No. 13-534

In the Supreme Court of the United States

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 WE ALL HELP PATIENTS, INC. AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

JAROD M. BONA
Counsel of Record
AARON R. GOTT
BONA LAW P.C.
4275 Executive Square
Suite 200
La Jolla, CA 92037
(858) 964-4589
jarod.bona@bonalawpc.com
aaron.gott@bonalawpc.com

Counsel for Amicus Curiae

2014 – Bachman Legal Printing ■ (612) 339-9518 ■ 1-800-715-3582 ■ Fax (612) 337-8053

TABLE OF CONTENTS

Table of Authorities

Cases: **Page**

Statutes

Other

BRIEF OF WE ALL HELP PATIENTS AS *AMICUS CURIAE* IN SUPPORT OF THE RESPONDENT[1]

INTERESTS OF AMICUS CURIAE

We All Help Patients, Inc. is a nonprofit coalition of healthcare providers—including acupuncturists, midwives, massage therapists, and doctors of medicine, osteopathy, naturopathy, and chiropractic—patients, consumer advocates, and concerned members of the public. We All Help Patients was founded by Dr. Yvoune Petrie, D.C., out of recognition that a healthcare myth has been and continues to be perpetuated to enrich a segment of the medical establishment at the expense of the public health. The brunt of this broken system is borne by those who are least capable of fixing it: people with illnesses that can be treated by methods the medical establishment does not sanction.

The coalition seeks to help patients get better, feel better, and stay better without resorting to a scalpel and a prescription pad. It also seeks to establish a new standard of care under which all healthcare providers incorporate methods that advance health and that are uniformly covered by health insurance. By collaborating with the full spectrum of healthcare providers and patients, the coalition hopes to create a system in which complementary and alternative medicine

1. No counsel for any party has authored this brief in whole or in part, and no person other than *amicus*, its members, or its counsel have made any monetary contribution intended to fund the preparation or submission of this brief. The parties' letters consenting to the filing of amicus briefs have been filed with the Clerk of Court.

practitioners can contribute to the health of their patients according to their training and scope without fear or persecution.

We All Help Patients thus has a significant interest in this case because state-sanctioned medical boards made up of financially interested professionals present one of the most significant barriers to complimentary and alternative medicine.

INTRODUCTORY STATEMENT AND SUMMARY OF ARGUMENT

The federal antitrust laws—the "Magna Carta of free enterprise"—protect and nurture competition. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972). Competition in healthcare, however, suffers because over time medical associations and their members have acquired market power by influencing the composition and power of state licensing boards, who in turn keep other types of healthcare providers from invading the "turf" of these powerfully entrenched professionals. Without vigorous antitrust enforcement, patients will pay higher prices for fewer healthcare options.

The "independent centers of decisionmaking" here—the dentists on the North Carolina State Board of Dental Examiners—are financially interested private parties. This is the crucial fact that requires the Board to prove active state supervision to obtain state-action immunity. The proper antitrust analysis of any state or private entity must focus on these functional "independent centers of decisionmaking," not on formal labels or corporate or state structures that a defendant can manipulate. *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 191 (2010). Applying the active-state-supervision element

in these circumstances protects the limiting policy of state-action immunity that only the state sovereign—not private individuals or groups—can displace the national policy of competition that our federal antitrust laws embody.

1. Like all antitrust exemptions, courts strictly limit and disfavor state-action immunity. *FTC v. Phoebe Putney Heath Sys., Inc.*, ___ U.S. ___, 133 S. Ct. 1003, 1010 (2013). This limited exemption exists solely to allow the states as sovereigns to regulate their economies and provide essential services to their citizens, without interference by a law meant to apply to market not regulatory conduct. *Id.* at 1016. At the same time, states may not "give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker v. Brown*, 317 U.S. 341, 351 (1943). Courts must consider these limits when interpreting and applying the state-action immunity elements developed by *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105, (1980).

2. This Court need not definitively answer the broad question of whether state agencies must prove active state supervision for immunity. Rather, the Court should apply the analysis of *American Needle, Inc. v. National Football League*, 560 U.S. 183 (2010). In that case, the Court looked beyond the legal formalities of a single entity to determine whether it comprised "independent centers of decisionmaking," which is the unit of analysis for competition under the Sherman Act. *Id.* at 196. The Court should thus examine whether these units of competition—dentists who sit on the North Carolina State Board of Dental Examiners—have private interests. If the independent centers of decisionmaking that engage in anticompetitive

conduct are private rather than public, there is no assurance that the acts are acts of the sovereign state. *See Phoebe Putney*, 133 S. Ct. at 1011.

3. Whether board members are elected or appointed doesn't matter under a proper analysis. Rather than introduce a highly factual, case-by-case analysis that elevates form over function and invites scrutiny of state political processes, this Court should consider whether the independent centers of decisionmaking—the Board members—have private incentives.

4. Professional-licensing boards are one of the fastest-growing labor institutions in the U.S. economy. They often consist primarily of members of the regulated profession—independent centers of decisionmaking. These boards have an inherent conflict of interest between their public duties and private interests. They cannot be trusted to determine the scope-of-practice for other professions because they have private pecuniary interests and are often beholden to their peers. Their actions are usually final and not subject to approval by a disinterested state official. Rather, they are subject only to limited and deferential judicial review that does not determine whether the anticompetitive conduct actually furthers state regulatory policies.

5. Professional-licensing boards typically don't have clear state-law delegations of authority to expand their monopoly. Thus, this Court should be skeptical at the outset that such self-aggrandizing acts are the state sovereign's own. Instead, the Court should find active supervision only where that supervision comes in the form of mandatory, pre-injury review of the particular anticompetitive act.

6. This Court's decision requiring proof of active state supervision in this case is vital to the

nation's global standing in healthcare. The traditional medical establishment has long used its influence to prevent healthy competition. Today, entrenched market participants—allopathic healthcare providers—wield the full power of their respective states to suppress competition from complimentary and alternative medicine (CAM) practitioners instead of protecting the public health. Innovations in CAM care have improved patient outcomes, decreased the need for medications, and reduced costs. With such high stakes, this Court must ensure that the national policy of competition is not undermined by private interests hiding behind the veil of state sovereignty to avoid scrutiny of their self-interested anticompetitive acts.

ARGUMENT

I. An Entity that Consists of Market Participants Must Prove Active State Supervision to Invoke State-Action Immunity.

A. State-action immunity is only available when the State owns the anticompetitive act, as a sovereign.

The state-action immunity from the federal antitrust laws is strictly limited and disfavored. *FTC v. Phoebe Putney Heath Sys., Inc.*, ___ U.S. ___, 133 S. Ct. 1003, 1010 (2013). This Court just reiterated in *Phoebe Putney* the underlying policy behind state-action immunity that only the "State's sovereign capacity to regulate their economies and provide services to their citizens" can displace the " 'essential national policies' embodied in the antitrust laws." *Id.* at 1016 (citation omitted).

Variations of the test this Court developed in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), answer the question whether the anticompetitive act derives from the state as sovereign. First, the challenged restraint must be "clearly articulated and affirmatively expressed as state policy." *Id.* at 105. Second, the policy must be "actively supervised by the State itself." *Id.*

Courts should not, however, apply these factors in a vacuum, parsing the plain language of each. Instead, they are a means to the specific policy underlying the state-action immunity doctrine, not ends by themselves. This Court has explained, for instance, that both elements are "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992); *see also* Jarod M. Bona, *The Antitrust Implications of Licensed Occupations Choosing Their Own Exclusive Jurisdiction*, 5 U. St. Thomas J. L. & Pub. Pol'y 28, 37 (2011) ("The real battle is to determine whether a particular challenged action actually flows from the state acting as sovereign or from some other basis.").

In *Phoebe Putney*, this Court in fact developed the first factor—clear articulation—toward the doctrine's policy by holding that when a state offers a general delegation of power to a sub-state entity, immunity fails because the State's action does not show that it "affirmatively contemplated" and "articulated" the anticompetitive acts. 133 S. Ct. at 1016–17. That is, it wasn't clear that the anticompetitive conduct was the State's own—as a sovereign—rather than merely the acts and decisions of a political subdivision that is not sovereign itself. *Id.* at 1010–14.

The core policy of this immunity doctrine also incorporates the consistently reaffirmed maxim from *Parker v. Brown* that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it." 317 U.S. 341, 351 (1943); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 602 (1976). States as sovereigns may engage in anticompetitive conduct "to regulate their economies and provide services to their citizens." *Phoebe Putney*, 133 S. Ct. at 1016. But they may not transfer this immunity—as though it were an alienable commodity—unto others to exercise. The policy behind state-action immunity requires that the damage to our nation's competition policy must come from an intentional decision by the sovereign state itself. This is a cost of federalism that is narrowly circumscribed.

This Court previously relieved municipalities from the burden of proving the second *Midcal* requirement—active state supervision—because they "have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011; *see Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985). Thus, this Court determined that when there is no private interest involved in the decisionmaking process, it would trust the public actor with properly applying the specifically articulated sovereign wishes with less supervision.[2]

---

2. The municipality, however, is not worthy of this trust when it is acting as a commercial participant instead of a regulator because it has its own private interests. This Court declined to consider the "market-participant exception" to state-action immunity in *Phoebe Putney*, 133 S. Ct. at 1010 n. 4. *See* Jarod M. Bona & Luke Anthony Wake, *The Market-Participant*

This Court expressly reserved the question of whether state agencies must prove active state supervision for immunity. *Id.* at 46 n.10. As explained below, this Court need not fully answer this question because it can dispose of this case on more narrow grounds consistent with the policy underlying the state-action immunity doctrine.

B. The application of the active state supervision requirement depends not on the form of the entity, but on the nature of the independent center of decisionmaking.

This Court need not answer the question—once and for all—whether the active-state-supervision element applies to state agencies because this case involves a unique entity made up of market-participants that are "independent centers of decisionmaking." *American Needle, Inc. v. Nat'l Football League*, 560 U.S. 183, 196 (2010); *Copperweld Corp. v. Independence Tube Corp.*, 467 U.S. 752, 769 (1984).

Indeed, this Court's analysis in *American Needle* requires a simple answer here. In that case, the Court considered whether concerted action could be taken by a single entity—a corporation formed by the thirty-two National Football League teams to manage their intellectual property. *American Needle*, 560 U.S. at 186. The first section of the Sherman Act only applies to contracts, combinations, or

---

Exception to State-Action Immunity from Antitrust Liability, 23 Competition 156 (2014), *available at* http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2402444 (advocating a market-participant exception to state-action immunity).

conspiracies, so if the Section 1 defendant is a "single entity" under the antitrust laws it escapes antitrust scrutiny. *Id.* at 188–89. In answering the question, this Court "eschewed" a formalistic approach focused on the type of entity "in favor of a functional consideration of how the parties involved in the alleged anticompetitive conduct actually operate." *Id.* at 191.

This Court explained, for example, that it has "repeatedly found instances in which members of a legally single entity violated § 1 when the entity was controlled by a group of competitors and served, in essence, as a vehicle for ongoing concerted activity." *Id.* Notably, this Court further stated that it has "similarly looked past the form of a legally 'single entity' when competitors were part of professional organizations or trade groups." *Id.* at 192. Among other cases, this Court cited *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975), which, like the present case, involved a state-licensing entity with a private professional membership accused of anticompetitive conduct. *American Needle*, 560 U.S. at 192 n.3.

American Needle thus confirmed that the unit of analysis for antitrust purposes is the "independent center of decisionmaking." *Id.* at 196. This makes sense because a federal policy of competition underlies the antitrust laws and the independent center of decisionmaking is, in fact, the unit of competition. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services."); *American Needle*, 560 U.S. at 195 ("The key is whether [the concerted action] joins together separate decisionmakers."). A

"contract, combination, or conspiracy" deprives the market of these independent decisionmaking centers and is therefore scrutinized under Section 1 of the Sherman Act. *Id.* at 199.

Similarly, here, determining whether the active-state-supervision requirement applies to the North Carolina State Board of Dental Examiners must occur by examining the interests of the independent centers of decisionmaking—the unit of analysis for competition. Consistent with this approach, this Court rejected a state-action immunity analysis centered on the form or label of the broader entity in *Goldfarb*, where "the State Bar is a state agency for some limited purposes." 421 U.S. at 791. This "state entity" classification did not allow it "to foster anticompetitive practices for the benefit of its members." *Id.* Thus, the Court need not consider the public or private nature of the dental-board entity itself to derive answers to the issues in this case.

Instead, similar to *American Needle*, this Court should examine whether the units of competition—the independent decisionmakers—are private interests or, as with at least some municipalities, "have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011.

Here, each of the dental-board members are, like the teams in *American Needle*, part of separate and "independently owned and independently managed business[es]." 560 U.S. at 196; *see also* Pet. App. 4a–5a, 72a. That isn't disputed. Thus, the "independent centers of decisionmaking" in this case are indisputably private interests, which this Court in *Phoebe Putney* reiterated must satisfy *Midcal's* active state supervision requirement. 133 S. Ct. at 1011.

This conclusion also follows from the policies underlying state-action immunity. Only the state sovereign can displace the "essential national policies" embodied in the antitrust laws, and the *Midcal* elements seek to ensure that any anticompetitive act operates "because of a deliberate and intended state policy." *Ticor Title*, 504 U.S. at 636.

If the independent units of decisionmaking that engage in the anticompetitive conduct are private rather than public, there is no assurance—without active state supervision—that the acts are, indeed, the acts of the state sovereign. *Phoebe Putney*, 133 S. Ct. at 1011–12 (acknowledging that private parties have an incentive to pursue "their own self-interest under the guise of implementing state policies"); *Patrick v. Burget*, 486 U.S. 94, 101 (1988) ("Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests."); Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 672 (1991) ("[T]hose who stand to profit financially from restraints of trade cannot be trusted to determine which restraints are in the public interest and which are not.").

Just as importantly, allowing the state to deputize private independent centers of decisionmaking to harm competition would contravene the policy that "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it." *Parker*, 317 U.S. at 351. Active state supervision in these circumstances ensures that any displacement of our national policy of competition comes from the state sovereign itself.

Otherwise, a state could easily sanction private anticompetitive conduct by, for example, forming a commission or some other public agency made up of representatives from a particular favored industry in the state to set prices or exclude competitors.

Perhaps, for example, the State of Michigan decides to form a state agency or board consisting of representatives of major car manufacturers, which are important business citizens of the State. If the unit of analysis were the state entity itself, a state could manipulate it so it passes scrutiny as a "state" entity rather than a private entity. The car manufacturers would have a heyday with this state-sponsored cartel, which the federal antitrust laws couldn't touch. And the State of Michigan and its citizens are happy because car-manufacturer victories over others in the vertical chain of competition benefit Michigan and its citizens.

But if a court were to look instead to the "independent centers of decisionmaking," it will observe that the car-manufacturer representatives have an "incentive to pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 133 S. Ct. at 1011. The antitrust laws would thus govern the conduct, supporting the state-action immunity policy that a state cannot give others immunity to violate the federal antitrust laws. *Parker*, 317 U.S. at 351

C. The route that private interests travel to a quasi-state entity is irrelevant to whether *Midcal's* active state supervision requirement applies.

The Board members in this case were elected by other dentists. *N.C. State Bd. of Dental Examiners*

v. FTC, 717 F.3d 359, 364 (4th Cir. 2013). But that fact does not affect the proper analysis here. First, what matters is whether the "independent centers of decisionmaking" are private actors with corresponding pecuniary self-interests. An appointment by a government official does not remove strategic private or industry incentives and behavior from the anticompetitive activity.

Second, it is likely that appointments will originate from either a financially ambitious professional or trade association that recommends nominations to a state official. *See, e.g.*, Idaho Code Ann. § 54-1805(2)(a)(b) (West 2013) (governor must appoint from nomination pool submitted by private medical associations); N.Y. Pub. Health Law § 230(1) (McKinney 2013) (85% of state medical board appointments must come from nominations by private medical associations). These nominees are likely beholden to the private association of their fellow professionals as much as if they were elected.

Third, if the route that a financially interested professional took to a state or quasi-state agency were relevant, courts would have to examine the behind-the-scenes election and appointment processes in each case to make what are likely to be conflicting and subjective judgments about individual government-official motivations. Federal courts would be required, in these circumstances, to delve into the sensitive workings of the state political process. *See Hallie*, 471 U.S. at 44 n.7. This would also introduce a highly factual issue and great uncertainty into every federal antitrust case involving a licensing board or other agency made up of private interests. It isn't apparent that boards full of elected members are necessarily less likely to pursue the state sovereign's goals than members that

are appointed, particularly when a private trade group, in practice, runs the appointment-nomination process.

Finally, adopting such a distinction between appointments and elections would elevate form over function, an approach that this Court rejected in *American Needle*., 560 U.S. at 191. What matters is not the political form of how private interests came to the board or agency, but how they function in practice, including their private interests and incentives.

II. Active State Supervision Requires More than Some State Involvement Through Limited Agency or Judicial Review Procedures.

A. The Purpose of the Active Supervision Requirement.

As we explained above, only those acts considered a state's own, as sovereign, are exempt from federal antitrust scrutiny. *See Goldfarb*, 421 U.S. at 791 ("It is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."). To this end, the active supervision requirement maintains a state's flexibility "to benefit their citizens through regulation," *Ticor Title*, 504 U.S. at 637, while ensuring that the state itself "exercise ultimate control over the challenged anticompetitive conduct." *Patrick*, 486 U.S. at 101. Without this requirement, regulatory schemes that empower those other than the sovereign to act anticompetitively would lack accountability mechanisms to ensure that those acts,

"in the judgment of the State, actually further state regulatory policies." *Id.* Clear articulation, standing alone, would lead the state-action immunity doctrine to "become a rather meaningless formal constraint." *Ticor Title Ins. Co.*, 504 U.S. at 637. This disfavored exception would eclipse the rule and defeat the "national policy in favor of competition." *Midcal*, 445 U.S. at 106.

B. The Structure of State Licensing Boards.

Licensing boards such as the North Carolina Board of Dental Examiners usually consist of members of the regulated profession—independent centers of decisionmaking. This creates an opportunity for these financially interested professionals to expand their scope of practice to exclude competition from other occupations. Clark C. Havighurst, *Contesting Anticompetitive Actions Taken in the Name of the State: State Action Immunity and Health Care Markets*, 31 J. Health Pol. Pol'y & L. 587, 596 (2006) (explaining that licensing boards may have little enthusiasm for competition). Besides their financial interest, these board members are also affected by the private financial interest of their peers through esprit de corps, social pressure, or their appointment or election.

Thus, they "cannot be trusted to decide which restrictions on competition advance the public interest [in the way] disinterested, politically accountable actors can." Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 668 (1991). Absent a robust active supervision requirement, these "unsupervised self-interested boards [are] subject to neither political nor market

discipline to serve consumers' best interests." *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 632 (2011).

Professional-licensing boards are ubiquitous. *See* Morris M. Kleiner & Alan B. Krueger, *The Prevalence and Effects of Occupational Licensing*, 48 British J. of Indus. Rel., 676, 676 (2010) (describing occupational licensing as "[o]ne of the fastest-growing yet least understood institutions in the US [labor] market"). And because they consist of independent centers of decisionmaking, they have the potential to engage in "what is essentially private anticompetitive conduct" under "the gauzy cloak of state involvement." *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 57 (1985) (quoting *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980)). These Boards, with financially interested members, have inherent conflicts of interest. *Hallie*, 471 U.S. at 45 ("A private party . . . may be presumed to be acting primarily on his or its own behalf."); 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 227b, at 501 (3d ed. 2009) (stating that a "decisive coalition . . . made up of participants in the regulated market" should be classified as "private" for state action purposes); *see also Gibson v. Berryhill*, 411 U.S. 564, 579 (1973) ("[T]hose with substantial pecuniary interests in legal proceedings should not adjudicate these disputes.").

Absent a rigorous program of supervision under which disinterested "state officials have and exercise power to review particular anticompetitive acts . . . there is no realistic assurance" that the anticompetitive conduct the boards engage in is actually the state's own. *Patrick*, 486 U.S. at 101.

C. Professional-licensing boards are not Actively Supervised through Judicial Review

In *Patrick v. Burget*, this Court held that state judicial review of hospital privilege-termination proceedings "falls far short of satisfying the active supervision requirement," but reserved the broader question of "whether state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state-action doctrine." *Id.* at 103–04. Instead, the Court pointed to the limited nature of the particular proceedings available in that case, which did little more than "ensure that some sort of reasonable procedure was afforded and that there was evidence" to support the finding. *Id.* at 105.

The Eleventh Circuit later held that even though Florida law comprehensively regulated a peer-review procedure terminating hospital privileges, the decision's merits were neither reviewed by disinterested agency officials nor the courts and thus were not actively supervised. The court explained that "Florida courts expressly advocate judicial restraint in this area, viewing judicial intervention as necessary or appropriate only when a peer review board uses unfair or unreasonable procedures, or when a board arbitrarily and capriciously applies its procedures." *Shahawy v. Harrison*, 875 F.2d 1529, 1536 (11th Cir. 1989).

The same is true in the area of professional-licensing boards. The actions of licensing boards are typically final and not subject to review by a disinterested state administrator. *See, e.g.*, *Solomon v. Bd. of Physician Quality Assur.*, 845 A.2d 47, 50 (2003) (stating procedural history of appeal from

board decision); *Nelson v. Bd. of Veterinary Med.*, 662 So. 2d 1058, 1059 (Miss. 1995) (same). Rather, their decisions are subject only to the limited judicial review afforded administrative agency decisions.

Indeed, state judicial review of administrative decisions is invariably deferential when it concerns professional-licensing boards. In Arkansas, for example, courts uphold administrative decisions "if they are supported by substantial evidence and not arbitrary, capricious, or characterized by an abuse of discretion." *Arkansas Prof'l Bail Bondsman Licensing Bd. v. Oudin*, 69 S.W.3d 855, 859 (Ark. 2002) (citations omitted). In Connecticut, courts are "limited to determining whether the board acted illegally, and the court may not exercise its independent judgment . . . ." *Lillis v. Dep't of Health Servs.*, 564 A.2d 646, 649 (Conn. Super. Ct. 1989) (citing *Jaffe v. Dep't of Health,* 64 A.2d 330, 353–355 (Conn. 1949)). Other states require particular deference to an agency interpretation of a statute it administers. *See, e.g.*, *Williamson v. D.C. Bd. of Dentistry*, 647 A.2d 389, 392 (D.C. 1994) ("We deal here with an agency's interpretation of a statute it administers, to which we give particular deference."); *Maclen Rehab. Ctr. v. Dep't of Health & Rehab. Servs.*, 588 So. 2d 12, 13 (Fla. Dist. Ct. App. 1991) ("An agency's interpretation of its rules and the statutes which it is charged to administer is to be given great deference."); *LTV Steel Co. v. Griffin,* 730 N.E.2d 1251, 1257 (Ind. 2000) ("An interpretation of a statute by an administrative agency charged with the duty of enforcing [it] is entitled to great weight . . . ."); *Lippitt v. Bd. of Certification*, 88 A.3d 154, 159–60 (Me. 2014) ("[W]e generally defer to an agency's interpretation of an ambiguous regulation or statute that is within its area of expertise." (citations and

internal quotations omitted)). Iowa and Vermont take this further, granting even greater deference to a board composed of peers within the profession. *See Al-Khattat v. Eng'g & Land Surveying Examining Bd.*, 644 N.W.2d 18, 23 (Iowa 2002) ("[W]e defer to an agency's construction of statutes and rules within the agency's expertise, unless the interpretation is erroneous or unreasonable. This is particularly true in the case of statutes and regulations entrusted to agencies responsible for licensing professionals. Therefore, we generally affirm the informed decision of the agency, and refrain from substituting our less-informed judgment.") (citations omitted); *In re Porter*, 70 A.3d 915, 918 (Vt. 2012) ("We defer to an administrative agency's interpretation of statutory provisions that are within its particular area of expertise. Where the Board evaluating the professional's conduct is composed of a group of his peers, we afford the Board's decision additional deference." (citations and internal quotations omitted)).

Furthermore, judicial review of administrative decisions is usually narrow, with the burden of persuasion on the appealing party. *See, e.g.*, *Lippitt*, 88 A.3d at 159 (burden is on challenger of agency action); *Solomon*, 845 A.2d at 52 ("Appellate review of an administrative agency's decision is narrow."); *Karasik v. Bd. of Regents*, 130 A.D.2d 923, 925 (N.Y. App. Div. 1987) ("We may not substitute our judgment for that of respondent and may only inquire as to whether the record shows facts which leave no possible scope for the exercise of discretion.").

In sum, the decisions of professional-licensing boards comprising independent centers of decisionmaking are usually subject to only a "constricted review" not on the merits. *Patrick v.*

Burget, 486 U.S. 94, 105 (1988). Because the "active supervision prong of the *Midcal* test requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy," *Id.* at 101, state court review of these decisions necessarily fails to fulfill the active-supervision requirement.

D. The constitution of active state supervision.

Active supervision should require not only that a disinterested state official determine that an anticompetitive act "actually further[s] state regulatory policies," *Patrick*, 486 U.S. at 101, but that this determination occur prior to the market injury. *See* Elhauge, *supra*, at 716 (stating that "post-injury state review is insufficient because, however automatic the right to review, the effort and time necessary to invoke state review can discourage and delay vindication of the right to a competitive market."); *see also In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 632 (2011) (expressing doubt that post-injury review by political or judicial process could constitute active supervision).

Professional-licensing boards do not usually have clear authority to expand their monopoly under their legislative delegations of authority. *See* Bona, *supra*, at 46. Thus, courts engaging in a state-action immunity analysis should scrutinize that "it is the state itself—and not a self-interested board—that is expanding the zone of anticompetitive harm." *Id.* Indeed, the policy underlying state-action immunity includes a presumption against finding such expansive authority because "a state does not give

immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351.

Where professional-licensing boards engage in anticompetitive acts by expansively interpreting the scope of practice during disciplinary adjudications, active supervision should require approval from a disinterested state official whose acts can fairly be interpreted as those of the sovereign.

Professional-licensing boards that use informal threats of action to suppress competition, much like the cease-and-desist letters issued by the Board in this case, are inherently unsupervisable by state officials because such informal action evades administrative procedures and judicial review. *See N.C. Bd. of Dental Exam'rs*, 151 F.T.C. at 632.

Where professional-licensing boards use official rulemaking procedures to expand their jurisdiction, mandatory executive or legislative pre-approval review should suffice. *See, e.g.*, Nev. Rev. Stat. § 233B.067(3)–(5) (implementing mandatory pre-clearance legislative review procedures for administrative rules). But in states with administrative rulemaking-review procedures, mandatory pre-approval is uncommon. *See* Jason A. Schwartz, *52 Experiments with Regulatory Review: The Political and Economic Inputs into State Rulemakings*, Institute for Policy Integrity, N.Y.U. Law, Report No. 6 (Nov. 2010), at 86 (describing various administrative rules review mechanisms in the states). These mechanisms don't provide adequate supervision because "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." *Ticor Title* at 638. In such cases, those boards that want to expand their jurisdiction to the detriment of competitors in other

occupations must instead seek legislative amendment of their statutory jurisdiction, which would then itself become an expressed policy of the state, immune from antitrust scrutiny.

III. Without federal antitrust scrutiny, state medical boards will exclude health professionals that offer competitive alternatives to the traditional medical establishment.

"Necessity is the mother of invention." This aphorism captures the entrepreneurial and creative spirit of the American people. Americans excel at identifying needs, forming ideas, and creating novel solutions. When these solutions are not safe, effective, or economical, they shrivel and die. Our nation's antitrust laws were designed to protect these patently American ideals of innovation and competition. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("The heart of our national economic policy long has been faith in the value of competition.").

The healthcare industry is no exception. Competition and innovation can make healthcare more effective, reduce costs, increase availability, create better outcomes, and improve Americans' quality of life. But our healthcare system is hardly competitive, and the numbers prove it. The United States is ranked thirty-seventh in the world for overall health. Christopher J.L. Murray & Julio Frenk, *Ranking 37th—Measuring the Performance of the U.S. Health Care System*, 362 N. Engl. J. Med. 98, 98 (2010). Healthcare is also prohibitively expensive. Our healthcare spending—$8,680 per capita, $2.7 trillion in total, or 17.9% of GDP—is higher than any

other country. Nat'l Ctr. for Health Statistics, DHHS Pub. 2014-1232, *Health, United States, 2013*, Table 112 (2014).

Despite our nation's embarrassing global standing in health, the traditional healthcare establishment is uninterested in a solution through competition; perhaps because they fear one might be found elsewhere. Indeed, a seven-year study in Illinois shows that using complimentary- and alternative-medicine (CAM) practitioners (specifically, doctors of chiropractic) as primary-care physicians results in a marked reduction in hospital admissions, hospital stays, out-patient surgeries, the use of prescription medications, and the costs of care compared to exclusive reliance on allopathic practitioners. *See* Richard L. Sarnat, James Winterstein & Jerrilyn A Cambron, *Clinical Utilization and Cost Outcomes from an Integrative Medicine Independent Physician Association: An Additional 3-Year Update*, 30 J. Manipulative Physiotherapy 263, 267 (2007). By contrast, one of allopathic medicine's primary tools—prescription medication—is the nation's fourth leading cause of death. *See* Donald W. Light, Joel Lexchin & Jonathan J. Darrow, *Institutional Corruption of Pharmaceuticals and the Myth of Safe and Effective Drugs*, 41 J. L. Med. & Ethics 590, 593 (2013).

Medical professional associations have long used their muscle and influence to prevent healthy competition. The American Medical Association's Committee on Quackery was created in 1962 to contain and ultimately eliminate competition from chiropractic care. *Wilk v. Am. Med. Ass'n*, 719 F.2d 207, 213 *adhered to*, 735 F.2d 217 (7th Cir. 1983). AMA's boycott ultimately failed and chiropractors have since been licensed in all fifty states. *See Wilk v.*

Am. Med. Ass'n, 895 F.2d 352, 356 (7th Cir. 1990). But the allopathic medical profession has found another way to exert its members' will: through state medical boards. These boards often comprise a membership dominated by medical doctors who are either elected by their peers or appointed through nomination processes controlled by private trade organizations—their state's medical associations—whose purpose necessarily is to protect their members' interests. *See, e.g.*, Idaho Code § 54-1805(2)(a), (b) (requiring governor to appoint medical board from state medical association's slate of nominees).

These entrenched market participants now suppress their competition through disciplinary proceedings, civil actions, criminal charges, and threats of all of the above. Like the North Carolina dentists who have co-opted state power to further their own pecuniary interests, allopathic practitioners can further their interests—at the expense of everyone else—only if they are shielded from federal antitrust scrutiny. They have not simply captured a regulatory arm of the state; they have commandeered it. The national policy of competition should not be set aside simply because conspirators have a particular form of political success.

State medical boards dominated by market participants are charged with protecting and advancing the public health, and they have failed. Competition, on the other hand, has a proven track record of success. Innovations in allopathic medicine such as penicillin and the cesarean section have saved millions of lives. Likewise, innovations in chiropractic care have decreased the necessity of lower-back surgery, reduced pain, improved function, and saved money. CAM has improved patient

outcomes while reducing the need for medication. Healthy competition between different types of healthcare providers—both allopathic practitioners (doctors of medicine, osteopathy, and podiatry, dentists, and nurses) and CAM practitioners (doctors of chiropractic, naturopathy, and certified professional midwives, among others)—empowers patients with choices and has resulted in new and better methods of preserving and promoting health. *See* Fed. Trade Comm'n Staff, *Policy Perspectives: Competition and the Regulation of Advanced Practice Nurses* 20 (2014) (stating scope-of-practice restrictions deprive consumers of many benefits of competition).

We ask this Court to reaffirm our nation's commitment to healthy competition and deny these financially interested, politically entrenched market participants the unwarranted reprieve they seek.

CONCLUSION

For the foregoing reasons, We All Help Patients, Inc. urges this Court to hold that the active-state supervision requirement applies when the state-action-immunity-seeking entity consists of independent centers of decisionmaking with private interests.

Respectfully submitted,

JAROD M. BONA
Counsel of Record
AARON R. GOTT
BONA LAW P.C.
4275 Executive Square
Suite 200
La Jolla, CA 92037
(858) 964-4589
jarod.bona@bonalawpc.com
aaron.gott@bonalawpc.com

Counsel for Amicus Curiae
We All Help Patients, Inc.

Dated: August 6, 2014.