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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 9 OTHER STATES IN SUPPORT OF PETITIONER

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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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INTRODUCTION AND INTEREST OF *AMICI CURIAE*[1]

Certiorari is warranted to redress the serious and immediate harms caused to States by the Fourth Circuit's decision. As Petitioner North Carolina State Board of Dental Examiners (the "NC Dental Board") explains, the Fourth Circuit's decision has created a circuit split and contravenes Supreme Court precedent. *Amici* States submit this brief to stress that the Court should resolve this jurisprudential conflict forthwith because the Fourth Circuit's decision causes immediate harm to the States in at least two ways.

First, the circuit split created by the decision violates the principle of equal sovereignty among the States. There are now different rules throughout the country with respect to how States may exercise their sovereignty in creating regulatory boards. This varying discretion contravenes the foundational principle that the States are coequal sovereigns with identical authority to manage their internal affairs.

Second, States will suffer harm adapting to the Fourth Circuit's erroneous rule. *Amici* States have all exercised their sovereign authority to create regulatory boards that, like the NC Dental Board, include members that are also market participants. These boards—which include lawyer disciplinary boards, state medical and nursing boards, as well as boards overseeing architects and acupuncturists,

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[1] Pursuant to Supreme Court Rule 37.2(a), the State of West Virginia has timely notified counsel of record of its intent to file an amicus brief in support of Petitioners.

psychologists and physical therapists, dentists and dieticians—serve many important state regulatory functions, including protecting the public from unqualified and unsavory individuals. The presence of market participants on the boards provides critical benefits. As a result of their education, training and experience, these market participants have considerable expertise in their respective fields. This specialized knowledge allows for greater precision in regulation and also permits regulation to remain current as practices and standards of care advance.

In response to the Fourth Circuit's decision, and motivated by a desire to minimize the threat of lawsuits from both private parties and the Federal Trade Commission ("FTC"), these state boards and state legislatures will begin to take steps to alter the way they use market participants, if they continue to use them at all. West Virginia boards have already been hampered by the decision, to the detriment of the citizens they are charged with protecting. In time, state legislatures will reconfigure their regulatory boards, either by adding more costly and inefficient bureaucracy, or by eliminating reliance on the valuable expertise of market participants entirely.

The petition should be granted to restore equal sovereignty among the States and prevent unnecessary and harmful changes to state governance.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S DECISION CREATED A CIRCUIT SPLIT THAT VIOLATES THE EQUAL SOVEREIGNTY OF THE STATES.

A. The Fourth Circuit's Decision Conflicts with Decisions of the Fifth and Ninth Circuits.

As the NC Dental Board explains, the Fourth Circuit's decision squarely conflicts with the decisions of other federal circuit courts applying the antitrust state-action doctrine. Petition 13-18. The Fourth Circuit concluded below that state boards "in which a decisive coalition (usually a majority) is made up of participants in the regulated market, who are chosen by and accountable to their fellow market participants, are private actors and must meet both *Midcal* prongs" to qualify for the state-action doctrine. Pet. App. 14a (internal citation omitted) (referencing *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)) Even where such a board is acting pursuant to a "clearly articulated" state policy, the court of appeals reasoned, the board must be "actively supervised" by the State to ensure that it has exercised "'sufficient independent judgment and control.'" *Id.* at 15a (quoting *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992)). According to the Fourth Circuit, "a state agency operated by market participants must show active state involvement." *Id.*

The Fifth and Ninth Circuits have reached the opposite conclusion. In *Earles v. State Board of*

Certified Public Accountants of Louisiana, the Fifth Circuit determined that the State Board of Certified Public Accountants—a board "composed entirely of CPAs who compete in the profession they regulate" and who are effectively chosen by their market peers—did not need to satisfy the "active supervision" prong of *Midcal*. 139 F.3d 1033, 1041 (5th Cir. 1998). And in *Hass v. Oregon State Bar,* the Ninth Circuit reached the same decision about the Board of Governors of the State Bar—a board composed predominantly of attorneys elected by their market peers. 883 F.2d 1453, 1460 n.3 (9th Cir. 1989). Indeed, unlike the Fourth Circuit, the Ninth Circuit expressly found the board members' accountability to their fellow market participants to be a reason *not* to require active state supervision. *See id*. at 1460 n.3 ("[T]he members of the Oregon State Bar … have the ability to 'check' the actions of the Board by the electoral process.").

These cases are irreconcilable. There is no doubt that the Fourth Circuit would require active state supervision of the boards at issue in *Earles* and *Hass*. Like the NC Dental Board, those boards were "operated by market participants" and thus would be found to lack "sufficient independent judgment and control." Pet. App. 15a. They are even similar to the NC Dental Board in that their market-participant members were chosen in some respect by other market participants—by election in *Hass* and by nomination of an exclusive slate of candidates in *Earles*. *Hass*, 883 F.2d at 1460 n.3, *Earles*, 139 F.3d at 1035. This last point is not critical to the Fourth Circuit's reasoning, as the NC Dental Board

explains, *see* Pet. 22-24, but it further highlights the conflict between the courts.

B. The Conflicting Decisions Create Different Rules Regarding State Governance in Contravention of the States' Equal Sovereignty.

Setting aside their merits, these conflicting opinions cannot be permitted to persist because their mere existence renders the States unequal sovereigns. There are now different rules throughout the country with respect to how States may govern themselves. The States within the Fifth and Ninth Circuits have discretion to choose, simply by clear articulation of state policy, to endow a board of market participants with the power to regulate that particular market. *See also* Pet. 17 n.1. States in the Fourth Circuit, however, are saddled with an additional burden. If they desire to entrust a board of market participants with the State's regulatory power, they must "actively" supervise that board. States in circuits that have not expressly addressed this question will have to determine their own level of risk tolerance, which may lead some to continue following *Hass* and *Earles*, others to begin complying with the FTC's position as adopted by the Fourth Circuit, and some to avoid relying on market participants entirely until the state of the law is resolved.

The varying discretion among the States contravenes the bedrock principle that the States "are *coequal* sovereigns under the Constitution." *PPL Montana, LLC v. Montana*, 132 S. Ct. 1215, 1227 (2012) (emphasis added). Since the Founding,

it has been the nation's "historic tradition that all the States enjoy 'equal sovereignty.'" *Nw. Austin Mun. Util. Distr. No. One v. Holder*, 557 U.S. 193, 203 (2009) (quoting *United States v. Louisiana*, 363 U.S. 1, 16 (1960)). For example, each State was granted equal representation in the Senate—a body that "derive[d] its powers from the States, as political and coequal societies." The Federalist No. 45, at 289 (J. Madison) (Clinton Rossiter ed., 1999). This country "was and is a union of states, equal in power, dignity, and authority, each competent to exert that residuum of sovereignty not delegated to the United States by the Constitution itself." *Coyle v. Smith*, 221 U.S. 559, 567 (1911); *see also Pennoyer v. Neff*, 95 U.S. (5 Otto) 714, 722 (1877) ("The several States are of equal dignity and authority. . . ."), *overruled in part on other grounds by Shaffer v. Heitner*, 433 U.S. 186 (1977).

This tenet is best illustrated by the "constitutional principle that all States are admitted to the Union with the same attributes of sovereignty. . . ." *Minnesota v. Mille Lacs Band of Chippewa Indians*, 526 U.S. 172, 203-04 (1999). Every State is "guaranteed . . . upon admission," *United States v. States of Louisiana, Texas, Mississippi, Alabama and Florida*, 363 U.S. 1, 16 (1960), the "'same rights, sovereignty and jurisdiction . . . as the original States possess within their respective borders,'" *Oregon ex rel. State Land Bd. v. Corvallis Sand & Gravel Co.*, 429 U.S. 363, 370 (1977) (quoting *Mumford v. Wardwell*, 73 U.S. (6 Wall.) 423, 436 (1867)). Thus, every State is "upon an equal footing, in all respects whatever." *Pollard v. Hagan*, 44 U.S. (3 How.) 212, 224 (1845).

To be sure, this Court has recognized that "[t]he doctrine of the equality of States" does not prohibit Congress from "remed[ying] … local evils which have subsequently appeared." *Nw. Austin Mun. Util. Dist. No. One*, 557 U.S. at 203 (quotation marks omitted); *see also id.* ("[A] departure from the fundamental principle of equal sovereignty requires a showing that a statute's disparate geographic coverage is sufficiently related to the problem that it targets."). But that is far from the case here. This is not an Act of Congress that deliberately discriminates between the States, as a matter of national policy, to correct a specific problem that has arisen only in certain parts of the country. Quite the opposite. These are regional court decisions that purport to set forth generally applicable principles about state sovereignty, but that consequently create a patchwork of conflicting rules due simply to their limited geographical jurisdiction.

Moreover, concerns about state sovereignty are particularly weighty here, since the state-action antitrust exemption is grounded in federalism principles. As this Court first explained in recognizing the exemption in *Parker v. Brown*: "We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. 341, 350-51 (1943).

The petition thus must be granted to promptly restore equal sovereignty among the States. As this Court has recently reaffirmed, "'the constitutional equality of the States is essential to the harmonious operation of the scheme upon which the Republic was organized.'" *Shelby County, Ala. v. Holder*, 133 S. Ct. 2612, 2623 (2013) (quoting *Coyle*, 221 U.S. at 580). Regardless of the merits, so long as the circuits are divided over a question pertaining directly to the scope of state sovereignty, this country suffers a fundamental and immediate harm.

II. STATES WILL SUFFER SOVEREIGN HARM ADAPTING TO AN ERRONEOUS RULE REGARDING STATE GOVERNANCE.

A. The Fourth Circuit's Decision Is Incorrect.

As the Petition explains, the Fourth Circuit's decision is wrong for at least two reasons. *First*, it contravenes three of this Court's antitrust state-action decisions: *Parker*; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); and *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991). Together, those three decisions establish the rule that "an official state entity's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government[,] . . . without regard to the public officials' independence from private interests, method of selection, or supervision by other state entities." Pet. 19; *see also id.* at 19-32. By requiring state supervision of an official state entity acting pursuant to a clearly articulated state policy, the Fourth Circuit's decision directly conflicts with this rule.

Indeed, this Court has squarely addressed and rejected the Fourth Circuit's primary concern: that market-participant board members may not exercise sufficiently "independent judgment" from that of their market peers. In *Omni*, the plaintiffs argued that the municipality was not entitled to the state-action exemption because city council members had received benefits from their zoning actions. The Fourth Circuit agreed, finding an exception to the state-action exemption for action "taken pursuant to a conspiracy with private parties." 499 U.S. at 375. This Court reversed, explaining that "it is both inevitable and desirable that public officials often agree to do what one or another group of private citizens urges upon them," *id.*, and refusing to permit a "deconstruction of the governmental process and probing of the official 'intent' . . . ." *Id.* at 377.

Second, the Fourth Circuit's rule violates the "principles of federalism and state sovereignty" that the state-action antitrust exemption is intended to protect. *Omni*, 499 U.S. at 370; *see also* Pet. 33-36. As this Court has explained, the exemption is a recognition of "the role of sovereign *States* in a federal system" and "our national commitment to federalism." *Id.* at 370, 374. But by dictating the level and manner of supervision a State must give certain state agencies based on how the state legislature has chosen to structure them, the Fourth Circuit has shown little respect for the States as sovereign entities.

Intrusion on a State's internal government decisions is the height of federal intervention. "Through the structure of its government, and the

character of those who exercise government authority, a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991). The Founders intended each State, as a sovereign entity, to retain power over "all the objects which, in the ordinary course of affairs, concern the lives, liberties, and properties of the people, and the internal order, improvement, and prosperity of the State." The Federalist No. 45, at 289 (J. Madison) (Clinton Rossiter ed., 1999). Thus, this Court has repeatedly held that a State has "vast leeway in the management of its internal affairs." *Sailors v. Bd. of Ed. of Kent Cnty.*, 387 U.S. 105, 109 (1967) (holding that the Constitution permits a state to delegate authority to "subordinate governmental instrumentalities" that are not popularly elected) ; *see also Holt Civic Club v. City of Tuscaloosa*, 439 U.S. 60, 71 (1978) ("[A] State is afforded wide leeway when experimenting with the appropriate allocation of state legislative power."); *Luther v. Borden*, 48 U.S. (7 How.) 1, 47 (1849) ("[A]ccording to the institutions of this country, the sovereignty in every State resides in the people of the State, and . . . they may alter and change their form of government at their own pleasure.").

B. States Will Suffer Harm Adapting to the Fourth Circuit's Erroneous Rule if It Is Not Corrected.

The NC Dental Board is not unique. States often exercise their sovereign powers to create, and clearly delegate authority to, regulatory boards that include "market participant" members. Doctors sit on boards of medicine, dentists sit on dental boards, funeral directors oversee other funeral directors, accountants

lead boards of accountancy, and so on. *See, e.g.*, W. Va. Code §§ 30-3-5 (Board of Medicine); 30-4-4 (Board of Dental Examiners); 30-6-4 (Board of Embalmers and Funeral Directors); 30-9-3 (Board of Accountancy).

The ubiquity of the practice of relying on market participants to regulate professional conduct has at least two significant implications. *First*, it suggests a consensus among States and their legislatures that this board composition is the most appropriate and effective way to regulate members of the various professions. Not surprisingly, state legislators have ample reasons to choose to rely on the specialized knowledge of professionals to regulate their own market. *See* Pet. 34. The expertise of professionals ensures that a board can hold market participants to meaningful standards, respond quickly to developments in the profession, and knowledgably address concerns raised by the public.

Second, the Fourth Circuit's decision will have widespread and immediate negative consequences. The court's reasoning should cause the many "state agenc[ies] operated by market participants" outside the Fifth and Ninth Circuits to be concerned about potential FTC action. Pet. App. 15a. All such agencies fall squarely within the Fourth Circuit's rule—no matter how their market-participant members are selected. As the Petition explains, although the Fourth Circuit purports to limit its rule to state boards with market-participant members who are elected by their market peers, nothing in the

decision explains "why the state-law selection method is legally relevant." Pet. 22.[2]

These state agencies (particularly in the Fourth Circuit) now face significant obstacles to carrying out their statutory duties. When confronted with individuals engaging in activities that a state agency deems detrimental to health and safety, the agency must be concerned that the FTC, or some private party, will bring an antitrust action and demand proof of active state supervision. According to the Fourth Circuit, that requirement cannot be met by "[t]he mere presence of some state involvement or monitoring" or "generic oversight." Pet. App. 17a-18a (quotation marks omitted). Instead, the State must itself "establish prices," "review the reasonableness of price schedules," "regulate the terms of fair trade contracts," "monitor market conditions," or "engage in … pointed reexamination" of its agency's actions. *Id.* at 17a (quotation marks omitted). Even if the agency could

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[2] Even if relevant, the method of market-participant selection would not be much of a limitation. Similar to the NC Dental Board, many market-participant members of these boards are elected or selected to some extent by their peers. *See, e.g.*, W. Va. R. Disciplinary P. 1.3 (appointment of members of the Lawyer Disciplinary Board by the Board of Governors of the West Virginia State Bar at its annual meeting); W. Va. Code §§ 30-16-4 (chiropractor members of the Board of Chiropractic selected by Governor from slate of three nominees "recommended by the West Virginia chiropractic society, incorporated"); 30-19-4 (members of Board of Forestry selected by Governor "from five nominees recommended by the West Virginia Division of the Society of American Foresters"); 30-35-3 (members of Board of Licensed Dieticians selected from list submitted to Governor "by the West Virginia dietetic association").

meet that standard, the State would have to incur the time and expense necessary to satisfy the FTC's fact-intensive inquiry.

Some state agencies may choose to scale back their activities until this Court settles the law. In West Virginia, the decision has already hobbled the State's Board of Dental Examiners to the detriment of West Virginia citizens. Like the NC Dental Board, the West Virginia Dental Board is composed predominantly of licensed dentists. And although those dentists are chosen by the Governor, the statute contemplates the involvement of market participants, specifically the state Dental Association, in the selection process, as they are invited to submit recommendations to the Governor for board vacancies. W. Va. Code § 30-4-4(c). In light of these similarities to the NC Dental Board and out of concern about potential FTC action, the West Virginia Dental Board has declined to take action in response to complaints received concerning the unauthorized practice of dentistry by unlicensed individuals performing teeth-whitening services within the State—the same actions taken by the NC Dental Board and sanctioned by the Fourth Circuit. For a board charged with "the protection of public health and safety," however, *see* W. Va. Code § 30-1A-1,hesitancy to act can have very harmful effects.

Other West Virginia boards have expressed concern, too. These numerous state regulatory bodies include the Board of Psychologists, the Massage Therapy Licensure Board, the Board of Osteopathic Medicine, and the Board of Optometry—all of which explicitly support this brief and the NC

Dental Board's petition. Each of these boards is also composed predominantly of market participants, *see* W. Va. Code §§ 30-21-5 (Board of Psychologists); 30-37-3 (Massage Therapy Licensure Board); 30-14-3 (Board of Osteopathic Medicine); 30-8-4 (Board of Optometry), and charged with protecting public health and safety within its area of expertise, *see* W. Va. Code §§ 30-21-1 ("the practice of psychology affects the general welfare and public interest of the state and its citizens"); 30-37-1 (requiring massage therapy license "[t]o protect the health, safety and welfare of the public and to ensure standards of competency"); 30-3-1 (finding a need to regulate the practice of medicine "to protect the public interest"); 30-1A-1 ("The Legislature finds that regulation should be imposed on an occupation or profession only when necessary for the protection of public health and safety.").

Worse still, state legislatures will likely take steps to reconfigure their regulatory boards, even though there are already ample restraints in place. In addition to the federal-law requirement that boards act pursuant to "clearly articulated" policy, numerous existing state-law "checks" ensure that regulatory boards and agencies act within the law and in accordance with the will of the State. These include: gubernatorial oversight for unbecoming conduct, *see, e.g.*, W. Va. Code §§ 3-3-5 (allowing Governor to remove members of the Board of Medicine for "official misconduct, incompetence, neglect of duty or gross immorality"), 30-10-4 (allows removal of veterinary board members for "neglect of duty, incompetency or official misconduct"); state ethics commission rules, *see* W. Va. Code §§ 6B-1-1 *et*

seq.; required annual reports to the legislature, *see* W. Va. Code § 30-1-12(b); budget control, *see* W. Va. Const. Art. 6 § 51; legislative approval of rules, *see* W. Va. Code §§ 29A-3-1 *et seq*.; open meetings requirements, *see* W. Va. Code §§ 6-9A-1 *et seq*.; state public records laws, *see* W. Va. Code § 30-1-12(a); state administrative procedures, *see* W. Va. Code §§ 29A-1-1 *et seq*.; and judicial review through declaratory judgment actions, *see* W. Va. Code §§ 55-13-1 *et seq*.

Now, the Fourth Circuit's rule will cause unnecessary and detrimental changes. Some States may choose to add more layers of regulatory oversight, even though it will cost money, time, and efficiency, and they can only hope that the additional measures will satisfy a court later reviewing for sufficiently "active supervision." Other States may choose instead to stop relying on market participants and lose the benefits of their professional expertise. In any event, the States and their citizens are the ones who suffer.

Finally, the very act of reconfiguring its regulatory apparatus is itself harmful to a State. One incalculable but very real cost is the legislature's time—time that could be directed toward other measures to serve the people of the State. Another is the harm to state sovereignty that results from a State being forced by fear of federal regulatory consequences to change its system of self-governance.

The petition must be granted to prevent these unnecessary harms. If the Court agrees to review this case, it is likely that few state legislatures will

make permanent changes to their regulatory boards. But the longer this Court waits to resolve this issue, the more likely it is that States will take broad steps that will be difficult to reverse.

III. THIS CASE IS AN IDEAL VEHICLE.

This case presents an ideal vehicle to determine whether the "active supervision" requirement of *Midcal* applies to a state board simply because some or all of its members are also market participants. That is the only issue before the Court. There is no question at this time as to whether the NC Dental Board acted pursuant to and within "clearly articulated" state policy. The FTC assumed that the board had satisfied that requirement, *see* Pet. App. 47a, and the Fourth Circuit did not need to reach that issue. If this Court rules in favor of the NC Dental Board, this case could properly return to the FTC for an adjudication of that issue. *See, e.g.*, *Federal Comm. Comm'n v. Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (upholding challenged orders on administrative law grounds and remanding for consideration of constitutional issues that had not been decided by the lower court). Nor is there any question before this Court as to whether the "active supervision" requirement has been met, if it does indeed apply. The NC Dental Board has not challenged that fact-intensive determination or any of the remaining substantive antitrust issues addressed in the Fourth Circuit's decision.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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