



May 4, 2015

The Honorable «First_Name» «Last_Name»
Attorney General of the State of «State»
«Address»
«City_State_Zip»

Re: *North Carolina State Board of Dental Examiners v. FTC*

Open Letter of Inquiry and Request for Documents

Dear «Title» Attorney General:

We write to alert you to the critical significance of the U.S. Supreme Court’s recent decision in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. ___, 135 S. Ct. 1101 (February 25, 2015), and solicit your response as well as relevant public documents regarding its implementation in «State». As discussed below, this case holds that much of the activity conducted by «State»’s licensing boards is not protected by the “state-action antitrust immunity” doctrine. Critically, the Court’s holding hinges on the fact that the majority of the members of the state regulatory board at issue were “engaged in the active practice of the profession it regulates.” *Id.* at 1107. In other words, “active market participants cannot be allowed to regulate their own markets free from antitrust accountability.” *Id.* at 1111. Accordingly, your board and commission members are theoretically vulnerable to federal felony prosecution and civil treble damages – and your indemnifying state budget may be similarly exposed. We explain this apparently startling circumstance as follows:

As you know, «State» has numerous agencies that regulate trades and professions. These agencies often take the form of multimember “boards” or “commissions.” They commonly regulate a large portion of the state’s economy – from accountants, architects, attorneys, pharmacists, dentists, and doctors, to most of the other licensed trades – contractors, brokers, barbers, nurses, and many others.

Many of the decisions these entities make on a regular basis necessarily “restrain trade.” For example, they decide who is allowed to practice a trade or profession and who is excluded, with the force of law. They revoke licenses, and specify how the licensees are to practice. These acts, if committed by a cartel – or any private grouping of competitors – would be *per se* antitrust violations under federal law (*e.g.*, Sherman

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Act, 15 U.S.C. § 1 *et seq.*) For example, licensing boards control supply by limiting entry into the profession or market. These barriers to entry are effectively “group boycotts,” which, as *per se* offenses, constitute antitrust violations without recourse to their “reasonableness” or other related defenses. The federal remedy for any violation of the Sherman Act includes potential felony prosecution, as well as private civil treble damages relief.

Virtually all of the regulation these agencies undertake sufficiently “affects interstate commerce” to invoke the supremacy jurisdiction of federal antitrust law. Because federal courts have recognized “state-action immunity” from antitrust laws, and have permitted such restraints notwithstanding their facial violation of law, that “state action” status is critical to the lawful function of every state regulatory board.

Three seminal decisions by the U.S. Supreme Court frame this special immunity, starting with *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, the Supreme Court created the longstanding “two-pronged test” to qualify for “state-action” immunity: The challenged action must be (1) affirmatively authorized by the state, and 2) subject to active supervision by the state. *Id.* at 351-52.

The second seminal case is *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), a decision that directly examined the “active state supervision” prong. That case stands partly for the proposition that “state supervision” must be specific and *bona fide*. *Id.* at 105-06. In other words, state “rubber stamping” of a regulatory board’s action will not suffice. *Id.*

We respectfully contend that, notwithstanding these and related precedents, your state (like many others) has chosen to ignore them, and has created “state” boards that are directly controlled by members of the very trade or profession they purport to regulate. Indeed, the vast majority of occupational licensing boards and commissions nationwide are now comprised of majorities (or even supermajorities) of licensed professionals in the very economic tribal grouping with an economic interest in restraints of trade benefiting them. In fact, «State» actually *requires* that board and commission positions be filled by those with such a conflict.¹

It is in this context that the U.S. Supreme Court has just decided the third in this series of basic cases: *North Carolina State Board of Dental Examiners*, 135 S. Ct. 1101. We attach for your reference the full three-page syllabus of this 6-3 decision, bolded to emphasize the most pertinent passages. This decision is neither narrow nor subject to

¹ Political reformers are concerned about the surrender of the legislative and other elective elements of our democracy to special interest domination from campaign contribution to job interchange and lobbying domination. Indeed, there has been a marked evolution of political organization around peers and colleagues in virtually every trade, occupation, and economic grouping, such that the Congress and state legislatures increasingly function as passive mediators among the “stakeholders” so represented, and leaving diffuse and future interests unrepresented. These latter concerns, including our legacy to those who follow us, form a central value of individuals within our democracy – a value that ideally is not subjugated.

exception or avoidance. It directly and repeatedly announces a bright-line minimum test for “state action” sovereign immunity: Those controlling the decisions that might restrain trade may not be “active market participants” in the trade regulated. For every agency so afflicted, the legal status of those making such decisions is clear – they are, in the words of the Court, “nonsovereign actors” who lack any state sovereign immunity whatever. Their decisions are no different than a decision undertaken by a cartel or private combination of competitors. You are invited to review the decision *en toto* and draw your own conclusions, or to refer it and this letter to the leading antitrust prosecutors and experts in your jurisdiction.

Significantly, the decision renders unlawful what has become the common regulatory practice across all 50 states. The holding reviews the prior *Parker* and *Midcal* decisions as described above. It states: “Limits on state action immunity are most essential when a State seeks to delegate its regulatory power to active market participants.” *North Carolina State Board of Dental Examiners*, 135 S.Ct. at 1111.

Either the composition of the board receiving such delegation must be changed (*e.g.*, with the addition of a supermajority of non-conflicted “public members”) or all actions of a board dominated by active market participants must be subject to a state supervision mechanism that “provide[s] ‘realistic assurance’ that a nonsovereign actor’s anticompetitive conduct ‘promotes state policy, rather than merely the party’s individual interests.’” *North Carolina State Board of Dental Examiners*, 135 S.Ct. at 1116, *quoting Patrick v. Burget*, 486 U.S. 94, 100-01 (1988). This alternative requires actual “active supervision” by the state. The Court does not mince words in describing the inadequacy of theoretical or general oversight to accomplish such a cure, noting that such supervision cannot be undertaken by those who are “active market participants” in the relevant trade themselves, and going beyond that threshold as follows: “[T]he supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it...; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy...; , and the ‘mere potential for state supervision is not an adequate substitute for a decision by the State....’” 135 S.Ct. at 1116 (citations omitted).

In these regards, neither the presence of an Office of Attorney General official, nor a general rulemaking review entity, nor general legislative or other oversight will confer such immunity. Only where the decision is made by those who are not “active market participants” in the relevant trade or activity, or where decisions and acts are specifically reviewed for anticompetitive effect by a state agency lacking that bias and with the authority to veto and modify, will sovereign status be conferred. Lacking that structure – which is currently rare to non-existent – the presence of even a majority of a quorum of “active market participants” on an applicable governing board precludes or jeopardizes its immunity.²

² For example, more than three members of a 13-member board currently participating in the industry would allow those persons to win a vote of a quorum, thus determining that decision in violation of this holding.

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The extent of current liability under federal antitrust law for many occupational licensing boards and their members is *in extremis*. Signatory Center for Public Interest Law (CPIL) is familiar with the applicable caselaw and the impact of the *North Carolina* decision. Professor Fellmeth personally served as a state and federal antitrust prosecutor for nine years and is the co-author of the treatise *California White Collar Crime* (with Thomas A. Papageorge, Tower Publishing, 4th edition 2013), as well as other relevant publications. CPIL has studied the activities of California's regulatory agencies for 35 years, teaching the subject, and publishing the *California Regulatory Law Reporter*. Our analysis is not borne of naiveté, nor is it the product of ideological predilections – apart from sympathy with the precepts of democratic government. See www.cpil.org.

The Citizen Advocacy Center (CAC) is a nonprofit organization whose mission is to increase the accountability, transparency, and effectiveness of state health care professional regulatory boards and national voluntary certification organizations by offering training, research, and networking opportunities for public members serving on these entities. The CAC supports efforts to review unjustifiable anticompetitive restrictions they impose that harm consumers. See www.cacenter.org.

Consumers Union is the advocacy division of the nonprofit publisher, Consumer Reports, which for nearly 80 years has empowered consumers with the knowledge they need to make better and more informed choices. The organization's Safe Patient Project has advocated for a safer health care system for the past 12 years on several fronts, covering physician accountability, health care-acquired infections, medical errors, and medical device safety. See www.SafePatientProject.org.

Each of these organizations has a longstanding interest in securing a legitimate democracy controlled by the People; one without corruptive delegation to cartel or other pecuniary special interests. We are concerned that the law upholding these core values is enforced and that the Attorneys General of the respective states perform their assigned preeminent task to assure that compliance.

We understand that a board or commission structure has advantages over a bureau or department. For example, the multimember board structure generally activates “open meeting” procedural statutes that make their operations more transparent. In contrast, a bureau or department headed by an individual may be subject to *ex parte* lobbying by the plethora of economically-interested trade associations who track and advocate before regulatory agencies. That pattern of hidden influence is endemic, and is also problematical where there are not proper limitations on privately-advanced contentions and secretly negotiated deals. And there are other features of the current regime in «State» that we recognize warrant at least a measure of favorable consideration.³

³ We recognize that most members of regulatory boards and commissions believe that they are serving the public interest, are unpaid, and intend to serve democratic values. But they are necessarily part of the tribal grouping that our occupational associations have fostered. By way of illustration: State bars controlled by attorneys rarely discipline for excessive billing or intellectual dishonesty. Few require any demonstration whatever of competence in the actual practice area of law relied upon by clients. Few

You are the chief law enforcement official of «State». You also advise state agencies. As such, your predominant obligation is not to arrange or excuse violations of law, but to prevent them and, where that fails, to enforce the law. That function may place you at odds with the political and institutional prerogatives of these agencies, but we respectfully contend that your duty is not to them as clients receiving blind fealty, but to compliance with applicable Supreme Court decisions warranting your respect.

With the above in mind, we ask the following four questions divided into (a) and (b) respectively. Under (a) we respectfully ask for your response to our questions. Under (b) we separately request documents that contain related information, as described below, pursuant to your Public Records Act.

1. (a) Which agencies governed by multi-member boards regulating professions or trades are composed in majority of “active market participants” in the regulated trade or profession? Which acts and decisions of these boards are subject to “independent state supervision” for restraint of trade impact prior to their legal efficacy? Please explain which entity accomplishes this review, its authority, and its directive to consider anticompetitive implications.

(b) Please provide documents that identify the make-up of your regulatory agencies’ multi-member governing bodies, including the statutes/rules governing how many and which ones are required to be participants in the trade or profession regulated.

2. (a) How many of the members of these boards and commissions identified in your answer to Question #1 above have you notified of their potential criminal and civil liability if they make decisions that would constitute a violation of federal antitrust law? Does that notice include the revelation that their decisions are not entitled to “state action” or other sovereign protection?

(b) Please produce copies of your notification to such persons. If the notice is the same or similar to all such persons, a single copy will suffice, with a list of recipients.

require malpractice insurance, or in any way ameliorate the harm from attorney incompetence. The point is, each of the many agencies within your state is empowered to carve out momentous exceptions from federal antitrust law, and those decisions in particular require a level of independence from the implicit focus of current practitioners.

We also recognize that there is an important role for expertise in the regulation of most trades and professions. As Justice Scalia has pointed out, we have an interest in listening to neurosurgeons in evaluating the competence of new applicants to such an important and complex function. But such contributions may be received without conferring final authority over state policy to current and conflicted practitioners of that trade.

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3. (a) Please explain the indemnification policy of the state in terms of criminal or civil liability if a federal criminal or civil case arises and judgment is entered against those individuals? Is publicly financed counsel provided in such a case? Are damages to be subsumed by the state treasury? Please provide estimates or calculations of possible public exposure to federal court treble damage awards.

(b) Please produce documents that analyze or disclose antitrust liability exposure to the state treasury from potential agency antitrust violations, if any such documents exist.

4. (a) With whom have you communicated about the implications of this holding? Have you communicated with your Supreme Court Justices or Legislators or their respective offices or agents? Have you communicated with the Federal Trade Commission or the United States Attorney General or a United States Attorney's Office or its agents?

(b) Please produce such notifications. If the notice is the same or similar to all such persons, a single copy will suffice, with a list of recipients.

Thank you for your consideration of this request. Please mail your responses to Center for Public Interest Law, University of San Diego School of Law, 5998 Alcalá Park, San Diego, CA 92110 or email to cpil@sandiego.edu.

Very sincerely,



Robert C. Fellmeth
Executive Director, Center for Public Interest Law
Price Professor of Public Interest Law
University of San Diego School of Law



David Swankin
President and CEO
Citizen Advocacy Center



Lisa McGiffert
Director, Safe Patient Project
Consumers Union

Attached: Three-page U.S. Supreme Court syllabus of *North Carolina State Board of Dental Examiners v. FTC* (Feb. 25, 2015)

cc: State Attorneys General
National Association of Attorneys General