

WHAT'S IN IT FOR YOU?

The “State-Action” Exemption to Federal Antitrust Law and The U.S. Supreme Court’s Decision of *North Carolina Board of Dental Examiners v. Federal Trade Commission*

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Appeal from the US Court of Appeals for the Fourth Circuit



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Alcohol regulations are not as sacrosanct as they used to be. Shortly after the Twenty-first Amendment was ratified, Supreme Court Justice Louis Brandeis declared, and the rest of America agreed, that state alcohol laws were impervious to legal challenge.¹

What a difference 80 years can make! As demonstrated by the *Costco Wholesale*² and *TFWS*³ cases, federal antitrust laws under certain circumstances may not only be the basis of a legal challenge against state regulatory requirements, but in the right circumstances may trump state alcohol laws.

A bulwark against such challenges historically has been the “**state-action defense**,” *i.e.*, the doctrine of jurisprudence providing that a state agency’s conduct -- when expressly authorized by state lawmakers -- is immune from federal antitrust challenge. However, the U. S. Supreme Court’s decision this year in *North Carolina Board of Dental Examiners v. Federal Trade Commission*⁴ is the latest in a series of recent cases that appear to be restricting the scope and application of the state-action doctrine.

¹ See, *e.g.*, *Joseph S. Finch & Co. v. McKittrick*, 305 U.S. 395 (1939); *Indianapolis Brewing Co., Inc. v. Liquor Control Comm.*, 305 U.S. 391 (1939); *Mahoney v. Joseph Triner Corp.*, 304 U.S. 401 (1938); *State Board of Equalization of California v. Young’s Market Co.*, 299 U.S. 59 (1936).

² *Costco Wholesale Corp. v. Hoen*, 522 F.3d 874 (9th. Cir. 2008).

³ *TFWS, Inc. v. Franchot*, 572 F. 3d 186(4th Cir. 2009).

⁴ 135 S. Ct. 1101 (U.S. 2015).

The Key Question Before the Court: Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may be deemed a “private” actor ineligible for state-action status simply because, pursuant to state law, a majority of the board’s members are “market participants” appointed to their official positions by other market participants.

The Answer: State licensing boards composed of market participants do not enjoy automatic immunity from antitrust laws. The **decision** affirms the U.S. Court of Appeals for the Fourth Circuit and deals a setback to a form of regulation that is not uncommon to the alcohol industry.

A. The Evolution of State-Action Antitrust Immunity

The Sherman Antitrust Act of 1890, as amended,⁵ is a federal statute that attempts to maintain free and orderly markets by prohibiting monopolies and every “contract, combination . . . or conspiracy, in restraint of trade.”⁶ When business people or commercial enterprises, commonly referred to by the courts as “market participants,” engage in prohibited anticompetitive behavior, they expose themselves to liability under the federal antitrust law.

Nothing in the Sherman Act expressly distinguishes state agencies from private parties, when it comes to restraining trade. Nevertheless, since 1943 certain forms of state-action have been immune from the antitrust laws.

In *Parker v. Brown*,⁷ the U.S. Supreme Court ruled that federal antitrust laws do not apply to state regulations that otherwise would produce anticompetitive effects.⁸ The Court based its holding on an implied exemption from the Sherman Act, reasoning that because the federal statute contains no express language suggesting that its purpose is to restrain a state from activities directed by its legislature, the Court was justified in declining to extend the federal antitrust law to encompass the anticompetitive conduct of states.⁹ The Court further reasoned that although Congress admittedly has the power to prevent states from disregarding the federal antitrust laws through the Supremacy Clause of the U.S. Constitution,¹⁰ respect for federalism requires that Congress must express its intent to exercise such power explicitly.¹¹ The effect of the Court’s decision in *Parker* was to permit a state to engage in anticompetitive behavior in order to achieve an alternative public policy goal.

⁵ Sherman Act, July 2, 1890, ch. 647, 26 Stat. 209, 15 U.S.C. §§1–7.

⁶ 15 USC §§ 1–2.

⁷ 317 U.S. 341 (1943).

⁸ *Id.* at 346–48, 350–51. In *Parker*, the plaintiff was a raisin grower who sought to enjoin California officials from enforcing a state raisin marketing program that aimed to fix prices under the auspices of the state’s Agricultural Prorate Act. Although the program was anticompetitive, the U.S. Supreme Court held that the program was immune from Sherman Act challenges because the program “derived its authority . . . from the legislative command of the state.” *Id.* at 350.

⁹ *Id.* at 351.

¹⁰ Article VI, clause 2 of the U.S. Constitution, which states: “*This Constitution, and the laws of the United States which shall be made in pursuance thereof; and all treaties made, or which shall be made, under the authority of the United States, shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding.*”

¹¹ While “the States regulate their economies in many ways not inconsistent with the antitrust laws,” in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit

Since the *Parker* decision in 1943, the Supreme Court has extended its “state-action doctrine” of antitrust immunity to encompass three sets of circumstances:

1. **Conduct by the State Itself** — Actions taken by the state’s lawmakers or the state supreme court that result in anticompetitive effects enjoy immunity from federal antitrust laws.¹²
2. **Private Parties Acting under the “Active Supervision” of the State** — Under the two-prong test in *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*,¹³ private parties may claim state-action immunity if their actions are: (a) pursuant to a “clearly articulated and affirmatively expressed”¹⁴ state policy; and (b) “‘actively supervised’ by the State.”¹⁵ In *Midcal*, a California statute required all wine producers and wholesalers to file fair trade contracts or price schedules with the state and prohibited wholesalers from selling wine to a retailer for a price other than the one stated in the contract or schedule. When California’s Department of Alcoholic Beverage Control charged Midcal Aluminum, a wholesale wine distributor, with selling below a scheduled price, Midcal filed for an injunction against California’s wine pricing system, alleging a restraint of trade in violation of the Sherman Act. In announcing and applying the two-prong test, the U.S. Supreme Court held that while the California statute satisfied the clear articulation requirement, it failed to actively supervise the trade contracts and price schedules filed by the producers and wholesalers. The state neither reviewed the reasonableness of the price schedules nor regulated the terms of the fair trade contracts. This failure was determinative to the Court, because the active supervision requirement ensures that a private party’s anticompetitive conduct promotes state policy and not merely the private party’s interests. To accomplish this purpose, the state must have, and exercise, the power to review the particular acts of private parties and disapprove of the acts that it does not believe are in accord with state policy.¹⁶
3. **Municipalities Acting Pursuant to a “Clearly Articulated” State Policy** — In *Town of Hallie v. City of Eau Claire*,¹⁷ and *Southern Motor Carriers Rate Conference v. United States*,¹⁸ decided on the same day, the U.S. Supreme Court held that municipalities need not show active state supervision as a prerequisite to securing the protections of the state-action doctrine.¹⁹

competition to achieve public objectives. *North Carolina State Board of Dental Examiners v. FTC*, 574 U. S. ___, 135 S. Ct. 1101, 1109 (2015), quoting *FTC v. Ticor Title Ins. Co.*, 504 U. S. 621, 635-36 (1992). If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States’ power to regulate. *Id.*, citing *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117, 133 (1978); see also Easterbrook, “Antitrust and the Economics of Federalism,” 26 *J. Law & Econ.* 23, 24 (1983).

¹² *Hoover v. Ronwin*, 466 U.S. 558, 567–68 (1984).

¹³ 445 U.S. 97 (1980).

¹⁴ *Id.* at 105, quoting *New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (internal quotation marks omitted).

¹⁵ *Id.*, quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion). See also *Hoover v. Ronwin*, 466 U.S. 558, 568, (1984) (“Closer analysis is required when the activity at issue is not directly that of” the State itself, but rather “is carried out by others pursuant to state authorization.”).

¹⁶ *Midcal*, 445 U.S. at 105, citing *Patrick v Burget*, 486 US 94, 100–01 (1988).

¹⁷ 471 U.S. 34 (1985).

¹⁸ 471 US 48 (1985).

¹⁹ The Supreme Court has focused on three differences between private parties and municipalities to explain why the former, and not the latter, are subject to active supervision. **First**, the Court emphasized that, unlike private parties, municipalities are subject to public scrutiny. *Hallie*, 471 U.S. at 45 n.9. Municipal officers “are checked to some degree through the electoral process,” and cities in some states are subject to mandatory disclosure requirements. *Id.* According to the Court, “[s]uch a position in the public eye may provide some greater protection against antitrust

Instead, the Court determined that municipalities can earn *Parker* immunity when, under the first *Midcal* prong, they act pursuant to a “clearly articulated” state policy to displace competition and such actions are a “foreseeable” consequence of the state policy.²⁰

Operating in this legal environment, state legislatures have been passing laws with *de facto* anticompetitive effects for decades. State regulation of the alcohol industry has been rife with laws that produce anticompetitive effects in the marketplace, including regulations relating to minimum pricing, price posting and exclusive distribution requirements. An easy answer to avoiding the requirements imposed by *Midcal* has been for the state to regulate via a state agency or a state-authorized and appointed authority, such as a supervisory board or other quasi-official administrative body.

That approach may no longer provide the easy answer it once did. As noted above, several important Supreme Court cases over the last thirty years have addressed the doctrine of state-action immunity and helped to define its contours, particularly as the doctrine applies to actions outside sovereign²¹ state legislatures. Those cases have raised the issue of whether non-sovereign state authorities, especially those that are quasi-public in nature (including some state alcohol authorities) should be subject to an active supervision requirement as a prerequisite to earning the state-action exception to federal antitrust compliance. This specific issue was never directly addressed by the courts. In fact, it has been considered an “open question” for decades.²²

B. Recent Retrenchment of the State-Action Doctrine

Even though the state-action doctrine started out strong in the late 1940s, and continued so for half a century, judicial decisions in more recent years have been chipping away at the scope of this federal antitrust immunity. In a unanimous opinion for the case of *FTC v. Phoebe Putney Health System*,²³ released in 2013, the U.S. Supreme Court said that state-authorized actions are not immune from the federal antitrust laws unless the state “affirmatively contemplated the displacement of competition”

abuses than exists for private parties.” *Id.* (explaining that public disclosure requirements and electoral constraints raise a presumption that municipalities act in the public interest). **Second**, the Court focused on the fact that municipalities, as arms of the state, have authority to act on behalf of the state. Private parties have no such authority. *Id.* at 45, 47. **Third**, the Court reasoned that private parties, unlike municipalities, can be presumed to act for their own interests and not for those of the public. *Id.*

²⁰ See *id.* at 46–47. The “clear articulation” requirement technically was first announced in 1978 by a plurality decision of the U.S. Supreme Court in *City of Lafayette v. Louisiana Power & Light Company*; in that case, it was intended to ensure that non-sovereign bodies claiming to act for the state as sovereign do, in fact, act for it. *Lafayette*, 435 U.S. at 412–13 (plurality opinion). The foreseeability element, subsequently announced by the Court in *Hallie*, was a nuanced clarification that a governmental entity acts pursuant to a clearly articulated state policy for the purposes of receiving state-action immunity as long as its anticompetitive conduct would foreseeably result from the legislature’s authorization to regulate. See *Hallie*, 471 US at 42; see also *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370–72 (1991) (Because municipalities and other political subdivisions are not themselves sovereign, state-action immunity under *Parker* does not apply to them directly; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively).

²¹ State sovereignty is the concept that states are in complete and exclusive control of all the people and property within their territory. States generally possess the power to legislate on all matters within their territorial jurisdiction. This “police power” does not arise from the Constitution, but is an inherent attribute of each state’s territorial sovereignty. See Thomas, Kenneth R., *Federalism, State Sovereignty, and the Constitution: Basis and Limits of Congressional Power*, Congressional Research Service (September 23, 2013) at 1.

²² *Hass v. Or. State Bar*, 883 F.2d 1453, 1459 (9th Cir. 1989).

²³ *Federal Trade Commission v. Phoebe Putney Health System, Inc.*, 589 U.S. ___, 133 S. Ct. 1003 (2013).

resulting from those actions.²⁴ In other words, not only does the state-action doctrine require a “clearly articulated and affirmatively expressed” state policy to support anticompetitive actions taken pursuant to state law, but there also must be a demonstration by the state that it created the laws in question knowing that their implementation would have anticompetitive consequences.

The *Phoebe Putney* case involved a state hospital authority's acquisition of the only competing hospital in the county. In 1941, the State of Georgia amended its Constitution to allow political subdivisions to provide health care services.²⁵ The state concurrently enacted the “Hospital Authorities Law” to provide a mechanism “for the operation and maintenance of needed health care facilities in the several counties and municipalities of th[e] state.”²⁶ The Hospital Authorities Law empowered counties and municipalities to create hospital authorities – quasi-public entities that were granted numerous powers, including the power to acquire hospitals.

Dougherty County, Georgia, took advantage of the Hospital Authorities Law to create its own local hospital authority, which then proceeded to acquire one of the two hospitals operating in that relatively small community. However, when that authority subsequently announced its plan to acquire its sole competitor, the Federal Trade Commission (FTC) sued to enjoin the transaction.

The federal district court dismissed the FTC's suit on the basis of the state-action doctrine,²⁷ and the United States Court of Appeals for the Eleventh Circuit affirmed.²⁸ However, the U.S. Supreme Court reversed, holding that “Georgia's grant of general corporate powers to hospital authorities does not include permission to use those powers anticompetitively.”²⁹ Justice Sotomayor’s unanimous opinion acknowledged that the Supreme Court’s prior opinions immunized conduct undertaken by governmental entities pursuant to a “clearly articulated and affirmatively expressed” state policy, a test that is met when the anticompetitive effect of the conduct was the “foreseeable result” of what the state had authorized.³⁰ In the instant case, however, the Court found “no evidence the State affirmatively contemplated that hospital authorities would displace competition by consolidating hospital ownership.”³¹

Justice Sotomayor and her fellow justices compared the Georgia statute to a grant of general corporate power that “does not clearly articulate and affirmatively express a state policy empowering the Authority to make acquisitions of existing hospitals that substantially lessen competition.”³² The unanimous decision in the *Phoebe Putney* case further noted that the Court could find a sufficient expression of the state's intent where the anticompetitive effects in question were “the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature.”³³ [In other words, if it was obvious to any reasonable observer that the state legislature’s actions would produce anticompetitive results, then those

²⁴ *Id.*, slip opinion at 11.

²⁵ 1941 Ga. Laws p. 50.

²⁶ *Id.*, at 241, Ga.Code Ann. § 31-7-70 *et seq.* (2014).

²⁷ *FTC v. Phoebe Putney Health System, Inc.*, 793 F. Supp.2d 1356 (M.D. Ga. 2011).

²⁸ *FTC v. Phoebe Putney Health System, Inc.*, 663 F. 3d 1369 (11th Cir. 2011).

²⁹ 589 U.S. ___, 133 S. Ct. at 1010.

³⁰ *Id.*

³¹ *Id.*

³² *Id.* at 1013.

³³ *Id.*

results must have been intentional.] However, the Court in *Phoebe Putney* determined that Georgia's statute failed this test because the power to acquire hospitals "does not ordinarily produce anticompetitive effects."³⁴ In a boost to federal antitrust enforcement, Justice Sotomayor's opinion added that "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state-action immunity is disfavored, much as are repeals by implication."³⁵

The Court's holding in *Phoebe Putney* signaled the start of a significant shift in the U.S. Supreme Court's construction of the "state-action" doctrine as originally articulated by *Parker*. *Phoebe Putney* also implicated numerous regulated industries beyond health care. Going forward, non-sovereign administrative agencies and quasi-public authorities seeking the protection of the state-action doctrine to shield their legislatively-authorized actions from antitrust liability would have to demonstrate that they acted pursuant to a "clearly articulated and affirmatively expressed state policy" to displace competition.

Against this evolving backdrop, the U.S. Supreme Court this year took another step towards restricting the state-action doctrine. Building on the decision handed down by the Court in *Midcal*, antitrust immunity generally covers non-state actors only if the state both: (i) clearly articulates the anticompetitive policy (including the state's acknowledgment that anticompetitive consequences are foreseeable and intended); and (ii) actively supervises the policy. The latest question pondered by the Court is whether, if the state agency in question actually is a professional licensing board comprised of private industry members, must another state actor supervise the agency in order for it to be immune from the antitrust laws?

The U.S. Supreme Court's recent decision in *North Carolina Board of Dental Examiners v. Federal Trade Commission*³⁶ advances a step closer to answering that question.

C. The NC Dental Board Case

In North Carolina, the legislature delegated the regulation of dentists to a dental board. By state law, practicing dentists must fill a majority of the seats on the dental board.³⁷

This type of "self-regulation" is common among state licensing boards, because practitioners of the regulated industry are deemed to pose substantial experience and expertise that can be valuable to the regulatory process.

However, human nature and actual practice demonstrate time and again that it is the natural tendency of market players to become anticompetitive. Members of a guild frequently want to shelter insiders who are already in, keep outsiders out, and raise barriers to entry for their trade. A broad range of modern professions fall under professional licensing boards, including doctors, lawyers, and dentists.

³⁴ *Id.*

³⁵ *Id.* at 1010, quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

³⁶ 574 U. S. ____ (2015).

³⁷ The North Carolina State Board of Dental Examiners is the state's dentistry licensing board. It has eight members: six licensed dentists elected by dentists, one licensed dental hygienist elected by dental hygienists, and one consumer member appointed by the Governor. The Board is empowered to sue to enjoin the unlicensed practice of dentistry.

In the *NC Bd. Of Dental Examiners* case, the dental board tried to exclude non-dentists from the market for teeth-whitening services after dentists complained about the low prices non-dentists charged for teeth whitening. The Dental Board sent threatening letters to competing non-dentists who offered teeth-whitening services, and even encouraged mall operators to prohibit kiosks that were being used by the non-dentist competitors as venues for teeth-whitening services.³⁸

The Dental Board's actions were not supervised by any state officials from North Carolina other than the minority of state-employed members of the board itself. On these facts, the Federal Trade Commission took action against the Dental Board. In 2010, the FTC issued an administrative complaint, alleging that the NC Dental Board's enforcement measures violated section 5 of the FTC Act, which prohibits "[u]nfair methods of competition."³⁹

The NC Dental Board moved to dismiss the FTC's complaint, arguing that it was not under the FTC's jurisdiction and that it was entitled to state-action immunity.⁴⁰ An Administrative Law Judge (ALJ) denied the Dental Board's motion,⁴¹ and ultimately determined that the Board had violated the FTC Act.

Based on the ALJ's decision, the FTC enjoined the NC Dental Board from continuing its actions against teeth-whitening providers.⁴² The Dental Board subsequently petitioned for judicial review of the FTC's order.⁴³

The U.S. Court of Appeals for the Fourth Circuit denied the NC Dental Board's petition.⁴⁴ Two members of the three-judge appellate panel agreed with the FTC that the non-sovereign Dental Board was the equivalent of a private party, *i.e.*, not entitled to be considered an agency of the State of North Carolina; as such, the Board had to demonstrate active supervision by the state, as well as the articulated state purpose, in order to qualify for *Parker* antitrust immunity.⁴⁵ During the appeal, the NC Dental Board's attorney argued that the Board was the equivalent of a municipality acting under a state-authored regulatory scheme, and therefore was not required to demonstrate state supervision based on the US Supreme Court's prior decision in *Town of Hallie v. City of Eau Claire*. However, the Fourth Circuit appellate panel countered by reasoning that the Supreme Court dispensed with the active supervision

³⁸ In 2003, dentists complained to the NC Dental Board about non-dentists providing low-cost teeth-whitening services. In response, the Dental Board issued cease-and-desist letters to twenty-nine non-dentist teeth-whitening providers, effectively ousting non-dentists from the teeth-whitening market.

³⁹ 15 U.S.C. § 45(a)(1). The U.S. Court of Appeals for the Fourth Circuit previously had determined that this antitrust provision incorporates any violation of section 1 of the Sherman Act, 15 U.S.C. § 1. *See North Carolina State Board of Dental Examiners v. FTC*, 717 F.3d 359, 371 (4th Cir. 2013), *cert. granted*, No. 13-534, 2014 WL 801099 (U.S. March 3, 2014). The FTC and the Fourth Circuit limited their review to whether the conduct violated section 1. *Id.* Although the *Parker* doctrine is more often discussed in relation to the Sherman Act, the Supreme Court has applied it to cases arising under the FTC Act. *See, e.g., FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

⁴⁰ *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 365.

⁴¹ *See N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 608 (2011). The NC Dental Board also filed for a declaratory judgment in federal district court regarding FTC jurisdiction and state-action immunity. The district court denied it as an improper attempt to appeal decisions not entitled to interlocutory review. *See N.C. State Bd. of Dental Exam'rs v. FTC*, 768 F. Supp. 2d 818, 820, 822 (E.D.N.C. 2011).

⁴² *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 366.

⁴³ *Id.*

⁴⁴ *Id.* At 375.

⁴⁵ *Id.* At 370.

requirement for municipalities in *Hallie* because a municipality presents “little or no danger that it is involved in a private price-fixing arrangement.”⁴⁶

Thus, before the case came to the U.S. Supreme Court, both the FTC and the Fourth Circuit had rejected the NC Dental Board’s attempt to invoke the defense of state-action immunity. Specifically, the Fourth Circuit upheld an FTC order directed against the Dental Board for engaging in anticompetitive behavior.⁴⁷ The federal appellate court ruled that the state-created Board, comprised primarily of practicing dentists elected by dentists, was subject to — and failed to pass — the *Midcal* test for private parties acting under a delegation of state authority.⁴⁸

The Fourth Circuit’s decision cited extensively to *Midcal* and *Hallie*, stating that “when a state agency is operated by market participants who are elected by other market participants, it is a ‘private’ actor” subject to the *Midcal* — not *Hallie* — test for state action immunity.”⁴⁹ However, the appellate judges did not expressly clarify how their focus on the NC Dental Board’s composition proved that the Board itself was a private actor, or how that conclusion fit the Supreme Court’s stated goal of preventing self-interested private parties from using the cover of state authority to engage in anticompetitive conduct.

D. SCOTUS: What’s In It For You Can Make A Difference

In a six-to-three opinion written by Justice Anthony Kennedy, the U.S. Supreme Court affirmed the Fourth Circuit, holding that the NC Dental Board was not entitled to immunity from the antitrust laws under the state-action doctrine.⁵⁰ The key factor was the Board’s composition, and specifically the fact that a majority of its members were private practitioners (referred to by Justice Kennedy as “active market participants”) in the same industry that the Board oversaw.⁵¹

⁴⁶ While the *Hallie* Court limited its holding to municipalities, it nevertheless speculated in a footnote that state agencies would “likely” also be exempt from that requirement. *Hallie*, 471 U.S. at 46 n.10. In its decision, the Fourth Circuit also acknowledged this “dicta in footnote 10” but found it to be outweighed by other Supreme Court precedent, including a recent case in which the Supreme Court noted that “state-action immunity is disfavored.” *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013). The Fourth Circuit drew on *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), in which the Supreme Court concluded that the Virginia State Bar Association’s minimum fee schedule was “essentially a private anticompetitive activity” not “shield[ed]” from the Sherman Act by the Bar’s formal label as a state agency. *Goldfarb*, 421 U.S. at 791. Comparing the facts of *Goldfarb* to municipal regulation, the Fourth Circuit reasoned that a state agency should be treated like a private actor if it “ha[s] the attributes of a private actor” and takes “actions to benefit its own membership.” *N.C. State Bd. of Dental Exam’rs*, 717 F.3d at 369.

⁴⁷ *Id.* at 374-75.

⁴⁸ *See id.* at 370.

⁴⁹ *Id.* at 370. Though the NC Dental Board cited several cases in which a state agency was not required to show active supervision, the majority of the Fourth Circuit’s panel concluded that those cases demonstrated only “that the particular state agency at issue was more akin to a municipality than a private actor.” *Id.* at 369 n.6. The appellate judges then concluded that “when a state agency is operated by market participants who are elected by other market participants, it is a ‘private’ actor” subject to the *Midcal* — not *Hallie* — test for state-action immunity.

⁵⁰ *North Carolina State Board of Dental Examiners v. FTC*, 574 U. S. ___, 135 S. Ct. 1101 (2015).

⁵¹ 574 U. S. ___, 135 S. Ct. at 1111 (2015) (“Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor.”).

The Majority: When Is A State Board Eligible For Federal Antitrust Immunity?

Akin to the fabled wolf guarding the henhouse, the Supreme Court's majority reasoned that a state agency populated by private actors was an arm of the sovereign in name only:

[T]he need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade. . . . State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal* 's supervision requirement was created to address. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. . . . In important regards, agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, "[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm." For that reason, those associations must satisfy *Midcal* 's active supervision standard.

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. **The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal* 's active supervision requirement in order to invoke state-action antitrust immunity.** (citations omitted) (emphasis added)⁵²

The Court's opinion explained that even though the NC Dental Board technically is created and authorized by the state, that status alone is not enough to assure application of the state-action doctrine. According to Justice Kennedy's majority opinion, "formal designation given by the States" does not itself create immunity.⁵³

Stated slightly differently, where the motives and public-mindedness of the agency may be questioned, as when the agency's composition is made up primarily of private practitioners or "active market participants," the agency's actions must be supervised by the state in order to enjoy antitrust immunity. As Justice Kennedy's majority opinion concluded:

⁵² *NC State Bd. Of Dental Exam'rs v. FTC*, 574 U. S. _____, 135 S. Ct. 1101, 1114 (2015) (citations omitted).

⁵³ *Id.*

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.⁵⁴

In the case before the Supreme Court, the NC Dental Board was populated and controlled by market participants in the same occupation the Board regulated. That nexus, Justice Kennedy wrote, closed the door to automatic federal antitrust immunity under the state-action doctrine: “When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest.”⁵⁵

The Dissent: A State Authority Is An Authority of the State, Regardless of Composition

Justice Samuel Alito, joined by Justices Antonin Scalia and Clarence Thomas, dissented from the majority opinion in the *North Carolina Dental Board* case.⁵⁶ The dissent began by noting that the practice of self-regulation by dentists in particular predates the Sherman Act, reaching back into the 1800s.⁵⁷

Justice Alito then explained that the Dental Board was entitled to federal antitrust immunity as a state actor because North Carolina officially designated the dental board as a state authority, and that doing so was an exercise of “the quintessential police power legislation.”⁵⁸ The dissent, relying on federalism and deferring to the States, reasons that a state-authorized body such as a hospital authority or a dental board is not a private party, and the courts should not wade into determining whether a state-authorized regulatory body is sufficiently independent to warrant state-action immunity without being actively supervised by another state official or entity.⁵⁹

Finally, the dissenters noted that the majority’s decision raised as many questions as it sought to answer. As Justice Alito wrote:

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

⁵⁴ *Id.* at 1117.

⁵⁵ *Id.*

⁵⁶ *NC State Bd. Of Dental Exam'rs v. FTC*, 574 U. S. ___, 135 S. Ct. 1101, 1117-23 (2015)(dissenting opinion).

⁵⁷ *Id.* at 1117 (dissenting opinion).

⁵⁸ *Id.* at 1119 (dissenting opinion), citing *Hawker v. New York*, 170 U.S. 189 (1898) and *Dent v. West Virginia*, 129 U.S. 114 (1889).

⁵⁹ *Id.* at 1120-21, 24 (dissenting opinion).

As a result of today's decision, States may find it necessary to change the composition of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because “active market participants” constitute “a controlling number of [the] decisionmakers,” ante, at 1114, but this test raises many questions.

What is a “controlling number”? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circumstances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an “active market participant”? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person “active” in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.⁶⁰

CONCLUSION

So, what’s the takeaway from all this?

In its current form, the state-action doctrine provides that state legislatures and high courts generally enjoy federal antitrust immunity. The jurisprudence also demonstrates that government administrative agencies and municipalities must act pursuant to a clearly articulated state policy, but need not be actively supervised by the state to get immunity.

The *NC Dental Board* decision qualifies how the state-action doctrine applies – or, more accurately, does not apply – when the state-authorized entity is “controlled by active market participants.” When trade associations or boards comprised primarily of market participants are authorized to act under the state’s imprimatur, those entities will not be entitled to state-action protection from federal antitrust laws unless they meet both prongs of the *Midcal* standard, *i.e.*, the anticompetitive actions at issue are: (a) undertaken pursuant to a “clearly articulated and affirmatively expressed” state policy; and (b) “actively supervised” by the state. In contrast, actions taken by state boards or authorities with no involvement from market participants likely do not have to satisfy the *Midcal* requirements.

⁶⁰ *Id.* at 1122-23.

The *NC Dental Board* opinion also identifies some factors concerning adequate state supervision. For example, the state supervisor actually must review the substance of the board's actions and have the power to overrule or modify the actions.

The bottom line of the *Board of Dental Examiners* decision is that a board, a hybrid agency or trade association consisting of active market participants unsupervised by the state should not expect that it will be entitled to state-action antitrust immunity. An entity engaged in such activity should consult with antitrust counsel to assess whether its actions are eligible for protection under the state-action doctrine as newly clarified by the U.S. Supreme Court.