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

REPLY TO BRIEF IN OPPOSITION

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It is undisputed that the Board is a *bona fide* agency of the State of North Carolina, charged with regulating the practice of dentistry pursuant to state-law powers and state-law duties that public entities traditionally have and that private actors typically do not have. Pet. 3-4; BIO 2-3. The disputed question is whether the Fourth Circuit erred by nevertheless treating the Board as if it were a "private" actor for purposes of state-action antitrust immunity—and thus subject to the "active supervision" requirement—simply because state law provides that a majority of the Board's members must also be practicing dentists. Pet. 10; BIO 10.

The certiorari petition demonstrated that the Fourth Circuit's decision warrants review for three reasons: **(I)** it conflicts with decisions of the Fifth and Ninth Circuits, Pet. 13-18; **(II)** it conflicts with the legal rule consistently applied in this Court's decisions, *id.* 19-32; and **(III)** it presents exceptionally important questions of federalism and state sovereignty, *id.* 33-36. Numerous *amici*—including 10 States and national associations of both regulators and the regulated—have powerfully underscored the need for review, by detailing the widespread and immediate harm imposed by this unprecedented break from 70 years of state-action jurisprudence. As demonstrated below, the opposition brief does not credibly refute these points.

I. THE FTC FAILS TO REFUTE THE CONFLICT BETWEEN THE FOURTH CIRCUIT'S DECISION AND DECISIONS OF THE FIFTH AND NINTH CIRCUITS

The FTC concedes that, unlike the decision below, *Earles v. State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998), and *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), both "held that the boards [there] could invoke the state action doctrine" "[w]ithout … proof of active supervision by the State" *even though* they were "controlled by members of [the regulated] profession." BIO 18-19; *see also* Pet. 13-18. The FTC even concedes "some variation" between "the reasoning" of these cases and the decision below. BIO 10. Nevertheless, the FTC futilely attempts to deny that a circuit conflict exists.

A. The FTC's primary argument is that "[i]n neither [*Earles* nor *Hass*] … did the court regard the challenged board action as responding to a competitive threat facing the existing market participants who dominated the board." *Id.* 19. But this argument is legally and factually baseless.

Legally, the rule adopted in each case does not mention or permit the FTC's proposed distinction. As for *Earles*:

> [T]he Board is functionally similar to a municipality.… Despite the fact that the Board is composed entirely of [accountants] who compete in the profession they regulate, the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition. So long as the Board is acting within its authority

> and pursuant to a clearly established state policy, there is no need for active supervision of the exercise of properly delegated authority. (139 F.3d at 1041.)

Likewise, for *Hass*:

> These [state-law] requirements leave no doubt that the Bar is a public body [despite the requirement that 12 of the 15 members of the Bar's governing board must be practicing attorneys]…. [W]e hold that the Bar, as an agency of the State of Oregon, need not satisfy the 'active supervision' requirement … [a]s long as [it] acts pursuant to a clearly articulated and affirmatively expressed state policy. (883 F.2d at 1460-61.)

These *unqualified* holdings foreclose the FTC's assertion that the decisions rested on unique factual grounds as well as its speculation that future panels might manufacture such distinctions.

Factually, there is also no basis for the FTC's contention that the challenged conduct in these cases did not implicate the competitive interests of the market-participant officials. In *Earles*, the ban on selling securities deprived accountants with securities licenses of their competitive advantage over accountants without securities licenses. *See* 139 F.3d at 1034-36, 1043 n.12. Similarly, in *Hass*, the requirement that all attorneys had to buy malpractice insurance from a state fund forced lower-risk attorneys to cross-subsidize premiums for higher-risk attorneys. *See* 883 F.2d at 1455-56, 1463. In short, the agencies' challenged conduct had self-evident competitive implications for their market-participant officials; nevertheless, the Fifth

and Ninth Circuits declined to require active supervision—in direct conflict with the Fourth Circuit here.

B. The FTC's additional arguments denying a circuit conflict also fail.

As to *Earles*, the FTC speculates that the Fifth Circuit might rule differently where, as here, the agency's market-participant officials are elected by fellow market participants, rather than selected (as in *Earles*) by the State from an exclusive slate of nominations made by fellow market participants. BIO 20. But the FTC never disputes that this minor factual difference in state-law selection methods is irrelevant under the legal rule of *Earles*, which turns solely on "the public nature" of the agency's actions. Pet. 14-15; *supra* at 2-3. Indeed, the FTC's suggestion that the Fifth Circuit would treat the selection method as a *dispositive* distinction is especially disingenuous given the FTC's concession that its own "approach taken … in this case" treated the selection method as an *immaterial* distinction. *See* BIO 17 n.5.

As to *Hass*, the FTC speculates that it might no longer be "authoritative within the Ninth Circuit" after *Washington State Electrical Contractors Ass'n v. Forrest*, 930 F.2d 736 (9th Cir. 1991) (per curiam). BIO 20-21. But that two-page opinion merely remanded for additional fact-finding without ruling on the merits. 930 F.2d at 736-37. *Forrest* did not purport to abrogate *Hass*, and no case has suggested otherwise over the past 23 years. Nor could *Forrest* have abrogated *Hass*, since Ninth Circuit precedent binds later panels absent "intervening higher authority" that is "clearly irreconcilable." *See Miller*

v. Gammie, 335 F.3d 889, 892-93 (9th Cir. 2003) (en banc). The FTC responds that *Patrick v. Burget*, 486 U.S. 94 (1988), was decided "[a]fter *Hass*" and could authorize abrogating it, BIO 20-21, but that is not true: among other things, *Patrick* was decided more than a year *before Hass*.

C. The FTC's illusory speculation is particularly improper given the compelling need for immediate review.

As explained by 10 States (who comprise 4 of the 5 States inside the Fourth Circuit as well as 6 States outside the Fourth Circuit), "the Fourth Circuit's decision will have widespread and immediate negative consequences" because it "will cause unnecessary and detrimental changes" to the States' "ubiquit[ous] … practice of relying on market participants to regulate professional conduct." WV *Amicus* Br. 11, 15. The States represent that given "the threat of lawsuits from both private parties and the [FTC]," they "will begin to take steps to alter the way they use market participants, if they continue to use them at all"; and "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." *Id.* 2, 16.

Likewise, national and state associations of healthcare professionals and regulators have explained that "the need for this Court's guidance is urgent" because the decision below "will interfere with the operation of every state medical and dental board … in the country." ADA *Amicus* Br. 11. They "represent … that this case is being closely watched by … many highly qualified practitioners," who "will either resign or refuse to accept office lest they face

significant personal antitrust exposure" "[i]f this case is permitted to stand." *Id.* 16.

In short, the harmful consequences of the decision below have already begun manifesting and spreading. Review is necessary now.

II. THE FTC FAILS TO REFUTE THE CONFLICT BETWEEN THE DECISION BELOW AND THE LEGAL RULE CONSISTENTLY APPLIED IN THIS COURT'S DECISIONS

The certiorari petition also demonstrated that the decision below conflicts with the rule established in this Court's antitrust state-action jurisprudence—namely, a *bona fide* state agency's enforcement of a clearly articulated anticompetitive state policy is a sovereign act of State government, without regard to whether the agency's officials are either acting independently from private interests or supervised by disinterested state decisionmakers. Pet. 19-32. The FTC's contrary arguments radically contradict this Court's precedents.

A. Most untenable is the FTC's treatment of *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991).

The FTC claims that *Omni* presented only the question whether a "governmental body [that] is *otherwise entitled* to invoke the state action doctrine" "could lose that exemption if the relevant public officials' motives were illicit," whereas this case presents "the *antecedent* question whether [the Board] is entitled to invoke the state action doctrine *at all*." BIO 23 (emphases added). In actuality, however, *Omni* unqualifiedly rejected the "proposition that … government *regulatory* action may be deemed private … when it is taken pursuant

to a conspiracy with private parties," which forecloses the FTC's proposed distinction between alleging a conspiracy to create an "exception" to the defendant's immunity and alleging a conspiracy to defeat the defendant's "prima facie entitle[ment]" to immunity. *See* 499 U.S. at 374-75. Indeed, the FTC's approach would effectively abrogate *Omni*, since plaintiffs could end-run it just by relabeling their argument. Rather than arguing for a "conspiracy exception" to immunity that is otherwise available, *id.*, they could argue (per the FTC) that municipal officials who conspire in favor of private interests must be actively supervised in order to satisfy their prima facie case for immunity.

The FTC also claims that the decision below complied with *Omni* because it did "not turn upon … the *actual* motives of [the Board's] members," but rather "reflect[ed] the more general conclusion" that "a state agency … operated by market participants" should be treated as "a 'private actor.'" BIO 23 (emphasis added). The only reason asserted for that conclusion, however, is that the FTC and Fourth Circuit are suspicious of Board members' *potential* motives: they perceive a "danger" that market participants may "act[] to further [their] own interests, rather than the governmental interests of the State." *See id.* 13; Pet.App. 15a. The FTC's proposed distinction is thus between questioning the defendants' actual motives versus their potential motives—a distinction foreclosed by *Omni*'s unqualified "rejection of any interpretation of [federal antitrust law] that would allow plaintiffs to look behind the actions of state sovereigns." *See* 499 U.S. at 379. Again, the FTC's approach would effectively abrogate *Omni*, since plaintiffs could end-

run it just by relabeling their argument. Rather than arguing that municipal officials actually have "corrupt motives" due to benefits received from market participants, *id.* at 367, 376, they could argue (per the FTC) that municipal officials who receive benefits from market participants must be actively supervised when regulating that market due to the potential danger that they are acting to further private rather than public interests.

Simply put, the FTC's grounds for distinguishing *Omni* make a mockery of its proclamation that this Court's "principle[s] … [cannot] be avoided through the use of … nomenclature." *See* BIO 18.

B. Almost as implausible is the FTC's treatment of *Parker v. Brown*, 317 U.S. 341 (1943).

The FTC claims that *Parker* is legally irrelevant because "the question presented here concerns the proper application of [*California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980)]." BIO 22. But *Midcal* merely synthesized "decisions [that] ha[d] applied *Parker*'s analysis." *See* 445 U.S. at 104-05. Thus, the recognition in *Parker*'s progeny that "private parties" "must be 'actively supervised,'" *id.* at 105, did not purport to abrogate the distinct immunity rule established in *Parker* for a State's own "officers or agents"—namely, they may not be "restrain[ed]" from performing "activities directed by its legislature." 317 U.S. at 350-51.

The FTC also claims that this Court should ignore the factual context of *Parker*, which applied its legal rule to a Commission operated by members who were also market participants and not actively supervised by disinterested state officials, because

this Court supposedly lacked "a meaningful record" concerning the precise role of the Commission's members who were market participants. BIO 21-22. But the fact that the Commission's decisions were not actively supervised by any other state entity is clear from this Court's opinion, *Parker*, 317 U.S. at 346-47, 352, and the fact that a super-majority of the Commission's members were also agricultural producers is clear from the statutory provision cited by this Court, Pet. 21. Nor is it credible for the FTC to object on the ground that it is not clear whether a majority of the Commission's agricultural-producer members had a financial interest in regulating the *particular commodity* involved in *Parker*. It is inconceivable that this landmark decision rested on an unstated factual assumption that such a majority did not exist. Likewise, it is inconceivable that the case would come out the opposite way if such a majority did in fact exist. After all, a financially self-interested Commission majority was entirely consistent with the State's anticompetitive purpose behind this regulatory scheme, which was unabashedly to "maintain prices in the distribution of … commodities." *See Parker*, 317 U.S. at 346.

In sum, the FTC's contention that "[t]he court of appeals correctly applied this Court's precedents" (BIO 10) expressly disregards the seminal precedent of *Parker* itself.

C. The FTC is no better in its treatment of *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985).

First, the FTC claims that, because *Hallie* contrasted "a state agency" (which "likely" need not be actively supervised) with "a private party" (which needs to be actively supervised), *id.* at 46 n.10, it

somehow "presume[d] the existence of hybrid entities that are properly viewed … as 'private parties' even though they participate in 'state or municipal regulation.'" BIO 16-17. But the fact that *Hallie* explicitly drew a *favorable* distinction *between* state agencies and private parties in no way implicitly "presumes" an *unfavorable* distinction *among* state agencies based on their composition.

Second, the FTC claims that *Hallie* held that the function of the active-supervision requirement is to prevent defendants from "pursu[ing] their own self-interest under the guise of implementing state policies"—a function that the FTC claims was held unnecessary for municipalities in *Hallie* yet is necessary for the Board here. *Id.* 12, 16. But, as the certiorari petition showed and the FTC ignores, *that function is already completely served* by the clear-articulation requirement. Pet. 25-26. Thus, properly understood, *Hallie* held instead that the active-supervision requirement serves *the distinct function of preventing the State from trying to immunize illegal private conduct* by merely casting "a gauzy cloak of state involvement" over private actors' independent anticompetitive arrangements—and that function is unnecessary for all public entities, including the Board, that are charged with traditional state-law powers and duties. *Id.* 26-28.

Finally, the FTC repeatedly claims that the Board's theory of both *Hallie* and state-action immunity turns on "labels" and "form." BIO 15, 18. But that assertion mischaracterizes the Board's consistent position here, which turns instead on a *substantive* question: is the agency at issue a *bona fide regulatory arm* of the State, or is it instead

merely a private entity participating within the State's regulatory scheme? Contrary to the FTC's assertion (*id.* 17-18), there is a fundamental distinction between a "private trade association" and a public agency like the Board that is charged with traditional governmental powers and duties. This is starkly confirmed by the FTC's inability to identify a single other case within 70 years of antitrust state-action jurisprudence that treats a *bona fide* State agency as a "private" actor subject to the active-supervision requirement.[1]

III. THE FTC FAILS TO REFUTE THE EXCEPTIONAL IMPORTANCE OF THE DECISION BELOW IN LIGHT OF ITS HARMFUL IMPACT ON THE STATES' SOVEREIGN REGULATORY REGIMES

The certiorari petition lastly demonstrated that the decision below seriously threatens state sovereignty and state regulation by interfering with the States' choices concerning the most effective way to structure their own agencies. Pet. 33-36. The FTC's cavalier dismissal of these concerns underscores the need for this Court's intervention.

A. The FTC's essential response is that the decision below "is not a diktat to the States" because it leaves them with options: (1) staff their agencies "with disinterested state officials"; (2) "provid[e]

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[1] As for *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), the FTC logically errs by treating this Court's "intimat[ion]" that active supervision might *sometimes be sufficient* as "strong support" for the distinct proposition that active supervision *is always necessary*. BIO 13-14. Critically, unlike in *Goldfarb*, requiring active supervision is unnecessary here because the clear-articulation requirement is already satisfied per the decisions below. Pet. 31; BIO 5-6.

appropriate supervision" of "self-interested" officials; or (3) accept the "consequence" that their officials "will be subject" to federal oversight. BIO 24-25. But, far from constituting a meaningful response, that rejoinder illustrates the intrusion here on a State's sovereign choice to structure its regulatory agencies in the manner that it deems most effective.

As the 10 State *amici* explain, because they obviously cannot risk "the threat of lawsuits from both private parties and the [FTC]," they must either "eliminat[e] reliance on the valuable expertise of market participants" or "add[] more costly and inefficient bureaucracy." WV *Amicus* Br. 2. Nor can the FTC rehabilitate the latter option merely by noting that, where regulatory agencies are operated by members who are also market participants, *some* States have chosen to actively supervise *some* of the regulatory decisions of *some* such agencies. BIO 25-26 & nn.6-7. That meager showing hardly justifies forcing *all* States to actively supervise *all* of the regulatory decisions of *all* such agencies.

B. The FTC also asserts that the Board's concerns about state sovereignty "ring[] particularly hollow" because the FTC's order only bars the Board "from employing coercive measures that it lacked state-law authority to undertake" *according to the FTC and court below*. BIO 26-27. But, of course, determining the proper scope of the Board's state-law authority is not a "federal antitrust job"; rather, that is the role of "state administrative review." *Omni*, 499 U.S. at 372. Thus, here again, the FTC's argument directly flouts *Omni* and "undermin[es] the very interests of federalism [that *Parker* immunity] is designed to protect." *Id.*

CONCLUSION

Certiorari should be granted.

Respectfully submitted,

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