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

BRIEF OF THE AMERCIAN DENTAL ASSOCIATION, AMERICAN MEDICAL ASSOCIATION, ET AL. AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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American Association of Dental Boards
Federation of State Medical Boards
American Academy of Pediatric Dentistry
American Association of Orthodontists
American Society of Anesthesiologists
The Litigation Center of the American Medical Association and the State Medical Societies
Medical Society of Virginia
North Carolina Medical Society
South Carolina Medical Association
West Virginia State Medical Society

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INTEREST OF THE *AMICI CURIAE*[1]

Amici American Dental Association, American Medical Association,[2] American Osteopathic Association, American Veterinary Medical Association, American Academy of Pediatric Dentistry, American Association of Orthodontists, American Society of Anesthesiologists, and the listed state medical societies have as members doctors whose practices are regulated by state boards in all fifty states, the District of Columbia, and U.S. territories. *Amici* American Association of Dental Boards and Federation of State Medical Boards are, respectively, the national associations of such boards in the fields of dentistry and medicine. *Amici* have a strong interest in supporting the determination by state legislatures that the health professions should be regulated by knowledgeable health care professionals who have practical experience in the profession that they are regulating. *Amici* and their members believe that the public is best served when state regulatory boards duly constituted in accordance with state law are free to make decisions on public health issues without fear of second-guessing under the federal antitrust laws.

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[1] After timely notification pursuant to Rule 37.2(a), the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, *amici* state that no counsel for any party authored this brief in whole or in part, and no person or entity has made any monetary contribution intended to fun the preparation or submission of this brief.

[2] The American Medical Association, along with the four state medical societies that join this brief as *amici*, files this brief both on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies.

In direct conflict with holdings of two other Courts of Appeals, the Fourth Circuit's decision in this case allows the Federal Trade Commission ("FTC"), an agency with no particular knowledge of medicine or dentistry, to displace the judgment of an expert agency charged by its state legislature with determining what is in the public interest in the area of the agency's regulatory authority. Supreme Court review is required now because, as long as it is permitted to stand, the Fourth Circuit's decision will undermine the traditional role of the states in regulating the professions by subjecting the states to costly and uncertain antitrust litigation. It will also discourage knowledgeable practitioners both from serving on state regulatory Boards and from making difficult decisions as they face the prospect of antitrust liability despite acting in their capacities as state regulators.

Accordingly, *amici* respectfully urge the Court to grant certiorari and reverse the Fourth Circuit.

INTRODUCTION

North Carolina has decided—along with every other state in the country—that the best way to regulate dentistry in the public interest is to create a state licensing agency whose members include licensed dentists. Similarly, all 50 states have determined that the practice of medicine should be regulated by licensing boards that include licensed physicians, and each of the 14 states with a separate osteopathic board requires that the board's members include licensed osteopathic physicians. Moreover, 49 states have specified that veterinary medicine should be regulated by a board that includes licensed veterinarians.

The North Carolina State Board of Dental Examiners (the "Board") is "the agency of the State for the

regulation of the practice of dentistry," N.C. Gen. Stat. § 90-22(b), and is vested "with full power and authority to enact rules and regulations governing the practice of dentistry within the State," *id.* § 90-48. The Board has exclusive power to license individuals who wish to engage in the practice of dentistry—a practice which, by statute, includes the removal of "stains, accretions or deposits from the human teeth." *Id.* § 90-29(b)(2). Thus, the North Carolina legislature has decided that the Board should decide who may and who may not remove stains from teeth.

The FTC takes issue both with (a) North Carolina's decision that the agency which regulates the practice of dentistry in that State should consist primarily of practicing dentists and (b) the exercise by that agency of its regulatory authority in this case. Specifically, the FTC has determined that the Board's decision "to exclude non-dentists from the market for teeth whitening services" constitutes an unfair method of competition and is thus within the FTC's jurisdiction to review. Pet. App. 82a-83a. Sitting in judgment of the state agency, the FTC has forbidden the Board to so much as "discourag[e] the provision of . . . Teeth Whitening Services by a Non-Dentist Provider"—despite the statutory directive that removal of stains from human teeth constitutes the practice of dentistry.[3] *Id.* at 146a. Predicating its assertion of jurisdiction on the manner in which the State legislature has chosen to constitute the Board of Dental Examiners, the FTC has subjected the Board to its continuing supervision: The Board must submit regular and detailed written reports on its ongoing compliance with

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[3] The statute in question does not refer to teeth whitening explicitly, but whitening is fairly characterized as "[r]emoving stains, accretions or deposits from the human teeth." N.C. Gen. Stat. § 90-29(b)(2).

the FTC's Order. *Id.* at 150a-151a. If the Board exercises its statutory authority to regulate the practice of dentistry in a way that conflicts with the FTC's Order, the Board faces civil penalties of up to $10,000 for each violation. *See* 15 U.S.C. § 45(l).

This is precisely the kind of interference with decisions of legislatively-created state regulatory agencies that this Court has held to be outside the purview of the federal antitrust laws in a system of dual sovereignty. *See Parker v. Brown*, 317 U.S. 341, 350-51 (1943) (holding that the federal antitrust laws do not "restrain a state or its officers or agents from activities directed by its legislature"). Notably, if a petition for review of the FTC Order in this case had come before the Fifth Circuit or the Ninth Circuit, the Order would have been vacated. Each of those Courts of Appeals has held that state-action immunity extends to the statutorily authorized actions of a state agency whose members are market participants—even where there is no "active supervision" of the agency by the State. *See Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1041 (5th Cir. 1998) (holding agency exempt from federal antitrust laws "[d]espite the fact that the Board is composed entirely of CPAs who compete in the profession they regulate"); *Hass v. Or. State Bar*, 883 F.2d 1453, 1460-61 n.3 (9th Cir. 1989) (holding bar's Board of Governors exempt from federal antitrust laws even though it was comprised of practicing attorneys elected by attorneys); *see also* 883 F.2d at 1465 (Ferguson, J., dissenting) (criticizing majority for failing to account for the "Bar's private interests in the very field in which it regulates").

In the decision below, however, the Fourth Circuit took a different tack. It announced a rule that no Court of Appeals has ever adopted before: "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, are private actors and must" satisfy the active-supervision requirement of *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Pet. App. 14a (internal quotation marks omitted). Applying this novel rule, the Fourth Circuit held that the Board was required to show that the challenged activity was actively supervised by the State. *Id.* at 17a. That holding creates a square conflict with the decision of the Fifth Circuit in *Earles* and with the decision of the Ninth Circuit in *Hass*.

The decision below is as significant as it is erroneous. Professional licensure is "at the core of the State's power to protect the public." *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977). If state licensure decisions are subject to invalidation by federal agencies with no particular expertise in the healing arts, then those federal agencies will become the final arbiters of matters of public safety, tasks that they are ill-equipped to perform.

Apart from trampling on the sovereignty of states in our federal system, the decision below has three perverse consequences. First, it induces state regulatory agencies faced with difficult policy judgments to subordinate their view of what is in the best interest of the public—in favor of a policy choice that is less likely to expose an agency and its members to federal antitrust liability. Second, it strongly discourages conscientious practitioners from serving on state regulatory boards lest they be subject to the threat of personal liability, including treble damage actions brought by persons claiming that their actions as state regulators had anticompetitive consequences. Third, in order to avoid intrusion by the FTC in mat-

ters traditionally regulated by the states, the states will be pushed to alter their choices as to the membership and method of selection of members of state regulatory boards in favor of the FTC's preferences on these matters.

REASONS FOR GRANTING THE PETITION

I. THE FOURTH CIRCUIT'S ERRONEOUS DECISION CREATES A CONFLICT IN THE COURTS OF APPEALS.

As petitioner has shown, there is a split among the circuits as to whether *Midcal*'s active-supervision requirement applies to a state agency whose members are market participants elected by other market participants. Pet. 13-17; *see also* J. Thomas Rosch, FTC, Remarks at the 2012 Lewis Bernstein Memorial Lecture: Returning the State Action Doctrine to Its Moorings 6 (Oct. 3, 2012), http://www.ftc.gov/speeches/rosch/121003stateaction.pdf (explaining that "courts have been less than consistent with respect to the treatment of special-purpose regulatory agencies, such as professional licensing boards"). Rather than repeat petitioner's analysis, *amici* will highlight the competing principles that have generated the conflict in the Courts of Appeals and explain why the need for this Court's guidance is urgent.

A. The Fourth Circuit held that a state agency vested by the state legislature with "full power and authority to enact rules and regulations" is nonetheless a private actor for purposes of the antitrust state-action doctrine when its members are market participants selected by other market participants. Pet. App. 14a. The guiding principle for that holding, drawn in part from a 1991 law review article, is that "financially interested action is . . . 'private action' subject to antitrust review." *Id.* (quoting Elhauge,

The Scope of Antitrust Process, 104 Harv. L. Rev. 667, 689 (1991)). According to the Fourth Circuit, when an agency's members are market participants, the agency's actions may be financially interested and thus private—and immune from the federal antitrust laws only when there is active state supervision.

Judged against the approach taken in other Courts of Appeals, the Fourth Circuit not only got the answer wrong; it got the question wrong as well. The proper question is whether a state regulatory board really is a state agency, such that its actions are those of the state itself. *Cf. FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992) ("The question is not how well state regulation works but whether the anticompetitive scheme is the State's own."). It is not, as the FTC would have it, whether the board includes market participants or how the legislature has determined that members of the board should be selected.

In *Earles*, for example, the Fifth Circuit held that a state board of accountants was exempt from the active-supervision requirement in light of "the public nature of the Board's actions." 139 F.3d at 1041; *see also Benton, Benton & Benton v. La. Pub. Facilities Auth.*, 897 F.2d 198, 203 (5th Cir. 1990) (holding that defendant was a state agency and "*as such*" exempt from active-supervision requirement (emphasis added)). And in *Hass*, the key question at issue was whether the state bar was a state agency. *See, e.g.*, 883 F.2d at 1461 (finding that "the Bar is clearly an agent . . . for the purposes of administering the malpractice insurance program"); *id.* at 1461 n.4 (suggesting that such a finding will justify state-action immunity when the clear articulation requirement is met).

Indeed, this Court has suggested that whether an entity is a state agency is likely dispositive, and the Courts of Appeals have followed that guidance. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985) (noting that, where "the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue"); *Charley's Taxi Radio Dispatch v. SIDA of Haw., Inc.*, 810 F.2d 869, 876 (9th Cir. 1987) (decisions of the Hawaii Dept. of Transportation and its director are entitled to state action immunity); *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986) (Urban Development Corporation authorized by state legislature need not satisfy the state supervision requirement); *Porter Testing Lab. v. Bd. of Regents*, 993 F.2d 768, 772 (10th Cir. 1993) (showing of active supervision is unnecessary for the State Board of Regents to qualify for state action antitrust immunity).

Framed this way, the instant case is straightforward. Virtually every decision to address the issue has held that a State Board of Medicine or a State Board of Dentistry is a legitimate state agency. *See, e.g.*, *Bettencourt v. Bd. of Registration in Med.*, 904 F.2d 772, 781 (1st Cir. 1990); *Neuwirth v. La. State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988); *Howard v. Miller*, 870 F. Supp. 340, 343 (N.D. Ga. 1994); *Connolly v. Beckett*, 863 F. Supp. 1379, 1381 (D. Colo. 1994). The fact that a state dental board may be composed entirely or largely of practicing dentists does not change the analysis. As one legal scholar has observed:

> State agencies occupy a dual role with respect to the articulation and implementation of state policy. Unlike municipalities, they may, within the scope of their delegated state law authority,

> adopt anticompetitive regulatory policies for the state as a whole. Because those actions by definition constitute state policy, they should be entitled to antitrust immunity under the Parker doctrine without any further requirement for clear articulation or active supervision by the state legislature.

C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Immunity*, 41 B.C. L. Rev. 1059, 1112 (2000).

Where the action of a state agency is at issue, the very concept of applying an "active state supervision" requirement makes no sense. The state can act only through its agents, and it is up to each state to determine which entities will be empowered to act on its behalf. And where a state agency acts pursuant to its delegated authority, it *is* the state. To require active supervision would be to "turn the State against itself and ultimately to commandeer the entire political machinery of the State." *Alden v. Maine*, 527 U.S. 706, 749 (1999).

Focusing on whether an entity acts as a state agency makes sense in light of the "principles of federalism and state sovereignty" on which the antitrust state-action doctrine is based. *Hallie*, 471 U.S. at 38. The principle that the authorized actions of an official or agency of the state are those of the sovereign is central to the doctrine of state sovereign immunity under the Eleventh Amendment. *See, e.g.*, *Edelman v. Jordan*, 415 U.S. 651, 663 (1974) (explaining that Eleventh Amendment immunity extends to suits against officials where liability would be paid from public funds). Such sovereign actions are precisely those designed to be exempt from antitrust scrutiny under *Parker*. As this Court explained in that case, the antitrust statutes give "no hint that [they were]

intended to restrain state action or official action directed by a state," and this Court has refused to attribute to Congress an "unexpressed purpose to nullify a state's control over its officers and agents." 317 U.S. at 351.

B. This Court should resolve the circuit split now—in a case that cleanly presents the question that has divided the Courts of Appeals—rather than allow the Fourth Circuit's erroneous decision to impede the operation of state licensing agencies.

First, the question presented is dispositive on the issue of liability. The FTC has issued a final Order, and petitioner has not challenged here the FTC's analysis on the merits of whether, in the absence of immunity, there was a violation of the FTC Act. Petitioner is either immune under the state-action doctrine or liable under the FTC's Order. Moreover, as to the state-action inquiry, the only question is whether active supervision is required. The petition does not question the Fourth Circuit's factual finding that there has been no active supervision in this case. There is also little doubt that the Board acted pursuant to a "clearly articulated" state policy in the sense elaborated in *Hallie*, *i.e.*, that "anticompetitive effects logically would result from [the Board's] broad authority to regulate." 471 U.S. at 42. Thus, this case cleanly presents the legal issue on which the Courts of Appeals have come to disagree.

Second, this case arises in an area of commerce in which the federalism concerns that led the *Parker* Court to narrowly construe the Sherman Act apply with special force. This Court has long recognized that the State's protection of "the health of its citizens . . . is at the core of its police power." *Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 956 (1982). And where federal law is alleged to control in an area that

"the States have traditionally occupied, . . . we start with the assumption that the historic police powers of the States were not to be superseded." *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 485 (1996) (internal citation and quotation marks omitted); *United States v. Lopez*, 514 U.S. 549, 583 (1995) (Kennedy, J., concurring) (cautioning against "foreclos[ing] the States from experimenting and exercising their own judgment in an area to which States lay claim by right of history and expertise"). As a consequence, this case squarely presents an opportunity to resolve a circuit split in a context that demonstrates the significance of the question presented.

Moreover, the need for this Court's guidance is urgent. To wait would not only subject the North Carolina State Board of Dental Examiners to continuing oversight under the FTC's Order; it will interfere with the operation of every state medical and dental board whose members include licensed professionals—which is true of every state medical and dental board in the country. *See infra* Part II. Although parts of the Fourth Circuit's opinion suggest that the holding is limited to states that rely on market participants to select officials—which is sufficient on its own to create a split among the circuits and warrant intervention by this Court—the reasoning cannot be so contained. The Fourth Circuit's rule derives from a general concern about the financial interest of state officials. Pet. App. 14a. In fact, the Court of Appeals indicated that "a state agency operated by market participants must show active state involvement." *Id.* at 15a. Thus, even in states where board members are selected by the governor, for example, there is every reason to believe the FTC or private litigants will wield the Fourth Circuit's decision to justify federal antitrust review of state health policy. At a min-

imum, state licensing boards will tailor their decisions on critical issues of public health with a view towards avoiding costly and intrusive FTC proceedings.

This Court's recent decision in *FTC v. Phoebe Putney Health System, Inc.*, 133 S.Ct. 1003 (2013), underscores the need for this Court's intervention. In that case, this Court held that a Georgia hospital authority did not enjoy state-action immunity because the Georgia legislature had not "affirmatively contemplated that hospital authorities would displace competition." *Id.* at 1011. *Phoebe Putney* rejected a "loose application of the clear-articulation test," *id.* at 1016, to ensure that immunity would attach only "when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own,'" *id.* at 1010 (quoting *Ticor Title*, 504 U.S. at 635). But where, as here, the authorized actions of a duly-constituted state regulatory agency are challenged, the clear-articulation requirement is easily satisfied.

The "very purpose" of regulating professionals is "to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 373 (1991). No further inquiry is, or ought to be, required. As this Court explained in *Omni Outdoor Advertising*, "in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Id.* at 374.

II. THE FOURTH CIRCUIT'S DECISION UNDERMINES THE ABILITY OF STATES TO REGULATE THE HEALTH PROFESSIONS.

The Fourth Circuit affirmed an Order that gives the FTC continuing supervisory authority over the Board for years to come. Pet. App. 150a. Thus, the constraints that can result from the Fourth Circuit's denial of state-action immunity are specific and palpable in this particular case. But the decision's impact is much broader. If permitted to stand, the decision will induce states to change how they regulate health professionals in significant ways. In particular, states cannot expect to be able to rely on highly qualified professionals—as all 50 states do in the fields of medicine and dentistry—to participate in regulating their profession. The risk of antitrust liability—or even costly antitrust investigations—is simply too great for the states and such professionals to bear.

A. States that currently regulate health professionals through agencies whose members are professionals themselves will face a risk of antitrust scrutiny. The risk of FTC scrutiny would place a chill on state regulatory boards and cause harm to the public interest because there could be no confidence that a board's implementation of the applicable state statute would survive second-guessing by the FTC. It is not the job of the FTC—applying the "gauzy cloak" of the federal antitrust laws—to pass judgment on the procedures and policy decisions of a duly constituted agency of state government. But the risk that the FTC will do so is likely to distort state health policy. And the risk that the decision below will be invoked to justify treble damages actions and other proceedings against boards or their members can only further distort regulation.

Suppose, for example, that a state medical board is called upon to determine whether the performance of certain services by a nurse practitioner unsupervised by a physician constitutes the unlicensed practice of medicine. The board may well conclude that, as a matter of medicine, the training of nurse practitioners is such that permitting them to perform these services without adequate physician supervision would pose significant risks to patients. However, knowing that such a decision could expose both the board and its members to litigation by the FTC or a private plaintiff alleging that the decision suppresses competition by nurse practitioners against physicians, the board is more likely to adopt a rule that permits the nurse practitioners to perform services for which the board concludes that they are not qualified.

In such circumstances, state health policy is subordinated to federal antitrust policy, contrary to the principles of *Parker*. The federal antitrust laws were not enacted, and should not be permitted, to subvert good faith medical and dental decisions regarding what is in the best interests of patients and the public. In this connection, it is worth noting that this Court has recognized that even private professional self-regulation can promote competition in a market in which consumers have difficulty monitoring the quality of services available. *See Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 772-74 (1999).

At bottom, the decision below reflects a profound mistrust of the state democratic process. If a state legislature enacts laws that are not in the interest of the public in that state, the cure lies in the electoral process. If a state board whose members are market participants acts in the interests of their fellow practitioners rather than in the interests of the public,

the remedy lies in the state legislature—where either the substance of a regulation or the composition of the board can be changed by majority vote. Private actors are not subject to electoral or legislative scrutiny; state-created regulatory agencies (including agencies comprised of market participants) are. It is the democratic process, not decisions of antitrust enforcers far removed from the realities of the practice of a profession in a state, that should protect the public interest in the regulation of professionals by a state agency.

B. The decision below undercuts state regulation of the professions in yet another way. If state regulatory boards are subject to the federal antitrust laws on the theory that their members are private actors, then those members may fear that they will be exposed to personal liability for treble damages.[4] *See* 15 U.S.C. § 15(a) (providing that persons injured by antitrust violations "shall recover threefold the damages" they sustain). In effect, they would reasonably be concerned that they will be treated no differently from private conspirators attempting to line their own pockets by price fixing schemes, territorial allocations, or similar economically self-serving conduct. In the circumstances, why would any conscientious practitioner ever volunteer to serve on a state regulatory board in an area in which he or she practices? The risks of personal liability are simply too great.

The same considerations that underlie the doctrine of official immunity apply equally here. That doc-

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[4] Although the members of a state regulatory board ought to be immune from suit for their official actions under the Eleventh Amendment, they might reasonably fear that sovereign immunity will be denied. *See, e.g.*, *Versiglio v. Bd. of Dental Exam'rs of Ala.*, 651 F. 3d 1272 (11th Cir. 2011) (denying immunity).

trine is based on the proposition that the public is best served when government officials are not subject to personal liability for action taken in good faith. *See, e.g.*, *Butz v. Economou*, 438 U.S. 478, 506 (1978) (emphasizing "the need to protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority"). Otherwise, as noted above, the officials will be constrained from making the hard decisions lest they be exposed to personal damages actions. Yet exposure to the threat of treble damages actions is precisely what members of state boards will face if the decision below is not reviewed and reversed.

As national and state associations of practitioners who serve on state regulatory boards in health care and as the associations of such boards, *amici* represent to this Court that this case is being closely watched by those who might be called upon to serve their states. If this case is permitted to stand, the foreseeable result is that many highly qualified practitioners who would otherwise be willing to serve on boards will either resign or refuse to accept office lest they face significant personal antitrust exposure. For that reason, this Court should not wait for another vehicle to resolve the circuit conflict. Rather, it should take this case and make clear that the authorized actions of state regulatory boards and their members are immune from the federal antitrust laws even if those boards are comprised of market participants.

C. In this suit, the FTC has been allowed to override a substantive policy decision of a state agency. In addition, it has eviscerated the decision of a state legislature on the composition and method of selection of members the state's regulatory agency. These

results are directly contrary to the teachings of this Court in *Parker v. Brown* and subsequent state action cases.

For years, the FTC has recommended that states "broaden the membership of state licensure boards," based on the FTC's view that boards of practicing professionals are more likely to "engage in conduct that unreasonably increases prices or lowers access to health care." U.S. Dep't of Justice & FTC, *Improving Health Care: A Dose of Competition* 22 (July 2004), *available at* http://www.justice.gov/atr/public/health_care/204694.pdf. But many states—including North Carolina—have different views of what is in the interest of their citizens. These states have chosen to rely on boards that include practicing professionals to regulate many health professions.

By conditioning state-action immunity on the structure and composition of the state agency in question, the decision below pushes the states to refashion their administrative agencies in the FTC's image. This result is inconsistent with the principles of federalism articulated in *Parker* and embodied in the Constitution. Notwithstanding the supremacy of federal law, the federal government does not have the power to force state agencies to advance federal policy. *See, e.g.*, *New York v. United States*, 505 U.S. 144, 162 (1992) ("[T]he Constitution has never been understood to confer upon Congress the ability to require the States to govern according to Congress' instructions."). The authorized actions of a duly constituted state agency should be immune from second-guessing under the federal antitrust laws, regardless of whether the state agency is organized as the FTC would like it to be.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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