Supreme Court, U.S.
FILED
OCT 25 2013
OFFICE OF THE CLERK

No. 13-534

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

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N.C. Gen. Stat. § 120-70.101 4

OTHER AUTHORITIES

Phillip Areeda & Herbert Hovenkamp,
1A *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 227b
(3d ed. 2009) 24

Einer Elhauge, *The Scope of Antitrust Process*,
104 Harv. L. Rev. 667 (1991) 24

John Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941 (1986) 21, 35

PETITION FOR A WRIT OF CERTIORARI

The North Carolina State Board of Dental Examiners ("the Board") respectfully submits this petition for a writ of certiorari.

OPINIONS

The opinion of the Court of Appeals for the Fourth Circuit (Pet.App. 1a) is reported at 717 F.3d 359. The opinion of the Federal Trade Commission ("FTC") entering summary decision against the Board's state-action defense (Pet.App. 34a) is reported at 151 F.T.C. 607. The FTC's final opinion and order entered against the Board (Pet.App. 69a, 143a) are not yet reported, but are available electronically at 2011 WL 6229615.

JURISDICTION

The Fourth Circuit entered judgment on May 31, 2013, and denied rehearing on July 30, 2013. Jurisdiction to review the judgment rests on 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The appendix reproduces relevant provisions of the Sherman Act and FTC Act, 15 U.S.C. §§ 1, 45, and of North Carolina law establishing and governing the Board, *see generally,* N.C. Gen. Stat. §§ 90-22 *et seq.*, 93B-1 *et seq.*

STATEMENT OF THE CASE

1. This case involves the state-action antitrust exemption recognized in *Parker v. Brown*, 317 U.S. 341 (1943), and its progeny. The exemption provides that "the federal antitrust laws" "should not be read to bar States from imposing market restraints 'as an act of government.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (quoting *Parker*, 317 U.S. at 352). Allowing States to undertake "anticompetitive actions ... in their governmental capacities as sovereign regulators" reflects "our national commitment to federalism." *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991).

Under this state-action doctrine, "when a state legislature adopts legislation, its actions constitute those of the State ... and *ipso facto* are exempt from the operation of the antitrust laws." *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984). A "[c]loser analysis is required," however, "when the activity at issue is not directly that of the legislature ...[,] but is carried out by others." *Id.* Private parties may invoke the exemption when two requirements are satisfied: their conduct must (1) be authorized by a "clearly articulated ... state policy" to displace competition, and (2) be "actively supervised" by state officials. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). In contrast, municipalities need only satisfy the first of those requirements: so long as a "municipality act[s] pursuant to a clearly articulated state policy[,] ... there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." *Town of Hallie v. City*

of Eau Claire, 471 U.S. 34, 46-47 (1985). In *Hallie*, this Court further suggested without deciding that, "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required." *Id.* at 46 n.10.

The Fourth Circuit in this case, following the FTC's lead, spurned *Hallie*'s guidance and broke from 70 years of precedent explicating *Parker*'s state-action antitrust exemption. The court below held that an official state regulatory board created by state law is a "private" actor—and thus must satisfy the "active supervision" requirement—simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants. Pet.App. 17a. That decision warrants this Court's review, both because it directly conflicts with decisions of the Fifth and Ninth Circuits as well as an established legal rule applied in the decisions of this Court, and because it raises exceptionally important questions concerning federalism and state regulatory enforcement.

2. "The North Carolina State Board of Dental Examiners ... [is] the agency of the State for the regulation of the practice of dentistry." N.C. Gen. Stat. § 90-22(b). Since 1961, the State Legislature has mandated that the Board contain six practicing dentists elected by the State's licensed dentists, as well as (since 1980) one practicing hygienist elected by the State's licensed hygienists and one consumer member appointed by the Governor. *See id.*

a. As a state agency, the Board has traditional governmental powers that private actors typically do not have: It has quasi-legislative power

"to enact rules and regulations governing the practice of dentistry," backed by criminal penalties. *Id.* § 90-48. It has quasi-executive power to issue licenses for dental practice, *id.* § 90-30(a), and to conduct investigations "into any practices committed in th[e] State that might violate" the laws that it enforces, *id.* § 90-41(d). And it has quasi-judicial power to "issue subpoenas requiring the attendance of persons and the production of papers and records ... in any hearing, investigation or proceeding." *Id.* § 90-27.

Likewise, as a state agency, the Board has traditional governmental duties that private actors typically do not have: It must comply with restrictions concerning ethics, administrative procedures, public records, and open meetings. *Id.* § 93B-5(g). Its conduct is also subject to scrutiny by all three branches of state government. For example, a legislative committee is charged with conducting oversight "to determine if [the Board is] operating in accordance with statutory requirements." *Id.* § 120-70.101(3a). Executive-branch officials receive annual reports summarizing the Board's regulatory activities. *Id.* § 93B-2(a). And judicial review of the Board's conduct is authorized. *See, e.g.*, *Charlotte-Mecklenburg Hosp. Auth. v. North Carolina Indus. Comm'n*, 443 S.E.2d 716, 721 (N.C. 1994) (declaratory relief proper where a state agency acts "in excess of [its] statutory authority").

b. North Carolina law has long made it illegal "to practice dentistry" without a license from the Board. N.C. Gen. Stat. § 90-40. "A person shall be deemed to be practicing dentistry" if, among other things, he "[r]emoves stains, accretions or deposits

from the human teeth." *Id.* § 90-29(b)(2). If the Board concludes that these provisions have been violated, it may refer the matter for criminal prosecution, *id.* § 90-40, or itself bring a civil suit for injunctive relief, *id.* § 90-40.1(a).

In 2003, the Board started receiving complaints that non-dentists were performing the dental practice of stain removal by providing "teeth whitening" services. Pet.App. 75a. As relevant here, such services entail "the application of some form of peroxide to the teeth using a gel or strip," thereby "trigger[ing] a chemical reaction that results in whiter teeth." *Id.* 73a.

After some investigation and discussion, the Board in 2006 enforced the state-law ban on unlicensed stain removal by sending "cease and desist letters" on its official letterhead to non-dentist teeth whitening providers. *Id.* 76a. It also sent letters to shopping mall operators, requesting that they stop leasing kiosks to non-dentist teeth whiteners. *Id.* 77a. It similarly persuaded the North Carolina Board of Cosmetic Art Examiners to notify its licensed salons and spas that teeth whitening required a state dental license. *Id.* 78a. The Board's enforcement efforts caused some non-dentists to stop providing such services. *Id.* 77a-78a.

3. The FTC issued an administrative complaint against the Board under the FTC Act, 15 U.S.C. § 45(a)(2),(b). Pet.App. 78a. The complaint claimed that the Board had violated Section 5 of the FTC Act, 15 U.S.C. § 45(a)(1), by violating Section 1 of the Sherman Act, 15 U.S.C. § 1. Pet.App. 86a-87a. In particular, the complaint alleged that, through the "cease and desist letters" and other official

communications discussed above, the Board had engaged in concerted action with the intent and effect of excluding competition from non-dentist providers of teeth whitening services. *Id.* 78a-79a.

a. The Board moved to dismiss based on state-action immunity, and Complaint Counsel moved for partial summary decision on that issue. *Id.* 36a. The FTC rejected the Board's immunity defense. *Id.* 68a.

The FTC first assumed that the Board had satisfied the requirement that its conduct must be authorized by a "clear[ly] articulat[ed]" state policy to displace competition, given the state-law ban on unlicensed stain removal. *See id.* 47a n.8. Although Complaint Counsel had questioned whether that ban covered the teeth whitening services at issue and whether the Board was authorized to enforce that ban in the manner that it had, *see id.* 48a, the FTC avoided those state-law issues. *See Omni*, 499 U.S. at 372 (holding that the "concept of authority" under the state-action exemption is "broader than what is applied to determine the legality of the municipality's action under state law").

Then, however, the FTC broke new ground by deciding that the Board also had to satisfy the requirement that its conduct must be "actively supervised by the State itself," notwithstanding that the Board itself is an official state agency. Pet.App. 46a-47a. The FTC held in particular that "a state regulatory body that is controlled by participants in the very industry it purports to regulate" must be actively supervised by a component of the State that is not. *See id.* 58a. The FTC asserted that, "when determining whether the state's 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.* 49a. The FTC's conclusion was "reinforced" by the fact that the Board's members "are elected directly by ... the other licensed dentists in North Carolina." *Id.* 59a. Notably, though, that fact was not necessary to the FTC's decision, which treated as sufficient that a majority of the Board's members are also practicing dentists, regardless of the method that state law provides for their selection. *See, e.g.*, *id.* 35a-36a, 58a, 68a, 81a.

The FTC further concluded that no other state entity had actively supervised the Board's official communications to non-dentists regarding teeth whitening. *Id.* 68a. The FTC reasoned that, while the Board was subject to "generic oversight" by various state actors, *see id.* 63a-68a, none of them had performed the type of "pointed reexamination" of the Board's conduct that the FTC deemed necessary under the active-supervision standard, *see id.* 61a-63a.

b. After a merits hearing, the FTC entered a final opinion and order against the Board. *Id.* 71a.

The FTC first ruled that the Board was legally capable of engaging in concerted action to restrain trade because its members had separate economic interests, *id.* 94a-100a, and also that the Board's members in fact had conspired to restrain trade rather than each acting independently, *id.* 100a-104a. The FTC then held that the Board had unreasonably restrained trade by using its official communications to deter teeth whitening by non-dentists. *Id.* 104a. In so holding, the FTC repeatedly

noted that the Board's communications had the tendency and effect of excluding competition due to the Board's official status and apparent authority. *See, e.g.*, *id.* 107a, 112a-113a, 128a-129a. And the FTC rejected the Board's asserted procompetitive justifications. *Id.* 114a-125a.

The FTC's final order prohibits the Board from directing non-dentists to cease teeth whitening services and from instructing non-dentists or their business partners that unlicensed teeth whitening is illegal. *See id.* 145a-147a. It also compels the Board to provide corrective notifications and to follow new reporting and inspection requirements. *See id.* 148a-151a, 153a-155a.

The FTC's final order disclaims any interference with the Board's authority to investigate the unlicensed practice of dentistry or to initiate judicial proceedings. *See id.* 147a. It also permits the Board to communicate its belief that unlicensed teeth whitening is illegal as well as its *bona fide* intent to initiate judicial proceedings, so long as the communications include an FTC-drafted disclosure emphasizing that the Board itself lacks the authority to declare unlicensed teeth whitening unlawful or to enjoin that practice. *See id.* 147a-148a, 152a. These provisos in the FTC's final order, however, do not purport to exempt any of the Board's actions from the FTC's state-action decision or to exempt them from federal antitrust scrutiny (absent active state supervision) if later challenged by the FTC or private parties. *See id.* 35a-36a, 81a.

4. The Board filed a petition for review under the FTC Act, 15 U.S.C. § 45(c). Pet.App. 4a. The Fourth Circuit denied the petition. *Id.*

As relevant here, the Fourth Circuit "agree[d] with the FTC that state agencies in which a decisive coalition ... is made up of participants in the regulated market, who are chosen by and accountable to their fellow market participants," must satisfy the active-supervision requirement. *Id.* 14a (internal quotation marks omitted). Like the FTC, the Fourth Circuit asserted the need to ensure that "the State has exercised sufficient independent judgment and control" over such state agencies, even where their conduct is authorized by a clearly articulated anticompetitive state policy. *See id.* 15a. In sum, the court held that, "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" for the state-action exemption. *Id.* 17a.

Judge Keenan wrote a brief concurrence, which emphasized that this case involved a state agency where the market-participant members were "elected by other private participants in the market," rather than "appointed or elected by state government officials." *Id.* 29a-31a.

5. Rehearing en banc was denied. *Id.* 157a.

REASONS FOR GRANTING THE PETITION

At the FTC's behest, the Fourth Circuit radically departed from 70 years of settled antitrust law by holding that a state agency—the North Carolina State Board of Dental Examiners—must be actively supervised by another state entity to receive state-action immunity. Notably, the decision below does not dispute that: (1) the Board is created by state law as the official state agency to regulate dental practice within the state; (2) the Board has state-law powers and duties that state agencies traditionally have and that private actors typically do not have; (3) the Board's enforcement steps against non-dentist teeth whiteners were taken pursuant to a clearly articulated state policy to displace competition in dentistry; and (4) the Board's challenged communications excluded competition only because they carried the State's imprimatur. *Supra* at 3-9. The Fourth Circuit's unprecedented holding was that the Board nonetheless is a "private" actor that must satisfy the "active supervision" requirement, simply because, pursuant to state law, a majority of the Board's members are also market participants who are elected to their official positions by other market participants. Pet.App. 17a.

The decision below warrants this Court's review. It is contrary to well-established precedent that consistently applies a basic legal rule: an official state entity's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government and thus exempt from federal antitrust law—without regard to the public officials' independence from private interests, method of selection, or supervision by other state entities. The

decision is also contrary to the basic principles of federalism upon which state-action antitrust immunity is based: federal regulators have no license to condition a State's sovereign right to adopt anticompetitive state laws on the manner in which the State exercises its equally sovereign right to choose who shall be the public officials that enforce those laws and how they shall do so.

I. The Fourth Circuit's decision directly conflicts with the Fifth Circuit's decision in *Earles v. State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998), and the Ninth Circuit's decision in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989). Each of those cases held that the active-supervision requirement does not apply to an official state agency's acts even though the agency's officers there, like the Board's members here, were required under state law also to be private market participants whose selection for office was caused by other private market participants. *See Earles*, 139 F.3d at 1035, 1040-42; *Hass*, 883 F.2d at 1459-61.

II. The Fourth Circuit's decision also conflicts with the state-action jurisprudence established by this Court's decisions in *Parker*, *Hallie*, and *Omni*. *Supra* at 2-3. *First*, *Parker* held that acts of a state agency when enforcing an anticompetitive state law are sovereign acts of state government that are exempt from federal antitrust law; this Court thus granted immunity to a state agency that, like the Board here, was operated under state law by officers who were also private market participants and not actively supervised by other public officers. *See* 317 U.S. at 346-47, 350-52. *Second*, *Hallie* held that the

State must actively supervise anticompetitive activity that it has clearly authorized only where necessary to ensure that the activity is the State's own rather than merely private conduct that the State has blessed; this Court thus declined to require active supervision of municipalities, which, like the Board here, are indisputably public entities through which the State effectuates its own sovereign conduct, regardless of the amount of supervision. *See* 471 U.S. at 46-47. *Third, Omni* held that public regulatory action is not transformed into private conduct merely because the regulating public officials have shared interests with regulated private persons; this Court thus refused to create a conspiracy exception to state-action immunity for public officials who, like the Board members here (according to the FTC), could receive financial and electoral benefits by taking anticompetitive regulatory steps favoring certain private interests. *See* 499 U.S. at 367, 374-79.

III. The Fourth Circuit's departure from this established precedent is exceptionally important. "[F]ederal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004); *accord Omni*, 499 U.S. at 372, 374-75. *Parker* thus declined to interpret federal antitrust law to interfere with "a state's control over its officers and agents," 317 U.S. at 351, as a fundamental principle of federalism is that "a State defines itself as a sovereign" "[t]hrough the structure of its government[] and the character of those who exercise

government authority," *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). In contrast, the decision below strips a state agency's officers of antitrust immunity where the state legislature chooses to select and supervise them in a manner that renders their regulatory actions less independent from private interests than federal authorities deem preferable. Moreover, this harm to state sovereignty is exacerbated by the serious threat posed by the decision below to the effective enforcement of the state-law regimes that have long governed regulated professions, such as dentists, doctors, lawyers, and accountants. Forcing States to reduce the level of regulatory involvement by practicing professionals deprives agencies of valuable expertise. And forcing States to increase the supervision of their own expert agencies is both intrusive and impractical.

Accordingly, certiorari should be granted.

I. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER FEDERAL CIRCUIT COURTS APPLYING THE ANTITRUST STATE-ACTION DOCTRINE

Both the Fifth Circuit in *Earles* and the Ninth Circuit in *Hass* squarely refused to apply the active-supervision requirement to an official state agency that, like the Board here, was operated pursuant to state law by state officers who were also market participants whose selection for office was caused by other market participants. Indeed, the decision below is the only federal appellate decision in the 70 years since *Parker* to treat a *bona fide* state regulatory agency as a "private" actor subject to the active-supervision requirement.

A. The Fifth Circuit's Decision In *Earles*

In *Earles*, the Fifth Circuit expressly held that a regulation promulgated by the official state agency that regulated public accountants was "exempted from the active-supervision prong" because of "the public nature of the [agency's] actions," "[d]espite the fact" that the agency was "composed entirely of [accountants] who compete in the profession they regulate." 139 F.3d at 1041. Citing *Hallie*, the court applied the legal rule that, "[s]o long as [such an agency] is acting within its authority and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority" to displace competition. *Id.*

The Fourth Circuit's decision below directly conflicts with the Fifth Circuit's decision in *Earles*. Just like the agency's regulation in *Earles*, "the Board's actions" here were of a "public nature," *id.*, as they were *official communications* concerning non-dentist teeth whiteners, *supra* at 5. Thus, under the legal rule applied in *Earles*, "there [was] no need [here] for active supervision of [the Board's] exercise of properly delegated authority" to displace competition, "[d]espite the fact that the Board is composed [primarily of dentists] who compete in the profession they regulate." *See* 139 F.3d at 1041.

To be sure, in *Earles*, the practicing accountants who also served as the agency's controlling officials were not, as here, elected to office under state law by their fellow market participants. *See id.* at 1035. But "the Society of Louisiana Certified Public Accountants" still *caused* the selection of the agency's accountant members in *Earles*: pursuant to state law, they nominated the *exclusive* "slate of

candidates" from which those members were "chosen by the governor" and "confirmed by the state senate." *Id.* Even more importantly, under the Fifth Circuit's legal rule in *Earles*, the only relevant fact is the "public nature" of the agency's actions. *See id.* at 1041. The *Earles* court entirely rejected the relevance of the agency's market-participant membership, and thus its analysis did not even arguably turn on the particular method under state law for selecting those members for office, let alone on the slight difference between exclusive nomination slates and elections. *See id.* In short, the legal rule applied in *Earles* for when active supervision is not required fully applies to the acts of the elected Board members here.

Although that conclusion alone shows a conflict on the elected-member scenario here, the conflict also extends to the nominated-member scenario in *Earles*. Notably, the Fourth Circuit did not itself distinguish *Earles* based on the particular selection method there; rather, it generically characterized the Fifth Circuit's decision as fact-bound without even attempting to identify any particular distinguishing fact. Pet.App. 16a-17a n.6. Moreover, the Fourth Circuit's purported concern about the elections required under state law here was that the Board's market-participant members are "chosen by and accountable to their fellow market participants." *See id.* 14a. And the Board's dentist members still would be "chosen by and accountable to" their fellow dentists if state law instead had required that they be selected from an exclusive slate of nominees provided by the dentists' professional association. In short, the legal rule applied by the Fourth Circuit for when active supervision is required would fully apply

to the acts of the Board members here even if they had been selected for office from an exclusive slate of nominees, as in *Earles*. *See also infra* at 22-24 (further showing that the Fourth Circuit's core rationale does not turn on selection methods *at all*).

B. The Ninth Circuit's Decision In *Hass*

Hass applied the same legal rule as *Earles* applied—and on the same facts as here. In *Hass*, the Ninth Circuit held that an official state agency that regulated lawyers "need not satisfy the 'active supervision' requirement." 883 F.2d at 1461. Citing *Hallie*, the court applied the legal rule that a "clearly articulated ... state policy" is sufficient to avoid "a *private* [anticompetitive] arrangement" when "a public body" is involved. *See id.* at 1460-61.

Critically, *Hass* treated the state bar there as a "public body" even though that agency was controlled by a fifteen-member board of governors, twelve of whom were also *lawyers elected by the other lawyers in the state*. *Id.* at 1460 & n.3. Indeed, directly contrary to the decision here, *Hass* held that the election of the board's lawyer-members by other lawyers *affirmatively supported* state-action immunity, since the elections served as a "'check' [on] the actions of the [b]oard." *See id.*

Accordingly, even on the narrowest reading of the Fourth Circuit's decision below, its holding squarely conflicts with the Ninth Circuit's holding in *Hass*. There is no basis for the Fourth Circuit's *ipse dixit* assertion that *Hass* was a fact-bound decision that it could distinguish without even attempting to

identify any particular distinguishing fact. Pet.App. 16a-17a n.6.[1]

C. No Other Decision Of A Federal Circuit Court Supports The Fourth Circuit's Decision

Not only does the Fourth Circuit's decision conflict with *Earles*, *Hass*, and the decisions cited here in footnote one, but it is the sole outlier from an otherwise consistent body of federal appellate decisions. Although the court below suggested otherwise, *see* Pet.App. 16a, the three decisions it cited are inapposite.

FTC v. Monahan, 832 F.2d 688 (1st Cir. 1987), and *Washington State Electrical Contractors Association, Inc. v. Forrest*, 930 F.2d 736 (9th Cir. 1991) (per curiam), were interlocutory opinions that merely allowed additional fact-finding without ruling on the merits. *See Monahan*, 832 F.2d at 689-90; *Forrest*, 930 F.2d at 737. Indeed, the Ninth Circuit panel in *Forrest* could not have held that active supervision was required for the agency there, given the binding earlier panel opinion in *Hass*.

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[1] Other federal circuit courts have reached similar results as *Hass* and *Earles*. *See, e.g.*, *Cine 42nd St. Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986) (holding that, because a corporate governmental agency was "by statute a political subdivision of the state, ... its interests must be defined as public rather than private, and consequently, the active state supervision requirement is unnecessary"); *Brazil v. Arkansas State Bd. of Dental Examiners*, 759 F.2d 674, 675 (8th Cir. 1985) (per curiam), *aff'g* 593 F. Supp. 1354, 1362-63, 1368-69 (E.D. Ark. 1984) (same as *Earles*); *Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 614-15, 620 (6th Cir. 1982) (pre-*Hallie* case effectively exempting a state agency structured as in *Earles* from the active-supervision requirement, by deeming it satisfied simply because the agency was enforcing a clearly articulated anticompetitive state statute).

Asheville Tobacco Board of Trade, Inc. v. FTC, 263 F.2d 502 (4th Cir. 1959), did not involve an official state agency. Instead, it involved a local "tobacco board of trade"—namely, "a non-stock corporation" that "constitute[d] a contract[ual]" association "organized primarily for the benefit of those engaged in the business," with "[m]embership ... open to warehousemen and purchasers of leaf tobacco." *Id.* at 505, 509. Although some state-court decisions had in *dicta* "referred to [such] boards as 'administrative commissions,'" *see id.* at 508, the Fourth Circuit in *Asheville* recognized that those boards were not *bona fide* "State agenc[ies]," *see id.* at 509-10. The private trade boards there, unlike the state Board here, did not have *any* of the state-law duties that true governmental bodies typically have. *Compare id.* (lack of reporting requirements or other state supervision of local trade boards), *with supra* at 3-4 (traditional state-law duties of Board here).

In sum, among the federal circuit court decisions in the 70 years since *Parker*, the Fourth Circuit's decision here is the only one ever to treat an official state board as a "private" actor subject to the active-supervision requirement, and the only one even to suggest that the state-law method for selecting the board's members who are also market participants is legally relevant to state-action antitrust immunity. In contrast, the Fifth Circuit in *Earles* and the Ninth Circuit in *Hass* refused to subject an official state agency to the active-supervision requirement, regardless of whether, and even though, the agency's officers were also private market participants whose selection for office under state law was caused by other private market participants. This Court thus should grant review to resolve the circuit conflict.

II. THE FOURTH CIRCUIT'S DECISION CONFLICTS WITH A WELL-SETTLED LEGAL RULE UNDER THIS COURT'S ANTITRUST STATE-ACTION DECISIONS

The reason why the Fourth Circuit's decision is an outlier is that it conflicts with a well-settled legal rule developed by this Court in its antitrust state-action decisions over the past 70 years—a rule established by *Parker*, confirmed by *Hallie*, and underscored by *Omni*. Specifically, the rule applied in those cases is that an official state entity's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government and thus exempt from federal antitrust law, without regard to the public officials' independence from private interests, method of selection, or supervision by other state entities. Indeed, no decision of this Court has even suggested any possible deviation from that consistently applied legal rule.

A. This Court's Decision In *Parker*

1. In *Parker*, this Court established the legal rule that federal antitrust law does not "restrain a state or its officers or agents from activities directed by its legislature." 317 U.S. at 350-51. Both that rule and its limits were based on the principles of federalism that underlie our "dual system of government." *Id.* at 351.

On one hand, this Court emphasized that, because "the states are sovereign, ... an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Id.* On the other hand, this Court admonished that respect for state sovereignty does not go so far as to permit "a state [to] give immunity"

to private "individuals" who are violating federal antitrust law merely "by authorizing them to violate it[] or by declaring that their action is lawful." *Id.*

The *Parker* Court then applied that distinction between "individual and ... state action" to the conduct at issue, *id.* at 352, which was a scheme of agricultural "programs" designed "to restrict competition among the growers and maintain prices in the distribution of their commodities to packers," *id.* at 346. In particular, state law authorized a committee of private producers to formulate a program establishing the exclusive terms on which a commodity could be sold in an area, and that program became effective upon approval from both a super-majority of the area's producers *and* the State's "Agricultural Prorate Advisory Commission." *Id.* at 346-47; *see also id.* at 347, 352 (the Commission's actions were not actively supervised by any other state entity).

Parker concluded that "[t]he state in adopting and enforcing the prorate program ... imposed the restraint as an act of government which [federal antitrust law] did not undertake to prohibit." *Id.* at 352. It was "plain that the prorate program ... was never intended to operate by force of individual agreement," but rather "derived its authority and its efficacy from the legislative command of the state." *Id.* at 350. Specifically, "[a]lthough the organization of a prorate zone is proposed by producers, and a prorate program ... must also be approved by referendum of producers, *it is the state, acting through the Commission*, which adopts the program and which enforces it ... in the execution of a governmental policy." *Id.* at 352 (emphasis added).

The rule of decision below for when state-action immunity is unwarranted thus conflicts with *Parker*'s legal rule. The Fourth Circuit here denied immunity to the state Board because it did not deem the Board "sufficient[ly] independent" from private market participants given how it was structured and supervised. *See* Pet.App. 14a-15a. In contrast, this Court in *Parker* granted immunity to the state Commission members, without reference to such considerations, simply because federal antitrust law does not "restrain a state or its officers" when they are performing "activities directed by [the] legislature." 317 U.S. at 350-51.

2. The conflict between the legal rules applied in the decision below and *Parker* is underscored by the fact that the members of the state Commission in *Parker* were *not* all entirely disinterested public officials. As made clear by the statute in *Parker* that this Court cited without further discussion, *six of the nine* Commission members were *required* also to be engaged "in the production of agricultural commodities as their principal occupation." *See id.* at 346 (citing 1939 Cal. Stat. ch. 894, § 3, p. 2488); *see also* John Lopatka, *The State of "State Action" Antitrust Immunity: A Progress Report*, 46 La. L. Rev. 941, 948 & n.21 (1986).

Given these facts, the decision below even more starkly conflicts with *Parker*. The Fourth Circuit here held that the state Board, with its controlling members who are also market participants, is a "private" actor that needs "active supervision" by a disinterested state entity to ensure that "the State has exercised sufficient independent judgment and control." *See* Pet.App. 15a. In contrast, this Court in

Parker held that the state Commission, with its controlling members who were also market participants, *was* "the state" in "execut[ing] ... a government policy," and, therefore, that its conduct was itself an exempt "act of government," despite the lack of active supervision. *See* 317 U.S. at 352.

To be sure, the Commission's market-participant officials in *Parker* were appointed by the State's Governor and confirmed by its Senate, rather than, as here, elected to office under state law by other market participants. *See id.* at 346. But, under this Court's legal rule in *Parker*, the only relevant fact is that the State's "officers or agents" are performing "activities directed by its legislature," because "our dual system of government" requires respect for a State's "sovereign" choices concerning how to exercise "control over its officers and agents." *See id.* at 350-51. This Court's analysis thus did not even arguably turn on the particular method under state law for selecting the Commission's members for office—*i.e.*, by appointment rather than election. *See id.* at 346, 350-52. In short, the legal rule applied in *Parker* for when active supervision is not required fully applies to the acts of the elected Board members here.

Although that conclusion alone shows a conflict on the elected-member scenario here, the conflict also extends to the appointed-member scenario in *Parker*. Below, both the panel and concurring opinions nominally emphasized that the Board's dentist members are elected; but those opinions conspicuously failed to provide *any explanation* why the state-law selection method is legally relevant even under their own (erroneous) reasoning, much

less why a change in state law from election to appointment would legally transform the Board's market-participant members from "private" actors into "state" officers. *See* Pet.App. 14a-17a, 29a-31a. To the contrary, the Fourth Circuit's analysis of why the Board lacked "sufficient independen[ce]" to constitute "the State" rather than "a private actor" turned *solely* on the premise that the Board's dentist members were engaged in "financially interested action" that "benefit[ted] [their] own membership." *See id.* 14a-15a. And whatever overlapping economic interests may exist between the Board's dentist members and other practicing dentists, they exist equally whether those members are selected for office under state law through appointment by the Governor or through election by other dentists. In short, the Fourth Circuit's essential legal reasoning for when active supervision is required would fully apply to the acts of the Board members here even if they had been selected for office by gubernatorial appointment, as in *Parker*.

Tellingly, even the secondary sources upon which the Fourth Circuit chiefly relied advocate treating a state agency as a "private" actor *whenever* its controlling officials are also market participants. For example, while the decision below emphasized that it was "agree[ing] with the FTC," *id.* 14a, 17a, the FTC treated the election of the Board's market-participant members only as "reinforc[ing]" its "conclusion," *id.* 59a, *not as limiting it*. The FTC thus consistently stated its holding in broad terms that did not depend on the particular method for selecting the Board's members who were also market participants: "because the Board is controlled by practicing dentists, the Board's challenged conduct

must be actively supervised by the [S]tate for it to claim state action exemption from the antitrust laws." *Id.* 68a, 81a.[2] Likewise, while the decision below quoted the Areeda and Hovenkamp treatise, it inserted the election qualifier *after* the quotation, because the treatise's broader "[r]ecommendation[]" is to presumptively require active supervision for *all* state agencies controlled by officers who are also market participants, without regard to selection method. *Compare id.* 14a, *with* Phillip Areeda & Herbert Hovenkamp, 1A *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 227b, at 501 (3d ed. 2009); *see also* Pet.App. 14a (citing Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 689 (1991), which broadly advocated for *always* requiring active supervision of financially interested public officials).

3. In sum, neither the rule of *Parker*, nor the essential reasoning of the Fourth Circuit, nor the secondary sources cited below depend in any way upon the state-law method for selecting the controlling officers of a state agency when they are also market participants. Thus, there is a square conflict between the legal rules for state-action immunity applied by the decision below and by

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[2] *Accord* Pet.App. 35a-36a ("In the case before us, the decisive majority of the Board ... earns a living by practicing dentistry.... We conclude that given the Board's obvious interest in the challenged restraint, the state must actively supervise the Board in order for the Board to claim state action protection from the antitrust laws."); *id.* 58a ("We accordingly hold that a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy [the 'active supervision' requirement] to be exempted from antitrust scrutiny under the state action doctrine.").

Parker on the specific facts of state agencies whose controlling officers are also market participants—notwithstanding that the Fourth Circuit included within the statement of its holding the immaterial fact that the state-law method for selecting the controlling market-participant members here happens to be elections by other market participants rather than appointments by the Governor. And more generally, by imposing the active-supervision requirement on public officers of state agencies who are also private market participants, the Fourth Circuit flouted this Court's core rule in *Parker* that federal antitrust law does not "restrain" the State's "officers" when they are performing "activities directed by its legislature." *See* 317 U.S. at 350-51.

B. This Court's Decision In *Hallie*

Following *Parker*, this Court in *Hallie* confirmed the legal rule that "there is no need to require the State to supervise actively" an official state entity that is "act[ing] pursuant to a clearly articulated state policy." *See* 471 U.S. at 47. While the state entity at issue on the facts of *Hallie* was a municipality, this Court emphasized that its legal conclusion there "likely" applied to "state agenc[ies]" as well. *See id.* at 46-47 & n.10.

In so holding, *Hallie* initially observed that "the requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Id.* at 46. This Court of course recognized that the *mere existence* of an anticompetitive state policy must already be shown under the clear-articulation requirement. *See id.* at 47. It thus explained that the active-

supervision requirement addresses a distinct aspect of the state-policy question that is not resolved by the clear-articulation requirement: namely, whether the anticompetitive state policy "further[s] ... interests" that are properly treated as truly "governmental" rather than merely "private." *See id.*

In particular, *Hallie* reaffirmed that the specific purpose of the active-supervision requirement is "to prevent a State from circumventing [federal antitrust law] 'by casting a gauzy cloak of state involvement over what is essentially a private [anticompetitive] arrangement.'" *Id.* at 46-47 (quoting *Midcal*, 445 U.S. at 106); *see also, e.g.*, *Midcal*, 445 U.S. at 105-06 (denying immunity where "[t]he State simply authorize[d] price setting and enforce[d] the prices established by private parties"). The active-supervision requirement thus implements *Parker*'s admonition that federal respect for state sovereignty does not warrant immunizing private parties when the State merely "authoriz[es] them to violate [federal antitrust law]," but rather only when the State uses them as part of "the execution of a governmental policy." *See* 317 U.S. at 351-52. Simply put, active supervision is what legally transforms private action into immune state action. *See Hallie*, 471 U.S. at 46-47.

Given the active-supervision requirement's limited role, *Hallie* declared it inapplicable to the actions of municipalities. *See id.* at 47. *Hallie* recognized that, once the State clearly authorizes a municipality to act anticompetitively, "there is little or no danger" that the State is merely immunizing "a *private* [anticompetitive] arrangement." *Id.* The state-sanctioned anticompetitive acts of municipal

officers hardly reflect "a gauzy cloak of state involvement" over what are truly the acts of private parties, *see Midcal*, 445 U.S. at 106; rather, they clearly constitute "sovereign" "act[s] of [state] government," *see Parker*, 317 U.S. at 352, in the "execution of what is a properly delegated function," *see Hallie*, 471 U.S. at 47.

The rule of decision below for when active supervision is required thus conflicts with *Hallie*'s legal rule. The Fourth Circuit here required active supervision of the state Board's actions to ensure that they were taken with "sufficient independen[ce]" from private dentists. *See* Pet.App. 15a. In contrast, this Court in *Hallie* did not require active supervision of municipalities because there was "little or no danger" that the State was merely immunizing "a *private* [anticompetitive] arrangement" through "a gauzy cloak of state involvement." *See* 471 U.S. at 46-47. In other words, the proper question under *Hallie* is not whether official conduct is being taken independently from private market participants, but whether private conduct is being taken independently from the State—active supervision is required only in the latter situation under *Hallie*, contrary to the decision below.

Here, there is no question whether private conduct is being taken independently of the State, because the only conduct involved is the Board's unquestionably official conduct. As the FTC recognized (Pet.App. 40a-41a), the Board is the "agency of the State for the regulation of the practice of dentistry." N.C. Gen. Stat. § 90-22(b). Accordingly, under state law, the Board has powers

and duties that public agencies traditionally have and that private parties typically do not have. *Supra* at 3-4. Furthermore, as the FTC assumed, the Board's communications about non-dentist teeth whiteners were undertaken pursuant to a state law that clearly displaces competition by non-dentists. *Supra* at 6. Last but not least, *the State's imprimatur* is what the FTC found caused those communications to have the tendency and effect of excluding competition from non-dentists.[3]

In sum, the Board's official status is not even arguably a mere "gauzy cloak" thrown over "private part[ies]" who are "involved in a *private* price-fixing arrangement." *See Hallie*, 471 U.S. at 47. Instead, the Board is a *bona fide* state agency "executi[ng] ... a properly delegated function." *See id.* By nevertheless holding that the Board must be actively supervised to obtain state-action immunity, the Fourth Circuit contravened *Hallie*.

C. This Court's Decision In *Omni*

Following *Parker* and *Hallie*, this Court in *Omni* rejected a contrary legal rule that "government *regulatory* action may be deemed private—and therefore subject to antitrust liability—when it is taken pursuant to a conspiracy with private parties."

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[3] *See* Pet.App. 107a ("The Board viewed [its 'cease and desist'] letters as having the force of law and recipients of these communications had a similar understanding."); *id.* 112a ("[S]tate agencies, such as the Board, are likely to have greater ability to enforce restrictions than private organizations."); *id.* 128a (concluding that the Board "ha[d] market power" "to exclude competition" based on its "authority to regulate and discipline dentists" and "its perceived authority to exclude non-dentists from providing teeth whitening services").

499 U.S. at 374-75. Specifically, this Court reversed the Fourth Circuit's creation of a "conspiracy exception" to *Parker* immunity for cases where self-interested public officials agree with private actors to restrain competition. *Id.* at 374.

In *Omni*, the plaintiff claimed that "City Council members [had] received advantages," including campaign contributions, for "protect[ing] [a competitor's] monopoly position" through favorable zoning ordinances. *Id.* at 367. The plaintiff thus argued that, even if the zoning ordinances were authorized by a clearly articulated anticompetitive state policy (as this Court so held, *id.* at 370-73), state-action immunity still should be denied, simply because the public officials involved shared financial interests with private persons when enforcing that anticompetitive policy. *See id.* at 374.

The *Omni* Court, however, responded that "[t]here is no such conspiracy exception." *Id.* It held that, regardless of public officials' alleged motives, "[t]he rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the [federal antitrust laws] should not be interpreted to prohibit anticompetitive actions by the States *in their governmental capacities as sovereign regulators*." *Id.* (emphasis added).

In so holding, *Omni* explained that inquiring into whether public officials have acted with "selfish or corrupt motives" would entail "the sort of deconstruction of the governmental process and probing of the official 'intent' that [this Court has] consistently sought to avoid." *See id.* at 376-77; *see also, e.g.*, *Withrow v. Larkin*, 421 U.S. 35, 55 (1975) (citing *United States v. Morgan*, 313 U.S. 409, 421

(1941)). Accordingly, *Parker* and other state-action cases "unmistakably hold that, where the action complained of ... [is] that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." *Hoover*, 466 U.S. at 579-80. And *Omni* confirmed that this "*ipso facto* exempt[ion]" extends to public officials whose anticompetitive conduct is clearly authorized by state policy, whether or not they are disinterested. *See* 499 U.S. at 374, 378-79; *see also City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 411 n.41 (1978) (plurality opinion) ("We think it obvious that the fact that the ancillary effect of [a state agency's] policy, or even the conscious desire on its part, may have been to benefit the lawyers it regulated cannot transmute the [agency]'s official actions into those of a private organization.").

The rule of decision below deeming relevant the personal interests of public officers thus conflicts with *Omni*'s legal rule. The Fourth Circuit here imposed the active-supervision requirement on a state agency controlled by officials who are also market participants in order to ensure that "the State has exercised sufficient independent judgment and control." *See* Pet.App. 15a. In contrast, this Court in *Omni* held that any failure by public officials to exercise independent judgment on behalf of the State when enforcing anticompetitive state law—whether motivated by their own personal economic interests or any other reason—is "unrelated to th[e] purposes" of the federal antitrust laws, which are "not directed to th[e] end" of perceived "good government." *See Omni*, 499 U.S. at 378-79. Indeed, comparing the facts of the two cases starkly underscores the legal conflict: whatever

abstract "independence" concerns may arise here because state law requires that Board members must also be practicing dentists who are elected to office by other dentists, *see* Pet.App. 14a-15a, they pale in comparison to the concrete "independence" concerns that arose from the allegations of outright "bribery" that *Omni* nonetheless deemed legally irrelevant, *see* 499 U.S. at 367, 378-79.

D. No Other Decision Of This Court Supports The Fourth Circuit's Decision

While the Fourth Circuit completely ignored the conflict with *Parker*, *Hallie*, and *Omni*, it tried to justify its unprecedented holding by citing two other decisions of this Court. *See* Pet.App. 14a-15a. But neither case is apposite.

First, the Fourth Circuit cited *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), to support the claim that the Board here may not "foster anticompetitive practices for the benefit of its members" without active state supervision. *See id.* at 791. But *Goldfarb* did not hold that an official state agency must satisfy the active-supervision requirement. Rather, *Goldfarb* held that the State Bar there had not satisfied the "threshold" clear-articulation requirement, "because it [could not] fairly be said that the State of Virginia through its Supreme Court Rules required [the Bar's] anticompetitive activities." *Id.* at 790; *accord S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 60-61 (1985) (treating *Goldfarb* as a clear-articulation case, not as an active-supervision case). *Goldfarb* thus is irrelevant here, because (as the FTC assumed) the clear-articulation requirement is satisfied. *Supra* at 6.

Second, the Fourth Circuit cited *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621 (1992), to support the claim that the State here must "exercise[] sufficient independent judgment and control" over the Board. *See id.* at 634. But *Ticor* did not present the question whether an official state agency must be actively supervised by another state entity to ensure sufficient independence from regulated private persons. Rather, the defendants in *Ticor* themselves were "private entities organized by title insurance companies to establish uniform rates for their members." *Id.* at 628. Thus, *Ticor*'s disapproval of their "independence" was simply a reaffirmation of the settled rule that the anticompetitive conduct of "private parties" must be actively supervised in order to ensure that it is "the State's own," *id.* at 634-35, not just "a *private* price-fixing arrangement" with "a gauzy cloak of state involvement," *Hallie*, 471 U.S. at 46-47. Indeed, contrary to the Fourth Circuit's further inquiry into whether *public officials* are sufficiently *disinterested*, the *Ticor* Court disavowed any suggestion that requiring active supervision is proper "to determine whether the State has met some normative standard ... in its regulatory practices." *See* 504 U.S. at 634-35.

In sum, neither *Goldfarb* nor *Ticor* remotely supports the Fourth Circuit's radical departure from the clear legal rule recognized and repeatedly reaffirmed by this Court's antitrust state-action jurisprudence—namely, an official state entity's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government and thus exempt from federal antitrust law without any further showing. This Court thus should grant review to reverse the violation of its legal rule.

III. THE FOURTH CIRCUIT'S DECISION IS EXCEPTIONALLY IMPORTANT BECAUSE OF ITS HARMFUL IMPACT ON THE STATES' SOVEREIGN REGULATORY REGIMES

The Fourth Circuit's novel and erroneous decision violates the fundamental principles of federalism that underlie the state-action antitrust exemption, by subjecting to federal scrutiny a State's sovereign choices concerning how to structure its own regulatory agencies and thereby enforce its own anticompetitive policies. This Court's review is thus essential, especially given the grave harms posed.

As noted, *Parker* is grounded in "our national commitment to federalism." *Omni*, 499 U.S. at 374. In our system of dual sovereigns, "a State defines itself as a sovereign" "[t]hrough the structure of its government[] and the character of those who exercise government authority." *Gregory*, 501 U.S. at 460. Accordingly, "federal legislation threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in a way that preserves a State's chosen disposition of its own power." *Nixon*, 541 U.S. at 140.

Consistent with these principles, this Court has rejected interpretations of *Parker* that would "undermin[e] the very interests of federalism it is designed to protect." *See Omni*, 499 U.S. at 372, 374-75; *see also, e.g.*, *Hallie*, 471 U.S. at 43-44. Yet here, *contra Parker*, the Fourth Circuit's holding radically overrides a State's "sovereign" choices concerning who shall serve as its "officers" and how it shall exercise "control over" them. *See* 317 U.S. at 350-51. Specifically, the decision below leaves States that

enforce anticompetitive laws with only two options—each of which is a significant infringement on state sovereignty and which could seriously impair the effective enforcement of the state-law regimes that have long governed regulated professionals, such as dentists, doctors, lawyers, and accountants.

First, States could stop entrusting control over regulatory agencies to officers who are also market participants (or at least not market-participant officers elected by other market participants). But "[i]t is obviously essential to the independence of the States" that they retain "the power to prescribe the qualifications of its officers and the manner in which they shall be chosen." *Gregory*, 501 U.S. at 460. Moreover, the intrusion on that vital aspect of state sovereignty is particularly troubling here, where the sovereign decision being nullified is that experienced professionals should serve as, and also select, the officers of state regulatory agencies. Because the "lay public" often "is incapable of adequately evaluating" issues that require the "specialized knowledge" of professionals, *see California Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999), forcing States to regulate without their desired level of professional involvement might "diminish, if not destroy, [the] usefulness" of "[a]gencies [that] are created ... to deal with problems ... outside the competence of" the public, *see S. Motor Carriers*, 471 U.S. at 64.

Second, States could start actively supervising regulatory agencies that are controlled by market-participant members when they enforce the countless state-law regimes that authorize anticompetitive regulatory practices, such as professional licensing schemes. But "it is hard to

imagine a greater *intrusion* into the internal affairs of a state than a federal inquiry into the government's oversight of its own agencies, and it is not easy to imagine just how a state in *practice* would go about supervising its agencies." Lopatka, *supra*, at 1040-41 (emphases added). More specifically, as to "intrusion," requiring a State to actively supervise its own agencies infringes on its "absolute discretion" to resolve a "question central to state self-government"—namely, which of its "agencies ... may be entrusted" with "exercising [which] of the governmental powers of the State." *See City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 437 (2002). As to "practice," it largely defeats the point of having a separate agency if all of its activities must be subjected to "pointed reexamination" by a different state actor. *See Midcal*, 445 U.S. at 106. Nor would such reexamination even seem feasible where the underlying reason for selecting market participants as agency officers is their *expertise*. And in all events, "the threat of being sued for damages ... will deter [market participants] from performing this essential public service," *see Hoover*, 466 U.S. at 580 n.34, especially given that they "may not know until after their participation has occurred (and indeed until after their trial has been completed) whether the State's supervision will be 'active' enough," *see Ticor*, 504 U.S. at 640-41 (Scalia, J., concurring).

In sum, by departing from the well-established jurisprudence of *Parker* and its progeny, the decision below threatens "the dignity and essential attributes inhering in" "the sovereign status of the States" to regulate as they deem most effective. *See Alden v. Maine*, 527 U.S. 706, 714 (1999). Moreover, by

conflicting with the decisions of the Fifth and Ninth Circuits, the decision below also threatens the "fundamental principle of *equal* sovereignty[] among the States." *See Shelby Cnty. v. Holder*, 133 S. Ct. 2612, 2623 (2013).

CONCLUSION

Accordingly, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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