No. 13-534

IN THE

Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE AMERICAN DENTAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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American Association of Orthodontists
American College of Radiology
American College of Surgeons
American Psychiatric Association
American Society of Anesthesiologists
North Carolina Medical Society
The Litigation Center of the American Medical Association and the State Medical Societies

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INTEREST OF THE *AMICI CURIAE*[1]

Amici American Dental Association, American Medical Association,[2] American Osteopathic Association, American Veterinary Medical Association, and the other listed professional societies have as members doctors whose practices are regulated by state boards in all fifty states, the District of Columbia, and U.S. territories. *Amici* American Association of Dental Boards and Federation of State Medical Boards are, respectively, the national associations of such boards in the fields of dentistry and medicine. *Amici* support the determination by state legislatures across this country that the health professions should be regulated by knowledgeable health care professionals who have practical experience in the profession that they are regulating. *Amici* and their members believe that the public is best served when state regulatory boards duly constituted in accordance with state law are free to make decisions on public health issues based on clinical experience without fear of second-guessing under the federal antitrust laws.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fund the preparation or submission of this brief. Letters from the parties consenting to the filing of *amicus* briefs have been filed with the Clerk's office.

[2] The American Medical Association and North Carolina Medical Society file this brief both on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies.

INTRODUCTION AND SUMMARY OF ARGUMENT

North Carolina has decided—along with every other state in the country—that the best way to regulate dentistry in the public interest is to create a state licensing agency whose members include practicing dentists. Similarly, all 50 states have determined that the practice of medicine should be regulated by licensing boards that include practicing physicians, and each of the 14 states with a separate osteopathic board provides for a board whose members include licensed osteopathic physicians. Moreover, 49 states have specified that veterinary medicine should be regulated by a board that includes practicing veterinarians. This reliance on regulatory boards composed of practicing doctors reflects an approach stretching back over 150 years in this country. *See infra* Part III.C (describing history of medical and dental boards).

The FTC takes the position that decisions of a state board of dentistry—established, constituted, and functioning in accordance with state law—are subject to being overturned under the federal antitrust laws if members of that state agency include practicing dentists. In this case, the FTC has forbidden the North Carolina Board of Dentistry to so much as "discourag[e] the provision of . . . Teeth Whitening Services by a Non-Dentist Provider"—despite a determination by the State legislature that removal of stains from human teeth constitutes the practice of dentistry.[3] Pet. App. 146a. Predicating its decision

[3] The statute in question does not refer to teeth whitening explicitly, but whitening is fairly characterized as "[r]emoving stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(2).

on the structure of the regulatory body that the State legislature has chosen to constitute, the FTC determined that the Board is subject to the FTC's continuing supervision, and the Fourth Circuit affirmed the FTC's Order. The Fourth Circuit's decision should be reversed.

First, as explained in Part I, the decision below is contrary to *Parker v. Brown*, 317 U.S. 341 (1943). In that case, this Court held that the Sherman Act was not intended to apply to sovereign regulatqrs, including regulators that had as members participants in the regulated field. More than seventy years ago, the Court recognized that where a state agency is duly constituted and empowered by the legislature to engage in regulation, any regulatory restraint imposed by that agency is an act of a sovereign government which Congress did not intend the antitrust laws to reach. The decision in that case, and in all subsequent state action cases of this Court, was based on the role of the states in our system of federalism—and not on an analysis of the supposed economic interests of members of the state agency.

Second, as addressed in Part II, the FTC Act's text, purpose, and legislative history confirm that the Act was never intended to subject state regulatory boards to the FTC's oversight. In particular, § 5 of the FTC Act empowers the FTC to prevent "persons, partnerships, or corporations" from engaging in "unfair methods of competition." 15 U.S.C. § 45(a)(1), (2). Yet state agencies are not, and were never intended to be treated as, "persons, partnerships, or corporations" subject to the FTC's jurisdiction.

Third, adoption of the FTC's position, as affirmed in the decision below, would have perverse consequences for patients and the public. These conse-

quences, examined in Part III of this Brief, include the following:

A. Subordinating Public Health to Antitrust Considerations. Affirmance of the Court of Appeals would induce state medical and dental boards faced with difficult policy judgments to subordinate their view of what is in the best interest of the *public health*—in favor of decisions that reflect the FTC's views on federal *competition* policy. Indeed, the threat of antitrust liability may well cause state regulatory authorities to forbear from regulating at all in areas where the need to protect the public from unsound medical practices or unqualified medical practitioners is most critical—lest they and their members be subjected to costly, burdensome, and uncertain antitrust litigation.

B. Discouraging Service on Regulatory Boards. Affirmance could discourage conscientious practitioners from serving on state regulatory boards for fear of burdensome litigation and possible personal liability, including treble damage actions brought by persons claiming that the state regulators violated the federal antitrust laws. *See, e.g.*, Am. Compl., *Petrie v. Va. Bd. of Medicine et al.*, No. 1:13-cv-1486 (E.D. Va. Feb. 3, 2014) (D.I. 13) (seeking treble damages from medical board and the practicing physicians who serve on it).

C. Disrupting a 150-Year Tradition of Regulation by Practicing Professionals. Finally, in order to avoid intrusion by the FTC in health care regulatory matters traditionally the responsibility of the states, state legislatures would be pushed to alter their choices as to the membership and method of selection of members of state regulatory boards in favor of the FTC's preferences on these matters. This result would interfere with a long tradition of regulation of the medical professions by boards composed of experienced and practicing doctors, which stretches back over 150 years and is based on virtually uniform state legislative judgments that such practitioners are best qualified to promote the public health.

As national and state associations of practitioners who serve on state regulatory boards in health care and as the associations of such boards, *amici* represent to this Court that this case is being closely watched by those who might be called upon to serve their states. If the decision below is permitted to stand, the foreseeable result is that many highly qualified practitioners who would otherwise be willing to serve on boards will either resign or refuse to accept office lest they face significant personal antitrust exposure. More importantly, the decisions of state medical and dental boards will be distorted by considerations of federal competition policy to the detriment of public health. For that reason, this Court should make clear that the actions of duly established state regulatory boards and their members are immune from the federal antitrust laws even if those boards are made up of market participants—as they have been for over 150 years.

ARGUMENT

I. THE BOARD IS A DULY CONSTITUTED STATE AGENCY THAT ACTS ON BEHALF OF THE STATE ITSELF.

A. Under *Parker v. Brown*, Agencies Of The State Cannot "Restrain Trade" Even If They Include Market Participants.

The dispositive issue in this case is whether the Board really is—as the North Carolina legislature explicitly declared it to be—"the agency of the State

for the regulation of the practice of dentistry," N.C. Gen. Stat. § 90-22(b). If so, its actions and regulations are those of the state itself and cannot be conspiracies "in restraint of trade," 15 U.S.C. § 1, or "unfair methods of competition," *id.* § 45(a)(1), within the meaning of the federal antitrust laws. For under *Parker* and its progeny, official state regulation that restrains competition "as an act of government" falls outside the purview of the antitrust laws. *Parker*, 317 U.S. at 352; *see also Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 365 (1991) ("We reiterate that . . . *any* action that qualifies as state action is *ipso facto* exempt from the operation of the antitrust laws." (quotes and alteration removed)).

On this dispositive question, the case can begin and end with *Parker*. That decision held that California's Agricultural Prorate Advisory Commission was immune from liability under the Sherman Act because the Commission's acts were those of the state: "[I]t is the state, acting through the Commission, which adopts the program and which enforces it with penal sanctions." 317 U.S. at 352. "The state itself exercises its legislative authority in making the regulation and in prescribing the conditions of its application." *Id.* The Prorate Advisory Commission, like the Dental Board here, exercised regulatory authority as a state agency when it issued and enforced rules within its area of regulatory authority.

Notably, a majority of the Commission's members in *Parker* were market participants with a direct financial interest in the proration of agricultural commodities. *See* 1939 Cal. Stat. ch. 894, § 3 ("Six of the [nine] appointive members of said commission shall be engaged at the time of their appointment in the production of agricultural commodities as their principal occupation"). Yet that fact played no role in this

Court's analysis because the composition of a state agency is irrelevant to the principles of federalism that underlie the state action doctrine. Rather, because (1) the Sherman Act does not "restrain a state or its officers or agents from activities directed by its legislature," and (2) the Commission was a state agency regulating pursuant to legislative authorization, the Sherman Act simply did not apply.

A straightforward application of *Parker* and the principles on which it is based controls this case. Notwithstanding the FTC's focus on the manner in which North Carolina has chosen to constitute its Board of Dental Examiners, the Board is an "agency of the State." N.C. Gen. Stat. § 90-22(b).[4] It is vested "with full power and authority to enact rules and regulations governing the practice of dentistry within the State." *Id.* § 90-48.[5] Because the Board *is* the state, its authorized actions are not subject to antitrust scrutiny. *See Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) ("The reason that state action is immune

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[4] The decision below emphasized the fact that the dentists comprising the North Carolina Board are elected by their professional peers rather than being appointed by the Governor. While this fact does provide a distinction between the North Carolina Board and the majority of state professional boards, the distinction should make no difference. The critical fact is that, under each system, members are chosen by a process established by the state legislature. There is no reason to treat the North Carolina Board as warranting any less protection under the state action doctrine.

[5] Virtually every decision to address the issue has held that a state board of medicine or a state board of dentistry is a legitimate state agency. *See, e.g., Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772, 781 (1st Cir. 1990); *Neuwirth v. La. State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988); *Howard v. Miller*, 870 F. Supp. 340, 343 (N.D. Ga. 1994); *Connolly v. Beckett*, 863 F. Supp. 1379, 1381 (D. Colo. 1994).

from Sherman Act liability is not that the State has chosen to act in an anticompetitive fashion, but that the State itself has chosen to act.").

If the Board were a private party rather than a state agency, the inquiry would be more complex and contextual. *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) ("Following *Parker*, we have held that under certain circumstances, immunity from the federal antitrust laws may extend to nonstate actors carrying out the State's regulatory program."). The reason for this complexity is that, unlike state officers or agencies, private parties do not make state policy. Thus, where private conduct is concerned, there is always a question as to "whether the anticompetitive scheme is the State's own." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

As this Court has explained, the existence of legislation merely authorizing private conduct that may have anticompetitive effects is insufficient to confer *Parker* immunity on private parties: "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980); *see also Parker* 317 U.S. at 351. A private restraint is treated as state action only when it is clearly articulated as state policy and actively supervised by the state—that is, when the anticompetitive consequences are fairly treated as the affirmative choice of the state itself. *Midcal*, 445 U.S. at 105. But when a duly authorized state agency acts within the scope of its legislative mandate, that action is the action of the state itself—which makes the "active supervision" inquiry beside the point.

The FTC's reliance on *Midcal* in an attempt to impose an active-supervision requirement on a state's own agency is contrary to the Court's analysis in *Midcal* itself. *See id.* at 104. The relevant portion of the opinion concerns the role of "local cooperatives" in "develop[ing] market policies for the raisin crop" at issue in *Parker*. *Id.* The participation of these private cooperatives might have invited antitrust scrutiny, were it not for the supervision by a state Advisory Commission:

> The Court emphasized that the Advisory Commission . . . had to approve cooperative policies following public hearings . . . . In view of this *extensive official oversight*, the Court wrote, the Sherman Act did not apply. Without such oversight, the result could have been different.

Id. at 104 (emphasis added). State agencies do not require supervision—they *provide* it. *See also Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985) (noting that, where "the actor is a state agency, it is likely that active state supervision would also not be required"). State agencies cannot provide supervision as the state and simultaneously require supervision by the state.

Active supervision is a prerequisite to treating private restraints as state policy, but state agencies make state policy directly. As one legal scholar has observed:

> State agencies may . . . adopt anticompetitive regulatory policies for the state as a whole. Because those actions by definition constitute state policy, they should be entitled to antitrust immunity under the Parker doctrine without any further requirement for clear articulation or active supervision by the state legislature.

Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Immunity*, 41 B.C. L. Rev. 1059, 1112 (2000); *see also* Weber, Comment, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. Chi. L. Rev. 737 (2012) (arguing that state boards should not be subject to active-supervision requirement). The Board makes state policy within the zone of its statutory authority without any need for input from, or supervision by, any other state official or agency. Hence, its authorized actions should be immune from antitrust scrutiny.

Further, requiring active state supervision of a dental or medical licensure board is impractical. Any supervising body composed of competent and experienced professionals would be equally subject to the FTC's proposed supervision requirement. Thus the state would have to supervise its supervisors. And any non-professional supervising body would lack the expertise necessary for a meaningful evaluation of the complicated and technical decisions made by the board. *Cf. Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999) (noting the "specialized knowledge required to evaluate [professional] services"); *S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 64 (1985) ("Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature.").

The principle advocated here is fully consistent with *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which denied antitrust immunity for the Virginia State Bar's role in setting and enforcing minimum fees for legal services. The Bar in that case was a state agency, but only for the very limited purpose of "investigating and reporting the violation of . . . rules and regulations as are adopted by the [Virginia Supreme] Court . . . to a court of competent jurisdiction." *Id.* at 776 n.2 (quoting Va. Code Ann. § 54-49 (1972)). The Bar's enforcement of minimum fee schedules fell far outside this delegated regulatory authority. Indeed, such enforcement flouted a rule of the Virginia Supreme Court, which expressly barred lawyers from "permit[ting themselves] to be controlled" by a "schedule of minimum fees adopted by a Bar Association." *Id.* at 789 n.18. The "fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield" for activities far beyond the Bar's delegated regulatory authority. *Id.* at 791. Here, by contrast, the Board has acted squarely within the area of the authority conferred on it by the state legislature, *i.e.*, the investigation and prevention of the unauthorized practice of dentistry.

B. The FTC's Approach Would Subordinate Federalism To Competition Policy.

If adopted, the FTC's contrary approach (and the approach of the Court of Appeals below) would tear *Parker* from its conceptual moorings and undermine the principles of federalism that animate the doctrine of state-action immunity.

The FTC seeks to distinguish among state agencies—treating some as the state itself and others as nonstate actors under *Parker*—based on the extent to which an agency's decision-making may arguably be influenced by private financial interests. Pet. App. 14a. The FTC's theory, drawn largely from the academic literature, is that financial interest increases the risk that officials may act contrary to good public policy and, more specifically, contrary to the policies of the antitrust laws. *See, e.g.*, 1A Areeda & Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 224b1 (3d ed. 2009) ("we would reserve the 'state itself' designation only for government agencies . . . that have no partic-

ular susceptibility to capture by a particular business group."); *id.* ¶ 224b2 (worrying that, with representatives from industry serving as officials, "the idea of a neutral government watchdog has largely been given away"); Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 690-91 (1991) (justifying distinction between private and public action "based on the economic incentives of the person restraining trade" in light of the observation that "the private party has interests at issue that can be advanced by restraining trade").

The fundamental flaw in this theory is that it subordinates the principles of federalism on which the state action doctrine is based to antitrust considerations—even though *Parker* is based on precisely the opposite balancing, *i.e.*, that antitrust values must give way to the sovereignty of states in our federal system. In addition, the FTC's theory would create significant expense and uncertainty for state regulation of the professions. It would subject state boards and their members to fact-based litigation on whether their decisions were based on private financial interests.

Not surprisingly, therefore, the approach advocated in the academic literature and invoked by the FTC in this case was expressly rejected by this Court in *Omni Outdoor Advertising*. There, the plaintiff argued that there should be a "conspiracy exception" to state action, *i.e.*, that state officials or agencies should not be entitled to immunity where they pursue private interests or act in bad faith. 499 U.S. at 376. And the plaintiff's concerns about the officials' motivations were not unfounded, since the mayor and other members of the city council were "personal friends" of the majority owner of a local monopolist, which "contributed funds and free billboard space to their campaigns." *Id.* at 367. In fact, the plaintiff proved to a jury that the monopolist conspired with city officials "to restrain trade and monopolize the market." *Id.* at 369.

Nevertheless, this Court held that the city was immune, for there is no conspiracy or corruption exception to state action. "The rationale of *Parker* was that . . . the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Id.* at 374. The private interests of the regulators are beside the point: "we reaffirm our rejection of any interpretation of the Sherman Act that would allow plaintiffs to look behind the actions of state sovereigns." *Id.* at 365.

This Court's decision to focus on whether an entity acts in a governmental capacity as sovereign regulator, without looking behind those actions, reflects the "principles of federalism and state sovereignty" on which the antitrust state-action doctrine is based. *Hallie*, 471 U.S. at 38. Indeed, the principle that the actions of an official or agency of the state are those of the sovereign is central to the doctrine of state sovereign immunity under the Eleventh Amendment. *See, e.g., Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (explaining that Eleventh Amendment immunity extends to suits against officials where liability would be paid from public funds). Such sovereign actions are precisely those designed to be exempt from antitrust scrutiny under the doctrine of state-action immunity. As this Court explained in *Parker*, the antitrust statutes give "no hint that [they were] intended to restrain state action or official action directed by a state," and this Court has refused to attribute to Congress an "unexpressed purpose to nullify a state's control over its officers and agents." 317 U.S. at 351.

For years, the FTC has pushed states to "broaden the membership of state licensure boards," based on the FTC's view that boards of practicing professionals are more likely to "engage in conduct that unreasonably increases prices or lowers access to health care." U.S. Dep't of Justice & FTC, *Improving Health Care: A Dose of Competition* 22 (July 2004), *available at* http://www.justice.gov/atr/public/health_care/204694.pdf. But every state—including North Carolina—has adopted a different view of what is in the interest of its citizens. These states have chosen to rely on boards that include practitioners to regulate the health professions. Conditioning state-action immunity on the structure and composition of the state agency in question would force the states to refashion their administrative agencies in the FTC's preferred image.

Indeed, to require active supervision for the Board would be to "turn the State against itself and ultimately to commandeer the entire political machinery of the State." *Alden v. Maine*, 527 U.S. 706, 749 (1999). Nothing in the Sherman Act or the FTC Act requires, or should be construed to require, sovereign states to structure their duly constituted administrative agencies in this way. *Cf. VOPA v. Stewart*, 131 S.Ct. 1632, 1641 (2011) (noting the "limits on the Federal Government's power to affect the internal operations of a State").

The authorized actions of a duly constituted state agency should be immune from second-guessing under the federal antitrust laws, regardless of whether the state agency is organized as the FTC would like it to be.

C. Federal Oversight Of State Agencies Is Particularly Inappropriate Given The States' Traditional Role In The Regulation Of The Health Care Professions.

Federal overturning of state policy choices—at least in the absence of a clear and explicit congressional directive—is particularly inappropriate where, as here, regulation of the health professions is at issue. This Court has long recognized that the state's protection of "the health of its citizens . . . is at the core of its police power." *Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 956 (1982). And where federal law is alleged to control in an area that "the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal citation and quotation marks omitted); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (cautioning against "foreclos[ing] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise").

Regulation of the professions is a traditional area of state concern. *See, e.g., Semler v. Or. Bd. of Dental Exam'rs*, 294 U.S. 608, 611 (1935) ("That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute."). Indeed, this Court has carefully protected professional regulation by the states against interference from the federal antitrust laws: "we intend no diminution of the authority of the State to regulate its professions. Allowing the instant Sherman Act challenge to the disciplinary rule would have precise-

ly that effect." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 n.11 (1977); *see also Hoover*, 466 U.S. at 593 n.18 (1984) (refusing to entertain antitrust challenge in connection with regulation of attorneys: "Few other professions are as close to the core of the State's power to protect the public" (internal quotation marks removed)). Allowing federal agencies to subject state boards responsible for regulating the professions to second-guessing under the antitrust laws would generate the very interference this Court sought to avoid in *Bates*.

II. CONGRESS NEVER INTENDED TO SUBJECT STATE REGULATORY BOARDS TO FTC OVERSIGHT.

Parker immunity is based on an interpretation of the Sherman Act. *See* 317 U.S. at 352 ("The state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit."). By contrast, the FTC brought this case under § 5 of the FTC Act. 15 U.S.C. § 45(a)(1). There is no dispute that the principles underlying *Parker* apply equally to cases brought under the FTC Act. If anything, the fact that this case was brought under the FTC Act provides an additional reason to reverse the Fourth Circuit's decision.

The FTC's power under the FTC Act is limited to preventing "persons, partnerships, or corporations" from using "unfair methods of competition." *Id.* § 45(a)(2). This limiting language raises an interpretive question as to whether a state agency is a "person, partnership, or corporation" that Congress intended the FTC to regulate. The answer is no. The text, purpose, and history of the FTC Act reveal that

the statute is targeted at the competitive actions of businesses and other commercial entities—not the regulatory actions of state agencies. State agencies simply are not "persons, partnerships, or corporations" within the meaning of § 5(a)(2) of the FTC Act. *Id.* § 45(a)(2).

The Board certainly is not a "partnership." Nor does it come within the FTC Act's definition of a "corporation," which includes "any company . . . or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members." *Id.* § 44. With its focus on entities organized to carry on business for profit, this definition confirms that the FTC Act is concerned with unfair competitive practices of businesses.

Nor is the Board a "person" within the meaning of § 5 of the FTC Act. Although "person" is sometimes given a capacious construction in other contexts, the word is best read under the Act to refer more narrowly to natural persons, and certainly not to government agencies. *See, e.g., Vt. Agency of Natural Res. v. United States ex rel. Stevens*, 529 U.S. 765, 780 (2000) (applying the "longstanding interpretive presumption that 'person' does not include the sovereign"). If "person" were construed to include "corporations and associations" as under the Sherman Act, for example, 15 U.S.C. § 7, the words "partnerships" and "corporations" would be mere surplusage.[6] Construing "per-

[6] Unlike the FTC Act, neither the Sherman Act nor the Clayton Act uses the limiting phrase "persons, partnerships, or corporations." For this reason, the Fourth Circuit was wrong to rely on this Court's interpretations of "person" under the Sherman Act and Clayton Act when construing the term "person" under the FTC Act. *See* Pet. App. 9a n.2 (citing *Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 155 (1983); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 395 (1978)).

sons" as natural persons avoids this outcome and gives operative effect to Congress's decision to list these other kinds of entities. *See Dunn v. Commodity Futures Trading Comm'n*, 519 U.S. 465, 472 (1997) ("[L]egislative enactments should not be construed to render their provisions mere surplusage."). In contrast, reading "partnerships" and "corporations" out of the statute fails to "respect Congress' decision to use different terms to describe different categories of people or things." *Mohamad v. Palestinian Auth.*, 132 S.Ct. 1702, 1708 (2012).

The text of the FTC Act thus confirms what this Court has long recognized with respect to the purposes of the antitrust laws more generally: "[T]he antitrust laws regulate business, not politics." *Omni Outdoor Adver.*, 499 U.S. at 383. Congress passed the FTC Act to curtail unfair methods of competition of for-profit business engaged in a rough-and-tumble marketplace.

This conclusion is reinforced by the history of the FTC Act. At the time of its passage in 1914, there was a widespread belief that existing judicial enforcement of the Sherman Act against industrial and commercial enterprises and combinations thereof had been inadequate. *See* S. Rep. No. 62-1326, at 13 (1913); S. Rep. No. 63-597, at 8-9 (1914); H.R. Rep. No. 63-1142, at 18-20 (1914). Congress expected that the new Trade Commission that it was establishing would develop such unique expertise concerning industrial and commercial entities that it would be better able to apply national antitrust policy to these entities than would a court.[7] Accordingly, the whole

[7] The legislative history repeatedly emphasized the conviction of Congress that the Trade Commission would be "an administrative body of practical men thoroughly informed in regard to

thrust of the legislative history is that the Act was passed to apply to "industrial business" and, specifically, to manufacturers, dealers and associations, or other combinations thereof.[8] And although state regulatory boards had long been in operation, *see, e.g.*, *Dent v. West Virginia*, 129 U.S. 114 (1889), there was no testimony or discussion related to empowering the FTC to police the activities of such boards.

In short, the language and legislative history of the FTC Act, much like that of the Sherman Act in *Parker*, give "no hint that [the statute] was intended to restrain state action or official action directed by a state." *Parker*, 317 U.S. at 351. To the contrary, the FTC was not authorized by Congress to regulate state agencies that are charged by state legislatures with regulating the health care professions.

III. SUBJECTING STATE REGULATORY BOARDS TO OVERSIGHT BY THE FTC WOULD UNDERMINE THE ABILITY OF STATES TO REGULATE THE HEALTH PROFESSIONS.

The Fourth Circuit affirmed an Order that gives the FTC continuing supervisory authority over the Board for years to come. Pet. App. 150a. If this Court adopts the Fourth Circuit's approach, it will encourage states to change how they regulate health professionals in significant ways. States could not

business," H.R. Rep. No. 63-1142, at 18-19 (1914), and would have unique expertise concerning "the business and economic conditions of . . . industry." S. Rep. No. 63-597, at 8-9.

[8] *See, e.g.*, 51 Cong. Rec. 8840, 8840 (1914) (Rep. Covington) ("covers industrial business"); *id.* at 8851 (Rep. Stevens) (retailers and manufacturers discussed); *id.* at 8986 (Rep. Montague); *Comty. Blood Bank v. FTC*, 405 F.2d 1011, 1017-18 (8th Cir. 1969) (quoting letter to Sen. Newlands discussing associations of manufacturers and dealers).

safely rely on highly qualified, practicing doctors—practical professionals thoroughly informed in regard to their profession—to regulate within the area of their expertise. The risk of antitrust liability with the threat of treble damages and fee-shifting provisions, or even costly antitrust investigations, would undermine state regulation of the health professions.

A. Requiring State Boards To Adopt The FTC's Position On Competition Would Come At The Expense Of Public Health.

Subjecting state regulatory boards whose members are professionals to antitrust scrutiny would place a chill on state regulatory boards and cause harm to the public interest because there could be no confidence that a board's implementation of the applicable state statute would survive second-guessing by the FTC. It is not the job of the FTC—applying the "gauzy cloak" of the federal antitrust laws—to pass judgment on the procedures and policy decisions of a duly constituted agency of state government. But the risk that the FTC will do so is likely to distort state health policy. And the risk that a decision requiring active supervision may be invoked to justify treble damages actions (with a mandatory award of attorneys fees to a prevailing plaintiff)—and other proceedings against boards or their members—can only further distort regulation.

Suppose, for example, that a state medical board is called upon to determine whether the performance of certain services by a non-physician clinician constitutes the unlicensed practice of medicine. The board may well conclude that, based on its medical judgment, the nature of the procedures and the training of the non-physician clinician are such that permitting him or her to perform these services without adequate physician supervision would pose significant

risks to patients. However, knowing that such a decision could expose both the board and its members to litigation by the FTC or a private plaintiff alleging that the decision suppresses competition by non-physician clinicians against physicians, the board is more likely to adopt a rule that permits such clinicians to perform services that pose a risk to the public. Or the board might be so concerned about the threat of antitrust liability that it refuses to adopt any rule at all.

In such circumstances, state health policy is trumped by federal antitrust policy—directly contrary to the principles of *Parker*. The federal antitrust laws were not enacted, and should not be permitted, to subvert medical and dental decisions by duly constituted state boards regarding what they believe to be in the best interests of patients and the public. In this case, the state legislature has determined that, when it comes to preventing the unauthorized practice of dentistry, the Board should make decisions in a way that puts a premium on avoidance of risk to patients, even at the cost of higher prices. The state's policy choice might be debated, but it should not be set aside in favor of the FTC's preferred policy.

In this connection, it is worth noting that this Court has recognized that even private professional self-regulation can promote competition in a market in which consumers have difficulty monitoring the quality of services available. *See Cal. Dental Ass'n*, 526 U.S. at 772-74. As the Court noted, "the quality of professional services tends to resist either calibration or monitoring by individual patients or clients, partly because of the specialized knowledge required to evaluate the services," and the "existence of such significant challenges to informed decision-making by the customer for professional services immediately

suggests" that certain restrictions on competition likely benefit consumers. *Id.* at 772-73. It is true that, by design, medical and dental licensing boards limit the extent and ways in which individual professionals may compete, but those limits tend to promote rather than inhibit patient decision-making and public health.

At bottom, allowing the FTC to sit in judgment of state regulatory boards reflects a profound mistrust of the democratic process and of judicial review in the state courts. If a state legislature enacts laws that are not in the interest of the public, the cure lies in the electoral process. And if a state board whose members are market participants acts in the interests of their fellow practitioners rather than in the interests of the public, the remedy lies in the state legislature—where either the substance of a regulation or the composition of the board can be changed by majority vote. In addition, a remedy is available in the state courts—where any person aggrieved by final agency action may obtain judicial review. *See* N.C. Gen. Stat. § 150B-43.

Private actors are not subject to electoral or legislative scrutiny, or judicial scrutiny under a state's administrative procedure act; state-created regulatory agencies (including agencies comprised of market participants) are. It is the democratic process and the state courts, not the decisions of federal antitrust enforcers far removed from the realities of the practice of a profession in a state, that should protect the public interest in the regulation of professionals by a state agency.

B. The Risk Of Antitrust Liability Will Discourage Qualified Professionals From Serving On Regulatory Boards.

Exposing regulatory boards to antitrust scrutiny undercuts state regulation of the professions in yet another way. If state regulatory boards are subject to the federal antitrust laws on the theory that their members are private actors, then those members may fear that they will be exposed to personal liability for treble damages.[9] *See* 15 U.S.C. § 15(a) (providing that persons injured by antitrust violations "shall recover threefold the damages" they sustain). They would reasonably be concerned that they will be treated no differently from private conspirators. In the circumstances, conscientious practitioners who might otherwise volunteer to serve on a state regulatory board in areas in which they practice will determine that the risk of burdensome litigation and even liability is too great.

At least one treble-damages suit against physicians who serve on a state medical board has already been filed in the wake of the Court of Appeals decision in this case. *See* Am. Compl., *Petrie v. Va. Bd. of Med, et al.*, No. 1:13-cv-1486 (E.D. Va. Feb. 3, 2014) (D.I. 13). The complaint in *Petrie* alleges that a state medical board and its members, including practicing physicians appointed by the Governor, conspired to restrain trade by agreeing to bar chiropractors from competing in certain service markets. When the defendants moved to dismiss, the plaintiff in *Petrie* ex-

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[9] Although the members of a state regulatory board may be immune from suit for their official actions under the Eleventh Amendment, they might reasonably fear that sovereign immunity will be denied. *See, e.g., Versiglio v. Bd. of Dental Exam'rs of Ala.*, 651 F. 3d 1272 (11th Cir. 2011) (denying immunity).

pressly invoked the decision below and succeeded in avoiding dismissal. *See* Resp. to Mot. to Dismiss at 12 (Mar. 4, 2013) (D.I. 27) ("Petrie presents strong and serious federal antitrust claims with great similarity to claims affirmed . . . by the Fourth Circuit in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*"). In short, the risk that the holding in the decision below will invite expensive antitrust litigation threatening treble damages against individual board members is not hypothetical. Such litigation has already been brought, and it has survived dismissal based at least in part on the decision under review.

This Court has previously recognized the chilling effect of antitrust scrutiny on the willingness of professionals to participate on state regulatory boards:

> It is customary for lawyers of recognized standing and integrity to serve on these bodies, usually as a public duty and with little or no compensation. . . . There can be no question that the threat of being sued for damages—particularly where the issue turns on subjective intent or motive—will deter "able citizens" from performing this essential public service.

Hoover, 466 U.S. at 580-81 n.34. This observation applies to physicians, dentists, and other professionals just as it does to the attorneys in *Hoover*.

The same considerations that underlie the doctrine of official immunity apply equally here. That doctrine is based on the proposition that the public is best served when government officials are not subject to personal liability for action taken in good faith. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478, 506 (1978) (emphasizing "the need to protect officials who are required to exercise their discretion and the related

public interest in encouraging the vigorous exercise of official authority"). Otherwise, as noted above, the officials will be constrained from making the hard decisions lest they be exposed to personal damages actions. Yet exposure to the threat of treble damages actions is precisely what members of state boards will face if the decision below is affirmed.

C. Federal Antitrust Oversight Would Disrupt A 150-Year Tradition Of State Regulation By Boards Of Practicing Doctors.

States have relied on boards whose members are practicing professionals from the birth of modern regulation of the health professions. These boards have long been treated as agencies of the state, created for the protection of the public.

Although licensure goes back to the colonies, the modern system can be traced to the mid- to late-nineteenth century. *See* Johnson & Chaudhry, *Medical Licensing and Discipline in America* 23 (2012). In 1859, North Carolina became one of the very first states to create a board of medical examiners, which consisted entirely of "regularly graduated physicians" and was empowered "to examine all applicants for license to practice medicine or surgery." N.C. Stat. ch. 258, §§ 3-5 (1859). Other states followed suit, typically creating medical boards composed solely of professionals. *See, e.g.*, Colo. Stat. ch. 101, § 3547 (1881) (establishing a board of medical examiners, "to be composed of nine practising physicians, of known ability and integrity"); Va. Stat. ch. 77, § 1745 (1886) ("[B]oard shall consist of men learned in medicine and surgery"); *cf.* Penn. Pub. L. 79, May 16, 1895, § 1 (establishing State Board of Veterinary Medical Ex-

aminers, "to consist of five members, who shall be of good standing in the veterinary profession").[10]

Around the same time, states began to create state licensing boards for dentistry. These boards, too, were typically composed entirely of practicing professionals. For example, North Carolina's first board of dental examiners, established in 1879, consisted of "six members of the North Carolina Dental Society, to be elected by the said society." N.C. Stat. ch. 139, § 2 (1879); *see also, e.g.*, Ill. Stat. ch. 91, § 36 (1881) ("A board of examiners, to consist of five practicing dentists, is hereby created"); Ok. Stat. ch. 28, § 2669 (1890) (creating board "consist[ing] of five practicing dentists . . . who shall have been engaged in the continuous practice of dentistry or dental surgery for at least two years prior to the passage of this act"); 48 Wash. Stat. § 2855 (1888) ("A board of dental examiners, consisting of five practicing dentists, is hereby created"); Wis. Stat. ch. 56c, § 1410e (1897) (creating board "consist[ing] of five practicing dentists, at least three of whom shall be members of the Wisconsin state dental society"). In many states, as in North Carolina, board members were selected by other practicing dentists. *See, e.g.*, Ala. Stat. ch. 3, § 1310-11 (constituting dental board, to be "elected by the Alabama Dental Association"); 8 S.C. Stat. ch. 24, § 985 (1875) ("The South Carolina State Dental Association shall elect a Board of Examiners, to consist of

[10] *See also* Johnson & Chaudhry, *supra*, at 23 ("Texas adopted its medical licensing authority and created county boards of medical examiners in 1873 (its state board of examiners . . . was created in 1907), Nevada in 1875 (its board of medical examiners was created in 1899), Alabama and California in 1876, Illinois in 1877, Minnesota in 1883, Colorado and Washington in 1881, New Mexico in 1882, Virginia in 1884 and Oklahoma in 1890.").

five members, to be known by the title of the Board of Dental Examiners in the State of South Carolina").

Courts appreciated the value and legitimacy of such boards from early on as well, even where their membership included medical professionals appointed by other medical professionals. For example, in *Ex parte Gerino*, 77 P. 166 (Cal. 1904), the Supreme Court of California rejected a constitutional challenge to the power of a board of medical examiners whose members were appointed by the state's medical societies, explaining as follows:

> The board of examiners, when constituted, is not the agent of the medical societies which appoint its members, and its functions are not conferred or designed for the benefit of those societies, or either of them. The board constitutes a state agency for the regulation of the practice of medicine and surgery, and it must discharge that duty under oath and impartially for the benefit of the people . . . .

Id. at 167; *see also Wilson v. Thompson*, 83 N.J.L. 57 (N.J. 1912) (noting that the New Jersey Dental Society has the power to appoint members of "the State Dentistry Board, which has entire control, as agent of the state, of the practice of dentistry in the state").

This Court expressed similar approval for the nascent field of modern professional regulation in *Dent v. West Virginia*, 129 U.S. 114 (1889). *Dent* concerned a constitutional challenge to a conviction for practicing medicine without an appropriate certificate from the state board of health, which was composed entirely of experienced, practicing physicians. *See State v. Dent*, 25 W.Va. 1 (1884) (providing factual background on conviction); W. Va. Stat. ch. 90, § 1 (1882) ("There shall be a state board of health in this state consist-

ing of two physicians residing in each congressional district thereof, who shall be graduates of reputable medical colleges, and who shall have practiced medicine for not less than twelve years continuously."). This Court rejected the challenge, recognizing the value of requiring that anyone who seeks to offer medical services possess "learning and skill" and "present evidence of it by a certificate or license from a body designated by the State as competent to judge of his qualifications." 129 U.S. at 123.

The FTC's proposed rule would disrupt a tradition in this country—stretching back over 150 years—of state reliance on practitioners "competent to judge" the qualifications of medical professionals. *Id.* In its place, the FTC would erect a regime of review by non-practitioners without knowledge of "the human body in all its complicated parts, and their relation to each other, as well as their influence on the mind." *Id.* at 122.[11] Neither the FTC nor private antitrust plaintiffs are well-situated to determine what constitutes the practice of medicine or dentistry, much less how to best regulate the practice of medicine or dentistry to protect the health and well-being of patients.

[11] Even if the decision of the State Board of Dentistry in this case is regarded as restricting competitive entry, regulation by a duly constituted licensure board that includes practitioners promotes competition and consumer welfare by encouraging regulated individuals to meet certain standards and by providing information to consumers of their services. *See Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) ("Congress designed the Sherman Act as a consumer welfare prescription." (internal quotation marks removed)). As noted in *Consolidated Metal Products, Inc. v. American Petroleum Institute*, 846 F.2d 284, 297 (5th Cir. 1988) (Wisdom, J.), a system is not anticompetitive even though one decision coming out of that system might be seen as potentially suppressing competition. *Id.* ("An individual business decision that is negligent or based on insufficient facts or illogical conclusions is not a sound basis for antitrust liability."). Moreover, regulatory boards are designed to promote public health in ways that sometimes limit competition, such as refusing to license unqualified applicants or excluding unlicensed practitioners.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be reversed.

Respectfully submitted,

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