thereby "obscur[ing]" political responsibility. *See id.* at 636-37. But none of this reasoning has any application where, as here, the State's "political responsibility" is unmistakable because the conduct of a *bona fide* state agency is challenged and, in fact, the whole reason that the agency's conduct had an anticompetitive effect is that it carried the State's official imprimatur. *Supra* at 38.[2]

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[2] The State's self-evident "political responsibility" in this context is underscored by this Court's later decision in *Phoebe Putney*, which rejected the sort of "loose application of the clear-articulation test" that might have caused past concerns that satisfaction of that test "shows little more than that the State has not acted through inadvertence." *Compare Phoebe Putney*, 133 S. Ct. at 1012-13, 1016, *with Ticor*, 504 U.S. at 636.

C. The Academic Support For The "Risk Of Self-Interest" Rationale Is Both Limited And Unpersuasive

Lacking any real support in this Court's cases, the FTC and the Fourth Circuit also highlighted two academic sources, which offer similar proposals that the actions of public decisionmakers who are also financially interested market participants should not be immune from federal antitrust review. *See* Pet.App. 14a, 52a (citing Areeda & Hovenkamp, *supra*, ¶ 227b, and Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667 (1991)). But these particular academic proposals conflict with this Court's precedents and lack widespread approval among scholars.

1. Most importantly, neither the Areeda and Hovenkamp treatise nor Professor Elhauge's article make any serious effort to square their positions on this issue with this Court's contrary cases. These academics have no answer to either *Parker* or *Omni*, each of which granted immunity notwithstanding the unquestionable financial self-interest of the public officials involved.

As for the Areeda and Hovenkamp treatise, the proposal there does not even purport to be consistent with this Court's precedents. Instead, the treatise offers a thinly reasoned policy "[r]ecommendation[ ]" that makes no effort to reconcile itself with existing doctrine. *See* Areeda & Hovenkamp, *supra*, ¶ 227b, at 208-09.

As for Professor Elhauge's article, the proposal there does claim to be advancing a "descriptive thesis" that the "implicit process view" underlying this Court's "antitrust case law" is that only

"financially disinterested" decisionmakers are entitled to immunity. *See* Elhauge, *supra* at 671-72. But the article simply overlooks the market-participant composition of the Commission in *Parker*. *See id.* at 721 & n.266. Moreover, the article was written while the *Omni* case was still pending in this Court, and the article urged that a "co-conspiracy exception" should be recognized if (but only if) a public official "ha[d] a financial interest in the action," which would "clearly" include cases where the official "[a]ccepts a bribe." *See id.* at 704-06 & n.185. Instead, of course, *Omni* rejected even that narrow version of the "conspiracy exception," and it did so with full awareness of Elhauge's article (which it cited as support when rejecting broader versions of the conspiracy exception). *See* 499 U.S. at 375, 378-79.

Indeed, in a later article, Professor Elhauge conceded that *Omni's* refusal to recognize a "bribery" exception "may represent a departure from [his] functional process approach," but he tried to revive his theory by asserting that *Omni's* "statements [about bribery] were dicta." *See* Einer Elhauge, *Making Sense of Antitrust Petitioning Immunity*, 80 Cal. L. Rev. 1177, 1244-45 (1992). Yet that assertion is directly contradicted by this Court's description of the facts alleged in *Omni*, which involved a *quid pro quo* "agreement" under which City Council members received campaign contributions "in return for" protecting their co-conspirator's monopoly. *See* 499 U.S. at 367.

Accordingly, other scholars have recognized that *Omni* rejects the "financial disinterest" theory that underlies the proposals in both Professor Elhauge's

article and the Areeda and Hovenkamp treatise. For example, one such critique pointedly observes that "[t]he ample evidence of financial collusion between Omni and the City provides further reason to reject Professor Elhauge's view," because "[t]o call the municipal legislators in *Omni* 'disinterested' would be to deprive the word of any meaning at all," yet "that is precisely what Professor Elhauge concludes." *See* David Mcgowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning, and the First Amendment*, 17 Harv. J.L. & Pub. Pol'y 293, 340 (1994); *see also* C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. Rev. 1059, 1135 (2000) (noting that, "in *Omni*," this Court "appears to have rejected the[ ] approach[ ]" in Professor Elhauge's article that would deny immunity to "state agencies if they were determined … to have been 'financially interested' in the result" of their actions).

2. Even apart from the conflict with this Court's precedent, the "financial disinterest" theory that underlies the proposals in both Professor Elhauge's article and the Areeda and Hovenkamp treatise hardly represents a consensus academic view. Indeed, no such consensus exists.

Most specifically, Professor Lopatka, one of the leading scholars of the state-action antitrust doctrine, has expressly disagreed with the idea of requiring active supervision of public officials who are financially interested. Like the Board here, he has argued that it is "an internal matter for the state to resolve" whether to "choose[ ] to empower an agency" that "is apt to foster anticompetitive policies

that serve the financial interests of its members at the expense of the public." *See* Lopatka, *supra*, at 1028-29; *see also* Floyd, *supra*, at 1134-35 & n.364 (advocating that courts determine whether a given entity is a "public state agenc[y]" or a "private actor[ ]" based on a number of functional factors associated with traditional government agencies, rather than based solely on member composition). And Professor Lopatka likewise has argued that requiring active supervision of state agencies would impose significant costs (as it is "intrusi[ve]" and not "practic[al]"), yet would provide minimal benefits (given the clear-articulation standard). *See* Lopatka, *supra*, at 1002-05, 1040-41.

More generally, Judge Garland has criticized proposals to consider the influence of private actors on public action as inconsistent with the federalism underpinnings of the state-action antitrust doctrine. He has emphasized that the "revisionist" focus on "suspicions that regulatory programs have been captured by special interests" is incompatible with this Court's "effort to respect the results of the political process … at both the state and federal levels … by applying the state action doctrine to oust … only those state regulations … that seek to delegate to private parties the power to restrain market competition." *See* Merrick B. Garland, *Antitrust & State Action: Economic Efficiency and the Political Process*, 96 Yale L.J. 486, 487 (1987). Thus, like the Board here, he has observed that the active-supervision standard plays only the very narrow role of preventing improper delegation to nongovernmental actors: whereas "the 'clear articulation' requirement ensures that … the state does in fact intend to displace competition," "[t]he

supervision requirement ensures that[,] even where there is state authorization[,] such authorization constitutes … a scheme of state regulation" rather than "mere permission to violate the Sherman Act." *See id.* at 501; *accord* William H. Page & John E. Lopatka, *State Regulation in the Shadow of Antitrust: FTC v. Ticor Title Insurance Co.*, 3 Sup. Ct. Econ. Rev. 189, 212-13 (1993) ("The active supervision requirement … assures that the stated policy is not a disguise or sham," but it "is not imposed … to assure that private conduct is actually within the scope of the legislative authorization.").

Furthermore, Judge Easterbrook would expand the state-action doctrine by completely eliminating the active-supervision standard, thereby allowing States to delegate the power to restrain competition even to nongovernmental actors. He has reasoned that a State should be allowed to repeal federal antitrust law within its jurisdiction (so long as there are no extraterritorial effects), because that is more economically efficient than the "extensive command-and-control regulation" that the active-supervision standard encourages. *See* Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 29-33, 38, 45 (1983). Also urging that the state-action doctrine be expanded is Professor Floyd, who would allow "state agencies" to satisfy the clear-articulation standard by themselves "prescrib[ing] competition policy for the state as a whole under general delegations of authority from the state legislature." *See* Floyd, *supra*, at 1136.

In sum, as is often true, the academy "has hardly been of one voice" in analyzing this Court's state-action antitrust jurisprudence. *See id.* at 1060. And,

as is also often true, the academic commentary "has had little discernible impact on [this Court's] decisions." *See id.* at 1061.

Accordingly, rather than embarking down the new path that some academics have proposed, this Court should re-establish the judicial consensus that existed before the Fourth Circuit adopted the FTC's position in this case. Countless State agencies have been staffed and structured in reliance on cases like *Earles*, *Hass*, *Omni*, *Hallie*, and *Parker* itself; it would cause massive disruption to undo all that at this late date, as the Board's *amici* have explained and will explain further. Indeed, even some of the FTC's academic supporters admit that their position "would upset the balance between state and federal power struck in *Parker* and its progeny," and "alter the equilibrium of a complex system of regulation," by "put[ting] thousands of boards under the Sherman Act's microscope." *See* Edlin & Haw, *supra*, at 1136, 1144, 1154. Especially given the federalism concerns implicated, this Court instead should adhere to the well-settled state-action jurisprudence that has been developed over the course of 70 years.

III. IT IS IRRELEVANT THAT THE MARKET-PARTICIPANT OFFICIALS OF A STATE AGENCY ARE ELECTED TO OFFICE BY OTHER MARKET PARTICIPANTS

Finally, for the same reasons that it does not matter that a state agency's officials are market participants, it also does not matter that those officials are elected to office by other market participants. Indeed, while the Fourth Circuit at times emphasized the fact that the Board's dentist members were elected by the other practicing

dentists in North Carolina, *see* Pet.App. 16a-17a; *id.* 29a-31a (Keenan, J., concurring), the FTC itself only briefly referenced that fact, *see id.* 59a-60a, and did not treat the fact as essential to its decision, *see id.* 35a-36a, 58a, 68a, 81a. The particular method under state law for selecting market-participant officials is completely irrelevant under the state-action doctrine.

First, the scope of state-action immunity cannot properly turn on the method by which state officials are selected, because the federalism principles underlying the immunity require respecting the States' "power to prescribe the qualifications of [their] officers *and the manner in which they shall be chosen*." *See Gregory*, 501 U.S. at 460 (emphasis added). It is not lightly to be inferred that Congress intended to nullify the States' sovereign discretion to decide that "specialized knowledge [is] required to evaluate" (*California Dental*, 526 U.S. at 772) which particular market participants should be selected to serve as officers of an expert state agency. *See Parker*, 317 U.S. at 350.

Second, the fact that other market participants elected a State's market-participant officials does not affect the conclusion that an official state agency is no mere "gauzy cloak" created to shield those officials' "*private* [anticompetitive] arrangement[s]." *See Hallie*, 471 U.S. at 46-47. It remains the case that the enforcement of a clearly articulated anti-competitive state policy by a *bona fide* state regulatory agency charged with traditional state-law powers and duties is, by definition, "the State's own" regulatory conduct. *See Ticor*, 504 U.S. at 635.

Third, "governmental *regulatory* action may [not] be deemed private" simply because it "is taken

pursuant to a conspiracy" with, or on behalf of, the "private parties" that elected public officials. *See Omni*, 499 U.S. at 374-75. Federal antitrust law will not second-guess the "motives" or otherwise "look behind the actions" of public officials enforcing a clearly articulated anticompetitive state policy. *See id.* at 377-79. Ensuring that state officials' electoral accountability to market participants has not distorted their proper application of anticompetitive state policy remains the domain of "state administrative review." *See id.* at 371-72.

CONCLUSION

Accordingly, the Fourth Circuit's judgment should be reversed, and the Board's petition for review of the FTC's final order should be granted.

Respectfully submitted,

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APPENDIX

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15 U.S.C. § 1 provides:

§ 1 Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

15 U.S.C. § 45 provides:

§ 45 Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade

(1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.

(2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 57a(f)(3) of this title, Federal credit unions described in section 57a(f)(4) of this title, common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to part A of subtitle VII of Title 49, and persons, partnerships, or corporations insofar as

they are subject to the Packers and Stockyards Act, 1921, as amended [7 U.S.C.A. § 181 et seq.], except as provided in section 406(b) of said Act [7 U.S.C.A. § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

(3) This subsection shall not apply to unfair methods of competition involving commerce with foreign nations (other than import commerce) unless—

(A) such methods of competition have a direct, substantial, and reasonably foreseeable effect—

(i) on commerce which is not commerce with foreign nations, or on import commerce with foreign nations; or

(ii) on export commerce with foreign nations, of a person engaged in such commerce in the United States; and

(B) such effect gives rise to a claim under the provisions of this subsection, other than this paragraph.

If this subsection applies to such methods of competition only because of the operation of subparagraph (A)(ii), this subsection shall apply to such conduct only for injury to export business in the United States.

(4)(A) For purposes of subsection (a) of this section, the term "unfair or deceptive acts or practices" includes such acts or practices involving foreign commerce that—

(i) cause or are likely to cause reasonably foreseeable injury within the United States; or

(ii) involve material conduct occurring within the United States.

(B) All remedies available to the Commission with respect to unfair and deceptive acts or practices shall be available for acts and practices described in this paragraph, including restitution to domestic or foreign victims.

(b) Proceeding by Commission; modifying and setting aside orders

Whenever the Commission shall have reason to believe that any such person, partnership, or corporation has been or is using any unfair method of competition or unfair or deceptive act or practice in or affecting commerce, and if it shall appear to the Commission that a proceeding by it in respect thereof would be to the interest of the public, it shall issue and serve upon such person, partnership, or corporation a complaint stating its charges in that respect and containing a notice of a hearing upon a day and at a place therein fixed at least thirty days after the service of said complaint. The person, partnership, or corporation so complained of shall have the right to appear at the place and time so fixed and show cause why an order should not be entered by the Commission requiring such person, partnership, or corporation to cease and desist from the violation of the law so charged in said complaint. Any person, partnership, or corporation may make application, and upon good cause shown may be allowed by the Commission to intervene and appear in said proceeding by counsel or in person. The testimony in any such proceeding shall be reduced to writing and filed in the office of the Commission. If upon such hearing the Commission shall be of the

opinion that the method of competition or the act or practice in question is prohibited by this subchapter, it shall make a report in writing in which it shall state its findings as to the facts and shall issue and cause to be served on such person, partnership, or corporation an order requiring such person, partnership, or corporation to cease and desist from using such method of competition or such act or practice. Until the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, or, if a petition for review has been filed within such time then until the record in the proceeding has been filed in a court of appeals of the United States, as hereinafter provided, the Commission may at any time, upon such notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any report or any order made or issued by it under this section. After the expiration of the time allowed for filing a petition for review, if no such petition has been duly filed within such time, the Commission may at any time, after notice and opportunity for hearing, reopen and alter, modify, or set aside, in whole or in part, any report or order made or issued by it under this section, whenever in the opinion of the Commission conditions of fact or of law have so changed as to require such action or if the public interest shall so require, except that (1) the said person, partnership, or corporation may, within sixty days after service upon him or it of said report or order entered after such a reopening, obtain a review thereof in the appropriate court of appeals of the United States, in the manner provided in subsection (c) of this section; and (2) in the case of an order, the Commission shall reopen any such order to consider whether such order

(including any affirmative relief provision contained in such order) should be altered, modified, or set aside, in whole or in part, if the person, partnership, or corporation involved files a request with the Commission which makes a satisfactory showing that changed conditions of law or fact require such order to be altered, modified, or set aside, in whole or in part. The Commission shall determine whether to alter, modify, or set aside any order of the Commission in response to a request made by a person, partnership, or corporation under paragraph[1] (2) not later than 120 days after the date of the filing of such request.

(c) Review of order; rehearing

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein

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[1] So in original. Probably should be "clause".

concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

* * *

N.C. Gen. Stat. § 11-7 provides:

§ 11-7. Oath or affirmation to support Constitutional all officers to take

Every member of the General Assembly and every person elected or appointed to hold any office of trust or profit in the State shall before taking office or entering upon the execution of the office, take and subscribe the following oath:

"I, ...,do solemnly and sincerely swear that I will support the Constitution of the United States; that I will be faithful and bear true allegiance to the State of the North Carolina, and to the constitutional powers and authorities which are or may be established for the government thereof; and that I will endeavor to support, maintain and defend the Constitution of said State, not inconsistent with the Constitution of the United States, to the best of my knowledge and ability; so help me God."

N.C. Gen. Stat. § 90-22 provides:

§ 90-22 Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board

(a) The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the

State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist of six dentists who are licensed to practice dentistry in North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene. The dental hygienist or the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the

Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled by a majority vote of the remaining members of the Board to serve until the next regular election conducted by the Board, at which time the vacancy will be filled by the election process provided for in this Article, except that when the seat on the Board held by a person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental hygiene in North Carolina and is currently employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

(c) Nominations and elections of members of the North Carolina State Board of Dental Examiners shall be as follows:

(1) An election shall be held each year to elect successors to those members whose terms are expiring in the year of the election, each successor to take office on the first day of August following the election and to hold office for a term of three years and until his successor has been elected and shall qualify; provided that if in any year the election of the members of such Board for that year shall not have been completed by August 1 of that year, then the said members elected that year shall take office immediately after the completion of the election and shall hold office until the first of August of the third year thereafter and until their successors are elected and qualified. Persons appointed to the Board by the Governor shall take office on the first day of August following their appointment and shall hold office for a term of three years and until such person's successor has been appointed and shall qualify; provided that if in any year the Governor shall not have appointed a person by August first of that year, then the said member appointed that year shall take office immediately after his appointment and shall hold office until the first of August of the third year thereafter and until such member's successor is appointed and qualified.

(2) Every dentist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dentists to the Board. Every dental hygienist with a current North Carolina license residing or practicing in North Carolina shall be eligible to vote in elections of dental hygienists to the Board. The holding of such a license to practice dentistry or dental hygiene in North Carolina shall constitute registration to vote in such elections. The list of licensed dentists and dental

hygienists shall constitute the registration list for elections to the appropriate seats on the Board.

(3) All elections shall be conducted by the Board of Dental Examiners which is hereby constituted a Board of Dental Elections. If a member of the Board of Dental Examiners whose position is to be filled at any election is nominated to succeed himself, and does not withdraw his name, he shall be disqualified to serve as a member of the Board of Dental Elections for that election and the remaining members of the Board of Dental Elections shall proceed and function without his participation.

(4) Nomination of dentists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dentists licensed to practice in North Carolina and residing or practicing in North Carolina. Nomination of dental hygienists for election shall be made to the Board of Dental Elections by a written petition signed by not less than 10 dental hygienists licensed to practice in North Carolina and residing or practicing in North Carolina. Such petitions shall be filed with said Board of Dental Elections subsequent to January 1 of the year in which the election is to be held and not later than midnight of the twentieth day of May of such year, or not later than such earlier date (not before April 1) as may be set by the Board of Dental Elections: provided, that not less than 10 days' notice of such earlier date shall be given to all dentists or dental hygienists qualified to sign a petition of nomination. The Board of Dental Elections shall, before preparing ballots, notify all persons who have been duly nominated of their nomination.

(5) Any person who is nominated as provided in subdivision (4) above may withdraw his name by written notice delivered to the Board of Dental Elections or its designated secretary at any time prior to the closing of the polls in any election.

(6) Following the close of nominations, there shall be prepared, under and in accordance with such rules and regulations as the Board of Dental Elections shall prescribe, ballots containing, in alphabetical order, the names of all nominees; and each ballot shall have such method of identification, and such instructions and requirements printed thereon, as shall be prescribed by the Board of Dental Elections. At such time as may be fixed by the Board of Dental Elections a ballot and a return official envelope addressed to said Board shall be mailed to each person entitled to vote in the election being conducted, together with a notice by said Board designating the latest day and hour for return mailing and containing such other items as such Board may see fit to include. The said envelope shall bear a serial number and shall have printed on the left portion of its face the following:

"Serial No. of Envelope.....

Signature of Voter .....

Address of Voter .....

(Note: The enclosed ballot is not valid unless the signature of the voter is on this envelope)."

The Board of Dental Elections may cause to be printed or stamped or written on said envelope such additional notice as it may see fit to give. No ballot shall be valid or shall be counted in an election

unless, within the time hereinafter provided, it has been delivered to said Board by hand or by mail and shall be sealed. The said Board by rule may make provision for replacement of lost or destroyed envelopes or ballots upon making proper provisions to safeguard against abuse.

(7) The date and hour fixed by the Board of Dental Elections as the latest time for delivery by hand or mailing of said return ballots shall be not earlier than the tenth day following the mailing of the envelopes and ballots to the voters.

(8) The said ballots shall be canvassed by the Board of Dental Elections beginning at noon on a day and at a place set by said Board and announced by it in the notice accompanying the sending out of the ballots and envelopes, said date to be not later than four days after the date fixed by the Board for the closing of the balloting. The canvassing shall be made publicly and any licensed dentists may be present. The counting of ballots shall be conducted as follows: The envelopes shall be displayed to the persons present and an opportunity shall be given to any person present to challenge the qualification of the voter whose signature appears on the envelope or to challenge the validity of the envelope. Any envelope (with enclosed ballot) challenged shall be set aside, and the challenge shall be heard later or at that time by said Board. After the envelopes have been so exhibited, those not challenged shall be opened and the ballots extracted therefrom, insofar as practicable without showing the marking on the ballots, and there shall be a final and complete separation of each envelope and its enclosed ballot. Thereafter each ballot shall be presented for

counting, shall be displayed and, if not challenged, shall be counted. No ballot shall be valid if it is marked for more nominees than there are positions to be filled in that election: provided, that no ballot shall be rejected for any technical error unless it is impossible to determine the voter's choices or choice from the ballot. The counting of the ballots shall be continued until completed. During the counting, challenge may be made to any ballot on the grounds only of defects appearing on the face of the ballot. The said Board may decide the challenge immediately when it is made or it may put aside the ballot and determine the challenge upon the conclusion of the counting of the ballots.

(9)a. Where there is more than one nominee eligible for election to a single seat:

1. The nominee receiving a majority of the votes cast shall be declared elected.

2. In the event that no nominee receives a majority, a second election shall be conducted between the two nominees who receive the highest number of votes.

b. Where there are more than two nominees eligible for election to either of two seats at issue in the same election:

1. A majority shall be any excess of the sum ascertained by dividing the total number of votes cast for all nominees by four.

2. In the event that more than two nominees receive a majority of the votes cast, the two receiving the highest number of votes shall be declared elected.

3. In the event that only one of the nominees receives a majority, he shall be declared elected and

the Board of Dental Examiners shall thereupon order a second election to be conducted between the two nominees receiving the next to highest number of votes.

4. In the event that no nominee receives a majority, a second election shall be conducted between the four candidates receiving the highest number of votes. At such second election, the two nominees receiving the highest number of votes shall be declared elected.

c. In any election, if there is a tie between candidates, the tie shall be resolved by the vote of the Board of Dental Examiners, provided that if a member of that Board is one of the candidates in the tie, he may not participate in such vote.

(10) In the event there shall be required a second election, there shall be followed the same procedure as outlined in the paragraphs above subject to the same limitations and requirements: provided, that if the second election is between four candidates, then the two receiving the highest number of votes shall be declared elected.

(11) In the case of the death or withdrawal of a candidate prior to the closing of the polls in any election, he shall be eliminated from the contest and any votes cast for him shall be disregarded. If, at any time after the closing of the period for nominations because of lack of plural or proper nominations or death, or withdrawal, or disqualification or any other reason, there shall be (i) only two candidates for two positions, they shall be declared elected by the Board of Dental Elections, or (ii) only one candidate for one position, he shall be declared elected by the Board of Dental Elections, or (iii) no candidate for two

positions, the two positions shall be filled by the Board of Dental Examiners, or (iv) no candidate for one position, the position shall be filled by the Board of Dental Examiners, or (v) one candidate for two positions, the one candidate shall be declared elected by the Board of Dental Elections and one qualified dentist shall be elected to the other position by the Board of Dental Examiners. In the event of the death or withdrawal of a candidate after election but before taking office, the position to which he was elected shall be filled by the Board of Dental Examiners. In the event of the death or resignation of a member of the Board of Dental Examiners, after taking office, his position shall be filled for the unexpired term by the Board of Dental Examiners.

(12) An official list of licensed dentists shall be kept at an office of the Board of Dental Elections and shall be open to the inspection of any person at all times. Copies may be made by any licensed dentist. As soon as the voting in any election begins a list of the licensed dentists shall be posted in such office of said Board and indication by mark or otherwise shall be made on that list to show whether a ballot-enclosing envelope has been returned

(13) All envelopes enclosing ballots and all ballots shall be preserved and held separately by the Board of Dental Elections for a period of six months following the close of an election.

(14) From any decision of the Board of Dental Elections relative to the conduct of such elections, appeal may be taken to the courts in the manner otherwise provided by Chapter 150B of the General Statutes of North Carolina.

(15) The Board of Dental Elections is authorized to make rules and regulations relative to the conduct of these elections, provided same are not in conflict with the provisions of this section and provided that notice shall be given to all licensed dentists residing in North Carolina.

(d) For service on the Board of Dental Elections, the members of such Board shall receive the per diem compensation and expenses allowed by this Article for service as members of the Board of Dental Examiners. The Board of Dental Elections is authorized and empowered to expend from funds collected under the provisions of this Article such sum or sums as it may determine necessary in the performance of its duties as a Board of Dental Elections, said expenditures to be in addition to the authorization contained in G.S. 90-43 and to be disbursed as provided therein.

(e) The Board of Dental Elections is authorized to appoint such secretary or secretaries and/or assistant secretary or assistant secretaries to perform such functions in connection with such nominations and elections as said Board shall determine, provided that any protestant or contestant shall have the right to a hearing by said Board in connection with any challenge of a voter, or an envelope, or a ballot or the counting of an election. Said Board is authorized to designate an office or offices for the keeping of lists of registered dentists, for the issuance and the receipt of envelopes and ballots.

N.C. Gen. Stat. § 90-27 provides:

§ 90-27 Judicial powers; additional data for records

The president of the North Carolina State Board of Dental Examiners, and/or the secretary-treasurer of said Board, shall have the power to administer oaths, issue subpoenas requiring the attendance of persons and the production of papers and records before said Board in any hearing, investigation or proceeding conducted by it. The sheriff or other proper official of any county of the State shall serve the process issued by said president or secretary-treasurer of said Board pursuant to its requirements and in the same manner as process issued by any court of record. The said Board shall pay for the service of all process, such fees as are provided by law for the service of like process in other cases.

Any person who shall neglect or refuse to obey any subpoena requiring him to attend and testify before said Board or to produce books, records or documents shall be guilty of a Class 1 misdemeanor.

The Board shall have the power, upon the production of any papers, records or data, to authorize certified copies thereof to be substituted in the permanent record of the matter in which such books, records or data shall have been introduced in evidence.

N.C. Gen. Stat. § 90-29 provides:

§ 90-29 Necessity for license; dentistry defined; exemptions

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so,

unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.

(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

(1) Diagnoses, treats, operates, or prescribes for any disease, disorder, pain, deformity, injury, deficiency, defect, or other physical condition of the human teeth, gums, alveolar process, jaws, maxilla, mandible, or adjacent tissues or structures of the oral cavity;

(2) Removes stains, accretions or deposits from the human teeth;

(3) Extracts a human tooth or teeth;

(4) Performs any phase of any operation relative or incident to the replacement or restoration of all or a part of a human tooth or teeth with any artificial substance, material or device;

(5) Corrects the malposition or malformation of the human teeth;

(6) Administers an anesthetic of any kind in the treatment of dental or oral diseases or physical conditions, or in preparation for or incident to any operation within the oral cavity; provided, however, that this subsection shall not apply to a lawfully qualified nurse anesthetist who administers such anesthetic under the supervision and direction of a licensed dentist or physician;

(6a) Expired July 1, 1996.

(7) Takes or makes an impression of the human teeth, gums or jaws;

(8) Makes, builds, constructs, furnishes, processes, reproduces, repairs, adjusts, supplies or professionally places in the human mouth any prosthetic denture, bridge, appliance, corrective device, or other structure designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, except to the extent the same may lawfully be performed in accordance with the provisions of G.S. 90-29.1 and 90-29.2;

(9) Uses a Roentgen or X-ray machine or device for dental treatment or diagnostic purposes, or gives interpretations or readings of dental Roentgenograms or X rays;

(10) Performs or engages in any of the clinical practices included in the curricula of recognized dental schools or colleges;

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

(12) Uses, in connection with his name, any title or designation, such as "dentist," "dental surgeon," "doctor of dental surgery," "D.D.S.," "D.M.D.," or any other letters, words or descriptive matter which, in any manner, represents him as being a dentist able or qualified to do or perform any one or more of the acts or practices set forth in subdivisions (1) through (10) above;

(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

(c) The following acts, practices, or operations, however, shall not constitute the unlawful practice of dentistry:

(1) Any act by a duly licensed physician or surgeon performed in the practice of his profession;

(2) The practice of dentistry, in the discharge of their official duties, by dentists in any branch of the Armed Forces of the United States or in the full-time employ of any agency of the United States;

(3) The teaching or practice of dentistry, in dental schools or colleges operated and conducted in this State and approved by the North Carolina State Board of Dental Examiners, by any person or persons licensed to practice dentistry anywhere in the United States or in any country, territory or other recognized jurisdiction until December 31, 2002. On or after January 1, 2003, all dentists previously practicing under G.S. 90-29(c)(3) shall be granted an instructor's license upon application to the Board and payment of the required fee.

(4) The practice of dentistry in dental schools or colleges in this State approved by the North Carolina State Board of Dental Examiners by students enrolled in such schools or colleges as candidates for a doctoral degree in dentistry when such practice is performed as a part of their course of instruction and is under direct supervision of a dentist who is either duly licensed in North Carolina or qualified under subdivision (3) above as a teacher; additionally, the

practice of dentistry by such students at State or county institutions with resident populations, hospitals, State or county health departments, area health education centers, nonprofit health care facilities serving low-income populations and approved by the State Health Director or his designee and approved by the Board of Dental Examiners, and State or county-owned nursing homes; subject to review and approval or disapproval by the said Board of Dental Examiners when in the opinion of the dean of such dental school or college or his designee, the students' dental education and experience are adequate therefor, and such practice is a part of the course of instruction of such students, is performed under the direct supervision of a duly licensed dentist acting as a teacher or instructor, and is without remuneration except for expenses and subsistence all as defined and permitted by the rules and regulations of said Board of Dental Examiners. Should the Board disapprove a specific program, the Board shall within 90 days inform the dean of its actions. Nothing herein shall be construed to permit the teaching of, delegation to or performance by any dental hygienist, dental assistant, or other auxiliary relative to any program of extramural rotation, of any function not heretofore permitted by the Dental Practice Act, the Dental Hygiene Act or by the rules and regulations of the Board;

(5) The temporary practice of dentistry by licensed dentists of another state or of any territory or country when the same is performed, as clinicians, at meetings of organized dental societies, associations, colleges or similar dental organizations, or when such dentists appear in emergency cases upon the specific call of a dentist duly licensed to practice in this State;

(6) The practice of dentistry by a person who is a graduate of a dental school or college approved by the North Carolina State Board of Dental Examiners and who is not licensed to practice dentistry in this State, when such person is the holder of a valid intern permit, or provisional license, issued to him by the North Carolina State Board of Dental Examiners pursuant to the terms and provisions of this Article, and when such practice of dentistry complies with the conditions of said intern permit, or provisional license;

(7) Any act or acts performed by a dental hygienist when such act or acts are lawfully performed pursuant to the authority of Article 16 of this Chapter 90 or the rules and regulations of the Board promulgated thereunder;

(8) Activity which would otherwise be considered the practice of dental hygiene performed by students enrolled in a school or college approved by the Board in a board-approved dental hygiene program under the direct supervision of a dental hygienist or a dentist duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(9) Any act or acts performed by an assistant to a dentist licensed to practice in this State when said act or acts are authorized and permitted by and performed in accordance with rules and regulations promulgated by the Board;

(10) Dental assisting and related functions as a part of their instructions by students enrolled in a course in dental assisting conducted in this State and approved by the Board, when such functions are performed under the supervision of a dentist acting

as a teacher or instructor who is either duly licensed in North Carolina or qualified for the teaching of dentistry pursuant to the provisions of subdivision (3) above;

(11) The extraoral construction, manufacture, fabrication or repair of prosthetic dentures, bridges, appliances, corrective devices, or other structures designed or constructed as a substitute for a natural human tooth or teeth or as an aid in the treatment of the malposition or malformation of a tooth or teeth, by a person or entity not licensed to practice dentistry in this State, when the same is done or performed solely upon a written work order in strict compliance with the terms, provisions, conditions and requirements of G.S. 90-29.1 and 90-29.2.

(12) The use of a dental x-ray machine in the taking of dental radiographs by a dental hygienist, certified dental assistant, or a dental assistant who can show evidence of satisfactory performance on an equivalency examination, recognized by the Board of Dental Examiners, based on seven hours of instruction in the production and use of dental x rays and an educational program of not less than seven hours in clinical dental radiology.

(13) A dental assistant, or dental hygienist who shows evidence of education and training in Nitrous Oxide — Oxygen Inhalant Conscious Sedation within a formal educational program may aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental assistant who can show evidence of having completed an educational program recognized by the Board of not less than seven clock hours on Nitrous Oxide — Oxygen Inhalant Conscious Sedation may

also aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation. Any dental hygienist or dental assistant who has been employed in a dental office where Nitrous Oxide — Oxygen Inhalant Conscious Sedation was utilized, and who can show evidence of performance and instruction of not less than one year prior to July 1, 1980, qualifies to aid and assist a licensed dentist in the administration of Nitrous Oxide — Oxygen Inhalant Conscious Sedation.

(14) The operation of a nonprofit health care facility serving low-income populations and approved by the State Health Director or his designee and approved by the North Carolina State Board of Dental Examiners.

N.C. Gen. Stat. § 90-30 provides:

§ 90-30 Examination and licensing of applicants; qualifications; causes for refusal to grant license; void licenses

(a) The North Carolina State Board of Dental Examiners shall grant licenses to practice dentistry to such applicants who are graduates of a reputable dental institution, who, in the opinion of a majority of the Board, shall undergo a satisfactory examination of proficiency in the knowledge and practice of dentistry, subject, however, to the further provisions of this section and of the provisions of this Article.

The applicant for a license to practice dentistry shall be of good moral character, at least 18 years of age at the time the application is filed. The application for a dental license shall be made to the Board in writing and shall be accompanied by

evidence satisfactory to the Board that the applicant is a person of good moral character, has an academic education, the standard of which shall be determined by the Board; that the applicant is a graduate of and has a diploma from a reputable dental college or the dental department of a reputable university or college recognized, accredited and approved as such by the Board; and that the applicant has passed a clinical licensing examination, the standard of which shall be determined by the Board.

The North Carolina State Board of Dental Examiners is authorized to conduct both written or oral and clinical examinations or to accept the results of other Board-approved regional or national independent third-party clinical examinations that shall include procedures performed on human subjects as part of the assessment of restorative clinical competencies and that are determined by the Board to be of such character as to thoroughly test the qualifications of the applicant, and may refuse to grant a license to any person who, in its discretion, is found deficient in the examination. The Board may refuse to grant a license to any person guilty of cheating, deception or fraud during the examination, or whose examination discloses to the satisfaction of the Board, a deficiency in academic or clinical education. The Board may employ such dentists found qualified therefor by the Board, in examining applicants for licenses as it deems appropriate.

The North Carolina State Board of Dental Examiners may refuse to grant a license to any person guilty of a crime involving moral turpitude, or gross immorality, or to any person addicted to the use of alcoholic liquors or narcotic drugs to such an

extent as, in the opinion of the Board, renders the applicant unfit to practice dentistry.

Any license obtained through fraud or by any false representation shall be void ab initio and of no effect.

(b) The Department of Justice may provide a criminal record check to the North Carolina State Board of Dental Examiners for a person who has applied for a license through the Board. The Board shall provide to the Department of Justice, along with the request, the fingerprints of the applicant, any additional information required by the Department of Justice, and a form signed by the applicant consenting to the check of the criminal record and to the use of the fingerprints and other identifying information required by the State or national repositories. The applicant's fingerprints shall be forwarded to the State Bureau of Investigation for a search of the State's criminal history record file, and the State Bureau of Investigation shall forward a set of the fingerprints to the Federal Bureau of Investigation for a national criminal history check. The Board shall keep all information pursuant to this subsection privileged, in accordance with applicable State law and federal guidelines, and the information shall be confidential and shall not be a public record under Chapter 132 of the General Statutes.

The Department of Justice may charge each applicant a fee for conducting the checks of criminal history records authorized by this subsection

N.C. Gen. Stat. § 90-40 provides:

§ 90-40 Unauthorized practice; penalty

If any person shall practice or attempt to practice dentistry in this State without first having passed the examination and obtained a license from the North Carolina Board of Dental Examiners or having obtained a provisional license from said Board; or if he shall practice dentistry after March 31 of each year without applying for a certificate of renewal of license, as provided in G.S. 90-31; or shall practice or attempt to practice dentistry while his license is revoked, or suspended, or when a certificate of renewal of license has been refused; or shall violate any of the provisions of this Article for which no specific penalty has been provided; or shall practice or attempt to practice, dentistry in violation of the provisions of this Article; or shall practice dentistry under any name other than his own name, said person shall be guilty of a Class 1 misdemeanor. Each day's violation of this Article shall constitute a separate offense.

N.C. Gen. Stat. § 90-40.1 provides:

§ 90-40.1 Enjoining unlawful acts

(a) The practice of dentistry by any person who has not been duly licensed so as to practice or whose license has been suspended or revoked, or the doing, committing or continuing of any of the acts prohibited by this Article by any person or persons, whether licensed dentists or not, is hereby declared to be inimical to public health and welfare and to constitute a public nuisance. The Attorney General for the State of North Carolina, the district attorney

of any of the superior courts, the North Carolina State Board of Dental Examiners in its own name, or any resident citizen may maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry and from the doing, committing or continuing of such unlawful act. This proceeding shall be in addition to and not in lieu of criminal prosecutions or proceedings to revoke or suspend licenses as authorized by this Article.

(b) In an action brought under this section the final judgment, if in favor of the plaintiff, shall perpetually restrain the defendant or defendants from the commission or continuance of the act or acts complained of. A temporary injunction to restrain the commission or continuance thereof may be granted upon proof or by affidavit that the defendant or defendants have violated any of the laws or statutes applicable to unauthorized or unlawful practice of dentistry. The provisions of the statutes or rules relating generally to injunctions as provisional remedies in actions shall apply to such a temporary injunction and the proceedings thereunder.

(c) The venue for actions brought under this section shall be the superior court of any county in which such acts constituting unlicensed or unlawful practice of dentistry are alleged to have been committed or in which there appear reasonable grounds to believe that they will be committed, in the county where the defendants in such action reside, or in Wake County.

(d) The plaintiff in such action shall be entitled to examination of the adverse party and witnesses

before filing complaint and before trial in the same manner as provided by law for the examination of the parties.

N.C. Gen. Stat. § 90-41 provides:

§ 90-41 Disciplinary action

(a) The North Carolina State Board of Dental Examiners shall have the power and authority to (i) Refuse to issue a license to practice dentistry; (ii) Refuse to issue a certificate of renewal of a license to practice dentistry; (iii) Revoke or suspend a license to practice dentistry; and (iv) Invoke such other disciplinary measures, censure, or probative terms against a licensee as it deems fit and proper;

in any instance or instances in which the Board is satisfied that such applicant or licensee:

(1) Has engaged in any act or acts of fraud, deceit or misrepresentation in obtaining or attempting to obtain a license or the renewal thereof;

(2) Is a chronic or persistent user of intoxicants, drugs or narcotics to the extent that the same impairs his ability to practice dentistry;

(3) Has been convicted of any of the criminal provisions of this Article or has entered a plea of guilty or nolo contendere to any charge or charges arising therefrom;

(4) Has been convicted of or entered a plea of guilty or nolo contendere to any felony charge or to any misdemeanor charge involving moral turpitude;

(5) Has been convicted of or entered a plea of guilty or nolo contendere to any charge of violation of any state or federal narcotic or barbiturate law;

(6) Has engaged in any act or practice violative of any of the provisions of this Article or violative of any of the rules and regulations promulgated and adopted by the Board, or has aided, abetted or assisted any other person or entity in the violation of the same;

(7) Is mentally, emotionally, or physically unfit to practice dentistry or is afflicted with such a physical or mental disability as to be deemed dangerous to the health and welfare of his patients. An adjudication of mental incompetency in a court of competent jurisdiction or a determination thereof by other lawful means shall be conclusive proof of unfitness to practice dentistry unless or until such person shall have been subsequently lawfully declared to be mentally competent;

(8) Has conducted in-person solicitation of professional patronage or has employed or procured any person to conduct such solicitation by personal contact with potential patients, except to the extent that informal advice may be permitted by regulations issued by the Board of Dental Examiners;

(9) Has permitted the use of his name, diploma or license by another person either in the illegal practice of dentistry or in attempting to fraudulently obtain a license to practice dentistry;

(10) Has engaged in such immoral conduct as to discredit the dental profession;

(11) Has obtained or collected or attempted to obtain or collect any fee through fraud, misrepresentation, or deceit;

(12) Has been negligent in the practice of dentistry;

(13) Has employed a person not licensed in this State to do or perform any act or service, or has aided, abetted or assisted any such unlicensed person to do or perform any act or service which under this Article or under Article 16 of this Chapter, can lawfully be done or performed only by a dentist or a dental hygienist licensed in this State;

(14) Is incompetent in the practice of dentistry;

(15) Has practiced any fraud, deceit or misrepresentation upon the public or upon any individual in an effort to acquire or retain any patient or patients;

(16) Has made fraudulent or misleading statements pertaining to his skill, knowledge, or method of treatment or practice;

(17) Has committed any fraudulent or misleading acts in the practice of dentistry;

(18) Has, directly or indirectly, published or caused to be published or disseminated any advertisement for professional patronage or business which is untruthful, fraudulent, misleading, or in any way inconsistent with rules and regulations issued by the Board of Dental Examiners governing the time, place, or manner of such advertisements;

(19) Has, in the practice of dentistry, committed an act or acts constituting malpractice;

(20) Repealed by Laws 1981, c. 751, § 7.

(21) Has permitted a dental hygienist or a dental assistant in his employ or under his supervision to do or perform any act or acts violative of this Article, or of Article 16 of this Chapter, or of the rules and regulations promulgated by the Board;

(22) Has wrongfully or fraudulently or falsely held himself out to be or represented himself to be qualified as a specialist in any branch of dentistry;

(23) Has persistently maintained, in the practice of dentistry, unsanitary offices, practices, or techniques;

(24) Is a menace to the public health by reason of having a serious communicable disease;

(25) Has distributed or caused to be distributed any intoxicant, drug or narcotic for any other than a lawful purpose; or

(26) Has engaged in any unprofessional conduct as the same may be, from time to time, defined by the rules and regulations of the Board.

(b) If any person engages in or attempts to engage in the practice of dentistry while his license is suspended, his license to practice dentistry in the State of North Carolina may be permanently revoked.

(c) The Board may, on its own motion, initiate the appropriate legal proceedings against any person, firm or corporation when it is made to appear to the Board that such person, firm or corporation has violated any of the provisions of this Article or of Article 16.

(d) The Board may appoint, employ or retain an investigator or investigators for the purpose of examining or inquiring into any practices committed in this State that might violate any of the provisions of this Article or of Article 16 or any of the rules and regulations promulgated by the Board.

(e) The Board may employ or retain legal counsel for such matters and purposes as may seem fit and proper to said Board.

(f) As used in this section the term "licensee" includes licensees, provisional licensees and holders of intern permits, and the term "license" includes license, provisional license, instructor's license, and intern permit.

(g) Records, papers, and other documents containing information collected or compiled by the Board, or its members or employees, as a result of investigations, inquiries, or interviews conducted in connection with a licensing or disciplinary matter, shall not be considered public records within the meaning of Chapter 132 of the General Statutes; provided, however, that any notice or statement of charges against any licensee, or any notice to any licensee of a hearing in any proceeding, shall be a public record within the meaning of Chapter 132 of the General Statutes, notwithstanding that it may contain information collected and compiled as a result of any investigation, inquiry, or interview; and provided, further, that if any record, paper, or other document containing information collected and compiled by the Board is received and admitted into evidence in any hearing before the Board, it shall then be a public record within the meaning of Chapter 132 of the General Statutes.

N.C. Gen. Stat. § 90-48 provides:

§ 90-48 Rules and regulations of Board; violation a misdemeanor

The North Carolina State Board of Dental Examiners shall be and is hereby vested, as an agency of the State, with full power and authority to enact rules and regulations governing the practice of dentistry within the State, provided such rules and

regulations are not inconsistent with the provisions of this Article. Such rules and regulations shall become effective 30 days after passage, and the same may be proven, as evidence, by the president and/or the secretary-treasurer of the Board, and/or by certified copy under the hand and official seal of the secretary-treasurer. A certified copy of any rule or regulation shall be receivable in all courts as prima facie evidence thereof if otherwise competent, and any person, firm, or corporation violating any such rule, regulation, or bylaw shall be guilty of a Class 2 misdemeanor, and each day that this section is violated shall be considered a separate offense.

The Board shall issue every two years to each licensed dentist a compilation or supplement of the Dental Practice Act and the Board rules and regulations, and upon written request therefor by such licensed dentist, a directory of dentists.

N.C. Gen. Stat. § 93B-1 provides:

§ 93B-1 Definitions

As used in this Chapter:

"License" means any license (other than a privilege license), certificate, or other evidence of qualification which an individual is required to obtain before he may engage in or represent himself to be a member of a particular profession or occupation.

"Occupational licensing board" means any board, committee, commission, or other agency in North Carolina which is established for the primary purpose of regulating the entry of persons into, and/or the conduct of persons within, a particular profession or occupation, and which is authorized to

issue licenses; "occupational licensing board" does not include State agencies, staffed by full-time State employees, which as a part of their regular functions may issue licenses.

N.C. Gen. Stat. § 93B-2 provides:

§ 93B-2 Annual reports required; contents; open to inspection; sanction for failure to report

(a) No later than October 31 of each year, each occupational licensing board shall file with the Secretary of State, the Attorney General, and the Joint Regulatory Reform Committee an annual report containing all of the following information:

(1) The address of the board, and the names of its members and officers.

(2) The number of persons who applied to the board for examination.

(3) The number who were refused examination.

(4) The number who took the examination.

(5) The number to whom initial licenses were issued.

(6) The number who applied for license by reciprocity or comity.

(7) The number who were granted licenses by reciprocity or comity.

(7a) The number of official complaints received involving licensed and unlicensed activities.

(7b) The number of disciplinary actions taken against licensees, or other actions taken against nonlicensees, including injunctive relief.

(8) The number of licenses suspended or revoked.

(9) The number of licenses terminated for any reason other than failure to pay the required renewal fee.

(10) The substance of any anticipated request by the occupational licensing board to the General Assembly to amend statutes related to the occupational licensing board.

(11) The substance of any anticipated change in rules adopted by the occupational licensing board or the substance of any anticipated adoption of new rules by the occupational licensing board.

(b) No later than October 31 of each year, each occupational licensing board shall file with the Secretary of State, the Attorney General, the Office of State Budget and Management, and the Joint Regulatory Reform Committee a financial report that includes the source and amount of all funds credited to the occupational licensing board and the purpose and amount of all funds disbursed by the occupational licensing board during the previous fiscal year.

(c) The reports required by this section shall be open to public inspection.

(d) Failure of a board to comply with the reporting requirements of this section by October 31 of each year shall result in a suspension of the board's authority to expend any funds until such time as the board files the required reports. Suspension of a board's authority to expend funds under this subsection shall not affect the board's duty to issue and renew licenses or the validity of any application or license for which fees have been tendered in accordance with law. Each board shall adopt rules establishing a procedure for implementing this

subsection and shall maintain an escrow account into which any fees tendered during a board's period of suspension under this subsection shall be deposited.

N.C. Gen. Stat. § 93B-5 provides:

§ 93B-5 Compensation, employment, and training of board members

(a) Board members shall receive as compensation for their services per diem not to exceed one hundred dollars ($100.00) for each day during which they are engaged in the official business of the board.

(b) Board members shall be reimbursed for all necessary travel expenses in an amount not to exceed that authorized under G.S. 138-6(a) for officers and employees of State departments. Actual expenditures of board members in excess of the maximum amounts set forth in G.S. 138-6(a) for travel and subsistence may be reimbursed if the prior approval of the State Director of Budget is obtained and such approved expenditures are within the established and published uniform standards and criteria of the State Director of Budget authorized under G.S. 138-7 for extraordinary charges for hotels, meals, and convention registration for State officers and employees, whenever such charges are the result of required official business of the Board.

(c) Repealed by Laws 1981, c. 757, § 2.

(d) Except as provided herein board members shall not be paid a salary or receive any additional compensation for services rendered as members of the board.

(e) Board members shall not be permanent, salaried employees of said board.

(f) Repealed by Laws 1975, c. 765, § 1.

(g) Within six months of a board member's initial appointment to the board, and at least once within every two calendar years thereafter, a board member shall receive training, either from the board's staff, including its legal advisor, or from an outside educational institution such as the School of Government of the University of North Carolina, on the statutes governing the board and rules adopted by the board, as well as the following State laws, in order to better understand the obligations and limitations of a State agency:

(1) Chapter 150B, The Administrative Procedure Act.

(2) Chapter 132, The Public Records Law.

(3) Article 33C of Chapter 143, The Open Meetings Act.

(4) Articles 31 and 31A of Chapter 143, The State Tort Claims Act and The Defense of State Employees Law.

(5) Chapter 138A, The State Government Ethics Act.

(6) Chapter 120C, Lobbying.

Completion of the training requirements contained in Chapter 138A and Chapter 120C of the General Statutes satisfies the requirements of subdivisions (5) and (6) of this subsection.

N.C. Gen. Stat. § 120-70.101 provides:

§ 120-70.101 Purpose and powers of Committees

The Joint Legislative Administrative Procedure Oversight Committee has the following powers and duties:

(1) To review rules to which the Rules Review Commission has objected to determine if statutory changes are needed to enable the agency to fulfill the intent of the General Assembly.

(2) To receive reports prepared by the Rules Review Commission containing the text and a summary of each rule approved by the Commission.

(3) Deleted by S.L. 2009-125, § 1, eff. Oct. 1, 2009.

(3a) To review the activities of State occupational licensing boards to determine if the boards are operating in accordance with statutory requirements and if the boards are still necessary to achieve the purposes for which they were created. This review shall not include decisions concerning board personnel matters or determinations on individual licensing applications or individual disciplinary actions.

(4) To review State regulatory programs to determine if the programs overlap, have conflicting goals, or could be simplified and still achieve the purpose of the regulation.

(5) To review existing rules to determine if the rules are necessary or if the rules can be streamlined.

(6) To review the rule-making process to determine if the procedures for adopting rules give the public adequate notice of and information about proposed rules.

(7) To review any other concerns about administrative law to determine if statutory changes are needed.

(8) To report to the General Assembly from time to time concerning the Committee's activities and any recommendations for statutory changes.