No. 12-1172

In the United States Court of Appeals for the Fourth Circuit

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent.

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

BRIEF OF RESPONDENT FEDERAL TRADE COMMISSION (PAGE-PROOF COPY)

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GLOSSARY

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

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

STATEMENT OF JURISDICTION

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

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

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

STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

1. Whether the Commission has jurisdiction over the Board.

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

3. Whether substantial evidence supports the Commission's findings that the Board's exclusion of non-dentist service providers from the market for teeth whitening services—through issuance of extra-judicial cease and desist orders and communications with third parties regarding the purportedly unlawful nature of such services—is anticompetitive and not excused by any procompetitive justification, thus in violation of the FTC Act.

STATEMENT OF THE CASE

This matter involves a petition to review a final FTC cease and desist order against the Board, issued following administrative adjudication under the FTC Act, 15 U.S.C. §§ 41 *et seq*. The Commission issued its administrative complaint on June 17, 2010, charging that the Board violated Section 5 of the FTC Act, 15 U.S.C. § 45, by excluding non-dentist providers from the market for teeth whitening services in North Carolina.[1]

Trial commenced on February 17, 2011, and an administrative law judge (ALJ) issued an Initial Decision on July 14, 2011, finding that the Board's actions violated the FTC Act.[2] The Commission, on appeal, conducted *de novo* review of the record, and concluded that "the Board sought to, and did, exclude non-dentist providers from the market for teeth whitening services in violation of Section 5," Op. 2, and entered its Final Order.

This petition for review followed.

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[1] On February 1, 2011, the Board filed a declaratory action in the United States District Court for the Eastern District of North Carolina, alleging that the FTC's complaint suffers from jurisdictional and constitutional infirmities. That court dismissed the action on jurisdictional grounds. *See North Carolina State Bd. of Dental Examiners v. FTC*, 768 F. Supp. 2d 818 (E.D.N.C. 2011). An appeal of that decision is pending in this Court (No. 11-1679).

[2] On February 3, 2011, the Commission denied the Board's motion to dismiss the complaint on jurisdictional and state action grounds. SA Op. 2.

STATEMENT OF FACTS

A. The Teeth Whitening Services Market

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

Growing demand for teeth whitening services led, around 2003, to the entry of non-dentist providers. Op. 1; IDF 137. These providers generally occupy an intermediate level—in terms of cost, convenience, and efficacy—between dentists' chair-side services and over-the-counter products. IDF 138-150. They utilize

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

intermediate-concentration peroxide, in a single, consumer-administered application, lasting an hour or less. IDF 140, 146, 149-150. Non-dentist services are often offered at prices hundreds of dollars less than dentists' in-office services. IDF 147-150.

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

B. The North Carolina State Board of Dental Examiners

The Board is a state agency, charged with regulating dentistry in North Carolina, IDF 1, 87; N.C.G.S. § 90-48, but funded only by private licensees' dues and fees. IDF 13. It consists of six licensed dentists, elected directly by other state licensed dentists; one licensed dental hygienist, elected by other licensed hygienists; and one consumer member, appointed by the governor. IDF 2-4, 15. The six dentist-members must also be active practitioners while on the Board; thus, they provide for-profit dental services (some including teeth whitening), and have a significant financial interest in the business of their profession. IDF 6, 8, 12. They are elected to three-year, renewable terms. IDF 17, 24-25.

The Board is tasked with enforcing North Carolina's Dental Practice Act (DPA), N.C.G.S. §§ 90-22 *et seq.*, including the licensure and professional conduct

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

C. The Board's Challenged Conduct

Starting in 2003, the Board began receiving complaints from its dentist licensees regarding teeth whitening service offerings by non-dentists at spas, salons, and trade shows. IDF 194-206. Many complainants appeared concerned that the prices of those offerings were undercutting their own. IDF 196, 200, 202; *see also* IDF 232 (dentist complaints attaching price advertisements by non-dentists). Few complaints referred to any consumer harm. IDF 227, 231. The Board's response was to send to non-dentist teeth whiteners "'numerous cease and desist orders

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

throughout the state'." IDF 201 (quoting Board's Chief Operating Officer, *see* CX404).

Prior to the wave of dentist complaints about non-dentist teeth whiteners, the Board handled allegations of unlicensed dental practice by sending "litigation warning letters," containing no cease-and-desist command language, but warning the recipient that the Board was considering litigation for alleged DPA violations. *See, e.g.*, CX136 (October 2000 Board letter to Ortho Depot, stating: "This is to advise you that the [Board] is considering initiating a civil suit to enjoin you from the unlawful practice of dentistry"); CX139 (December 2001 letter, stating: "It has come to the attention of the [Board] that you may be setting up a dental practice in conjunction with the Dowd Central YMCA. This is to advise you that the Board is conducting an inquiry based on this knowledge."). Failure of the recipient to respond prompted the Board to send follow-up letters, similarly devoid of any commands. *See, e.g.*, CX138. Indeed, the Board's Chief Operating Officer testified that sending litigation warning letters (instead of cease and desist orders) did not impair the Board's ability to enforce the DPA. CX573 (White, Dep.) at 10.

The Board's practice of issuing its own, extra-judicial cease and desist orders to non-dentist teeth whiteners began in 2006. IDF 208. A January 2006 Board letter to Serenity Day Spa, for example, noted that the latter is reportedly providing

"'professional teeth whitening,' which would attest that you are engaged in the unlicensed practice of dentistry," and commanded: "You are hereby ordered to CEASE AND DESIST any and all activity constituting the practice of dentistry * * *." CX38 at 1. A May 2006 Board letter to Star-Bright Whitening Systems, Inc., contained an identical command. CX44 at 4-5. *See* IDF 221 (detailing similarly commanding letters to 39 recipients). Beginning in 2007, the volume of dentist complaints about non-dentist teeth whitening providers increased, and "it became the policy of the Board to issue cease and desist letters on the basis of the complaint, without any investigation." IDF 210 (citing CX70; CX562 at 13); *see also* IDF 211-215. In all, between 2006 and 2009, the Board sent at least 47 purported cease and desist orders concerning teeth whitening services. IDF 209, 216-218. All those letters were sent on the Board's letterhead, IDF 219, and at least 40 stated, in bold headings: "NOTICE AND ORDER TO CEASE AND DESIST," or "NOTICE TO CEASE AND DESIST." IDF 220.[5]

The Board's self-described orders were designed to cause the recipients to abandon their provision of teeth whitening services. *See* IDF 234-245. And to at least

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

some recipients, the letters' conspicuously mandatory language was understood as having the force of law. *See* IDF 246-256. Thus, in many cases, non-dentist providers abandoned their teeth whitening businesses. *See, e.g.*, CX162 (salon owner writing to the Board that she would "no longer perform this business as per your order to stop"); CX50 (spa owner writing that, in response to the Board's order, she has ceased offering the service and removed the equipment from her salon); *see also* CX622, CX623, CX658, CX660; Hughes, Tr. 943, 946 (same).

The Board's campaign to exclude rival teeth whiteners targeted not only non-dentist providers, but also third parties with substantial influence over those providers. It told manufacturers and distributors of teeth whitening products, for example, that the provision of such services by non-dentists "is, constitutes, or may constitute, the unauthorized practice of dentistry in North Carolina, which is a misdemeanor." IDF 261 (citing CX100; CX122; CX371; CX110; CX66; Nelson, Tr. 850); *see* IDF 262-285. As a result, many recipients lost or ceased sales of teeth whitening products and delayed or abandoned expansion plans in North Carolina. *See* IDF 269, 272, 278-279, 281, 283, 286. The Board also contacted mall operators, who leased space to teeth-whitening kiosks, asserting that "teeth whitening services offered at these kiosks are not supervised by a licensed North Carolina dentist. Consequently, this activity is illegal." IDF 288 (quoting nearly identical communications, *see* CX203 through

CX205; CX259 through CX263; CX323 through CX326). Mall operators thus became reluctant to lease space to non-dentist providers, and some refused to lease or cancelled existing leases. *See* IDF 294 (citing CX255; CX525; CX629; CX647; Wyant, Tr. 876-884; Gibson, Tr. 627-28, 632-33); *see also* IDF 295-313. The Board's own expert witness reported that, in response to the Board's communications, mall operators "cooperated by refusing to renew leases or rent to operators of teeth whitening services." RX78 at 8.

Finally, the Board buttressed its exclusionary campaign by seeking, and receiving, the help of the North Carolina Board of Cosmetic Art Examiners—the state regulator of salons and spas—which posted a website notice to its licensees, drafted by the Board, asserting that teeth whitening services constituted dentistry, thus a misdemeanor if provided by a cosmetologist. *See* IDF 314-323. As a result, some cosmetologists abandoned their offerings of non-dentist teeth whitening services. *See* IDF 324-327.

D. The Commission's Decision

On the Board's motion to dismiss, the Commission first rejected the Board's state action defense. An ALJ then conducted a hearing and concluded that the Board's conduct violated the FTC Act. The Commission reviewed that record *de novo* and concluded that the Board's actions were indeed anticompetitive and not excused by

any legitimate justification, and thus in violation of the FTC Act. Accordingly, the Commission issued a cease and desist Final Order against the Board.

1. The Board's State Action Defense

The Commission rejected the Board's argument that the state action doctrine shields it from federal antitrust scrutiny. SA Op. 1-2. Applying the familiar two-part test of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980), the Commission assumed without deciding that the Board could meet the "clear articulation" element of that test (SA Op. 7 n.8), and focused instead on the "active state supervision" requirement. It concluded first that the Board must satisfy that element of the test. *Id.* at 8-9. Surveying Supreme Court teachings on this issue, the Commission recognized that, in determining whether active supervision is required, "the operative factor is a tribunal's degree of confidence that the entity's decision-making process is sufficiently independent from the interests of those being regulated." *Id.* at 9. It pointed out that the Court "has been explicit in applying the antitrust laws to public/private hybrid entities, such as regulatory bodies consisting of market participants." *Id*. (citing *Goldfarb v. Va. State Bar*, 421 U.S. 773 (1975)). It also noted that several courts of appeals, including this Court, have held that financially interested governmental bodies must meet the active supervision requirement. *Id*. at 9-10 (citing, *inter alia*, *Asheville Tobacco Bd. of Trade, Inc. v.*

FTC, 263 F.2d 502 (4th Cir. 1959)). Given that "the decisive majority of the Board * * * earns a living by practicing dentistry," and, thus, has an "obvious interest in the challenged restraint," the Commission concluded that "the state must actively supervise the Board in order for the Board to claim state action protection." *Id*. at 2.

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

2. The ALJ's Initial Decision

The ALJ then held a hearing between February 17 and March 16, 2011. ID 3-4. He heard testimony from sixteen witnesses, resulting in over 3,000 pages of transcript,

and admitted over eight-hundred exhibits in evidence. *Id*. In the end, he concluded that concerted action by the Board to exclude non-dentists from the market for teeth whitening services in North Carolina constituted an unreasonable restraint of trade, and an unfair method of competition in violation of the FTC Act. *Id*. at 8-9.

3. The Commission's Merits Decision

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

a. Concerted Action

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

joint decisions could deprive the marketplace of actual or potential competition." Op. 16.

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

b. Restraint of Trade

Turning to the question whether the Board's actions constituted an unreasonable restraint of trade, the Commission assessed the Board's conduct under three alternative modes of analysis under the rule of reason, each of which has been endorsed by the Supreme Court: an abbreviated analysis based on the inherently suspect nature of the restraint; an analysis assessing the restraint's likely impact in light of defendants' market power; and an analysis based on a showing of actual

anticompetitive effects. *See* Op. 11-13, 18 (citing *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447 (1986)).

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

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

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

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

Turning to the Board's proffered justifications, the Commission concluded that the Board—having failed to satisfy the elements of the state action doctrine, which affords States a means of accommodating their general health and welfare concerns—could not assert such concerns as a procompetitive justification for its restraint on competition. Op. 24-25 (citing *National Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978); *Indiana Fed'n*, 476 U.S. at 452; *Virginia Acad. of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 485 (4th Cir. 1980)).

Further, it found that, even if the Board's proffered justification were cognizable within an antitrust rule of reason analysis, contemporaneous evidence supporting its claim was lacking. *Id*. at 26-27. It concluded that "the record as a whole fails to substantiate [the Board's] public safety claims." *Id*. at 28.[6]

c. Remedy

Having concluded that the Board's conduct violated the FTC Act, the Commission issued a cease and desist order enjoining the Board from unilaterally issuing extra-judicial cease and desist orders against non-dentist providers of teeth whitening services, or communicating to those providers or to others that the provision of such services by non-dentists is a violation of the DPA. *See* Final Order, at 3. The Final Order explicitly provided, however, that its terms do not prohibit the Board from (i) investigating non-dentists for suspected DPA violations; (ii) filing court actions against non-dentists for alleged DPA violations; or (iii) pursuing administrative remedies authorized by state law. *Id*. at 4. It also excluded from its injunctive provisions the Board's communicating to third parties (i) notice of its belief or opinion that a particular method of teeth whitening may violate the DPA; (ii) factual information regarding legislation or court proceedings concerning teeth

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

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

STANDARD OF REVIEW

"The findings of the Commission as to the facts, if supported by evidence, shall be conclusive." 15 U.S.C. § 45(c). This formulation has been accepted by the courts as referring to the "essentially identical 'substantial evidence' standard for review of agency factfinding." *Indiana Fed'n*, 476 U.S. at 454; *accord Telebrands Corp. v. FTC*, 457 F.3d 354, 358 (4th Cir. 2006). Thus, a reviewing court "must accept the Commission's findings of fact if they are supported by 'such relevant evidence as a reasonable mind might accept as adequate to support a conclusion'." *Indiana Fed'n*, 476 U.S. at 454 (quoting *Universal Camera Corp. v. NLRB*, 340 U.S. 474, 477 (1951)). It may not, however, "'make its own appraisal of the testimony, picking and choosing for itself among uncertain and conflicting inferences'." *Id*. (quoting *FTC v. Algoma Lumber Co.*, 291 U.S. 67, 73 (1934)); *accord United States Retail Credit Ass'n, Inc. v. FTC*, 300 F.2d 212, 221 (4th Cir. 1962) ("An inference made by an administrative agency may not be set aside upon judicial review because the court would have drawn a different inference").

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

Finally, the Commission has "broad discretion" in fashioning an effective and appropriate order to remedy violations of the FTC Act, and "courts will interfere with the remedy selected by the FTC 'only where there is no reasonable relation between the remedy and the violation'." *Telebrands*, 457 F.3d at 358 (quoting *Atlantic Ref. Co. v. FTC*, 381 U.S. 357, 377 (1965)).

SUMMARY OF ARGUMENT

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

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

Nor does the Board challenge the Commission's findings concerning a prima facie violation of the antitrust laws. The Board does not challenge the relevant market, or that—by virtue of its statutory authority to regulate and discipline dentists—it has the power to exclude competition within that market. Nor does it challenge the findings that, as a result of its actions, many non-dentist providers of teeth whitening services forwent market participation or were denied access to teeth whitening products and retail space.

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

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

Second, as to the state action defense, the Commission correctly held that the Board—as a state regulatory body controlled by the very market participants it is tasked to regulate—must (but does not) meet the active supervision prong of that defense. Precedents from both the Supreme Court and this Court make clear that active supervision is required unless the state entity engaged in the challenged conduct possesses "sufficient independent judgment and control" to establish that its actions were the "product of deliberate state intervention." The Board lacks such attributes. And its attempts to distinguish those binding precedents are unconvincing, leaving it with the irrelevant assertion that other courts have reached contrary conclusions.

Binding precedent, and sound antitrust policy, mandate that this Court affirm the Commission's ruling on this issue.

Third, the Commission's finding of concerted action in this case is supported by substantial record evidence. The dentist Board members, who indisputably control the Board and actively maintain their dental practices while serving on it, are capable of concerted action because, as actual or potential competitors, they have distinct and potentially competing economic interests (and a "personal stake" in the challenged restraint on trade), and thus form "independent centers of decisionmaking." Direct and circumstantial evidence demonstrate, moreover, that the dentist Board members implemented a calculated campaign to exclude their non-dentist rivals from the teeth whitening services market. The Board's contrary arguments misapprehend the nature of the conduct condemned by the Commission. The conduct challenged here is not the enforcement of state law, but the unilateral issuance of extra-judicial cease and desist orders, and the unsupported assertions to third parties that non-dentist teeth whitening is illegal.

Finally, the Board's purported justifications for its exclusionary conduct—that it was acting to safeguard legal competition or to maintain the professional reputation of dentists—are neither cognizable under the antitrust laws, nor borne out by the record in this case. Likewise without merit is the Board's claim that it was only acting

to protect public health. States are free, within the bounds of the state action doctrine, to displace competition in order to further such public policies. But, where the Board acts without the protection of the state action defense, it may not itself determine that competition in the market for teeth whitening services is incompatible with the public interest. In any event, the Commission correctly determined that the Board's claim on this point is unsupported by the record.

ARGUMENT

I. THE COMMISSION HAS JURISDICTION OVER THE BOARD

The Board makes the perfunctory argument that the Commission lacks jurisdiction over it, on the ground that it is "not a person, partnership, or corporation," within the meaning of the FTC Act. *See* Br. 23 (citing *Parker v. Brown*, 317 U.S. 341, 350-51 (1943); *California State Bd. of Optometry v. FTC*, 910 F.2d 976, 981 (D.C. Cir. 1990)). Neither of those cases has any bearing on the Board's jurisdictional argument that it is not a "person" under the FTC Act, however, as both dealt with the state action antitrust exemption, discussed in detail in Part II below.[7]

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[7] In *California Bd. of Optometry*, the D.C. Circuit did pose the question "whether a State acting in its sovereign capacity is a 'person' * * * under section 5(a)(2) of the [FTC] Act," 910 F.2d at 979, but it apparently answered that question in the affirmative, before deciding the case on state action grounds. After concluding that neither the text nor legislative history of the FTC Act was decisive on the "state as person" question, it turned to the "dispositive" rules of statutory construction, observing that "several Supreme Court decisions hold that a State *is* a person for purposes of the antitrust laws." *Id*. at 980 (emphasis original). Then, having reached

Recognizing their central role in ordering the market, and thus their capacity for anticompetitive conduct, the Supreme Court has held that public entities are "persons" covered by the antitrust laws. *See Jefferson Cnty. Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 155 (1983); *Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 395 (1978); *Georgia v. Evans*, 316 U.S. 159, 162 (1942). The Commission has construed the FTC Act, consistent with the Court's reasoning in these decisions, as applying to state regulatory boards, such as the Board.[8] SA Op. 5-6; *see, e.g.*, *Virginia Bd. of Funeral*

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that answer, it turned to the eventually decisive state action issue. *See id*. ("Although a State may be a 'person' for purposes of the antitrust laws, it is equally clear, under the 'state action' doctrine * * * it is exempt from the antitrust laws * * *); *see also id*. ("properly framed, the question before us is not simply whether a State is a person under section 5(a)(2) of the Act, but whether a State acting in its sovereign capacity is subject to the Act"). At any rate, unlike *California Bd. of Optometry*, this case does *not* challenge any state legislation. As we show below, the Commission challenged only the exclusionary but unsupervised actions of the Board—a state agency, to be sure, but not *itself* sovereign.

[8] *Jefferson County* is particularly instructive here. In holding state agencies and subdivisions *not* exempt from the Robinson-Patman Act, the Supreme Court reasoned that (1) the statute "by its terms does not exempt state purchasers"; (2) when Congress intended to exclude a class of persons, it did so explicitly, and the "only express exemption is that for nonprofit institutions"; (3) the term "persons" is "sufficiently broad to cover governmental bodies"; (4) "the legislative purpose and history * * * reveals no such contrary intention," to exempt public entities; and (5) "there is a heavy presumption against implied exemptions from the antitrust laws." 460 U.S. at 154, 154-55, 155, 157, 158 (internal quotation marks and citations omitted). These factors apply with equal force to the FTC Act's prohibition on unfair methods of competition. The Act exempts nonprofit corporations, but contains no express exemption for state entities. And its legislative history expresses no intention to exempt the States, but does—as we discuss below—show Congress's intention to expand the Commission's jurisdiction beyond business entities.

Dirs. & Embalmers, 138 F.T.C. 645 (2004); *South Carolina State Bd. of Dentistry*, 138 F.T.C. 229 (2004); *Massachusetts Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988). Contrary to amici's arguments, the Commission's construction of its organic statute is supported by both the text and legislative history of that Act.

Amici argue that the FTC Act's use of the term "persons" in conjunction with "partnerships, or corporations" means that the term "must refer to natural persons," lest the other terms become surplusage. ADA Br. 4.[9] But such a reading is compelled by neither precedent nor reason.[10] First, the conjunction of "persons" with other terms does not, in itself, limit the meaning of that term to "natural persons." In *Union Pacific R.R. Co. v. United States*, for example, the Supreme Court—holding that a municipality was a "person"—rejected such a reading of Section 1 of the Elkins Act, 49 U.S.C. § 41, which made it unlawful for "any person, persons, or corporations" to

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[9] Section 5 of the FTC Act provides, in relevant parts:

> The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions * * *, Federal credit unions * * *, common carriers * * *, and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act * * *, from using unfair methods of competition in or affecting commerce * * *.

15 U.S.C. § 45(a)(2).

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

give or receive rebates in connection with the transportation of property in interstate commerce. 313 U.S. 450 (1941). Moreover, Congress has used the term "natural person(s)" in other antitrust statutes, indicating that, in those instances, it had intended such a limitation on the meaning of "person." *See, e.g.*, 15 U.S.C. §§ 15c(a)(1) ("Any attorney general of a State may bring a civil action in the name of such State, as parens patriae on behalf of natural persons residing in such State"); 1311(f) ("the term 'person' means any natural person, partnership, corporation, association, or other legal entity."). But Congress chose not to do so in the FTC Act.

Nor does the conjunction render the terms "partnerships, or corporations" surplusage. These terms are subject to specific definitions and exemptions in another section of the statute, so it was necessary for Congress to separate them from the more generally applicable term "persons." *See* 15 U.S.C. § 44 (defining "corporations" as entities "organized to carry on business for its own profit or that of its members," but excepting "partnerships" from that definition); *see also Community Blood Bank of Kansas City Area, Inc. v. FTC*, 405 F.2d 1011, 1017 (8th Cir. 1969) ("Congress intended to exclude some corporations from the Commission's jurisdiction"). Of course, to the extent that the statutory text is deemed ambiguous, the Commission is entitled to deference in reasonably interpreting its organic statute. *See National Fed'n of the Blind v. FTC*, 420 F.3d 331, 337 (4th Cir. 2005) ("*Chevron* instructs that we

first review the statute to see if the intent of Congress is clear. If Congress has not answered the question at hand, then we defer to the agency's interpretation of the statute, so long as it is a reasonable one") (citing *Chevron U.S.A., Inc. v. Natural Res. Def. Council, Inc.*, 467 U.S. 837, 842-43 (1984)).

Amici also argue that the legislative history of the FTC Act supports their narrow reading of "persons." ADA Br. 6-7. But the legislative history—to the extent it points in any one direction, *see Community Blood Bank*, 405 F.2d at 1017 (characterizing that legislative history as "not too illuminating")—evinces Congress's clear intent to *expand* the jurisdiction of the Commission. The legislation originally focused only on corporations (as the Commission initially was to assume the investigative functions of the existing Bureau of Corporations), and the phrase "persons, partnerships, and corporations" was inserted as an amendment, offered by Senator Cummins, 51 CONG. REC. 13044, 13018-09 (1914), because of concerns that restraints of trade were not limited to corporations. *See* 51 CONG. REC. 12215 (July 16, 1914) (Statement of Senator Sterling). Commenting on the proposed expanded powers, Senator Brandegee noted that the Cummins amendment "authorizes the commission to prohibit what the bill declares to be unlawful by whosoever the offense is committed." 51 CONG. REC. 13103 (Aug. 1, 1914); *see id*. ("If unfair competition is an offense at law, * * * it ought to be prohibited and punished, no

matter by whom committed"). After the Senate language was adopted in conference, the sponsor of the House version (and member of the conference committee) described the newly expansive language as "embrac[ing] within the scope of that section every kind of person, natural or artificial, who may be engaged in interstate commerce." 51 CONG. REC. 14928 (Sept. 10, 1914) (Statement of Mr. Covington).

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

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

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

In *Parker*, the Supreme Court held that Congress did not intend the Sherman Act to extend to acts of the sovereign States, thus giving birth to what became the "state action doctrine." 317 U.S. at 350-51. But, to accommodate a national economic policy built on "fundamental and accepted assumptions about the benefits of competition," *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992), the doctrine exempts from federal antitrust law only States' *sovereign* policy choices. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 574 (1984) (exemption applies to conduct "of the State acting as a sovereign"). Thus, in *Midcal*, the Court held that non-sovereign parties qualify for state action exemption only upon showing that their conduct was both (1) taken pursuant to a "clearly articulated and affirmatively expressed [] state policy;" and (2) "actively supervised by the State itself." 445 U.S. at 105 (internal quotation marks omitted).

The Court refined its *Midcal* requirements in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). First, it confirmed that municipalities are not *ipso facto* exempt, because "they are not themselves sovereign," *id*. at 38, and thus can only enact anticompetitive regulations pursuant to a clearly expressed state policy to displace competition. *Id*. at 40. Second, the Court held that municipalities need not

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

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

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

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

A. The Board Must Show Active State Supervision in Order to Qualify for State Action Exemption

The Supreme Court has explained that the active supervision requirement serves to ensure that "the State has exercised *sufficient independent judgment and control* so that the details of the [restraint] have been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634 (emphasis added); *see also Patrick*, 486 U.S. at 100 (requiring active supervision "stems from the recognition that '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'.") (quoting *Hallie*, 471 U.S. at 47). Accordingly, the Court has required active state supervision—and applied the federal antitrust laws in its absence—whenever the actor lacked such "sufficient independent judgment and control." *E.g.*, *Goldfarb*; *Midcal*; *Patrick*; *Ticor*. The Court has not confronted directly the question whether a state regulatory agency controlled by private market participants (such as the Board) must be actively supervised in order to qualify for *Parker* exemption. But its reasoning in cases in which such bodies were denied antitrust exemption leaves no doubt that the operative factors in demanding active supervision have to do, *not* with the formalities

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

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

analysis might well have been different. *See* 421 U.S. at 791. But absent such active supervision, and where the state agency is not sufficiently independent from private interests, even "a state agency by law" would not be exempt from the antitrust laws. *Id*. at 790.

Likewise, this Court has found the absence of active state supervision determinative in denying exemption to a state regulatory board comprising market participants. *Asheville Tobacco* concerned the conduct of a local board, authorized by state law "to make reasonable rules and regulations for * * * the sale of leaf tobacco at auction." 263 F.2d at 505. "[O]nly warehousemen or their general managers [were] eligible for membership on * * * the governing body of the [tobacco] Board." *Id*. Defending against allegations of market allocation, the tobacco board claimed antitrust exemption as "an administrative agency of the State of North Carolina, exercising powers delegated to it by the legislature." *Id*. at 508. This Court denied the exemption, explaining that "the state may regulate [an] industry in order to control or, in a proper case, to eliminate competition therein. It may even permit persons subject to such control to participate in the regulation, provided their activities are adequately supervised by independent state officials." *Id*. at 509. This Court also affirmed the Commission's finding that independent supervision was lacking, because—like the Board here—"[t]he State bears no part of the expense of operating

boards of trade. The officers and directors of the Asheville Board, and of other boards, are neither elected by the people nor appointed by State authority; they are businessmen who own and operate warehouses on the tobacco market. They are not accountable to the State, and are not supervised in any manner by State officials." *Id.* at 510.[13]

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[13] Other courts of appeals have reached similar conclusions. *See, e.g.*, *Washington State Elec. Cont'rs Ass'n, Inc. v. Forrest*, 930 F.2d 736, 737 (9th Cir. 1991) (requiring supervision because private members of state agency "have their own agenda which may or may not be responsive to state * * * policy"); *FTC v. Monahan*, 832 F.2d 688, 689-90 (1st Cir. 1987) (Breyer, J.) (whether state board activities "are 'essentially' those of private parties," thus requiring supervision, "depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists"); *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011, 1018 (3d Cir. 1971) ("the relevant distinction is between genuine governmental action controlling the anticompetitive practice, and an attempt by government officials to 'authorize individuals to perform acts which violate the antitrust laws'") (quoting *Asheville Tobacco*, 263 F.2d at 509).

The Board's attempts to distinguish these authorities are unconvincing. *See* Br. 35-38. It points to the *Forrest* apprenticeship council having public and private members, but the Board here is even more accountable to private pecuniary interests, with a decisive majority of its members actively practicing dentists, elected by other dentists. Likewise, it argues that the *Monahan* board was enforcing internal rules, but that fact played no role in then-Judge Breyer's conclusion that being "a subordinate governmental unit," 832 F.2d at 689, does not alone relieve it from having to show supervision. Finally, the Board's attempt to distinguish *Norman's* is misleading. It describes that decision as involving "a Virgin Islands law exceed[ing] 'the authority granted to the Virgin Islands legislature by Congress'," and thus inapposite. Br. 37 (quoting 444 F.2d at 1016). But the quoted language by the court of appeals referred to "section 3 of the Sherman Act," not to the Islands' *power* to pass the law. 444 F.2d at 1016. The decision, in fact, denied antitrust exemption for lack of supervision. *See id.* at 1018 (regulatory board enforcing the Virgin Islands law "has no power to approve, disapprove, or modify the prices fixed by private persons").

Like the market in *Asheville Tobacco*, dentistry in North Carolina is effectively a *self-regulated* market, with governmental power enforcing private decisions. Its regulator—the Board—is controlled decisively by active market participants who are economically affected by competitive threats from new entrants (such as non-dentist teeth whiteners), and thus are "persons with economic incentives to restrain trade." *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 501 (1988); *see* Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 689 (1991) (*Allied Tube* "confirm[s]" the *Goldfarb* and *Continental Ore* "principle that financially interested action is always 'private action' subject to antitrust review");[14] *see also Fisher v. City of Berkeley*, 475 U.S. 260, 267-68 (1986) ("Where private actors are thus granted 'a degree of private regulatory power,' the regulatory scheme may be attacked under § 1 [of the Sherman Act]") (internal citation omitted). Moreover, the dentist Board members are elected to the regulatory body by market peers (and rivals), and thus are not subject to any significant form of public accountability. *See Ticor*, 504 U.S. at 635 ("Federalism serves to assign political responsibility, not to obscure it. * * * For States which do choose to displace the free

[14] *Continental Ore Co. v. Union Carbide and Carbon Corp.*, 370 U.S. 690 (1962), held that an alleged antitrust conspirator, "acting as an arm of the Canadian Government," *id*. at 704, was not exempt by *Parker*, *id*. at 706, because the governmental agent, and other alleged co-conspirators, "were engaged in private commercial activity," *id*. at 707, with no evidence that "any other official within the structure of the Canadian Government approved" the agent's conduct. *Id*. at 706.

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

Prominent antitrust commentators agree. Professors Areeda and Hovenkamp have concluded in their leading treatise, for example, that conduct of "any organization in which a decisive coalition (usually a majority) is made up of participants in the regulated market" should be treated as private conduct for state action purposes, in which case "outside supervision seems required." *See* Phillip E. Areeda & Herbert Hovenkamp, 1A ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶227b at 208, ¶224a at 93 (3d ed. 2009). Likewise, Professor Elhauge has reported, after reviewing the Supreme Court's state action cases, that "financially interested action is always 'private action' subject to antitrust review." Elhauge, *supra*, 104 HARV. L. REV. at 689.

The Board's reliance on decisions from other Circuits is misplaced. *See* Br. 31-34.[15] Most of those decisions are inapposite, and those that do address the question

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

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

B. The Board Has Failed to Show Active State Supervision

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

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

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

its communications to third parties, that non-dentist teeth whitening was unlawful, were not grounded in any judicial decision holding such services unlawful. Nor was there any "pointed reexamination" of the Board's actions by any other state official. *See Midcal*, 445 U.S. at 106; *Bates*, 433 U.S. at 362.

To be sure, there were other means available to the Board, by which to exclude non-dentists from performing teeth whitening. Promulgating a formal Board rule or binding interpretation of the DPA concerning teeth-whitening-as-dentistry would be subject to the state's Administrative Procedure Act and to review by legislative committees. N.C.G.S. §§ 150B-21.2(g), 120-70.100. And a lawsuit based on such determination, to enjoin allegedly illegal teeth whitening, must then be brought in state court. N.C.G.S. §§ 90-40 & 40.1. But, as the Commission correctly pointed out (*see* SA Op. 17), even if *ex-post* judicial, legislative, or executive review of the Board's classification of teeth whitening as dentistry were to constitute adequate state supervision,[17] the Board did not exercise any of those options. Instead, it chose to evade independent review altogether, by proceeding directly to issuing extra-judicial

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

cease and desist orders that purport to enforce its unilateral, unsupervised classification of teeth whitening as dentistry.[18]

C. Requiring Active State Supervision of the Board's Exclusionary Conduct Is Consistent with the Policies Underlying *Parker*

The alarm bells sounded by the Board and amici, foretelling dire consequences from demanding that the Board's conduct be actively supervised, ring hollow. *See* Br. 40-41; ADA Br. 19-20; AMA Br. 16-21; NABP Br. 23-29; FSBPT Br. 20-24. The Commission's decision is firmly grounded in the policies underlying *Parker*, and its practical effect, both in North Carolina and elsewhere, is likely to be narrow.

Parker and its progeny represent a careful balance between judicial respect for the principles of federalism and, otherwise, strict adherence to a national policy "of such a pervasive and fundamental character" in favor of competition. *Ticor*, 504 U.S. at 632. Moreover, because it exempts conduct that otherwise would be illegal under federal law, the state action doctrine is "disfavored" and must be narrowly construed. *Id*. at 636. State regulatory bodies, such as the Board, can wield enormous market power by virtue of their inherent ability to order the markets they regulate, including

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[18] Before the Commission, the Board argued that state reporting provisions provided the requisite supervision. *See* SA Op. 15-17. But, generic oversight cannot be deemed approval of the "particular anticompetitive acts" at issue. *Patrick*, 486 U.S. at 101. And, as the Commission noted (SA Op. 16), none of those provisions suggests that other state officials were even aware of the Board's actions, much less approved them. The Board appears to have abandoned this argument.

by deciding who can participate in these markets, and under what conditions. When an entity endowed with such extraordinary market power is composed of incumbent market participants, the potential for abuse requires a system of checks to ensure that its decisions are consistent with the state policy underlying its grant of regulatory power. Under such circumstances, "sole reliance on the requirement of clear articulation will not allow the regulatory flexibility that * * * States deem necessary," because "it cannot alone ensure * * * that *particular* anticompetitive conduct has been approved by the State." *Id*. at 637; *cf. Hallie*, 471 U.S. at 39 ("the State may not validate [a state actor's] anti-competitive conduct simply by declaring it to be lawful.") (citing *Parker*, 317 U.S. at 351).

Many states have recognized this potential for unintended exclusionary conduct by their regulatory boards, and have accordingly set in place various regimes that seek to insulate these boards' decisions from private interests through varying degrees of independent review and approval of board actions.[19] *See* White, Tr. 2255 (Board's

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[19] In West Virginia, for example, the dental board can only propose rules, to be adopted by the legislature. *See* W. Va. Code § 30-4-6. Likewise, in Connecticut, Illinois and Utah, the dental board has authority only to make recommendations to another (independent) state official. *See* Conn. Gen. Stat. Ann. § 20-103a; 225 Ill. Comp. Stat. § 25/7; Utah Code Ann. § 58-1-202. *See also, e.g.*, Colo. Rev. Stat. Ann. § 12-35-104 (Colorado dental board under supervision and control of state division of registrations); Mass. Gen. Laws Ann. 112 § 1 (Massachusetts public health commissioner supervises work of dental board).

Indeed, even in North Carolina, the great majority of state regulatory boards

COO acknowledging that other states have "umbrella agencies" over licensing boards). The States are likewise free to establish mechanisms by which particular actions undertaken by regulatory boards are made subject to judicial or other control. Whether, in a particular instance, a regulatory action requires supervision and has in fact been adequately supervised to meet the *Midcal* standard are questions that can only be answered on a case-by-case basis. But the existence of myriad ways in which the States can—and do—structure the regulation of the professions shows that upholding the Commission's carefully tailored ruling in the present case will do nothing to preclude effective state regulation.

The Board and amici point out that dentists form a learned profession, with such appurtenant constraints as licensure and an ethics code, and often have, in addition to pecuniary interests, concerns for advancing public welfare. *See* Br. 57-59; AMA Br. 8-10; NABP Br. 23-27. But these factors, as *Goldfarb* made clear, do not neutralize the incentive for a class of market participants to conduct themselves for their own benefit or for the benefit of those being regulated, and thus cannot justify doing away with active (independent) state supervision. *See Professional Engineers*, 435 U.S. at 696 (rejecting blanket antitrust exemption for learned professions). To conclude

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

otherwise would be to ignore "the central substance of the situation," *American Needle*, 130 S. Ct. at 2209-10, and to look at the competitive world through rose-colored glasses.

Thus, the assertion by the Board and amici that the Commission's ruling here represents a broadside attack on state regulation of the professions is without foundation. The conduct that the Commission addressed here was stark: a body controlled decisively by actors with vested economic interests, acting entirely extra-judicially and with no supervision by any accountable state official, taking direct actions to squelch competition. If state law indeed authorized such actions by economically interested actors,[20] then federal antitrust policy rightly insists that they be subject to active supervision by disinterested state officials. Recognizing this modest but important principle still leaves ample room for effective state regulation of all aspects of professional activities.

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[20] In truth, it appears that state law did *not* authorize such actions, but instead contemplated that the Board would seek exclusion of allegedly unauthorized dental practice through the judicial system. N.C.G.S. § 90-40.1(a); *see supra* note 4 and accompanying text. While the lawfulness of the Board's activities under state law was not before the Commission, and is not before this Court, the likelihood that the Board's challenged actions were not authorized by state law shows that the Commission's prohibition of such practices is unlikely to be widely applicable to state regulatory boards in North Carolina, much less nationwide.

III. THE COMMISSION CORRECTLY HELD THAT THE BOARD'S ACTIONS VIOLATED THE FTC ACT

In assessing the Board's conduct under the FTC Act, the Commission properly applied the standards of Section 1 of the Sherman Act, *see California Dental*, 526 U.S. at 762 & n.3; *Indiana Fed'n*, 476 U.S. at 451-55,[21] and concluded correctly that the Board's conduct constituted concerted action; had a tendency and likelihood to, and in fact did, harm competition; and was not excused by any legitimate justification. Op. 2.

A. The Board's Challenged Conduct Constitutes Concerted Action

The Commission's conclusion that the dentist members of the Board undertook a conspiracy to restrain trade in the market for teeth whitening services is supported by law and substantial evidence.

1. The Board Members Are Capable of Concerted Action

"Independent action is not proscribed" by Section 1 of the Sherman Act, so "something more" than evidence of conduct merely consistent with unilateral action—i.e., "evidence that tends to exclude the possibility of independent action"—"is needed." *Monsanto Co. v. Spray-Rite Serv. Corp.*, 465 U.S. 752, 761,

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[21] A violation of Section 1 of the Sherman Act requires the showing of a "contract, combination * * * or conspiracy," effecting an unreasonable "restraint of trade." 15 U.S.C. § 1; *State Oil Co. v. Khan*, 522 U.S. 3, 10 (1997); *Robertson v. Sea Pines Real Estate Cos., Inc.*, 679 F.3d 278, 284 (4th Cir. 2012); *Dickson v. Microsoft Corp.*, 309 F.3d 193, 202 (4th Cir. 2002).

768, 764 (1984); *see Oksanen v. Page Mem'l Hosp.*, 945 F.2d 696, 702 (4th Cir. 1991) (*en banc*) (Section 1 "applies only to concerted action; unilateral conduct is excluded from its purview"). Recent decisions from the Supreme Court and this Court confirm that the dentist members of the Board are capable of such concerted action.

In *American Needle*, the Supreme Court held unanimously that conduct of the National Football League Properties (NFLP)—a separately incorporated joint venture of the thirty-two members of the National Football League (NFL)—could constitute concerted action. The Court re-affirmed its long-held principle that "'substance, not form, should determine whether a[n] * * * entity is capable of conspiring'," and that "concerted action under § 1 does not turn simply on whether the parties involved are legally distinct entities." 130 S. Ct. at 2211, 2209 (quoting *Copperweld Corp. v. Independent Tube Corp.*, 467 U.S. 752, 773 n.21 (1984)). The key functional inquiry is, instead, whether an agreement exists "amongst 'separate economic actors pursuing separate economic interests,' such that the agreement 'deprives the marketplace of independent centers of decisionmaking,' and therefore of 'diversity of entrepreneurial interests,' and thus of actual or potential competition." *Id*. at 2212 (internal citations omitted). Applying these standards, the Court held that NFLP's activities constituted concerted action, because the NFL members "remain separately controlled, potential competitors with economic interests that are distinct from NFLP's." *Id*. at 2215.

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

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[22] Indeed, this Court has long recognized a "personal stake" exception to *Copperweld*'s intra-firm immunity. *See, e.g., American Chiropractic Ass'n, Inc. v. Trigon Healthcare, Inc.*, 367 F.3d 212, 224 (4th Cir. 2004); *Oksanen*, 945 F.2d at 705-06; *Greenville Publ'g Co. v. Daily Reflector, Inc.*, 496 F.2d 391, 399-400 (4th Cir. 1974).

Here too, the dentist Board members are distinct economic actors, with financial interests in restraining trade in the teeth whitening services market. The DPA requires that the dentist Board members continue to be "actually engaged in the practice of dentistry" while serving on the Board, N.C.G.S. § 90-22(b), thus ensuring that they remain potential competitors with distinct economic interests.[23] The Board's own economic expert acknowledged that dentist Board members have a financial interest in the challenged restraints, and that the Board's decision to exclude non-dentists "may well [have been] influenced by the impact on the bottom line." *See* Baumer, Tr. 1781, 1856, 1859-62; CX826 at 28-34.[24] Thus, the Commission correctly concluded that, because they "have a significant, nontrivial financial interest in the business of their profession, including teeth whitening," Op. 15, the dentist Board members were capable of § 1 conspiracy. *See Oksanen*, 945 F.2d at 706 (medical staff "comprised of physicians with independent and at times competing economic interests * * * have

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

[24] Professor Baumer also testified that state regulatory boards can be, and have been, used to exclude competition to augment the incomes of their members. Baumer, Tr. 1763, 1848-50, 1855-56, 1884, 1896-98, 1901-03, 1911-13, 1915; RX78 at 8.

the capacity to conspire as a matter of law"). The Board's contrary arguments are unpersuasive.

The Board argues that its members cannot collude because they are "required to comply with a number of statutory safeguards to remove any potential financial interests." Br. 44. First, the Board does not explain how those statutory provisions—related to ethics-in-government standards—preclude the existence of an agreement as a matter of law. *See* N.C.G.S. §§ 138A-14(b) (basic ethics training); 138A-21 (disclosure of financial and personal interests); 138A-27 (penalties for false disclosure forms). Such provisions are not designed to, and do not, preclude efforts by market participants, using their market power as self-regulators, to exclude an entire class of lower-cost competitors. Second, the Board is arguing, in effect, that its conduct cannot constitute concerted action because its members acted in their capacity as Board members, rather than in their personal capacity as market-participating dentists. As noted above, this Court has only recently dismissed just such an argument. *See Robertson*, 679 F.3d at 284 (rejecting claim that conspiracy cannot exist because "individual brokerages acted only in their capacities as MLS board members").

Equally unconvincing is the Board's argument that "[o]nly one decision-maker—the Legislature—directed [Board] members to take action that would limit

the practice of teeth-whitening to dentists." Br. 45. But the Legislature did *not* define teeth whitening as "dentistry." The Board took it upon itself, instead, to construe state law as having made that determination, then proceeded to issue its own, extra-judicial cease and desist orders to exclude non-dentist providers from that market.[25]

2. The Board Members Engaged in Concerted Campaign to Exclude Rival Non-Dentists from the Teeth Whitening Services Market

Monsanto's "something more" requirement has been formulated by the Court as making a showing of "conscious commitment to a common scheme designed to achieve an unlawful objective," which, the Court added, may be established either by "direct or circumstantial evidence." *Monsanto*, 465 U.S. at 768; *see Thompson Everett, Inc. v. National Cable Adv., L.P.*, 57 F.3d 1317, 1324 (4th Cir. 1995) (same); *Laurel Sand & Gravel, Inc. v. CSX Transp., Inc*., 924 F.2d 539, 542 (4th Cir. 1991) ("agreement to restrain trade may be inferred from other conduct").

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[25] The Board's letters cited no judicial authority construing the DPA as prohibiting teeth whitening by non-dentists. Instead, they quoted the DPA's "removal of stains" language, *see* N.C.G.S. § 90-29(b), with the clear purpose of conveying the (false) implication that the statute includes teeth whitening within the definition of dentistry. The Commission declined to rule on whether teeth whitening constitutes "dentistry" under the DPA, as irrelevant to determining whether the Board's conduct violated the FTC Act. Op. 3 nn.3-4; *see* ID at 82, 109 (ALJ concluding likewise). But evidence was adduced before the ALJ that teeth whitening does not fit the statutory definition of "dentistry." *See, e.g.*, Giniger, Tr. 111-118 (industry expert testifying that teeth whitening is not "stain removal" as envisioned by the North Carolina legislature); *see also* CCPFF ¶¶159-173 (summarizing prevailing "stain removal" methods at the time of DPA's enactment).

Here, substantial record evidence supports the Commission's finding that the dentist Board members launched a vigorous and prolonged campaign to exclude non-dentist lower-cost rivals from the market for teeth whitening services. The Board's meetings minutes show that the Board, on several occasions, discussed the provision of teeth whitening services by non-dentists just before voting to take actions that restricted these services. *See, e.g.*, IDF 264-265, 274-275, 286 (Board authorizing letters to suppliers); IDF 289 (Board authorizing letters to mall operators); IDF 317-318, 321 (Board approving letter to cosmetology board). In addition, "a wealth of circumstantial evidence" tended to show a determined plan by Board members to exclude non-dentist rivals. Op. 18. The cease and desist orders themselves were sent on the Board's official letterhead, indicated that the Board was the source of the directives contained in them, and directed any inquiries back to the Board. *See* IDF 219 (listing examples).[26] These communications conveyed the same message—that teeth whitening by non-dentists was unlawful—regardless of the type of recipient, product involved, or location within the state. *Id.* Indeed, members and staff acknowledged the Board's campaign against non-dentists. *See, e.g.*, CX369 (noting Board's "strategy" for addressing teeth whitening kiosks); CX404 (Board's COO

[26] Board counsel acknowledged at oral argument before the Commission that the "case officers" (all of whom were dentist Board members) were acting within their delegated authority when they sent the cease and desist orders. Oral Arg. Tr. 11-12. Certainly, the Board never took any steps to repudiate those actions.

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

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

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[27] *Parkway Gallery Furniture v. Kittinger/Penn. House Group, Inc.*, 878 F.2d 801 (4th Cir. 1989), and *Cooper v. Forsyth Cnty. Hosp. Auth.*, 789 F.2d 278 (4th Cir. 1986), are not to the contrary. *See* Br. 51-53. Unlike the alleged conspiracy in *Parkway Gallery* between a manufacturer and its complaining dealers, the unlawful agreement here is amongst dentist Board members, not between the Board and the complaining dentists. Moreover, unlike in *Cooper*, where a conspiracy was to be inferred from communications between a peer-review physician group and a hospital board, the inferences drawn by the Commission here came principally from the Board's actions in response to dentist complaints, not from the complaints themselves.

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

Likewise, the Board argues that enforcement of state law cannot constitute antitrust conspiracy. Br. 48-49. But that is not what the Board did here. Enforcement of the DPA is limited to instituting a court action against alleged infringers of that statute. *See* N.C.G.S. § 90-40.1(a). The Board members instead agreed to construe state law on their own to include teeth whitening within the statutory definition of dentistry, then to issue extra-judicial cease and desist orders to exclude their rival non-dentists. These are not the actions of a unitary law enforcer, but of a group of competitors taking advantage of their ability to act in concert to stifle competition.

B. The Commission Correctly Concluded That the Board's Challenged Actions Were Anticompetitive and Not Excused by Any Legitimate Justification

As detailed above, the Commission concluded, under three different modes of the rule of reason analysis, that the Board's actions—in determining unilaterally to classify teeth whitening as dentistry, then issuing extra-judicial orders to exclude its lower-cost rivals, and encouraging third parties to boycott those rivals—inherently

tended to, was likely to, and in fact did, restrain competition. *See Robertson*, 679 F.3d at 286 ("the power of [] board members to pass restrictive membership rules can also threaten economic harm to nonmembers and deprive the [] market of the competitive forces that are at the 'heart of our national economic policy'.") (quoting *Professional Engineers*, 435 U.S. at 695).

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

Commission was correct, therefore, in citing to precedent that condemned the market exclusion of lower-cost rivals in order to conclude that the Board's conduct here could be analyzed under an abbreviated rule of reason. *See* Op. 20-22 (discussing "close family" precedents and opinions of economic experts).

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

Instead, the Board argues that its conduct "is saved by procompetitive justifications." Br. 54. *See Northwest Wholesale Stationers v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985) (practices can be "justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive"); *Indiana Fed'n*, 476 U.S. at 459 (even conduct presumed to be unreasonable can be justified by having "some countervailing procompetitive virtue"). But, as the Commission correctly concluded, the Board's purported justifications are neither cognizable under the antitrust laws, nor borne out by the record of this case.

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

The Board also argues that its conduct should be excused either because its members "were motivated by public protection concerns," or as "agreements between professionals." Br. 57, 58. Neither of these arguments has merit. Courts have repeatedly rejected social welfare and public safety concerns as cognizable justifications for restraints on competition. *See, e.g.*, *Professional Engineers*, 435 U.S. at 685 (rejecting purported justification that "awarding engineering contracts to the lowest bidder, regardless of quality, would be dangerous to the public health, safety, and welfare"); *Indiana Fed'n*, 476 U.S. at 452 (condemning dentists' agreement not to submit x-rays to insurers as not justified by dentists' assertion that "provision of x rays might lead the insurers to make inaccurate determinations of the proper level of care and thus injure the health of the insured patients").[28] As the Supreme Court has emphasized, arguments that competition should be suppressed because it might be dangerous to public health or safety are "'nothing less than a frontal assault on the basic policy of the Sherman Act'." *Id*. at 463 (quoting

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

Professional Engineers, 435 U.S. at 695). A state could, of course, choose to prioritize such concerns over competition, by enacting a state regulatory scheme that satisfies the requirements of the state action exemption from federal antitrust scrutiny. But, as shown above, that is not what happened in this case.

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

More important, the record reflects that the Board itself had no basis for any such safety claims, nor was there any indication that such concerns actually prompted the challenged actions. None of the Board's testifying members, nor its own expert witness, could cite any clinical or empirical evidence to validate the claim that non-dentist teeth whitening causes consumer injury. *See* Hardesty, Tr. 2818, 2829; CX565 (Hardesty Dep.) at 38; CX554 (Allen Dep.) at 26; CX555 (Brown Dep.) at 16, 26-27;

Wester, Tr. 1313-15, 1402, 1405-06; CX560 (Feingold Dep.) at 65-66; CX567 (Holland Dep.) at 37; CX564 (Hall Dep.) at 16; Owens, Tr. 1664; Haywood, Tr. 2696, 2713-14, 2729; CX402 at 5. Indeed, as the Commission detailed, *see* Op. 27-28, the Board began sending the cease and desist orders two years before it became aware of any claim of consumer injury. *Compare* CX38 at 1 (first cease and desist letter, dated January 11, 2006), *with* CX476 at 1 (first complaint claiming injury, dated February 20, 2008). Moreover, only two of the Board cease and desist orders appear to have been related to allegations of specific health and safety concerns. *Compare* CX59, CX388 (Board orders) *with* RX21 at 3-7, RX17 at 1, 2 (complaints about possible consumer injuries).

What the record evidence shows is that the Board responded to dentist complaints without any reference to harm. *See, e.g.*, CX36 at 2-4 (dentist complaints about Edie's Salon Panache's offering of $149 teeth whitening as lower than dentists' prices); CX365 at 2 (dentist complaint about teeth whitening kiosk, noting the latter's advertised price of $100); CX278 (dentist complaint about kiosk's price of $99); *see also* IDF 232 (listing dentist complaints that referenced or attached advertisements of prices by non-dentists).

Accordingly, the Commission properly rejected those justifications as neither cognizable under the antitrust laws, nor supported by the record evidence in this case.

CONCLUSION

For the reasons set forth above, this petition for review should be denied.

STATEMENT REGARDING ORAL ARGUMENT

This Court likely will benefit from counsel's oral argument. Accordingly, the Commission requests that oral argument be scheduled in this case.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

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

CERTIFICATE OF SERVICE

I certify that on June 27, 2012, I filed the foregoing brief using the court of appeals's CM/ECF system, and the same was served electronically on all counsel of record.

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