N . 12-1172

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

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

FINAL BRIEF OF RESPONDENT FEDERAL TRADE COMMISSION

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For ease of reference, the following abbreviations and citation forms are used in this brief:

ADA Br.	–	Amicus Brief of the American Dental Association et al.
AMA Br.	–	Amicus Brief of the American Medical Association et al.
Br.	–	Petitioner Board's Opening Appellate Brief
CCPFF	–	Complaint Counsel's Proposed Findings of Fact (R.142)
CX	–	Complaint Counsel's Trial Exhibit
DPA	–	N.C. Dental Practice Act, N.C.G.S. §§ 90-22 *e , e* .
FSBPT Br.	–	Amicus Brief of the Federation of State Boards of Physical Therapy et al.
ID	–	Initial Decision of the ALJ (R.165) (Page Number)
IDF	–	Initial Decision of the ALJ (R.165) (Factual Finding Number)
JA	–	Joint Appendix
NABP Br.	–	Amicus Brief of the National Association of Boards of Pharmacy et al.
Op.	–	The Commission's Opinion of December 2, 2011 (R.177)
R.	–	Entry No. in Record List of FTC Docket No. 9343
RX	–	Respondent Board's Trial Exhibit
SA Op.	–	The Commission's State Action Opinion of February 3, 2011 (R.98)
Tr.	–	Transcript of Trial Testimony before the Administrative Law Judge

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This is a petition to review a Final Order of the Federal Trade Commission (FTC or Commission), entered on December 2, 2011, pursuant to Section 5 of the Federal Trade Commission Act (the FTC Act), 15 U.S.C. § 45.

Petitioner North Carolina State Board of Dental Examiners (the Board), filed its petition for review on February 10, 2012.

This Court has jurisdiction to review the Commission's Final Order pursuant to 15 U.S.C. § 45(c).

A EMEN OF HE I □E PRE EN ED FOR RE IE

1. Whether the Commission has jurisdiction over the Board.

2. Whether the Board's challenged conduct is exempt from the federal antitrust laws by operation of the state action doctrine.

3. Whether substantial evidence supports the Commission's findings that the Board's exclusion of non-dentist service providers from the market for teeth whitening services—through issuance of extra-judicial cease and desist orders and

[1] On February 1, 2011, the Board filed a declaratory action in the United States District Court for the Eastern District of North Carolina, alleging that the FTC's

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Since 1989, peroxide-based teeth whitening has become one of the most popular cosmetic dental services. IDF 100-104 [JA 143-44].[3] Teeth whitening is available as an in-office treatment, or take-home kits, by dentists; as over-the-counter products; and at salons, malls, and other convenient locations by non-dentists. IDF 105, 138, 149 [JA 144, 148-49]. Although all these methods employ peroxide, they vary in important respects, including immediacy of results, ease of use, necessity of repeated application, need for technical or professional support, and price. IDF 106-109 [JA 144]. Thus, while dentists' "chair-side" services are quick and effective—usually providing results in a single visit—they are also "the most costly" alternative. IDF 118-120 [JA 146]. At the other end of the spectrum, over-the-counter products, with relatively low concentrations of peroxide, are the least expensive, but with highly variable efficacy, as they require diligent and repeated application by consumers. IDF 129-136 [JA 147-48].

Growing demand for teeth whitening services led, around 2003, to the entry of non-dentist providers. Op. 1 [JA 265]; IDF 137 [JA 148]. These providers generally occupy an intermediate level—in terms of cost, convenience, and efficacy—between

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[3] The Commission has adopted the ALJ's findings to the extent they are not inconsistent with its decision. *See* Op. 2 [JA 266].

dentists' chair-side services and over-the-counter products. IDF 138-150 [JA 148-49]. They utilize intermediate-concentration peroxide, in a single, consumer-administered application, lasting an hour or less. IDF 140, 146, 149-150 [JA 148-49]. Non-dentist services are often offered at prices hundreds of dollars less than dentists' in-office services. IDF 147-150 [JA 149].

As competition from non-dentists mounted, North Carolina dentists demanded that the Board "do something" about the new market entrants. *See* Op. 1 [JA 265], IDF 194-206 [JA 154-56] (dentist complaints often citing price disparity with non-dentist providers, but rarely health or safety concerns).

B. The North Carolina Board of Dental Examiners

The Board is a state agency, charged with regulating dentistry in North Carolina, IDF 1, 87 [JA 128, 141]; N.C.G.S. § 90-48, but funded only by private licensees' dues and fees. IDF 13 [JA 130]. It consists of six licensed dentists, elected

IDF 6, 8, 12 [JA 129-130]. They are elected to three-year, renewable terms. IDF 17, 24-25 [JA 130-31].

The Board is tasked with enforcing North Carolina's Dental Practice Act (DPA), N.C.G.S. §§ 90-22 *et seq.*, including the licensure and professional conduct of dentists, and—together with the state's Attorney General, the various state district attorneys, and any resident citizen, *id.* at § 90-40.1(a)—the policing of the unauthorized practice of dentistry. IDF 33, 35, 41 [JA 132-33].[4] Like state prosecutors and private citizens, the Board's only lawful means of undertaking this latter function, however, is to institute in state court "an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry." N.C.G.S. § 90-40.1(a); *see also* IDF 43-45 [JA 134]. In contrast to its authority over licensees and applicants for a license, *see* N.C.G.S. §§ 90-27, 90-41.1, the Board may not discipline unlicensed persons, or order non-licensees to stop violating the DPA. IDF 46-49 [JA 134].

[4] The DPA provides that a person "shall be deemed to be practicing dentistry" by undertaking, or attempting, any of the actions listed in the statute. *See* N.C.G.S. § 90-29(b)(1)-(b)(13); *see also*, *id.* at § 90-29(c)(1)-(c)(14) (listing acts that "shall not constitute the unlawful practice of dentistry").

conducting an inquiry based on this knowledge."). Failure of the recipient to respond prompted the Board to send follow-up letters, similarly devoid of any commands. *See, e. .*, CX138 [JA 1114]. Indeed, the Board's Chief Operating Officer testified that sending litigation warning letters (instead of cease and desist orders) did not impair the Board's ability to enforce the DPA. CX573 (White, Dep.) at 10 [JA 1764].

whitening services. IDF 209, 216-218 [JA 156-58]. All those letters were sent on the Board's letterhead, IDF 219 [JA 158], and at least 40 stated, in bold headings: "NOTICE AND ORDER TO CEASE AND DESIST," or "NOTICE TO CEASE AND DESIST." IDF 220 [JA 158-59].[5]

The Board's self-described orders were designed to cause the recipients to abandon their provision of teeth whitening services. *See* IDF 234-245 [JA 163-64]. And to at least some recipients, the letters' conspicuously mandatory language was understood as having the force of law. *See* IDF 246-256 [JA 164-65]. Thus, in many cases, non-dentist providers abandoned their teeth whitening businesses. *See, e. .*, CX162 [JA 1124] (salon owner writing to the Board that she would "no longer perform this business as per your order to stop"); CX50 [JA 998-1000] (spa owner writing that, in response to the Board's order, she has ceased offering the service and removed the

[5] After the Commission's investigation began, the Board modified the language of its letters slightly, although they continued to convey a purported order by the Board. The last three letters the Board sent, in 2009, referred to "NOTICE OF APPARENT VIOLATION AND DEMAND TO CEASE AND DESIST." IDF 222-223 [JA 159-160].

It told manufacturers and distributors of teeth whitening products, for example, that the provision of such services by non-dentists "is, constitutes, or may constitute, the unauthorized practice of dentistry in North Carolina, which is a misdemeanor." IDF 261 [JA 166] (citing CX100 [JA 1051]; CX122 [JA 1108-09]; CX371 [JA 1208]; CX110 [JA 1097]; CX66 [JA 1020]; Nelson, Tr. 850 [JA 456]);, *ee* IDF 262-285 [JA

familiar two-part test of *Ca, , , a Re q L- u, Dea e, A, ', . M dca A u , u ,* *I, c.*, 445 U.S. 97, 105 (1980), the Commission assumed without deciding that the Board could meet the "clear articulation" element of that test (SA Op. 7 n.8) [JA 82], and focused instead on the "active state supervision" requirement. It concluded first that the Board must satisfy that element of the test. *Id.* at 8-9 [JA 83-84]. Surtv(Sng]TJ-12s An

The Commission found, moreover, that such supervision was lacking. SA Op. 14-17 [JA 89-92]. It noted the Supreme Court's teaching that active supervision "'mandates that the State e e ɕ, e ultimate control over the challenged anticompetitive conduct'," and that "'mere presence of some state involvement or monitoring does not suffice'." *Id.* at 14 [JA 89] (quoting *Pa , c . B e* , 486 U.S. 94, 101 (1988) (emphasis by the Commission)). It found no evidence, however, that an arm of the State has developed a record or rendered a decision that assessed whether the Board's challenged conduct comported with state policy. *Id.* at 15 [JA 90]. It dismissed the Board's reliance on statutory reporting requirements as insufficient "generic oversight," reasoning that none of those provisions "suggest that a state actor was even aware of the Board's policy toward non-dentist teeth whitening, let alone reviewed or approved it in fulfillment of the active supervision requirement." *Id.* at 16 [JA 91].

2. ALJ D

The ALJ then held a hearing between February 17 and March 16, 2011. ID 3-4 [JA 122-23]. He heard testimony from sixteen witnesses, resulting in over 3,000 pages of transcript, and admitted over eight-hundred exhibits in evidence. *Id.* In the end, he concluded that concerted action by the Board to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an unreasonable restraint of

trade, and an unfair method of competition in violation of the FTC Act. *Id.* at 8-9 [JA 127-28].

3. The Commission's Decision

On the Board's appeal to the Commission, the latter reviewed the entire record *de novo*, and—noting that, like the ALJ, it would apply the standards of Section 1 of the Sherman Act—concluded that the Board had violated the FTC Act. Op. 10, 37 [JA 274, 301].

C. The Commission's Analysis

Addressing the question whether the Board's actions were undertaken pursuant to a "contract, combination * * * or conspiracy," 15 U.S.C. § 1, the Commission first concluded that "Board members were capable of conspiring," because, as "actual or potential competitors," they constituted separate economic actors. Op. 14 [JA 278] (citing *American Needle, Inc. v. National Football League*, __ U.S. __, 130 S. Ct. 2201, 2209, 2211-12 (2010)). Citing also this Court's "personal stake" exception to the rule that corporate officers cannot conspire with their corporation, the Commission found that the dentist Board members have a financial interest in excluding non-dentists from

interests whose joint decisions could deprive the marketplace of actual or potential competition." Op. 16 [JA 280].

Moreover, the Commission found direct and circumstantial evidence showing that the dentist Board members "had a common plan to exclude non-dentist teeth whitening providers from the market." Op. 17 [JA 281]. It cited the Board's discussions of non-dentist teeth whitening before taking actions—such as sending cease and desist orders and contacting suppliers, mall operators, and the cosmetology board—that restrict such services. *Id.* at 17-18 [JA 281-82]. It rejected the Board's argument that using multiple case officers precluded concerted action, recognizing instead that the use of different agents to deliver a consistent message, to different parties and over several years, tended to negate the possibility of independent action. *Id.*

See Op. 11-13, 18 [JA 275-77, 282] (citing *FTC . I d a a Fed , De , , ,* 476 U.S. 447 (1986)).

First, the Commission concluded that the Board's conduct can be condemned without consideration of market power. Op. 19 [JA 283] (citing *Ca , , , a De a A , ' . FTC*, 526 U.S. 756, 781 (1999); *P a H d , I c.*, 136 F.T.C. 310 (2003), *a d, P a H d , I c. . FTC*, 416 F.3d 29 (D.C. Cir. 2005)). It reasoned—citing the increasing popularity of teeth whitening, and the competitive pressure exerted by non-dentists charging lower prices than dentists for these services, Op. 20 [JA 284]—that the Board's conduct "is, at its core, concerted action excluding a lower-cost and popular group of competitors," which "bears a close resemblance" to agreements that "have long been treated as per se illegal or presumptively illegal under the antitrust laws." *Id.* at 19, 21-22 [JA 283, 285-86] (discussing Supreme Court precedents). Thus, the Commission concluded, "the challenged conduct is inherently suspect under *P a* and thus presumptively unreasonable unless [the Board] can produce a legitimate justification." *Id.* at 23 [JA 287].

The Commission then reached the same conclusion under "a more fulsome rule of reason analysis." Op. 29 [JA 293]. It noted that the Board neither disputed the contours of the relevant market, nor properly or adequately challenged the ALJ's finding that—by virtue of its statutory authority to regulate dentistry, and thus to

exclude competition to dentists—the Board possessed substantial power in the market for teeth whitening services. *Id.* at 29-31 [JA 293-95]. It concluded that, when coupled with its earlier determination concerning the exclusionary nature of the Board's actions, this finding of market power "provides 'indirect' evidence that those policies have or likely will have anticompetitive effects." *Id.* at 31 [JA 295].

Lastly, the Commission upheld the ALJ findings, unchallenged by the Board, that the latter's actions resulted in actual anticompetitive effects. Op. 31 [JA 295]. It pointed to "undisputed evidence" of non-dentist providers ceasing, or forgoing, offering teeth whitening services, and of access to teeth whitening products and retail space being restricted or cut off. *Id.* This exclusion of non-dentists services, it found, not only deprived consumers of a popular choice, but—as the parties' experts agreed—also led to higher prices for teeth whitening. *Id.* at 32 [JA 296].

Cir. 1980)). Further, it found that, even if the Board's proffered justification were cognizable within an antitrust rule of reason analysis, contemporaneous evidence supporting its claim was lacking. *Id*

[6] The Commission also rejected, as not cognizable under the antitrust laws, the Board's asserted defenses that its actions were intended to promote "legal competition," and that it was acting "in good faith." Op. 28 [JA 292].

information regarding legislation or court proceedings concerning teeth whitening; or (iii) notice of the Board's bona fide intention to file a court action or pursue administrative remedies in connection with teeth whitening goods or services. *Id.* Lastly, the Final Order included certain notice and reporting requirements, in accordance with standard agency practice. *Id.* at 4-6 [JA 305-07].

ANDARD OF RE IE

"The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). This formulation has been accepted by the courts as referring to the "essentially identical 'substantial evidence' standard for review of agency factfinding." *I d a a Fed* , 476 U.S. at 454; *acc d Te eb a d Ç . . FTC*, 457 F.3d 354, 358 (4th Cir. 2006). Thus, a reviewing court "must accept the Commission's findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'." *I d a a Fed* , 476 U.S. at 454 (quoting *U e a Ca e a Ç . . NLRB*, 340 U.S. 474, 477 (1951)). It may not, however, "'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences'." *Id.* (quoting *FTC . A a I be Ç .*, 291 U.S. 67, 73 (1934)); *acc d U ed S a e Re a C ed A , , I c. . FTC*, 300 F.2d 212, 221 (4th Cir. 1962) ("An inference made by an administrative

agency may not be set aside upon judicial review because the court would have drawn a different inference").

"The legal issues presented—that is, the identification of governing legal standards and their application to the facts found"—are reviewed *de* , , , , "although even in considering such issues the courts are to give some deference to the Commission's informed judgment that a particular commercial practice is to be condemned as 'unfair'." *I d a a Fed'* , 476 U.S. at 454; *acc d A e , e T bacc* , 294 F.2d at 626 ("The conclusions of the Commission in this respect are not binding upon the court but are entitled to weight since they are reached by a body which is appointed to make a study of business and economic conditions and which is deemed to be especially competent to deal with matters committed to its charge").

Finally, the Commission has "broad discretion" in fashioning an effective and appropriate order to remedy violations of the FTC Act, and "courts will interfere with the remedy selected by the FTC 'only where there is no reasonable relation between

SUMMARY OF ARGUMENT

This case concerns unsupervised conduct by members of a state regulatory board, controlled by financially interested market participants, to exclude lower-cost rivals from competing in that market.

The principal underlying facts in this case are not in contention. The Board does not dispute that six of its eight members are (and, by state law, must be) licensed dentists, elected by other licensed dentists in the state, and actively engaged in the practice of dentistry while serving on the Board. It also does not seriously dispute that it sent dozens of extra-judicial cease and desist orders to non-dentist providers of teeth whitening services, causing many of them to forgo participating in that market, when state law authorizes the Board only to seek judicial orders to that effect. Nor does it deny sending communications to suppliers of teeth whitening products, operators of retail malls, and other third parties, asserting (without judicial support) that the provision of teeth whitening services by non-dentists is unlawful, thus causing many of those recipients to cease offering supplies or retail space to non-dentist providers of such services.

Nor does the Board challenge the Commission's findings concerning a prima facie violation of the antitrust laws. The Board does not challenge the relevant market, or that—by virtue of its statutory authority to regulate and discipline dentists—it has

the power to exclude competition within that market. Nor does it challenge the findings that, as a result of its actions, many non-dentist providers of teeth whitening services forwent market participation or were denied access to teeth whitening products and retail space.

Thus, this petition for review boils down, principally, to the Board's assertion of state action defense, dispute of the Commission's finding of concerted action, and challenging the Commission's rejection of its purported justifications. The Board's arguments on these issues (and amici's arguments on other, adjunct issues) are without merit.

First, the Board's perfunctory challenge to the Commission's jurisdiction over it as a "person" under the FTC Act, pressed principally by amici, has no basis in either the statutory text or legislative history, both of which point to Congress's intent to grant the Commission expansive powers to prevent unfair methods of competition.

Second, as to the state action defense, the Commission correctly held that the Board—as a state regulatory body controlled by the very market participants it is tasked to regulate—must (but does not) meet the active supervision prong of that defense. Precedents from both the Supreme Court and this Court make clear that active supervision is required unless the state entity engaged in the challenged conduct possesses "sufficient independent judgment and control" to establish that its actions

were the "product of deliberate state intervention." The Board lacks such attributes. And its attempts to distinguish those binding precedents are unconvincing, leaving it with the irrelevant assertion that other courts have reached contrary conclusions. Binding precedent, and sound antitrust policy, mandate that this Court affirm the Commission's ruling on this issue.

Third, the Commission's finding of concerted action in this case is supported by substantial record evidence. The dentist Board members, who indisputably control the Board and actively maintain their dental practices while serving on it, are capable of concerted action because, as actual or potential competitors, they have distinct and potentially competing economic interests (and a "personal stake" in the challenged restraint on trade), and thus form "independent centers of decisionmaking." Direct and

Finally, the Board's purported justifications for its exclusionary conduct—that it was acting to safeguard legal competition or to maintain the professional reputation of dentists—are neither cognizable under the antitrust laws, nor borne out by the record in this case. Likewise without merit is the Board's claim that it was only acting to protect public health. States are free, within the bounds of the state action doctrine, to displace competition in order to further such public policies. But, where the Board acts without the protection of the state action defense, it may not itself determine that competition in the market for teeth whitening services is incompatible with the public interest. In any event, the Commission correctly determined that the Board's claim on this point is unsupported by the record.

ARGUMENT

I. THE COMMISSION HAS JURISDICTION OVER THE BOARD

The Board makes the perfunctory argument that the Commission lacks jurisdiction over it, on the ground that it is "not a person, partnership, or corporation," within the meaning of the FTC Act. *See* Br. 23 (citing *Parker v. Brown*, 317 U.S. 341, 350-51 (1943); *California State Bd. of Optometry v. FTC*, 910 F.2d 976, 981 (D.C. Cir. 1990)). Neither of those cases has any bearing on the Board's jurisdictional argument

[7] In *Ca, , , a Bd., O , e* , the D.C. Circuit did pose the question "whether a State acting in its sovereign capacity is a 'person' * * * under section 5(a)(2) of the [FTC] Act," 910 F.2d at 979, but it apparently answered that question in the affirmative, before deciding the case on state action grounds. After concluding that nei* und'.ion groundq5e]TJaegislbefor history [FTC] 910 wasng thsfor offirm

Court reasoned that (1) the statute "by its terms does not exempt state purchasers"; (2) when Congress intended to exclude a class of persons, it did so explicitly, and the "only express exemption is that for nonprofit institutions"; (3) the term "persons" is

neither precedent nor reason.[10] First, the conjunction of "persons" with other terms does not, in itself, limit the meaning of that term to "natural persons." In *U. . Pac. c R.R. C. . . U. ed S a e.*, for example, the Supreme Court—holding that a municipality was a "person"—rejected such a reading of Section 1 of the Elkins Act, 49 U.S.C. § 41, which made it unlawful for "any person, persons, or corporations" to give or receive rebates in connection with the transportation of property in interstate commerce. 313 U.S. 450 (1941). Moreover, Congress has used the term "natural person(s)" in other antitrust statutes, indicating that, in those instances, it had intended such a limitation on the meaning of "person." *See, e. .*, 15 U.S.C. §§ 15c(a)(1) ("Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State"); 1311(f) ("the term 'person' means any natural person, partnership, corporation, association, or other legal entity."). But Congress chose not to do so in the FTC Act.

Nor does the conjunction render the terms "partnerships, or corporations" surplusage. These terms are subject to specific definitions and exemptions in another

[10] States themselves have intervened in Commission proceedings on the ground that they are "persons" under the FTC Act. *E. ., I. d a. a Fed'. . De. .*, 93 F.T.C. 231, n.1 (1979).

entities "organized to carry on business for its own profit or that of its members," but excepting "partnerships" from that definition); *see also Cmty. Blood Bank of Kan. City Area, Inc. v. FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969) ("Congress intended to exclude some corporations from the Commission's jurisdiction"). Of course, to the extent that the statutory text is deemed ambiguous, the Commission is entitled to deference in reasonably interpreting its organic statute. *See Nat'l Fed'n of Blind v. FTC*, 420 F.3d 331, 337 (4th Cir. 2005) ("*Chevron* instructs that we first

Senator Cummins, 51 CONG. REC. 13044, 13018-09 (1914), because of concerns that restraints of trade were not limited to corporations. *See* 51 CONG. REC. 12215 (July 16, 1914) (Statement of Senator Sterling). Commenting on the proposed expanded powers, Senator Brandegee noted that the Cummins amendment "authorizes the commission to prohibit what the bill declares to be unlawful by whosoever the offense is committed." 51 CONG. REC. 13103 (Aug. 1, 1914); *see, id.* ("If unfair competition is an offense at law, * * * it ought to be prohibited and punished, no matter by whom committed"). After the Senate language was adopted in conference, the sponsor of the House version (and member of the conference committee) described the newly expansive language as "embrac[ing] within the scope of that section every kind of person, natural or artificial, who may be engaged in interstate commerce." 51 CONG. REC. 14928 (Sept. 10, 1914) (Statement of Mr. Covington).

Thus, neither the text nor legislative history of the FTC Act limits the Commission's jurisdiction over the Board. As we discuss next, the state action doctrine limits the *e e c, e* of such jurisdiction, but only where the restraints are effected in accordance with established requirements for that defense.[11]

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[11] Amici's argument that exercising jurisdiction over the Board somehow "renders incorrect or meaningless prior positions by the FTC" is also without merit. ADA Br. 7-8. Where a Commission investigation targets a business entity, the agency asserts jurisdiction under the "partnerships, or corporations" prong, as the cases cited by amici illustrate. *Id.* But the Commission has never claimed "persons" jurisdiction over entities that otherwise would fall within an expressed exemption to the terms

II. THE COMMISSION PROPERLY HELD THAT THE BOARD'S ACTIONS ARE NOT EXEMPT FROM ANTITRUST CHECKS UNDER THE STATE ACTION DOCTRINE

In *Parker*, the Supreme Court held that Congress did not intend the Sherman Act to extend to acts of the sovereign States, thus giving birth to what became the "state action doctrine." 317 U.S. at 350-51. But, to accommodate a national economic policy built on "fundamental and accepted assumptions about the benefits of competition," *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), the doctrine exempts from federal antitrust law only States' *sovereign* policy choices. *See, e.g., Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985); *Parker*, 317 U.S. at 350-51; *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 53-54 (1982); *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 413-14 (1978); *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790-91 (1975); *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-60 (1977); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 592-93 (1976); *Georgia v. Pennsylvania R. Co.*, 324 U.S. 439, 456-57 (1945). Thus, in *Midcal*, the Court held that non-sovereign parties qualify for

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"partnerships, or corporations."

competition. *Id.* at 40. Second, the Court held that municipalities need not satisfy *Midcal*'s active supervision prong. *Id.* at 46. It explained that, unlike private parties, in the case of a municipality, "[t]he only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals," a danger ameliorated by satisfying the clear articulation requirement. *Id.* at 47. The Court then speculated that if "the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue." *Id.* at 46 n.10. But, it emphasized in the same footnote, "[w]here state or municipal regulation by a private party is involved * * *, active state supervision must be shown, even where a clearly articulated state policy exists." *Id.* (citing *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 62 (1985)).

Here, noting that the Board "is an agency of the State of North Carolina," SA Op. 4 [JA 79], the Commission concluded that because the Board is controlled decisively by private, financially interested actors, it must satisfy *Midcal*'s active supervision prong, but that such supervision is lacking.[12] The Commission's

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[12] The Commission assumed, without deciding, that the Board's conduct satisfied the clear articulation prong. SA Op. 7 n.8 [JA 82]. Thus, although the Board argues that it satisfies this requirement, Br. 25-30, the issue is not properly before this Court. Likewise, amici's arguments regarding the application of *Cantor v. Cuyahoga Valley Joint Vocational School District*, 499 U.S. 365 (1991)—decided on clear articulation grounds—are inapposite. *See* ADA Br. 11; AMA Br. 18 n.6; NABP Br. 20-23; FSBPT Br. 8-14.

conclusions are supported by binding precedent and substantial record evidence, and are securely moored to the policies animating the state action doctrine.

A. B M A O Q A E

The Supreme Court has explained that the active supervision requirement serves

of constituting the regulator as a "state agency," but with the degree of independent judgment and control that it exercises over the relevant market.

In *Goldfarb*, for example, the Supreme Court denied antitrust exemption to a minimum fee schedule for certain legal services, enforced by the Virginia State Bar—"a state agency by law." 421 U.S. at 783, 790. It rejected the state action defense, in part, because the state bar's enforcement of the fee schedule—via issuance of ethical opinions—was undertaken "for the benefit of its members," *and because* "there was no indication * * * that the Virginia Supreme Court approves the [ethical] opinions." *Id.* at 790-91. "[T]hat the State Bar is a state agency for some limited purposes," the Court explained, "does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members." *Id.* at 791; *see Actavis*, 130 S. Ct. at 2209-10 (antitrust courts must "'seek the central substance of the situation' and therefore ' * * * are moved by the identity of the persons who act, rather than the label of their hats'.") (quoting *United States v. Sealy, Inc.*, 388 U.S. 350, 353 (1967)). That active supervision can be required of state agencies—under circumstances that evince the potential that their decisions will promote private over public interest—was, thus, confirmed by the Court's view that, had the Virginia Supreme Court exercised a more active supervisory role (by, for example, itself approving the Virginia State Bar's ethical opinions), the state action

analysis might well have been different. *See* 421 U.S. at 791. But absent such active

insistence on real compliance with both parts of the *Midcal* test will serve to make clear that the State is responsible for the [restraint] it has sanctioned and undertaken to control"); *Areeda, The Tobacco*, 263 F.2d at 510 (public accountability part of state supervision calculus).

Prominent antitrust commentators agree. Professors Areeda and Hovenkamp have concluded in their leading treatise, for example, that conduct of "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market" should be treated as private conduct for state action purposes, in which case "outside supervision seems required." *See* Phillip E. Areeda & Herbert Hovenkamp, 1A ANTITRUST LAW: AN ANALYSIS OF AA

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[15] The Board also cites *Bates v. State Bar of Ariz.*, 433 U.S. 350 (1977), but the Court there held merely that the "the affirmative command of the Arizona Supreme Court," which is, [illegible] sovereign in nature, was exempt from antitrust scrutiny. *Id.* at 361. That decision has no application here, where the Board does not (and cannot) claim that its actions are, [illegible] sovereign.

relevant here—whether state regulatory bodies must show active supervision when dominated by private market participants with economic incentives to restrain trade—elevate form over substance, in contravention of the Supreme Court's teachings in *Goldfarb* and *Automobile Board of Curriculum*. *See* SA Op. 11-12 [JA 86-87] (distinguishing specific cases). As the Commission correctly concluded, those decisions ignore the functional realities of state entities, and rely inappropriately instead on formalistic state-law attributes (such as open records, and general financial and ethical reporting requirements). But such attributes cannot determine if those entities possessed "sufficient independent judgment and control" to avoid having to show active supervision. *See Asheville Tobacco*, 263 F.2d at 508 ("In determining the scope of the [FTC] Act, * * * this court is not bound by the State court's characterization of the boards. The interpretation of a federal statute is peculiarly the function of the federal courts"); Areeda & Hovenkamp, *supra*, ¶227a at 197 ("federal law determines which bodies require further supervision in order to gain *Parker* immunity. That question can seldom be resolved through state legislative declarations."). At any rate, as none of those decisions has the persuasive (or binding) power of *Goldfarb*, *Automobile Board of Curriculum*, and *Asheville Tobacco*, they should not be followed by this Court.

B. [illegible]

There is no doubt that the Board's challenged actions were not "actively supervised by the State itself." *Midcal*, 445 U.S. at 105. This requirement "is designed to ensure that the state action doctrine will shelter only the particular anticompetitive acts * * * [that] actually further state regulatory policies." *Patrick*, 486 U.S. at 101; *see Town of Hallie*, 504 U.S. at 633 (to be exempt, displacement of competition must be "both intended by the State and implemented in [its] specific details") (emphasis added). "The mere presence of some state involvement or monitoring," therefore, "does not suffice." *Patrick*, 486 U.S. at 101; *see also* Areeda & Hovenkamp, *supra*, ¶226c at 169 ("*Patrick* thus requires 'active supervision' in the sense of government review of specific decisions of private parties on their substantive merits, not merely on their procedural adequacy").[16]

No such supervision took place here. It is undisputed that the Board sent the cease and desist orders to non-dentist providers without judicial authorization, and that

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[16] The Board's argument that active supervision is satisfied when "a state agency acts pursuant to state law, within the powers legislatively granted to it," impermissibly conflates the two *Midcal* prongs. *See* Br. 39 (citing *Gabel v. Ky. Bd. of Dentistry*, 689 F.2d 612, 619 (6th Cir. 1982)). The majority in *Gabel* understood that (contrary to the Board's position here) a board consisting of market participants requires active supervision, but it then rendered that requirement a nullity by "run[ning] these two requirements [*i.e.*, clear articulation and active supervision] together," finding active supervision in the fact that the Kentucky board was enforcing state law. *See* 689 F.2d at 621 (Feikens, J., dissenting).

its communications to third parties, that non-dentist teeth whitening was unlawful,

[17] Neither the Supreme Court, *see Pac*, 486 U.S. at 103-04, nor the Commission in this case, has addressed this issue.

[18] Before the Commission, the Board argued that state reporting provisions provided the requisite supervision. *See* SA Op. 15-17 [JA 90-92]. But, generic oversight cannot be deemed approval of the "particular anticompetitive acts" at issue. *Pa , c* , 486 U.S. at 101. And, as the Commission noted (SA Op. 16) [JA 91], none

[19] In West Virginia, for example, the dental board can only propose rules, to be adopted by the legislature. *See*

(Board's COO acknowledging that other states have "umbrella agencies" over licensing boards). The States are likewise free to establish mechanisms by whichny-of*c-.85

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(53 of 58) are not set up like the Board, whose members are accountable only to its regulated market participants. *See* CCPFF ¶¶46-47 (summarizing composition of the fifty-eight state regulatory boards).

[21] A violation of Section 1 of the Sherman Act requires the showing of a "contract, combination * * * or conspiracy," effecting an unreasonable "restraint of trade." 15 U.S.C. § 1; *S a e O Ç . . K a* , 522 U.S. 3, 10 (1997); *R be . Sea P e Rea E a e C ., I c.*, 679 F.3d 278, 284 (4th Cir. 2012); *D c . M c Ç* .

, ee O, a, e, . Pa e Me ' H, ,., 945 F.2d 696, 702 (4th Cir. 1991) (*e, ba, c*) (Section 1 "applies only to concerted action; unilateral conduct is excluded from its purview"). Recent decisions from the Supreme Court and this Court confirm that the dentist members of the Board are capable of such concerted action.

In *A e, ca, Need e*, the Supreme Court held unanimously that conduct of the National Football League Properties (NFLP)—a separately incorporated joint venture of the thirty-two members of the National Football League (NFL)—could constitute concerted action. The Court re-affirmed its long-held principle that "'substance, not form, should determine whether a[n] * * * entity is capable of conspiring'," and that

This Court too has recently applied these standards to conclude that the broker members of a real estate multi-listing service (MLS)—defending against allegations that they used the MLS "as a conduit to create rules * * * designed to exclude innovative, lower-priced competitors and thus insulate the defendants from competitive pressures"—were capable of concerted action. *R be* , 679 F.3d at 283. It rejected the brokers' arguments that their conduct was "the product of independent action by agents of a single corporation," and that they "passed the MLS by-laws in their capacity as MLS board members," not in their personal capacity as brokers. *Id.* at 285. It explained that the gravamen of the antitrust allegations was "that the brokerages colluded to use the MLS corporate vehicle to exclude lower cost brokerages from competing in the relevant real estate market and to stabilize prices within that market," and, therefore, "the relevant question is whether defendants acted 'on interests separate from those of the firm itself'." *Id.* at 285, 286 (quoting *A e ca Need e*, 130 S. Ct. at 2215). It found that concerted action existed, because "defendants remained separately controlled, potential competitors with [distinct] economic interests." *Id.* at 286 (internal quotation marks and citation omitted).[22]

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[22] Indeed, this Court has long recognized a "personal stake" exception to *C e e d*'s intra-firm immunity. *See, e. ., A e ca C ac c A , I c. . T Hea ca e, I c.*, 367 F.3d 212, 224 (4th Cir. 2004); *O a e* , 945 F.2d at 705-06; *G ee e R b' C . . Da Re ec , I c.*, 496 F.2d 391, 399-400 (4th Cir. 1974).

[23] Board counsel acknowledged at oral argument before the Commission that Board members "are potential competitors." Oral Arg. Tr. 9-10 [JA 261-62]. Indeed, some Board members even provided teeth whitening services. IDF at 6-9, 32 [JA 129, 132]. And all dentist members are elected by other dentists, who too have a financial interest in limiting the practice of teeth whitening to dentists. IDF 15-23 [JA 130-31]. Moreover, only dentist Board members decided teeth whitening matters. IDF 40, 59-60, 184, 192-93 [JA 133, 136, 153-54].

[24]

[25] The Board's letters cited no judicial authority construing the DPA as prohibiting teeth whitening by non-dentists. Instead, they quoted the DPA's "removal of stains" language, *see* N.C.G.S. § 90-29(b), with the clear purpose of conveying the (false) implication that the statute includes teeth whitening within the definition of dentistry. The Commission declined to rule on whether teeth whitening constitutes "dentistry" under the DPA, as irrelevant to determining whether the Board's conduct violated the FTC Act. Op. 3 nn.3-4 [JA 267]; *see* ID at 82, 109 [JA 201, 228] (ALJ concluding likewise). But evidence was adduced before the ALJ that teeth whitening does not fit the statutory definition of "dentistry." *See, e.g.*, Giniger, Tr. 111-118 [JA 344-351] (industry expert testifying that teeth whitening is not "stain removal" as envisioned by the North Carolina legislature); *see a*

[26] Board counsel acknowledged at oral argument before the Commission

for addressing teeth whitening kiosks); CX404 [JA 1236-38] (Board's COO responding, to dentist's inquiry, that "we are currently going forth to do battle" with "bleaching kiosks" and "[w]e've sent out numerous cease and desist orders throughout the state"). As the Commission properly reasoned, Op. 18 [JA 282], the frequency and consistency of the Board's message—over a period of years, across the tenures of different Board members—demonstrate agreement among these members to exclude their lower-cost non-dentist rivals.[27]

The Board does not challenge any of this evidence. Instead, it offers irrelevant and unconvincing assertions. *See* Br. 47-54. It asserts that "[t]here is absolutely no evidence" that the Board acted for "any reason other than * * * protecting the health, safety, and welfare." Br. 48, 50-51. But the record demonstrates otherwise. *See* Op. 4 [JA 268] (citing many complaints about rivals' prices, not consumer harm); *see also* IDF 196, 200, 202 (same) [JA 154-55]; IDF 232 [JA 162] (dentist complaints attaching advertisements of lower prices by non-dentists). The Board also argues that the

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[27] *Pa a Ga e F , , e . K , , e /Pe , . H , e G , , I c.*, 878 F.2d 801 (4th Cir. 1989), and *C , e . F , . C . H , . A . .*, 789 F.2d 278 (4th Cir. 1986), are not to the contrary. *See* Br. 51-53. Unlike the alleged conspiracy in *Pa a Ga e* between a manufacturer and its complaining dealers, the unlawful agreement here is amongst dentist Board members, not between the Board and the complaining dentists. Moreover, unlike in *C , e* , where a conspiracy was to be inferred from communications between a peer-review physician group and a hospital board, the inferences drawn by the Commission here came principally from the Board's actions in response to dentist complaints, not from the complaints themselves.

evidence did not exclude the possibility that its members acted "to maintain the professional reputation of dentists." Br. 51. But the record does not support this assertion. Only one dentist complaint even made reference to such concerns—and then only in connection with her non-dentist rivals' prices. *See* CX278 [JA 1169] (dentist complaining that $99 prices at teeth whitening mall kiosk "cheapens and degrades the dental profession."). In any event, these assertions have no bearing on the existence of concerted action.

Likewise, the Board argues that enforcement of state law cannot constitute antitrust conspiracy. Br. 48-49. But that is not what the Board did here. Enforcement of the DPA is limited to instituting a court action against alleged infringers of that statute. *See* N.C.G.S. § 90-40.1(a). The Board members instead agreed to construe state law on their own to include teeth whitening within the statutory definition of

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classify teeth whitening as dentistry, then issuing extra-judicial orders to exclude its lower-cost rivals, and encouraging third parties to boycott those rivals—inherently tended to, was likely to, and in fact did, restrain competition. *See R be* , 679 F.3d at 286 ("the power of [] board members to pass restrictive membership rules can also threaten economic harm to nonmembers and deprive the [] market of the competitive forces that are at the 'heart of our national economic policy'.") (quoting *P e a E ee* , 435 U.S. at 695).

The Board does not seriously challenge any of these Commission findings and conclusions. *See* Br. 54-57. Its sole argument is that the Commission had "no support for the application of a truncated analysis," because "no court has ever applied a rule of reason analysis to a state agency acting pursuant to state law." *Id.* at 55, 56. As an initial matter, the Board misapprehends the proper role of its status as a state agency in an antitrust analysis—truncated or not. Whether certain conduct has the potential to harm, or the effect of harming, competition does not turn on the public- or private nature of the actor in question. The public status of the actor may become relevant to the antitrust analysis, but only as a defense (as within the state action exemption, discussed above). But the fact that the anticompetitive conduct was undertaken by a state agency does not, in itself, mean that such conduct is procompetitive or even competitively harmless. Relatedly, whether certain conduct is inherently suspect can

be based on "close family resemblance" to conduct already judged to be anticompetitive, regardless of the public/private nature of the actors involved. The Commission was correct, therefore, in citing to precedent that condemned the market exclusion of lower-cost rivals in order to conclude that the Board's conduct here could be analyzed under an abbreviated rule of reason. *See* Op. 20-22 [JA 284-85] (discussing "close family" precedents and opinions of economic experts).

At any rate, the Commission relied as well on two other analytical approaches, and came to the same conclusion. The Board does not (and cannot) challenge those analyses. It does not dispute that it possesses market power, by virtue of its status as a market regulator. Nor does it dispute that its conduct at least had the tendency to suppress competition by excluding those non-dentists from the market. Nor does it dispute that, in fact, some of those non-dentist providers forwent participation in that market as a direct result of receiving the Board's unauthorized cease and desist orders.

Instead, the Board argues that its conduct "is saved by procompetitive justifications." Br. 54. *See N* - *e W*- *e a e S a*, , *e*, . *Pac*, *c S a*, , *e* & *P*, , , *C* ., 472 U.S. 284, 294 (1985) (practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive"); *I d a a Fed'* , 476 U.S. at 459 (even conduct presumed to be unreasonable can be justified by having "some countervailing procompetitive virtue").

But, as the Commission correctly concluded, the Board's purported justifications are neither cognizable under the antitrust laws, nor borne out by the record of this case.

The Board argues, for example, that its conduct is justified because it "acted pursuant to state law," or because "state legislatures * * * may restrain competition." Br. 57, 59. These arguments are merely a reformulation of the Board's state action defense, properly rejected by the Commission, and do not constitute efficiencies that can even be considered as procompetitive justifications under the rule of reason. *See Id. at Fed.*, 476 U.S. at 459 (procompetitive justification is one that leads to the "creation of efficiencies in the operation of a market or the provision of goods and services"); *Broadcast Music, Inc. v. Columbia Broad. Sys., Inc.*, 441 U.S. 1, 19-20 (1979) (cognizable justifications "increase economic efficiency and render markets more, rather than less, competitive"). Indeed, *Id. at Fed.* rejected just such an argument. "That a particular practice may be unlawful," reasoned the Court, "is not, in itself, a sufficient justification for collusion among competitors to prevent it." 476 U.S. at 465 (citing *Fashion Originators' Guild of Am., Inc. v. FTC*, 312 U.S. 457, 468 (1941)). Thus, unless the Board could establish that its conduct constituted state action (which it could not here), there is no free-standing justification based on the enforcement of state law.

collusion among private actors, even when its goal is consistent with state policy, acquires antitrust immunity only when it is actively supervised by the State.").

The Board also argues that its conduct should be excused either because its members "were motivated by public protection concerns," or as "agreements between professionals." Br. 57, 58. Neither of these arguments has merit. Courts have repeatedly rejected social welfare and public safety concerns as cognizable justifications for restraints on competition. *See, e.g.*, *Professional Engineers*, 435 U.S. at 685 (rejecting purported justification that "awarding engineering contracts to the

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[28] In some circumstances, restrictive agreements may be justified as efficiency-enhancing to the extent that they facilitate the offering of products that are superior in terms of health or safety enhancements provided to consumers. *See generally Central Florida Enterprises, Inc. v. United Agriculture, Inc.*, 277 F.3d 499, 514 (4th Cir. 2002). But the Board has proffered no such efficiencies. On the contrary, its actions simply seek to squelch competition by depriving consumers of the ability to choose a lower-cost and (ostensibly) lower-quality product. This Court has rightly rejected attempts to justify restrictions of this sort "upon an incantation of 'good medical practice'." *See Virginia Academy of Clinical Psychologists*, 624 F.2d at 485.

dangerous to public health or safety are "'nothing less than a frontal assault on the basic policy of the Sherman Act'." *Id.* at 463 (quoting *P , e , , a E , ee ,* , 435 U.S. at 695). A state could, of course, choose to prioritize such concerns over competition, by enacting a state regulatory scheme that satisfies the requirements of the state action exemption from federal antitrust scrutiny. But, as shown above, that is not what happened in this case.

In any event, the Board's public health and safety claims also lack factual support. The Commission found no credible evidence supporting the Board's claims of threats to public health and safety. *See* Op. 26-28 [JA 290-92]. On the contrary, as the Commission found, "there was a wealth of evidence presented at trial suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." Op. 28 [JA 292] (citations omitted). For this reason, other states have permitted non-dentist teeth whitening (e.g., California, Florida, Illinois, Indiana, New York, Ohio, Tennessee, Texas, and Wisconsin). *See* Nelson, Tr. 769 [JA 444]; CX419 [JA 1243-44]; CX488 at 49 [JA 1261]; CX649 [JA 1409]; Osborn, Tr. 668-69 [JA 424-25]; CX650 [JA 1410-13]; CX651 [JA 1414-17].

More important, the record reflects that the Board itself had no basis for any such safety claims, nor was there any indication that such concerns actually prompted the challenged actions. None of the Board's testifying members, nor its own expert

witness, could cite any clinical or empirical evidence to validate the claim that non-dentist teeth whitening causes consumer injury. *See* Hardesty, Tr. 2818, 2829 [JA 681, 687]; CX565 (Hardesty Dep.) at 38 [JA 1754-57]; CX554 (Allen Dep.) at 26 [JA 1735-37]; CX555 (Brown Dep.) at 16, 26-27 [JA 1738-1746]; Wester, Tr. 1313-15, 1402, 1405-06 [JA 520-23, 532, 535-36]; CX560 (Feingold Dep.) at 65-66 [JA 1747-1750]; CX567 (Holland Dep.) at 37[JA 1758-1763]; CX564 (Hall Dep.) at 16 [JA 1751-53]; Owens, Tr. 1664 [JA 569]; Haywood, Tr. 2696, 2713-14, 2729 [JA 658, 659-60,662]; CX402 at 5 [JA 1232]. Indeed, as the Commission detailed,, *ee*

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B), because it contains 13,909 words, excluding references to the joint appendix and the parts thereof exempted by Fed. R. App. P. 32(a)(7)(B)(iii) and Circuit Local Rule 32(b).

CERTIFICATE OF SERVICE

I certify that on July 18, 2012, I filed the foregoing brief using the court of appeals's CM/ECF system, and the same was served electronically on all counsel of record.

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