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 FEDERATION OF STATE BOARDS OF PHYSICAL THERAPY, *ET AL.* AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONERS AND REVERSAL

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INTERESTS OF THE *AMICI CURIAE*

Each of the organizations that is a party to this *amicus curiae* brief has a special interest in this case because it, or its members, perform regulatory and licensing duties like those of the North Carolina State Dental Board ("Dental Board")[1]:

- The Federation of State Boards of Physical Therapy ("FSBPT") is a not-for-profit federation of the state physical therapy regulatory licensing boards of each of the fifty states, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands. FSBPT member boards regulate the safe and lawful practice of physical therapy in their respective jurisdictions.

- The Federation of Associations of Regulatory Boards ("FARB") is a not-for-profit, 501(c)(3) membership association that promotes public protection and provides a forum for beneficial collaboration among its members, associations of regulatory boards across disciplines, jurisdictions, and professions.

- The National Council of State Boards of Nursing ("NCSBN") is a not-for-profit, 501(c)(3) corporation composed of the boards of nursing of all states, the District of Columbia and four United States territories. NCSBN's member boards are the

1. No party to the instant appeal has authored or contributed money to this brief, nor has anyone other than *amici curiae* and their members contributed to this brief, financially or otherwise. All parties have consented to the filing of this brief.

state agencies responsible for the regulation of registered, practical and vocational nurses throughout the United States and its territories. The NCSBN assists its member boards of nursing to act and counsel together on matters of common interest and concern affecting the public health, safety and welfare, including the development of the national licensing examinations in nursing.

- The National Board of Certification in Occupational Therapy ("NBCOT") is a not-for-profit credentialing agency that promotes public protection by providing a certification process for the occupational therapy profession.

- The American Association of Veterinary State Boards ("AAVSB") is a not-for- profit, 501(c)(3) association that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of the 57 veterinary licensing boards in the United States, the District of Columbia, the U.S. Virgin Islands, Puerto Rico and four Canadian provinces.

- The Association of Social Work Boards ("ASWB") is a not-for-profit, 501(c)(3) association that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of social work regulatory licensing boards in the United States and Canada.

- The Federation of State Massage Therapy Boards ("FSMTB") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by

providing programs and services to its membership, which is comprised solely of jurisdictional agencies authorized by statute to regulate the practice of massage therapy in the United States.

- The International Conference of Funeral Service Examining Boards, Inc. ("ICFSEB") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of the jurisdictional agencies authorized by statute to regulate the practice of funeral and embalming services in the United States and Canada.

- The National Association of Long Term Care Administrator Boards ("NAB") is a not-for-profit organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of the boards which regulate long term care administrators in the United States and District of Columbia.

- The American Association of State Counseling Boards ("AASCB") is a not-for-profit association that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of governmental agencies responsible for the licensure and certification of counselors throughout the United States.

- The Association of Regulatory Boards of Optometry ("ARBO") is a not-for-profit, 501(c)(3) organization

that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of optometry regulatory boards in the United States, Canada, and Australia.

- The Association of State and Provincial Psychology Boards ("ASPPB") is a not-for-profit association that promotes public protection and uniformity by providing programs and services to its membership, which is comprised solely of the psychology boards in the United States and Canada.

- The National Association of Boards of Pharmacy ("NABP") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised of boards of pharmacy in the United States, District of Columbia, Guam, U.S. Virgin Islands, Puerto Rico, Australia, New Zealand, and Canada.

- The National Association of State Boards of Accountancy ("NASBA") is a not-for-profit organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised of boards of accountancy in the United States.

- The National Association of State EMS Officials ("NASEMSO") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised of state EMS agencies in the United States.

- The Federation of Chiropractic Licensing Boards ("FCLB") is a not-for-profit, 501(c)(3) organization that promotes public protection and uniformity by providing programs and services to its membership, which is comprised of chiropractic regulatory boards in the United States, Canada, Australia, and Mexico.

Like the Dental Board, the member boards of the *amici* parties are tasked with regulating their respective professions for the good of the public and enforcing certain limitations on the practice of their profession, as mandated by their state lawmakers. These boards are frequently composed of professionals who regulate their respective professions. Thus, *amici*'s member boards face the threat of antitrust actions against them if the decision of the Fourth Circuit is permitted to stand, or if the Fourth Circuit's decision is interpreted to define as a private actor any regulatory board comprised of a majority of regulated professionals. *Amici* therefore have an interest in apprising the Court of the consequences of the Fourth Circuit's decision to decline to apply state action immunity to the Dental Board.

Amici focus on the question of whether state regulatory boards are entitled to state action immunity from the federal antitrust laws when the boards include members of the regulated profession. *Amici* are concerned that the Fourth Circuit's test for determining state action immunity could subject *amici*'s boards and their board members to antitrust liability and, thus, destroy the usefulness of state regulatory boards, to the detriment of the professions and to the consuming public.

Many states have enacted statutes establishing regulatory boards that include members of the regulated profession. Such boards rely upon a professional membership with a flexible and strong enforcement power to regulate their profession. The threat of liability could discourage members from passing necessary regulations, enforcing their mandates vigorously, and regulating their professions properly. This decision could thus negatively affect the quality of the boards and the professionals they regulate, as well as the health and safety of the public whom they serve.

SUMMARY OF ARGUMENT

Amici curiae respectfully submit this brief in support of the Petitioner. *Amici* submit that the judgment of the Fourth Circuit was erroneous and should be reversed by this Court. The state action immunity doctrine should apply to actions of state boards like the Dental Board. The Fourth Circuit's decision was erroneous as a matter of law and ill-advised as a matter of policy.

The fundamental purpose of state regulatory boards is to protect the public from harm caused by the unlawful or unsafe practice of the professions they regulate. Accordingly, states invest these boards with mandates to protect against the danger of unlicensed practitioners, ensure minimum standards, and regulate professional conduct. The Fourth Circuit's decision threatens to jeopardize this regulatory process and must be overturned for at least four reasons.

First, the Fourth Circuit's decision threatens to undermine states' ability to delegate functions to their

regulatory boards. This Court has recognized that the Sherman Act was not designed to nullify a state's control over its officers and agents. This Court has also recognized the essential role that state regulatory boards composed of professional members play in the proper administration of state government. The Fourth Circuit's test would force states to restructure their administrative systems to eliminate market participant members from their regulatory boards or impose a duplicative and unnecessary extra layer of supervision over their boards. As a result, the Fourth Circuit's test would destroy the many benefits inherent in delegation to state regulatory boards, while also potentially endangering the public whom these boards are tasked with protecting.

Second, state regulatory boards like the Dental Board are clearly state entities. They possess the public attributes that this Court emphasized in holding that municipalities are not required to meet the active supervision prong of the state action doctrine. Like municipalities, state boards have broad public mandates and are consistently exposed to public scrutiny. Thus, like municipalities, the need for active supervision does not arise.

Third, the Fourth Circuit improperly presumed that state regulatory boards do not act in the public interest and that the Dental Board must not be a state entity. The mere presence of a majority of licensed professionals on a board that regulates a profession does not make that board a private actor, however. The Fourth Circuit presumed that because the individuals comprising a board have private interests, the board pursues those interests. There is no stated basis for this presumption. In fact, just the opposite presumption is preferable. This Court has

applied a presumption that municipalities act in the public interest. This presumption is no less appropriate for state regulatory boards. Like municipalities, state regulatory boards are arms of the state and have open-government laws and other disclosure requirements. The open and public nature of these entities indicates that they have an incentive to act in the public interest and not pursuant to individual private interests.

Fourth, the Fourth Circuit's test improperly looks behind state action to inquire into the private motives of state board members. The Fourth Circuit focused its inquiry on the composition of the Dental Board and the potential private interests of the dentists serving on it. The Fourth Circuit's test is in direct opposition to this Court's clear mandate that courts are not permitted to look behind the actions of states to determine whether they qualify for state action immunity. This mandate is derived from this Court's dual concerns for state sovereignty and federalism. Allowing courts to inquire into the private interests of state actors in determining whether to apply active supervision would necessarily intrude on a state's ability to determine the structure of its administrative systems.

ARGUMENT

I. ACTS TAKEN BY DULY AUTHORIZED STATE REGULATORY BOARDS SHOULD BE IMMUNE FROM FEDERAL ANTITRUST LIABILITY UNDER THE STATE ACTION DOCTRINE.

The state action doctrine immunizes a state from federal antitrust liability when exercising its sovereign

governmental authority. *Parker v. Brown*, 317 U.S. 341, 350-351 (1943). Conduct by a state acting through the legislature is *ipso facto* immune from the antitrust laws. *Hoover v. Ronwin*, 466 U.S. 558, 567-568 (1984). In such a case, states are granted immunity not because they have chosen to act anticompetitively, but rather, because the state has chosen to act at all. *Id*. at 574. This Court has justified this doctrine based on federalism and state sovereignty rationales:

> "In a dual system of government, in which, under the Constitution the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not to be lightly attributed to Congress."

Parker, 317 U.S. at 351.

The doctrine does not apply directly to sub-state entities or private actors because such actors are not themselves sovereign. However, such entities may receive the protection of the doctrine where their actions are authorized implementations of state policy. *See Federal Trade Commission v. Phoebe Putney Health System*, 133 S.Ct. 1003, 1010 (2013); *City of Columbia v Omni*, 499 U.S. 365, 370 (1991); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989); *Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir. 1998).

The application of state action immunity to private and sub-state actors differs depending on the type of

entity at issue. If the actor is a private actor then it must satisfy two prongs to gain the benefit of state action immunity. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, 445 U.S. 97 (1980). First, it must show that there is a clearly articulated state policy to displace competition. Second, it must show that there is active supervision by the state of the conduct at issue. If the actor is instead a municipality, it must show only that there is a clearly articulated policy to displace competition. Unlike private actors, municipalities are not required to show that their activity is actively supervised by the state. *Town of Hallie*, 471 U.S. at 46. Importantly, this Court has also suggested that sub-state entities, including state boards and agencies, are also not required to meet the active supervision requirement. *Id.* at 46 n.10 ("In cases in which the actor is a state agency, it is likely that active supervision would also not be required").

A. The Fourth Circuit's test imperils states' ability to delegate their authority to expert regulatory boards and undermines those boards' ability to regulate in accordance with their public mandates.

The state action doctrine protects a state's ability to delegate its authority to sub-state entities. *Town of Hallie*, 471 U.S. at 38. In developing the state action doctrine, this Court has stressed that the Sherman Act was not intended to "nullify a state's control over its officers and agents." *Id.* at 38. This Court has recognized that regulatory boards play an essential role in the efficient operation of state governments and in the protection of the public. *See Southern Motors Rate Conf. v. United States*, 471 U.S. 48, 64 (1985) (explaining that "[a]gencies are created because

they are able to deal with problems unforeseeable to, or outside the competence of the legislature").

States create regulatory boards to serve important public interests, including the protection of the public health. *Gambrel v. Kentucky Board of Dentistry*, 689 F.2d 612, 618 (6th Cir. 1981) (describing Kentucky's regulatory interest in restricting certain activities to licensed dentists, "a matter which is of vital interest to the health and safety of citizens"). Professional regulatory boards guard against unlicensed and unqualified practitioners in a variety of professions. *See e.g., Semler v. Oregon State Bd. of Dental Exam'rs*, 294 U.S. 608 (1935) (finding that that Legislature was dealing "with the vital interest of public health" and that the public is concerned with the "maintenance of professional standards"). Professional boards ensure consistent standards of quality and exclude individuals who cannot meet those standards from practice.

States structure their regulatory boards carefully to achieve those important public interests. To this end, regulatory boards often include market participant members because market participants are typically in a better position than lay people to examine the highly technical matters that these boards regulate. States recognize that experts are often better equipped to authorize and regulate their professions than are non-members of the profession. *See Cal. Dental Ass'n v. FTC*, 526 U.S 756, 772 (1999) (recognizing the specialized knowledge to evaluate medical services); *Southern Motors Rate Conf. v. United States*, 471 U.S. 48, 64 (1985) (noting that states create agencies because they are often better equipped to deal with unforeseeable issues). States intend that board members will apply their expertise to technical

problems, which lay persons do not have the specialized knowledge to address. *Cal. Dental Ass'n*, 526 U.S. at 772 (citing the "common view that the 'lay public is incapable of adequately evaluating the quality of medical services'").

Under one reasonable interpretation of the Fourth Circuit's ruling, a state board made up of a majority of market participants (no matter how selected) would not qualify as a state entity and thus would be required to show active supervision to obtain state action immunity. *See The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359, 368 (2013) ("We agree with the FTC that state agencies '"in which a decisive coalition (usually a majority) is made up of participants in the regulated market,'" who are chosen by and accountable to their fellow market participants, are private actors and must meet both *Midcal* prongs"). Such a test would destroy states' ability to structure their regulatory boards with a majority of individuals who work in the profession they regulate. To obtain the mere possibility of state action immunity, states would be required to either restructure their boards to include a majority of non-market participants or actively supervise their boards in some undefined way. As a result, the Fourth Circuit's test would undermine the very purposes of delegation to expert regulatory boards.

Without state action immunity, board members would operate under the constant threat of antitrust liability. This Court has recognized this concern and noted that if state action immunity is easily avoided then antitrust litigation may have a discouraging effect on public service. *See Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984) ("the threat of being sued for damages . . . will deter [individuals] from performing this essential public service"). Without

the certainty of state action immunity, many professionals may be reluctant to serve on regulatory boards for fear of incurring liability. *See id.* at 580 n.34. Individuals who do serve may be reluctant to or unable to make controversial decisions or pass regulations necessary to regulate their professions effectively. Professional regulatory boards depend on having strong enforcement powers to oversee their members and ensure quality and safety. The threat of liability would negatively affect the quality of oversight these boards provide and, as a result, the quality of the professionals who are licensed. Consequently, the absence of effective enforcement would imperil the public whom these boards are often tasked with protecting. For example, board members might be reluctant to enforce claims of malpractice or impose discipline upon a licensed professional where such enforcement could lead to antitrust liability. This would allow unqualified and potentially dangerous practitioners to continue providing services to the public, thus exposing the public to new and serious risks.

States also create regulatory boards to avoid micromanagement. Delegation to regulatory boards allows states to achieve important efficiency benefits. States have neither the resources nor the ability to regulate all segments of the state effectively. Thus, states delegate functions to state boards and expect that those expert boards will regulate those segments in accordance with their mandates. Without regulatory boards, states would necessarily be involved in every detail of state regulation. For example, without regulatory boards states would be required to design complex professional certification examinations and craft technical medical regulations on their own. Boards allow states the ability to delegate these details to a group of experts.

Finding such boards to be private actors requiring active supervision would eviscerate the rationale for having a board of professionals. Active supervision would impose a duplicative, unnecessary, and potentially time-consuming extra layer of review over these boards by non-experts. In short, it would require states to micromanage the very boards to which they have chosen to delegate authority. As this Court has observed, requiring "express authorization of every action that an agency might find necessary to effectuate state policy would diminish if not destroy, [a board's] usefulness." *See Southern Motors Rate Conf.*, 471 U.S. at 64. Lay supervision of these highly technical boards would diminish the effectiveness of the regulatory regime and imperil the public whose health and safety these boards are tasked with protecting. There is no reason to believe that an additional layer of supervision overseen by lay persons would improve the decision making of these boards. Rather, without technical expertise, such lay persons must rely on the counsel of the market participant board members anyway. Absent such reliance, decisions made by lay members could imperil the health and the well-being of the public. Those lay members who would ignore the conclusions of the expert board would make medical, dental, or other highly technical judgments without the benefit of expert guidance. Thus, in effect, any active supervision of these boards would either be entirely duplicative or, more seriously, pose a significant risk to the public.

The Fourth Circuit's test is simply not a workable objective standard for state boards to follow. Instead, it puts boards in a state of constant uncertainty regarding their legality. The Fourth Circuit's ruling seems to hold that there are too many privately interested professionals

on the Dental Board to be a state entity. *The N.C. State Board of Dental Examiners*, 717 F.3d at 368. Thus, any board composed of market participants would be vulnerable to the charge that it is actually a private actor requiring active supervision. The Fourth Circuit does not clearly explain, however, how a state might structure its regulatory boards to avoid active supervision. Instead, the Fourth Circuit merely notes that active supervision might not be required for boards that are more "quintessential" state agencies, without explaining how a regulatory board might rise to such "quintessential" status. *Id.* at 367 n.4. Moreover, what the Fourth Circuit does not acknowledge is that state boards are almost always dominated by market participants. *See e.g., Hass*, 883 F.2d 1453 (twelve of fifteen members of the board were professionals); *Earles*, 139 F.3d 1033 (entire board was composed of professionals). As discussed *supra*, the reasons for this are manifold, but generally states have determined that the effective administration of regulatory boards *requires* that they include interested members. *See Hoover v. Ronwin*, 466 U.S. 558, 580 (1984) (recognizing that state committees, commissions, and others "*necessarily must advise the sovereign*") (emphasis added). Thus, any test that hinges the application of active supervision on the membership structure of a state board is simply unworkable and destroys a state's ability to delegate functions to these boards.

Although the Fourth Circuit's decision appears to have articulated a test that hinges the application of active supervision upon whether a regulatory board contains a majority of market participants, *See The N.C. State Board of Dental Examiners*, 717 F.3d at 368, the concurring opinion suggested that the critical feature was not the

ratio of professionals on the board, but rather the means by which Dental Board members were selected—election by other licensed professionals, as opposed to selection by the state government.[2] *Id.* at 376. The specific parameters of the Fourth Circuit's test for state action immunity are therefore unclear. To the extent this Court concludes that the Dental Board should be treated as a private actor solely because of the method by which its members were selected, *amici* respectfully urge this Court to expressly so state, so as to construe the Fourth Circuit's ruling narrowly and to provide clearer guidance regarding the permissible role of licensed professionals on regulatory boards.

B. State regulatory boards are clearly state entities and possess the attributes that this Court has emphasized in holding that municipalities do not need to meet the active supervision test.

State regulatory boards are state entities. They possess the public attributes that this Court recognized in *Town of Hallie*, holding that a municipality was not required to show active supervision. *See Town of Hallie*, 471 U.S. at 45-47. This Court acknowledged that, unlike private actors, a municipality's conduct was likely to be exposed to public scrutiny and was checked to some degree through the electoral process. *Id.* at 45 n.9.

2. Although *amici* do not endorse selection of board members via election by licensed professionals, the delegation of state functions to licensed professionals serves a vital role in state regulation, and this Court's precedent makes clear that it is not a proper role of the federal government to second guess the means by which the States opt to structure their regulatory boards.

These characteristics provided the Court comfort that "there is little or no danger that [the entity] is involved in a private price fixing arrangement." *Id.* at 47. This Court has used the clear articulation prong of the *Midcal* test alone to guard against anticompetitive behavior by state, municipality, and sub-state entities. *See e.g., id.* at 47*; Federal Trade Commission v. Phoebe Putney*, 133 S.Ct. 1003, 1016 (2013). For these types of entities, clear articulation provides sufficient protection against anticompetitive behavior. For example, in *Goldfarb v. Virginia State Bar*, this Court held that a state bar association made up of market participants did not qualify for state action immunity "because it [could not] fairly be said that the State of Virginia through its Supreme Court Rules required [the Bar's] anticompetitive activities." 41 U.S. 773, 790 (1975). In other words, this Court held that Virginia had not clearly articulated a policy to displace competition. *See Phoebe Putney*, 133 S.Ct. at 1016 ("[I]n Goldfarb v. Virginia State Bar… we found no evidence that it had adopted a policy to displace price competition among lawyers"). Although the FTC and Fourth Circuit have both relied on *Goldfarb*, *Goldfarb* is a case that turned exclusively on the absence of clear articulation not on active supervision, which this Court did not apply. The reasoning behind this Court's application of active supervision to municipalities and other sub-state entities is as compelling if not more so when applied to state regulatory boards.

State boards similarly have broad public mandates and rules designed to protect the legitimacy and integrity of their processes. In the immediate case for example, North Carolina defines the Dental Board as a public entity. N.C. Gen. Stat. § 90-22(b). The Dental Board is established

by action of the state legislature—not by decree of a medical society or other private entity. N.C. Gen. Stat. 90-22(b). The state has expressly designated the Dental Board as the agent through which the state will regulate the practice of dentistry. *Id.* (describing it as "an agency of the State for the regulation of the practice of dentistry in this state"). The Dental Act's very purpose is to protect the public interest. N.C. Gen. Stat. § 90-22 (declaring the practice of dentistry "to affect the public health, safety, and welfare and to be subject to regulation and control in the public interest").

Unlike private actors, and like municipalities, state boards are consistently exposed to public scrutiny. For example, in the immediate case, as a state agency, the Dental Board is subject to open-government laws and strict ethics rules. The Dental Board's records are open for public inspection, N.C. Gen. Stat. § 90-41(g), and its accounts and financial affairs are subject to periodic audits by the state auditor. N.C. Gen. Stat. §§ 93B-4; 147-64.1 – 147-64.14. It is required to give public notice of its meetings, which must be open to the public. N.C. Gen. Stat. § 143-318.9 – 143-318.18. Any rules passed by the Dental Board must be reviewed and approved by the Legislature's Rules Review Commission. N.C. Gen. Stat. §143B30.1 – 143B-30.4. Board members are sworn to protect the public and required by statute to avoid conflicts of interest. N.C. Gen. Stat §§ 138A-2; 138A-22(a). Board members are public officials who must comply with a code of ethics. N.C. Gen. Stat. § 138A-1 – 138A-45. Lastly, and directly relevant to the Fourth Circuit's rationale, as a state agency, members of the Dental Board are expressly forbidden from using their board membership for private gain. N.C. Gen. Stat. §§ 138A-31, 138A-34, 138A-45(g).

The courts that have ruled on this issue have adopted the reasoning of *Town of Hallie* and noted the public characteristics of state boards. *See e.g., Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989); *Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir. 1998); *Porter Testing Laboratory v. Board of Regents for Oklahoma Agricultural & Mechanical Colleges*, 993 F.2d 768 (10th Cir. 1993). In *Hass*, the Ninth Circuit held that a State Bar Association was not subject to active supervision even though twelve of the fifteen members of the Board were practicing attorneys who were elected by other lawyers in the state. 883 F.2d at 1460. The court held that the state bar association had attributes similar to those noted by this Court in *Town of Hallie* and noted that the Bar Association was a "public corporation" and an "instrumentality of the judicial department." *Id.* at 1455. The Bar Association was also "the agency of the state of Oregon organized to regulate the practice of law for the benefit of the public." *Id.* at 1460. The court acknowledged several characteristics that exposed the Bar Association to public scrutiny including that its records were open to public inspection, its accounts subject to periodic audit, its meetings open to the public, and its members subject to ethics rules. *Id.* at 1460. These characteristics, the court held, left "no doubt that the Bar is a public body, akin to a municipality for the purposes of the state action exemption." *Id.* at 1460.

Similarly, in *Earles*, the Fifth Circuit held that a State Board of Certified Public Accountants was not subject to active supervision even though the Board was "composed entirely of CPAs who compete in the profession they regulate." 139 F.3d at 1041. The court held that the CPA Board was functionally similar to a municipality because

of the "public nature of the Board's actions." *Id.* at 1041. In the immediate case, the Dental Board exhibits those public characteristics that the courts in both *Earles* and *Hass* emphasized in finding those boards public entities. As were the boards in *Hass* and *Earles*, and as are a multitude of regulatory boards across states and professions in this country, the Dental Board is clearly a public entity.

C. The mere presence of a majority of licensed professionals on a board that regulates that profession does not make that board a "private" actor.

The Fourth Circuit improperly applied a presumption that board members are motivated by self interest and, thus, the Board must not be a state entity. *See The N.C State Board of Dental Examiners*, 717 F.3d at 369 ("[W]hen a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership . . . both parts of *Midcal* must be satisfied"). Any test that would deem a state entity private simply because, pursuant to state law, a majority of the board's members are also market participants, improperly presumes that a state entity is motivated by self-interest. Unlike private actors, however, state regulatory boards should be presumed to be acting in furtherance of their state mandated missions. This is consistent with this Court's treatment of municipalities. *See Town of Hallie*, 471 U.S. at 45.

This Court has applied a presumption that municipalities act in the public interest. *Town of Hallie*, 471 U.S. at 45. In *Town of Hallie*, this Court did not hold that courts should engage in a case-by-case analysis to determine whether individual municipalities are entitled

to such a presumption, but simply declared that because a municipality is an arm of the state it may be presumed to be acting in the public interest. *Id.* at 45. To justify this presumption, this Court emphasized the open-government laws and other disclosure requirements that make a municipality "more likely to be exposed to public scrutiny than is private conduct." *Id.* at 45-47.

This presumption is no less appropriate for state regulatory boards. Like municipalities, state regulatory boards are arms of the state. Also like municipalities, regulatory boards are organized for the benefit of the public and not the benefit of business participants. For example, The North Carolina Dental Act's express purpose is to protect the public interest. N.C. Gen. Stat. § 90-22 (declaring the practice of dentistry "to affect the public health, safety, and welfare and to be subject to regulation and control in the public interest"). To that end, the Dental Board has been designated as the agency of the state that will regulate dentistry. N.C. Gen. Stat. § 90-22(b).

In light of *Town of Hallie*, courts have held that other sub-state entities should also be presumed to be acting in the public interest. For example, in *Cine 42nd St. Theater Corp. v. Nederlander Organization, Inc.*, the Second Circuit held that a public development corporation must be presumed to be publicly interested because it was "by statute a political subdivision of the state," thus, "its interests must be defined as public rather than private." 790 F.2d 1032, 1047 (2d Cir. 1986).

The Fourth's Circuit's holding requires a dubitable presumption. It does not necessarily follow that because individual board members are private actors, the board

itself will act in the private interest rather than in the public interest. In order to reach that conclusion, it would have to be presumed that the individual board members have a unity of private interests or that the board can accommodate each individual's disparate, private interest. Both seem unlikely. In fact, even if each individual board member acted pursuant to his or her private interest, it is at least as likely that *the board* behaves in the public interest. Indeed, it is more likely that individual board members behave, as board members, in the public interest than in their private interest. As discussed *supra*, state regulatory boards have a variety of open-government and other public disclosure requirements that consistently expose board members to the public eye. This openness indicates that the individuals and the board as a whole are more likely to behave in the public interest than in pursuit of private interests, as might be the case if, instead, they acted behind closed doors.

Indeed, even if the Fourth Circuit was correct to apply a presumption that market participant board members are motivated by self-interest, such private interests do not make the actor a private actor. As discussed *infra*, this Court has held that a court may not deem state action private action by virtue of the private interests of the members of a state entity. *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 375 (1991). And, as a corollary to this rule, a court cannot deem a state actor a private actor due the presence of private interests of the board members. Deeming a state board a private actor by virtue of the private interests of its members improperly looks behind state action in opposition to this Court's clear holding in *City of Columbia v. Omni*. *See id.* at 370.

D. Under this Court's decision in *City of Columbia v. Omni*, it is improper for a federal court to examine the makeup and character of a state board in order to challenge the board's status as a state actor.

The Fourth Circuit's test for active supervision improperly looks behind the actions of state entities to determine whether they are motivated by private interests. *See The North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359, 369 (2013) ("[W]hen a state agency appears to have the attributes of a private actor and is taking actions to benefit its own membership . . . both parts of *Midcal* must be satisfied"). The Fourth Circuit's focus on private interests is in direct opposition to this Court's clear mandate that courts are not permitted to examine governmental actions for perceived conspiracies, deconstruct the governmental process, or probe the official "intent" to determine if the process has been usurped by private entities. *City of Columbia*, 499 U.S. at 370. Under the *City of Columbia*'s mandate, an official state regulatory board created by state law may not be treated as a "private" actor simply because of the method and means by which the state chooses to construct the board.

This Court has rejected any interpretation of the Sherman Act that would allow courts to second guess the actions of a state to determine whether an action is "state action enough." *See City of Columbia*, 499 U.S. at 379. The only relevant inquiry is whether the state has chosen to act, not how it has chosen to act. *City of Columbia*, 499 U.S. at 379. A court may not "deem" public action private action to escape the application of the state action doctrine.

Id. at 375. Judicial tests for state action that inquire into the private motives of an entity or that presume the existence of private motives based on an entity's structure are tests that inherently look behind the actions of the entity. *See e.g., City of Columbia*, 499 U.S. at 378, 383 ("[I]t [is] impracticable or beyond the purpose of the antitrust laws to identify and invalidate lawmaking that has been selfishly motivated by agreement with private interests").

This Court has made clear that courts need not, indeed must not, start down the slippery slope of evaluating motives of state entities. *City of Columbia*¸ 499 U.S. at 378 ("[W]here the action complained of . . . was that of the State itself, the action is exempt from anti-trust liability regardless of the State's motives in taking the action") (quoting *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984)). In *City of Columbia*, this Court found that even a conspiracy between private actors and government officials could not abrogate state action. 499 U.S. at 379. Inquiry into the quality of the decision making, whether because of conspiracy, fraud, or private interest, is simply not relevant in determining whether state action immunity applies. *Id.*

The prohibition against questioning the actions of state actors applies equally to a court's determination of whether to require active supervision. As the Ninth Circuit has recognized, a court's determination of whether to apply active supervision cannot and must not hinge on the alleged private interests of state actors:

> The allegations of illegitimate motive are not relevant to the application of *Parker* immunity.

> Having acknowledged that the [entity] is a "public entity" [the plaintiff's] argument that the district has improperly abandoned the public interest *is not a basis to impose the active supervision requirement.*

Hedgecock v. Blackwell, 52 F.3d 333 (9th Cir. 1995) (emphasis added).

It would be a curious thing to prohibit a court from inquiring into the private motives of a state entity as was done in *City of Columbia* when a conspiracy was alleged, but to then allow a court to inquire into private motives to determine whether active supervision applies. This would allow courts and plaintiffs to circumvent the clear mandate from *City of Columbia*. Such a test would allow plaintiffs to claim that a variety of entities are private because of their composition, even if these entities have been created by state legislatures. This analysis would leave the rule in *City of Columbia* hollow and would subject a multitude of state boards around the country to potential antitrust liability. Plaintiffs could simply claim that they were addressing not whether the action of an entity was state action, but whether the entity was a state actor at all. Thus, such a rule would allow courts to inquire freely into the motives and incentives of state officials or at the very least use the composition of a state entity as a proxy for inquiring into such motives.

In this case, the Fourth Circuit, by focusing its inquiry on the composition of the Dental Board and its alleged private motives, is attempting to do exactly what this Court prohibited plaintiffs from doing in *City of Columbia*. The Fourth Circuit tested for the application of state

action by inquiring into the private motives of the Dental Board. The Fourth Circuit held that state agencies that have "the attributes of a private actor and [are] taking actions to benefit [their] own membership" must meet both prongs of *Midcal* because in such a situation the state actor is actually a "private actor." *N.C. State Board of Dental Examiners*, 717 F.3d at 369. In *City of Columbia*, this Court rebuffed similar logic, finding that government action cannot be deemed private when taken pursuant to a private interest. 499 U.S. at 375. This Court reasoned that, "[s]ince it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them, such an exception would virtually swallow up the *Parker* rule." *Id.* at 375.

Note that in neither *City of Columbia* nor *Town of Hallie* did this Court suggest that possible private motives should be examined, with the possible result that the state entity might instead be found to be a private entity. In fact, this Court has noted in other cases that municipalities are largely free to make economic choices "counseled solely by their own parochial interests." *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 408 (1977). *City of Columbia* is especially instructive because the alleged conspiracy presented a real danger that, in concert with the local company, the municipality was furthering a private price fixing arrangement. Thus, any test that hinges application of state action immunity on the potential for private interests simply cannot be reconciled with *Town of Hallie* or *City of Columbia*.

As this Court has observed, all actions taken by a state entity are vulnerable to the accusation that they are not in the public interest and were done pursuant

to private interests. *City of Columbia*, 499 U.S. at 375. Judicial tests focused on determining whether an actor is actually a state actor based on these private interests would be impractical and would require courts to engage in subjective evaluations of state entities whenever an entity raised state action as a defense.

Additionally, this Court has emphasized that the prohibition against examining the basis and motivations for state actions is based in large measure on the state action doctrine's dual concerns for federalism and state sovereignty. *See City of Columbia*, 499 U.S. at 374 (holding that "in light of our national commitment to federalism, 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"); *see also id.* at 372 ("[I]n order to prevent *Parker* from undermining the very interests of federalism it is designed to protect…"). This Court has cautioned that if a state entity's decision to regulate "is made subject to ex post facto judicial assessment . . . with personal liability of [public officials] a possible consequence, we will have gone far to compromise the States' ability to regulate their domestic commerce." *City of Columbia*, 499 U.S. at 377.

Federalism requires deference to the decision making of states, even where faulty. *See City of Columbia*, 499 U.S. at 373. Thus, the state action doctrine is designed to protect the result of the state's political process even if that result is fundamentally at odds with federal antitrust policy. *See Surgical Care Ctr. v. Hospital Serv. Dist. No. 1*, 153 F.3d 220 (5th Cir. 1998) (holding that *Parker* "commands judicial deference to regulatory schemes enacted by state legislatures, notwithstanding a court's views on

the economic wisdom of the challenged regulation"). As this Court has emphasized, allowing courts to look behind governmental actions would "emasculate" the *Parker* doctrine because it would allow "[P]laintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others *who necessarily must advise the sovereign*." *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984) (emphasis added).

The Fourth Circuit's ruling tested for application of active supervision by inquiring into the structure of the entity, while ignoring the formalities of state law. The Fourth Circuit's ruling further disregarded the fact that the Dental Board has been designated as a state agency. Federalism, however, demands that courts respect the formalities of state law in determining whether a regulatory body is a state entity. Otherwise federal courts would necessarily become impermissibly involved in structuring state administrative systems. Federal courts would, in effect, have the authority to delineate the proper administrative structure for states. This is a job that courts are ill-equipped to do and should avoid.

CONCLUSION

For the reasons set forth above, the Court should hold that an official state regulatory board created by state law may not be properly treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants. If the Court does find for the Respondent, *amici* request that the Court provide guidance on how state boards can be legally structured to preserve their status as state entities.

Respectfully submitted,

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