No. 11-1679

In the United States Court of Appeals
for the Fourth Circuit

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,
Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of North Carolina
Western Division

BRIEF OF APPELLANT

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ORAL ARGUMENT REQUESTED

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No. 11-1679 N.C. St. B. Dt. E . F T C

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CERTIFICATE OF SERVICE

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This action arises under the Constitution and laws of the United States. At issue is whether the U.S. District Court for the Eastern District of North Carolina has federal question jurisdiction over this action by operation of Article III of the Constitution and 28 U.S.C. § 1331. The question presented is whether that court properly had jurisdiction to resolve a state's constitutional challenge of a federal agency's assertion of subject matter jurisdiction. The federal agency sought to preempt state public protection statutes despite the federal agency's lack of Congressional authorization, despite seventy years of contrary Supreme Court precedence and despite a contrary Executive Order.[1] This action is brought pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 (Creation of Remedy), 2202 (Further Relief); 28 U.S.C. § 1651 (Writs); the implied non-statutory review procedure provided by 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1361 (Action to Compel an Officer of the United States to Perform His Duty); and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*.

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[1] Exec. Order No. 13132 (Aug. 4, 1999) ("The constitutional relationship among sovereign governments, State and national, is inherent in the very structure of the Constitution and is formalized in and protected by the Tenth Amendment to the Constitution."). See also Presidential Memorandum for the Heads of Exec. Dep'ts & Agencies (May 20, 2009) ("The purpose of this memorandum is to state the general policy . . . that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.")

The Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 14 *et seq.*, contains no waiver of sovereign immunity by North Carolina or any other state, as is unmistakably clear in the language of the statute. Without waiving its sovereign immunity under the Tenth Amendment, the North Carolina State Board of Dental Examiners ("State Board") seeks judicial determination of the Federal Trade Commission ("FTC" or "Commission")'s lack of subject matter jurisdiction to force a bona fide state agency to submit to an unprecedented administrative proceeding, contrary to the heart of the balance of federal and state sovereignty assured in the Tenth Amendment to the U.S. Constitution, as well as Article I, Section 8, Clause 3 (the Commerce Clause) and Article III, Section 2, Clause 2 (original jurisdiction over actions against states).

The Fourth Circuit Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. § 1291. In addition, jurisdiction exists under 28 U.S.C. § 1651. See

pursuant to Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure, which provides that a notice of appeal may be filed with the district court within sixty days after the order was entered. The State Board asserts that its appeal is taken from a final order/judgment of the district court that disposes all of the parties' claims.

STATEMENT OF THE ISSUES

1) Does a district court have jurisdiction over an action challenging the jurisdiction of the Commission when it has acted unconstitutionally, contrary to its

agency, acting as a sovereign, to a federal agency tribunal over a matter generally reserved to the states for regulation and not expressly regulated by Congress?

STATEMENT OF THE CASE

The State Board brought its action against the Commission because the federal agency violated the State Board's U.S. Constitution, the Commission's authorizing statute, and nearly seven decades of established, unquestioned, and unchallenged U.S. Supreme Court jurisprudence. On February 1, 2011, the State Board filed a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction against the Commission ("Complaint"). On February 2, 2011, the State Board filed a Motion for Temporary Restraining Order and Other Equitable Relief, which sought to restrain and enjoin the Commission from further prosecution of its administrative action against the Board. The Motion for Temporary Restraining Order was denied by the District Court on February 9, 2011.

On February 28, 2011, the Commission responded to the State Board's

executive[s] ... act within their lawful authority, their acts are those of the sovereign"). This is analogous to the case at bar because the State Board is an agency of the state created by statute. It has and continues to operate within its statutory mandate under Chapter 93B of the North Carolina General Statutes and the North Carolina Dental Practice Act.

Occupational licensing boards, board members, and board employees are granted sovereign immunity under North Carolina law. See N.C. Gen. Stat. 93B-16(b) ("Occupational licensing boards shall be deemed State agencies for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes, and board members and employees of occupational licensing boards shall be considered State employees for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes."). Thus, the actions of the State Board, its members, and its employees, are actions of the state and are considered by the state of North Carolina to be entitled to sovereign immunity.

The Act sets forth the State Board's structure and mandates its activities. This includes requiring that the State Board be comprised of a majority of licensed dentists. Complaint p. 12; N.C. Gen. Stat. § 90-22(b). The Act also mandates that the State Board limit the practice of dentistry to licensed dentists. Complaint p. 10; N.C. Gen. Stat. § 90-22(b). Dental hygienists may also perform certain procedures such as stain removal from teeth under the supervision of a licensed dentist. N.C.

Gen. Stat. § 90-233(a). Most significantly, the Act clearly and unambiguously defines the practice of dentistry as the removal of stains from the human teeth and the offering to perform such services. Complaint pp. 18-19; N.C. Gen. Stat. § 90-

sent cease and desist letters to non-licensed providers of teeth whitening services within the state of North Carolina, such as spas and mall kiosks, and discouraged non-dentists from opening teeth whitening businesses in the state. FTC Complaint p. 50; Board Response p. 68. The Commission also took the State Board to task for sending letters to the owners or management companies of North Carolina shopping malls where teeth whitening services were likely to be offered to North Carolina consumers. FTC Complaint p. 50; Board Response p. 68. These mall letters explained that stain removal services constituted the practice of dentistry in North Carolina, and thus could only be performed by licensed dentists. Board Response p. 68-69.

The Commission also alleged in its administrative complaint that, solely because the majority of the members of the State Board are licensed dentists—as required by North Carolina statute—the State Board members' activities were motivated by financial interest and, therefore, the State Board was not entitled to the defenses available under the "state action immunity" doctrine. FTC Complaint p. 47. Shortly before the administrative hearing began, the Commission, on February 8, 2011, issued an opinion on the State Board's Motion to Dismiss and Complaint Counsel's Motion for Partial Summary Decision. See In the Matter of The North Carolina [State] Board of Dental Examiners, slip opinion, http://www.ftc.gov/os/adjpro/d9343/110208commopinion.pdf. The opinion held

Board of Dental Examiners, Notice of Appeal, http://www.ftc.gov/os/adjpro/d9343/110728respnotoceofappeal.pdf.

SUMMARY OF THE ARGUMENTS

This federal action is not a *sub rosa* interlocutory appeal nor an attempt by a private party to subvert an administrative proceeding regarding a matter clearly within the province of a federal agency. This case is not collateral attack on due process grounds against an administrative proceeding (though the due process grounds in this case are disturbing in number and kind). Nor is the focus of this case substantive antitrust analysis of alleged restraints of trade. The fundamental question in this suit is whether a bona fide sovereign state agency must submit to the jurisdiction of a federal agency

This action does not concern Commission regulation of a trade association or non-government entity, nor does it concern a state agency's internal policy or agency-created rules. Price-fixing and commercial speech are also not at issue. This action is also not a direct restraint on interstate commerce. Instead, the issue in this case is statutory definition of dentistry and the statutory composition of a state licensing agency created and controlled by state law, comprised of state officials, and funded by state funds. These state officials are bound by oaths of office, state ethics laws, and the state constitution to leave behind their private interests in their roles as state regulators. Failure to do so may result in removal

from office and prosecution. As a bona fide state agency, the Board members must comply with open meetings, public records, ethics legislation, and administrative procedure laws.

The question before this court is whether the Commission can, without specific congressional authorization, extend its own reach to preempt state statutes. Absent federal legislative or judicial authorization, the Commission's basis for this preemption is its own debatable economic/political theory, not adopted by Congress nor developed through Commission rulemaking. This case therefore raises the critical question: may a federal agency theory force a state into admi

from the Commission in this matter, the State Board was forced to bring a direct action in the District Court.

The Commission's actions are unconstitutional under the Tenth Amendment of the U.S. Constitution, which only permits the preemption of state law under certain limited circumstances; none of which exist here. Further, Article I, Section 8, Clause 3 of the U.S. Constitution (the Commerce Clause) vests in the legislative branch -- not the executive branch -- the power to regulate interstate commerce. An executive branch agency may only regulate commerce pursuant to a delegation of congressional authority; no such delegation can be found in the FTC Act.

This action was dismissed in error by the District Court for lack of subject

12(b)(1) is *de novo*. Simmons v. United Mortg. & Loan Inv., LLC, 634 F.3d 754, 762 (4th Cir. 2011) (citing Pitt County v. Hotels.Com, L.P., 553 F.3d 308, 311 (4th Cir. 2009)). Further, this Court should "r

The Constitution does not provide for administrative agencies in the Executive Branch to make constitutional determinations or decisions on their own limited statutory authorizations. There is no remedy available for the State Board within the Commission's administrative proceeding because the Commission does not have, and cannot have, the authority to investigate or act against a state agency behaving pursuant to a clearly articulated state statute. Federal court review of the Commission's actions on appeal from a final Commission decision is also inadequate. The issue in this matter is not the eventual decision by the Commission, but the basic fact that the Commission does not have jurisdiction in this matter. The Commission cannot make a final decision on the question of whether it has jurisdiction in this matter; only a federal court can settle that issue. Therefore, the federal courts are the exclusive avenue for the protection of the

F.2d 914 (4th Cir. 1977), cert. denied, 439 U.S. 862 (1978); Am. Gen. Ins. Co. v. FTC, 496 F.2d 197, 199-200 (5th Cir. 1974) (citing Fay v. Douds, 172 F.2d 720 (2d Cir. 1949); Leedom v. Kyne, 358 U.S. 184 (1958)). As demonstrated in a number of cases where these exceptions applied, federal courts hear direct challenges to federal agency actions when necessary to prevent and stop those agencies' constitutional violations and *ultra vires* actions.

While some courts have expressed concern that allowing a private party to commence litigation prior to exhausting remedies may open the flood gates, this is inapposite here. In Free Enterprise, Justice Breyer noted in his dissenting opinion that:

> any person similarly regulated by a federal official who is potentially subject to the Court's amorphous new rule will be able to bring an "implied private right of action

By pursing its administrative enforcement action against the State Board, the Commission is engaging in acts that violate the State Board's rights under the Commerce Clause (Article I, Section 8, Clause 3) and the Tenth Amendment to the U.S. Constitution. The Commission also is engaging in *ultra vires* actions by exceeding its limited statutory authorization set forth in the FTC Act and the many decades of case law interpreting its own enabling statute. As a result of these constitutional and statutory violations, the State Board is not required to exhaust its administrative remedies before bringing this lawsuit against the Commission. See, e.g., Leedom, 358 U.S. 184; R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002). Since the District Court has jurisdiction, the Commission's arguments regarding mootness and exhaustion of remedies fail.

A. Subject Matter Jurisdiction Was Properly Vested in the District Court.

The District Court sidestepped jurisdiction in this matter by granting the Commission's motion for a Rule 12(b)(1) dismissal for lack of subject matter jurisdiction. The District Court decided that jurisdiction was not properly before it because the Commission was subjecting the State Board to an "ongoing" administrative proceeding. Order p. 157. Essentially, the District Court contends that a party can never prevent or stop an illegal and unconstitutional assertion of power by a federal agency until that federal agency has made its final decision in a case. This is incorrect; as detailed below, there are a number of circumstances in

which a party may properly bring suit against a federal agency based on that agency's illegal and unconstitutional actions.

where the constitutional and statutory rights of a state must be protected by preventing a federal agency action until the constitutional issues are resolved.

The State Board is not required to exhaust all administrative remedies prior to seeking judicial relief when the Commission has acted outside of its limited

First Circuit declared that the court, not the Commission, was in the best position to adjudicate whether the Commission's jurisdiction attached in the case.

> We do not agree with the FTC that the question of state action is one on which this court should defer to that agency, either because of its expertise or its statutory fact-finding authority. The Commission is not here interpreting the statute as it has been charged with administering (i.e., the [FTC Act]) but instead is resolving a judicially-created principle of immunity that, if applicable, bars the Commission's jurisdiction. Cf., Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984). ... [S]tate action immunity is a threshold issue that

and are applicable in this case. Furthermore, the Commission has acted well outside the scope of its limited authority. Therefore, the State Board is not required to exhaust all administrative remedies.

2. The District Court Erroneously Treated This Action as an Interlocutory Appeal, and Not a Direct Suit.

The District Court incorrectly characterized this action as an interlocutory appeal and an effort to circumvent an administrative proceeding to obtain a "state action exemption" from an Article III court. Order pp. 152 & 154 (citing S.C. State Bd. of Dentistry v. FTC

action cannot be used to substitute for an appeal." Order p. 154; Travelers, 490 F.2d 536, 544 n.34 (3rd Cir. 1974). However, as previously stated, this is a direct action on a jurisdictional question; this is not an appeal. The note in Travelers references a Pennsylvania case where a defendant was convicted of murder in state court and, instead of proceeding through the normal appellate process, he filed a declaratory judgment action in federal district court seeking a declaration of his constitutional rights with regards to post-trial motions. United States ex rel. Roberts v. Pennsylvania, 312 F. k cus6proJ17.7(, 312 Fding .9ver, Theof pronvi1.9e do.)peal7

jurisdiction to require the NLRB to grant full party status to a collective bargaining

and *ultra vires*

emergency regulation (not a state statute, but a Board-created rule) prohibiting oral hygienists from performing certain dental services in schools when a dentist had previously examined the students. However, this rule directly contradicted a clearly worded state statute permitting hygienists to perform such services. In response, the Commission commenced an administrative proceeding and ordered the Board to cease and desist. The South Carolina Board asserted that it was entitled to Parker immunity and, therefore, the Commission must refrain from its administrative proceeding. After the Commission denied Parker immunity, the South Carolina Board filed an interlocutory appeal with the Fourth Circuit seeking relief on the sole basis of state action immunity.

In the case at bar, the District Court failed to recognize that this case does not involve an interlocutory appeal. This case is not simply about whether Parker immunity can be immediately appealed. Rather, it is a direct suit that operates independent of the ongoing administrative proceeding. The crux of this direct action centers around the State Board's argument that, absent a specific act of Congress, sovereign states can still regulate the practice of professions within their borders in ways those states see fit. The South Carolina Board was not instituting a direct action to vindicate its constitutional rights; rather, it was seeking to have this Court overturn the Commission's denial of its request for Parker immunity. In addition, the instant case involves the State Board's enforcement of a clearly

articulated statute whereas the South Carolina Board was promulgating an agency-created rule that was contrary to a clearly worded state statute. While the South Carolina Board's action may appear similar because of the names of the parties involved and the jurisdictional questions, it does not control this action.

The District Court's reliance on South Carolina State Board of Dentistry is further misguided given this Court's approach to the South Carolina Board's state action immunity claim. The South Carolina Board argued that the state action immunity doctrine provided it with *ipso facto* immunity regardless of whether the Board was acting pursuant to state law or under active state supervision. This Court actually considered the possibility that *ipso facto* immunity might be permitted, as it has been by some federal courts, even though the South Carolina Board was acting contrary to a clearly articulated state statute (unlike the North Carolina State Board). S.C. State Bd. of Dentistry, 455 F.3d at 442 n.6. It is surprising, then, that the District Court would rely on a case which did not rule on whether *ipso facto* immunity exists, in rejecting the State Board's argument that less than *ipso facto* immunity is statutorily required.

The District Court also misinterpreted the Ukiah case, which involved an interlocutory appeal of an administrative agency's actions. Ukiah Adventist Hosp. v. FTC, 981 F.2d 543 (D.C. Cir. 1991). Again, this case is inapposite here because the State Board has sought a direct action to vindicate its constitutional rights; it

did not file an interlocutory appeal of a final agency decision. The District Court appears to have cherry-picked from the Ukiah case the statement that the "relevant statute [at issue in the case] 'commits revi

independent of the ongoing administrative proceeding and the District Court has original jurisdiction to rule as to the violation of a state's constitutional rights.

The District Court further relied upon two cases to establish that it lacked jurisdiction to enjoin ongoing administrative enforcement proceedings such as the one at issue here. Order p. 154. This reliance was misguided as these two cases, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) and Gallanosa v. United States, 785 A tmi 16 T(4e Cir. 1986), ar viastly diffre.t pfrothe vistian

jases TInGallanosa]TJET4123.78 479.5 545.92.66003 refBT13.98 0 0 13.98 7

or labeling an article pending an administrative review of whether the branding or labeling is fraudulent or misleading. The Petitioner sought to have the district court enjoin the FDA's preliminary administrative action until a hearing could be

(9th Cir. 1989); Benson v. Az. State Bd. of Dental Examiners, 673 F.2d 272 (9th Cir. 1982); Gambrel v. Ky. Bd. of Dentistry, 689 F.2d 612 (6th Cir. 1982); Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24 (1st Cir. 1999); Saenz v. Univ. Interscholastic League, 487 F.2d 1026 (5th Cir. 1973); see also Brazil v. Ark. Bd. of Dental Examiners, 593 F. Supp. 1354 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985); Nassimos v. N.J. Bd. of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376 (D.N.J. Apr. 4, 1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996). The Commission has pointed to cases involving private actions under color of state laws, rules or policy, suggesting that the mere fact that the state statutes provides for a licensee majority on the Board converts the state action into a private action. The *stare decisis* effect of those cases and the facts are to the contrary. Aside from the long-standing court presumption that such Board members are acting in good faith, there are specific state statutory and state constitutional mandates requiring the licensee members to eschew conflicts of interest and act only as state officials. Neither Congress nor the courts have suggested otherwise.

III. The Commission Cannot Displace the North Carolina Dental Practice Act or Interfere with the Composition of the State Board Absent Statutory and Constitutional Authority.

The District Court disregarded the fact that the Commission acted in brazen defiance of its statutory mandate, exceeding the scope of its limited authority

expressly granted by Congress and the Constitution. In its Order, the District Court misunderstood that the State Board is not asking this Court or the District

party is immune from federal

interpretation of the relevant statute, we will find that it did not 'violate a clear statutory mandate,' and Leedom jurisdiction will not lie")).

Contrary to the District Court's conclusion, this is a settled area of the law. Order p. 156 (citing N.C. State Bd. of Registration for Prof'l Eng'rs & Land Surveyors v. FTC, 615 F. Supp. 1155, 1161 (E.D.N.C. 1985) (declining to apply the "brazen defiance" doctrine where "the case law setting the parameters of [the] agency's authority is presently unsettled")). The Commission's attempts to assert jurisdiction over the State Board therefore violate Section 4 of the FTC Act.

B. The Commission's Action Is Contrary to Section 5 of the FTC Act.

Section 5 of the FTC Act delineates and prohibits certain "unfair methods of competition" and empowers the Commission to act against "persons, partnerships, or corporations" engaged in such unfair competition. 15 U.S.C. § 45(a). However, the State Board has not engaged in any "unfair methods of competition," and the Commission does not have jurisdiction to take any action against it. As previously stated, the State Board is immune from the enforcement of the FTC Act because it is a state agency acting pursuant to state law. This fact was not contradicted by either the Commission or the Administrative Law Judge in their reviews of this case. As a state agency, the State Board is not required to show that its enforcement of state law was actively supervised by the state.

The Supreme Court itself has stated it is "likely" that state agencies are immune from antitrust law so long as they act pursuant to state statute. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985). According to every single court that has contemplated the issue since the Town of Hallie opinion was rendered, the Commission does not have jurisdiction over state agencies acting pursuant to state law. See, e.g., Hass v. Or. State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989); Gambrel v. Ky. Bd. of Dentistry, 689 F.2d 612, 616-18 (6th Cir. 1982); see also Brazil v. Ark. Bd. of Dental Examiners, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985); Nassimos v. Bd. of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376, at *10 (D.N.J. Apr. 4,1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996). According to numerous district and circuit court decisions, the issue of state supervision of a state agency's enforcement of the law is irrelevant to the question of whether that state agency is immune.[4] The only question before the courts in

[4] Unlike state actors, private parties must show "active supervision" by the state for each of their actions to be permitted. See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Even if state agencies were required by law to show "active supervision," they demonstrate such supervision when they act pursuant to state statutes to supervise the actions of private actors. Flav-O-Rich, Inc. v, N.C. Milk Comm'n, 593 F. Supp. 13, 18 (E.D.N.C. 1983) (concluding that, although the Commission was a state agency, it demonstrated active supervision of a clearly-articulated state law by holding "regular meetings" and by its monitoring of private milk producers' "flow of price and cost information," as required by state statutes).

these cases was whether the state agency acted pursuant to clearly articulated state

Moreover, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute." Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 580 (1978). The Supreme Court has had opportunities to put forth an interpretation of the FTC Act requiring active supervision of state agencies; it has not done so. The legislative and judicial branches will not budge from their grant of immunity to state agencies acting pursuant to state law, so the executive branch is apparently acting *ultra vires* to create a new law. A final decision by the full Commission on this matter is not needed; the State Board is seeking immediate relief from the Commission's unauthorized interpretation of its authorizing statute.

C. The Commission Is Attempting to Achieve a Result Through *Ultra Vires* Action that It Cannot Achieve Through Lawful Rulemaking.

It is widely known and documented that the Commission has spent years lobbying for expanded jurisdiction over state agencies, and arguing for an end to state action immunity for majority-licensee state agencies acting pursuant to state law. See, e.g., FTC, *Report of the State Action Task Force*, at 37 *et seq.* (2003), http://www.ftc.gov/os/2003/09/stateactionreport.pdf. In fact, the Commission has actually attempted to circumvent state action immunity by its own internal rulemaking. Such a blatant power grab was overturned by the federal courts, just as this circumvention of federal law and the Constitution should be.

"for the purpose of abrogating Eleventh Amendment immunity in patent cases, to close a 'sovereign immunity loophole'").

In California Optometry, the Commission investigated restrictions imposed by the California State Board of Optome

at 982. The court determined that "[a]n

role of state licensing boards in defining professional practices. See, e.g., 15 U.S.C. § 7610(2) (defining prescriber as "an ophthalmologist, optometrist, or other person permitted under State law to issue prescriptions for contact lenses"). This illustration is applicable here because the Commission has attacked a state statute and threatened the composition of a state board absent any authority to do so. Congress has not acted to authorize the Commission to displace state statutes regulating the profession of dentistry. Moreover, the Commission has no grounds on which it can base its actions and, to the contrary, has even defied the Constitution, U.S. Supreme Court jurisprudence, and Presidential Orders.

The Commission may not, by its internal rulemaking procedures or its internal administrative proceedings, act beyond the scope of its statutory authority. There is no evidence that Congress intended to confer upon the Commission the statutory authority to prevent states from regulating licensed professions and protecting public health and safety.

D. The Commission Is Violating the State Board's Rights Under the Commerce Clause of the U.S. Constitution.

The Commerce Clause, Article I, Section 8, Clause 3 of the U.S. Constitution, precludes the Commission from pursuing its administrative enforcement action against the State Board. In essence, the Commission is attempting to dictate how the State Board may regulate the practice of dentistry in North Carolina. It is the constitutional province of the legislative branch—not the

executive branch—to regulate interstate commerce. An executive branch agency is only permitted to regulate commerce under the delegation of congressional authority. While the FTC Act permits the Commission to address antitrust violations by persons, corporations and partnerships, no such right exists regarding sovereign states acting pursuant to a clearly articulated statute. See Parker, 317 U.S. at 359-60 ("The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with congressional legislation enacted in the exercise of those

Parker, 317 U.S. at 362. In Parker, ninety-five percent of the products regulated by California's state statute were ultimately sold outside the state. Yet the Court did not find any Commerce Clause violation stemming from the state law. Id. at 359.

In the instant action, the statute under which the State Board acted to enforce prohibitions against the unauthorized practice of dentistry does not discriminate against interstate commerce, and the benefits of the statute outweigh any incidental burden that it places on interstate commerce. The State of North Carolina could have left the regulation of dentistry entirely up to the free market, but it made a deliberate choice to vest such responsibility with the State Board and empowered its members to take action to uphold their statutory duties. Hass, 883 F.2d at 1462. North Carolina law restricts the performance of stain removal services to licensed dentists and dental hygienists under the supervision of licensed dentists. See N.C. Gen. Stat. § 90-22(b) (restricting the practice of dentistry to licensed dentists), N.C. Gen. Stat. § 90-29(b)(2) (defining the performance and offering to perform "stain removal" as the practice of dentistry), and N.C. Gen. Stat. § 90-233(a) (requiring that a dental hygienist practice only under the supervision of a licensed dentist). The statutorily-mandated duty of the State Board to ensure the health and safety of consumers of teeth whitening services far outweighs any incidental effects on interstate commerce. As recognized in United Haulers Association:

> [G]overnment is vested with the responsibility of protecting the health, safety, and welfare of its citizens. ... These important

> responsibilities set state and local government apart from a typical private business. ... Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.

550 U.S. at 342-43 (internal citations omitted); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."); Hawkins v. N.C. Dental Soc'y, 355 F.2d 718, 720 (4th Cir. 1966) (Board of Dental Examiners is a "creature[] of the State of North Carolina" and its functions are "concededly public functions of the state").

In addition, the Commission can make no argument that the FTC Act is intended to preempt the North Carolina state statutes at issue in this case. As recognized by the Fourth Circuit, federal law only can preempt state law under three circumstances: "(1) when Congress has clearly expressed an intention to do so ('express pre-emption'); (2) when Congress has clearly intended, by legislating comprehensively, to occupy an entire field of regulation ('field pre-emption'); and (3) when a state law conflicts with federal law ('conflict pre-emption')." Med-Trans Corp. v. Benton, 581 F. Supp. 2d 721, 730 (E.D.N.C. 2008) (quoting College Loan Corp. v. SLM Corp., 396 F.3d 588, 595-96 (4th Cir. 2005)) (internal citations omitted). The "starting presumption is that Congress does not intend to supplant state law," and this presumption is "even stronger against preemption of state

remedies ... when no federal remedy exists." 396 F.3d. at 597 (internal citations omitted). Further, the Fourth Circuit has determined that the decision on "whether a federal statute preempts a state statute ... is a constitutional question." Am. Petroleum Inst. v. Cooper, 681 F. Supp. 2d 635, 641 (E.D.N.C. 2010) (internal citation omitted) (finding that a federal law did not preempt a North Carolina statute because the state law "did not stand as an obstacle" to the federal law). Therefore, it is a question properly put to this Court, not an issue to be addressed in an administrative proceeding.

In this case, as discussed above, there is nothing in the legislative history of the FTC Act to suggest that Congress intended to preempt North Carolina's laws on the regulation of the practice of dentistry. Even if the Commission could argue that the FTC Act is intended to preempt North Carolina's ability to regulate the practice of dentistry as it best sees fit, such preemption would be unconstitutional. Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 2000). The plaintiff private business in Petersburg Cellular Partnership applied for a conditional use permit to construct a communications facility. The defendant, a county board, recommended approval of the permit,

concerns expressed by county citizens. Plaintiff filed a federal lawsuit seeking a mandatory injunction to enforce the terms of the Telecommunications Act by

464 (citing L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988))

the State Board's expertise to the exclusion of expert witnesses. See, e.g., Leahy v. N.C. Bd. of Nursing, 346 N.C. 775, 780-81 (1997). The Commission cannot point to any evidence that Congress intended to give the Commission the power to preempt this state statute. Therefore, absent such preemption, the actions of the Commission are unconstitutional.

The Commission's attempts to direct the manner in which North Carolina and the State Board regulate the practice of dentistry is still another violation of the Tenth Amendment. As discussed above, such attempts are contrary to the prohibitions set forth in New York

Indeed, the Commission has directly violated a Presidential Order that expresses the general policy of the Executive Branch relating to the preemption of state laws. On May 29, 2009, President Obama sent a memorandum to the heads of executive departments and agencies instructing that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with sufficient legal basis for preemption." Contrary to this memo, the Commission has continued to perpetrate an unprecedented campaign to preempt the enforcement of an unambiguous state statute enacted to protect the citizens of North Carolina.

In sum, the Commission is clearly trampling upon the State Board's Tenth Amendment rights. The Commission has no authority to dictate the steps that must be taken by the State Board to enforce North Carolina's Dental Practice Act. Nor does it have the authority to infer collusion merely because a licensee is serving on an occupational licensing board. Asserting such authority is a violation of the Tenth Amendment, and this Court should invalidate such assertion of authority in the absence of any evidence of preemption.

CONCLUSION

Wherefore, Appellant respectfully requests this Honorable Court to reverse the judgment of the District Court and order the Commission to dismiss its

administrative proceeding. Alternatively, Appellant requests remand of this action for further proceedings.

REQUEST FOR ORAL ARGUMENT

The State Board hereby respectfully requests oral argument of the issues presented in its brief. These are novel issues that would benefit from oral argument before this Honorable Court.

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellant affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. 29(d) and Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 12,140 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Executed this 6th day of October, 2011.

s/ Noel L. Allen

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Appellate CM/ECF System on September 29th, 2011.

I certify that all parties to this case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF System.

Executed this 6th day of October, 2011.

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ADDENDUM

U.S. Constitution Provisions

Article I, Section 8, Clause 3 (the Commerce Clause)

Power of Congress to regulate commerce:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article III, Section 2, Clause 1

Subjects of Jurisdiction

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State;--between Citizens of different States, --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article III, Section 2, Clause 2 (original jurisdiction over actions against states)

Jurisdiction of Supreme Court:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Tenth Amendment

Powers reserved to states or people:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Code

15 U.S.C. § 44. Definitions

The words defined in this section shall have the following meaning when found in this Act, to wit:

“Commerce” means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

“Corporation” shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

…

15 U.S.C. § 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 18(f)(3) [15 USCS § 57a(f)(3)], Federal credit unions described in section 18(f)(4) [15 USCS § 57a(f)(4)], common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 USCS §§ 40101 et seq.], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 USCS §§ 181 et seq.], except as provided in section 406(b) of said Act [7 USCS § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

…

<u>North Carolina Statutes</u>

N.C. Gen. Stat. § 90-22(a) & (b). 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

N.C. Gen. Stat. § 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:

…

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

…

(7) Takes or makes an impression of the human teeth, gums or jaws;
ou. 2; 9377 co. 368; 9379 c2d tSssi. co. 1935,6.37

…

(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;

…

(13) Represents to the public, by any advertisement or announcement, by or
92 su. 2; 9361 co. 446 su.-6.14

i2; 9365 co. 163 csu. 1 c2; 9371 co. 755,

N.C. Gen. Stat. § 90-233(a). Practice of dental hygiene

(a) A dental hygienist may practice only under the supervision of one or more licensed dentists. This subsection shall be deemed to be complied with in the case of dental hygienists employed by or under contract with a local health department or State government dental public health program and especially trained by the Dental Health Section of the Department of Health and Human Services as public health hygienists, while performing their duties for the persons officially served by the local health department or State government program under the direction of a duly licensed dentist employed by that program or by the Dental Health Section of the Department of Health and Human Services.

…

HISTORY: 1945, c. 639, s. 12; 1971, c. 756, s. 13; 1973, c. 476, s. 128; 1981, c. 824, ss. 2, 3; 1989, c. 727, s. 219(6a); 1997-443, s. 11A.23; 1999-237, s. 11.65; 2007-124, s. 2.

N.C. Gen. Stat. § 93B-16. Occupational board liability for negligent acts.

…

(b) Occupational licensing boards shall be deemed State agencies for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes, and board members and employees of occupational licensing boards shall be considered State employees for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes. To the extent an occupational licensing board purchases commercial liability insurance coverage in excess of one hundred fifty thousand dollars ($ 150,000) per claim for liability arising under Article 31 or 31A of Chapter 143 of the General Statutes, the provisions of G.S. 143-299.4 shall not apply. To the extent that an occupational licensing board purchases commercial insurance coverage for liability arising under Article 31 or 31A of Chapter 143 of the General Statutes, the provisions of G.S. 143-300.6(c) shall not apply.

…

HISTORY: 2002-168, s. 1.