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## Note

*North Carolina State Board of Dental  
Examiners v. FTC: When Will Enough Active  
State Supervision Be Enough?*

ALEXANDRA W. JABS\*

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*,<sup>1</sup> the United States Supreme Court considered whether a state regulatory board's anticompetitive actions were entitled to state action immunity<sup>2</sup> from antitrust law scrutiny.<sup>3</sup> The Court held that a state regulatory board with a "controlling number of active market participants" must show that the challenged market restraint was "clearly articulated" as state policy and "actively supervised" by the State itself.<sup>4</sup> The Court

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1. 135 S. Ct. 1101 (2015).

2. This Note discusses the antitrust state action doctrine that provides immunity from federal antitrust law liability, for both state and private actors, as first articulated by the United States Supreme Court in *Parker v. Brown*. 317 U.S. 341, 352 (1943). The state action doctrine is commonly referred to as state action immunity, the state action exemption, *Parker* immunity, and the *Parker* exemption, and these terms are used interchangeably throughout this Note. For a more in-depth discussion of the Supreme Court's use of terms to refer to the state action doctrine, see Jason Kornmehl, *State Action on Appeal: Parker Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 SEATTLE U. L. REV. 1, 15 (2015) (discussing the Supreme Court's characterization of the state action doctrine).

3. *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1110.

4. *Id.* at 1114. The clear articulation requirement and the active state supervision requirement are commonly referred to as the *Midcal* test, as first articulated in *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.* 445 U.S. 97, 105 (1980). Under the state action doctrine, private actors must satisfy both prongs of the test in order to invoke state action immunity from antitrust liability. *Id.* The first prong of the test—the clear articulation prong—requires the private actor to prove that the challenged anticompetitive actions were pursuant to "a clearly articulated and affirmatively expressed" state policy. *Id.* The second prong of the test—the active supervision prong—requires that the anticompetitive conduct "must be actively supervised by the State itself." *Id.*

ultimately affirmed the Fourth Circuit's decision, concluding that the North Carolina State Board of Dental Examiners could not invoke the state action doctrine because the state regulatory board did not contend that the State had actively supervised its anticompetitive actions.<sup>5</sup>

The Court was correct in holding that the active supervision prong of the *Midcal* test should apply to state regulatory boards, under federal antitrust policy.<sup>6</sup> Even though the Court came to the correct holding, the Court did not articulate clear guidance for adequate state supervision to invoke state action immunity.<sup>7</sup> Because the Court could not render a decision on whether the North Carolina State Board of Dental Examiners had sufficient active state supervision, the Court left the door open for the Federal Trade Commission ("FTC") to delineate exacting standards for the active state supervision prong of the *Midcal* test.<sup>8</sup> Consequently, a regulatory board must effectively act as solely an advisory board to the State in order to invoke the state action exemption for any anticompetitive actions.<sup>9</sup>

## I. THE CASE

Under the North Carolina Dental Practice Act,<sup>10</sup> the North Carolina State Board of Dental Examiners ("the Board") has the broad authority to regulate the practice of dentistry.<sup>11</sup> The Board consists of eight members: six members must be licensed, actively practicing dentists; one member must be a licensed, actively practicing dental hygienist; and the final member must be a non-dentist consumer.<sup>12</sup> Licensed dentists in North Carolina elect the six dentist members and licensed hygienists elect the hygienist member of the Board.<sup>13</sup> The Governor appoints a resident of North Carolina to serve as the consumer member of the Board.<sup>14</sup> The Board's primary function is to create, administer, and enforce a licensing system for practicing dentists.<sup>15</sup> If the Board suspects an individual of engaging in the unlicensed practice of dentistry, the Board may bring an action to perpetually enjoin the individual from continuing the unlawful

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5. *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1116–17.

6. *See infra* Part IV.A.

7. *See infra* Part IV.B.1.

8. *See infra* Part IV.B.2.

9. *See infra* Part IV.B.3.

10. N.C. GEN. STAT. §§ 90-22–90-48.3 (2015).

11. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 364 (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015); N.C. GEN. STAT. § 90-48.

12. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 364.

13. *Id.*

14. *Id.*

15. *Id.*

practice.<sup>16</sup> Notwithstanding the Board's ability to enjoin the unlawful practice of dentistry, the Board "does not have the authority to discipline unlicensed individuals or to order non-dentists to stop violating the Dental Practice Act."<sup>17</sup>

Throughout the 1990s, dentists in North Carolina began offering teeth whitening services, often earning substantial fees for these services.<sup>18</sup> Around 2003, many non-dentists entered the teeth whitening market, offering bleaching services at considerably lower prices than their dentist-counterparts.<sup>19</sup> Practicing dentists complained to the Board about the provision of whitening services by non-dentist providers.<sup>20</sup> Following these complaints, the Board investigated the provision of teeth whitening services by non-dentists, indicating it would attempt to stop non-dentist providers.<sup>21</sup>

At the conclusion of the Board's investigations, the Board issued forty-seven cease-and-desist letters, on official Board letterhead, to twenty-nine different non-dentist bleaching providers.<sup>22</sup> These letters requested that the provider cease and desist "all activity constituting the practice of dentistry."<sup>23</sup> Many letters indicated that the provision of teeth whitening products and services by non-dentists is a misdemeanor under North Carolina law.<sup>24</sup> The Board also sent letters to mall operators, encouraging them to stop leasing kiosk space to non-dentist bleaching providers.<sup>25</sup> As a result, some mall operators refused to lease or continue leasing space to non-dentist teeth whitening providers.<sup>26</sup> Taking further action, the Board contacted the North Carolina Board of Cosmetic Art Examiners ("Cosmetic Board"), and requested that the Cosmetic Board warn cosmetologists to refrain from providing teeth whitening services.<sup>27</sup> As a result of its efforts, the Board successfully halted the provision of bleaching services by non-

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16. *Id.*

17. *Id.*

18. *Id.* at 365.

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.* The Board sent these letters without state oversight or the required judicial authorization. *Id.* at 370. The Board does not have the statutory authority to order unlicensed individuals to cease violating the Dental Practice Act, and consequently judicial authorization is required. *Id.* at 364. If the Board suspects an individual of engaging in the unlicensed practice of dentistry, the Board is only given the statutory authority under the Dental Practice Act to refer the matter to the District Attorney or to bring an action to enjoin the practice before the North Carolina Superior Court. *Id.* (citing N.C. GEN. STAT. § 90-40.1).

23. *Id.* at 365.

24. *Id.*

25. *Id.*

26. N.C. Bd. of Dental Exam'rs, 152 F.T.C. 75, 198 (2011).

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

dentists, causing manufacturers and distributors of teeth whitening products for non-dentist providers “to exit or hold off entering North Carolina.”<sup>28</sup>

On June 17, 2010, the FTC issued an administrative complaint against the Board for violating 15 U.S.C. § 45,<sup>29</sup> as a result of the Board’s actions attempting to exclude non-dentist teeth whitening providers from the market.<sup>30</sup> The Board moved to dismiss the complaint, arguing that as an agency of the State, its actions were that of the State itself and, consequently, it was exempt from federal antitrust liability under the state action doctrine.<sup>31</sup> An Administrative Law Judge (“ALJ”) denied the Board’s motion to dismiss<sup>32</sup> and the FTC affirmed the ALJ’s decision, holding that, to be exempted from antitrust scrutiny, the Board must show that its challenged actions were 1) pursuant to a “clearly articulated and affirmatively expressed state policy,” and 2) “actively supervised by the State,” because the Board was controlled by “participants in the very industry it purports to regulate.”<sup>33</sup> Finding that the Board’s actions to exclude non-dentist providers from the teeth bleaching market were not actively supervised by the State, the FTC declined to extend immunity to the Board under the state action doctrine.<sup>34</sup>

Subsequently, the Board filed a federal declaratory action in the United States District Court for the Eastern District of North Carolina to enjoin the FTC’s administrative proceeding.<sup>35</sup> Specifically, the Board argued that the FTC 1) did not have antitrust jurisdiction over the Board, 2) was constitutionally barred from exercising jurisdiction in a pending administrative proceeding, and 3) was attempting to preempt state law regarding the statutory composition of the state board.<sup>36</sup> The FTC moved to

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28. *Id.*; *N.C. Bd. of Dental Exam’rs*, 152 F.T.C. at 199–200.

29. Specifically, 15 U.S.C. § 45 declares that “[u]nfair methods of competition . . . and unfair or deceptive acts or practices in or affecting commerce” are unlawful, and empowers the FTC to prevent this type of conduct. 15 U.S.C. § 45(a)(1)–(2) (2012).

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

31. *Id.*; *N.C. Bd. of Dental Exam’rs*, 151 F.T.C. 607, 617 (2011). The Board also moved to dismiss the complaint on the grounds that the FTC lacked subject matter jurisdiction over it. *N.C. State Bd. of Dental Exam’rs*, 717 F.3d at 365. An ALJ denied this motion on the basis that state regulatory bodies constitute “persons” under antitrust laws and the FTC may exercise jurisdiction over “persons” pursuant to 15 U.S.C. § 45. *N.C. Bd. of Dental Exam’rs*, 151 F.T.C. at 614.

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

33. *N.C. Bd. of Dental Exam’rs*, 151 F.T.C. at 626.

34. *Id.* at 633.

35. *N.C. State Bd. of Dental Exam’rs v. FTC*, 768 F. Supp. 2d 818, 820 (E.D.N.C. 2011).

36. *Id.* The Board argued that the FTC does not have antitrust jurisdiction because the FTC is only empowered to “prevent persons, partnerships, or corporations . . . from using unfair methods of competition” and does not have the “jurisdiction or authority to take action against a state (or its *bona fide* state agencies).” Complaint for Declaratory Judgment and Preliminary and Permanent Injunction at 7, *N.C. State Bd. of Dental Exam’rs v. FTC*, 768 F. Supp. 2d 818, (E.D.N.C. 2011) (No. 5:11-CV-49-FL) (quoting 15 U.S.C. § 45(a)(2)). The Board further argued that the FTC was constitutionally barred from exercising jurisdiction because, under Article III,

dismiss the declaratory action, maintaining that the district court did not have jurisdiction to decide a collateral challenge to the FTC's administrative action.<sup>37</sup> The district court dismissed the Board's declaratory action, reasoning that it lacked subject matter jurisdiction to render a judgment.<sup>38</sup> Likewise, the district court held that the Board's action was an improper attempt by the Board to enjoin an ongoing administrative proceeding.<sup>39</sup>

After the district court dismissed the Board's declaratory action, an ALJ held a trial on the merits.<sup>40</sup> The ALJ found that the Board violated the Federal Trade Commission Act through its anticompetitive actions to exclude non-dentist practitioners from the teeth whitening market.<sup>41</sup> On appeal, the FTC affirmed the ALJ's findings on the same grounds: that the Board engaged in concerted action, which effectively excluded non-dentist teeth whiteners from the relevant market.<sup>42</sup>

The Board petitioned the United States Court of Appeals for the Fourth Circuit to review the FTC's final order denying the Board's motion to dismiss, on the grounds that the Board was exempt from antitrust laws under the state action doctrine.<sup>43</sup> The Board argued that as a sub-state governmental entity, it only needed to show that its challenged actions were pursuant to a clearly articulated state policy.<sup>44</sup> The Fourth Circuit upheld the FTC's conclusion that the Board was a "private actor" due to the fact that the Board consisted primarily of market participants.<sup>45</sup> Reasoning that, as a private actor, the Board could take anticompetitive actions to benefit its own membership, the Fourth Circuit required the Board to satisfy both the clear articulation and active supervision requirements delineated in

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§ 2, Clause 2 of the U.S. Constitution, the federal government could not force the Board, as a state agency, to defend itself in a jurisdiction other than a federal court. *Id.* at 30.

37. *N.C. State Bd. of Dental Exam'rs*, 768 F. Supp. 2d at 821.

38. *Id.* at 824.

39. *Id.*

40. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 366 (4th Cir. 2013).

41. *Id.* The ALJ found that the members of the Board had a "common scheme or design," composing an agreement to exclude non-dentists from the market and engaged in concerted actions, which effectively caused providers to exit the relevant market. *N.C. Bd. of Dental Exam'rs*, 152 F.T.C. 75, 176 (2011).

42. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 365; *N.C. Bd. of Dental Exam'rs*, 152 F.T.C. 640, 642 (2011). On appeal, the Board argued that 1) there was no contract, combination, or conspiracy to restrain trade; 2) several pro-competitive justifications for the action outweighed any harm to competition; and 3) the ALJ's proposed remedy was overbroad and will prevent the Board from investigating or challenging violations of the Dental Practice Act. *N.C. Bd. of Dental Exam'rs*, 152 F.T.C. at 653.

43. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 366. The Board also petitioned for review of the FTC's final order on the grounds that it did not engage in concerted action under the Sherman Act and its activities did not unreasonably restrain trade. *Id.*

44. *Id.* at 368.

45. *Id.*

*California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.* to invoke state action immunity.<sup>46</sup> The Fourth Circuit further concluded that the Board's anticompetitive actions were not subject to sufficient supervision to meet the active state supervision prong of the *Midcal* test.<sup>47</sup> Consequently, the Fourth Circuit determined that the Board could not invoke state action immunity protections from antitrust laws.<sup>48</sup> The United States Supreme Court granted certiorari to decide whether the North Carolina State Board of Dental Examiners' anticompetitive actions should be subject to the active supervision requirement, in order to invoke state action immunity.<sup>49</sup>

## II. LEGAL BACKGROUND

Antitrust laws serve to ensure a competitive marketplace.<sup>50</sup> The state action doctrine provides immunity to the states, state actors, and private actors from liability for violations of federal antitrust laws, provided the actor's anticompetitive actions are that of the State.<sup>51</sup> Since the doctrine's first formal pronouncement over seventy years ago in *Parker v. Brown*,<sup>52</sup> the Supreme Court had yet to decide when *Parker* immunity would apply to state regulatory boards.<sup>53</sup> Consequently, lower federal courts were left to decide what requirements were necessary for a state board to invoke state action immunity. Many lower courts presumptively allowed state regulatory boards to invoke *Parker* immunity as long as a board's action fell within the policy of the state.<sup>54</sup> Part II.A of this Note explores relevant provisions of the Sherman Act and details the FTC's authority over Sherman Act violations.<sup>55</sup> Part II.B explores the development of the *Parker* immunity doctrine and the resulting circuit split as to its application to state boards.<sup>56</sup>

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46. *Id.* at 370.

47. *Id.*

48. *Id.*

49. N.C. State Bd. of Dental Exam'rs v. FTC, 134 S. Ct. 1491 (2014).

50. See 15 U.S.C. §§ 1–7, 12 (2012) (providing numerous prohibitions on restraint of trade and anticompetitive measures).

51. See generally *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (holding that private actors are entitled to state action immunity, so long as they meet both the clear articulation and active supervision requirements); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 36 (1985) (deciding whether a municipality's anticompetitive activities were entitled to state action immunity from federal antitrust liability); *Parker v. Brown*, 317 U.S. 341, 351 (1943) (designating state actions as immune from antitrust liability).

52. 317 U.S. at 341.

53. See *infra* Part II.B.

54. See *infra* Part II.B.

55. See *infra* Part II.A.

56. See *infra* Part II.B.

A. *Congress Enacted the Sherman Act to Preserve Free Enterprise*

Designed to combat anticompetitive action and to promote market efficiency through robust competition, the Sherman Act prohibits monopolies or other business combinations and conspiracies restraining trade.<sup>57</sup> Section 1 of the Sherman Act provides that “[e]very contract, combination . . . or conspiracy, in restraint of trade or commerce among the several States . . . is declared to be illegal.”<sup>58</sup> Section 2 further provides that “[e]very person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States . . . shall be deemed guilty of a felony.”<sup>59</sup> Penalties under the Sherman Act can be quite severe, including civil and criminal liability.<sup>60</sup> Under the Clayton Act amendments, the Sherman Act bans mergers and acquisitions where the effect “may be to substantially lessen competition or tend to create a monopoly.”<sup>61</sup> The Sherman Act also bans certain discriminatory prices, services, and allowances in dealings between merchants, as amended under the Robinson-Patman Act of 1936.<sup>62</sup> Referred to as the “Magna Carta of free enterprise,” antitrust laws, particularly the Sherman Act, serve to preserve economic freedom.<sup>63</sup> The United States Supreme Court deemed the Sherman Act to be “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.”<sup>64</sup>

The FTC technically does not have the authority to enforce the Sherman Act,<sup>65</sup> but the FTC does have the authority to act under the Federal Trade Commission Act (“FTC Act”).<sup>66</sup> The FTC Act, enacted in 1914, established the Federal Trade Commission.<sup>67</sup> The Supreme Court has routinely held that all violations of the Sherman Act violate the FTC Act.<sup>68</sup>

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57. 15 U.S.C. §§ 1–7 (2012). The Sherman Act was amended by the Clayton Act. *Id.* §§ 12–27.

58. *Id.* § 1.

59. *Id.* § 2.

60. *Id.* §§ 2, 15, 18(g), 21(l). The Sherman Act imposes criminal penalties of up to \$100 million for a corporation and \$1 million for an individual, and up to ten years in prison. *Id.* § 2.

61. *Id.* § 14; *see also* *Id.* § 18.

62. *Id.* § 13.

63. *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 610 (1972).

64. *Id.*

65. 15 U.S.C. § 9 (“It shall be the duty of the several United States attorneys, in their respective districts, under the direction of the Attorney General, to institute proceedings . . . and restrain such violations.”).

66. *Id.* § 45(a)(2).

67. *Id.* § 41.

68. *See Fashion Originators’ Guild of Am. v. FTC*, 312 U.S. 457, 463 (1941) (“If the purpose and practice of the combination of garment manufacturers and their affiliates runs counter to the public policy declared in the Sherman and Clayton Acts, the Federal Trade Commission has the

The FTC Act prohibits “unfair methods of competition” and “unfair or deceptive acts or practices.”<sup>69</sup> Under the FTC Act, the FTC has the power to “prevent persons, partnerships, or corporations . . . from using unfair methods of competition in or affecting commerce.”<sup>70</sup> Effectively, the FTC can bring cases that violate the Sherman Act under the FTC Act.<sup>71</sup>

*B. The United States Supreme Court Developed a Piecemeal Application of the State Action Doctrine, Resulting in Confusion over Its Application to State Regulatory Boards*

The state action doctrine finds its origins in two cases, *Olsen v. Smith*<sup>72</sup> and *Lowenstein v. Evans*.<sup>73</sup> In *Lowenstein*, the Circuit Court for South Carolina upheld a statute creating a state liquor monopoly by preventing the sale of distilled spirits by private parties, against a Sherman Act challenge.<sup>74</sup> Following *Lowenstein*, the United States Supreme Court found that a statute restricting pilotage, the profession of piloting, to licensed pilots did not violate the federal antitrust laws in *Olsen*.<sup>75</sup> In *Olsen* and *Lowenstein*, both the Circuit Court for South Carolina and the United States Supreme Court relied on the fact that anticompetitive actions were an act of the legislature and, therefore, an act of the State itself.<sup>76</sup> It was not, however, until *Parker v. Brown* that the United States Supreme Court articulated the formal underpinnings of the current state action doctrine.

In *Parker*, the Court declined to invalidate a proration marketing program for raisins for violating the Sherman Act.<sup>77</sup> Pursuant to the California Agricultural Prorate Act, state officials developed a marketing

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power to suppress it as an unfair method of competition.”); *see also* *FTC v. Ind. Fed’n. of Dentists*, 476 U.S. 447, 466 (1986) (“[F]indings are sufficient as a matter of law to establish a violation of § 1 of the Sherman Act, and, hence, § 5 of the Federal Trade Commission Act.”); *FTC v. Beech-Nut Packing Co.*, 257 U.S. 441, 453 (1922) (“The Sherman Act is not involved here except in so far as it shows a declaration of public policy to be considered in determining what are unfair methods of competition, which the Federal Trade Commission is empowered to condemn and suppress.”).

69. 15 U.S.C. § 45(a)(1).

70. *Id.*

71. *See supra* note 68.

72. 195 U.S. 332 (1904).

73. 69 F. 908 (C.C.D.S.C. 1895).

74. *Id.* at 911.

75. *Olsen*, 195 U.S. at 344–45.

76. *Id.* at 345 (“[I]f the state has the power to regulate, and in so doing to appoint and commission, those who are to perform pilotage services, it must follow that no monopoly or combination in a legal sense can arise from the fact that the duly authorized agents of the state are alone allowed to perform the duties devolving upon them by law.”); *Lowenstein*, 69 F. at 911 (“But by this act the state makes no contract, enters into no combination or conspiracy . . . . The state is a sovereign having no derivative power . . . the monopoly now complained of is that of the state, no relief can be had without making the state a party, and this destroys the jurisdiction of this court.”).

77. *Parker v. Brown*, 317 U.S. 341, 352 (1943).

program for the production of raisins in California, in order to restrict competition among growers and maintain prices.<sup>78</sup> Finding that the program “was never intended to operate by force of individual agreement or combination,” but rather, “derived its authority and its efficacy from the legislative command of the state,”<sup>79</sup> the Court reasoned that the Sherman Act was never “intended to restrain state action or official action directed by a state.”<sup>80</sup> The Court, however, was careful to note that “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that the action is lawful,” and that the question before them did not involve the “state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade.”<sup>81</sup> The *Parker* decision elucidated that state actions were immune from liability for federal antitrust violations.<sup>82</sup> In coming to its conclusion, the Court relied on the identity of the actor—private citizen or state actor—but failed to further delineate between the two, leaving lower courts to decide whether *Parker* applies to *only* actions by the State, or whether *Parker* applies to *any* action by a municipal or subordinate state governmental actor.<sup>83</sup>

1. *After Articulating the State Action Doctrine in Parker, the United States Supreme Court Refined the Guidelines for Antitrust Immunity*

Over thirty years after *Parker*, the Supreme Court declined to extend state action immunity to a professional licensing board in *Goldfarb v. Virginia State Bar*.<sup>84</sup> The Virginia State Bar, an administrative agency regulating the practice of law in Virginia, published a minimum fee schedule for lawyers, and consequently the plaintiffs were unable to find a lawyer who would examine the title for a home purchase for less than the minimum fee schedule.<sup>85</sup> While noting that the State Bar was a state agency by law, the Court refused to allow the agency to avail itself of state action immunity, finding that the State of Virginia had not “required the anticompetitive activities” of the State Bar.<sup>86</sup> In *Goldfarb*, the Court cautioned that, even though a state licensing board may be a state actor for some limited purposes, being a state board, in itself, “does not create an

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78. *Id.* at 346.

79. *Id.* at 350.

80. *Id.* at 351.

81. *Id.* at 351–52.

82. *Id.* at 352.

83. *Id.* at 351–52.

84. 421 U.S. 773, 791–92 (1975).

85. *Id.* at 776.

86. *Id.* at 790–91.

antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”<sup>87</sup>

Similarly, in *Cantor v. Detroit Edison Co.*,<sup>88</sup> the Court denied antitrust immunity to a state agency when the agency passively accepted a public utility’s tariff.<sup>89</sup> The Court indicated that the connection between the legislative grant of power to the agency and the subordinate state governmental body’s use of that power cannot be too tenuous, and ruled that the connection in this case was inadequate.<sup>90</sup> This holding was ultimately solidified in *Bates v. State Bar of Arizona*.<sup>91</sup> The Court granted state action immunity to the State Bar’s rules against lawyer advertising, because they “reflect[ed] a clear articulation of the State’s policy with regard to professional behavior,” and were “subject to the pointed re-examination by the policy maker—the Arizona Supreme Court—in enforcement proceedings.”<sup>92</sup>

## 2. A Clarified Test for State Action Immunity When Private Actors Are Involved

In *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, the United States Supreme Court finally had the opportunity to distinguish private action from state action, and to elucidate a test for when immunity applies.<sup>93</sup> Under the California Business and Professions Code, all wine producers, wholesalers, and rectifiers had to file fair trade contracts or prices schedules with the State, essentially setting wine prices.<sup>94</sup> The private actions were effectively authorized by the State.<sup>95</sup> The State,

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87. *Id.* at 791.

88. 428 U.S. 579 (1976).

89. *Id.* at 590–92 (distinguishing state officials from private actors, as “unquestionably the term ‘state action’ may be used broadly to encompass individual action supported to some extent by state law or custom,” but because the Court’s holding in *Parker* was limited to official action taken by state officials, finding that the defendant, while a public utility company, should be considered a private actor).

90. *Id.* at 594–95; *see also* *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 393 (1978) (“A subordinate state governmental body is not *ipso facto* exempt from the operation of the antitrust laws.” (quoting *City of Lafayette v. La. Power & Light Co.*, 532 F.2d 431, 434 (5th Cir. 1976))); *Goldfarb*, 421 U.S. at 791 (“It is not enough that . . . anticompetitive conduct is ‘prompted’ by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.”).

91. 433 U.S. 350 (1977).

92. *Id.* at 362. *Bates* was ultimately decided on First Amendment grounds. The Court held that the lawyers’ advertisement was not misleading and was entitled to First Amendment protection. *Id.* at 384. Consequently, the State Bar’s disciplinary actions against the appellants, pursuant to its rules against lawyer advertising, violated the First Amendment. *Id.*

93. 445 U.S. 97, 99 (1980).

94. *Id.* at 99–101.

95. *Id.* at 100. The Court found that the initial system for wine pricing was authorized by the State because “[t]he legislative policy is forthrightly stated and clear in its purpose to permit resale price maintenance.” *Id.* at 105.

however, had neither direct control over nor power to review the reasonableness of the wine prices set by private wine dealers.<sup>96</sup>

The *Midcal* Court articulated that in order to invoke *Parker* immunity, the challenged restraint must meet 1) the clear articulation prong: the action must be “clearly articulated and affirmatively expressed as state policy” and 2) the active supervision prong: the conduct “must be actively supervised by the State itself.”<sup>97</sup> The *Midcal* Court declined to extend immunity to the California system for wine pricing because, even though it satisfied the first prong with legislative policy clearly permitting price maintenance, the State did not review or regulate the price schedules, and therefore, the system did not meet the second prong of the analysis.<sup>98</sup> Instead, the Court reiterated its reasoning in *Parker*, highlighting that, “[t]he 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.”<sup>99</sup>

Since *Midcal*, the United States Supreme Court has refined the standards for each prong of the *Midcal* test. For the first prong of the analysis, the clear articulation requirement, the actor must show that there is a clearly articulated and affirmatively expressed “state policy to displace competition,”<sup>100</sup> such that “[b]esides authority to regulate . . . [the actor also has] authority to suppress competition.”<sup>101</sup>

The standard for the second prong of the *Midcal* test, active state supervision, is less clear. In *Patrick v. Burget*,<sup>102</sup> the Court highlighted that the “active supervision prong requires that state officials have and exercise the power to review an [actor’s] particular anticompetitive acts and disapprove of those that fail to accord with state policy.”<sup>103</sup> The Court indicated in *FTC v. Ticor Title Insurance Co.*<sup>104</sup> that the fundamental purpose of the active supervision inquiry is to determine “whether the State exercised sufficient independent judgment and control” to make the actions of the agency “a product of deliberate state intervention.”<sup>105</sup> More broadly, the active supervision requirement asks whether the State “has played a substantial role” in order to protect the market from agreements between

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96. *Id.*

97. *Id.* at 105 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)).

98. *Id.* at 105–06 (“The State neither established prices nor reviews the reasonableness of the price schedules; nor does it regulate the terms of fair trade contracts. The State does not monitor market conditions or engage in any ‘pointed reexamination’ of the program.”).

99. *Id.* at 106.

100. *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 51 (1982) (quoting *La. Power & Light Co.*, 435 U.S. at 413).

101. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 372 (1991).

102. 486 U.S. 94 (1988).

103. *Id.* at 101.

104. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).

105. *Id.* at 634.

private actors to further the private actor's own interests.<sup>106</sup> Short of having no evidence of state supervision, a case has yet to present itself where the Court has an opportunity to delineate what certifies a "substantial role" by the State.<sup>107</sup>

Since *Midcal*, the Court has had the opportunity to decide if certain subordinate governmental actors would be subject to both prongs of the *Midcal* test.<sup>108</sup> In *Community Communications Co. v. Boulder*, the United States Supreme Court clearly indicated that municipalities were not ipso facto exempt from antitrust liability because "cities are not themselves sovereign" under the federalism principle.<sup>109</sup> Municipalities, however, may be immune from antitrust liability if the State sanctions their anticompetitive activities.<sup>110</sup> The Court held that the local government's limitation of cable service to a certain area of the city did not meet the clear articulation requirement because the Home Rule Amendment, vesting "every power . . . in local and municipal affairs," did not implement a sufficiently expressed state policy with regard to regulation of cable television competition, but the Court left the question open as to whether the municipality's actions would have to meet the active supervision requirement.<sup>111</sup> In *Town of Hallie v. City of Eau Claire*, the Court declined to apply the active supervision prong of the *Midcal* test to a municipality, reasoning that when a municipality is engaged in anticompetitive activity, there is little concern that the municipality is seeking to further private interests.<sup>112</sup>

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106. *Id.* ("[T]he purpose of the active supervision inquiry is not to determine whether the State has met some normative standard . . . . Its purpose is to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private practices . . . . [T]he analysis asks whether the State has played a substantial role . . . .").

107. *See Ticor Title Ins. Co.*, 504 U.S. at 638 (1992) (concluding that the State's choice to exercise veto power was not sufficient supervision, and consequently there was no evidence of active supervision); *Patrick*, 486 U.S. at 102–04 (1988) (finding no evidence of active state supervision on behalf of the private actor).

108. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 36 (1985) (deciding whether a municipality's anticompetitive activities were entitled to state action immunity from federal antitrust liability); *Cnty. Comm'ns Co. v. Boulder*, 455 U.S. 40, 52 (1982) (deciding whether a "home rule" municipality "enjoys the 'state action' exemption").

109. 455 U.S. at 50 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412–13 (1978)).

110. *Id.* at 51 ("The State as sovereign might sanction anticompetitive municipal activities and thereby immunize municipalities from antitrust liability.").

111. *Id.* at 52–56 (quoting *Denver Urban Renewal Auth. v. Byrne*, 618 P.2d 1374, 1381 (Colo. 1980)).

112. *Town of Hallie*, 471 U.S. at 46–47 ("Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of overriding state goals. This

The Court, however, had not clearly determined if both prongs of the analysis should apply to state regulatory boards, though in dicta from *Hallie*, the Court predicted that state regulatory boards, similar to municipalities, would not have to meet the active state supervision requirement of the *Midcal* test.<sup>113</sup> Most recently in *FTC v. Phoebe Putney Health System, Inc.*,<sup>114</sup> the Court denied *Parker* immunity to a subordinate governmental entity, a hospital authority, on the grounds that it did not meet the clear articulation prong.<sup>115</sup> The hospital authority, Phoebe Putney Health System, failed to demonstrate that the State had affirmatively contemplated its anticompetitive actions; the State had not clearly articulated a state policy to displace competition in the market for hospital services.<sup>116</sup> Since the Court found that the hospital authority failed to prove the clear articulation requirement, the Court declined to rule on the second prong of the *Midcal* analysis.<sup>117</sup> Thus, the Court had yet to decide the question of whether state boards should be subject to the second prong of the *Midcal* test.

3. *The Court Failed to Delineate When a State Board's Action Qualifies as "That of the State"*

Lower courts have questioned whether state regulatory boards can be characterized as state actors for the purpose of the state action immunity and whether both prongs of the *Midcal* analysis should apply. The Fifth and Ninth Circuits have not subjected state boards to the second prong of the *Midcal* test, while the Fourth Circuit, in its decision in *North Carolina State Board of Dental Examiners*, required a state agency to show active state supervision when presented with the application of *Parker* immunity to a state board.<sup>118</sup>

The Ninth Circuit held that state boards are not subject to the active supervision prong.<sup>119</sup> In *Hass v. Oregon State Bar*, the Ninth Circuit concluded that the State Bar was an agent of the judicial department of the State of Oregon, and "a public body, akin to a municipality," for the

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danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy.").

113. *Id.* at 46, n.10 ("In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.").

114. 133 S. Ct. 1003 (2013).

115. *Id.* at 1017.

116. *Id.* at 1015–16.

117. *Id.* at 1017.

118. Compare *Hass v. Or. State Bar*, 883 F.2d 1453, 1460–61 (9th Cir. 1989) (holding that a state bar, as essentially a state licensing board, only had to show clear articulation) and *Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1041 (5th Cir. 1998) (holding that a state regulatory board only needed to meet the clear articulation requirement) with *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 375 (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015).

119. *Hass*, 883 F.2d at 1460–61.

purpose of state action immunity.<sup>120</sup> The Ninth Circuit reasoned that the State Bar was unlikely to pursue other interests than those of the State, due to its public accountability.<sup>121</sup> Similarly, in *Earles v. State Board of Certified Public Accountants of Louisiana*, the Fifth Circuit applied the *Hallie* Court's footnote, finding that the licensing board was a state agency and declining to apply the active supervision prong of the *Midcal* test.<sup>122</sup> The Fifth Circuit reasoned that the Board of Certified Public Accountants was "functionally similar to a municipality" because "the public nature of the Board's actions means there is little danger of a cozy arrangement to restrict competition."<sup>123</sup>

The Fourth Circuit, however, decided to apply *Midcal*'s second prong to the licensing board in the case at hand, *North Carolina State Board of Dental Examiners v. FTC*.<sup>124</sup> The Fourth Circuit reasoned that "when a state agency appears to have attributes of a private actor and is taking actions to benefit its own membership . . . both parts of *Midcal* must be satisfied."<sup>125</sup> Thus, the Fourth Circuit's application of *Midcal*'s active supervision requirement created a circuit split between it and the Ninth and Fifth Circuits.

### III. THE COURT'S REASONING

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the United States Supreme Court affirmed the Fourth Circuit's decision in a 6-3 decision.<sup>126</sup> The Court found that the Board could not invoke state action immunity from federal antitrust law for its anticompetitive actions to exclude non-dentists from the teeth whitening market.<sup>127</sup> More broadly, the Court held that a state board with a "controlling number" of active market participants is considered a nonsovereign actor within the scope of the state action exemption.<sup>128</sup> The Court reaffirmed that nonsovereign actors must prove both prongs of the *Midcal* test, 1) a clearly articulated state policy allowing the anticompetitive conduct and 2) active state supervision over the anticompetitive conduct, in order to invoke *Parker* immunity.<sup>129</sup> In so holding, the Court relied on

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120. *Id.* at 1460.

121. *Id.*

122. *Earles*, 139 F.3d at 1041.

123. *Id.*

124. N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 375 (4th Cir. 2011), *aff'd*, 135 S. Ct. 1101 (2015).

125. *Id.* at 369.

126. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1117 (2015) (6-3 decision).

127. *Id.*

128. *Id.* at 1114.

129. *Id.* at 1112, 1114 (first citing *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992); then citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)).

federal antitrust policy, prohibiting “anticompetitive self-regulation by active market participants”<sup>130</sup> and encouraging “robust competition”<sup>131</sup> to safeguard the “Nation’s free market structures.”<sup>132</sup>

The North Carolina State Board of Dental Examiners argued that its actions to prevent non-dentist teeth whitening providers from offering teeth whitening services in North Carolina garnered state action immunity from federal antitrust law.<sup>133</sup> Specifically, the Board contended that its concerted actions were “cloaked with *Parker* immunity” because North Carolina had vested its members with the power of the State when establishing the Board.<sup>134</sup> The Board further argued that sub-state entities should not be subject to the second prong of the *Midcal* test by virtue of their designation as a state agency, and consequently should not have to show active state supervision over their anticompetitive actions in order to receive immunity.<sup>135</sup> With regard to policy, the Board argued that if the Court ruled in a manner that further limited the availability of state action immunity and subjected the Board and its members to potential liability for money damages, this would discourage active market participants from participating in state government.<sup>136</sup>

In affirming the Fourth Circuit’s decision that the Board was not entitled to state action immunity, the Court asserted that the Board was a nonsovereign actor.<sup>137</sup> While a state’s own anticompetitive actions, such as state legislation and decisions by a state supreme court, are ipso facto exempt “out of respect for federalism,”<sup>138</sup> the Court reasoned that sub-state entities could not be deemed sovereign actors simply because of their governmental character.<sup>139</sup> Instead, the Court considered the Board’s contingency of active market participants as a potential threat to the free market, as its actions may serve to further private anticompetitive motives of its members.<sup>140</sup> Consequently, the Court concluded that limits on state action immunity were necessary when a state delegates its regulatory power and control over a market to a nonsovereign actor.<sup>141</sup>

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130. *Id.* at 1111.

131. *Id.* at 1110.

132. *Id.* at 1109.

133. *Id.* at 1110.

134. *Id.*

135. *Id.* at 1113.

136. *Id.* at 1115.

137. *Id.* at 1110.

138. *Id.* at 1110–11.

139. *Id.* at 1111.

140. *Id.* at 1110–11 (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence.” (quoting *Hoover v. Ronwin* 466 U.S. 558, 584 (1989) (Stevens, J. dissenting))).

141. *Id.* at 1111.

The Court affirmed that nonsovereign actors should be subject to both prongs of the *Midcal* test: “first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.”<sup>142</sup> The Court relied on the *Midcal* test, which it had previously applied to private actors, reasoning that the test is the “proper analytical framework to resolve” whether an anticompetitive action is in fact the State’s exercise of sovereign authority.<sup>143</sup> The Court noted that the clear articulation prong seeks to analyze whether anticompetitive conduct is pursuant to state policy.<sup>144</sup> The Court, however, hesitated to rely on solely the first prong because the first prong alone is seldom sufficient to ensure anticompetitive actions are actually that of the State.<sup>145</sup> State policies “may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated.”<sup>146</sup> The Court highlighted that “[t]he resulting asymmetry between a state policy and its implementation can invite private self-dealing.”<sup>147</sup> Consequently, the Court reasoned that nonsovereign actors, such as the Board, must fulfill the second prong of *Midcal* test to remedy concern that the actor is acting to further its own interest.<sup>148</sup>

The Court distinguished its application of the state action doctrine to the Board from the narrow exception applied to municipalities.<sup>149</sup> The Court referenced its previous decision in *Hallie* in which it held that municipalities are subject to only the clear articulation requirement and not the active state supervision prong.<sup>150</sup> The Court, however, declined to apply this exception to the Board, reasoning that when the actor is a municipality, there is little to no danger that the municipality is “involved in a private price-fixing arrangement.”<sup>151</sup> The Court further distinguished municipalities from sub-state entities composed of active market participants, noting that municipalities are held “accountable electorally and lack the private incentives” to engage in price fixing.<sup>152</sup> The Court

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142. *Id.* at 1112 (quoting *FTC v. Tior Title Ins. Co.*, 504 U.S. 621 (1992) (citing *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980))).

143. *Id.*

144. *Id.*

145. *Id.*

146. *Id.* (citing *Tior Title Ins. Co.*, 504 U.S. at 636–37).

147. *Id.* (“Entities purporting to act under state authority might diverge from the State’s considered definition of the public good.”).

148. *Id.* (reasoning that active state supervision demands “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests” (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988))).

149. *Id.* at 1112–13.

150. *Id.* at 1112.

151. *Id.*

152. *Id.* at 1112–13.

concluded that none of the justifications available to municipalities were applicable to the Board; rather, the Board was akin to a private actor.<sup>153</sup>

The Court underscored that actors with state action immunity, specifically the State itself, could not lose their immunity based on “ad hoc and *ex post* questioning of their motives.”<sup>154</sup> Based on this, the Court justified its focus on the composition of the Board and its members.<sup>155</sup> Therefore, the Court held that a state board, composed of a majority of active market participants, must satisfy both prongs of the *Midcal* test to invoke *Parker* immunity.<sup>156</sup>

Even though the Court decided that the Board must meet the requirements of both prongs, the Court did not have the opportunity to apply the *Midcal* test.<sup>157</sup> In the case before the Supreme Court, the parties assumed that the Board’s conduct satisfied the clear articulation requirement.<sup>158</sup> Furthermore, the Board did not contend that there was active state supervision over its anticompetitive conduct.<sup>159</sup> Accordingly, no *Midcal* analysis was required. The Court nevertheless provided, in dicta, some guidance for the active state supervision prong of the *Midcal* analysis.<sup>160</sup> The Court delineated a few constant requirements for active state supervision, namely: 1) the State must actually review the substance of the anticompetitive decision, 2) the State must have the power to veto or modify the actor’s decision, and 3) the state supervisor may not be an active market participant.<sup>161</sup> The Court further noted that the mere potential for state supervision is not sufficient, even though the analysis for active state supervision is “flexible and context-dependent.”<sup>162</sup>

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153. *Id.*

154. *Id.* at 1113 (“*Omni* also rejected subjective tests for corruption that would force a ‘deconstruction of the governmental process and probing of the ‘official intent’ that we have consistently sought to avoid.” (quoting *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 377 (1991))).

155. *Id.*

156. *Id.* at 1114.

157. *Id.* at 1116 (“*Omni*’s holding makes it all the more necessary to ensure that conditions for granting immunity are met in the first place.”).

158. *Id.* at 1110.

159. *Id.* at 1116.

160. *Id.*

161. *Id.* (citing *Patrick v. Burget*, 486 U.S. 94 (1988)). The Court further detailed that in order to prove active supervision: 1) “the supervisor must [have] review[ed] the substance of the anticompetitive decision, not merely the procedures followed to produce it,” 2) “the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy,” and 3) “the state supervisor may not itself be an active market participant.” *Id.* at 1116–17.

162. *Id.* at 1116 (noting that “[a]ctive supervision need not entail day-to-day involvement . . . or micromanagement of its every decision,” but cautioning that “the mere potential for state supervision is not an adequate substitute for a decision by the State” (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992))).

Turning to policy, the Court declined to entertain the Board's argument that the FTC's order will discourage citizens from serving on state boards that regulate their own occupation.<sup>163</sup> While espousing the tradition of professional self-regulation and the necessity of experts serving on state boards, the Court asserted that its decision does not deny state boards the protection of state action immunity.<sup>164</sup> Rather, the Court emphasized that its holding serves to reduce the risks to the free market posed by licensing boards dominated by active market participants.<sup>165</sup>

Justice Alito, joined by Justices Scalia and Thomas, dissented from the majority, arguing that the Board is entitled to state action immunity as a state agency.<sup>166</sup> Justice Alito fundamentally disagreed with the majority's designation of the Board as a nonsovereign entity, arguing that the Board is "unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State's power."<sup>167</sup> Additionally, the dissent asserted that "the Court goes astray because it forgets the origin of the *Parker* doctrine" and misapplies the *Midcal* test, which should only be applied in the case of a private entity.<sup>168</sup> Further noting the practical problems of the majority's holding, the dissent struggled with the majority's lack of clarity as to how states should adjust to comply with the majority's ruling and potentially alter the composition of members on state regulatory boards.<sup>169</sup> Justice Alito also questioned why the majority found it necessary to solely inquire into the structure of a state regulatory board as a basis for antitrust immunity.<sup>170</sup> For Justice Alito, the majority created a new standard that failed to conform to the origins of the *Parker* doctrine and "our traditional respect for federalism and state sovereignty."<sup>171</sup>

#### IV. ANALYSIS

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the United States Supreme Court affirmed the judgment of the

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163. *Id.* at 1115–16.

164. *Id.*

165. *Id.* at 1116.

166. *Id.* at 1117–18 (Alito, J., dissenting).

167. *Id.* at 1119–20 ("North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina *created a state agency.*").

168. *Id.* at 1120–21 ("Nothing in *Parker* supports the type of inquiry that the Court now prescribes," rather "the Court crafts a test . . . [that] treats these state agencies like private entities.").

169. *Id.* at 1122–23. Justice Alito highlights the issues with defining the majority's terms in its holding, inquiring into what constitutes a controlling number and when is a board member considered an active market participant. *Id.* at 1123.

170. *Id.* (questioning the majority's focus on the composition of the board to alleviate its concerns that regulatory capture has occurred).

171. *Id.*

Fourth Circuit, holding that state action immunity does not presumptively apply to state boards.<sup>172</sup> In so holding, the Court affirmed that when a controlling number of board members are active market participants in the occupation that the board regulates, the board is a nonsovereign entity.<sup>173</sup> Accordingly, when a state regulatory board has a controlling number of active market participants, the board must satisfy both prongs of the *Midcal* test in order to invoke state action antitrust immunity.<sup>174</sup> Even though the Court came to the correct holding under federal antitrust policy, the Court did not delineate a clear standard for the active supervision requirement. Consequently, subordinate governmental entities are left to question when enough active supervision is enough. Part IV.A. of this Note discusses how the Court's holding aligns with federal antitrust policy,<sup>175</sup> while Part IV.B argues that the Court's and FTC's guidance on the active supervision prong places a chilling effect on state regulatory boards. Part IV.B also proposes a solution to the cumbersome FTC requirements for active state supervision.<sup>176</sup>

A. *The Court Came to the Correct Holding Under Federal Antitrust Policy*

Federal antitrust law is a fundamental part of safeguarding our Nation's free market economy.<sup>177</sup> An open marketplace with aggressive competition among sellers seeks to ensure that the market produces lower prices and higher quality products, as well as more choice and greater innovation.<sup>178</sup> In order to ensure a vibrant economy, Congress and the FTC sought to develop a regulatory scheme to protect free and open markets from threats of anticompetitive conduct and further actions within the public interest.<sup>179</sup> The states are permitted to regulate their markets in an

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172. *Id.* at 1114 (majority opinion).

173. *Id.* at 1113–14.

174. *Id.* at 1114.

175. *See infra* Part IV.A.

176. *See infra* Part IV.B.

177. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1109 (2015) (“Federal antitrust law is a central safeguard for the Nation’s free market structures.”). *But see* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 698 (1991) (highlighting that the “Sherman Act was directed at one central evil. Businesses were combining to restrain competition in order to charge high rates . . . and reap monopoly profits” but noting that there is little indication that “Congress viewed regulation of competition as inherently unwise” or criticized governmental restraints on competition).

178. FED. TRADE COMM’N, GUIDE TO THE ANTITRUST LAWS, <https://www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws> (last visited Feb. 9, 2016).

179. *Id.*; *see* Elhauge, *supra* note 177, at 697–701 (arguing that Congress considered the public interest at the heart of the Sherman Act and fundamentally was concerned about financially interested decisionmakers imposing restraints (first citing 21 CONG. REC. 2728 (1890); then citing 20 CONG. REC. 1458 (1889); and then citing 21 CONG. REC. 2457 (1890))).

anticompetitive manner under our dual system of Government.<sup>180</sup> However, it would be an “impermissible burden,” at the expense of other fundamental state values, if the states were required to conform to every mandate of the Sherman Act in enacting every law or policy.<sup>181</sup>

Congress never suggested that it intended to preempt state and local law simply because that law interferes with competitive markets, even though Congress could do so under the Supremacy Clause of the Constitution.<sup>182</sup> The state action exemption, a judicially created doctrine, serves “to avoid conflicts between state sovereignty and the Nation’s commitment to a policy of robust competition.”<sup>183</sup> Yet state action immunity is strongly disfavored under the policies of free enterprise and economic competition embodied in federal antitrust laws.<sup>184</sup> When the State delegates its power to sub-state entities, or even private actors, to regulate the market, one very serious threat to the free market arises: the potential for private anticompetitive motives.<sup>185</sup> Consequently, *Parker* immunity should be limited to instances where the actions are an exercise of the State’s sovereign authority.<sup>186</sup> In turn, some form of enforcement mechanism or limitation is necessary to ensure that actions of a sub-state

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180. HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE 739 (3d ed. 2005).

181. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1109–10 (citing *Exxon Corp. v. Governor of Md.*, 437 U.S. 117, 133 (1978); Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. LAW & ECON. 23, 24 (1983) (arguing that any limits imposed by the Court on the methods of state regulation are unlikely to be beneficial)).

182. HOVENKAMP, *supra* note 180, at 736.

183. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1110.

184. See *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (“[G]iven 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.’” (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992))).

185. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1111 (noting that “[d]ual allegiances are not always apparent to an actor”).

186. *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374–75 (1991) (“[I]mmunity does not necessarily obtain where the State acts not in a regulatory capacity but as a commercial participant in a given market.”); *Hoover v. Ronwin*, 466 U.S. 558, 584 (1984) (Stevens, J., dissenting) (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence.”); see also Merrick B. Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 YALE L.J. 486, 500 (1987) (“[T]he Court did not believe Congress had intended the Sherman Act to ‘nullify’ a state’s regulation of its own economy; on the other hand, it was equally sure that Congress would not have permitted a state to nullify the Sherman Act itself by ‘authorizing’ private parties ‘to violate’ the Act ‘or by declaring that their action is lawful.’” (quoting *Parker v. Brown*, 317 U.S. 341, 351 (1943))).

entity, to which the State has delegated its authority, are not a result of private self-dealing.<sup>187</sup>

In *North Carolina State Board of Dental Examiners*, the Court provided an analytical framework to determine whether the actions of a state board were that of the State.<sup>188</sup> The first prong, whether the State has articulated a clear policy to allow the anticompetitive conduct, seeks to decipher where the State has actually delegated the authority to act or regulate anticompetitively.<sup>189</sup> However, the use of this first prong alone is inconsistent with antitrust policy because it is insufficient to resolve the threshold question of “whether an anticompetitive policy is indeed the policy of a State.”<sup>190</sup> An anticompetitive policy could withstand this test, since most statutory grants of authority are defined with a high level of generality and “it cannot alone ensure . . . that particular anticompetitive conduct has been approved by the State.”<sup>191</sup> Therefore, the second prong of the *Midcal* test, requiring active state supervision, is necessary to ensure that actors are not furthering their own interests, but rather the policy of the State, by engaging in anticompetitive conduct.<sup>192</sup> Consequently, the *Midcal* test satisfies antitrust policy by limiting the application of state action immunity to instances where the actor is acting pursuant to state policy and the public interest.

*B. The Supreme Court Could Not Delineate Clear Guidance for Sufficient Active Supervision*

While the Court came to the correct holding, under federal antitrust policy, the Court could not delineate a clear standard for active supervision.<sup>193</sup> In *North Carolina State Board of Dental Examiners*, the Supreme Court did not rule on whether the Board had sufficiently met this prong because the Board did not contend that it had active state supervision over its mailing of cease-and-desist letters.<sup>194</sup> Instead, the Court proffered some guidance for the second prong of the *Midcal* test.<sup>195</sup> In announcing that the adequacy of supervision “will depend on all the circumstances of a case,” the Court failed to clarify what is in fact *adequate*.<sup>196</sup>

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187. *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105–06 (1980); see Elhauge, *supra* note 177, at 701–03 (warning that the real concern is financially interested actors but this does not confer a complete prohibition on anticompetitive regulation).

188. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1112.

189. *Omni Outdoor Advert., Inc.*, 499 U.S. at 372.

190. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1112.

191. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636–37 (1992).

192. *Id.*; *Patrick v. Burget*, 486 U.S. 94, 100–01 (1988).

193. See *supra* Part IV.A.

194. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1116.

195. See *supra* notes 160–162 and accompanying text.

196. *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1116–17.

Following the Court's decision in *North Carolina State Board of Dental Examiners*, the FTC issued guidance as to what the FTC would consider *adequate* for the active state supervision.<sup>197</sup> The breadth of the holding in *North Carolina State Board of Dental Examiners* permitted the FTC to take a very conservative stance with its requirements for active state supervision. Part IV.B.1 of this Note recounts the Court's limited guidance regarding the active supervision requirement.<sup>198</sup> Part IV.B.2 details the FTC's requirements for active state supervision,<sup>199</sup> while Part IV.B.3 illustrates how the Court's inability to articulate a clear standard, when coupled with the FTC's guidance, effectively renders a regulatory board as an advisory board in order to invoke state action immunity.<sup>200</sup> Finally, Part IV.B.4 proposes that simple review by an independent state commission should meet the standard for the clear articulation requirement.

1. *The Supreme Court Created an Amorphous Active State Supervision Requirement*

In *North Carolina State Board of Dental Examiners*, the Supreme Court noted, in dicta, that the active state supervision requirement is “flexible and context-dependent.”<sup>201</sup> The Court identified a “few constant requirements” of active state supervision that it had previously indicated in *Patrick v. Burget* and *FTC v. Ticor Title Insurance Co.*<sup>202</sup> Specifically, the Court highlighted that 1) “[t]he supervisor must review the substance of the anticompetitive decision, not merely the procedures to produce it,” 2) “the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy,” and 3) “the state supervisor may not itself be an active market participant.”<sup>203</sup> Furthermore, the “mere potential” for supervision is not sufficient to constitute active state supervision.<sup>204</sup> More broadly, a state's supervisory mechanisms must be sufficient to provide a “realistic assurance” that a board's actions promote state policy.<sup>205</sup>

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197. *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*, FED. TRADE COMM'N 1 (2015), [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf) [hereinafter *FTC Guidance*].

198. *See infra* Part IV.B.1.

199. *See infra* Part IV.B.2.

200. *See infra* Part IV.B.3.

201. *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1116.

202. *Id.*; *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992); *Patrick v. Burget*, 486 U.S. 94, 102–03 (1988).

203. *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1116–17 (citing *Patrick*, 486 U.S. at 102–03; *Ticor Title Ins. Co.*, 504 U.S. at 638).

204. *Id.* at 1116.

205. *Id.* (citing *Patrick*, 486 U.S. at 100–01).

Even though the Court's guidance gives some structure to the active supervision prong of the *Midcal* analysis, there are questions remaining as to the specifics of the active supervision assessment. Is it sufficient for an agency secretary to review the board's actions or does the action need to be subject to the bureaucratic process of the agency? What is sufficient for reviewing the substance of the decision? Does the review require a hearing or a form of public input? Does this include reviewing massive amounts of data on the effects of the decision? Does the supervisor need to routinely review the board's actions or is one independent review sufficient? While not an exhaustive list of the questions left open after the Court's decision, these are indicative of the questions facing the states.<sup>206</sup> Consequently, the Court's dicta, perhaps intended as a stopgap until it could reach the issue of the active supervision prong on the merits of a case before it, left a vast amount of regulatory space for the FTC.

## 2. *The FTC Provided Unrealistic Requirements for Active State Supervision*

Notably, the Court's holding in *North Carolina State Board of Dental Examiners* is limited to those actions taken by regulatory boards that violate federal antitrust laws.<sup>207</sup> Generally, states delegate authority to regulatory boards to determine licensing requirements, disciplinary licensing actions, and ultimately who may enter the market for a given occupation.<sup>208</sup> Today, licensing is required for over 800 occupations, including traditionally regulated professions, such as doctors, as well as historically unregulated professions, such as hair braiders.<sup>209</sup> Consequently, many regulatory board actions have the propensity to violate antitrust laws by restricting entry into the market a board regulates.<sup>210</sup> In order to invoke state action immunity, the first step, following *North Carolina State Board of Dental Examiners*, is to decipher whether a "controlling number" of active market participants

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206. *See id.* at 1123 (Alito, J., dissenting) (discussing questions left open from the Court's adoption of a "crude test for capture" and noting that "[t]he answers to these questions are not obvious, but the States must predict the answers").

207. *See FTC Guidance, supra* note 197, at 1 ("While most regulatory actions taken by state actors will not implicate antitrust concerns, some will.").

208. *See id.* ("States have created a large number of regulatory boards with the authority to determine who may engage in an occupation (e.g., by issuing or withholding a license), and also to set the rule and regulations governing that occupation.").

209. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1096, 1102 (2014); *see, e.g.*, Jacob Goldstein, *So You Think You Can Be a Hair Braider?*, N.Y. TIMES MAG. (June 17, 2012), [http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html?\\_r=0](http://www.nytimes.com/2012/06/17/magazine/so-you-think-you-can-be-a-hair-braider.html?_r=0) (describing the difficulty of obtaining a license in the hair braider profession).

210. *See* Edlin & Haw, *supra* note 209, at 1096 (stating that "[m]any boards have abused their power to insulate incumbents from competition").

are decision-makers the board.<sup>211</sup> If a regulatory board has a controlling number of active market participants, the board must show both *Midcal*'s clear articulation and active supervision requirements.<sup>212</sup> If, however, the regulatory board does not have a controlling number of active market participants, the Court's opinion is nebulous as to whether the board must satisfy the active supervision prong.<sup>213</sup>

As Justice Alito inquired in his dissent in *North Carolina State Board of Dental Examiners*, how does one define a "controlling number of active market participants?"<sup>214</sup> In its guidance, the FTC defines an active market participant as a person who is either 1) "licensed by the board," or 2) "provides any service that is subject to the regulatory authority of the board."<sup>215</sup> The FTC further refines this definition to broadly cover any person participating in any profession or occupational subspecialty that the board regulates, even though he or she may have temporarily suspended active participation.<sup>216</sup> Additionally, the method by which a board member is selected to serve on a state regulatory board, whether appointed or elected, is irrelevant to the active market participant analysis.<sup>217</sup>

The FTC defines a "controlling number" as when the active market participants control the decision itself.<sup>218</sup> To clarify, a controlling number is not necessarily a numerical majority.<sup>219</sup> Instead, the FTC will rigorously evaluate 1) "the structure of the regulatory board," 2) "the rules governing the board's authority," 3) "[w]hether active market participants have veto power over the board's regulatory decisions," and 4) whether other board members either generally defer to the active market participants or are not sufficiently informed regarding the board's business.<sup>220</sup>

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211. *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1114 (majority opinion). *But cf. id.* at 1123 (Alito, J., dissenting) (arguing that the "controlling number" test is not clearly defined by the majority opinion and will have to be sorted out by lower courts).

212. *Id.* at 1114 (majority opinion).

213. This question was not addressed by the majority. Justice Alito, however, questioned this structural delineation as a basis for granting state action immunity. *Id.* at 1122–23 (Alito, J., dissenting) (arguing that regulatory capture can occur in many ways and questioning why the Court "ask[s] only whether the members of a board are active market participants").

214. *Id.* at 1123 (questioning the meaning of a "controlling number"); Kate Ortbahn, Note, *The Root Canal of Antitrust Immunity: North Carolina State Board of Dental Examiners v. FTC*, 94 N.C. L. REV. ADDENDUM 1, 13 (2015) ("[S]tate legislatures (and reviewing courts) could reasonably come to vastly different calculations of what a 'controlling number' equals.").

215. *FTC Guidance*, *supra* note 197, at 7.

216. *Id.*

217. *Id.* (giving the example that, "a licensed dentist is deemed to be an active market participant regardless of whether the dentist (i) is appointed to the state dental board by the governor or (ii) is elected to the state dental board by the state's licensed dentists").

218. *Id.* at 8–9.

219. *Id.*

220. *Id.* at 8–9 (noting that if an active market participant's vote is essentially required for a regulation to become effective, active market participants effectively have veto power).

The FTC details an aggressive stance for the active state supervision requirement.<sup>221</sup> In its guidance, the FTC relies on the few constant requirements identified by the Supreme Court.<sup>222</sup> Articulating some broad but informative principles, the FTC generally implies that the active state supervision analysis is “context-dependent” and, overall, the State’s supervision must ensure that the anticompetitive conduct is the State’s own such that the “States accept political accountability for anticompetitive conduct.”<sup>223</sup> However, the FTC then goes further, requiring an exacting analysis of 1) whether the supervisor obtained the necessary information, such as facts and data assembled by the board, conducted public hearings, invited and reviewed public comments, conducted studies, and reviewed documentary evidence, to make a proper evaluation of the action, 2) whether the supervisor evaluated the “substantive merits” of the recommended action and whether it “comports with the standards established by the state legislature,” and 3) whether the supervisor has issued a written decision with his or her rationale for the decision regarding the board’s action.<sup>224</sup> The FTC also recommends that, in order to avoid conflicts with antitrust laws, states could create regulatory boards that only serve in an advisory capacity or could staff boards with non-active market participants.<sup>225</sup>

The FTC’s guidance is not realistic, considering the current status of state regulatory boards. In practice, state regulatory boards are generally dominated by active participants.<sup>226</sup> A recent study found that active market participants have a majority on ninety percent of boards in Florida and on ninety-three percent of boards in Tennessee.<sup>227</sup> For the most part, active market participants are best able to regulate their professions and to consider what may place the welfare of the public at stake.<sup>228</sup> For example,

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221. Compare *supra* Part IV.B.1 (discussing the Court’s unclear stance for adequate state supervision), with *FTC Guidance, supra* note 197, at 9–11 (indicating that only a significant amount of supervision by the State will be sufficient).

222. *FTC Guidance, supra* note 197, at 9 (“The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decision to ensure they accord with state policy; and the ‘mere potential for state supervision is not an adequate substitute for a decision by the State.’ Further, the state supervisor may not itself be an active market participant.” (quoting *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1116–17)).

223. *Id.* at 9–10 (quoting *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1111).

224. *Id.* at 10.

225. *Id.* at 1.

226. Edlin & Haw, *supra* note 209, at 1095, 1103.

227. *Id.* at 1103, 1157–64.

228. See *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1122–23 (2015) (Alito, J., dissenting) (underscoring that “[i]t is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions” and that staffing a board with non-market participants who do not have expertise in the field “would also compromise the State’s interest in sensibly regulating a technical profession”).

licensing requirements, and other barriers to entry, may serve as an attempt to cure market inefficiencies.<sup>229</sup> Some anticompetitive actions can be beneficial by curing inefficiencies, that often result from information asymmetry, in the name of the public interest.<sup>230</sup> Some professions have been self-regulated for years, such as dentists and doctors, requiring specific expertise to regulate their profession in order to protect the public from harm.<sup>231</sup> Consequently, self-regulation and practitioner dominated regulatory boards are inevitable, and these boards will have to show sufficient active state supervision in order to invoke *Parker* immunity.

The FTC erred on the side of idealism in its guidance, but the FTC's idealistic requirements for active state supervision are not practical for the states. In implementing the FTC's guidelines, a state agent must not only review the substance of a board's anticompetitive decision but also engage in activities amounting to the level of the promulgation of a regulation: the agency must hold public hearings for anyone affected by the board's intended actions, as well as obtain and verify published studies, data, and information on the specifics and the effects of action, in order for a state board to invoke *Parker* immunity.<sup>232</sup>

Many state regulatory board decisions are in the realm of licensing, which in and of itself creates a barrier to entry into a specific market.<sup>233</sup> Consequently, a board's actions will implicate antitrust laws. As detailed above, since most boards are practitioner dominated and subject to the

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229. See Elhauge, *supra* note 177, at 668–69 (“The motivation for such anticompetitive state and local regulation can range from the benign to the insidious: correcting economic inefficiencies resulting from market failures, furthering noneconomic conceptions of the public interest, or garnering monopoly profits for powerful interest groups that have captured the regulators.”).

230. See *id.* at 702 (“Another body of economic literature establishes the potential for furthering the public interest by regulating and restraining competition to correct market imperfections.”); Edlin & Haw, *supra* note 209, at 1107, 1111 (“For some professions, licensing provides such an obvious public benefit that barriers to entry and regulation of practice are accepted as necessary evils. . . . State professional boards arose from the belief that, for some professions, inexpert practice would be socially inefficient or even dangerous. Licensing created a mechanism by which the government could prevent incompetent practitioners from participating.”).

231. See *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1122–23. (“[M]edical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach.”); see also Edlin & Haw, *supra* note 209, at 1140 (“[P]ractitioner dominance is inevitable. Tailoring restrictions to benefit the public . . . usually requires experience in the profession. Laypersons are generally unable to make judgments about the quality and risks of professional service. . . . But the need for expertise creates a problem: those who have the most to gain from reduced consumer welfare . . . are tasked with protecting consumer welfare in the form of health and safety—the fox guards the henhouse.”).

232. *FTC Guidance*, *supra* note 197, at 11–12 (detailing an example of satisfactory active supervision of a state board regulation).

233. Edlin & Haw, *supra* note 209, at 1096, 1107, 1112, (stating that professional licensing can act as a barrier to entry into the profession but noting that “[f]or some professions, licensing provides such an obvious public benefit that barriers to entry and regulation practice are accepted as necessary evils,” while other restrictions are an abuse of the authority to regulate).

active state supervision requirement, there is concern that every decision made by regulatory boards may be subject to direct oversight and approval by state employees for many of the board's actions.<sup>234</sup> Yet, state agencies and sub-state entities are notoriously understaffed and lack sufficient resources to engage in the oversight the FTC is trying to extract.<sup>235</sup> States routinely delegate their authority to state regulatory boards, in order to overcome resource burdens. Therefore, the FTC's guiding principles and factors for active state supervision are unrealistic, and likely never to be satisfied.

3. *Within the Realm of Anticompetitive Decisions, Regulatory Boards Are Effectively Advisory Boards to Invoke State Action Immunity*

Following *North Carolina State Board of Dental Examiners*, regulatory boards have limited options to avoid federal antitrust liability. In order to avoid active state supervision, states could decide to change the composition of state boards by not requiring a majority of active market participants.<sup>236</sup> Boards could also avoid decisions implicating federal antitrust liability.<sup>237</sup> However, as discussed in Part IV.B.2, these options are unrealistic.<sup>238</sup> While the FTC recommends that a state legislature “generally should [] prefer that a regulatory board be subject to the requirements of the federal antitrust laws,” in practice, this could serve as a

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234. Speech, Maureen K. Ohlhausen, Commissioner, U.S. Federal Trade Commission, Reflections on the Supreme Court's North Carolina Dental Decision and the FTC's Campaign to Rein in State Action Immunity 14 (Mar. 31, 2015), [https://www.ftc.gov/system/files/documents/public\\_statements/634091/150403hertiagedental.pdf](https://www.ftc.gov/system/files/documents/public_statements/634091/150403hertiagedental.pdf) (quoting Brief of Amici Curiae State of West Virginia and 21 Other States in Support of Petitioner at 15, *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534)).

235. Michal Dlouhy, Note, *Judicial Review as Midcal Active Supervision: Immunizing Private Parties from Antitrust Liability*, 57 *FORDHAM L. REV.* 403, 414 (“Even when a strict supervision requirement is imposed only on delegation of state authority to private parties, it requires costly supervision and limits the methods a state may employ to implement a program of regulation.”); see, e.g., Editorial, *State Agencies Dangerously Understaffed, Dependent on Overtime*, *TULSA WORLD* (June 25, 2015), [http://www.tulsaworld.com/opinion/editorials/tulsa-world-editorial-state-agencies-dangerously-understaffed-dependent-on-overtime/article\\_52c4ac37-85fe-5f16-b3eb-428a1fc69f23.html](http://www.tulsaworld.com/opinion/editorials/tulsa-world-editorial-state-agencies-dangerously-understaffed-dependent-on-overtime/article_52c4ac37-85fe-5f16-b3eb-428a1fc69f23.html) (underscoring that state agencies were dangerously understaffed leading to \$32.5 million in overtime in 2014); Rupa Shenoy, *Understaffed and Underfunded, State Medical Examiner Backlogs Swell*, *WGBH NEWS* (May 16, 2014), <https://news.wgbh.org/post/understaffed-and-underfunded-state-medical-examiner-backlogs-swell> (reporting that following “a series of scandals involving piles of unclaimed bodies and pools of blood on autopsy-room floors” the Massachusetts’ Medical Examiner’s Office still did not have the staff nor the financial resources necessary to fulfill its duties).

236. *FTC Guidance*, *supra* note 197, at 1; Ohlhausen, *supra* note 234, at 15.

237. Ohlhausen, *supra* note 234, at 15.

238. See *supra* notes 226–235 and accompanying text.

deterrent for many potential board members.<sup>239</sup> Consequently, if states want to staff their boards with active market participants, who know best how to regulate their field, boards must submit to the stringent active state supervision requirements in the hopes of invoking state action immunity.<sup>240</sup> If a state undertakes to meet the FTC's stringent guidelines, the board is effectively submitting a recommendation.<sup>241</sup> In light of this, there is little difference between the federal rulemaking process and the active state supervision requirement.<sup>242</sup> Essentially, state regulatory boards have been stripped of the authority vested by the State, leaving them powerless to effectuate any agenda, whether state sanctioned or privately interested, that may have anticompetitive effects. Thus, the FTC's decision as to what constitutes enough active state supervision effectively renders state boards as solely advisory bodies.

#### 4. *Enough Supervision Should Be Enough When There Is an Independent Review Commission*

Given the Supreme Court's ruling in *North Carolina State Board of Dental Examiners* that the active state supervision requirement applies to state regulatory boards with a "controlling number of active market participants," states may have to make changes to their regulatory structures.<sup>243</sup> Scholars have debated the value of the active state supervision requirement and have proposed differing solutions.<sup>244</sup> Notably,

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239. *FTC Guidance*, *supra* note 197, at 2–3; *Ortbahn*, *supra* note 214, at 12–13 (stating that "[t]his puts professionals who serve on boards in an awkward position . . . professionals are likely to be put off by the potential for personal antitrust liability" and refuse to continue to serve on boards).

240. *See* N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1114 (2015) (requiring both prongs of the *Midcal* test).

241. *See supra* notes 232–235 and accompanying text.

242. *Compare* OFFICE OF THE FED. REGISTER, A GUIDE TO THE RULEMAKING PROCESS (2011), [https://www.federalregister.gov/uploads/2011/01/the\\_rulemaking\\_process.pdf](https://www.federalregister.gov/uploads/2011/01/the_rulemaking_process.pdf), *with FTC Guidance*, *supra* note 197, at 9–11 (delineating the FTC's standard for sufficient active state supervision).

243. David J. Owsiany, *Federalism Implications of Applying Federal Antitrust Scrutiny to State Licensing Boards*, 15 ENGAGE: J. FEDERALIST SOC'Y PRAC. GROUPS 27, 29, n.65 (2014) ("States would be forced to make sweeping changes to their licensing and regulatory structures, impacting dozens of boards in each state" and potentially impacting over a third of the Nation's workforce. (citing Edlin & Haw, *supra* note 209, at 1144)).

244. *See* Edlin & Haw, *supra* note 209, at 1144, 1146, 1148, 1150 (contending that the active state supervision requirement should apply to licensing boards but that "courts should apply a modified rule-of reason analysis in licensing cases" that would allow licensing boards to cite public safety and quality enhancement justifications). *But see* Elhauge, *supra* note 177, at 695 (arguing that "the Court should dispense with the potentially misleading supervision requirement altogether" in favor of a simplified test where "state action immunity applies only when a financially disinterested state official controls the terms of the challenged restraint"); William H. Page, *State Action and "Active Supervision": an Antitrust Anomaly*, 35 ANTITRUST BULL. 745, 769–70 (1990) (arguing that "[t]he Court should abandon its concern with supervision" and focus on the clear articulation requirement); John Shepard Wiley Jr., *A Capture Theory of Antitrust*

many scholars highlight public participation as a fundamental premise for state action immunity, in order to ensure that a board's anticompetitive actions are in the public's interest.<sup>245</sup> However, public participation in state board affairs is typically low.<sup>246</sup> Furthermore, any solution must consider the current status of regulatory boards and balance the role of state regulatory boards, to which the State has delegated its authority, with the concern for the self-interested nature of active market participants.

In lieu of the complex and exhaustive set of requirements designated by the FTC, states should appoint an independent review commission. The independent review commission would review potential anticompetitive actions by state boards, determine whether a seemingly anticompetitive action serves the public interest or remedies any market inefficiencies, and issue written approval or exercise its veto power. This independent body would only need to apply a simple, but active, review of the evidence presented and exercise their independent judgment as to the reasonableness of a board's actions. In turn, states would still have the flexibility to delegate authority to state regulatory boards, allowing boards to fulfill their governmental role without fear of antitrust scrutiny.<sup>247</sup>

While how to staff and set up these commissions should be left to the states in the interest of state sovereignty, the procedures used should safeguard that none of the members are financially interested or market participants, and further afford members who have a personal stake in a

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*Federalism*, 99 HARV. L. REV. 713, 731–39 (1986) (rejecting the active state supervision prong and proposing a preemption test, evaluating whether a board's actions were in fact a result of regulatory capture). This is not an exhaustive list.

245. See William H. Page, *Antitrust, Federalism, and the Regulatory Process: A Reconstruction and Critique of the State Action Exemption after Midcal Aluminum*, 61 B.U. L. REV. 1099, 1117 (1981) (“Through this application of the *Parker* doctrine, the Court sought to assure the existence of valid popular consent as a prerequisite to coercive and arguable anticompetitive use of state power.”); cf. Thomas Jorde, *Antitrust and the New State Action Doctrine: A Return to the Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 249–50 (1987) (arguing that active supervision provides an opportunity for citizen participation, since “although the public is able to participate in the initial decision to delegate regulatory authority, that is not the critical point at which decisions are made”).

246. Edlin & Haw, *supra* note 209, at 1139–40 (“While most states’ sunshine laws require publication of minutes and require board meetings to be open to the public, only members typically attend. Individual consumers lack the incentive . . . [and] rarely would it be rational for a consumer to take the time and effort to try and change a licensing rule . . . lobbying groups could theoretically fill this void . . . but public choice theory illustrates that meaningful consumer participation in the political process is difficult even with this mechanism.” (first citing Clark C. Havinghurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. HEALTH POL. POL’Y & L. 587, 596 (2006); then citing N.C. Bd. of Dental Exam’rs v. FTC, 151 F.T.C. 607, 626 (2011); then citing FLA. STAT. ANN. § 286.011 (West 2012); then citing TENN. CODE. ANN. §§ 8-44-102, 104 (West 2012); and then citing Ginevra Bruzzone, *Deregulation of Structurally Competitive Services: Economic Analysis and Competition Advocacy*, in THE ANTICOMPETITIVE IMPACT OF REGULATION 5, 21 (Giuliano Amato & Laraine L. Laudati eds., 2001))).

247. See *supra* note 239 and accompanying text.

particular board's actions the ability to recuse themselves.<sup>248</sup> States may choose to appoint or elect citizens to the independent review commission, but should ensure that these individuals are subject to the political process, in order to garner the necessary public participation<sup>249</sup> and political accountability.<sup>250</sup>

To illustrate the possibility of an independent review commission, it is informative to examine California's recent appointment of an independent reapportionment commission, the California Citizens Redistricting Commission ("Commission").<sup>251</sup> Notably, legislators acting out of self-interest have the incentive to draw district lines in a manner that ensures reelection.<sup>252</sup> California citizens tried and were indeed successful in removing the influence of self-interested elected officials by appointing an independent commission.<sup>253</sup> The Commission is composed of fourteen members, with five members from the state's largest political party, five members from the next largest political party, and four members from minor parties or with no party affiliation.<sup>254</sup> Furthermore, the voting structure of the Commission seeks independence by requiring at least three votes from all three groups of commissioners.<sup>255</sup> Additionally, the Commission's system seeks to heighten public participation.<sup>256</sup> Thus, setting up an independent review commission that serves a similar purpose to these redistricting commissions is indeed possible.<sup>257</sup>

An independent review commission would satisfy the active state supervision requirements articulated by the Supreme Court.<sup>258</sup> However,

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248. See Elhauge, *supra* note 177, at 697–702 (arguing that the issue lies in distrust in financially interested decisionmaking).

249. See *supra* notes 245–246 and accompanying text.

250. See *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1111 (2015) (requiring that states "accept political accountability for anticompetitive conduct they permit and control").

251. Angelo N. Ancheta, *Redistricting Reform and the California Citizens Redistricting Commission*, 8 HARV. L. & POL'Y REV. 109, 109 (2014).

252. *Id.*

253. *Id.* at 110.

254. *Id.* at 116 (citing CAL. CONST. art. XXI, § 2(c)(2)).

255. *Id.* at 116–17 (citing CAL. CONST. art. XXI, § 2(c)(5)).

256. *Id.* at 127 ("The Commission system is designed to open up the process, not only by empowering citizens to make the redistricting decisions, but by creating structures that ensure participation and limit decision making outside of the public eye.").

257. Furthermore, the Supreme Court upheld the appointment of the Arizona Independent Redistricting Commission, holding that the U.S. Constitution permits commissions established by popular vote to draw Congressional voting districts. *Ariz. State Legislature v. Ariz. Indep. Redistricting Comm'n*, 135 S. Ct. 2652 (2015). For the Arizona Independent Redistricting Commission, five members are selected from a list of candidates compiled by Arizona's Commission on Appellate Court Appointments and only serve for one redistricting cycle. *Id.* at 2661.

258. Namely, a supervisor must not be an active market participant, must actually review the substance of the actions, must have the power to veto or modify the decision, and must not merely have the potential to review a board's decision. See *supra* notes 201–205 and accompanying text.

this body would relieve the states from the cumbersome FTC requirements, such as copious public hearings and vast information gathering efforts.<sup>259</sup> Consequently, approval by an independent review commission accords with the central concern of restricting the application of the state action doctrine to only when “the anticompetitive scheme is the State’s own.”<sup>260</sup>

## V. CONCLUSION

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, the United States Supreme Court concluded that state regulatory boards with a controlling number of active market participants are subject to both the clear articulation and active state supervision requirements of the *Midcal* test, in order to invoke state action immunity.<sup>261</sup> Although the Court came to the correct holding, that a state regulatory board must prove both *Midcal* prongs and the Board’s actions did not warrant *Parker* immunity,<sup>262</sup> the Court did not articulate clear guidance as to what would constitute sufficient active state supervision.<sup>263</sup> The Court’s inability to give direct guidance, coupled with the FTC’s exacting requirements for active state supervision, have effectively reduced state regulatory boards to advisory boards for anticompetitive actions, in order to invoke *Parker* immunity.<sup>264</sup> In order to overcome the cumbersome FTC requirements by proposing that states set up an independent review commission, this Note seeks to balance a state board’s interest in being able to effectively fulfill their statutory purpose with the public’s interest in ensuring that the board’s actions serve the general welfare.<sup>265</sup>

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259. See *supra* notes 224, 232 and accompanying text.

260. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992).

261. *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1114 (2015).

262. *Id.* at 1117; see *supra* Part IV.A.

263. See *supra* Part IV.B.1.

264. See *supra* Parts IV.B.2–3.

265. See *supra* Part IV.B.4.