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PERSPECTIVE

Justices to weigh 'state action' antitrust exemption

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When the U.S. Supreme Court begins its 2014 term next month, one of the first cases it will hear argued is *North Carolina State Board of Dental Examiners v. Federal Trade Commission* — an appeal from a decision that a state dentistry board engaged in a collective boycott in violation of federal antitrust laws by issuing cease-and-desist letters to prevent teeth-whitening companies from competing with licensed dentists. Although the claims at issue arise under the antitrust laws, the case will likely turn on more fundamental federalism concerns regarding the interplay between federal and state regulatory authority.

At issue in *North Carolina State Board* is the "state action" exemption from the reach of the federal antitrust law. Although, by its terms, the Sherman Act deems "*[e]very* contract, combination … or conspiracy, in restraint of trade … to be illegal," the Supreme Court beginning in 1943 has held that the purpose of the act was not "to restrain a state or its officers or agents from activities directed by its legislature." *Parker v. Brown*, 317 U.S. 341, 350-51 (1943). As a result, the court has on several occasions shielded state legislative enactments from federal antitrust scrutiny.

Over the years, the court has attempted to define what types of state action beyond pure legislation qualify for immunity. Decisions from a state supreme court (*Bates v. State Bar of Ariz.*, 433 U.S. 350, 359-63 (1977)) and possibly actions by a state's governor (*Hoover v. Ronwin*, 466 U.S. 558, 568 n.17 (1984)) are "sovereign" acts and altogether exempt from antitrust scrutiny.

But beyond purely sovereign acts, the contours of state action become much hazier. For sub-state entities such as municipalities and state agencies, the exemption applies only if the action is undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. *Community Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 52 (1982). If, for instance, a state hospital is authorized generally to participate in the competitive marketplace but is not given clear power to displace competition, the hospital's conduct is not deemed state action and is not exempt from federal antitrust scrutiny. *FTC v. Phoebe Putney Health Sys. Inc.*, 133 S. Ct. 1003, 1011 (2013). And for private actors operating in relation to a clear and affirmatively expressed state policy, their actions are exempt only if they also are "actively supervised by the State." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985).

North Carolina State Board raises the question whether a state agency that is staffed and elected by the professionals (dentists) it regulates is a *private* entity that triggers the "active supervision" requirement or a *bona fide* state agency that, like a municipality, need only act pursuant to a "clearly articulated and affirmatively expressed" state policy in order to be immune from Sherman Act liability. The board's allegedly anticompetitive boycott of teeth-whiteners — lower-cost and popular competitors — is not before the Supreme Court, and the FTC assumed below that the board was within its statutory authorization to issue cease-and-desist letters to punish the unlicensed practice of dentistry. As a result, the only issue before the court is whether the board's conduct required "active[] supervis[ion] by the State itself" to qualify for the state action exemption.

The North Carolina Dental Practices Act designates the Board of Dental Examiners an "agency of the State," and authorizes the board to license and discipline dentists, set licensing standards, and promulgate "rules and regulations governing the practice of dentistry in the state," which become effective upon approval by the North Carolina Rules Review Commission — another state agency, whose members are appointed by the legislature. Members of the dental board are, like all state officers, subject to ethical and disclosure rules, as well as general oversight by a committee of the legislature. But unlike many other agencies, the constituent members are private actors (licensed, practicing dentists), elected every three years by those whom they regulate (dentists).

The FTC argues that the licensed practitioners who serve on the dental board have a significant financial interest in the business of the profession, and therefore have powerful incentives to restrain competition from teeth-whiteners to benefit their members. As a result, the FTC argues, the "active supervision" requirement is of paramount importance to ensure that disinterested government agents oversee the board's actions. The FTC relies on a line of cases dealing with bar associations and other trade groups, in which the court has held that "a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefits of its members." *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975).

The board's argument in response is that the "state action" exemption is grounded in principles of federalism that preclude a court's close scrutiny of the inner workings of state government. According to the board, North Carolina's determination that the dental board is an "agency of the State" is near-dispositive. "Our Federalism" requires "a proper respect for state functions … and a continuance of the belief that the National Government will fare best if the States and their institutions are left free to perform their separate functions in their separate ways." *Younger v. Harris*, 401 U.S. 37, 44 (1971). Moreover, in City of *Columbia v. Omni Outdoor Advertising Inc.*, 499 U.S. 365, 374-79 (1991), the Supreme Court held that state action immunity from Sherman Act liability was not divested by allegations of bribery by public officials because principles of federalism preclude either questioning whether conspiratorial state regulatory action is "not in the public interest," or invalidating such action based on "principles of good government," which are "unrelated to th[e Sherman Act's] purposes." As a result, courts are not to second-guess the state's decision on how to structure the agency, including whether to staff the board with licensed professionals or government bureaucrats.

The board is also supported by The National Governors Association and 22 states (among other amici), which stress the importance of allowing states to choose for themselves how they will structure their regulatory agencies. According to these amici, North Carolina's system is not unique, and failing to exempt the dental board from antitrust liability would open scores of state agencies up to potential liability. State agencies benefit greatly from active professionals, who possess specialized knowledge that the lay public, career bureaucrats, and state legislators lack. And requiring a state to install a supervisory body to oversee the agency's work would impose unnecessary costs and burdens that would slow decision-making with no countervailing benefit. The board and its amici also emphasize states' abilities to police their own agencies through ethics rules, disclosure laws, and other oversight; for example, in some states, "general conflict of interest violations" are punishable by *felony*, such as "when [a public] official reaps a monetary or other reward from a decision made in his or her public capacity."

The board's argument has the virtue of establishing a bright-line rule — that when a state creates an administrative agency with the force of law and gives the agency clear authority to displace competition, its actions are exempt from antitrust liability regardless of the regulatory structure the state adopted. The FTC's proposed standard, which requires courts to examine the inner workings of an agency and determine whether its members are sufficiently disinterested, is unworkable. The FTC's concern over agency capture and self-interested professionals is laudable, but the "state action" exemption is a blunt tool for ensuring good state government.

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