IN THE SUPREME COURT OF FLORIDA
CASE NO.: SC18-149

THE FLORIDA BAR,
Petitioner,

L.T. Case Nos.: 20174035(11B) and 20174045(11B)

vs.
TIKD SERVICES LLC, A Foreign Limited Liability Company,

and

CHRISTOPHER RILEY, individually and as Founder of, TIKD SERVICES LLC,
Respondents.
_____/

ERWIN ROSENBERG'S MOTION FOR JUDICIAL NOTICE THAT (1) THE FLORIDA BAR'S AMICI BRIEF IN SUPPORT OF THE PARTY THAT ENDED LOSING IN *STATE BD. OF DENTAL EXAMINERS v. FTC*, 135 S.CT. 1101 (2015) REFLECTS THE FLORIDA BAR'S OPINION THAT IT MAY BE CRIMINALLY VIOLATING FEDERAL ANTITRUST LAW AND (2) THAT THE FLORIDA BAR HAS NEVER OBTAINED A FAVORABLE DECLARATORY JUDGMENT IN A CASE WHERE THE U.S. GOVERNMENT WAS A PARTY THAT ITS DISCIPLINARY ENFORCEMENT ACTIVITIES COMPORT WITH FEDERAL ANTITRUST LAW

F.S. 90.202(6) and (12) say as follows:

> Matters which may be judicially noticed.—A court may take judicial notice of the following matters, to the extent that they are not embraced within s. 90.201:
> . . .
> (6) Records of any court of this state or of any court of record of the United States or of any state, territory, or jurisdiction of the United States.
> . . .
> (12) Facts that are not subject to dispute because they are capable of accurate and ready determination by resort to sources whose accuracy cannot be questioned.

In State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015) the U.S. Supreme Court ruled against the State Bd. of Dental Examiners. However, The Florida Bar aloing with the North Carolina State Bar and others was an Amici Curiae in support of the party that

ended losing the case. The Florida Bar's brief is evidence of its understanding of the significance of the U.S. Supreme Court's decision in State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015). This Court should note that the brief reflects The Florida Bar's opinion that it may be criminally violating federal antitrust law. See Exhibit "A", *North Carolina State Board of Dental Examiners v. FTC*, No. 13-534, May 30, 2014 Brief of the North Carolina State Bar, the North Carolina State Board of Law Examiners, the West Virginia State Bar, the Nevada State Bar and The Florida Bar, as Amici Curiae in support of Petitioner) at page 16:

> State action immunity allows antitrust claims against state agencies to be disposed of at an early stage. The Fourth Circuit's decision, however, would require litigation at least over whether a state bar is a "more quintessential state agency" or the subject of sufficiently active state supervision to warrant state action immunity. If the state bar loses on those issues, the antitrust claim would proceed much further— perhaps to a trial under the complex rule of reason or under the more plaintiff-friendly per se or "quick look" tests described in the opinion. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 373-74. As this Court noted with concern in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007), antitrust litigation is complex and expensive. It threatens defendants with treble damages and awards of attorney fees, 15 U.S.C. § 15, **and even raises the prospect of "the criminal liability of public officials**," *Omni*, 499 U.S. at 373 n.4. Further, liability insurance may not be available to mitigate the risks and defray the cost of defending these claims. *E.g., Rose Acre Farms, Inc. v. Columbia Cas. Co.*, 662 F.3d 765, 769 (7th Cir. 2011) (excluding antitrust claims from insurance coverage because "[p]articipation in a conspiracy to violate federal antitrust law is both deliberate **and criminal**").

(emphases added).

Furthermore this Court should also take judicial notice that The Florida Bar has never obtained a favorable declaratory judgment in a case where the federal government was a party that its disciplinary enforcement activities comport with federal antitrust law. Wherefore I move for judicial notice that (1) The Florida Bar's amicus brief in State Bd.

of Dental Examiners v. FTC in support of the party that ended losing reflects The Florida Bar's opinion that it may be criminally violating federal antitrust law and (2) that The Florida Bar has never obtained a favorable declaratory judgment in a case where the federal government was a party that its disciplinary enforcement activities comport with federal antiotrust law.

CERTIFICATE OF SERVICE

I hereby certify that on February 14, 2020 I served a copy hereof on all registered persons via Portal Filing.

Respectfully,

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EXHIBIT "A"

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 Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

BRIEF OF THE NORTH CAROLINA STATE BAR, THE NORTH CAROLINA BOARD OF LAW EXAMINERS, THE WEST VIRGINIA STATE BAR, THE NEVADA STATE BAR AND THE FLORIDA BAR, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

Amicus The North Carolina State Bar (the "State Bar") was created by the North Carolina General Assembly (the "General Assembly") to protect the public by regulating the practice of law in North Carolina. The State Bar's regulatory functions include formulating and adopting rules of professional ethics and conduct; investigating and prosecuting matters of professional misconduct; preventing or stopping the unauthorized practice of law; distributing compensation to members of the public harmed by professional misconduct; obtaining injunctions to prevent professional misconduct, including freezing the trust accounts of lawyers believed to have misappropriated entrusted funds; and protecting clients of deceased, disbarred or disabled lawyers. N.C. Gen. Stat. §§ 84-23(a), 84-28(f), (j), 84-37 (2011); 27 N.C. Admin. Code 1D .1401-.1403 (2012); *In re Establishment of a Client Security Fund*, 311 N.C. 748 (1984). Extensive safeguards ensure that parties are provided an appropriate and fair process before being subjected to regulatory action.[2]

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have consented to the filing of this brief, and letters of consent from all parties have been submitted to the Clerk. Pursuant to Supreme Court Rule 37.6, counsel for *amici curiae* state that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amici curiae* or their counsel made a monetary contribution intended to fund the preparation or submission of this brief.

[2] *See, e.g.*, 27 N.C. Admin. Code 1B .0111(b)-(d), .0112, .0113, .0204 (investigation, notice, and opportunity to respond to allegations of professional misconduct); *id.* 1B .0114-.0116, .0118, .0123 (procedures for discipline and disability hearings); *id.* 1D .0201-.0206, 1E .0313 (procedures before the Authorized Practice Committee); *id.* 1D .0707 (procedures for resolution of disputed

The State Bar's authority is vested in the State Bar Council (the "Council"), which is composed of 61 lawyers elected from judicial districts across North Carolina, four officers (who must be lawyers), and three public members (collectively, the "Councilors"). N.C. Gen. Stat. § 84-17.

The regulatory responsibilities and composition of the State Bar are similar to those of the petitioner the North Carolina State Board of Dental Examiners (the "Dental Board") and numerous other statutorily-created state regulatory bodies, in North Carolina and other states, that are composed entirely or primarily of licensed professionals.

The State Bar of West Virginia, The State Bar of Nevada, The Florida Bar, and the North Carolina Board of Law Examiners join the State Bar as co-*amici*. Each of the state-bar *amici*, like the State Bar, regulates the practice of law through a governing body composed primarily of lawyers. (The Florida Bar's governing body, like that of the State Bar, is elected by other lawyers licensed to practice in the state. *See* R. Regulating Fla. Bar 1-4.1.)

The North Carolina Board of Law Examiners is responsible for the admission and licensure of attorneys to practice in North Carolina, in accordance with rules and regulations that it presents to the Council, and that are then certified to the State Supreme Court. *See* 27 N.C. Admin. Code 1C .0102, .0104. The State Supreme Court retains discretion to decline any rules or regulations it finds to be

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fees); *id.* 1D .0903, .1001 (procedures before Administrative Committee); *id.* 1D .1417-.1419 (procedures for Client Security Fund); *id.* 1D .1801 (hearing and appeal rules of the Board of Legal Specialization); *id.* 1G .0122 (review and appeal of denial of paralegal certification).

inconsistent with the laws governing the State Bar. N.C. Gen. Stat. § 84-21(b). The members of the North Carolina Board of Law Examiners are all lawyers whom the Council elects. *Id.* § 84-24. This brief focuses on the facts concerning North Carolina and its State Bar for illustrative purposes.

SUMMARY OF ARGUMENT

The Fourth Circuit's decision ignores well-established precedent that a state agency that is a "sovereign regulator" constituted under state law and acting pursuant to statutory authorization to displace competition with regulation is a state actor that is entitled to state action immunity from the application of the federal antitrust laws. *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991) ("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"). Instead, the Fourth Circuit found that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor" that is not entitled to state action immunity from federal antitrust laws unless it is "actively supervised" by other state officials. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 370, 375 (4th Cir. 2013). The Fourth Circuit's decision is not only inconsistent with *Parker v. Brown,* 317 U.S. 341 (1943), and its progeny but will expose those charged by the state with regulating professionals—and their board or council members—to antitrust claims (and, potentially, to awards of treble damages and attorney fees, as well as to criminal liability). This exposure to antitrust liability is likely to undermine the functioning of those state regulatory bodies.

The Fourth Circuit's decision threatens an important and sovereign state interest: the choice by a state to regulate state-licensed professionals by state bodies composed primarily of those practicing the same profession (or, at least, ones who are elected by their fellow professionals). By denying these state regulators state action immunity unless they show active supervision by other parts of state government, the decision impairs the ability of state regulators to enforce state laws enacted to protect the public. There are four likely sources of impairment:

- The limited resources available to prosecute lawyer misconduct and to prevent the unauthorized practice of law will be diverted to litigating whether the state bar's action has been actively supervised in a manner sufficient to provide state action immunity.
- State bars will have to defend expensive antitrust actions even though states explicitly authorize the state bars to regulate the conduct being challenged.
- Lawyers will be reluctant to serve as bar councilors for fear of being sued—and of being held individually liable—in treble-damage antitrust actions.
- Councilors who do agree to serve may be deterred from fulfilling their state-authorized enforcement duties against defendants who threaten antitrust claims.

Aside from these severe practical problems, the imposition of potential antitrust liability is not needed to protect or vindicate the rights of aggrieved parties. In allowing the antitrust laws to become a vehicle to

review and challenge state regulation, the decision strikes at the principles of federalism that underlie the state action doctrine.

ARGUMENT

I. THE FOURTH CIRCUIT'S DECISION RADICALLY SUBVERTS THE VALUES OF FEDERALISM ON WHICH THE STATE ACTION DOCTRINE IS FOUNDED.

Not everyone in North Carolina is allowed to practice dentistry. Instead, the General Assembly has restricted competition by requiring dentists to be licensed upon meeting certain qualifications. The General Assembly has also defined the practice of dentistry and included in that definition the removal of "stains, accretions or deposits from the human teeth." *See* N.C. Gen. Stat. § 90-29(b)(2). The scope of the restriction on competition that the General Assembly has imposed is thus explicit.

Unremarkably, the General Assembly has chosen to entrust the regulation of dentistry to a Dental Board composed of the citizens of North Carolina most knowledgeable about the subject: practicing dentists. According to the Federal Trade Commission and the Fourth Circuit, however, the Dental Board and the dentists who serve on it are now subject to treble-damage lawsuits under the Sherman Act precisely because they fulfilled their statutory duty (to prevent unlicensed individuals from removing stains from the human teeth) while serving on a board structured in exact compliance with the governing statutes.

Similarly, not everyone can practice law. Legislatures have restricted who can practice law, set qualifications to obtain a law license, and entrusted state bars such as *amici* to regulate the practice of law and to

exclude from the practice unlicensed individuals and lawyers who have been suspended or disbarred. Many state legislatures have chosen to regulate the legal profession through agencies composed of lawyers elected by their peers or nominated by their peers for selection by another government actor. If the Fourth Circuit's decision stands, those state bars will face Sherman Act liability—even when they are clearly authorized or even mandated by statute to regulate in a manner that displaces competition—simply because a state legislature chose to populate the Council with practicing lawyers as the regulators.

The professions themselves are creatures of state statute. State statutes define what constitutes a profession, and states establish licensing requirements that set forth the qualifications required to be a professional. By interfering with states' sovereign choices concerning the structure, composition, and supervision of professional regulatory boards, and subjecting state regulators to liability in the federal courts, the decision below ignores the states' authority to regulate professions that they created using regulators who have practical experience and expert knowledge of the subject matter they are regulating.

The Fourth Circuit's discussion of federalism presents a circular argument, asserting that subjecting the Dental Board to liability under the Sherman Act presents "no federalism issue" because of the "conclusion that the Board is a private actor under the antitrust laws." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 375. To the contrary, the decision to deny immunity to a state regulatory body presents a stark challenge to federalism. This Court has explained that "immunity for state regulatory programs is grounded in our federal structure." *California Retail Liquor*

Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 103 (1980).

The breadth of the Fourth Circuit's holding is illustrated by the fact that, under the court's opinion, when a state chooses to staff a professional regulatory board with working professionals elected by their peers, *no* action taken by that board qualifies for state action immunity, including enforcement actions that are unquestionably authorized by the state's decisions to replace unlimited competition with a regulatory structure. (For example, an action related to the extraction of teeth by unlicensed individuals would not be immune.) The Fourth Circuit concedes that the Dental Board is "a state agency." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 364. The General Assembly has charged the Dental Board with addressing all licensing matters, and has empowered the Dental Board to bring an action to enjoin the unlicensed practice of dentistry in North Carolina. N.C. Gen. Stat. § 90-41. Furthermore, the General Assembly not only requires a license to practice dentistry, *id.* § 90-29(a), but also defines the practice of dentistry to include "remov[ing] stains, accretions or deposits from the human teeth," *id.* § 90-29(b)(2), which was the subject of the Dental Board's enforcement action here.

There can be no dispute that the General Assembly, as state sovereign, has chosen to make the Dental Board the state agency with broad and specific power to regulate the practice of dentistry and to constitute the Dental Board with members who are active, practicing dentists. Yet even had the General Assembly expressly required the Dental Board to send cease-and-desist letters with the very wording the

Dental Board used, the opinion below would still deny the Board state action immunity.

The choice to treat a state regulatory body created by and acting pursuant to state statute as a private actor is inconsistent with this Court's rulings on federalism in antitrust cases. "The Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state." *Parker*, 317 U.S. at 351; *see also Omni*, 499 U.S. at 374 ("The rationale of *Parker* was that, 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.").[3]

Furthermore, the Fourth Circuit's suggestion that municipalities (which are entitled to state action immunity without having to show active supervision, *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 367) should be afforded a greater degree of deference than should a state body is in conflict with this Court's decisions in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985) and *Omni.* The Fourth Circuit misreads *Town of Hallie*, especially footnote 10, which states:

> In cases in which the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here

[3] Treating a state agency as a "private actor" would not only potentially deprive state agencies and their officials of state action immunity, but would also cast doubt on the availability of other immunities, such as immunity under the Eleventh Amendment. A clear benefit of the state action doctrine is to avoid sending antitrust litigation, complex as it is, into the thicket of other official immunity doctrines.

> decide that issue. Where state or municipal regulation by a private party is involved, however, active state supervision must be shown, even where a clearly articulated state policy exists.

471 U.S. at 46 n.10 (citing *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 62 (1985)). Footnote 10 contrasted state regulation by a *private party* (such as the rate bureaus in *Southern Motor Carriers*, which were "private associations," 471 U.S. at 52), with arrangements in cases—such as this one—where "the actor is a *state agency*," *Town of Hallie*, 471 U.S. at 46 n.10 (emphasis added). The Fourth Circuit apparently takes this Court's distinction as being without a difference, and declares a State agency *to be* a private party—even if that agency is exercising its core regulatory function pursuant to sovereign State law.

This case deals with the core regulatory function of the Dental Board's policing of the practice of dentistry. It is not for the federal courts to employ the Sherman Act to second-guess the regulatory activities of the states, even if they believe those activities to be misguided or not in complete compliance with state law. As this Court explained with regard to municipal zoning rulings found by a jury to have been the product of a conspiracy, if regulatory decisions are "made subject to *ex post facto* judicial assessment of 'the public interest,' with personal liability of city officials a possible consequence, we will have gone far to 'compromise the States' ability to regulate their domestic commerce.'" *Omni*, 499 U.S. at 377 (quoting *S. Motor Carriers*, 471 U.S. at 56).

In *Hoover v. Ronwin*, 466 U.S. 558, 580 (1984), this Court explained precisely how the principles of

federalism on which *Parker* is founded would be undermined if state entities (there, Arizona's bar examination committee) were subjected to antitrust liability:

> The reasoning adopted by the dissent [in *Hoover*] would allow Sherman Act plaintiffs to look behind the actions of state sovereigns and base their claims on perceived conspiracies to restrain trade among the committees, commissions, or others who necessarily must advise the sovereign. Such a holding would emasculate the *Parker v. Brown* doctrine. For example, if a state legislature enacted a law based on studies performed, or advice given, by an advisory committee, the dissent would find the State exempt from Sherman Act liability but not the committee. A party dissatisfied with the new law could circumvent the state-action doctrine by alleging that the committee's advice reflected an undisclosed collective desire to restrain trade without the knowledge of the legislature. The plaintiff certainly would survive a motion to dismiss—or even summary judgment—despite the fact that the suit falls squarely within the class of cases found exempt from Sherman Act liability in *Parker*.

The Fourth Circuit's decision will cause exactly the harms this Court warned against in *Hoover*. The decision displaces a state's sovereign authority to determine how best to regulate professionals who practice in the state, and undermines the state's judgment that boards composed primarily of licensed professionals, elected by fellow professionals, are, because of their expertise, best qualified and able to

exercise the state's regulatory authority. The decision also intrudes on state sovereignty by essentially compelling states, against their experience, will, and judgment, to impose on professional regulatory boards an unwieldy, intrusive, and unnecessary administrative mechanism to "actively supervise" the boards' actions, so that the boards will qualify for state action immunity and thus remain able to attract qualified professionals to serve on them.

II. THE DECISION BELOW WILL SEVERELY DISRUPT THE ABILITY OF THE STATE BAR AND SIMILAR STATE ENTITIES TO FULFILL IMPORTANT MANDATES OF THE STATE.

The Fourth Circuit holds that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor," and therefore must be actively supervised by other state officials to receive state action immunity. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370, 367 n.4 (while also stating that its "opinion should not be read as precluding" an otherwise undefined category of "more quintessential state agencies," not "composed entirely of private market participants," from "arguing that they need not satisfy the active supervision requirement"). Absent such supervision, no action of a state body run by elected professionals would appear to be reliably protected by state action immunity, even if the conduct is mandated by state statute or state constitution.[4] The decision thus poses a direct

[4] An example of such a statute is N.C. Gen. Stat. § 84-23(a) (requiring that the Council of the State Bar "shall administer this Article; take actions that are necessary to ensure the competence of lawyers [and] investigate and prosecute matters of professional misconduct").

challenge to a state's ability to organize its regulatory scheme as it sees fit.

It is the states, of course, that license lawyers and many other professionals to practice within their borders, and the states, accordingly, bear the important responsibility to regulate those professionals and protect the public from serious harm they might do. Indeed, in *Hoover*, this Court characterized the regulation of bar applicants as an "essential public service." 466 U.S. at 580 n.34. The regulation of the legal profession is a fundamental state function. As early as 1695, North Carolina disciplined wayward lawyers, with at least three members of the bar "forbidden" from practicing. *See* Ernest H. Alderman, *The North Carolina Colonial Bar*, *in* 13 The James Sprunt Historical Publications 1, 9 (The Univ. of N.C., 1913), https://archive.org/details/northcarolinaco00aldegoog. In 1715, the General Assembly not only adopted legislation such as the Statute of Frauds and statutes of limitations, but it also passed a statute regulating—and limiting competition in—the legal profession, to "prevent the Commissioners and other inferior Officers of the said Court, pleading as Attornies" (sic). Justice James Iredell, *Laws of the State of North Carolina*, 10-14, 22-25 (1791).

To meet this responsibility to protect its citizenry, every state must implement a regulatory regime that has the expertise necessary to identify, analyze, understand, and resolve the issues that arise with respect to the profession being regulated. With respect to lawyers, the General Assembly has determined, understandably, that licensed lawyers are in the best position to implement the State's interest in regulating the legal profession. Likewise, North Carolina and other states have determined that

numerous other professions, such as medicine and dentistry, require regulation by practicing members of the profession. *See, e.g., Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999) ("'lay public'" often "'is incapable of adequately evaluating'" issues that require the "specialized knowledge" of professionals) (quoting Barry R. Furrow et al., 1 *Health Law* § 3-1, 86 (1995)); *In re Guess*, 393 S.E.2d 833, 837 (N.C. 1990) ("Certain aspects of regulating the medical profession plainly require expertise beyond that of a layman.").

The General Assembly has also determined that the appropriate means of selecting qualified lawyers who are willing to bear that responsibility is to have them run for election by their peers in the judicial districts in which they practice, where their abilities, character, and reputations are best known. *See* N.C. Gen. Stat. §§ 84-16; 84-18(a), (b). Finally, the General Assembly has chosen not to impose on the State Bar and other expert professional regulatory bodies an intrusive and unnecessary additional layer of oversight that the Fourth Circuit would seem to require. Instead, the State is willing to rely on state agencies to perform their duties in compliance with their statutory authorization and subject to oversight from the three branches of state government.[5] *See* Pet. Br.

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[5] The Supreme Court of North Carolina, for example, retains oversight of the State Bar. *See* N.C. Gen. Stat. § 84-21(b) (requiring that the rules, regulations and amendments adopted by the Council "shall be certified to the Chief Justice of the Supreme Court of North Carolina" and "entered by the North Carolina Supreme Court upon its minutes," but adding that the court may "decline to have so entered" any rules, regulations and amendments "which in the opinion of the Chief Justice are inconsistent" with the laws governing the State Bar); 27 N.C. Admin. Code 1A .1403(c) ("No proposed rule or amendment to a

6-7 (explaining oversight of Dental Board by other branches of government).

The Fourth Circuit's decision fundamentally undermines North Carolina's, and other states', state-mandated professional regulatory regimes and their sovereign interests and choices with respect to bringing the necessary expertise to the regulation of law, dentistry, and numerous other professions. In particular, the Fourth Circuit's erosion of the state action exemption will give litigants against the State Bar and similar agencies every incentive to assert Sherman Act claims to complicate or block enforcement actions, thereby impeding the agencies' ability to protect the public. For example, it is not unusual for disbarred lawyers to try to continue to practice under the guise of being paralegals; some surely will use the Fourth Circuit's decision to attack the efforts of the State Bar to bring enforcement proceedings against them.

Especially disruptive is the likelihood that individual Councilors and board members of similar agencies will be sued for alleged Sherman Act violations. It is already challenging to find lawyers who have earned the trust and confidence of their peers, who are willing to run for election, and who are willing to give up several weeks a year to serve as Councilors, especially in view of the absence of any compensation (aside from a $50 per diem for quarterly Council meetings, *In re Council of the N.C. State Bar* (N.C. March 7, 1996) (on file with the State Bar)). The prospect of facing federal antitrust claims will increase that challenge and will make Councilors—

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rule adopted by the council shall take effect unless and until it is approved by order of the North Carolina Supreme Court.").

and board members of similar agencies—reluctant to take the decisive actions necessary to fulfill their statutory duties, potentially depriving the State not only of their expertise, but also of the substantial cost savings realized by their free service.

In *Hoover,* this Court recognized the seriousness of this chilling effect. Having noted that "[p]etitioners were named as defendants in the suit in their capacity as individual members of" Arizona's bar examination committee, 466 U.S. at 565, the Court wrote:

> Ronwin has brought a suit for damages under the Sherman Act, with the threat of treble damages. There can be no question that the threat of being sued for damages—particularly where the issue turns on subjective intent or motive—will deter 'able citizens' from performing this essential public service.

Id. at 580 n.34 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982)).

The State Bar's exercise of its regulatory authority results in its continual involvement in litigation, as both plaintiff and defendant. As of its April 25, 2014 quarterly meeting, the State Bar was a party to 15 lawsuits in state and federal courts, including one lawsuit seeking to enjoin its imposition of discipline on a lawyer; two lawsuits alleging the State Bar harmed the plaintiffs by failing to impose discipline on lawyers; and three lawsuits, pending in the North Carolina Business Court, seeking to nullify charges of the unauthorized practice of law. In all three Business Court cases, the opposing party asserted claims under the North Carolina Constitution for purported monopolization. *See World Law South, Inc. v. N.C.*

State Bar, No. 13 CVS 11048 (N.C. Super. Ct. filed Aug. 18, 2013); *N.C. State Bar v. Janis Lundquist and Lienguard, Inc.*, No. 11 CVS 7288 (N.C. Super. Ct. filed May 12, 2011); *LegalZoom.com, Inc. v. N.C. State Bar*, No. 11 CVS 15111 (N.C. Super. Ct. filed Sept. 30, 2011). The Fourth Circuit's decision will entice the State Bar's opponents in similar controversies to assert Sherman Act claims in federal court (under 28 U.S.C. § 1337(a)), making it more costly and difficult for the State Bar to protect the public from harm.

State action immunity allows antitrust claims against state agencies to be disposed of at an early stage. The Fourth Circuit's decision, however, would require litigation at least over whether a state bar is a "more quintessential state agency" or the subject of sufficiently active state supervision to warrant state action immunity. If the state bar loses on those issues, the antitrust claim would proceed much further—perhaps to a trial under the complex rule of reason or under the more plaintiff-friendly *per se* or "quick look" tests described in the opinion. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 373-74. As this Court noted with concern in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558 (2007), antitrust litigation is complex and expensive. It threatens defendants with treble damages and awards of attorney fees, 15 U.S.C. § 15, and even raises the prospect of "the criminal liability of public officials," *Omni*, 499 U.S. at 373 n.4. Further, liability insurance may not be available to mitigate the risks and defray the cost of defending these claims. *E.g., Rose Acre Farms, Inc. v. Columbia Cas. Co.*, 662 F.3d 765, 769 (7th Cir. 2011) (excluding antitrust claims from insurance coverage because "[p]articipation in a conspiracy to violate federal antitrust law is both deliberate and criminal").

Instead of applying its limited resources to protect the public, the State Bar will now have to expend those resources litigating antitrust claims.

The State Bar faces a substantial workload in carrying out its responsibilities. Each year, the State Bar handles 1,200 to 1,400 grievances involving lawyer misconduct, 80 to 100 matters involving the unauthorized practice of law, and 40 to 60 contested disciplinary cases. *See, e.g.*, 2013 Annual Report and 2014 April Quarterly Report of the Office of Counsel to the N.C. State Bar, http://www.ncbar.gov/PDFs/office_of_counsel_report.pdf; http://www.ncbar.gov/PDFs/Council_report.pdf. Under the Fourth Circuit's opinion, the State Bar will not be able to send cease-and-desist letters to inform individuals that they are practicing law without a license or in an unauthorized manner without the State Bar taking the risk that it is exposing its Councilors to personal liability under the antitrust laws. The Fourth Circuit's opinion would, as a practical matter, require that the State Bar sue individuals engaging in the unauthorized practice of law without warning rather than writing a cease-and-desist letter that may resolve the matter and avoid the cost and expense of filing lawsuits. By limiting the State Bar's options for deploying its limited resources in a manner that will allow state action immunity, the Fourth Circuit's decision may make it difficult or impossible for the State Bar to handle its volume of cases.

The Fourth Circuit suggests that the State can somehow provide "active supervision." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 370. Subjecting state agencies to "active supervision" by the legislature or judiciary, or by state officials who are not "market participants," would be impractical, cumbersome and

inefficient. A redundant bureaucracy would serve little purpose given the separate requirement that "the challenged restraint . . . be 'one clearly articulated and affirmatively expressed as state policy.'" *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978)). Moreover, because the regulation of professionals frequently involves "the specialized knowledge required to evaluate the services" at issue, beyond the expertise of the "'lay public,'" *Cal. Dental Ass'n*, 526 U.S. at 772 (quoting Furrow et al., at 86), non-practicing state bureaucrats may be unable to provide competent oversight in any event. Nor would it be feasible for the State Supreme Court to provide meaningful oversight of thousands of matters per year.

Adding a new level of bureaucracy also would fail to cure the practical problem that the decision below creates. Under current doctrine, agencies "may not know until after their [conduct] has occurred (and indeed until after their trial has been completed) whether the State's supervision will be 'active' enough." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 641 (1992) (Scalia, J., concurring). This lingering uncertainty over the outcome of antitrust lawsuits would be enough to dissuade professionals from serving as state officials and would further impair an agency's ability to fulfill its statutory mandate. Thus, even if a state were willing to adopt some sort of regime to supervise its expert regulatory agencies, doing so would fail to dispel the chilling effect, about which this Court warned in *Hoover*, on professionals' willingness to perform "this essential public service." 466 U.S. at 580 n.34.

Moreover, the Fourth Circuit's broad reasoning is not logically limited to agencies whose boards are

composed of *elected* professionals. The Fourth Circuit wrote that "[a]t the end of the day, this case is about a state board run by private actors in the marketplace . . . ." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 375. This concern extends to *any* state regulatory body "run by" members of the profession being regulated, no matter how those members are selected. The decision does not state or identify how appointed board members and elected board members would behave differently in regulating their peers. (Indeed, the Federal Trade Commission's opinion denying state action immunity to the Board held that "a state regulatory body that is controlled by participants in the very industry it purports to regulate must satisfy both prongs of *Midcal* to be exempted from antitrust scrutiny under the state action doctrine"—*without regard* to the method by which the members were selected. *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 626 (2011)). Thus, numerous state regulatory bodies composed of professionals *appointed* to regulate their peers—including, for example, the North Carolina Boards of Architecture, N.C. Gen. Stat. § 83A-2, General Contractors, *id.* § 87-2, and Medicine, *id.* § 90-2—face the potential loss of the state action exemption, upsetting their functioning as well.

Finally, the Fourth Circuit's decision is vague and unhelpful with respect to exactly the proportion of board members that can be private market participants before its new rule will apply. This ambiguity alone will spawn costly litigation. The court variously indicates that its decision applies to state agencies in which market participants constitute a "'decisive coalition (*usually* a majority),'" *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 368 (emphasis added) (quoting Phillip E. Areeda & Herbert Hovenkamp, 1A *Antitrust Law: An Analysis of Antitrust*

Principles and Their Application ¶ 227b, 501 (3d ed. 2009)), and to agencies that are "operated by," *id.* at 370, or "run by," *id*. at 375, such market participants. We can only guess about the circumstances in which a "coalition" composed of other than a majority of market participants might be enough to come within the reach of the decision or about what, exactly, it means for an agency to be "operated by" or "run by" such market participants. There is much fodder for litigation here.

Even less helpful to the agencies, and their members, is the Fourth Circuit's observation that "more quintessential state agencies" may still argue "that they need not satisfy the active supervision requirement," *id.* at 367 n.4. The concept of "quint-essentiality" is a new addition to the law of state action immunity, and it is not clear why a state agency created by statute and performing within its statutory mandate would not be seen as "quint-essential" in the first instance. If this comment about "more quintessential state agencies" is intended to suggest a test or standard, then it is too vague to be useful. The decision below does not indicate what factors might bear on quintessentiality. One can only imagine the aggregate cost of the lawsuits that will be required to develop such a list of factors that will provide meaningful guidance.

III. THE DECISION BELOW DISRUPTS THE LONGSTANDING RELIANCE OF STATES ON *PARKER* AND ITS PROGENY IN REGULATING THE PROFESSIONS USING MEMBERS OF THE PROFESSION.

As noted above, North Carolina and many states have chosen to regulate all manner of professions with state agencies that are composed of members of

their professions who often work for no compensation. In arranging their regulatory structures with professionals from the profession being regulated, states have relied on this Court's jurisprudence, and on lower court cases such as *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989) and *Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998). There have been no contrary cases; the Fourth Circuit's decision, and the FTC's position, represent a reversal that would upset state reliance on previously settled law.

For example, what the Fourth Circuit found dispositive, in concluding that the Dental Board was not entitled to state action immunity, was that the Dental Board was "a state agency . . . operated by market participants who are elected by other market participants." *N.C. State Bd. of Dental Exam'rs,* 717 F.3d at 370. In *Hass*, the board of the Oregon State Bar had exactly those characteristics, being composed of lawyers elected by the other lawyers practicing in the state. 883 F.2d at 1460 n.3. Yet the Ninth Circuit relied on the fact that the lawyers doing the regulating were elected by their peers to conclude that the Oregon State Bar *was* entitled to state action immunity. *Id.* at 1461. The Fourth Circuit attempts to distinguish *Hass* by portraying that decision as being bound by its facts, writing that the Ninth Circuit "merely determined that the particular state agency at issue was more akin to a municipality than a private actor." *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 369 n.6. However, the facts that ultimately mattered to the Fourth Circuit concerning the Dental Board and the board of the Oregon State Bar are identical, so the cases squarely conflict.

The Ninth Circuit specifically relied on the election of the agency's board as a factor *supporting* the treatment of the bar as a public body entitled to state action immunity, reasoning that the elections served as a "'check' [on] the actions of the [b]oard." *Hass*, 883 F.2d at 1460 n.3. Moreover, the additional reasons the Ninth Circuit gave for treating the Oregon State Bar as a state actor apply with equal force to both the Dental Board and the State Bar. *Hass* emphasized the following features of the Oregon Bar, 883 F.2d at 1460, all of which are shared by the State Bar:

- The Oregon State Bar "is an agency of the state of Oregon organized to regulate the practice of law for the benefit of the public," (*see* N.C. Gen. Stat. § 84-15 (the State Bar is "created as an agency of the State of North Carolina")).
- The governing body of the Oregon State Bar has "nonlawyer members of the public," (*see id.* § 84-17 (the Council shall have "three public members not licensed to practice law in this or any other state")).
- The Oregon Bar's members "must comply with the Code of Ethics enacted by the state legislature to guide the conduct of all public officials" (the North Carolina State Ethics Commission has designated the Council as a board subject to all the provisions of the State Government Ethics Act, *see id.* § 138A-3(1c), http://www.ethicscommission.nc.gov/coverage/coveredBoards.aspx (last visited May 30, 2014)).

Under *Hass,* the State Bar would easily qualify for state action immunity, but under the Fourth Circuit's

decision, it must show active supervision or qualify under the "quintessentiality" standard.

The foreseeable result of affirming the Fourth Circuit's opinion would be that the Federal Trade Commission will be given license to challenge any state regulatory structure in which professionals play a prominent role. States that have relied on *Parker* and *Hass* will be forced to re-examine who they choose to regulate the professions and how they supervise the conduct of state agencies that are composed of professionals. Whether citizens who are not members of a profession will be willing to provide their services essentially for free, as the Councilors do, is an open question. States will also incur additional costs to provide some largely undefined degree of active state supervision to avail themselves of state action immunity. The end result is that states' long and appropriate reliance on *Parker* and the state action immunity doctrine will be disrupted, and states will face the ongoing risk and expense of having their regulatory structures being continually attacked under the antitrust laws.

IV. THE DECISION BELOW MISAPPREHENDS THE AUTHORIZATION REQUIREMENT OF THE STATE ACTION IMMUNITY DOCTRINE AND IGNORES THAT AGGRIEVED PARTIES HAVE ADEQUATE REMEDIES UNDER STATE LAW FOR ANY MISCONDUCT.

The Fourth Circuit recognized that the Dental Board was authorized by State law to bring an action to enjoin the unlicensed practice of dentistry. *N.C. State Bd. of Dental Exam'rs*, 717 F.3d at 364. Although the Fourth Circuit's footnote 9 asserts that "the Board was acting to regulate third parties in a

manner not authorized by state law," that assertion does not appear to be a basis for its holding that "when a state agency is operated by market participants who are elected by other market participants, it is a 'private' actor." *Id.* at 370, 373 n.9. The opinion's summation of its holding goes further than the footnote, suggesting that the relevant question is whether the letters were not just authorized, but *required*: "[a]t the end of the day, this case is about a state board run by private actors in the marketplace taking action outside of the procedures *mandated* by state law to expel a competitor from the market." *Id.* at 375 (emphasis added).

It is unclear whether, and the extent to which, the Fourth Circuit bases its decision to deny state action immunity to the Dental Board on its conclusion that the Dental Board's letters were not contemplated by statute. However, any such reliance where there is clear statutory authority to displace competition with regulation is inconsistent with *Omni* and undermines the Fourth Circuit's entire analysis of the state action immunity doctrine. In *Omni,* this Court rejected the notion that state action immunity is somehow lost to the regulator "whenever the nature of its regulation is substantively or even procedurally defective." *See Omni,* 499 U.S. at 371-73. As the Court explained with regard to the allegedly bribed city council in *Omni*, "in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law." *Id.* at 372.

This conclusion is further underscored by *Town of Hallie* and *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003 (2013). *Town of Hallie* illustrates

that authorization need not be as explicit as the Fourth Circuit's opinion suggests. This Court there explained that, for state action immunity to apply, "[i]t is not necessary . . . for the state legislature to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Town of Hallie*, 471 U.S. at 42. Rather, for state action immunity to apply to the City's tying sewage treatment services to the provision of sewage collection and transportation services, "it is sufficient that the statutes authorized the City to provide sewage services and also to determine the areas to be served." *Id.*

More recently, in *Phoebe Putney*, this Court explained that what is required is "a state policy to displace federal antitrust law . . . sufficiently expressed where the displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." 133 S. Ct. at 1012-13. *Phoebe Putney* quoted *Omni* to illustrate that a grant of zoning power was sufficient: "'[t]he very purpose of zoning regulation is to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition' and . . . a zoning ordinance regulating the size, location, and spacing of billboards 'necessarily protects existing billboards against some competition from newcomers.'" *Id.* at 1013 (quoting *Omni*, 499 U.S. at 373).

This is not a case in which the Dental Board has been given "'simple permission to play in a market.'" *Id.* (quoting *Kay Elec. Coop. v. Newkirk*, 647 F.3d 1039, 1043 (10th Cir. 2011)). To the contrary, "the very purpose" of the authorization of the Dental Board to enforce the state law requiring a license to practice

dentistry, including removing stains from teeth, is to displace competition. The General Assembly's statutory displacement of unfettered competition in dentistry with regulation by the Dental Board is why the holding in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) does not apply. As this Court explained in *Phoebe Putney*, state action immunity did not apply to the Virginia State Bar's adoption of a compulsory minimum fee schedule in *Goldfarb* because the State had not "adopted a policy to displace price competition among lawyers." 133 S. Ct. at 1016. By contrast, the essence of a licensing regulation is to displace competition from those without a license. The Dental Board has thus "been delegated authority to act or regulate anti-competitively," *id.* at 1012, and therefore is entitled to state action immunity for executing that responsibility—including by sending cease-and-desist letters.

The Fourth Circuit also ignored that, even if the Dental Board were to have acted in violation of state law, the imposition of potential antitrust liability is not needed to protect or vindicate the rights of aggrieved parties. To the contrary, this Court has warned explicitly against the "transformation of state administrative review into a federal antitrust job." *Omni,* 499 U.S. at 372. Thus, *Bates v. State Bar of Arizona*, 433 U.S. 350, 363, 383 (1977) upheld the application of state action immunity to the Arizona State Bar's enforcement of a ban on advertising by attorneys, while striking down the ban on other grounds. The Court recognized that subjecting the Arizona State Bar to antitrust liability was not necessary to remedy any alleged departures from state law.

The same is true here. In North Carolina, for example, aggrieved individuals may seek declaratory or injunctive relief or the enforcement of constitutional rights in Superior Court pursuant to N.C. Gen. Stat. § 7A-245. *See, e.g., Gilbert v. N.C. State Bar*, 678 S.E.2d 602, 612 (N.C. 2009) (noting that "the superior court division has original subject matter jurisdiction over constitutional claims"). Many agencies are subject to contested case proceedings under N.C. Gen. Stat. § 150B-23 to resolve claims that those agencies acted improperly or in excess of their authority. Finally, a petition for a writ of mandamus likewise may address any state-law excesses or compel the performance of official duties. *Sutton v. Figgatt*, 185 S.E.2d 97, 99-100 (N.C. 1971).

CONCLUSION

The Fourth Circuit's decision ignores this Court's teachings and the reliance that states have placed on existing law to structure their professional regulatory bodies. The decision will intrude upon the regimes that states have created to enforce laws governing regulated professionals, such as lawyers, doctors, dentists, physical therapists, pharmacists, engineers, and architects. The decision ignores federalism, frustrating the sovereign and commonsense choice of states (i) to entrust regulation of professionals to entities composed primarily of officials who are also "market participants," (and who thus have the requisite expertise), and (ii) not to seek somehow to "actively supervise" those expert bodies with another level of bureaucracy. By disrupting state regulatory regimes and by facilitating antitrust claims by persons subject to regulation, the decision below will impair the ability of the State Bar and other professional regulatory entities to protect the public.

For all of the foregoing reasons, the Fourth Circuit's judgment should be reversed.

Respectfully submitted,

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