CASE NO. 12-1172

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

ON PETITION FOR REVIEW OF AN ORDER OF
THE FEDERAL TRADE COMMISSION

PETITIONER'S REPLY BRIEF

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INTRODUCTION

Federal Trade Commission ("FTC" or "Commission"), in its Response Brief ("Response") urges acceptance of a dangerous construct that substantively rewrites each essential element of antitrust jurisprudence in this context and upends constitutional federal-state balance. FTC urges:

deference to patently false findings;

antitrust scrutiny of state agency administration of clearly-articulated statutes;

relevant market definition that includes illegal services;

presumptive conspiracy when state boards comprised of state officials (required by law to be licensees) enforce clearly-articulated unauthorized practice statutes;

enlarged FTC jurisdiction and evisceration of state action immunity without Congressional authority and admittedly without Supreme Court ("SCOTUS") precedence;

presumption that licensed state officials would violate state ethics laws to engage in self-aggrandizing restraints of trade because they could be potential competitors with illegal service providers; and

unreasonable restraint in the absence of proof that the N.C. State Board of Dental Examiners ("NCSBDE" or "Board")'s actions deprived the marketplace of any lawful choice.

As shown herein, FTC still has not supported its radical positions with any relevant cases or substantial evidence. FTC's Response never disputes that NCSBDE acted pursuant to the North Carolina Dental Practice Act ("NCDPA") and only upon finding *prima facie* evidence of a state law violations. Lacking any evidence of collusion, conceding a clearly-articulated statute, and deeming public protection irrelevant, FTC abandons the theory of its original complaint and urges antitrust scrutiny of the ministerial ways NCSBDE enforced clear statutes. It is not within the intended scope of federal antitrust nor FTC's prerogative to micromanage the manner in which a state agency attempts to obtain voluntary compliance with illegal operators who are *prima facie* violators of clear state law or to second-guess how a state legislature structures a state agency.

ARGUMENT

I. FTC'S SELF-SERVING FALSE FINDINGS AND CONCLUSIONS DO NOT WARRANT COURT DEFERENCE.

It is the reviewing court's prerogative, not FTC's, to resolve "identification of governing legal standards and their application to the facts found." *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 454 (1986). In particular, no deference is warranted to FTC's legal conclusions about its efforts to eviscerate state action

immunity. *See, e.g., New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064, 1072 (1st Cir. 1990).

Lacking substantial evidence, FTC's Response urges unconscious deference to self-serving and unfounded inferences (mislabeled as "findings of fact"). As shown in the Opening Brief ("Opening") and herein, FTC premises pivotal findings upon record citations that either do not support or actually contradict

II. NCSBDE IS NOT A "PERSON" UNDER THE FTCA.

A. Plain Meaning of "Persons" Under FTCA Does Not Include

"entity" because the complete definition reveals that Congress explicitly references state officials when it intends to include them. Response, 25. If Congress intended to grant FTC authority over states and state agencies, it would have expressed such intent.[1] *See* P. Areeda & H. Hovenkamp, ANTITRUST LAW ¶228 at 217 (3d ed. 2006) ("In other cases, such as those involving civil rights damages actions against

terms "partnership" and "corporation," indicating Congress's intent to limit FTC jurisdiction to these three specific categories—none of which include states and their statutory agencies. *See also Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 980 (D.C. Cir. 1990) (emphasis in original) ("The legislative history of the Act suggests that at the time of its original enactment, Congress was concerned with the anticompetitive conduct of *businesses*, whether organized as corporations, partnerships, associations, or sole proprietorships.").

Second, the clear statement rule requires courts not to interpret ambiguous statutes in a way that would "alter the usual constitutional balance between the States and the Federal Government," unless Congress's intent to do so is "unmistakably clear in the language of the statute." *Will*, 491 U.S. at 65; *United States v. Bass*, 404 U.S. 336, 349 (1971); *Gregory v. Ashcroft*, 501 U.S. 452, 470 (1991). FTC's assertion of jurisdiction over NCSBDE alters the usual balance of federalism. *See Gonzales v. Oregon*, 546 U.S. 243, 271, 274 (2006) (internal citation omitted) (health and safety regulation is primarily and historically a matter of local concern; federalism principles "belie the notion that Congress would use such an obscure grant of authority to regulate areas traditionally supervised by the States' police power"); *California Optometry*, 910 F.2d at 982.

In pursuing this case, FTC runs afoul of federalism principles by anointing itself to interpret not only Congressional intent but NCDPA, to preempt NCDPA,

and to "oversee" the state's regulation of the practice of dentistry. *See, e.g.*, Opening, 39-41. FTC's interpretation of FTCA violates the clear statement rule, as Congress was not "'unmistakably clear" and never "manifest[ed]" its intent "to preempt the historic powers of the States... ." *Will*, 491 U.S. at 65 (internal citations omitted). "Absent a basis more reliable than statutory language insufficient to demonstrate a 'clear and manifest purpose' to the contrary, federal

Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* at 981 (quoting *Parker v. Brown*, 317 U.S. 341, 350-51 (1943)). Indeed, "to give the state-displacing weight of federal law to mere Congressional ambiguity would evade the very procedure for lawmaking on which *Garcia*[3] relied to protect states' interests." *Id.* at 982 (quoting L. Tribe, AMERICAN CONSTITUTIONAL LAW § 6-25, at 480 (2d ed. 1988)); *see also United States v. Dauray*, 215 F.3d 257, 264 (2d Cir. 2000) ("A statute should be interpreted in a way that avoids absurd results."). Here, FTC attempts to preempt NC's regulation of dentistry, but fails to advance any jurisprudence demonstrating how NC's regulation of dentistry is not "quintessentially sovereign" and therefore subject to jurisdiction under FCTA.[4] Of course, in this case, FTC avoided earlier scrutiny by

separation of powers. Rules of statutory interpretation foreclose FTC's unfounded interpretation of "persons."

III. NCSBDE IS IMMUNE UNDER THE STATE ACTION DOCTRINE.

A. FTC Still Offers No Dispositive Cases Supporting Evisceration of State Action Immunity.

Without exception, federal courts grant antitrust immunity to

For example, FTC argues that *FTC v. Monahan* requires a showing of active supervision for state agencies whose members participate in the regulated profession. 832 F.2d 688 (1st Cir. 1987). *Monahan* addresses whether the state board must comply with an FTC-issued subpoena—not whether the board in fact violated FTCA. The court noted that, given the early stages of the investigation and without the benefit of a filed complaint, it simply did not know whether the board acted pursuant to a clearly-articulated statute. Furthermore, at issue in *Monahan* were board rules, not a state law. By contrast, NCSBDE acted pursuant

NCSBDE's actions, as discussed in greater detail in NCSBDE's Opening Brief. *See* Opening, 35-37. In *Asheville Tobacco*, this Court considered whether a local board of trade—a corporation created by market participants for the financial benefit of its members—was truly a state actor, ultimately concluding that it was not.[8] In so holding, this Court referenced a list of characteristics that distinguish state agencies from consortiums of private competitors. In contrast to the board of trade, NCSBDE meets these characteristics.[9]

Additionally, the state bar's actions in *Goldfarb* are distinguishable from NCSBDE's actions to enforce NCDPA. There, SCOTUS held that "the threshold inquiry in determining if an anticompetitive activity is state action ... is whether the activity is required by the State acting as sovereign." 421 U.S. at 790; *Kurek v. Pleasure Driveway & Park Dist.*

misconstrued beyond its limited application, indicating that "we intend no diminution of the authority of the State to regulate its professions." 421 U.S. at 793.

FTC urges this Court to decide "whether state regulatory bodies must show active supervision when "dominated" by priv

(1991)). But, Elhauge ignored extant case law. *See, e.g., Hass*, 883 F.2d at 1468; *Brazil v. Ark. Bd. of Dental Exam'rs*, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), *aff'd*, 759 F.2d 674 (8th Cir. 1985). Furthermore, since 1991, courts have continued to grant immunity to majority licensee state agencies acting pursuant to state law. *See, e.g., Earles v. State Bd. of Certified Public Accountants of La.*, 139 F.3d 1033, 1041 (5th Cir. 1998), *cert. denied*, 525 U.S. 982 (1998).

As SCOTUS recently made clear, there are constitutional limits to the extent to which even Congress could intentionally foist its will (or FTC's) upon states via the Commerce Clause. *See generally Nat'l Fed'n of Indep. Bus. v. Sebelius*, 183 L. Ed. 2d 450 (2012) (Congress can lure state action with funds, but it cannot compel state officials to act in an area traditionally reserved to state governance.). This would be especially true in the "quinteslicetrato wregulaally.

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because it acted pursuant to a clearly-articulated state law and because active supervision exists. *See* Opening, 38-39. FTC dismisses state laws assuring such supervision, indeed failing to mention a single state statute other than the NCDPA.

Requiring a more explicit showing of clear articulation and additional direct supervision would demand "a close examination of a state legislature's intent ...

C. Antitrust Scrutiny of How a State Agency Seeks Compliance with a Clearly-Articulated Unauthorized Practice Statute Is Not Good Public Policy.

Arguing that NCSBDE is dominated by private interests[11] and therefore subject to the "active supervision" requirement, FTC contrasts NCSBDE with other states' boards with less independent rule-making power[12] or more members appointed by the governor. However, there is **no case law** subjecting state agencies acting pursuant to state law to federal antitrust law—regardless of whether the agency is a majority licensee state board or elected by market participants.[13] *See, e.g., Hass,* 883 F.2d at 1460 n.3 (Oregon State Bar leadership elected by bar members). Asking courts to invent criteria differentiating some state agencies from others for the purposes of establishing immunity triggers the concern raised in *City of Columbia v. Omni Outdoor Advertising*:

> [T]he real question is whether a jury can tell the difference – whether *Solomon* can tell the difference – between municipal-action-not-entirely-independent-because-based-partly-on-agreement-with

[11] Contrary to FTC's suggestion, state agencies are not more susceptible to private interests than municipalities. Rossi, *Realizing the Promise of Electricity Deregulation*, 40 WAKE FOREST L. 2 (883 F.EV98 283216m (11)Tj 0.0004 Tc 0.307Tj 13.98 0 0 1[(. 617, 651-

private-parties that is *lawful* and municipal-action-not-entirely-independent-because-based-partly-on-agreement-with private parties that is *unlawful*. The dissent does not tell us how to put this question coherently, much less how to answer it intelligently.

FTC offers no authority to dispute that NCSBDE carried out its duty to enforce state law.[16] *Cf. State ex rel. Comm'r of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 404 (1980) (authority of state board should be liberally construed in light of purpose); N.C.G.S.§90-22(a) (NCDPA to "be liberally construed to carry out these objects and purposes").

FTC's argument belies wise federalism principles by anointing itself arbiter of procedurally-proper state action. *Hallie*, 471 U.S. at 42 (state legislature need not explicitly state that it expected agency to engage in conduct that would have anticompetitive effects). FTC would strip immunity from state agencies if they enforce state law in what FTC deems to be a procedurally defective manner. The Ninth Circuit squarely rejects such a position. Then-Judge Anthony Kennedy stated on behalf of the court: "actions otherwise immune should not forfeit that protection merely because the state's attempted exercise of its power is imperfect in execution under its own law." *Llewellyn v. Crothers*, 765 F.2d 769, 774 (9th Cir. 1985) (internal citation omitted).

[16] AAI contends NCSBDE "does not challenge FTC's conclusion that '[t]he Board had no authority to issue cease and desist orders under its enabling statute.'" AAI Brief, 16. Such contention misstates the principles underlying state action. *See City of Columbia*, 499 U.S. at 372-73 ("statutes clearly authorize immune conduct when such conduct is the 'foreseeable result' of the statute.").

efficient federalism calls for no such result [because] ... ordinary errors or abuses in the administration of procedures created or approved by the state should be left for state tribunals to review." Areeda & Hovenkamp, *supra*, ¶224d at 117. Indeed, "the state, not the federal antitrust tribunal, should ordinarily be left to respond to agency error, especially when state law creates a private remedy." *Id.* at 125. Recipients of C&Ds had ample remedies under state law if they believed that they were not violating state law. However, no recipients (most of whom had direct or indirect legal representation) availed themselves of these state remedies. FTC's unilateral attempt to regulate North Carolina's regulation of the practice of dentistry contradicts "wise and efficient federalism." Fundamental tenets of federalism and precedent prohibit FTC from questioning the way states choose to structure their professional licensing agencies and the manner in which a state agency enforces clear public protection statutes.

IV. NCSBDE IS NOT CAPABLE OF CONSPIRING WITH ITSELF.

FTC argues that NCSBDE is capable of concerted action because it is comprised of "distinct economic actors, with financial interests in restraining trade in the teeth whitening services market."

illegal teeth whitening providers.[18] *Am. Needle, Inc. v. NFL*, 130 S. Ct. 2201, 2214 (2010). In this specific context, NCSBDE members are not independent decision-makers who determined that unlicensed teeth whiteners acted illegally. Rather, NCSBDE members operate at the direction of the legislature, which prohibits unlicensed teeth whiteners from "remov[ing] stains, accretions or depositions from the human teeth" or from "tak[ing] or mak[ing] an impression of the human teeth, gums or jaws." *See* N.C.G.S.§90-29(b). As such, the General Assembly through the NCDPA—and not NCSBDE—decided to prohibit unlicensed teeth whiteners.

Perhaps recognizing this fatal flaw in their logic, FTC and AAI[19] make a last-ditch argument that neither the ALJ nor the Commission adopted. They argue that illegal teeth whiteners do not violate NCDPA and that NCSBDE members act as independent decision-makers by "falsely" interpreting the NCDPA for their own

[18] In its state action arguments, FTC suggests that it complains only about the **method** through which NCSBDE excluded illegal teeth whiteners. Response, 38. As such, FTC concedes that the exclusion of illegal teeth whiteners was not an unlawful objective, and no cons

separate economic interest.[20] FTC and amicus cite no precedent or credible evidence[21] for these positions, and for good reason. States that have addressed the legality of unlicensed teeth whiteners have found them in violation of their respective dental practice acts. *See, e.g.* Okla. Op. Att'y Gen. No. 03-13, 2003 Okla. AG LEXIS 13 (Mar. 26, 2003); Kan. Op. Att'y Gen. No. 2008-13, 2008 Kan. AG LEXIS 13 (June 3, 2008); *White Smile USA, Inc. v. Bd. of Dental Exam'rs of Ala.*, 36 So. 3d 9 (Ala. 2009). Furthermore, NCSBDE presented ample evidence at trial to show that teeth whiteners violate the NCDPA. *See, e.g.*, JA 639-40, 645, 651-52 (Haywood, Tr.).

Another reason why NCSBDE cannot unlawfully conspire—in the context of excluding illegal teeth whiteners—is that NCSBDE members do not act on economic interests separate from NCSBDE. As explained previously, most

[20] Since neither the ALJ nor the Commission ruled on whether teeth whitening services constitute the illegal practice of dentistry under NCDPA, FTC's arguments in favor of such a finding are not entitled to any deference.

[21] To show teeth whitening does not remove stains from teeth, FTC relies solely on its expert witness, Dr. Giniger, whose vested interest in this proceeding as a consultant for various teeth whitening companies renders his testimony suspect. Ironically, several of FTC's witnesses who actually operate teeth whitening businesses testified that teeth whitening **does** remove stains from teeth. *See, e.g.*, Nelson Tr., 818 ("So the only thing that teeth whitening is ... is actually stain removal, but the dentist created the term for marketing purposes 'teeth 1eeth620eetnesoxide betiktening

licensee NCSBDE members did not have a financial interest in excluding non-dentist teeth-whitening services. Opening, 16-17, 45-46. In response, AAI argues that capacity to conspire still exists, even if not all NCSBDE members actually compete in the relevant market,[22]

States v. Sealy, Inc., 388 U.S. 350, 352 (1967) (all licensees shared substantially similar economic interest in actually reselling bedding products); *North Texas Specialty Physicians*, 528 F.2d at 357 (finding capacity to conspire because of substantially similar economic interests when majority of members specialized in pulmonary, cardiovascular, and urology diseases); *Rothery Storage & Van Co. v. Atlas Van Lines, Inc.*, 792 F.2d 210, 214-15 (D.C. Cir. 1986) (all agents had substantially similar economic interests when they actually provided moving services and wished to maintain agency contracts with Atlas); *United States v. Visa U.S.A., Inc.*, 163 F. Supp. 2d 322, 379 (S.D.N.Y. 2001) (member banks all have substantially similar economic interests in actually issuing credit cards and maintaining membership with Visa USA).

Thus, even if not all NCSBDE members actually compete in the business of teeth whitening, FTC still must show that they have substantially similar economic interests in excluding non-dental teeth whitening. In light of the evidence that less than a majority of NCSBDE members actually provided teeth whitening services during the relevant period—coupled with the statutory safeguards to remove any possibility of personal financial interest[23]—FTC is unable to do so.

[23] AAI and FTC argue that statutory safeguards do not remove NCSBDE members' potential financial interests, but they ignore the most stringent statutes. *See, e.g.*, N.C.G.S.§§138A-12(o) (potential removal by Ethics Commission), 138A-15(d) (no participation if potential conflict of interest), 138A-39(a) (duty to eliminate

FTC attempts to analogize NCSBDE to the defendants in the recently-decided *Robertson v. Consolidated Multiple Listings Service, Inc.*, 679 F.3d 278

("This Court has similarly been sensitive to *Monsanto's* requirement that there be clear evidence of concerted activity."); *Cooper v. Forsyth County Hosp. Auth.*,

JA 1385 (concern about use of peroxide solution, exposure to high intensity light, and lack of prior dental examination);

JA 1553 (use of peroxide);

JA 1578-79 (consumers suffered burns);

JA1590-93 (patient suffered ulcers and infection);

CX310-1("It is my hope that the Board can be proactive in protecting the consumer by reserving tooth bleaching to the licensed dental professional."); and

JA 1637 ("... I am concerned about the safety of the people getting it done.").

Furthermore, **31 C&Ds** were triggered by complaints expressly questioning the legality of the non-dentist teeth whitening services.[25]

Only **three C&Ds** were triggered by dentists' complaints that expressly referenced price.[26] However, two of these complaints[27] also raised significant concerns over health, safety, and the professional reputation of dentists. One complaint[28] was made by a UNC-Chapel Hill professor of dentistry. If suggestive of anything, these complaints suggest that NCSBDE members acted for reasons

[25] JA 1142, 1237, 1516, 1521-22, 1546, 1549, 1553, 1578, 1580, 1588, 1599, 1601,

other than their own personal financial benefit. Therefore, FTC also failed to establish the second prong necessary to show concerted action.

VI. STATE AGENCIES' PURSUIT OF VOLUNTARY COMPLIANCE WITH UNAUTORIZED PRACTICE STATUTES IS NOT AN UNREASONABLE RESTRAINT OF TRADE.

FTC's restraint of trade analysis is inapplicable because SCOTUS has **never** applied such framework to a state agency acting pursuant to a clearly-articulated state law. Contrary to FTC's portrayal, NCSBDE did not unreasonably restrain trade simply because it is a public actor; rather, NCSDBE acted reasonably by enforcing clear state statutes, as required by law. FTC's entire attack is against conduct mandated by the NC General Assembly.

Additionally, FTC fails to respond to NCSBDE's argument that the Commission improperly included **illegal** services in the relevant market. FTC does not refute that the only affected activities were **illegal** under state law. *Microsoft Corp. v. Computer Support Servs. of Carolina, Inc.*, 123 F. Supp. 2d 945, 952 (W.D.N.C. 2000) (claim for injury in an illegal market not recognized under antitrust law); *Nobody in Particular Presents, Inc. v. Clear Channel Commc'ns, Inc.*, 311 F. Supp. 1048, 1079 (D. Colo. 2004) (same).

Under its untenable standard, FTC might not challenge the immunity of municipalities acting pursuant to state law or private corporations restraining trade while supervised by a state agency. But, it would, for example, challenge the

immunity of the NC Bar's[29] investigation of unlicensed practice pursuant to state statute[30] if it did not agree with the grounds of the investigation. Additionally, the Bar would not enjoy the benefit of a thorough rule of reason analysis, as private corporations would. The Bar could not raise the defense that it acted pursuant to clearly-articulated state law, or that it acted only to protect the public. FTC's unfathomable conclusions are exactly why the state action doctrine was developed—to prevent antitrust "plaintiffs from look[ing] behind the actions of state sovereigns and bas[ing] their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign." *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984).

CONCLUSION

Therefore, FTC's dispositive motions and its Opinion should be reversed and its Final Order vacated.

[29] Bar officers elected by its members. 27 N.C.A.C. 1A.0304.
[30] N.C.G.S.§ 84-37(a).

Respectfully submitted, this the 19th day of July, 2012.

/s/ Noel L. Allen

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CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Petitioner affirms and declares as

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 July 19, 2012.

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 19th day of July, 2012.

s/ Noel L. Allen