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Federal Trade Commission

**Reflections on the Supreme Court's *North Carolina Dental* Decision
and the FTC's Campaign to Rein in State Action Immunity**

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I. Introduction

Good afternoon. Thank you to Alden Abbott and the Heritage Foundation for inviting me to speak. I am delighted to be here.

In my remarks today, I will address the Supreme Court's recent decision in *North Carolina Dental*, as well as the long but successful road the FTC took to get to that and other favorable decisions in the state action area. I will then discuss some of the implications of the opinion—for state regulatory boards specifically and occupational licensing more generally.

Before I begin, I trust that anyone who is willing to spend his or her lunch hour hearing about the state action doctrine has a certain degree of familiarity with this area of antitrust law. I will therefore dive right in.

II. The *North Carolina Dental* Matter

The FTC filed an administrative complaint against the North Carolina Board of Dental Examiners (the Board) in June 2010.² We alleged that the Board—through its dentist-

¹ The views expressed in these remarks are my own and do not necessarily reflect the views of the Federal Trade Commission or any other Commissioner. I would like to thank Gregory Luib for his invaluable contributions to this speech.

members—was “colluding to exclude non-dentists from competing with dentists in the provision of teeth whitening services” in North Carolina.³ After deciding that whitening teeth constitutes the practice of dentistry, the Board issued at least forty-two letters to non-dentist teeth whitening providers, informing them that they were illegally practicing dentistry without a license and ordering the recipients to cease and desist from providing those services.⁴ The Board also issued at least eleven letters to various third parties, including mall owners and property management companies, with interests in approximately twenty-seven shopping malls, stating that teeth whitening services offered at mall kiosks are illegal.⁵

The Commission alleged that the Board’s activities constituted an unlawful restraint of trade under the standards governing Section 1 of the Sherman Act and thus an unfair method of competition under the FTC Act.⁶ The result of this concerted effort, as alleged in the complaint, was to deprive consumers of the benefits of price competition and increased choice provided by non-dentist teeth whiteners.⁷

Prior to the administrative trial in this matter, the Board filed a motion to dismiss, arguing that its conduct was protected by the state action doctrine. In a unanimous opinion written by then-Commissioner William Kovacic, the Commission held that “a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of

² *In re* N.C. Bd. of Dental Exam’rs, Docket No. 9343, Complaint (June 17, 2010) [hereinafter *N.C. Dental Compl.*], available at <https://www.ftc.gov/sites/default/files/documents/cases/2010/06/100617dentalexamcmpt.pdf>.

³ *Id.* at 1. The Board consists of six licensed dentists, one licensed hygienist, and one “consumer member,” who is neither a dentist nor a hygienist. *Id.* ¶ 2.

⁴ *Id.* ¶ 20.

⁵ *Id.* ¶ 22.

⁶ The FTC enforces Section 1 of the Sherman Act through the FTC Act. *See, e.g.*, *Cal. Dental Ass’n v. FTC*, 526 U.S. 756, 762 n.3 (1999) (“The FTC Act’s prohibition of unfair competition . . . overlaps the scope of § 1 of the Sherman Act . . .”) (citation omitted).

⁷ *N.C. Dental Compl.* ¶ 25.

Midcal to be exempted from antitrust scrutiny under the state action doctrine.”⁸ That is, to benefit from state action immunity, the Board must show not only that the state of North Carolina has “clearly articulated and affirmatively expressed” a state policy in favor of regulation and against competition with respect to teeth whitening services, but that the Board’s activities—like those of private parties—are “‘actively supervised’ by the State itself.”⁹ The Commission further found that the Board failed to demonstrate that “its decision to classify teeth whitening as the practice of dentistry and to enforce this decision with cease and desist orders was subject to any state supervision, let alone sufficient supervision to convert the Board’s conduct into conduct of the state of North Carolina.”¹⁰

Following that ruling, as well as a trial on the merits, the administrative law judge found the Board had violated the FTC Act,¹¹ a decision subsequently affirmed by the full Commission.¹² In May 2013, the Fourth Circuit Court of Appeals denied the Board’s petition for review of the Commission’s order, affirming both the state action ruling and the finding of liability.¹³

As everyone in this audience well knows, on February 25 of this year, the U.S. Supreme Court affirmed the Fourth Circuit decision, holding that “a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates

⁸ *In re* N.C. Bd. of Dental Exam’rs, Docket No. 9343, Opinion of the Commission, at 13 (Feb. 8, 2011), available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/02/110208commopinion.pdf>. That motion to dismiss was addressed by the Commission in the first instance, based on 2009 changes to the rules governing our administrative litigation. *See id.* at 3.

⁹ *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

¹⁰ *In re* N.C. Bd. of Dental Exam’rs, Docket No. 9343, Opinion of the Commission, at 17 (Feb. 8, 2011).

¹¹ *See In re* N.C. Bd. of Dental Exam’rs, Docket No. 9343, Initial Decision of the Administrative Law Judge (July 14, 2011), available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/07/110719ncb-decision.pdf>.

¹² *See In re* N.C. Bd. of Dental Exam’rs, Docket No. 9343, Opinion of the Commission (Dec. 7, 2011), available at <https://www.ftc.gov/sites/default/files/documents/cases/2011/12/111207ncdentalopinion.pdf>.

¹³ *See* N.C. State Bd. of Dental Exam’rs v. FTC, 717 F.3d 359 (4th Cir. 2013).

must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity."¹⁴ Justice Kennedy wrote the opinion for the Court and was joined by Chief Justice Roberts and Justices Ginsburg, Breyer, Sotomayor, and Kagan.

The Court reiterated the crucial role that antitrust plays in our economy, noting that "[f]ederal antitrust law is a central safeguard for the Nation's free market structures."¹⁵ And, citing its recent decision in *Phoebe Putney*, another Commission victory in this area, the Court explained that, "given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'"¹⁶

The Court also focused on the important issue of political accountability. It first rejected the idea that state agencies, such as the Board, are sovereign actors that automatically qualify for state action immunity, as the state itself. The Court in *Parker v. Brown*,¹⁷ in establishing the state action doctrine, recognized the importance of our federal system of government, including the sovereignty of the states. Thus, anticompetitive conduct is immunized only when it legitimately represents the state acting in its sovereign capacity. However, immunity for state agencies, the Court explained, "requires more than a mere facade of state involvement, for it is necessary in light of *Parker*'s rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control."¹⁸ In other words, "*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State

¹⁴ *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1114 (2015).

¹⁵ *Id.* at 1109.

¹⁶ *Id.* at 1110 (citing *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013)).

¹⁷ 317 U.S. 341 (1943).

¹⁸ *N.C. State Bd.*, 135 S. Ct. at 1111.

to regulate their own profession, result from procedures that suffice to make it the State's own."¹⁹

The Court also contrasted state agencies with municipalities, which it has held are not obligated to meet the active supervision prong to benefit from state action immunity. In particular, the Court noted that "municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market."²⁰ Further, municipalities tend to address issues "across different economic spheres, substantially reducing the risk that [they] would pursue private interests while regulating any single field."²¹ State agencies controlled by market participants, the Court noted, are "more similar to private trade associations vested by States with regulatory authority" than to municipalities.²²

In ruling for the FTC, the Court also rejected concerns raised by the Board and several of its amici that allowing the Commission's order to stand will discourage otherwise qualified citizens from serving on state regulatory agencies. As the Court explained, "Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath."²³ The Court further noted that, to the extent agency officials are concerned about antitrust damage claims, states may defend and indemnify those officials in the event of litigation.²⁴ Moreover, states can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition, and, if those agencies are controlled by market participants, by providing active

¹⁹ *Id.*

²⁰ *Id.* at 1112 (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 45 n.9 (1985)).

²¹ *Id.* at 1113.

²² *Id.* at 1114.

²³ *Id.* at 1115.

²⁴ *Id.*

supervision. Those two requirements and their underlying rationale, the Court found, should apply to the Board, just as they were held to apply to the medical peer review board in *Patrick v. Burget*,²⁵ where the Court directed to the legislative branch any challenges to the wisdom of applying the antitrust laws to the sphere of medical care.²⁶

Finally, the Court briefly addressed the issue of active supervision and how the Board, or any other agency controlled by market participants, can meet this prong of the *Midcal* test. The Board did not argue before the Court that North Carolina exercised active supervision over its conduct regarding non-dentist teeth whiteners, and thus the Court was not reviewing any particular supervisory system. The Court, however, made clear that the supervision inquiry is “flexible and context-dependent.”²⁷ The state’s “supervision need not entail day-to-day involvement in an agency’s operations or micromanagement of its every decision.” Rather, the critical inquiry is “whether the State’s review mechanisms provide ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’”²⁸

Of course, unlike the one in *Phoebe Putney*, the *North Carolina Dental* decision was not unanimous. Justice Alito, with Justices Scalia and Thomas joining, dissented. Among other things, the dissent argued that *Parker* immunizes state agencies, the Board is a state agency, “and that is the end of the matter.”²⁹ The fact that the Board “was serving the interests of dentists and

²⁵ 486 U.S. 94 (1988).

²⁶ See *N.C. State Bd.*, 135 S. Ct. at 1115-16.

²⁷ *Id.* at 1116.

²⁸ *Id.* (quoting *Patrick*, 486 U.S. at 100-101). The Court went on to identify “a few constant requirements of active supervision,” including: (1) “review [of] the substance of the anticompetitive decision, not merely the procedures followed to produce it”; (2) supervisory “power to veto or modify particular decisions to ensure they accord with state policy”; (3) the “mere potential for state supervision” is insufficient; and (4) “the state supervisor may not itself be an active market participant.” *Id.* at 1116-17.

²⁹ *Id.* at 1117-18 (Alito, J., dissenting).

not the public” did not bother the dissenting Justices; “that is not what *Parker* immunity is about,” they retorted.³⁰ The dissenters’ reading of *Parker* was clearly different from the majority’s. They noted that the regulation of the practice of medicine and dentistry has fallen “squarely within the States’ sovereign police power” since before the Sherman Act was passed in 1890.³¹ Thus, the state statutes that created, and conferred regulatory authority on, the Board “represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.”³²

The dissent also took issue with the practical problems that the majority opinion will supposedly create for state regulatory regimes, maintaining that it is unclear what changes to state boards will be necessary in light of the Court’s decision. The dissent further identified several questions left unanswered by the decision, including: (1) “What is a ‘controlling number [of decision makers]?’”; (2) “Who is an ‘active market participant?’”; and (3) “What is the scope of the market in which a member may not participate while serving on the board?”³³ Finally, the dissent noted that regulatory capture of a state agency can occur in many ways and asked why the inquiry should be limited to the question of whether an agency includes active market participants.³⁴

III. The FTC’s Long-Term Impact on the Scope of the Antitrust Laws

Before I further explore the *North Carolina Dental* decision and its implications, I would like to put that case into a broader context. More specifically, I would like to discuss how that decision represents the culmination of the Commission’s efforts in the state action area. Those

³⁰ *Id.* at 1118.

³¹ *Id.* at 1119.

³² *Id.*

³³ *Id.* at 1123.

³⁴ *Id.*

efforts spanned multiple administrations—both Republican and Democratic. They also reflect the use of the Commission’s unique tools and composition to develop the antitrust laws.

A. The FTC’s State Action Program

The modern state action program at the FTC began with the State Action Task Force.³⁵ When Tim Muris became Chairman of the agency in 2001, one of the central pieces of his affirmative agenda was reigning in antitrust exemptions and immunities. Thus, in July 2001, he convened the State Action Task Force, which I was privileged to be a part of.³⁶ I would note that our host, Alden Abbott, also served on the Task Force, as did then-Director of the Office of Policy Planning (OPP) Ted Cruz.

The work of the Task Force culminated in a September 2003 report that made several recommendations for the Commission to pursue to clarify and re-affirm the original purposes of the state action doctrine and thus better protect competition and consumers.³⁷ The three central recommendations of the report were to: (1) “[r]e-affirm a clear articulation standard tailored to its original purposes and goals”;³⁸ (2) “[c]larify and strengthen the standards for active supervision”;³⁹ and (3) “[c]larify and rationalize the criteria for identifying the quasi-

³⁵ For an overview of the Commission’s litigation efforts in the state action area during the 1980s and 1990s, for example, see FED. TRADE COMM’N, OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 59-63 (Sept. 2003) [hereinafter STATE ACTION TASK FORCE REPORT], available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf>.

³⁶ Another task force that I was part of during Tim Muris’s tenure as Chairman was the *Noerr-Pennington* Task Force. As in the state action area, the goal of the *Noerr* Task Force was to study the case law and make recommendations for the Commission to pursue improvements in the law. That meant trying to move the courts in the direction of maximizing the competition principles embodied in the antitrust laws, while fully respecting the core First Amendment values animating the *Noerr* doctrine. Although not as sweeping as the state action report, the *Noerr* report issued by staff in 2006 recommended the Commission take certain actions to further delineate the proper scope of the doctrine. See FED. TRADE COMM’N STAFF, ENFORCEMENT PERSPECTIVES ON THE *NOERR-PENNINGTON* DOCTRINE (2006), available at <https://www.ftc.gov/policy/policy-actions/advocacy-filings/2006/10/ftc-staff-report-concerning-enforcement-perspectives>.

³⁷ See STATE ACTION TASK FORCE REPORT, *supra* note 35, at 50-58.

³⁸ *Id.* at 50.

³⁹ *Id.* at 52.

governmental entities that should be subject to active supervision.”⁴⁰ Given the results that the Commission has obtained in the courts since 2003, which I will discuss shortly, the agency reasonably can declare victory with respect to each of those three core goals.

At the time of the 2003 report, the Commission began looking for appropriate cases in which to pursue a more limited interpretation of the state action doctrine. Early on, those cases focused on state movers associations and whether there was sufficient supervision of their collective rate-setting activities. For example, the Commission issued a Part III decision in 2005 in a case involving the Kentucky Household Goods Carriers Association.⁴¹ There, the Commission determined that the association and its members engaged in a combination to fix prices for the transportation of household goods within Kentucky and that the association’s collective ratemaking conduct was not protected by the state action doctrine. While refraining from endorsing any specific measures previously identified by the courts that must be taken to satisfy the active supervision prong of *Midcal*, the Commission found that the association had taken *none* of those measures and thus had little difficulty in finding a lack of active supervision.⁴² The Commission was subsequently affirmed by the Sixth Circuit.⁴³

Another early case involved the South Carolina State Board of Dentistry. In that case, the Commission issued a Part III opinion rejecting the board’s state action defense, concluding that there was no clear articulation by the state of a policy requiring patients to be examined by a dentist as a prerequisite to receiving any dental services from an oral hygienist.⁴⁴ In fact, the board’s preexamination requirement directly conflicted with a state legislative mandate to

⁴⁰ *Id.* at 55.

⁴¹ *In re Ky. Household Goods Carriers Ass’n*, 139 F.T.C. 404 (2005).

⁴² *See id.* at 421.

⁴³ *See Ky. Household Goods Carriers Ass’n v. FTC*, 199 Fed. Appx. 410 (6th Cir. 2006).

⁴⁴ *In re S.C. State Bd. of Dentistry*, 138 F.T.C. 229, 257-58 (2004).

eliminate such requirements. The Commission thus concluded that the board's conduct was not the foreseeable result of the relevant state statute. The Fourth Circuit subsequently affirmed the Commission,⁴⁵ and the matter was eventually settled.

During the early to mid-2000s, the Commission also engaged in competition advocacy, one of its most effective non-enforcement tools, to move the courts toward an interpretation of the state action doctrine that was more hospitable to competition and consumer welfare. We filed amicus briefs in several private suits where state action issues arose.⁴⁶ In 2005, I testified—in my capacity as OPP Director—on the proper scope of the state action doctrine before the Antitrust Modernization Commission (AMC).⁴⁷ Our advocacy before the courts, the AMC, and elsewhere was grounded in, and very much aided by, the State Action Task Force Report and all the research underlying that report.

More recently, at the beginning of this decade, the Commission filed the two state action cases that ended up in the Supreme Court. As discussed earlier, the Commission filed suit against the North Carolina Board of Dental Examiners in 2010. A year later, the Commission filed its merger challenge in the *Phoebe Putney* matter. There, the Supreme Court agreed with the Commission that the general grant of corporate powers to a local hospital authority is insufficient articulation of a state policy to displace competition via an anticompetitive hospital merger. The Court thus found that the hospital authority and the merging hospitals were not

⁴⁵ S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006).

⁴⁶ See, e.g., Brief for the United States and the Fed. Trade Comm'n as Amici Curiae Urging Reversal in Support of Appellant, Jackson, Tenn. Hosp. Co., LLC v. W. Tenn. Healthcare, Inc., No. 04-5387 (6th Cir. June 1, 2004); Brief of Fed. Trade Comm'n as Amicus Curiae Supporting Cross-Appellant and Urging Reversal, Brentwood Acad. v. Tenn. Secondary School Athletic Ass'n, Nos. 03-5245 & 03-5278 (6th Cir. Nov. 13, 2003).

⁴⁷ See, e.g., Prepared Statement of Maureen K. Ohlhausen, Dir., Office of Policy Planning, Fed. Trade Comm'n, before the Antitrust Modernization Comm'n on the State Action Doctrine (Sept. 29, 2005), available at <https://www.ftc.gov/public-statements/2005/09/ftc-staff-testimony-antitrust-modernization-commission-concerning-state>].

immune from the FTC's challenge to what virtually everyone agreed was a merger to monopoly.⁴⁸

B. The FTC's Unique Ability to Influence the Development of Antitrust

The timeline of the FTC's state action program over the past decade and a half should make clear a few points. First, and perhaps most importantly, our state action efforts, like most of our contributions to the development of the antitrust laws, depended on the broad use of all of our agency functions—including research, advocacy, administrative litigation, and federal court enforcement.

Second, policy continuity was critical to our state action program. Many people took part in the relay race from the State Action Task Force formed in 2001 to the *North Carolina Dental* decision from a few weeks ago. After all, that race spanned the last 14 years. I dare say that this is something that our sister agency, the Department of Justice Antitrust Division (Division), could not do. As fine an institution as the Division is, it is simply not designed to pursue this type of sustained campaign.

It is also worth noting that, in the past thirty years, of the two antitrust agencies, only the FTC has participated as a party in a Supreme Court case. Not only have we been before the Court during that time, we have been quite successful, prevailing in six of our seven cases before the Court. Similarly, in the circuit courts, looking at antitrust cases in which the Commission has issued a Part III opinion since 1995—that is, during the past twenty years—the agency has been affirmed in nine of the twelve cases that reached those courts. One of our three losses—the *Schering-Plough* pay-for-delay case in the Eleventh Circuit—ultimately was vindicated by the

⁴⁸ See *FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003, 1009, 1012 (2013).

Supreme Court in its 2013 *Actavis*⁴⁹ decision in favor of the FTC. Thus, whether it is nine of twelve or ten of twelve, that is a record of which any appellate litigator would be envious. It is even more impressive when one considers that, first, defendants in FTC cases can appeal the Commission decision to any circuit court in which they do business, giving them a potentially significant advantage, and, second, the Commission was designed to address—and in fact has addressed—complex issues arising under the antitrust laws, not merely run-of-the-mill cases.⁵⁰

To me, however, it comes as no surprise that we have been so successful in the appellate courts. The unique institutional features of the FTC, including our research capabilities, administrative litigation tools, and the composition of the Commission, have allowed us to develop and improve the antitrust laws over time. More specifically, the agency’s design gives it the singular ability to identify a potential competition problem in the market, develop empirical research to determine whether (and to what extent) a problem actually exists, and then plan and execute a multi-year advocacy and enforcement agenda to address the problem. In addition, the bipartisan, multi-member composition of the agency allows us to build consensus on questions of antitrust law over a longer timeframe—that is, one that may span multiple administrations.

The state action area is one of the best examples of the Commission leading the courts and others in the development of competition law toward better outcomes for competition and consumers. Of course, there are areas outside the state action doctrine that one can point to where we have accomplished the same thing. Those include hospital mergers and

⁴⁹ *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2237 (2013) (subjecting settlements of pharmaceutical patent litigation to federal antitrust scrutiny).

⁵⁰ *See, e.g.*, Jonathan Nuechterlein, Gen. Counsel, Fed. Trade Comm’n, *How the FTC Works: Lessons from the Commission’s Supreme Court Trifecta*, Prepared Remarks before the Admin. Law Rev. Annual Symposium, at 9-10 (Mar. 20, 2015), available at https://www.ftc.gov/system/files/documents/public_statements/632081/150320adminlawreview.pdf (“The Commission does not typically end up litigating slam dunk cases in Part 3. Instead, it uses its Part 3 authority to tackle the most challenging or complex issues in competition policy.”).

pharmaceutical pay-for-delay agreements. The Commission's efforts in those two areas have involved multi-year, and in fact, multi-administration efforts at moving the law in a more favorable direction for competition and consumers. Each of those topics merits a separate discussion; however, they are beyond the scope of today's remarks.⁵¹

IV. Implications of the *North Carolina Dental Decision*

Let me now return to the *North Carolina Dental* case. The decision is only a few weeks old; thus, it is a bit early to predict with any certainty what its likely effects will be. There are, moreover, open issues that may be litigated in the lower courts. The dissent seems to have identified several key questions that may need to be addressed. In particular, when the Court refers to a state agency controlled by active market participants, what does “controlled” mean? Does it mean a majority of the agency is comprised of participants in the regulated market? Also, how exactly should state boards go about demonstrating active supervision by the state?

Notwithstanding these open questions, I believe the Court's decision was a crucial victory for competition and consumers. It was also a fairly broad decision. Before the opinion was issued—particularly following oral argument last October—I had some significant doubts about how the Court was going to decide this case. Even among those who were anticipating a victory for the FTC in this case, there was conjecture about the breadth of the opinion. Would the Court key its decision off the concurrence at the Fourth Circuit⁵² and limit any holding to state boards whose members are elected by private individuals? Or, would the Court limit its holding to boards who, like the North Carolina Dental Board did here, act outside the scope of

⁵¹ For a discussion of these two programs, see, e.g., *id.* at 3-7; Maureen K. Ohlhausen, Comm'r, Fed. Trade Comm'n, *How To Measure Success: Agency Design and the FTC at 100*, Remarks before the ABA Section of Antitrust Law Fall Forum 2014, at 8-10 (Nov. 6, 2014), available at https://www.ftc.gov/system/files/documents/public_statements/597191/141106ftcat100fallforum.pdf.

⁵² See *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 376 (4th Cir. 2013) (Keenan, J., concurring) (stating that the majority opinion “turn[ed] on the fact that the members of the Board, who are market participants, are elected by other private participants”).

their authority? Thankfully for competition and consumers, the Court’s opinion in *North Carolina Dental* went beyond these narrow potential holdings.

So, what are the most important implications of the opinion? In the limited time I have, I would like to focus on two issues: (1) what regulatory boards can do going forward to satisfy the active supervision prong; and (2) the potential impact of the Court’s decision on occupational licensing in the states.

A. Implications for State Boards

First, there is no question that the Court’s decision has implications for state agencies throughout the country. Many licensing boards are controlled by active participants in the markets they regulate. A recent study, for example, found that active market participants have a majority on ninety percent of boards in Florida and on ninety-three percent of boards in Tennessee.⁵³ It is also understandable why states would prefer—and consumers might benefit from—having active market participants on state regulatory boards. They can offer valuable and potentially unique expertise in making important regulatory decisions. In an amicus brief filed with the Court in *North Carolina Dental*, several states raised concerns that subjecting regulatory board members to the antitrust laws would deter qualified professionals from serving on state boards.⁵⁴ The states also raised concerns that a decision in favor of the FTC could “subject *every* decision made by regulatory boards staffed by active professionals—including routine licensing decisions—to direct oversight and approval by full-time state employees.”⁵⁵

⁵³ See Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1103, 1157-64 (2014).

⁵⁴ See Brief of Amici Curiae State of West Virginia and 21 Other States in Support of Petitioner at 11, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. May 30, 2014).

⁵⁵ *Id.* at 15.

Although I appreciate these concerns, I believe state boards have several viable options for avoiding both antitrust liability for, and excessive oversight of, their conduct. These options should not be terribly onerous to implement and should help states retain individuals with sufficient relevant expertise on their regulatory boards. First, simply being more cognizant of, and hopefully minimizing, the competitive effects of a board's regulatory decisions would go a long way toward eliminating any antitrust exposure. This may be a bit of an oversimplification, but if a board is not engaging in conduct that is a violation of the antitrust laws, it need not even address the issue of active supervision. Second, state boards need not be controlled by active market participants.⁵⁶ Those individuals could comprise less than a majority of the board—or perhaps abstain from matters in which they have a financial interest. This option too would avoid the need to demonstrate active supervision of the board. Third, even if a state prefers a particular board to be controlled by market participants, there are many options for actively supervising the actions of that board. In fact, as the FTC argued before the Court, most states have established schemes to supervise some or all of the conduct of self-interested dental boards.⁵⁷ Under those schemes, which could be and are applied to other types of boards, ultimate regulatory decisions are made by legislative committees, umbrella state agencies, such as rules review commissions, or other disinterested state officials. And, of course, not every action of a regulatory board will need to be actively supervised; only those that potentially raise

⁵⁶ See, e.g., Brief of Amici Curiae Pacific Legal Foundation and Cato Institute in Support of Respondent at 23, *N.C. State Bd. of Dental Exam'rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014) (“[A]gencies could be made up of retired members of the profession, or could include existing members without their making up the majority of the board.”).

⁵⁷ See Brief for the Respondent at 54-55, *N.C. State Bd. of Dental Exam'rs v. FTC*, No. 13-534 (U.S. July 30, 2014); see also Brief of Amicus Curiae Neil Averitt in Support of Respondent at 4-7, *N.C. State Bd. of Dental Exam'rs v. FTC*, No. 13-534 (U.S. Aug. 5, 2014) (identifying several forms of supervision currently employed by the states).

antitrust issues would require such attention. As a last resort, states can opt to indemnify individual board members in the event that antitrust damages are imposed on them.⁵⁸

It is worth considering that, in a real sense, the *North Carolina Dental* case did not have to happen. The Board could have proceeded against the non-dentist teeth whiteners by seeking injunctions from the North Carolina courts, rather than issuing cease-and-desist letters directly to those parties. If the Board had chosen that path, it would have been shielded from antitrust liability under the *Noerr-Pennington* doctrine.⁵⁹ Alternatively, the Board could have promulgated a rule defining the practice of dentistry to include teeth whitening. Under North Carolina law, that rule would have been subject to review and approval by the Rules Review Commission, which could very well have constituted sufficient supervision under the state action doctrine.⁶⁰ Thus, the Board was subject to antitrust scrutiny because it opted to bypass its statutorily provided powers in favor of coercive measures that were not authorized under state law.

In any case, the Supreme Court in *North Carolina Dental* reiterated its view that active supervision is a flexible test. And, it is a test that the Court has now imposed on financially interested boards. States can do a lot to meddle with the free market. Under our federal system, that is their choice to make. However, states need to be politically accountable for whatever market distortions they impose on consumers.⁶¹

⁵⁸ See, e.g., *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1115 (2015); Edlin & Haw, *supra* note 53, at 1152-53.

⁵⁹ See Brief for the Respondent at 49-50, *N.C. State Bd. of Dental Exam'rs v. FTC*, No. 13-534 (U.S. July 30, 2014).

⁶⁰ See *id.* at 50.

⁶¹ See e.g., *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992) (“Federalism serves to assign political responsibility, not to obscure it. Neither federalism nor political responsibility is well served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends.”); Edlin & Haw, *supra* note 53, at 1139 (“When the FTC published its State Action Task Force Report in 2003, it adopted what had become the consensus view: antitrust federalism is defensible only when a state could be held accountable for an anticompetitive restriction.”).

B. Implications for Occupational Licensing Regimes More Generally

Another potential implication of the *North Carolina Dental* decision is the re-evaluation of the excessive state licensing regimes that have developed over the years. As the states take a step back to reconsider the composition and oversight of their regulatory boards, I would commend them also to take a very hard look at their occupational licensing regimes to see if they are on balance helping or harming consumers.⁶²

As is well documented, there has been a tremendous growth in such licensing over the past several decades.⁶³ As of 2011, at least 1,100 occupations were licensed in at least one state.⁶⁴ Among the professions with state licensure requirements are florists, interior designers, tour guides, barbers, hair braiders, and even “shampoo specialists.”⁶⁵ In fact, roughly thirty percent of U.S. workers are required to obtain a license to pursue their occupation—up from less than five percent in the 1950s.⁶⁶ Multiple studies have found that prices increase—by as much

⁶² Professor Morris Kleiner of the University of Minnesota, the foremost expert on the subject of occupational licensing, recently proposed several policy changes that the states, the federal government, and other interested stakeholders could pursue in an effort to reform such licensing. See Morris M. Kleiner, *Reforming Occupational Licensing Policies* 17-22 (The Hamilton Project, Discussion Paper 2015-01, 2015) [hereinafter Kleiner, *Reforming Occupational Licensing*], available at http://www.hamiltonproject.org/files/downloads_and_links/reforming_occupational_licensing_morris_kleiner_final.pdf.

⁶³ See generally *id.*; Morris M. Kleiner & Alan B. Krueger, *Analyzing the Extent and Influence of Occupational Licensing on the Labor Market*, 31 J. LAB. ECON. 173 (2013); Edlin & Haw, *supra* note 53.

⁶⁴ Stephanie Simon, *A License to Shampoo: Jobs Needing State Approval Rise*, WALL ST. J. (Feb. 7, 2011), <http://www.wsj.com/articles/SB10001424052748703445904576118030935929752> (citing statistics from the Council on Licensure, Enforcement and Regulation, a trade group for regulatory bodies).

⁶⁵ See *id.*; Melissa S. Kearney, et al., *Nearly 30 Percent of Workers in the U.S. Need a License to Perform Their Job: It Is Time to Examine Occupational Licensing Practices*, Brookings Institution Up-Front Blog (Jan. 27, 2015 11:00 AM), <http://www.brookings.edu/blogs/up-front/posts/2015/01/26-time-to-examine-occupational-licensing-practices-kearney-hershbein-boddy> (“[A]cross all states, interior designers, barbers, cosmetologists, and manicurists all face greater average licensing requirements than do [emergency medical technicians].”). For a comprehensive review of state licensing requirements, see INSTITUTE FOR JUSTICE, *LICENSE TO WORK: A NATIONAL STUDY OF BURDENS FROM OCCUPATIONAL LICENSING* (May 2012), available at <https://www.ij.org/licensetowork>.

⁶⁶ See Kleiner & Krueger, *supra* note 63, at 175-76 (findings based on 2008 survey conducted as part of Princeton Data Improvement Initiative).

as thirty-three percent—as a result of occupational licensing.⁶⁷ That might be tolerable if those price increases reflected improved quality in the services being provided; however, “economic studies have demonstrated far more cases where occupational licensing has reduced employment and increased prices and wages of licensed workers than where it has improved the quality and safety of services.”⁶⁸ Overall, the drag on the economy of excessive occupational licensing is counted in hundreds of billions of dollars annually.⁶⁹ As one of the *North Carolina Dental* amicus briefs put it, “The explosion of licensing and the tangle of restrictions it has created should worry anyone who believes that fair competition is essential to national economic health.”⁷⁰ (You can guess which party that brief supported.)

Licensing, of course, has its place. In many cases, it can ensure that minimally acceptable health and safety requirements are met. I most certainly want states to continue to maintain stringent licensing requirements to become, for example, a brain surgeon—an occupation, by the way, that garnered a non-trivial amount of discussion among the Justices during the *North Carolina Dental* oral argument. Some Justices appeared to be concerned that a ruling in favor of the FTC would lead to potentially lax standards in licensing brain surgeons and neurologists.⁷¹ With all due respect, the Justices need not worry about such an outcome.

⁶⁷ See, e.g., Kleiner, *Reforming Occupational Licensing*, *supra* note 62, at 15 (collecting studies); Edlin & Haw, *supra* note 53, at 1113-14 (same).

⁶⁸ Kleiner, *Reforming Occupational Licensing*, *supra* note 62, at 6; see also *id.* at 12-13 (collecting studies); Edlin & Haw, *supra* note 53, at 1111-12 (“The work of Kleiner and his contemporaries reveals a consensus in the academy: a licensing restriction can only be justified where it leads to better quality professional services – and for many restrictions, proof of that enhanced quality is lacking.”).

⁶⁹ Kleiner, *Reforming Occupational Licensing*, *supra* note 62, at 6.

⁷⁰ Brief of Antitrust Scholars as Amici Curiae in Support of Respondent at 21, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014).

⁷¹ See Transcript of Oral Argument at 31-32, 39, *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015) (No. 13-534), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/13-534_768c.pdf.

In any case, occupational licensing is not just a means for signaling to consumers that certain levels of training have been met; rather, it serves as a state-sponsored and -enforced prohibition on entering the occupations at issue, which results in reduced market competition and allows incumbents to collect higher profits than they would in the absence of the licensing. A particular concern I have is that occupational licensing regimes can create artificial and, in many cases, unnecessary barriers to entry for entrepreneurs seeking to take their first step on the economic ladder.⁷² This is particularly true for occupations that draw individuals who are just beginning a professional career. Licensing requirements, which often include certain educational components, can prevent lower-income workers, who may not be able to pay for additional education, from entering certain fields—even at the lowest rungs of the economic ladder. Competition and competitive markets, supplemented by sound antitrust enforcement, where necessary—not excessive licensing—will promote entrepreneurship in this country and provide the best platform for the least advantaged in our economy to prosper.

For its part, the Commission has devoted significant resources over the past forty years opposing state laws and regulations—including many in the occupational licensing area—that, in our view, unnecessarily restrict competition. As we explained in testimony last July before the House of Representatives Committee on Small Business:

We have seen many examples of licensure restrictions that likely impede competition and hamper entry into professional and services markets, yet offer few, if any, significant consumer benefits. In these situations, regulations may lead to higher prices, lower quality services and products, and less convenience for consumers. In the long term, they can cause lasting damage to competition and the competitive process by rendering markets less

⁷² Of course, the increased costs of excessive occupation licensing falls most heavily on those least able to afford them. See, e.g., Kleiner, *Reforming Occupational Licensing*, *supra* note 62, at 16 (“The net effects [of licensing] can be regressive, as lower-income consumers – who now have to pay higher prices and may have less access to services ranging from haircuts to dental exams – pay more to the regulated practitioners, some of whom are well compensated.”).

responsive to consumer demand and by dampening incentives for innovation in products, services, and business models.⁷³

The Commission has used two very different tools in opposing such regulations. The first tool at our disposal is law enforcement. The most recent example of our enforcement efforts in this area is, of course, the *North Carolina Dental* matter. The second and arguably more important tool for the agency is competition advocacy, whereby we provide our views—in response to public comment requests or invitations from legislators or regulators—on the likely competitive effects of specific laws or regulations. The primary goal of such advocacy is to convince policymakers to consider and then minimize any adverse effects on competition that may result from regulations aimed at preventing various consumer harms. Since the 1970s, the Commission has issued hundreds of comments and amicus briefs to state and self-regulatory entities addressing professional licensure and other restrictions across a wide range of industries.⁷⁴ My expectation is that the Commission will continue to pursue this important competition advocacy.

Any sweeping reform of occupation licensing practices, however, will need to come from the states. Such reform should garner support from across the political spectrum. As a recent Brookings Institution blog noted, licensing reform “should appeal to those interested in expanding the employment prospects of low- and middle-income workers and keeping prices more affordable to low- and middle-income consumers”⁷⁵—that is, folks with more typically liberal views. Licensing reform should also appeal to those with more typically conservative views—that is, “those committed to expanding economic opportunities by promoting

⁷³ Prepared Statement of the Fed. Trade Comm’n, Competition and the Potential Costs and Benefits of Professional Licensure, before the U.S. House of Representatives Committee on Small Business, at 1 (July 16, 2014), available at https://www.ftc.gov/system/files/documents/public_statements/568171/140716professionallicensurehouse.pdf.

⁷⁴ *Id.* at 9-13.

⁷⁵ Kearney, *supra* note 65.

entrepreneurship, the creation of small businesses, and giving individuals the ability to pursue their vocational interests.”⁷⁶ These are, of course, generalizations about political views; the takeaway is that there should be broad political support for reform of state licensing regimes. Similarly, there was broad political support for the outcome in the *North Carolina Dental* case, as evidenced by the diverse parties filing amicus briefs in support of the FTC. Those included a brief written by antitrust scholars from across the political spectrum,⁷⁷ a brief submitted by the American Antitrust Institute,⁷⁸ a brief submitted by the Institute for Justice on behalf of several public choice economists,⁷⁹ and a brief filed jointly by the Pacific Legal Foundation and the Cato Institute.⁸⁰ (To be fair, though, the amicus brief filed by twenty-two states in support of the North Carolina Dental Board was signed by some very red states as well as some very blue states.⁸¹)

V. Conclusion

In conclusion, given the extensive reach of state regulations and regulatory boards throughout our economy, *North Carolina Dental* ultimately could have the most significant impact on competition and consumer welfare of any of the Commission’s several court victories

⁷⁶ *Id.*

⁷⁷ See Antitrust Scholars Brief, *supra* note 70, at 1 (“While having a diverse range of antitrust views, [amici] all share the position taken in this brief.”).

⁷⁸ See Brief for the American Antitrust Institute as Amicus Curiae in Support of Respondent at 4, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014) (arguing that the FTC’s position “is fully in accord with this Court’s state-action precedents, good public policy, and the weight of academic scholarship across the ideological spectrum”).

⁷⁹ See Brief of Amici Curiae Scholars of Public Choice Economics in Support of Respondent at 6-7, *N.C. State Bd. of Dental Exam’rs v. FTC*, No. 13-534 (U.S. Aug. 6, 2014) (“When an economic interest group is given free rein to enact regulations that exclude potential competitors from the marketplace, should we expect that group to use its power in the service of legitimate governmental interests, or should we instead expect that group to promote its own private interests and those of its friends? One does not need a Ph.D. in economics – or even a particularly keen insight into human nature – to guess the answer to this question.”).

⁸⁰ See Pacific Legal Foundation/Cato Institute Brief, *supra* note 56, at 21 (“Whatever one’s opinion of antitrust law in general, there is no justification for allowing states broad latitude to disregard federal law and erect private cartels with only vague instructions and loose oversight.”).

⁸¹ See West Virginia Brief, *supra* note 54, at 18-20.

in the state action area. My hope is that, not only will this decision prevent the type of abuse that occurred in North Carolina, but it will also give states throughout the country the impetus and the opportunity to re-evaluate their occupational licensing regimes to ensure that they are truly serving consumers' best interests.

Thank you very much for your attention. I would be happy to entertain any questions you may have.