No. 13-534

IN THE
Supreme Court of the United States

NORTH CAROLINA 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 OF AMICUS CURIAE
PUBLIC CITIZEN, INC.,
IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

Public Citizen, Inc., a national consumer-advocacy organization founded in 1971, appears on behalf of its members before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents consumer interests in litigation, and regularly files amicus curiae briefs in cases in this Court and the federal appellate courts.

Public Citizen submits this brief because of its belief that the Fourth Circuit's decision in this case correctly found that the federal antitrust laws' state action exemption does not apply to the conduct the FTC challenges in this case. A contrary holding would significantly expand the scope of the exemption to encompass essentially private collusion among competitors in the guise of enforcement action by a licensing board—privately interested behavior neither authorized by the state nor carried out under its supervision. By applying and reinforcing the state action doctrine's requirement of active state supervision of anticompetitive activity, this Court can uphold the purposes of federal antitrust law and protect consumers against the extraction of monopoly rents that results when boards composed of industry members artificially inflate prices by excluding competitors from lucrative parts of their businesses.

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[1] This brief was not authored in whole or part by counsel for a party. No one other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief. Letters of consent to filing from counsel for all parties are on file with the Clerk.

SUMMARY OF ARGUMENT

State action immunity is a limited and functional doctrine under which states acting in their regulatory capacities are immune from antitrust enforcement. In extending the benefits of this doctrine to private actors that claim to be acting under the authority of a state regulatory program, this Court has established a two-part test to ensure that such entities are genuinely acting with specific state authorization: First, their actions must reflect a "clearly articulated and affirmatively expressed" state policy to restrict competition; second, their anticompetitive actions must be "actively supervised by the State itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97, 105 (1980).

In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38, 46–47 (1985), this Court held that, because of their nature as local, democratically governed political entities, municipalities are unlikely to be acting to further private anticompetitive interests and therefore need not be actively supervised by the state in order to share its antitrust immunity when the state has clearly articulated an anticompetitive policy. The petitioner here, the North Carolina Board of Dental Examiners, is an industry-dominated board accorded authority by the State of North Carolina to license dental practitioners. The Board insists that it, like the municipality in *Hallie*, also may claim exemption from the active supervision requirement because it is denominated a state agency. *Hallie*, however, does not turn on a formal distinction between public and private actors, but on a realistic assessment of whether the nature of a particular type of organization is such

that it is likely to act to further private rather than public interests.

Thus, the relevant inquiry is not whether the Board is defined as a state agency under North Carolina law, but whether "there is a real danger that [the Board] is acting to further [its] own interests, rather than the governmental interests of the State." *Hallie*, 471 U.S. at 47. *Hallie*'s holding that a municipality poses no such danger says little or nothing about whether a board dominated by particular private interests does so. Such a board, charged with regulating the industry its members are a part of, is highly likely to reflect the particular economic interests of its constituents rather than to act as a government body regulating in the public interest. Thus, the reasoning of *Hallie* demands that the Board be subject to the active supervision requirement to receive antitrust immunity.

The danger that regulatory boards representing the private interests of regulated industries will pursue those private interests in an anticompetitive manner is real. Such boards have proliferated widely. More professions are licensed than ever before—over 800 as of 2006—and nearly one third of the national workforce is in licensed occupations. In many cases, it makes sense for practitioners to be involved in professional licensing because they know what the profession should require for minimum competency. Nonetheless, practitioners on such boards, as rational economic actors, are not immune to the temptation to use their authority to advance their self-interest. There are many examples of such boards acting to protect their industries from competition while the state itself is not paying attention.

State action immunity should remain limited and functional in its application. Boards like the one here should receive no special dispensation from the requirements of the state action immunity doctrine because their economic incentives do not align with the public interest. The determining factor should be neither the formal label attached to the board nor the specific mechanism by which its members are appointed, but whether the nature of the board presents the danger of privately interested action found to be absent in *Hallie*. Boards made up of or dominated by industry members should therefore not receive immunity unless there is both (1) a state policy to displace competition that is clearly articulated by the state's lawmakers and (2) active supervision by state entities that reflect public rather than private interests. Such boards will not always act against the public interest, but antitrust enforcers (both public and private) should be able to raise the question whether, in an individual case, a board acted in a manner the antitrust laws forbid.

ARGUMENT

I. The Board Should Not Be Exempted from the Active Supervision Requirement Merely Because State Law Treats It as a State Agency.

A. The Active Supervision Requirement Is Critical to Containing State Action Immunity Within Its Proper Bounds.

In *Parker v. Brown*, 317 U.S. 341 (1943), this Court recognized a state action exemption to the federal antitrust laws, holding that because nothing in the "words and history" of the Sherman Act demonstrates that it should apply to the states as sovereign

political actors, a state acting in its regulatory capacity is immune from antitrust liability. *Id.* at 351–52. In cases throughout the following seventy years, this Court has repeatedly stated that because the immunity contravenes the "fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws," the state action carve-out is limited and, indeed, "disfavored." *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). Only those actions attributable to the "state itself" in furtherance of its own policy are exempt. *Phoebe Putney*, 133 S. Ct. at 1012.

The Court has held that state action immunity may sometimes be extended to private entities acting under an affirmative state regulatory policy to displace competition, but has set out strict rules to limit the circumstances in which immunity is available. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, this Court held not only that such a state policy must be "clearly articulated and affirmatively expressed," but that the conduct for which immunity is sought must be "'actively supervised' by the State itself." 445 U.S. at 105 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion)).

The requirement of active supervision is as essential as the clear articulation requirement to ensuring that anticompetitive conduct is attributable to the "state itself." The active supervision requirement operates to "prevent[] the State from frustrating the national policy in favor of competition by casting a 'gauzy cloak of state involvement' over what is essentially private anticompetitive conduct." *So. Motor*

Carriers Rate Conf., Inc. v. United States, 471 U.S. 48, 57 (1985). The requirement ensures that the state not only "intend[s]" a displacement of competition, but also implements it "in its specific details." *Ticor*, 504 U.S. at 603.

The active supervision requirement "stems from the recognition that '[w]here a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interest, rather than the governmental interests of the State.'" *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (quoting *Hallie*, 471 U.S. at 47). Requiring state supervision of anticompetitive conduct addresses this concern by "ensur[ing] that the state-action doctrine will shelter only the *particular* anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies." *Id*. at 100–01 (emphasis added). To meet this objective, it is not enough that there be "some state involvement"; rather, "state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id*. at 101. Unless the state exercises "ultimate control" in this manner, "there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Id*.

The active supervision requirement thus works hand in hand with the clear articulation requirement to "ensur[e] that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *Ticor*, 504 U.S. at 636. Absent the active supervision requirement, state action immunity might require "little more than that the State has not acted

through inadvertence," as the clear articulation standard by itself "cannot ensure, as required by [the Court's] precedents, that particular anticompetitive conduct has been approved by the State." *Id*. at 636–37. Put another way, "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Hallie*, 471 U.S. at 46.

More fundamentally, the active supervision requirement also ensures that states bear "political responsibility" and accountability if they intend to displace competition: They must both "sanction[] and undertake[] to control" anticompetitive conduct if they seek to immunize it from antitrust scrutiny. *Ticor*, 504 U.S. at 636. They may not do so simply by articulating general policies while avoiding the responsibility of controlling whether the particular applications of those policies are carried out in ways that benefit private interests in avoiding competition. *See id*. at 636–37. The active supervision requirement thus helps ensure that "the requirement of clear articulation" does not "become a rather meaningless formal constraint." *Id.* at 637.

B. *Hallie*'s Exception to the Active Supervision Requirement Applies Only to Entities That Pose No Real Danger of Serving Private Anticompetitive Interests.

The question in this case is whether the active supervision requirement applies to claims of immunity made by an entity that is in some sense public but is not "the State itself." *Phoebe Putney*, 133 S. Ct. at 1010. In *Hallie*, this Court addressed a claim to immunity for one such non-state (or "substate," *id.*)

public entity—a municipality. The Court held that a municipality's claim to state action antitrust immunity does not depend on a showing of active supervision because the nature of a municipal government is such that there is no "real danger" that its actions will reflect private interests in suppressing competition. *See* 471 U.S. at 47. Contrary to the Board's suggestion here, that holding does not extend to any entity that can claim the label of an "arm of the State," *id*. at 45, but is properly limited to those whose nature is such that they likewise pose no "real danger that [they are] acting to further [their] own interests, rather than the governmental interests of the State." *Id*. at 47.

As this Court has stated, "[t]he starting point in any analysis involving the state action doctrine is the reasoning of *Parker v. Brown.*" *Hallie*, 471 U.S. at 38. That reasoning, as applied in *Hallie*, requires that the terms under which *Parker* immunity is extended beyond the state itself reflect a realistic assessment of the incentives that drive the entity in question, not purely formalistic considerations.

State action immunity is a functional and pragmatic doctrine. The Court applies the doctrine "practically, but without diluting the ultimate requirement that the State must have affirmatively contemplated the displacement of competition such that the challenged anticompetitive effects can be attributed to the 'state itself.'" *Phoebe Putney*, 133 S. Ct. at 1012. Thus, the Court has commanded that the courts, when considering "clear articulation," realistically examine whether anticompetitive impacts are the "inherent, logical, or ordinary result" of a state's policy. *Id.* The same practicality is evident in reasoning about the active supervision requirement, which requires a real-

istic assessment of whether the state has actually "exercised sufficient independent judgment and control so that the details of the [anticompetitive policy] have been established as a product of deliberate state intervention"—a determination that requires consideration not merely of whether the state has the power to supervise in the abstract, but whether "the potential for state supervision" is "realized in fact." *Ticor*, 504 U.S. at 634, 638.

In *Hallie*, the Court applied its functional methodology to a claim of immunity by a municipality—an entity that is public, but is not the state itself. 471 U.S. at 38. Based on practical rather than formalistic considerations—including the facts that "municipal conduct is invariably more likely to be exposed to public scrutiny than is private conduct," and that "municipal officers … are checked to some degree through the electoral process," *id.* at 45 n. 9—the Court held that active state supervision is not necessary to a municipality's claim of state action immunity. The nature of a municipal government, the Court reasoned, is such that its actions are unlikely to be based on the pursuit of private gain:

> Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pur-

> suant to a clearly articulated state policy. Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function.

Hallie, 471 U.S. at 47.

Thus, the inquiry in *Hallie* was not focused only on whether a municipality was an arm of the state, but on whether this particular arm of the state was likely to seek to suppress competition for its own benefit. Indeed, the same consideration has led this Court to leave open the possibility of an exception to *Parker* immunity even for the state itself, when it acts not as a political body, but as a market participant. *Phoebe Putney*, 133 S. Ct. at 1010 n.4 (citing *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 379 (1991)).

That *Hallie*'s result did not turn on the formality that a municipality is an "arm of the State," 471 U.S. at 45, is confirmed by the Court's simultaneous characterizations of its earlier decision in *Goldfarb v. Virginia State Bar,* 421 U.S. 773 (1975). There, the Virginia State Bar had threatened to enforce a minimum fee schedule through disciplinary action against attorneys who deviated from it. The State Bar, like the Board here, was defined by Virginia law as an agency of the state, although it was composed of the attorneys whose activities it regulated. *Id*. at 776 & n.2, 790 & n. 20; 791. This Court held that such an agency was not immune from antitrust scrutiny for its attempt to fix prices because its actions were not "required by the State acting as sovereign." *Id*. at 790. In *Southern Motor Carriers*, a decision handed down on the same day as *Hallie*, the Court clarified that *Gold-*

farb should be understood as holding, consistent with the later decision in *Midcal*, that "private parties were entitled to *Parker* immunity only if the State 'acting as sovereign' intended to displace competition" through means satisfying *Midcal*'s criteria. *So. Motor Carriers*, 471 U.S. at 60; *see also id*. at 61 ("[T]he Court [in *Goldfarb*] would have reached the same result had it applied the two-pronged test later set forth in *Midcal*.").

Strikingly, *Southern Motor Carriers* explicitly recognized that the State Bar in *Goldfarb* was called a "state agency," *id*. at 60, even while stating that its claim to immunity was subject to the requirements imposed on "private parties" claiming immunity under *Midcal*. *Id.* As the Court explained, "*Goldfarb* … made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign." *Id.* at 61 (quoting *Lafayette*, 435 U.S. at 410 (plurality opinion)).

Hallie likewise contrasted the municipality at issue there with the agency whose actions were scrutinized in *Goldfarb*. *Goldfarb*, the Court stated, "concerned private parties—not municipalities—claiming the state action exemption," and while "[w]e may presume … that a municipality acts in the public interest," "[a] private party … may be presumed to be acting primarily on his or its own behalf." 471 U.S. at 45. *Hallie*, together with *Southern Motor Carriers*, thus reflects the Court's explicit recognition that whether an entity is entitled to immunity without state supervision turns not on its formal designation as a state subdivision, but on whether its actual characteristics make it a privately interested actor.

The Board is thus fundamentally wrong in asserting that as a "*bona fide* state agency," it should be exempt from the second half of the *Midcal* test. Pet. Br. 18. The issue does not turn on such formalistic considerations as the authority to use a state seal, but on where the economic incentives lie. Whether to free the Board from the active state supervision requirement depends on whether its composition poses a "real danger" that it may act to pursue private interests "rather than the governmental interests of the State." *Hallie*, 471 U.S. at 47.

C. There Is a Real Danger That the Board's Actions Will Further the Private Interests of Its Members and Constituents Rather than the Interests of the State.

The reasoning of *Hallie* and of the Court's state action immunity jurisprudence as a whole offers no support for excusing the Board from satisfying the active state supervision requirement when it claims state action immunity against antitrust claims. The dispositive fact is that the Board is controlled by the interests of a private industry that not only makes up the great majority of the Board's membership, but elects all but one of the Board's members. The question whether the composition of a board that by law *must* consist of elected industry representatives who actively practice in the market they regulate poses a "real danger" of actions furthering the private interests of the industry constituents it represents rather than the "governmental interests of the State," *Hallie*, 471 U.S. at 47, answers itself. Such an industry-dominated body lacks the characteristics that led this Court to hold that municipalities need not be actively supervised by the state when they act pursuant to a

clear state policy of displacing competition because there is no real danger that they will pursue private interests.

An industry-dominated, self-regulatory entity, even when denominated a state agency, is more like a trade association than a public body. This Court's state action jurisprudence reflects its recognition that when such privately interested entities seek to regulate their industries by suppressing competition, "there is no realistic assurance that [the] private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U.S. at 101. Indeed, a privately interested entity "may be presumed to be acting primarily on … its own behalf." *Hallie*, 471 U.S. at 45. As *Goldfarb* indicates, that presumption does not disappear merely because a privately interested organization is, as a legal matter, given the status of a state agency: Designating a private interest group a state agency does not transform it into the "State acting as a sovereign" for antitrust immunity purposes." 421 U.S. at 790.

This Court has repeatedly insisted that states may not simply "authorize" private actors to engage in anticompetitive activities. *Midcal*, 445 U.S. at 105–06; *Parker*, 317 U.S. at 351; *see*, *e.g.*, *Ticor*, 504 U.S. at 632–40. Active supervision is critical to ensuring that such activity in fact comports with state interests not only in general but in its particulars. *See id.* at 637. That objective is not served simply by designating a private industry body an arm of the state and letting it supervise itself. Such a formality does nothing to eliminate the "real danger" that a privately interested body will serve its private interests rather than those of the state itself, and hence, under the reasoning of

Hallie, it cannot justify eliminating the active state supervision requirement.

The issue, it should be emphasized, does not turn solely "on the method by which state officials are selected." Pet. Br. 59. An industry-dominated board is likely to pose a real danger of serving private interests regardless of whether its members are, as here, elected, or whether they are appointed in some other manner. As a practical matter, a licensing board's actions are no more likely to be "subjected to public scrutiny" or "checked to some degree through the electoral process" when its members are appointed than when they are elected by other market participants. *Hallie*, 471 U.S. at 45 n.9. And whether board members are elected or appointed, where a statute mandates that industry have majority voting power on the board, the temptation to serve the industry's economic interests will be present. Conceivably, the rigorous exercise of appointment and removal power by state officers to exercise actual control over actions of an industry-dominated board might in some instances suffice to demonstrate active state supervision, but the mere potential for the exercise of such authority constitutes neither active supervision, *see Ticor*, 504 U.S. at 638, nor a reason for dispensing with the requirement of active supervision.

II. Actions of Industry-Dominated Boards Show the Need for Active Supervision.

The industry-dominated licensing board at issue in this case is one example of a great number of professional licensing entities throughout the country, covering both traditional learned professions, such as lawyers and doctors, and ordinary businesses for which licensing has not historically been considered

necessary, such as auctioneers, florists, and casket sellers. These boards, usually created to regulate entry into a profession, are often dominated by members of the profession regulated.

Predictably, such boards frequently act in ways that benefit their industry constituencies. These actions exemplify the "real danger" of privately interested conduct that, under the reasoning of *Hallie*, differentiates these entities from municipalities and other governmental bodies that need not be subjected to active state supervision to receive antitrust immunity.

The activities of such boards also illustrate that the clear articulation requirement by itself is inadequate to ensure that anticompetitive actions genuinely reflect the interests and policies of the "state itself." The creation of a licensing board often reflects articulation of a policy to displace competition at least to some extent, as limiting entry into a business activity based on criteria developed by industry members is by nature anticompetitive. Where, as is often the case, the question is *how far* a state's policy of displacing competition extends, the active supervision requirement plays a critical role in ensuring that the *particulars* of anticompetitive self-regulatory actions in fact reflect the policy of the state as sovereign. *Ticor*, 504 U.S. at 636–37. Thus, the "evidentiary function" of the active supervision requirement remains an essential backstop to ensure that anticompetitive action is truly attributable to the state itself. *Hallie*, 471 U.S. at 46.

A. Occupational Licensing Has Proliferated, and Industry-Dominated Regulatory Boards Often Act Anticompetititvely.

Based on empirical research on the anticompetitive effects of licensing, economist Morris Kleiner found that over 800 different professions had licensure requirements as of 2006. Morris M. Kleiner, *Licensing Occupations: Ensuring Quality or Restricting Competition?* 5 (2006). In the 1950s, only five percent of the United States workforce was licensed; now, nearly one third is. *Id*.; Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market,* 31 J. Lab. Econ. S173, S198 (2013). Kleiner estimated that licensing costs consumers $116 to $139 billion every year and increases the wages of professionals who are licensed at the expense of workers who are not, contributing to wage inequality. Kleiner, *Licensing Occupations*, at 114–5. Both the costs to consumers and wage benefits to insiders that result from state licensing board activities are exactly the kinds of impacts that, if attributable to private collusion, are targeted by federal antitrust law.

Law professors Aaron Edlin and Rebecca Haw have investigated the regulatory powers of occupational licensing boards, concluding that the boards are "cartels by another name." Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093 (2014). In Tennessee and Florida alone, Edlin and Haw found eighty-seven professional licensing boards, for professions as varied as accounting, auctioneering, cosmetology, funeral services, hearing-aid dispensing, and nutrition, among others. Ninety per-

cent of the boards in the two states are dominated by industry, and ninety-five percent have rulemaking authority by statute. *Id.* at 1157–64.

Edlin and Haw also found several curious examples of "new professions" requiring licensing in addition to the traditionally licensed professions. *See id.* at 1096–97; 1102–06. In Alabama, for example, interior decorating without a license was a criminal offense until 2007. *See* Clark Neily, *Watch Out for That Pillow*, Wall St. J., Apr. 1, 2008, at A17. In Louisiana, all flower-arranging must be supervised by a licensed florist. La. Rev. Stat. Ann. § 3:3808(B)(1).

To date, there has been little systematic research into the extent and breadth of the regulatory powers of industry-dominated boards and the degree to which they are exercised in the interest of market participants rather than the public. Edlin and Haw's work appears to be the first systematic review of the makeup of these boards at the state level, and we have not located similar comprehensive published analyses of boards in states other than Florida and Tennessee. Given the dearth of research, however, the ease with which one can find examples of potentially anticompetitive activities by such boards is striking.

The facts underlying two cases that the Fourth Circuit sought to distinguish below are good examples of these activities.[2] In *Hass v. Oregon State Bar*, 883

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[2] Our point here is not that these two cases were wrongly decided on the particular facts or that the activities involved necessarily violated the antitrust laws. Rather, we discuss the cases as examples of professional licensing boards that are granted broad authority and have used that authority in ways that appear to

(*Footnote continued*)

F.2d 1453 (9th Cir. 1989), the Oregon legislature authorized the state bar to require attorneys to carry malpractice insurance, and further authorized the bar to do what was "necessary and convenient" to implement the provision, including owning, organizing, or sponsoring an insurance organization. *Id.* at 1458 (citing Or. Rev. Stat. § 9.080(2)(a)). The state bar in turn mandated both that attorneys carry insurance and that they buy it from the bar itself, rather than in an open insurance market in which the bar would be a participant. *Id.* at 1455. The Ninth Circuit read Oregon's statutes as evincing intent to displace competition. *Id.* But the extent of Oregon's desire to displace competition was unknown: Did the state actually mean to authorize the bar not only to *own* an insurance company, but also to prevent any market competition for itself? Without state supervision, whether or not the state intended the *particulars* of the activity alleged to be anticompetitive remained uncertain.

In *Earles v. State Board of Certified Public Accountants*, a Louisiana statute authorized a state board of accountants to set the ethical standards for the profession. 39 F.3d 1033, 1035 (5th Cir. 1998). Under this authority, the board promulgated a rule prohibiting accountants from participating in "incompatible occupations," which would theoretically impair the accountants' objectivity, and another rule prohibiting the receipt of commissions. *Id*. The board then interpreted these rules to bar the plaintiff, a securities broker, from also acting as a CPA. *Id.*

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reflect the economic self-interest that the active state supervision requirement exists to counterbalance.

The board in *Earles* acted based on broad statements of authority by the legislature, authorizing no specific policy barring other professionals from being CPAs. *Id.* at 1042–43. The board was also "composed entirely of CPAs who compete in the profession they regulate," *id.* at 1041, creating the potential for self-interested behavior. Here, again, the state policy to set and enforce ethical standards as a general matter was clear, but the boundaries of that clear articulation were not obvious. Regardless of the merits of the policy, absent state supervision it is uncertain whether barring other professionals from competing as CPAs reflected the policy of the state as sovereign or the interests of a particular industry.

Earles and *Hass* barely scratch the surface of the potentially anticompetitive activities pursued by industry-dominated boards. The FTC has brought several cases against optometry boards for restricting competition. *See* FTC Office of Policy Planning, *Report of the State Action Task Force* 60–61 (2003) ("*State Action Report*"). For example, the FTC brought a complaint against a Massachusetts optometry board comprising four practitioners and one public member for restraining competition by limiting truthful advertising of discount rates. *In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988). In the 1970s several state optometry boards created rules "discourag[ing] the 'commercial practice' of optometry" by banning "partnerships between optometrists and laymen, use of trade names, and chain operations combining the practice of optometry with the sale of eyeglasses in shopping centers," "in favor of

'traditional optometric practice.'" *Cal. Bd. of Optometry v. FTC,* 910 F.2d 976, 978 (D.C. Cir. 1990).[3]

Several states have attempted to restrict the market for caskets by permitting only licensed funeral directors to sell them. *See*, *e.g.*, *St. Joseph Abbey v. Castille,* 712 F.3d 215 (5th Cir. 2013), *cert. denied*, 134 S. Ct. 423 (2013) (Louisiana); *Powers v. Harris*, 379 F.3d 1208 (10th Cir. 2004) (Oklahoma); *Craigmiles v. Giles*, 312 F.3d 220 (6th Cir. 2002) (Tennessee). Although the basic requirement was established in each state by statute, industry-dominated boards had developed implementing regulations and licensing requirements that further restricted casket sales, *see*, *e.g.*, *Powers*, 379 F.3d at 1212, and had purported to exercise authority to enforce the restrictions through extrajudicial cease-and-desist orders, *see St. Joseph Abbey*, 712 F.3d at 219—much like the orders issued by the North Carolina Board in this case. The activities of the boards in restricting casket sales, moreover, were clearly unrelated to health or safety, as the laws did not impose requirements for the adequacy of caskets or even require them to be used burials. *See* Edlin & Haw, 162 U. Pa. L. Rev. at 1097, 1106; *St. Joseph Abbey*, 712 F.3d at 226; *Giles*, 312 F.3d at 225 (Tennessee law unrelated to health and safety).

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[3] The D.C. Circuit in *California Board of Optometry v. FTC* held that the FTC had exceeded its authority in purporting to adopt a rule that would have outlawed such restrictions even if imposed by state statute, a decision that was surely correct under *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984), which held that state legislative action is exempt from the antitrust laws. The imposition of similar restrictions by industry-dominated boards, absent active supervision from the state itself, should not likewise be exempt from antitrust scrutiny.

St. Joseph Abbey, *Powers*, and *Craigmiles* all involved substantive due process challenges to the underlying statutes, the enactment of which could not in itself constitute an antitrust violation under *Hoover v. Ronwin*, 466 U.S. at 567–68.[4] The regulatory and enforcement activities of the industry-dominated boards, however, illustrate how, absent supervision by state officials, such boards can further suppress competition in ways not clearly contemplated by the state as sovereign.

In many states, veterinary boards have outlawed performance of dental procedures on animals by non-veterinarians. *See* Am. Veterinary Med. Ass'n, *State Summary Report: Authority of Veterinary Technicians and Other Non-Veterinarians to Perform Dental Procedures* (June 2014), https://www.avma.org/advocacy/stateandlocal/pages/sr-dental-procedures.aspx. Thus, "teeth-floaters," who file horses' teeth for a living—an activity necessary because horses' teeth never stop growing and their modern diet does not wear their teeth down fast enough—are now shut out of the market in favor of veterinarians. Inst. Just., *Challenging Barriers to Economic Opportunity: Challenging Minnesota's Occupational Licensing of Horse Teeth Floaters*, http://www.ij.org/minnesota-horse-teeth-floating-background.

State cosmetology boards have begun demanding that African-style hair braiding and eyebrow threading, two lucrative and popular practices that are not

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[4] The constitutional challenges yielded inconsistent results: The Sixth and Fifth Circuits struck down the restrictions, while the Tenth held that favoring the private interests of a particular industry constituted a rational basis for the law in question.

dangerous (they require, for example, no sharp instruments or chemicals), be performed only by licensed cosmetologists. Such licenses not only are costly, but may require graduation from a cosmetology school. Edlin & Haw, *supra* at 1106.

In California, the industry-dominated Travel and Tourism Commission, comprising representatives from five industry categories including the rental car industry, not only imposed fees on car rentals, but allegedly took actions that had the effect of compelling rental car companies to pass those fees on to consumers, thus suppressing potential price competition. *See Shames v. Cal. Travel & Tourism Comm'n*, 626 F.3d 1079 (9th Cir. 2010). The Ninth Circuit initially held that the Commission's action reflected a clearly articulated state policy and was also exempted from the state supervision requirement because the Commission, although dominated by the industries whose interests its actions served, was a governmental entity; on a petition for rehearing, the court held that state action immunity was unavailable because the action was not authorized with sufficient clarity and therefore did not reach the state supervision issue. *See id.* at 1085 & n.3.

Traditionally regulated professions are subject to anticompetitive regulations as well. Lawyers are particularly good at self-protection. For example, every state bar has restrictions on lawyer advertising, some of which are anticompetitive. *See* LexisNexis, *50 State Surveys of Statutes & Regulations: Attorney Advertising* (Mar. 2013) ("Every state regulates the advertising of its attorneys.") Some state bars preclude truthful claims about prices, just as the Massachusetts optometry board did. *See* Ohio R. Prof'l Conduct 7.1

cmt. 4 (stating that it is misleading to characterize rates as discounted). Several states restrict lawyers from including "non-verifiable" statements in advertising, a prohibition that may inhibit competitive behavior among lawyer advertisers. *See, e.g.*, Ala. Code Prof'l Conduct R. 7.2(e) (requiring affirmative statement that the lawyer is not representing that he is better than another); Alaska R. Prof'l Conduct 7.1(c) (no comparisons unless factually verifiable); Fla. R. Prof'l Conduct 4-7.2(b)(1)(D) (same); N.Y. R. Prof'l Conduct 7.1(d)(2) & (e)(2) (same); *see also Alexander v. Cahill*, 598 F.3d 79 (2d Cir. 2010) (striking down several New York attorney advertising restrictions on First Amendment grounds).

A number of state bars require lawyers to be physically present in real estate closings, limiting competition from national and internet-based lenders. *See State Action Report* at 68–69. Several state bars also have bona fide office requirements, limiting competition from attorneys who are licensed in multiple states. *See* N.Y. Jud. Law § 470; Del. Sup. Ct. R. 12(d); *Tolchin v. N.J. Sup. Ct.*, 111 F.3d 1099 (3d Cir. 1997) (rejecting constitutional challenges to New Jersey's bona fide office requirement, which has since been amended, *see* N.J. Sup. Ct. R. 1:21-1).

Insofar as state supreme courts promulgate bar rules, the rules themselves, like state legislative enactments, may be exempt from antitrust scrutiny under *Hoover v. Ronwin*, 466 U.S. at 569. The activity of state bars in promoting such rules, however, still demonstrates the propensity of industry-dominated licensing boards to act in their own self-interest and shows the need for state supervision when they take action themselves. And to the extent state bars act to

interpret and enforce bar rules, they remain subject to potential antitrust scrutiny, as *Goldfarb* illustrates.

In many states, nurse practitioners cannot provide care independently of doctors, despite adequate training to perform services not requiring a physician. Such restrictions tend to limit availability of medical care, drive patients to physician-run practices, and may have price impacts on consumers who could benefit from wider availability of clinical services. *See Scope-of-Practice Laws for Nurse Practitioners Limit Cost Savings That Can Be Achieved in Retail Clinics*, 32 Health Aff. 1977 (2013). Similarly, many state dental boards limit the number of dental hygienists dentists may hire. *See* J. Liang & Jonathan Ogur, FTC Bureau of Econ., *Restrictions on Dental Auxiliaries: An Economic Policy Analysis* 6 & n.6 (1987), http://www.ftc.gov/sites/default/files/documents/reports/restrictions-dental-auxiliaries/232032.pdf (noting that restrictions generally allow dentists to employ between one and three hygienists).

In sum, many more occupations are regulated than ever before, and most boards doing the regulating—in both traditional and new professions—are dominated by industry members who compete in the regulated market. Those board member-competitors, in turn, commonly engage in regulation that can be seen as anticompetitive self-protection. The particular forms anticompetitive regulations take are highly varied, the possibilities seemingly limited only by the imaginations of the board members.

B. Active State Supervision Is a Necessary Corrective for the Tendency of Industry-Dominated Boards to Regulate in the Service of Private Interests.

State licensing of occupations and other forms of economic regulation are often critical to the protection of consumers and the public at large. This Court has long recognized that states have obvious and legitimate interests for engaging in such regulation. As the Court put it in *Goldfarb*, "We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health, safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions." 421 U.S. at 792.

Reliance on the expertise of those who practice a particular profession or trade, moreover, is an important and often necessary aspect of the creation of standards for the licensure and conduct of industry members. The purpose of creating state licensing boards comprising industry members and granting them rulemaking and enforcement authority is to enlist the assistance of presumed experts. Who better than the licensed professionals themselves—dentists, lawyers, doctors, or accountants—to know what standards are required for minimum competency in those professions?

Regulation also, at least in many instances, necessarily implies some displacement of competition. Licensing itself is anticompetitive in the sense that it restricts entry into an occupation, and many other forms of regulation may restrict practices that, in an

environment of unrestrained competition, would be prevalent, if not rampant.

These are not, however, reasons for excusing industry-dominated licensing or regulatory boards from the requirement of active state supervision. They are the very reasons that necessitate the requirement. When a state authorizes licensing or regulatory actions that displace competition to some extent, there will in most cases be uncertainty at the margins concerning the extent of that authorization, leaving room for argument both ways as to whether any resulting action reflects a clearly articulated state policy to displace competition. Whether a particular restriction on competition falls within the scope of a clearly articulated state policy may at times be in the eye of the beholder. *Compare Shames*, 626 F.3d at 1084–85 (holding on rehearing that there was no clearly articulated state policy because "there is no indication California authorized interference by the CTTC with normal industry competition"), *with Shames v. Cal. Travel & Tourism Comm'n*, 607 F.3d 611, 617 (9th Cir. 2010) (same panel holding on initial hearing that there was a clearly articulated policy because "the provisions here are comparable to those in which courts have found anticompetitive conduct legislatively authorized").

Industry members, moreover, are not only the foremost experts concerning their business, but also the very persons most likely to have private interests that will be affected, and potentially advanced, by actions that push the envelope of authorization (such as the Board's purported exercise in this case of authority to engage in extrajudicial enforcement measures against competitors in the teeth-whitening business).

Allowing entities controlled by private interests to police the limits of their own authority poses an inherent risk that they will act in the service of their private interests and not those of the state as sovereign and the public that it represents. Of course, this risk is the precise reason for the active supervision requirement, which ensures that the particulars of any potentially anticompetitive action are attributable to the state itself and not to private interests.

That the danger of self-interested activity counsels retention of the active state supervision requirement for entities of this sort does not mean that their actions are always suspect. Suppressing particular forms of competition (including some of the examples described above) may reflect sound public policy even if it incidentally benefits some private interests at the expense of others. Moreover, states that wish to make use of such boards are capable of exercising, and in a great many instances have exercised, active supervision over their activities, ensuring that if anticompetitive policies are chosen, they are chosen to advance state rather than private interests. *See* Resp. Br. 54–55. And even where such supervision is absent, particular actions of industry-controlled boards, although not immune from antitrust scrutiny, may also be found not to violate the antitrust laws under the rule of reason. But the potential for action motivated by self-interest rather than state interest weighs against granting an industry-dominated board that is not subject to active supervision the immunity possessed by the state when it acts as sovereign. The public role played by such an entity "does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Goldfarb*, 421 U.S. at 791.

Here, that North Carolina has charged the Board with the licensing of dentistry to ensure safety and the public interest, N.C. Gen Stat § 90-22, does not give the Board carte blanche to benefit its members anticompetitively. The Board is empowered to regulate dentistry by setting minimum standards of "good moral character" and "academic education," and requiring graduation from an accredited dental school and a minimum score on a "clinical licensing examination." *Id.* § 90-30. Even on the dubious assumption that the Board's actions in this case reflect a clearly articulated statutory policy to limit teeth-whitening to licensed dentists, the Board's actions in responding to complaints by dentists about lower-priced competition by routinely sending cease-and-desist letters, *see* Pet. App. 75a, J.A. 30, constitute an attempt to suppress competition without supervision by disinterested state officials.[5] Whether or not it is ultimately defensible, the Board's unsupervised attempt to bypass ordinary state law enforcement processes to benefit its industry constituents by isolating them from competition does not clearly reflect a policy adopted by the state *in its specific details*, *Ticor*, 504 U.S. at 603, and therefore should not receive immunity on the premise that it reflects action of the state as sovereign.

[5] The claim of clear authority here rests on a statutory provision defining dentistry to include the removal of "stains, accretions, or deposits from the human teeth," N.C. Gen. Stat. § 90-29(b)(2), which is a far cry from a requirement that only dentists may provide peroxide-based teeth-whitening services.

CONCLUSION

The Court should affirm the decision of the court of appeals.

Respectfully submitted,

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