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1 P R O C E E D I N G S

2 (11:06 a.m.)

3 CHIEF JUSTICE ROBERTS: We will hear
4 argument next in Case 13-534, North Carolina State Board
5 of Dental Examiners v. The Federal Trade Commission.

6 Mr. Mooppan.

7 ORAL ARGUMENT OF HASHIM M. MOOPPAN

8 ON BEHALF OF PETITIONER

9 MR. MOOPPAN: Mr. Chief Justice, and may it
10 please the Court:

11 A State regulatory agency does not lose its
12 State action antitrust immunity simply because the
13 agency is run by part-time public officials who are also
14 market participants in their personal capacities.

15 The FTC's contrary position that the
16 agency's officials must be disinterested cannot be
17 reconciled with this Court's jurisprudence for three
18 reasons: First, respect for federalism requires
19 deference to a State's sovereign choices concerning how
20 to structure and manage its own regulatory agencies.
21 Second, the regulatory conduct of public officials who
22 are also market participants cannot properly be equated
23 with the conduct of private businesspeople. And third,
24 the FTC's position would be massively and needlessly
25 disrupted.

1 States obtain valuable benefits from using
2 market participants as part-time public officials. They
3 gain the benefits of their expertise and they gain the
4 benefits of not having to have a full-time bureaucracy
5 with a full salary.

6 JUSTICE ALITO: Is thisit -- is it a question
7 of Federal law or a question of State law whether the
8 members of -- whether this board is a State
9 instrumentality?

10 MR. MOOPPAN: Ultimately whether this board
11 should be entitled to State action immunity is a
12 question of Federal law. But in characterizing the
13 board as public or private, we submit that absent
14 extraordinary circumstances, the Federal court should
15 treat a State's designation of a State entity as public,
16 and that when that entity is charged with public duties
17 as a State entity.

18 JUSTICE ALITO: Well, if you agree that a
19 State can't simply deem something that for all other
20 purposes is private to be a State entity or
21 instrumentality, there has to be some test. So what
22 would the test be?

23 MR. MOOPPAN: So we think the -- the
24 fundamental key is that it's not just that they're
25 designated as State officials but they are charged with

1 a State law duty to enforce State law. They are not
2 acting pursuant to their unfettered private discretion
3 to choose whatever -- whatever choices maximize their
4 personal profit. They are obligated --

5 JUSTICE GINSBURG: Here, in this case, they
6 didn't enforce State law. One puzzle in this case: Why
7 should there be an antitrust exemption for conduct that
8 is not authorized by state law? The objection here was
9 that this board was issuing a whole bunch of cease and
10 desist orders. They had no authority to do that. No
11 authority at all.

12 MR. MOOPPAN: Well, two points about that,
13 Your Honor. First, it's not quite right to say that
14 this board didn't have authority to issue these letters.
15 It is true that the board doesn't have authority to
16 issue self-executing orders akin to an injunction, but
17 it is also true that the board has authority to send
18 letters to prospective non-dentists saying that if you
19 don't cease and desist your conduct, we will sue you.

20 The only question in this case in terms of
21 State law authority is whether the wording of these
22 letters was somehow problematic. No State court has
23 ever determined that that is a problem, and more
24 fundamentally, all of that is a question about whether
25 there is a clear articulation here, and the FTC has

1 assumed that there is a clear articulation.

2 JUSTICE KAGAN: Mr. Mooppan, can I take you
3 back to Justice Alito's question, because I think you
4 said in response that the question -- that the answer
5 was has the State asked the organization to enforce
6 State law and given -- entrusted them with that
7 responsibility.

8 So suppose a State just looked around and
9 found a trade association and said we think that that
10 trade association is going to be a very good enforcer of
11 State law, and made the trade association a State
12 entity. That's the board that's going to regulate this
13 industry. Would that be sufficient?

14 MR. MOOPPAN: If they had a State -- if they
15 took an oath to the State to enforce State law, if they
16 were subject to the traditional duties that a public
17 entity has, if they had to comply with the
18 Administrative Procedures Act and the open records rules
19 and the ethics laws, if they were subject to judicial
20 review, absolutely.

21 JUSTICE KAGAN: Well, which of those are the
22 important ones? Do all of them have to be there?

23 MR. MOOPPAN: We think the absolute key is
24 that they're subject to a State law duty, that they have
25 sworn an oath to the State to enforce State law and not

1 to maximize their own private --

2 JUSTICE SCALIA: No, I don't buy -- I -- I
3 think in the trade association case, I get off your
4 train. It seems to me it's quite different to appoint
5 a -- what should I say -- an entity that is already a
6 conglomerate, which is already a contract or combination
7 of individuals, and to authorize that separately created
8 combination of individuals to enforce State law. I
9 think that's quite different from saying we're going to
10 have a board composed of dentists and we're going to
11 pick the dentists.

12 MR. MOOPPAN: Well, it is different, Your
13 Honor.

14 JUSTICE SCALIA: And they are serving only
15 in their individual capacity on this board, whereas the
16 people in the trade association you're talking about
17 are -- I guess the governors of the trade association
18 are elected by the members; right?

19 MR. MOOPPAN: Well, but that's the key, Your
20 Honor. I agree it is a more difficult case, but if the
21 State law has basically drafted a private trade
22 association and said: You will serve two hats;
23 sometimes you will act as a private trade association
24 but sometimes you will be the entity of the State that
25 is responsible for enforcing State law. You have a

1 State law oath to enforce State law. You cannot take
2 your actions to maximize your private gain. What you're
3 doing here is enforcing State law.

4 JUSTICE BREYER: Well, my goodness, there's
5 a lot of cases. I would have thought it was
6 well-established that if, in fact, the State says to a
7 group of wine merchants, you go fix your own wine
8 prices, be sure they're reasonable; or to a group of
9 truckers, you go set your own trucking prices but be
10 sure they're reasonable, et cetera, et cetera, that they
11 can do that if, and only if, there is supervision. And
12 because, you know, they might get out of hand, the wine
13 merchants or the truckers or anybody else.

14 Now, I started from that proposition. You
15 seem to be questioning that proposition.

16 MR. MOOPPAN: Not at all, Your Honor.

17 JUSTICE BREYER: All right. If we accept
18 that proposition, then how is your case any different?
19 Because what we have here is we have a group of dentists
20 like the group of wine merchants, like the group of
21 truckers, and of course they're not fixing prices, what
22 they're doing is deciding who will be in the business
23 and there we are, end of case. Is there supervision,
24 yes or no? The FTC says, no, there isn't, and I want to
25 know what you say to that.

1 MR. MOOPPAN: The fundamental difference
2 between the hypothetical you posed and this case is that
3 when you have private people who are authorized to set
4 their own prices, even if the State statute says they
5 must be reasonable, they are exercising their discretion
6 about what is reasonable in terms of maximizing their
7 personal profit. They are not acting as fiduciaries of
8 the State. They have no obligation to the State. They
9 have not sworn an oath to the State. They're not
10 subject to the State's administrative procedures --

11 JUSTICE BREYER: No, no, no. Well, we put
12 all that in. We put all that in. We say our truckers
13 and our wine merchants swear an oath. I swear that I am
14 a member now of the State commission setting prices and
15 I swear that I will be reasonable. Okay?

16 You think that would have changed the Midcal
17 result?

18 MR. MOOPPAN: Well, since those are
19 essentially the facts of Parker I do think it would
20 actually change the result. The commission in Parker --

21 JUSTICE BREYER: What happened? All that
22 happened is they take an oath. For all I know, maybe
23 the Midcal wine people did take an oath.

24 MR. MOOPPAN: They didn't and --

25 JUSTICE BREYER: Okay. Suppose I say I

1 don't think that's --

2 MR. MOOPPAN: It is no small thing --

3 JUSTICE BREYER: -- is there anything else?

4 MR. MOOPPAN: Huh?

5 JUSTICE BREYER: Is there anything else
6 besides the oath? Is this case identical to Midcal
7 except they -- they took an oath?

8 MR. MOOPPAN: No. So compared to Midcal
9 there was literally no substantive standard whatsoever
10 in the California statute. They were free to set
11 whatever price they want, not even a reasonableness
12 constraint.

13 In addition, not only is there the oath,
14 there's the fact that they are subject to all of the
15 traditional duties that public entities have. They have
16 to comply with the APA, the State ethics rules, open
17 meetings rules, public records laws. None of that
18 was --

19 JUSTICE GINSBURG: But why is it entirely
20 reasonable to say, yes, this can be a State actor, but
21 because they are made at the same time the State says
22 they must be in private practice. So they're both the
23 State actor and they're private actor.

24 So yes, you can have such a board, but there
25 needs to be a check of supervision; that is, they can't

1 just go make their regulations without approval from
2 some State entity and they can't go around issuing cease
3 and desist orders. They have to come to a court. If
4 they want to -- and the court would act as the check.

5 Why shouldn't -- because of the risk that
6 these people have the self-interest, why shouldn't there
7 be a check of the kind that Midcal --

8 MR. MOOPPAN: Because, fundamentally, it is
9 a question for the State to determine whether it wants
10 to bear that risk. These are the State's officials and
11 the State has made a different choice. The State has
12 decided that the benefits of having market participants
13 make decisions and not having their every -- each and
14 every decision actively second-guessed by a higher level
15 of bureaucracy is worth it.

16 JUSTICE SOTOMAYOR: That -- it really begs
17 the question, if we give immunity because only when we
18 have a clearly defined State intent, a policy accepted
19 and created by the State, what -- how is the State doing
20 that when all it's doing is letting dentists elect the
21 representatives of their board? This is not an
22 appointed position. This is an elected position by
23 dentists of each other.

24 How is the State going to be any different
25 in giving that group of private actors a pass on

1 antitrust litigation that -- when they have a
2 self-interest that's inherent in their occupation?

3 MR. MOOPPAN: Well, the State gets involved
4 at the front end in two ways. First, there has to be a
5 clearly articulated anticompetitive policy, and in this
6 case --

7 JUSTICE GINSBURG: And what is that clearly
8 articulated policy?

9 MR. MOOPPAN: In this case it's been assumed
10 by the FTC that that is satisfied here. What I would
11 submit is the reason it exists is because the Dental
12 Practice Act says that only licensed dentists can
13 practice dentistry. That is on its face inherently
14 anticompetitive.

15 JUSTICE GINSBURG: But is there any clear
16 policy that teeth whitening is the practice of
17 dentistry? I thought that that was determined before --
18 the standard about removing stains on teeth, that that
19 was before anybody ever knew about whitening.

20 MR. MOOPPAN: That's an interpretative
21 question under the statute. And what this Court has
22 held in cases like Omni is application of a clearly
23 articulated State policy is a question for State
24 administrator review.

25 JUSTICE GINSBURG: But how can it be clearly

1 articulated when the problem being addressed didn't even
2 exist when the -- when the policy was --

3 MR. MOOPPAN: For the same reason that in
4 Omni, for example. The State had authorized zoning, but
5 they hadn't asked whether the particular ordinance
6 passed in Omni was complying with substantive and
7 procedural law. And what this Court held is once you
8 have at the threshold a statute that authorizes the
9 displacement of competition, how public officials
10 implement that statute is a question for State
11 administrative review.

12 JUSTICE KENNEDY: Does The Federal government,
13 the FTC and the Sherman Act have an interest in ensuring
14 that regulators do not pursue their self-interest?.

15 MR. MOOPPAN: They do not. That is --

16 JUSTICE KENNEDY: That's inconsistent then
17 with what we said in Hallie. The City of Hallie, we
18 said this is not a case in which we are concerned with
19 entities pursuing their self-interest because it's the
20 city.

21 MR. MOOPPAN: I don't think that -- Your
22 Honor, with all respect, I don't think that's the
23 correct interpretation of Hallie. I think if you look
24 at that paragraph in its entirety the sentence
25 immediately prior to the sentence you just quoted said

1 that the risk that we're worried about is that the State
2 is circumventing the Federal antitrust laws.

3 The concern was not that the officials were
4 going to act contrary to the State's interest. The
5 concern was that the State was just authorizing them to
6 violate Federal law. What -- and then two sentences
7 after the sentence you just read, what the Court said is
8 if the concern is that they have parochial interests,
9 we'll work -- clear articulation solves that problem.

10 But if there's any ambiguity about where --
11 what Hallie says on this it's resolved by Omni, because
12 if ever there were a case where the State's officials
13 had the self-interest, where they might have been acting
14 contrary to the State's own interest, it's when the
15 State's officials are being bribed by private parties.

16 JUSTICE KAGAN: Mr. Mooppan, could we -- you
17 have to explain that understanding of Hallie to me. And
18 Hallie is a very important case because it essentially
19 asks the question that's right here, which is we have
20 this odd entity and we have to decide whether that
21 entity is more like just private parties or is more like
22 a prototypical State actor. And there we say it's more
23 like a prototypical State actor.

24 And how do we get there? We say the
25 requirement of active State supervision is a way of

1 ensuring that the actor is engaging in the challenged
2 conduct pursuant to State policy. And we need to have
3 that test, we need to have that test when there's a real
4 danger that the party is acting to further his own
5 interest but not when there is not such a danger.

6 And here that suggests that the question is:
7 Is this party, this board of all dentists, is there a
8 danger that it's acting to further its own interests
9 rather than the governmental interests of the State?
10 And that seems almost self-evidently to be true.

11 MR. MOOPPAN: With all due respect, Your
12 Honor, I think you've skipped a sentence in Hallie. In
13 between the first sentence and the second sentence you
14 read me there is a sentence that says the rest -- the
15 purpose of the active supervision requirement is to
16 prevent the State from circumventing the Sherman Act.
17 The danger that the Court was talking about in the
18 sentence you read is the danger that the State is just
19 authorizing private people to violate Federal law rather
20 than having its own State policy.

21 And that is what the Court meant in Hallie
22 when they said there was no danger. There is no danger
23 that the State create a municipality as an elaborate
24 sham to let private people violate Federal law under the
25 auspices of a municipality.

1 JUSTICE KENNEDY: But the concern is that
2 there is no State policy if the State simply says we --
3 you take an oath and then you do what you want. And if
4 the board says we think what's good for dentistry is
5 good for South -- good for North Carolina, our cases say
6 that's not enough because you're pursuing your
7 self-interest.

8 MR. MOOPPAN: Well, that's true, Your Honor,
9 because there the statute says do what you want. But
10 that's not what the statute here says, and a statute
11 that says do what you want wouldn't be a clearly
12 articulated policy to displace competition.

13 Here what the statute says is only licensed
14 dentists can practice dentistry. That is a clearly
15 articulated policy to displace competition, and the only
16 question is whether the State's officials have properly
17 implemented that statute.

18 CHIEF JUSTICE ROBERTS: Why is a statute
19 that says do what you want not clearly articulated?

20 MR. MOOPPAN: Because it's neutral.

21 CHIEF JUSTICE ROBERTS: It says clearly --
22 do what you want so long as it promotes the dental --
23 monopoly of dentists.

24 MR. MOOPPAN: If it said do what you want to
25 promote the monopoly of dentists, I guess at that point

1 it would be a clearly articulated policy to displace
2 competition. In a circumstance like that where all that
3 was at issue was a broad standard to do whatever was
4 best for the dental practice and there were private
5 parties and they were subject to no other type of
6 judicial constraints, maybe that would be the sort of
7 situation --

8 CHIEF JUSTICE ROBERTS: So it's not enough
9 just to say, oh, you're a public agent or you're a
10 public official.

11 MR. MOOPPAN: As I said to Justice Alito at
12 the outset, in extraordinary circumstances perhaps this
13 Court could say that what has been deemed a public
14 agency by the State is essentially a sham, but this is
15 far from that. The board in this case is structured
16 like -- the work of the board in this case is
17 accomplished like every other State agency. It is
18 subject to the administrative procedures rules, it's
19 subject to public records laws, it's subject to
20 ethics --

21 CHIEF JUSTICE ROBERTS: But none of that's
22 responsive to the concern that the State policy is
23 purely to displace competition by promoting the
24 self-interest of the dentist.

25 MR. MOOPPAN: It's response --

1 CHIEF JUSTICE ROBERTS: They can do that in
2 open meeting. They can do that with let anyone look at
3 the records but --

4 MR. MOOPPAN: It's responsive to the fact
5 that if these people are acting contrary to the State's
6 interest, the State can deal with it and the State has
7 chosen to deal with it in a certain way. And the
8 fundamental question in this case is does Federal law
9 second-guess how the State has chosen to deal with this
10 problem. And what we know from cases like Omni --

11 JUSTICE GINSBURG: The antitrust exemption
12 is a matter of State law -- of Federal law, not State
13 law. So it's -- the Federal law sets the dimensions of
14 what fits within the State action. It's not up to the
15 State to create the State action exemption. It's
16 Federal law and what its metes and bounds are are also
17 Federal law.

18 MR. MOOPPAN: That's true, but the line that
19 this Court has consistently drawn from Parker onwards is
20 that the Sherman Act does not apply to the acts of
21 States or their officials when implementing laws
22 directed by the legislature. And absent extraordinary
23 circumstances, I would think that Congress did not
24 intend for Federal courts to second-guess whether a
25 public entity is really private. That would flip

1 federalism on its head.

2 JUSTICE GINSBURG: Tell me if I'm wrong
3 about this, but I thought that the State action
4 exemption was adopted and announced by this Court.

5 MR. MOOPPAN: It was.

6 JUSTICE GINSBURG: And that's nothing
7 spelled out in a -- in a law.

8 MR. MOOPPAN: It was adopted by this Court.
9 It's a version of a more general clear statement rule
10 that this Court has consistently applied, that we
11 don't -- the Court does not assume that Congress lightly
12 intends to intrude on courts' sovereign prerogatives.
13 It's just like cases like Gregory v. Ashcroft. What the
14 Court said in Parker is nothing in the Sherman Act's
15 text or history indicates any intent to interfere with
16 sovereign State regulation, and therefore, States are
17 not subject to the Sherman Act.

18 And the question in this case is when you
19 have a State entity, that the State has labeled as a
20 State entity -- but not just labeled, charged with a
21 duty and subjected to all the duties that State agencies
22 normally have --

23 JUSTICE GINSBURG: But there's -- there's
24 another factor that the State has stipulated, that is,
25 the State has said "and the members of this board must

1 be private practitioners." That -- that is not your
2 typical State agency.

3 MR. MOOPPAN: Well, it actually is the
4 typical way of regulating the professions. Every State
5 medical board, every State dental board --

6 JUSTICE GINSBURG: And may be so, and that's
7 why the FTC says we need a check, we need the Midcal
8 check of some genuine State supervision over private --

9 MR. MOOPPAN: Well, I would submit it would
10 cut the other direction, that we should -- we would
11 require very clear intent that Congress intended to --
12 to oversee and regulate the most traditional way of
13 regulating the professions that States have historically
14 used and have consistently used for a long time.

15 JUSTICE ALITO: What would happen if the
16 North Carolina courts were to interpret the North
17 Carolina statute that says that removing stains from
18 teeth is the practice of dentistry, to apply to
19 whitening? What would -- what would that mean for this
20 case? Because that seems -- that's an unanswered
21 question, isn't it? An unanswered question of -- of
22 North Carolina law.

23 MR. MOOPPAN: It is an open question. If
24 they were to interpret it to say that it was the
25 practice of dentistry?

1 JUSTICE ALITO: Yes.

2 MR. MOOPPAN: Well, I'm not sure what it
3 would have to do -- the effect it would have on this
4 case, because the FTC has already assumed that we are
5 satisfied the clear articulation requirement. I assume
6 it would make their case harder on remand to dispute
7 that we were acting pursuant to clearly articulated
8 policy.

9 But in terms of going forward, whether we --
10 the board is correct about the meaning of the State
11 statute is a question of State administrative review.
12 If the State courts were to reach the opposite
13 conclusion, then the board would have to stop this
14 enforcement practice and they could be sued in State
15 court if they did.

16 The fundamental question here is whether
17 Federal courts need to second guess these State
18 administrative questions. Just like in Omni, it was
19 possible that the zoning ordinance that the city council
20 promulgated in Omni was in violation of State law.
21 There were all sorts of substantive and procedural
22 requirements that needed to be followed, and this Court
23 didn't ask whether any of those things were satisfied.
24 This Court said that that is a question for State
25 administrator review, not for Federal antitrust law,

1 because the Sherman Act was never intended to supplant
2 State administrative review. That would turn federalism
3 on its head.

4 And again, I would like to emphasize that
5 that was in the context of city council officials who
6 were allegedly being bribed. If city council officials
7 who are allegedly being bribed are entitled to immunity,
8 I find it very difficult to understand how the
9 mere existence --

10 JUSTICE BREYER: The obvious difference is
11 that city council officials are State officials, and a
12 local wine merchant is a local wine merchant. He is not
13 a State official. That's the obvious difference.

14 MR. MOOPPAN: Well, but these -- these are
15 not just local wine merchants. These are people who --

16 JUSTICE BREYER: That's your other argument.
17 You can -- I can understand your argument as saying, no,
18 there's enough Stateness in this that they become State
19 officials.

20 MR. MOOPPAN: Well, the --

21 JUSTICE BREYER: That's an argument I
22 understand.

23 MR. MOOPPAN: So the -- let me --

24 JUSTICE BREYER: I don't understand how Omni
25 supports you because there they were clearly not private

1 people. I mean, they weren't private merchants. The
2 evil we are trying to get at was not present.

3 MR. MOOPPAN: I guess the fundamental key is
4 that I don't really take the FTC to be disputing that
5 these are public officials. What they are saying is
6 they are public officials who have a conflict of
7 interest. They're saying that they're not disinterested
8 public officials.

9 They're not saying that they're actually
10 private people. They're not saying that --

11 JUSTICE GINSBURG: Let's say they have to be
12 because they are, by State law, they must be private
13 practitioners. They cannot be full-time civil servants.

14 MR. MOOPPAN: They are --

15 JUSTICE GINSBURG: They can't be on this
16 board unless you are a regularly practicing dentist.

17 MR. MOOPPAN: They are also private people.
18 They serve -- they have two hats.

19 JUSTICE BREYER: Just that they're private
20 people. The object of the antitrust laws is to prevent
21 private individuals who compete with each other in
22 business from getting together and making agreements.
23 That kind of interest seems present here, present in
24 Midcal, and present in all the other cases, but not
25 present in Hallie. Because in Hallie they were private,

1 yes, but they're not businesspeople about to make
2 agreements with each other in the sense that the
3 antitrust law is concerned.

4 MR. MOOPPAN: Well, two points about that,
5 Your Honor. First of all, in Parker, the people on the
6 commission were, in fact, market participants, and yet
7 this Court still treated that --

8 JUSTICE BREYER: If you don't -- you might
9 not agree with my analysis, and -- and go on with this
10 because I'll work that one out.

11 MR. MOOPPAN: Okay. So in setting aside
12 Parker, I think the more fundamental point is the -- the
13 Federal antitrust laws shouldn't be interpreted to
14 second guess whether a public official is really private
15 just because they have a conflict of interest.

16 JUSTICE SOTOMAYOR: Do we set aside
17 Goldfarb?

18 MR. MOOPPAN: No. Goldfarb, the basis --

19 JUSTICE SOTOMAYOR: Goldfarb says the fact
20 that the State bars the statesame agency for some limited
21 purpose does not create an antitrust shield that allows
22 it to foster anticompetitive practices of the benefit to
23 its members.

24 MR. MOOPPAN: Absolutely. Goldfarb -- what
25 you need in addition is a clearly articulated policy of

1 displaced competition. That was lacking in Goldfarb as
2 the Court explained in Goldfarb and has reaffirmed in
3 cases like Southern Motor Carriers, and it is present
4 here and the FTC doesn't dispute -- or at least for
5 present purposes that it is present here.

6 The question in this case, unlike in
7 Goldfarb, is whether a board that has public -- that has
8 market participants on it are entitled to immunity even
9 when enforcing a clearly articulated policy of displaced
10 competition.

11 JUSTICE KAGAN: But, Mr. Mooppan, the two
12 prongs of Midcal are supposed to operate in tandem with
13 each other. They both have a role to play in ensuring
14 that an actor is in accord with the State policy and is
15 not acting solely to further his own interest.

16 So the first prong comes along and says
17 here's what -- there needs to be a State policy, and
18 then the second prong -- because we understand that that
19 policy is not going to answer all questions. There are
20 going to be lots of little things that the actor does,
21 and the question is going to be are you acting in accord
22 with that State policy or not. And then there needs to
23 be some supervision to ensure that the actor is acting
24 in accord with State policy.

25 So to strip the second half of the test off

1 is to leave the first half of the test essentially --
2 you know, "meaningless" might be too strong, but
3 unprotected. There's no way to make sure that the
4 people are acting in accord with State policy rather
5 than to serve their own interests.

6 MR. MOOPPAN: Your Honor, I just
7 fundamentally don't think that that is the point of the
8 second prong. The point -- the concern that you are
9 articulating, the way to solve that problem is through
10 State administrator review. That's what Omni held. If
11 there's a -- if there's a possibility that State
12 officials are misapplying State law, are deviating from
13 State policy, that can be solved through State
14 administrator review, and Federal antitrust law was
15 never intended to second guess that question.

16 JUSTICE GINSBURG: When you --

17 MR. MOOPPAN: What active supervision is
18 intended to do instead is to prevent the State from
19 authorizing private people to violate Federal law, even
20 if that's what the State wants. Take a case like
21 Midcal, the economical act of supervision case.

22 JUSTICE KAGAN: I think all over,
23 Mr. Mooppan, it's in Patrick v. Burget, it's in other
24 cases, that the act of supervision prong is -- is to
25 make sure that the action is the State's own, it's in

1 accord with the State's policy. That's what it's doing.

2 MR. MOOPPAN: By State's own, what the Court
3 meant is they are not just authorizing private people to
4 act illegally. Take a case like Midcal where the State
5 said, go set prices. No substantive standard
6 whatsoever. There was no reason to think that the
7 private people were acting contrary to the State policy
8 because the State just wanted to let them fix prices.

9 The point of active supervision in a case
10 like Midcal is to make sure that private parties are not
11 just being authorized the power to violate Federal law
12 because private parties are presumptively subject to
13 Federal law and the only way they can get immunity is if
14 their actions are made the State's own by the State's
15 supervision. That is not necessary when the State has
16 already made their conduct their own by making them
17 public officials and charging them with the State law
18 duty to enforce State law.

19 If I can reserve the balance of my time.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Stewart.

22 ORAL ARGUMENT OF MALCOLM L. STEWART

23 ON BEHALF OF RESPONDENT

24 MR. STEWART: Mr. Chief Justice, and may it
25 please the Court:

1 If the dental board were designated a
2 private agency, this would be a paradigmatic case
3 illustrating the reasons that active supervision is
4 required. The board members, the majority of them at
5 least, are required to be practicing dentists, they have
6 an evident self-interest in the manner in which the
7 dental profession is regulated and in regulations that
8 might keep other people from competing with dentists.

9 That natural self-interest is reinforced by
10 the method of selection. North Carolina law provides
11 that the members of this dental board will be selected
12 not by the governor or by the public, but by the
13 community of dentists.

14 JUSTICE KAGAN: You are not suggesting, or
15 are you, that that's critical to your case?

16 MR. STEWART: We're not saying that that's
17 critical. That's simply a --

18 JUSTICE KAGAN: It's just like an add-on
19 feature.

20 MR. STEWART: That's right. And -- and
21 that's the way the commission treated it in its opinion.
22 The commission didn't suggest that the outcome would
23 have been different if the method of selection had been
24 different.

25 JUSTICE SCALIA: What do you do about a

1 State supreme court that sets the ethics rules for the
2 legal profession, including what constitutes the
3 unauthorized practice of law? And let's assume the
4 State has a requirement that all members of the State
5 supreme court have to be lawyers. What do you do about
6 that?

7 MR. STEWART: I mean, this is essentially
8 Goldfarb. Goldfarb involved the Virginia Bar, it was
9 designated as a State agency as a matter of law.

10 JUSTICE SCALIA: I'm not talking about the
11 Virginia Bar. I'm talking about the Supreme Court of
12 Virginia.

13 MR. STEWART: The Court in Goldfarb --

14 JUSTICE SCALIA: Are you going to say the
15 Supreme Court of Virginia has to be actively supervised?

16 MR. STEWART: No, the Supreme Court of
17 Virginia -- the Supreme Court of any State, like the
18 State legislature, speaks for the State itself.

19 JUSTICE SCALIA: They are all lawyers.

20 MR. STEWART: And that is simply an
21 unavoidable exception, if you will, to the general
22 requirement --

23 JUSTICE GINSBURG: But they are not
24 practicing lawyers?

25 MR. STEWART: They are not practicing

1 lawyers. Whatever marginal self-interest they might
2 have is outweighed by their status as supreme court bar
3 -- as supreme court justices.

4 CHIEF JUSTICE ROBERTS: Presumably they also
5 set judicial ethics rules.

6 MR. STEWART: They would set judicial ethics
7 rules. But what I was saying about Goldfarb is that
8 Goldfarb dealt with the relationship between what the
9 Virginia Supreme Court did and what the Virginia Bar
10 did. And it said, of course, the Virginia -- the ethics
11 rules promulgated by the Virginia Supreme Court would be
12 the authoritative state policy --

13 JUSTICE BREYER: Maybe we can pursue this,
14 because I think that's the question exactly that is
15 bothering me, but I have another example of the same
16 thing, and I think this is it's for me a very difficult
17 case. On the one hand, I absolutely understand the cases,
18 and I understand why the law -- at least I think I do.
19 You would be pretty careful about having a group of wine
20 merchants set their own prices or decide who can sell wine.
21 And the same is true of a group of railroads and the
22 same is true of a group of truckers and the same is true
23 blah, blah, blah, okay, probably including dentists.

24 And soSo what we have is a set of pretty tough
25 rules saying the State had better get in there and

1 supervise or you are subject to the antitrust laws.
2 That to me is the state of the art. And that all seems
3 fine and you seemed -- until I thought of a different
4 example. Now, what they are is they are neurologists
5 and they are brain surgeons, and what the State says is:
6 We would like this group of brain surgeons to decide who
7 can practice brain surgery in this State. I don't want
8 a group of bureaucrats deciding that. I would like
9 brain surgeons to decide that. Of course the risks are
10 -- and so we have to have some supervision, I guess.
11 What? What kind of supervision? And why isn't that
12 present here? A, any rule has to go to some rule
13 revision agency. B, before they can throw anybody out,
14 they have to go into court and get a court order. And
15 C, even these letters would be subject to their state
16 ABA.

17 So if I'm on your track, I want to see you
18 talk about the neurologists and any kind of serious
19 medical board, and I don't want to suddenly destroy all
20 the temptation of medical boards throughout the country
21 to decide everything in favor of letting in the
22 unqualified person, lest he sue them under the antitrust
23 law for treble damages and attorneys' fees. Those are
24 the things that -- have you followed where I'm coming
25 from? And I would very much appreciate your comment.

1 MR. STEWART: What is true of the Dental
2 Board in North Carolina and could also be true of the
3 neurology or the more general medical board in another
4 State is, as you say, any regulation that the board
5 promulgates as a matter of North Carolina law is subject
6 to review by the Rules Review Commission. And that's a
7 body of disinterested State actors who pass on the
8 validity of the rules, that the standard in the statute
9 is the Rules Review Commission determines is the
10 regulation reasonably necessary to implement the
11 statute, which at least suggests to me that the review
12 commission is engaged in something like de novo review:
13 Does this reflect the correct reading of the law.

14 JUSTICE SCALIA: Really, really? You are
15 going to have a review board composed of
16 non-neurologists deciding de novo whether a particular
17 person should be admitted or a particular rule should be
18 adopted?

19 MR. STEWART: For rules, and the basis
20 for --

21 JUSTICE SCALIA: I don't want that. I want
22 a neurologist to decide it.

23 MR. STEWART: If the State wanted a board of
24 expert practitioners to be able to promulgate rules and
25 have those rules reviewed deferentially within the State

1 agency, then the question would arise, is deferential
2 review sufficient to constitute active supervision? If
3 it were de novo, yes. Patrick v. Burget makes clear
4 that extremely deferential review, review only for
5 procedural regularity, is not sufficient. And the
6 question, is Chevron-type review enough, that's an open
7 question.

8 But the main point I'm making about the
9 Rules Review Commission is North Carolina evidently
10 doesn't believe that there is anything amiss with an
11 agency composed of -- the Rules Review Commission, an
12 agency composed of nonexperts, reviewing the regulations
13 promulgated by an expert body for consistency with the
14 governing statutes.

15 Now, the question of exclusion of an
16 individual member, a proceeding to revoke the license of
17 a particular practitioner, whether or not that would
18 qualify for State action immunity, it's very unlikely to
19 have adverse consequences for competition as a whole
20 and, therefore, would not likely be a subject of
21 antitrust concern.

22 I'm sorry, Mr. Justice.

23 JUSTICE ALITO: Could you tell me as
24 precisely as you can the contours of the rule that you
25 are advocating? You told Justice Kagan that election

1 isn't essential to the analysis here. So is it
2 essential that the statute -- that the statute
3 stipulates that the members must be dentists? If they
4 were appointed by the governor, would that take care of
5 it? If the governor had to appoint dentists, would that
6 -- would that involve the same problem? Is it essential
7 that they must all be dentists? What if there is a
8 breakdown between dentists and nondentists?

9 Let me just add this. What if there is no
10 requirement that they be dentists but the governor
11 always chooses dentists, because there's a very powerful
12 dentist lobby; so he is always going to put dentists on
13 this board exclusively.

14 MR. STEWART: I would say two things -- I'd
15 say three things maybe. I think, first, we would say
16 our theory still applies that the self-interest would be
17 present whether or not they were required to be
18 dentists.

19 The second thing we would say is, but that's
20 a harder case. In that situation you would at least
21 need to look beyond the statute books in order to
22 determine whether the people were dentists and you would
23 get, at least, a little closer to Omni --

24 JUSTICE ALITO: I think that's what troubles
25 me about your position because it seems to lead to a

1 case, State by State, board by board, inquiry by the
2 Federal courts as to whether the members of a regulatory
3 body are really serving the public interest or whether
4 they have been captured by some special interest?

5 MR. STEWART: But I guess the third point I was
6 going to make is we're not aware of any board like that.
7 That is, the amicus briefs on both sides say that it is
8 a frequent practice for States to establish regulatory
9 boards that are required by law to be composed of
10 members of the profession being regulated, and the
11 amicus briefs on the other side says, that's a good and
12 efficient practice. The amicus briefs on our side say
13 that's a problem. But they all agree that that is a
14 prevalent practice.

15 JUSTICE BREYER: Under that practice, you
16 said it's not an antitrust violation: Boycott. The guy
17 didn't get into the profession. He flunked the exam.
18 The antitrust lawyer says: I'm out of this profession;
19 I would offer them competition. We only have 82
20 qualified people in this specialty in this State. Now
21 there is only 81. That makes a difference. Their
22 questions are unfair, they are against me, and for a
23 bunch of reasons.

24 Silver v. New York Stock Exchange. You
25 know, it's not hard to make up reasons. I don't want to

1 cut you off from Justice Alito, but I would like you to
2 also, in doing that, to think about what my problem is.
3 It's the neurologists who are subject to the antitrust
4 suit. And the answer seems to lie in the kind of
5 supervision that you are advocating.

6 Now, go ahead and go back to Justice Alito,
7 but I put that in your mind.

8 MR. STEWART: I guess the point I was going
9 to make is, while there is a frequent practice of States
10 requiring by law that regulatory boards be staffed by
11 members of the profession, that there appears to be no
12 instance in which the State left it up to the governor
13 whom to decide whom to appoint and the governor chose to
14 appoint only practitioners. I mean, part of our point
15 in this case --

16 JUSTICE ALITO: Does that mean that is what
17 is critical in your opinion, that there is a State
18 statute that says they must be dentists? If that
19 weren't there, but the governor always chose dentists
20 because he wants the dentists' vote and the dentists are
21 very powerful in that particular State --

22 MR. STEWART: We're not prepared to give
23 that up, but we don't think that that's as strong a
24 case. I mean, the fact that they are required to be
25 dentists signals that they are there in their capacity

1 as such.

2 JUSTICE ALITO: If you are not prepared to
3 give that up, then I really don't understand the
4 contours of your rule. And I find it troubling, because
5 I really am not attracted to the idea of Federal courts
6 looking at State agencies, State regulatory entities, to
7 determine whether they are really serving the public
8 interest or they are serving some private interest.

9 MR. STEWART: We're certainly not advocating
10 that the Court look to the internal subjective
11 decision-making processes of the individual members.
12 That is, if the members were -- if the membership of the
13 board were people who had no active participation in the
14 dental profession, who had no economic interest.
15 The Court in Omni Outdoor certainly made it clear that
16 the Court is not supposed to be probing whether, in
17 fact, an individual board member made a decision based
18 on illicit criteria.

19 JUSTICE KAGAN: So to the same sort of
20 question. Suppose that, you know, we come out with a
21 ruling that makes clear that an all-dentists board is
22 not okay and then a State says, okay, we'll do a board
23 with five dentists and three non-dentists. How do we
24 feel about that.

25 MR. STEWART: It would still be a

1 majority or I think the commission used some phrase like
2 "decisive coalition." And in this case, in a sense, the
3 majority treatment of the dentists on the board was
4 exacerbated. Only six of nine of the board members are
5 actually practicing dentists. But three of the
6 members --

7 JUSTICE SCALIA: What about ex-dentists?
8 They're -- they're no longer practicing. But they're
9 all dentists and they have a lot of dentist friends.
10 They're sympathetic to the profession of dentistry. Are
11 you going to give them a pass?

12 MR. STEWART: I think if the -- if you --
13 the board were composed of retired dentists, people who
14 were selected because they had expertise but no current
15 financial interest, that would be a legitimate way of
16 staffing.

17 JUSTICE SCALIA: That's okayOkay. Okay. Do
18 you really think that the financial interest of the
19 individual members of the board is going to be
20 significantly affected? Of each individual member of
21 the board? My goodness. I -- I find that hard to
22 believe.

23 MR. STEWART: I guess to my -- to my
24 previous answer, I should add if those board members
25 were selected by a dispassionate State official; that

1 is, there could also be circumstances in which board
2 members themselves had no financial interest but were
3 selected by those who do. And that might be treated as
4 a separate --

5 JUSTICE KENNEDY: Well, going back to
6 Justice Alito's question, if we have to look at it board
7 by board, if I were a private practitioner and, in
8 Justice Breyer's hypothetical, a neurologist came to me
9 and said, I think it's important for us to do standards,
10 can I get on this board? I say, have no part of it.
11 Triple damages, attorneys' fees. You can't even afford
12 to defend this case. Get off that board. That's going
13 to be the consequence of your -- of the rule you
14 advocate it seems to me.

15 MR. STEWART: There's no problem with active
16 participation by -- but there's no problem with the
17 board -- boards being staffed by active practitioners so
18 long as they are adequately supervised.

19 JUSTICE BREYER: Does that consist of -- if
20 you want my off-the-cuff idea, which is probably not
21 particularly good to give you -- that active -- that
22 supervision consists of either your board on regulation
23 or a court which, when reviewing what they do, does so
24 with an awareness of the State law and the subject and
25 also the risks of anticompetitive harms. Ready to set

1 it aside if, in fact, those risks, which are outside
2 what the State law wants, seem likely to eventuate.

3 Now, I could write such a standard pretty
4 vaguely and that's not necessarily the right standard.
5 But this whole thing turns to me on what the supervision
6 consists of and whether it's good enough or not here.
7 And so that's why I repeat for the -- you know, like the
8 third time, and I think you -- probably the government
9 doesn't have a definite position on this or what it
10 consists of.

11 MR. STEWART: I mean, there are different --

12 JUSTICE BREYER: Not that you should. But I
13 just want to --

14 MR. STEWART: I mean, there are -- there are
15 different things that could qualify as adequate
16 supervision and, in part, that turns on the nature of
17 the question to be answered. That is, the difficult
18 question that is posed in this case or the -- the
19 ultimate contested question is: Is teeth whitening the
20 practice of dentistry as defined by North Carolina law?
21 That is a question of statutory interpretation. The
22 North Carolina statute speaks of removing stains or
23 accretions from the human teeth. There are arguments on
24 both sides as to whether that encompasses the teeth
25 whitening methods that are used today. That's the kind

1 of dispute that is capable of being definitively
2 resolved by --

3 JUSTICE BREYER: But they'd have to give
4 deference to the expert board's determination that would
5 be normal.

6 MR. STEWART: They -- they might or might
7 not --

8 JUSTICE BREYER: Well, if it's not, then
9 you're going to have the neurology qualification
10 determination made by some people in the State who are
11 not neurologists. Now, that to me spells danger.

12 MR. STEWART: And the point I was going to
13 make was the determination of whether a particular
14 individual is qualified to practice neurology is a
15 different sort of question from the issue is teeth
16 whitening the practice of dentistry. That question is
17 one of law that a court is capable of deciding. It
18 might or might not give deference to the views of a
19 particular administrative agency.

20 In our view, it would certainly make sense
21 not, as a matter of State administrative law, not to
22 give deference to the view of self-interested
23 practitioners for the same reasons that -- on that legal
24 question for the same reasons that --

25 CHIEF JUSTICE ROBERTS: What if the -- I'm

1 sorry. Please.

2 MR. STEWART: -- for the same reason that we
3 think the State action immunity shouldn't apply.

4 CHIEF JUSTICE ROBERTS: Well, what if one of
5 the members of the board is appointed as a full-time
6 member of the board for a one-year term and he's -- he's
7 called the board state supervisor, is that good enough?

8 MR. STEWART: I mean, it depends on what --
9 first, it would -- we would want to look into the
10 question does that alleviate his financial interest.
11 What is his --

12 CHIEF JUSTICE ROBERTS: No. It's only --
13 it's one year. But for that one year he's not
14 practicing dentistry or whatever. And that way the
15 supervisor is -- responsive to Justice Breyer's
16 concern -- the supervisor knows what he's talking about
17 when it comes to dentistry.

18 MR. STEWART: I guess in -- in order even
19 potentially to qualify as satisfying the active
20 supervision requirement, the one supervisory member
21 would have to have the power to countermand the orders
22 issued by the other members. If it were simply one and
23 he were designated a supervisor, but he didn't have the
24 authority to do --

25 CHIEF JUSTICE ROBERTS: Okay. So he has the

1 authority. For that one year, he can veto whatever the
2 board decides to do.

3 MR. STEWART: I'm -- I'm hesitant to take a
4 position on behalf of the FTC because it would turn on
5 part -- in part on would the expectation that this
6 person will return to private practice after a year be
7 sufficient to maintain his fundamentally private
8 characteristic.

9 JUSTICE SCALIA: Well, I mean, the question
10 that follows is: What if all of the members of the
11 board have to refrain from the practice of dentistry
12 during the year that they serve? And you're saying you
13 don't know what the answer will be to that? What the
14 FTC will say to that? I know what the FTC will say to
15 that.

16 MR. STEWART: Well, I guess part of what I
17 would say in response to these hypotheticals -- and it's
18 not that they're not legitimate questions. But this --
19 this seems to us to be the case at the furthest end of
20 the spectrum from those. This is a case in which the
21 only members of the board who actually participated in
22 the decision to issue the cease and desist letters were
23 practicing dentists. They were people who were required
24 by law to be practicing dentists. They were appointed
25 by other practicing dentists.

1 The other thing I would say --

2 JUSTICE SOTOMAYOR: Mr. Stewart, the problem
3 with your answer, at least for me, is that you're being
4 asked for the rule that we're going to announce not just
5 in this case, but to guide the decision-making for
6 future courts. I mean, just to say this board we can do
7 it the way Judge Keenan did, and say it was an elected
8 board, but an appointed board is different. We can say
9 one of a dozen sort of limitations or not. So what do
10 we say? How do we articulate your ruling?

11 MR. STEWART: I mean, the way I read both
12 Judge Keenan's concurrence and the majority opinion is
13 both of those said, at least where the members are
14 selected by other practicing dentists, there is no State
15 action immunity. We leave for another day the question
16 whether the outcome would be different if the members
17 were selected by the government.

18 JUSTICE SOTOMAYOR: Now, that's what the
19 Supreme Court does. It walks that line and it goes and
20 looks at the trajectory we're taking. And some of my
21 colleagues have expressed the concern that the
22 trajectory will involve us in case after case trying to
23 decide how far too far is.

24 MR. STEWART: And frankly, if the Court
25 wanted to say, as part of its opinion, as long as they

1 are actually required by law to be practicing dentists,
2 there's no State action immunity, but if the law doesn't
3 require that and it happens to be the pattern of
4 gubernatorial appointment, if the Court says that -- the
5 outcome would, in fact, be different in that case, we
6 would prefer that to a decision that says we're going to
7 give these boards a blanket pass because we can foresee
8 some hard questions at the end of the day.

9 JUSTICE BREYER: Look. Take your -- suppose
10 I write that down. Still the problem in the back of my
11 mind is there are now 311 million Americans who are
12 going to have medical care. And this is -- I agree with
13 you. This is at one extreme. But -- but those words
14 that you just enunciated seem to cover to exactly the
15 same extent every medical specialty. And I've
16 articulated that already that that's my concern. So I
17 wonder if you can do something a little bit better
18 before we say that the doctors cannot be active doctors
19 and decide on the qualifications of doctors.

20 MR. STEWART: I guess the -- the two
21 things -- the two or three things I would say are first,
22 I think the decisions about whether particular
23 individual practitioners will be licensed or have their
24 license -- license revoked is a fundamentally different
25 type of determination from the legal question is teeth

1 whitening or some other generic type of service the
2 practice of dentistry within particular State law.

3 The second thing is although, Justice
4 Sotomayor, you're certainly right that the Court doesn't
5 announce decisions that are good for one case only and
6 leave every other question unresolved, the Court also --
7 the Court also does proceed incrementally and it doesn't
8 feel disabled from announcing the right rule in the case
9 before it simply because it can foresee both that
10 difficult cases will arise in the future and that the
11 rule it's announcing won't clearly revolve --

12 JUSTICE SCALIA: You have very long
13 sentences, so it's very hard not to interrupt you. I --
14 I don't agree with your first point. I don't see that
15 there's an immense difference between establishing
16 the -- the standards for a profession and excluding an
17 individual from the profession. My goodness. What --
18 what is a more obvious restriction of competition than
19 preventing somebody from competing? I -- I don't see
20 how you draw that line. Well, it's one thing to say
21 that so-and-so can't practice, but it's another thing
22 to -- to say that tooth whitening is -- is part of the
23 practice. It seems to me they both involve
24 anticompetitive decisions.

25 MR. STEWART: They -- they involve

1 anticompetitive decisions and they involve -- they
2 require the State to tap into expertise. That is, the
3 basic decision to prohibit unlicensed individuals from
4 removing stains or accretions from teeth was made by the
5 North Carolina legislature back many decades ago.
6 Obviously, the North Carolina legislature is not an
7 expert body, it's not composed of dentists, but
8 presumably they got input from the dental profession and
9 they -- they tapped into the relative expertise for
10 purposes of making their decision.

11 The determination, once the statutory
12 structure has been established, the determination
13 whether teeth whitening falls within one of the
14 enumerated categories is not really establishing the
15 standards. It is interpreting the existing standards.
16 And that does require some interstitial discretionary
17 decision-making. And our point, as -- as Justice Kagan
18 was alluding to earlier, is we want those interstitial
19 decisions to be made by disinterested persons or at
20 least, if they're not made by disinterested persons, we
21 don't feel confident that they truly reflect the policy
22 choices of the State legislature itself.

23 JUSTICE ALITO: What would happen if the
24 North Carolina courts were to decide tomorrow that
25 whitening is the practice of dentistry under this old

1 statute?

2 MR. STEWART: If the North Carolina -- I
3 mean, to make the case clearest, if the North Carolina
4 Supreme Court held as an authoritative construction of
5 State law, I mean, that would basically be the end of
6 it. There could still be potential arguments that the
7 mode of enforcement had anticompetitive consequences
8 that went beyond the basic prohibition. But -- but for
9 all intents and purposes, just as if the North Carolina
10 legislature had specified that non-dentists cannot
11 lawfully perform teeth whitening, that policy choice
12 would not be subject to second-guessing by the FTC or a
13 Federal antitrust court.

14 Similarly, if the North Carolina Supreme
15 Court said, we construe the existing statute to have
16 that meaning, that determination also wouldn't be
17 subject to review by an antitrust court. And
18 there's been a lot of --

19 JUSTICE ALITO: Just to follow up on that.
20 So was the FTC decision predicated on the proposition
21 that this was not -- whitening teeth was not within this
22 old statute?

23 MR. STEWART: It was -- the FTC specifically
24 declined to announce a decision one way or the other;
25 that is, the complaint counsel in prosecuting the case

1 before the commission offered reasons to believe that
2 teeth whitening was not covered by this provision. And
3 basically, there were two reasons. The first is that
4 scientifically, teeth whitening does not result in the
5 removal of stains or accretions. The staining material
6 remains in the enamel. It's simply bleached so that the
7 discoloration is less and it's not so evident.

8 The second type of evidence that complaint
9 counsel offered was that, back when the statute was
10 passed, the methods of removing stains and accretions
11 that would have been familiar to the legislature
12 involved scraping, chipping, to some extent electronic
13 instruments. It was the type of procedure that could
14 not safely be done by people who lacked expertise.

15 JUSTICE ALITO: Well, you know, last week we
16 had a case in which the North Carolina Court of Appeals
17 held that an old motor vehicle statute required only one
18 brake light rather than two brake lights. So it doesn't
19 seem that an interpretation of this statute to cover
20 whitening would be completely out of the question.

21 MR. STEWART: We agree. And as I say, the
22 commission specifically declined to announce a decision
23 one way or the other as to what was the correct reading
24 of North Carolina law.

25 JUSTICE GINSBURG: I thought they agreed to

1 the stipulation that this was an articulated State
2 policy, and the question was must there be in addition
3 supervision. But you -- you've conceded for purposes of
4 this argument the articulated State policy, didn't you?

5 MR. STEWART: Well, we conceded -- the
6 commission assumed arguendo that there was a clearly
7 articulated State policy. But if, for instance, rather
8 than having the dental board composed of dentists, they
9 were composed of disinterested bureaucrats who would
10 hear from dentists but would make their own
11 determination. The clear articulation requirement would
12 be satisfied because clear articulation can be satisfied
13 by something phrased at a relatively high level of
14 generality. And so --

15 JUSTICE KENNEDY: If the consequences of a
16 decision in your favor were that no professionals or
17 representative of any occupation would ever serve on a
18 government board where there's any chance of antitrust
19 liability, would that, in your view, advance the
20 purposes of the antitrust laws?

21 MR. STEWART: I mean, if we thought that
22 were the consequence of the Court's decision, then we
23 would be very leery of urging this result. But we see
24 in cases like Goldfarb that the Virginia bar, for
25 instance, was held to be susceptible to suit under the

1 antitrust laws and could not invoke the State action
2 immunity because it was out ahead of the Virginia
3 Supreme Court, and that hasn't had the effect of
4 inducing members of the bar en masse to refrain from bar
5 association activities.

6 Just to finish my answer to Justice
7 Ginsburg, even if the statute is phrased at a relatively
8 high level of generality that leaves some interstitial
9 questions unresolved, it can still satisfy clear
10 articulation. So if we had a body of disinterested
11 bureaucrats who said we interpret the phrase "removal of
12 stains and accretions" to include teeth whitening, we'd
13 have clear articulation in the statute even though it
14 didn't resolve every question. And then we would have a
15 determination made by a body that would not require
16 active supervision and that would be good enough. That
17 would satisfy the prerequisites to State action immunity
18 as this Court has articulated.

19 If I could, I'd like to make two -- two
20 additional points. The first is that there was a fair
21 amount of talk in the first part of the argument about
22 the oath. The oath is at North Carolina General Statute
23 11-7, and basically, the members of the board, like --
24 like people who are designated State officials
25 generally, will take an oath to support the

1 Constitutions of North Carolina and the United States
2 and to essentially be loyal to the State of North
3 Carolina.

4 It's essentially a State law version of the
5 oath that new members of this Court's bar take in --
6 take when they're sworn, as was done this morning. I
7 believe the members -- I know the members of the bar
8 swear to support the Constitution of the United States.
9 I believe that they also swear to faithfully execute
10 their duties as officers of the Court and members of the
11 bar of this Court.

12 But when private counsel take that oath, no
13 one imagines that they lose their private character, and
14 in particular, nobody construes that oath as a promise
15 by private counsel that he will place the interests of
16 the general public ahead of the interests of his
17 clients. Everybody understands that vigorous
18 representation of a particular constituency may be
19 consistent with --

20 JUSTICE SCALIA: That's because what they're
21 promising to do is to serve as faithful private counsel.
22 If they were being sworn in to an agency and promise to
23 execute their duties in accordance with law, it would be
24 quite different. And that's what's happening here.

25 MR. STEWART: There's nothing in the oath

1 that requires them to place the interests of the public
2 on a par with the interests of the dental community.
3 And everything about their selection -- the fact that
4 they are required to be dentists, the fact that they are
5 selected by other dentists -- reinforces the sense that
6 they are expected to treat the dental community as their
7 constituency.

8 And the last thing I'd say is a lot of the
9 debate in areas like this centers on the idea of the
10 profession regulating itself; neurologists regulating
11 neurologists, dentists regulating dentists. A lot of
12 what the board does is dentists regulation -- regulating
13 dentists. But this case is not about that. This case
14 is about dentists regulating non-dentists and, in
15 particular, dentists telling dentists -- telling
16 non-dentists in what endeavors can you legally compete
17 with dentists. And so the concerns that underlie the
18 Sherman Act with unfair restrictions on competition are
19 at their zenith in a case like this one. Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you, counsel.

21 Mr. Mooppan, you have 4 minutes remaining.

22 REBUTTAL ARGUMENT OF HASHIM M. MOOPPAN

23 ON BEHALF OF PETITIONER

24 MR. MOOPPAN: I'd like to begin with Justice
25 Breyer's question. The ultimate question in this case

1 is how to balance a cost-benefit question.

2 There are benefits from having experts, and
3 there are risks from having experts be regulators, and
4 the question is who should make the decision of how to
5 weigh those costs and balance those risks. And what the
6 government is arguing is that the Federal antitrust laws
7 second-guess the State's decision about how to balance
8 that risk.

9 The States have decided that the better way
10 to handle the situation where you have experts like
11 neurologists is to have some level of supervision, but
12 not the level of active supervision that is required for
13 private parties.

14 JUSTICE BREYER: Why not simply say that the
15 supervisor, be it the Court or be it the commission,
16 must, when it decides the lawfulness of the agency's
17 action or the private board's action, take into account
18 the risks of self-dealing as well as the State policy
19 that favors them making this decision, and where the
20 consequence is an unreasonable weighing, it is unlawful
21 under State law.

22 Now, that way you bring in an anti-trust
23 element, it would comport with Midcal, you would be
24 guarding against self-dealing without interfering
25 tremendously with the state.

1 MR. MOOPPAN: Well, for two reasons. First,
2 Your Honor, because the states are allowed to act
3 anti-competitively. The states don't have to make a
4 balance between anti-competitive benefits and public
5 benefits. The states can unabashedly act competitively
6 if they wish.

7 It would also be extremely complicated
8 because what you would essentially have are two
9 different versions of active supervision. One standard
10 of active supervision that applies to private parties
11 and one standard of active supervision that applies to
12 public officials who also have private interests.

13 That's the reason why Mr. Stewart wouldn't
14 answer your question by saying any of those things would
15 work because they will never say that that stuff works
16 for purely private parties. They will never say that
17 just near --

18 JUSTICE KAGAN: Excuse me. I'm sorry.

19 MR. MOOPPAN: I was just going to say they
20 would never say that the mere ability to have some level
21 of review is good enough for private parties because
22 even they recognize there is a fundamental difference
23 between a private party and a public official who also
24 has private interests.

25 JUSTICE KAGAN: Mr. Mooppan, the active

1 supervision requirement has been around a long time and
2 it varies case by case and state by state. There are a
3 wide, wide, wide variety of mechanisms that might
4 satisfy the active supervision prong in a particular
5 state with respect to a particular kind of activity.

6 But what you are suggesting is that that
7 prong be simply removed from the analysis, that it be
8 utterly irrelevant, that there is no supervision at all,
9 and that's a very different and much more dramatic
10 thing.

11 MR. MOOPPAN: Well, what I'm suggesting is
12 twofold. First, the act of supervision is a fairly
13 rigorous standard and I am sure the FTC would have told
14 you that if you had asked them that question precisely.
15 And I'm saying that it -- the issue here isn't whether
16 these people will be unsupervised. The question is who
17 will determine what level of supervision. And the
18 question is whether the state should decide that a lower
19 level of supervision is the appropriate one, balancing
20 expertise versus the risk of conflicts of interests.
21 And especially when you're dealing with supervision of
22 market participants. There is a grave risk that if you
23 require too much supervision as a condition of
24 anti-trust immunity, no one will serve on these boards.

25 Mr. Stewart said he would be leery of

1 advocating this position if we would have a high
2 deterrence effect. Well, there is an amicus brief from
3 the ADA and the AMA and from 23 states, all of whom
4 express grave concern that if you require supervision
5 market participants will not serve on these boards, and
6 that is the sort of concern this Court has recognized in
7 cases like Hoover v. Romlin.

8 It is fundamentally up to the state to
9 determine how to bear this risk. Whether they want to
10 say that the benefits of expertise outweigh the risks of
11 conflicts of interest. That is what this Court held in
12 cases like Omni, that the Sherman Act is not intended to
13 serve as some general rule of good government. It is up
14 to the state to determine how they want to regulate as
15 sovereigns.

16 The final point I would like to make is
17 about Justice Alito's question about what would happen
18 if the State Supreme Court tomorrow said that teeth
19 whitening was the practice of dentistry. I'm not quite
20 sure I understood Mr. Stewart's position but the holding
21 below is that active supervision is required regardless
22 of whether there is clear articulation, so I would think
23 that there would be liability regardless of what
24 the Court did in the future.

25 CHIEF JUSTICE ROBERTS: Thank you, counsel.

1 The case is submitted.

2 (Whereupon, at 12:06 p.m., the case in the
3 above-entitled matter was submitted.)

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