ANTITRUST TREATMENT OF STATE LICENSING BOARDS IN THE WAKE OF *NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS V. F.T.C.*

By David Gringer[1]

I. INTRODUCTION

In its decision formulating the state action immunity doctrine, the Supreme Court rested its holding primarily on respect for the political processes in the states: "in a dual system of government in which . . . the states are sovereign . . . an unexpressed purpose to nullify a state's control over its officers and agents is not to be likely attributed to Congress."[2] In light of this principle, the Supreme Court held that the federal antitrust laws were not intended to, and in fact did not reach state action.[3] In so doing, the Court recognized Congress' desire to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our constitution."[4] A failure to recognize this principle would require the promotion of "competition at the expense of other values a State may deem fundamental" thereby "impos[ing] an impermissible burden on the States' power to regulate."[5]

State action immunity offers its most robust protection where the actor in question is the state acting as sovereign.[6] In such cases, the only showing that is required is that the challenged conduct was that of the state itself.[7] As a result, the Sherman Act simply does not apply "to anticompetitive restraints imposed by the States as an act of government."[8] Many cases have also held that actions pursuant to state agency regulation are entitled to the same protection.[9]

Municipalities and other political subdivisions may receive state action immunity as well—but only if their conduct is undertaken pursuant to a clearly articulated state policy.[10] Private parties may also receive state action immunity, but only if they are able to satisfy both prongs of the Supreme Court's state action immunity test. That is, the challenged conduct must be pursuant to a clearly articulated state policy *and* the challenged conduct must be actively supervised by the state.[11] The rationale for this distinction is:

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1 Counsel, Wilmer Cutler Pickering Hale and Dorr LLP. The views expressed in this article are the author's and do not necessarily reflect those of WilmerHale, its attorneys, or its clients.

2 *Parker v. Brown*, 317 U.S. 341, 351 (1943); *see also* Note, *The State Action Exemption and Antitrust Enforcement Under the Federal Trade Comm'n Act*, 89 Harv. L. Rev. 715, 721 (1976).

3 *Parker*, 317 U.S. at 351.

4 *Community Communications Co. v. Boulder*, 455 U.S. 40, 53 (1982).

5 *North Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1109 (2015); *see also Exxon Corp. v. Governor of Maryland*, 437 U.S. 117, 133 (1978).

6 *See, e.g.*, *Southern Motor Carriers Rate Conf., Inc. v. U.S.*, 471 U.S. 48, 63 (1985).

7 *Id.*

8 *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 370-71 (1991).

9 *See, e.g., Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24 (1st Cir. 1999); *Automated Salvage Transport, Inc. v. Wheelabrator Environmental Systems, Inc.*, 155 F.3d 59 (2d Cir. 1998).

10 *Omni*, 499 U.S. at 374.

11 *See, e.g.*, *Southern Motor Carriers Rate Conf., Inc. v. U.S.*, 471 U.S. 48, 64 (1985).

> Where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State. Where the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the expense of more overriding state goals. This danger is minimal, however, because of the requirement that the municipality act pursuant to a clearly articulated state policy.[12]

In several decisions, the Court appeared to suggest that state action immunity was at its strongest when a state acted to regulate a profession, such as a state board of lawyers, and where the defendant was the state entity itself. Yet, in its most recent state action decision—*North Carolina State Bd. of Dental Examiners v. F.T.C.,*[13] the Court held that state agencies, if controlled by active market participants, were required to not only demonstrate that they were acting pursuant to a clearly articulated state policy to displace competition with regulation, but also that in engaging in the challenged conduct, they were actively supervised by the state. That is, despite their status as state agencies, for state action purposes they were to be treated like private entities.

The decision, while not entirely surprising (prior opinions by the Court and Courts of Appeals had reached similar conclusions)[14] does raise significant questions for state licensing boards regarding their future antitrust liability. And while the decision did clarify one issue under the state action doctrine, the Court, in fashioning its new "active market participant" test, added several new ambiguities in resolving state action immunity claims.

II. THE *NORTH CAROLINA STATE BOARD* DECISION

A. Factual Background

The facts of the Court's decision in *North Carolina State Board of Dental Examiners* are relatively straightforward. North Carolina, like the other 49 states, regulates the practice of dentistry. Under the State's Dental Practice Act, the North Carolina State Board of Dental Examiners is "the agency of the State for the regulation of the practice of dentistry."[15] The legislature requires that six of eight Board members must be licensed dentists who actively practice dentistry.[16] The dentists who serve on the Board "are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board."[17] The Board is subject to the State's Administrative Procedure Act, Public Records Act, and

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12 *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46-47 (1985).

13 135 S. Ct. 1101 (2015).

14 *See, e.g.*, *Bates v. State Bar of Arizona*, 433 U.S. 350, 359-63 (1977); *see also Washington State Electrical Contractors Ass'n v. Forrest*, 930 F.2d 736 (9th Cir. 1991) (holding state agency comprised of public and private members required to satisfy active supervision prong because "[t]he Council has both public and private members, and the private members have their own agenda which may or may not be responsive to state labor policy"); *Federal Trade Commission v. Monahan*, 832 F.2d 690 (1st Cir. 1987) (Whether Massachusetts Board of Registration in Pharmacy required active supervision depended on "how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists."). The Court in *North Carolina State Board of Dental Examiners* appeared fully aware of the *Bates* decision's relevance. Slip Op. at 13.

15 N.C. Gen. Stat. Ann. § 90-22(b).

16 *Id.* § 90-22.

17 *North Carolina State Bd.*, 135 S. Ct. at 1108.

open-meetings law.[18] The Board also possesses the authority to issue rules and regulations governing the practice of dentistry in North Carolina, but those rules and regulations must be approved by a State Commission comprised of representatives appointed by the State Legislature.[19]

Notably, the challenged conduct at issue did not stem from the Board's authority to promulgate rules and regulations governing the practice of dentistry. Rather, the Board, responding to the rise of nondentist teeth whitening service providers, "issued at least 47 cease-and-desist letters on its official letterhead to nondentist[s]. . . . directed the recipient[s] to cease all activity constituting the unlicensed practice of dentistry; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes the practice of dentistry."[20] The Board also coerced another state created Board, the Board governing Cosmetic Arts, to urge its members not to provide teeth whitening services.[21] Apparently, the Board's efforts were successful. Nondentists ceased to offer teeth whitening services in North Carolina.[22]

In 2010, the FTC challenged the Board's actions under Section 5 of the Federal Trade Commission Act.[23] The Board moved to dismiss before an ALJ on state action immunity grounds, but the ALJ denied the motion. The entire FTC affirmed, holding that the Board was required to show—but could not show—that its challenged conduct was actively supervised by the State. After a trial on the merits, the Board appealed to the Fourth Circuit, which affirmed the FTC in all respects.[24] The Supreme Court granted certiorari to resolve the issue of whether the Board—as a state agency controlled by so-called active market participants—was, in fact, required to be actively supervised by the state.

B. Prior Legal Framework Governing Immunity of Licensing Boards

Arguably, the treatment of licensing boards for purposes of state action immunity was an issue that the Court had already resolved. In a prior case involving state licensing boards, the Supreme Court had assumed that the State Bar of Arizona was a private actor and was required to be actively supervised before claiming state action immunity for its actions.[25] In contrast, when a plaintiff had challenged regulations that were implemented by the State Supreme Court at the behest of the State Bar association, no active supervision was required because the Defendant there was the state itself. However, in its seminal state action decision *Town of Hallie v. City of Eau Claire,*[26] the Court had called the entire regime into question when, in the course of holding that municipalities were not subject to the

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18 *Id.*

19 *See* N.C. Gen. Stat. Ann. §§ 90–48, 143B–30.1, 150B–21.9(a).

20 *North Carolina State Bd.*, 101 S. Ct. at 1108.

21 *Id.*

22 *Id.*

23 15 U.S.C. § 45. It is not clear from the facts presented whether there could have been the requisite agreement to violate Section 1 of the Sherman Act; an issue both the FTC and the Defendants appear not to have grappled with at any stage of the litigation.

24 *North Carolina State Bd.*, 101 S. Ct. at 1108-09.

25 *Bates*, 433 U.S. at 363.

26 471 U.S. 34.

state action requirement, it stated, albeit in dicta, that "[i]n cases in which the actor is a state agency, it is likely that active state supervision would also not be required,"[27] without distinguishing state agencies controlled by active market participants.

In any event, some post-*Town of Hallie* courts assumed that all state agencies, no matter their composition, did not have to satisfy the active supervision prong. Most notably, the Fifth Circuit held that a State Board of Public Accountants did not have to meet the active supervision test.[28] The plaintiff in that case argued that the Board should have to satisfy active supervision to be immune because it was comprised wholly of the very parties it was regulating. The Fifth Circuit squarely rejected this argument: "Despite the fact that the Board is comprised entirely of CPAs 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."[29] The antitrust agencies clearly viewed these decisions as an unwarranted extension of *Town of Hallie*. Starting with its 2003 State Action Task Force Report, the FTC began urging that the identity of a governmental entity's decision-makers, rather than its mere status as a governmental entity, should control whether or not the active supervision prong applied.[30] In particular, the Task Force's Report approvingly cited an article by Einer Elhauge, which argued that "financially interested actors cannot be trusted to decide which restrictions on competition advance the public interest; disinterested, politically accountable actors can."[31]

C. State Agencies Controlled by Active Market Participants Must be Actively Supervised to Receive State Action Immunity

It was this difference between actors with private interests on the one hand, and political accountability on the other that formed the basis of the *North Carolina State Board of Dental Examiners* decision. In upholding the Fourth Circuit, the Supreme Court held that a "state board on which a controlling number of decisionmakers are active market participants in the occupation that the board regulates" were required to not only prove that their challenged conduct was pursuant to a clearly articulated state policy; but also that such conduct was

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27 *Town of Hallie*, 471 U.S. at 46 n. 10. The leading antitrust treatise had come to the same conclusion. *See* Areeda & Hovenkamp, ¶ 212.7a ("Dispensing with any supervision requirement for municipalities implies, a fortiori, the same for departments and agencies of the state itself.").

28 *Earles v. State Bd. of Certified Pub. Accountants of Louisiana*, 139 F.3d 1033 (5th Cir. 1998).

29 *Id.* at 1041-42. Other Circuits had reached similar decisions although did not grapple with the underlying issue. *See, e.g., Porter Testing Lab. v. Board of Regents for Okla. Agric. & Mechanical Colleges*, 993 F.2d 768, 772 (10th Cir.) (where the antitrust defendants included "a constitutionally created state board, its executive secretary, and a state created and funded university . . . a showing of active supervision is unnecessary to qualify for state action antitrust immunity") *cert. denied*, 510 U.S. 932 (1993); *Cine 42nd Street Theater Corp. v. Nederlander Org., Inc.*, 790 F.2d 1032, 1047 (2d Cir. 1986); *Haas v. Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989).

30 *See* FTC, *FTC State Action Task Force Report 37-38, available at* https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf.

31 *Id.* at 38 n. 167 (citing Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 668, 688 (1991)).

actively supervised by the state.[32] At the same time, the Court reaffirmed its 30-year old precedent from *Town of Hallie* that municipalities (and other public entities controlled by elected decision-makers) were not subject to the active supervision requirement.[33]

On the surface, the *North Carolina Board* Court's distinction between the treatment of state agencies controlled by active market participants on the one hand, and municipalities on the other, might seem anomalous. As Justice Alito's dissent correctly notes, the decision appears to create a tension within the state action doctrine: "municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state action immunity than private entities. Yet, under the Court's approach . . . a full fledged state agency is treated like a private actor and must demonstrate that the State actively supervises its actions."[34]

The majority has its reasons for treating the Board as being akin to a private entity. In particular, the Court appears persuaded by arguments that state licensing boards—particularly those controlled by active market participants—are pursuing their own financial interests and not state policy.[35] The Court concludes that municipalities do not pose the same concerns because they are electorally accountable. In the Court's view, it is this fact—that decision-makers in municipalities must stand before the electorate—that controls whether an entity must be actively supervised.[36]

Thus, post-*North Carolina State Board of Dentistry,* one (relative) ambiguity in the state action doctrine has been clarified. State agencies that are controlled by participants in the market that they are regulating, where those participants are not electorally accountable,[37] must satisfy both prongs of the state action doctrine to receive immunity.

III. IMPACT OF THE *NORTH CAROLINA STATE BOARD* DECISION

D. New Ambiguity in the State Action Doctrine

The decision also raises at least three new ambiguities in the application of the doctrine. The first ambiguity stems from the Court's statement that active supervision must occur *by the state.*[38] It is not clear, however, whether the Court really means what it says. The Supreme Court has stated in prior decisions that the challenged conduct must be "supervised by the state itself."[39] Most courts and commentators have previously declined to take the

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32 *North Carolina State Board of Dental Examiners*, 135 S. Ct. at 1115.

33 *Id.*

34 *North Carolina State Bd.*, 101 S. Ct. at 1122 (Alito, J. dissenting).

35 Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093, 1141-42 (2014).

36 *North Carolina State Bd.*, 101 S. Ct. at 1112-13.

37 That is they are accountable to an electorate that is broader than other active market participants.

38 *North Carolina State Bd.*, 101 S. Ct. at 1113.

39 *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *See also Patrick v. Burget*, 486 U.S. 94, 100; *Town of Hallie*, 471 U.S. at 46 n.10.

Court literally and have held that active supervision by a municipality also suffices.[40] But in an environment where state action immunity is being (somewhat) curtailed, it is at least reasonable to ask the question of whether municipal supervision will continue to suffice. And, of course, it follows that a municipality cannot delegate supervision to an entity controlled by active market participants.

The second major ambiguity stems from what the Court means by "active market participants." The state regime at issue here made that determination an easy one. The statute limited participation on the Board to those "licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry."[41] Other regimes may provide more challenging questions about just who exactly is an active market participant and who is not. For example, what if previously active market participants were required to be inactive during their tenure of service. Presumably, such individuals would, after serving, subsequently return to their active market participation, and would, as a result, have a future financial interest in the industry that they were regulating. Because that would give rise to an almost identical concern about financial self-interest to the one that animated the Court's decision,[42] one would think that active supervision in such a situation would be required. However, if this were the rule, it could quickly lead to line drawing problems and would require a case-by-case inquiry about whether officials were, in fact, likely to return to their industry after service.

This ambiguity is not limited to determining who is an "active" market participant. Determining who is a "market participant" may also vex courts and litigants alike. Antitrust litigation frequently turns on disputed definitions of the relevant markets,[43] and determining precisely who is (and isn't) a market participant could be a complicated issue in future cases. To give just one example of how the market definition inquiry could confuse, the North Carolina Board of Dental Examiners also includes a dental hygienist representative.[44] Normally, one might say that hygienists and dentists cannot compete in the same market.[45] But that is surely not true for all dental services. Indeed, in *North Carolina State Board of Dental Examiners* itself, the Board took action against the competitive threat posed by cosmetologists, who under

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40 *See, e.g.*, *Tri-State Rubbish v. Waste Management*, 998 F.2d 1073, 1079 (1st Cir. 1993) ("municipal supervision of private actors is adequate where authorized by or implicit in the state legislation"); *Gold Cross Ambulance & Transfer v. City of Kansas City*, 705 F.2d 1005 (8th Cir. 1983) (once state authorization is found, supervision can come from a municipality); Areeda and Hovenkamp at 386 ("The relevant supervision must generally come from the same level of government that has created the regulatory scheme under consideration—thus for example. . . . supervision under a municipal waste disposal scheme would generally come from the municipality through a designated agency or official.").

41 N.C. Gen. Stat. Ann. § 90-22(b).

42 *North Carolina State Bd.*, 101 S. Ct. at 1113.

43 *See, e.g.*, *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 415 (1956) (Warren, J. dissenting) ("This case, like many under the Sherman Act, turns upon the proper definition of the market."); *F.T.C. v. Whole Foods Market, Inc.*, 548 F.3d 1028, 1051 (D.C. Cir. 2008) (Kavanagh, J. dissenting) ("As in many antitrust cases, the analysis comes down to one issue: market definition.").

44 N.C. Gen. Stat. Ann. § 90-22.

45 *See Barton & Pittinos, Inc. v. SmithKline Beecham Corp.*, 118 F.3d 178, 180 (3d Cir. 1997) (finding plaintiff was not a competitor in the market for vine sales because it "lacked the required [regulatory] license to . . . sell the vine"); *Ethypharm S.A. France v. Abbott Labs.*, 707 F.3d 223, 235-36 (3d Cir. 2013) (finding that plaintiff "does not and cannot compete with [defendant]" because "[i]t did not enter the United States market and receive the required FDA approval").

normal circumstances might not be thought of as market participants. Thus, a licensing board could find itself in the awkward position of being controlled by active market participants depending on the type of conduct the challenged restraint reaches.

A third ambiguity exists where a state board has active market participant members, but is not controlled by those members. As an example, a state board could have a minority of active participants but have "independent" representatives make up a majority of the board. The *North Carolina State Board of Dental Examiners* does not say whether those types of boards would need to be actively supervised. If one wanted to predict, however, it would seem like those boards would also need to be actively supervised to qualify for state action immunity. Even where a board is made up of only a minority of active market participants, there is no guarantee that those representatives in coalition with one another could not obtain the private aims that concern the Court. But the opinion itself provides states and boards with no guidance as to how such boards are to be treated, and this question will surely be resolved in future cases.

E. State Agencies Cannot Lose Immunity Through Regulatory Capture

Where no ambiguity exists—despite Justice Alito's suggestions to the contrary—is on the question of whether state action immunity can somehow be lost if a particularly agency suffers from regulatory capture. Justice Alito describes the majority decision as resting on an "assessment of the varying degrees to which a . . . state agency like the North Carolina Board are likely to be captured by private interests."[46] As Justice Alito points out, correctly, such a holding would be at odds with the Court's prior state action decisions, including, most notably *City of Columbia v. Omni Outdoor Advertising, Inc.*[47] In *Omni*, the Court refused to recognize an exception to state action immunity where the defendants had acted in a manner against the public interest.[48] Overruling *Omni* would potentially place any public entity at risk of antitrust liability if it acted in a corrupt manner or as a participant in a conspiracy.

Justice Kennedy, however forcefully rebuts Justice Alito. The *North Carolina State Board* defendants must always be actively supervised, in the Court's view, precisely because there will not be a case-by-case inquiry into whether the Board has acted to further the public—or private—interests. As Justice Kennedy writes, "*Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions."[49] So understood, the majority has set an *ex ante* rule, to identify those entities who, by their very composition, are likely to "pursue private interests in restraining trade."[50]

F. Ramifications for State Licensing Boards

Taken at face value, the Court's decision in *North Carolina State Board of Dental Examiners* may appear to be unremarkable. The Court did not hold that restraints issued by licensing boards controlled by active market participants can never receive state action immunity; nor did it hold that such restraints are subject to any particular or close form of scrutiny. And

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46 *North Carolina State Bd.*, 101 S. Ct. at 1121 (Alito, J. dissenting).

47 499 U.S. 365.

48 *Id.* at 374.

49 *North Carolina State Bd.,* 101 S. Ct. at 1105.

50 *Id.*

unlike most gatherings of competitors, state licensing board regulations are unlikely to be treated as consistently illegal *per se*. Instead, all that is required is that state agencies satisfy the same test for immunity as a private entity.

However, in practice, many state licensing boards will face an increased vulnerability to antitrust challenge. It seems likely that many state licensing boards controlled by active market participants will not be actively supervised by the state through no fault of their own,[51] and, given the nature of their work—limiting output by placing restrictions on who can and can't practice in a particular profession—may face regular antitrust challenge.[52]

These appear to be the facts in the first antitrust challenge to a state licensing board post-*North Carolina State Board*. In *Teladoc, Inc. v. Texas Medical Board*,[53] the plaintiffs challenged a regulation from the Defendant Board that barred physicians from treating a patient without a prior in-person physical examination.[54] The Texas Medical Board—like the North Carolina State Board of Dentistry—is a state agency created by statute. And also like its North Carolina dentist-counterpart, it is made up of a majority of licensed physicians.[55] The regulation in question was challenged by a telemedicine company who alleged that the regulation had the effect of precluding them from operating in Texas. Interestingly, the Defendant Board did not even attempt to allege that it was immune under the state action doctrine, which they almost certainly would have done prior to *North Carolina State Board*. The District Court granted the plaintiff's request for a preliminary injunction and precluded the regulation from coming into effect.[56]

One can imagine countless other regulations across the licensing spectrum facing a similar outcome, even where there is no anticompetitive intent present. Indeed, state licensing boards may almost be viewed as an antitrust trap of sorts for the unwary. The state mandates regulation by active market participants in a particular manner and the exercise of that authority may, almost definitionally, give rise to antitrust liability (or at least a lengthy judicial proceeding with expensive discovery before the licensing board can prove that it had legitimate justifications for enacting the regulation in question).

Indeed, the Court's analogy of state licensing boards to private trade associations[57] suggests significant antitrust exposure for licensing boards moving forward. The Court has observed that private trade associations "often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive

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51 Presumably, in most cases, the board at issue will not be able to decide for itself whether its challenged conduct will or will not be actively supervised. Instead, the regulatory regime enacted by the State Legislature will make that decision. A unique aspect of the North Carolina State Board of Dental Examiners was that the Board elected not to exercise its more formal authority.

52 *See, e.g.*, *NCAA v. Board of Regents*, 468 U.S. 85, 99 (1984) (where "the challenged practices create a limitation on output . . . our cases have held that such limitations are unreasonable restraints of trade").

53 —F. Supp. 3d—, 2015 WL 4103658 (W.D. Tex. May 29, 2015).

54 *Id.* at *2.

55 *Id.* at *1.

56 *Id.* at *12.

57 *North Carolina State Bd.*, 101 S. Ct. at 1114.

harm."[58] Accordingly, there is no shortage of cases finding trade associations liable for antitrust violations.[59] And what must be of particular concern to licensing boards, trade associations are, in and of themselves, units of joint action sufficient to satisfy section 1 of the Sherman Act.[60]

State licensing boards may even face unique risks that trade associations do not. "[C]oncerted action does not exist every time a trade association member speaks or acts."[61] Instead, liability is reserved for agreements that bear the imprimatur of official action, "such as by a vote or passage of a resolution."[62] Some state licensing boards may only be able to take action through official processes, and thus may not be able to evade the concerted action requirement in any circumstances.

Interestingly, the regulatory regime in *North Carolina State Board* almost certainly illustrates the safest path to avoid antitrust liability for licensing boards moving forward. As noted, the Board possesses the authority to promulgate rules, subject to the approval of the North Carolina Rules Review Commission.[63] But the Board did not chose not to use that route. As Justice Kennedy, writing for the majority observed, the Board elected to issue cease-and-desist letters "rather than any of the powers at its disposal that would invoke oversight by a politically accountable official."[64] Since the Court goes on to state that the requirements of active supervision are that "[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] [f]urther the state supervisor may not itself be an active market participant," it stands to reason that had the Board invoked its rulemaking authority and had those rules been approved by the Rules Review Commission, the Board would have satisfied the active supervision requirement.

States may also alter their regulatory regime to allow for representatives on state licensing boards to be elected in broader elections. It follows from the Court's opinion that elected boards do not give rise to the same concerns of private price-fixing that animate the Court's decision and thus are not subject to the active supervision requirement. Of course, if states are altering their regulatory regime, they may also simply provide for active supervision by a state agency that is not controlled by active market participants.

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58 *Id.* (quoting *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 500 (1988)).

59 *See, e.g.*, *American Soc'y of Mechanical Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556 (1982); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); *Fashion Originators Guild of America v. F.T.C.*, 312 U.S. 457 (1941); *United States v. Topco Assoc., Inc.*, 405 U.S. 596 (1972).

60 *See* G.D. Webster, *The Law of Associations* § 9a.01[1], 9A3–4 (1991) ("There is no question that an association is a 'combination' within the meaning of Section 1 of the Sherman Act. Although a conspiracy requires more than one person, an association, by its very nature a group, satisfies the requirement of joint action. Thus, any association activity which restrains interstate commerce can be violative of Section 1 even if no one acts in concert with the association."); Stephanie W. Kanwit, *FTC Enforcement Efforts Involving Trade and Professional Associations*, 46 Antitrust L.J. 640, 640 (1977) ("Because trade associations are, by definition, organizations of competitors, they automatically satisfy the combination requirements of § 1 of the Sherman Act.").

61 *Alvord-Polk, Inc. v. F. Schumacher & Co.*, 37 F.3d 996, 1007-08 (3d Cir. 1994).

62 *Id.* at 1008.

63 *See* note 19 and accompanying text *supra*.

64 *North Carolina State Bd.*, 101 S. Ct. at 1116.

It may also be that individual board members will not face damages for antitrust liability in conjunction with their board service. The Court suggests, without deciding, that board members may be immune from antitrust money damages.[65] It is not clear what exactly Justice Kennedy is referencing when he alludes to this immunity, and he offers only a citation to a footnote in the Supreme Court's *Goldfarb* decision. That footnote references the possibility of state agencies receiving Eleventh Amendment immunity from damages.[66] But it is far from certain whether state licensing boards qualify for Eleventh Amendment immunity, and the *North Carolina State Board* decision cannot be said to advance the cause. A more likely scenario is Congressional action. When municipalities became subject to antitrust damages after the *City of Boulder* decision, Congress responded with the Local Government Antitrust Act immunizing political subdivisions and their employees from damages.[67] Licensing boards should, and likely will, push for similar treatment.

IV. CONCLUSION

As with the Supreme Court's other recent state action immunity decision, *FTC v. Phoebe Putney*, the Court took action to both clarify and cabin the state action immunity doctrine. Unlike *Phoebe Putney*, which was essentially an exercise in error correction, the *North Carolina State Board of Dental Examiners* decision clearly expands antitrust liability beyond the prior state of the law. State licensing boards controlled by active market participants face increased exposure to antitrust suits unless they are actively supervised by the state. Such exposure will be inherent in the nature of such boards, which bring together competitors under the aegis of the state. At the same time, municipalities and other political subdivisions have had their state action immunity reinforced; public entities controlled by elected decision-makers will not need to satisfy the active supervision prong to obtain immunity.

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65 *Id.* at 1115. The FTC was seeking only injunctive relief.

66 *Goldfarb*, 421 U.S. at 791 n.22.

67 15 U.S.C. § 34 *et seq.*