No. 13-534

In the Supreme Court of the United States

THE NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF OF *AMICI CURIAE* STATE OF WEST VIRGINIA AND 21 OTHER STATES IN SUPPORT OF PETITIONER

PATRICK MORRISEY
Attorney General

OFFICE OF THE ATTORNEY GENERAL
State Capitol
Building 1, Room E-26
Charleston, WV 25305
EL@wvago.gov
(304) 558-2021

ELBERT LIN
Solicitor General
Counsel of Record

MISHA TSEYTLIN
Deputy Attorney General

JENNIFER S. GREENLIEF
J. ZAK RITCHIE
Assistant Attorneys General

Counsel for Amicus Curiae State of West Virginia
[additional counsel listed at end]

QUESTION PRESENTED

Whether, for purposes of the state-action exemption from federal antitrust law, an official state regulatory board created by state law may properly be treated as a "private" actor simply because, pursuant to state law, a majority of the board's members are also market participants who are elected to their official positions by other market participants.

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INTEREST OF *AMICI CURIAE*

Amici Curiae—the States of West Virginia, Alabama, Arizona, Arkansas, Colorado, Connecticut, Delaware, Florida, Hawai'i, Idaho, Indiana, Kansas, Kentucky, Maryland, Michigan, North Carolina, Ohio, Oregon, South Carolina, Tennessee, Utah, and Virginia—have a significant interest in this case because the Fourth Circuit's decision punishes States for their sovereign choices as to how to staff and supervise their regulatory boards. *Amici* routinely use regulatory boards to oversee certain professions operating within their borders. And *Amici* have determined that for many professions, the individuals best positioned to staff these boards are those that actively practice in the relevant field. These professionals' expertise and assistance has proven to be an invaluable tool for enforcing state law. If the Fourth Circuit's decision in *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 717 F.3d 359 (4th Cir. 2013), is permitted to stand, however, federal antitrust law will be distorted to punish *Amici* States and the licensed professionals who serve on the States' boards, in violation of *Amici*'s sovereign authority to organize their own agencies as they see fit.

SUMMARY OF ARGUMENT

This case calls on the Court to yet again reaffirm that the federal antitrust laws were never intended, and should not be distorted, to interfere with the States' sovereign authority to regulate the industries within their borders. When Congress enacted the Sherman Antitrust Act in the late 19th Century, it was understood that Congress lacked the

power to regulate purely intrastate activity and therefore never contemplated that the Act could reach the States' traditional sovereign function of regulating professions operating within their borders. In recognition of this original understanding, this Court adopted the state-action exemption after the expansion of the Commerce Clause jurisprudence, in order to "preserv[e] to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws . . . ." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 39 (1985). Under this Court's caselaw, when a State clearly articulates its policy and delegates enforcement of that policy to state actors of its choosing, courts may not—in the guise of enforcing federal antitrust law—overturn the State's sovereign decision. The identity of the personnel that comprise the board, or the level of bureaucratic oversight over the actions of the board, are of no concern to federal antitrust law.

In the decision below, the Court of Appeals for the Fourth Circuit departed from these well-established principles. It held that when States staff their regulatory agencies with active professionals in the relevant field, the States and the professionals are subject to a heightened risk of antitrust liability, including the specter of treble damages and criminal liability. That is not, and should not be, the law.

The Fourth Circuit's approach to the state-action exemption must be rejected because it conflicts with this Court's precedent and the history of the Sherman Act, and is an egregious

infringement on the States' self-governance in at least two respects:

First, the Fourth Circuit's rule punishes States for adopting the long-standing and ubiquitous practice of staffing regulatory boards with active professionals. The decision thus directly impinges upon the States' sovereign right to "prescribe the qualifications of their own officers." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991) (quotation marks omitted). The practical result of this assault on state sovereignty is to encourage States to abandon the use of regulatory boards staffed with active professionals, who are experienced and knowledgeable in the field, and replace those professionals with career bureaucrats who will often lack the same expertise.

Second, by subjecting professional-staffed regulatory boards to the "active supervision" test, the Fourth Circuit's rule undermines the States' sovereign right to determine which "agencies . . . may be entrusted" with "exercising [which] of [their] governmental powers." *See City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 437 (2002) (quotation omitted). As part of determining how to subdivide their powers, States already have in place substantial supervisory and accountability regimes for their regulatory boards—from procedural protections to freedom-of-information requirements. But the Fourth Circuit would authorize federal courts to second-guess whether such oversight is sufficiently "active" in every case involving a regulatory board staffed by active professionals. What is more, this intrusive oversight would

incentivize States to adopt inefficient and duplicative bureaucratic structures, leading to significant negative consequences for the public.

ARGUMENT

I. THIS COURT ADOPTED THE STATE-ACTION ANTITRUST EXEMPTION BECAUSE THE FEDERAL ANTITRUST LAWS WERE NEVER INTENDED TO INTERFERE WITH STATES' ACTIONS AS SOVEREIGN REGULATORS.

As originally enacted, the Sherman Antitrust Act of 1890 did not even arguably implicate—let alone proscribe—the States' traditional sovereign function of regulating professions operating within their borders. By its terms, the Act outlaws private actions that "restrain" or "monopolize" "trade or commerce *among* the several States, or with foreign nations." 15 U.S.C. §§ 1, 2 (emphasis added). At the time Congress enacted the Act, the prevailing understanding was that Congress "lacked any power to regulate activity occurring completely within a state." Matthew L. Spitzer, *Antitrust Federalism and Rational Choice Political Economy: A Critique of Capture Theory*, 61 S. Cal. L. Rev. 1293 (1988). Under that view, "if the state regulation was constitutional, it was beyond the reach of Congressional power under the Sherman Act, and if the state regulation was within the reach of the Sherman Act, then it exceeded the state's legislative jurisdiction [pursuant to the Dormant Commerce Clause]." Herbert Hovenkamp & John A. MacKerron, *Municipal Regulation and Federal Antitrust Policy*, 32 UCLA L. Rev. 719, 725 (1985).

But the expansion of this Court's Commerce Clause jurisprudence roughly a half century later also led to an expanded interpretation of the Sherman Act and, with that, the possibility that the Act could reach state activity. During the 1930s, this Court enlarged what constituted "trade or commerce among the several States" under the Commerce Clause, and then transposed that enlarged understanding onto the Sherman Act as a matter of judicial construction. *See Hospital Bldg. Co. v. Trustees of Rex Hospital*, 425 U.S. 738, 743 n.2 (1976) ("When Congress passed the Sherman Act in 1890, it took a very narrow view of its power under the Commerce Clause . . . . Subsequent decisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power."). Under this approach, it became arguable that the meaning of "restraint" on "trade or commerce among the several States" in the Sherman Act prohibited broad swaths of traditional intrastate regulation, including those regulations that governed—and thus "restrain[ed]"—the manner in which certain professions could be practiced within a State's borders. *See* Richard Squire, *Antitrust And The Supremacy Clause*, 59 Stan. L. Rev. 77, 98 (2006). Even though the Sherman Act was not intended to trench upon the States' traditional authority as sovereign regulators, the broad words of the Act, as expanded by this Court's Commerce Clause jurisprudence, appeared to do just that.

This Court correctly put those arguments to rest in *Parker v. Brown*, 317 U.S. 341 (1943), adopting the state-action exemption in recognition of

the fact that the Sherman Act was never intended to impede States' traditional regulatory authority. The *Parker* Court explained that even assuming that California's program of restricting competition among raisin growers would have violated the Sherman Act "if [the program] were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons, individual or corporate," the program did not violate the Act because it was executed as state policy. *Id.* at 350-51. "[N]othing in the language of the Sherman Act or in its history," the Court reasoned, "suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* Because States are a "sovereign" part of our Nation's "dual system of government," this Court declined to infer an "unexpressed purpose" to "nullify a state's control over its officers and agents" or hinder "the state . . . in [its] execution of a governmental policy." *Id.* at 351-52.

Since *Parker*, this Court has repeatedly reaffirmed that proper understanding of the Act. When this Court returned to the scope of the state-action exemption from federal antitrust law in a series of cases almost fifty years after *Parker*, it reiterated the importance of affording due respect for federalism and state sovereignty. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), this Court based its analysis of the scope of the exemption on the understanding that "immunity for state regulatory programs is grounded in our federal structure." *Id.* at 103. In *Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), this Court recognized that the exemption "preserv[ed] to

the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws . . . ." *Id.* at 39. And in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365 (1991), this Court touted "principles of federalism and state sovereignty," and then explained that "the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *Id.* at 370, 374.

II. THE FOURTH CIRCUIT'S RULE WOULD SIGNIFICANTLY INTERFERE WITH, AND HAVE NEGATIVE CONSEQUENCES ON, THE STATES' SELF-GOVERNANCE.

The Fourth Circuit's parsimonious approach to the state-action exemption must be rejected because it conflicts with this Court's precedent and the history of the Sherman Act, and egregiously infringes state sovereignty. Above all, it is "through the structure of its government, and the character of those who exercise government authority, [that] a State defines itself as a sovereign." *Gregory v. Ashcroft*, 501 U.S. 452, 460 (1991); *accord Sailors v. Bd. of Ed. Of Kent Cnty.*, 387 U.S. 105, 109 (1967) (each State, as a sovereign entity, maintains "vast leeway in the management of its internal affairs"). Yet, the Fourth Circuit held that when a State staffs a regulatory board with active professionals, that board must be "actively supervised" by full-time state employees or be subject to federal antitrust law. This direct attack on the States' ability to use a method of governance that they have found desirable and beneficial must be rejected.

A. The Fourth Circuit's Threat Of Antitrust Liability On Professional-Staffed State Agencies Would Undermine The States' Sovereign Authority To Staff Their Own Agencies In The Manner They Have Deemed Most Desirable.

A State's choices about the individuals who serve in its government are decisions "of the most fundamental sort for a sovereign entity." *Gregory*, 501 U.S. at 460. As this Court has explained, those are questions that are within "an area traditionally regulated by the States." *Id.* It is "essential to the independence of the States, and to their peace and tranquility," that they retain "their power to prescribe the qualifications of their own officers," *id.*, and "the manner in which [their officials] shall be chosen," *id.* (quotation omitted).

In exercising that power, the States have chosen to staff "[t]he majority of licensing boards [with] active members of the profession being licensed." J.F. Barron, *Business and Professional Licensing – California, a Representative Example*, 18 Stan. L. Rev. 640, 649 (1966). *Amici* States alone use active professionals to oversee, among many others: doctors,[1] dentists,[2] chiropractors,[3] nurses,[4]

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[1] *See, e.g.*, Ind. Code § 25-22.5-2-1; Mich. Comp. Laws § 333.17021; N.C. Gen. Stat. § 90-2 *et seq.*; Tenn. Code Ann. § 63-6-101; Va. Code Ann. § 54.1-2911; W. Va. Code § 30-3-5.

[2] *See, e.g.*, Ark. Code Ann. § 17-82-201 *et seq.*; Ind. Code § 25-14-1-2(a); Ohio Rev. Code § 4715.02; N.C. Gen. Stat. § 90-22 *et seq.*; Tenn. Code Ann. § 63-5-102; Va. Code Ann. § 54.1-2702; (2013); W. Va. Code § 30-4-4.

pharmacists,[5] auctioneers,[6] optometrists,[7] veterinarians,[8] lawyers,[9] architects,[10] funeral directors,[11] accountants,[12] plumbers,[13] general engineers,[14] technical professionals,[15] real estate brokers,[16] social workers,[17] veterinarians,[18] and appraisers.[19]

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[3] *See, e.g.*, Ind. Code § 25-10-1-1.5(a); Tenn. Code Ann. § 63-4-102; W. Va. Code § 30-16-1 *et seq*.

[4] *See, e.g.*, Mich. Comp. Laws § 333.17221.

[5] *See, e.g.*, Ind. Code § 25-4-1-2; N.C. Gen. Stat. § 90-85.6, 85-7; Tenn. Code Ann. §§ 63-10-301, 63-10-301-302; Va. Code Ann. § 54.1-3305 (2013); W. Va. Code § 30-5-1 *et seq*.

[6] *See, e.g.*, Ind. Code § 25-6.1-2-1(c); Tenn. Code Ann. § 62-19-104; Va. Code Ann. § 54.1-602.

[7] *See, e.g.*, N.C. Gen. Stat. § 90-116 *et seq.*; Tenn. Code Ann. § 63-8-103; Va. Code Ann. § 54.1-3207; W. Va. Code § 30-8-1 *et seq*..

[8] *See, e.g.*, N.C. Gen. Stat. § 90-182; Tenn. Code Ann. § 63-12-104; Va. Code Ann. § 54.1-3802; W. Va. Code § 30-10-4.

[9] *See, e.g.*, N.C. Gen. Stat. § 84-15 *et seq.*; Tenn. Sup. Ct. R. 9.

[10] *See, e.g.*, Ind. Code § 25-4-1-2(b); N.C. Gen. Stat. § 83A-2; Tenn. Code Ann. § 62-2-201; Va. Code Ann. § 54.1-403; W. Va. Code § 30-12-1 *et seq*.

[11] *See, e.g.*, N.C. Gen. Stat. § 90-210.18A; Tenn. Code Ann. § 62-5-201; Va. Code Ann. § 54.1-2802; W. Va. Code § 30-6-1 *et seq*.

[12] *See, e.g.*, Ind. Code § 25-2.1-2-3(b); Mich. Comp. Laws § 339.721; Va. Code Ann. § 54.1-4402; W. Va. Code § 30-9-3.

[13] *See, e.g.*, Ind. Code § 25-28.5-1-4(a).

[14] *See, e.g.*, Ark. Code Ann. § 17-30-201 *et seq.*; Ind. Code § 25-31-1-3(b); N.C. Gen. Stat. § 89C-4; Tenn. Code Ann. § 62-2-201; Va. Code Ann. § 54.1-403; W. Va. Code § 30-13-1 *et seq*.

[15] *See, e.g.*, Kan. Stat. Ann. § 74-7004.

[16] *See, e.g.*, Mich. Comp. Laws § 339.2502.

Amici States have chosen to staff many of their regulatory boards with active professionals because such professionals ordinarily have "specialized knowledge" that the "lay public," career bureaucrats, and state legislators lack. *California Dental Ass'n v. FTC*, 526 U.S. 756, 772 (1999). Doctors, nurses, architects, attorneys, accountants, and numerous other regulated professions undergo years of advanced study, professional certification, and continuing education. "It is logical to assume that only those already qualified in [such] profession[s] can judge the competence of others to practice the profession." Barron, *Business and Professional Licensing*, *supra*, at 649. And it is not often that persons with such hard-won—and often expensive—knowledge and expertise will be willing to give up their active trades in order to serve as full-time government regulators.

Moreover, active professionals maintain a current knowledge base that inactive individuals with similar training will not have. Thus, even if sufficiently qualified professionals could be convinced to join full-time government employment in some fields, that would not necessarily be desirable. Highly-specialized fields such as medicine and dentistry change quickly. It is often individuals who practice in those fields day in and day out who are

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[17] *See, e.g.*, Tenn. Code Ann. § 63-23-101; Va. Code Ann. § 54.1-3703; W. Va. Code § 30-30-1 *et seq.*

[18] *See, e.g.*, Kan. Stat. Ann. § 47-818; Ind. Code § 25-38.1-2-4(a).

[19] *See, e.g.*, Ark. Code Ann § 17-14-201 *et seq.*; N.C. Gen. Stat. § 93E-1-4; Tenn. Code Ann. § 62-39-201; Va. Code Ann. § 54.1-2012; W. Va. Code § 30-38-1 *et seq.*

best situated "to spot emerging threats to public welfare in their respective fields," and to do so "faster than state legislators or bureaucrats." Ingram Weber, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 U. Chi. L. Rev. 737, 755 (2012).

The Fourth Circuit's approach violates state sovereignty because it undermines the States' right to staff their agencies in the manner they have deemed most desirable. The Fourth Circuit would punish the decision to use active professionals on regulatory boards with an increased risk of federal antitrust liability. In turn, States may feel compelled to use full-time government employees for the enforcement of their regulatory regimes and to give up the substantial benefits that active professionals bring to the administration of state law. And even if States wish to risk antitrust liability and to retain active professional boards, qualified professionals may simply refuse to serve. After all, "[t]here can be no question that the threat of being sued for damages [under the Sherman Act]—particularly where the issue turns on subjective intent or motive—will deter able citizens from performing this essential public service." *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984). This is especially true because the prospect of being sued under the Sherman Act carries with it the threat of personal liability of treble damages and attorneys' fees (15 U.S.C. § 15), as well as "criminal liability" (*Omni*, 499 U.S. at 373 n.4).[20]

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[20] The fact that the active professionals that staffed the regulatory board at issue here were selected by their peers was

That cannot be squared with the history and principles underlying the state-action exemption. This Court recognized that exemption precisely so that the Sherman Act would not be misapplied to undermine sovereign prerogatives. For this reason alone, the Fourth Circuit's approach must be rejected.

B. The Fourth Circuit's Imposition Of The "Active Supervision" Requirement On Professional-Staffed State Agencies Would Substantially Intrude On The States' Supervision Of Those Agencies.

Also "central to state self-government" is a State's discretion to subdivide its powers among agencies. *City of Columbus v. Ours Garage & Wrecking Serv., Inc.*, 536 U.S. 424, 437 (2002). As this Court has explained, States have the sovereign authority to determine which of their "agencies . . . may be entrusted" with "exercising [which] of [its] governmental powers." *Id.* (quotation omitted); *accord Omni*, 499 U.S. at 372 ("[S]tate administrative review" is not "a federal antitrust job"). Indeed, this Court has instructed that federal legislation "threatening to trench on the States' arrangements for conducting their own governments should be treated with great skepticism, and read in

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highlighted by the Fourth Circuit, but this was not critical to the court's reasoning. Nor does it, in any event, lessen the intrusion on the States' sovereign authority over their officials. States have no less a sovereign right to determine "the manner in which [their officials] shall be chosen" *Gregory*, 501 U.S. at 460 (quotations omitted), as they do to "prescribe the qualifications of th[ose] officers," *id.*

a way that preserves a State's chosen disposition of its own power." *Nixon v. Missouri Mun. League*, 541 U.S. 125, 140 (2004).

In exercising that sovereign authority, the States have carefully crafted mechanisms to ensure that all state governmental bodies—including regulatory boards staffed with active professionals—are properly exercising their delegated powers. In West Virginia, for example, the members of regulatory boards must comply with ethical rules applicable to all state governmental officials,[21] must open their meetings to the public,[22] must follow state freedom of information rules,[23] must issue annual reports as to the boards' activities,[24] must subject themselves to audits conducted by legislative committees,[25] and must submit their administrative rules for approval by the legislature.[26] Consistent with each State's sovereign authority to structure its government as it sees fit, the particular oversight mechanisms vary from State to State.[27]

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[21] W. Va. Code § 6B-2-1 *et seq.*

[22] W. Va. Code § 6-9A-3.

[23] W. Va. Code § 29B-1-1 *et seq.*

[24] W. Va. Code § 30-1-17.

[25] W. Va. Code § 4-2-1 *et seq*.

[26] W. Va. Code § 29A-3-9, *et seq.*

[27] *See, e.g.*, Ariz. Rev. Stat. Ann. § 41-1279.04 (state board records subject to inspect by Auditor General); 29 Del. Code § 10142 (state board decisions subject to state administrative procedure act); Kan. Stat. Ann. § 77-501 *et seq.* (same); Neb. Rev. Stat. § 84-901 *et seq*. (same); Kan. Stat. Ann. § 75-4317 *et seq.* (state board meetings subject to state open meeting's law);

The Fourth Circuit's approach violates state sovereignty because it would subject these state-designed regimes to intrusive federal court review in every antitrust action brought against a regulatory board staffed with active professionals. In each case, the court would be obligated to determine whether the methods described above were sufficiently "active." According to the Fourth Circuit, "[t]he mere presence of some state involvement or monitoring" or "generic oversight" is insufficient to satisfy the "active supervision" requirement. Pet. App. 17a-18a (quotation omitted). Whether the various supervisory and accountability provisions outlined above would be deemed by a federal court sufficiently "active"—or insufficiently "generic"—therefore would involve an unpredictable, case-by-case inquiry, where different federal judges may come to different conclusions. *See generally* William J. Martin, *State Action Antitrust Immunity for Municipally Supervised Parties*, 72 U. Chi. L. Rev. 1079, 1087-88 (2005) (describing uncertainty in the lower courts regarding application of the "active supervision" test). Subjecting the States' supervisory choices to such invasive federal oversight plainly trenches upon the States' authority to determine which of their agencies "exercise[e] [which] of [their] governmental powers." *City of Columbus*, 536 U.S. at 437.

Va. Code Ann. § 2.2-3707 (same); Neb. Rev. Stat. § 84-1407 *et seq*. (same); Neb. Rev. Stat. § 84-922 *et seq*. (state board subject to additional rulemaking requirements); N.C. Gen. Stat. § 93B-2(a) (state boards must issue annual reports); Va. Code Ann. §§ 2.2-108(B), 54.1-107 (state board members subject to appointment and for-cause removal by Governor).

What is more, the Fourth Circuit's approach would incentivize States to adopt inefficient and duplicative methods of governance. In order to avoid federal court oversight, States may simply opt for cumbersome bureaucratic structures that would undeniably satisfy the "active supervision" requirement. Specifically, States may subject *every* decision made by regulatory boards staffed by active professionals—including routine licensing decisions—to direct oversight and approval by full-time state employees. But this outcome would have numerous negative public policy consequences:

First, a requirement that full-time state employees must approve every decision made by regulatory boards staffed by active professionals would add significant expense in terms of paying for state employee time, at a time when many States' budgets are already overburdened. *See* Weber, *The Antitrust State Action Doctrine*, *supra* at 773 ("States choose to delegate power to privately composed boards in part because they are cheaper than bureaucratic agencies and reduce the attention legislatures must give to creating regulations themselves.").

Second, the additional layer of bureaucracy would necessarily slow decisionmaking, as every decision by the regulatory board would need to be approved (or disapproved) by the additional layer of state employees. This would extend the wait time of those seeking to obtain professional licenses or to vindicate their name against complaints, thus putting jobs, livelihoods and reputations at stake.

Third, this cumbersome bureaucracy would not produce better decisions. As explained above, States have found that active professionals are valuable members of regulatory boards because those professionals have "the specialized knowledge" that the "lay public," career government officials, and state legislators lack. *Cal. Dental Ass'n*, 526 U.S. at 772. Yet, if those experts' decisions are merely contingent, always subject to revision and oversight by full-time government employees lacking the active professionals' expertise, the benefit of that specialized knowledge will be diluted. Indeed, the frustration of coping with this constant oversight would likely diminish the quality of the professionals willing to devote time away from their active practices to serve on regulatory boards.

Fourth, adding a layer of bureaucracy into licensing and other regulatory decisions will actually have the reverse of its intended effect: rather than decrease anti-competitive behavior, it will *increase* opportunities for rent-seeking and regulatory capture. As Judge Easterbrook has explained, the "active supervision" requirement forces States to adopt duplicative regulatory structures, which are particularly "conducive to competition among cartelists for rents." Frank H. Easterbrook, *Antitrust and the Economics of Federalism*, 26 J.L. & Econ. 23, 30 (1983). In the context of regulatory agencies, an additional layer of supervision over those agencies simply gives private actors seeking to use the state regulatory apparatus for their anti-competitive ends two access points for their influence: either the regulatory board itself, or the career bureaucracy overseeing that board. While the Fourth Circuit

believed that its rule would forward the procompetitive goals of antitrust law, there is every reason to believe that the practical result would be just the opposite.

Finally, all of these costs would come with little benefit. The active supervision requirement is designed only to ensure that a State is not "casting . . . a gauzy cloak of state involvement over what is essentially a private . . . arrangement." *Hallie*, 471 U.S. at 146-47. Where a State has created a board to regulate professionals operating within its borders, clearly articulated the laws the board is to enforce, and then staffed that board with experts of the State's choice, the arrangement is entirely of the State's making. In that circumstance, the active supervision inquiry plays no useful role.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

PATRICK MORRISEY
Attorney General

ELBERT LIN
Solicitor General
Counsel of Record
OFFICE OF THE
ATTORNEY GENERAL
State Capitol
Building 1, Room E-26
Charleston, WV 25305
EL@wvago.gov
(304) 558-2021

MISHA TSEYTLIN
Deputy Attorney General

JENNIFER S. GREENLIEF
J. ZAK RITCHIE
Assistant Attorneys General

Attorneys for Amicus Curiae
State of West Virginia

MAY 30, 2014

LUTHER STRANGE
Attorney General
State of Alabama

LAWRENCE G. WASDEN
Attorney General
State of Idaho

THOMAS C. HORNE
Attorney General
State of Arizona

GREGORY F. ZOELLER
Attorney General
State of Indiana

DUSTIN MCDANIEL
Attorney General
State of Arkansas

DEREK SCHMIDT
Attorney General
State of Kansas

JOHN W. SUTHERS
Attorney General
State of Colorado

JACK CONWAY
Attorney General
Commonwealth of
Kentucky

GEORGE JEPSEN
Attorney General
State of Connecticut

DOUGLAS F. GANSLER
Attorney General
State of Maryland

JOSEPH R. BIDEN III
Attorney General
State of Delaware

BILL SCHUETTE
Attorney General
State of Michigan

PAMELA JO BONDI
Attorney General
State of Florida

ROY COOPER
Attorney General
State of North Carolina

DAVID M. LOUIE
Attorney General
State of Hawai'i

MICHAEL DEWINE
Attorney General
State of Ohio

ELLEN F. ROSENBLUM
Attorney General
State of Oregon

SEAN D. REYES
Attorney General
State of Utah

ALAN WILSON
Attorney General
State of South Carolina

MARK R. HERRING
Attorney General
Commonwealth of Virginia

ROBERT E. COOPER JR.
Attorney General
State of Tennessee