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ARTICLE

Straight Teeth and Misaligned Interests: Courtrooms Are Crowded with SmileDirectClub Litigation

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Abstract

SmileDirectClub markets, manufactures, and delivers clear plastic dental aligners directly to the consumer: no dental office necessary. This well-known business strategy—cut costs by cutting out the middleman—has in several instances caught the attention of state dental regulators. While the dental boards consider some of SmileDirectClub's practices to be violative of state dental practice law, the corporation has fought back in federal court, charging dental regulators with antitrust violations and with denying SmileDirectClub its constitutional rights.

The Supreme Court, as noted by SmileDirectClub, has insisted that a self-regulating state professional board is not itself the state, so a board's actions might be subject to federal antitrust law. In the SmileDirectClub cases, however, state regulators have acted as required by state legislatures and as expressed in state dental practice acts. The boards' activities here are therefore cloaked in the states' immunity to antitrust litigation and should be treated deferentially by federal courts. Furthermore, judicial review of the substance of every regulation to which SmileDirectClub objects is inappropriate under principles of constitutional law. In the interest of public safety, courts should permit state dental regulators to fulfill their mandates and ensure that all dental providers comply with state health regulations.

Keywords: SmileDirectClub; dental regulation; orthondics; antitrust law; constitutional law

Introduction

"Why SmileDirectClub?" asks the company website.[1] The answers are: "Doctor-directed teeth straightening … Results in as little as 4–6 months … Costs 60% less than braces or Invisalign … Lifetime Smile Guarantee™."[2] A skeptical consumer might wonder if these claims are too good to be true. SmileDirectClub ("SDC") itself admits that its ability to deliver depends significantly upon its escaping state dental regulators.[3]

SDC has argued that state dental boards violate federal antitrust law when the applicable state regulations inhibit SDC's competitive position within the marketplace for professional orthodontic services.[4] Although state regulators have long been thought immune from federal antitrust actions

[1] SmileDirectClub, https://smiledirectclub.com/why-smile-direct-club/?utm_content=brandhero (last visited Aug. 15, 2021).

[2] *Id.*

[3] *See* SmileDirectClub, LLC v. Ga. Bd. of Dentistry, No. 18-cv-02328, 2019 WL 3557892, at *1 (N.D. Ga. May 8, 2019) ("SmileDirect alleges that … subparagraph (3)(aa) makes it virtually impossible for SmileDirect … lawfully to conduct business in Georgia without making costly and prohibitive changes to SmileDirect's current business model.").

[4] *See id.* at *1–2 ("SmileDirect … asserts claims against the Georgia Board of Dentistry … seeking injunctive relief and damages for violations of 15 U.S.C § 1 … "); Sulitzer v. Tippins, No. CV 19-8902, 2020 WL 6115197, at *1 (C.D. Cal. Apr. 22, 2020).

under a state-action exemption, or *Parker* immunity,[5] SDC relies upon a recent Supreme Court decision in which North Carolina's dental regulators were found to have run afoul of antitrust law.[6]

Going beyond antitrust law and *North Carolina State Board of Dental Examiners*, SDC has also challenged state regulations on constitutional grounds, arguing that the regulations in question abridge SDC's Due Process rights and its right to Equal Protection.[7]

Do state dental boards, under the Constitution and federal antitrust law, have wide latitude to regulate dentistry-related activities of market actors like SDC? This Article argues that SDC—and any provider of professional services, no matter the size of the organization—must be governed by the same duly adopted state regulations. Absent evidence that the organization or its business model was the object of attempts "in restraint of trade,"[8] courts must uphold facially reasonable state regulations.

Part I of this Article provides background to SDC and its business model, and where they sit within the regulatory environment. Next, Part II discusses the origins of and legal basis for state professional regulatory boards, and developments in how antitrust doctrines are applied to those boards. Finally, Part III contains the Article's main arguments with a focus on recent litigation between SDC and state regulators. This Article argues that *North Carolina Board* not be read as broadly disqualifying the regulatory activity of state dental boards. Federalism remains a concern within federal antitrust law, and important matters of public policy—here, regulation of direct-to-consumer dental treatments—require effective state professional boards not excessively bogged down in antitrust law and litigation.

SDC's role in direct-to-consumer orthodontics

As is familiar in our time of disruptive technology,[9] this is a story of an "arms race" between new players in old industries and the regulators who must catch up. Dental braces have been in use for over ninety years in essentially the same form.[10] For nearly fifty years, some dentists have prescribed clear plastic aligners for minor movement of teeth.[11] It was digitalization of dental models and computerized simulation of tooth movement—pioneered in the 1990s, especially by Align Technology, maker of Invisalign—that has made clear-plastic aligners a commonplace in orthodontics, rivaling the popularity of metal braces.[12]

SDC, founded in 2014,[13] ran with these technological advances to develop a new business model.[14] Although Align was innovative in marketing a professional dental *product* directly to

[5]Named for Parker v. Brown, 317 U.S. 341 (1943); for the "state action doctrine" in general, see Earl W. Kintner et al., 10 Federal Antitrust Law § 76 (2019).

[6]N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 511–12 (2015) ("The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy … [the] active supervision requirement in order to invoke state-action antitrust immunity.").

[7]*See Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *5–6; *Sulitzer*, 2020 WL 6115197, at *1.

[8]Sherman Act of 1890, 15 U.S.C. § 1.

[9]*See generally* Mark Fenwick et al., *Regulation Tomorrow: What Happens when Technology Is Faster than the Law?*, 6 Am. U. Bus. L. Rev. 561 (2017).

[10]Edward H. Angle, *The Latest and Best in Orthodontic Mechanism*, 71 Dental Cosmos: A Monthly Record of Dental Science 164 (1929).

[11]Henry I. Nahoum, *The Vacuum Formed Dental Contour Appliance*, 30 N.Y. State Dental J. 385 (1964).

[12]William R. Proffit et al., Contemporary Orthodontics 316 (6th ed. 2018).

[13]SmileDirectClub, https://smiledirectclub.com/about/ (last visited Nov. 5, 2021).

[14]*See* SmileDirectClub, LLC v. Jacqueline I. Fulop, D.M.D., P.C., No. 19-CV-9582, 2020 WL 1322838, at *2 (S.D.N.Y. Mar. 19, 2020) ("[SDC] contends that its direct-to-consumer clear aligner treatment 'has disrupted … traditional, higher-cost orthodontic delivery models … .'"); SmileDirectClub, LLC v. Candid Care Co., 505 F. Supp. 3d 340, 343 (D. Del. 2020) ("[T]he invention claimed by the #522 patent is … . [t]o use the words of [SDC's] Complaint … a 'business model,' … and 'revolutionary workflow' … ").

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consumers, those consumers remain traditional dental patients transacting with traditional dental practices.[15] Essentially, Align remains a commercial dental laboratory, albeit a well-branded one, providing high-tech dental laboratory services to dental offices without transacting directly with the patient-consumer.[16] SDC, on the other hand, married the direct-to-consumer marketing strategy with direct-to-consumer transactions: the end-user pays SDC for aligners, which SDC delivers directly to the patient. This familiar business strategy of cutting costs by cutting out the middleman unsurprisingly troubles dentists, especially orthodontists.[17]

To make its business model fit the varied regulatory landscape among the states,[18] SDC must include licensed dentists in its workflow. While Align only needs technicians since their work is subject to approval by the dentist providing professional services in a traditional setting, SDC must employ dentists to approve any treatment plans. In some states this is accomplished by holding SDC out as a "dental services organization," providing only "non-clinical" services to the dentists who review treatment plans.[19] In many states, the "corporate practice of medicine doctrine" prevents corporate entities from engaging in professional practice unless owned and/or controlled by licensed professionals;[20] SDC adapts by engaging with an SDC-affiliated dentist-owned corporation.[21]

In any case, SDC works with dentists and does not deny that prescribing and planning aligners is part of the practice of dentistry.[22] This sets the facts of the SDC cases apart from those of *North Carolina Board*, the Supreme Court case that SDC depends upon for its antitrust arguments. SDC or its affiliate dentists are engaged in the practice of dentistry, but *North Carolina Board* itself was about non-dentists who might not have engaged in professional practice.[23]

[15]Invisalign, https://www.invisalign.com/how-invisalign-works (last visited Dec. 26, 2021) ("[H]ow does Invisalign … treatment work? … Step 1[:] meet with your doctor … ."); *see* Invisalign, https://www.invisalign.com/frequently-asked-questions (last visited Dec. 26, 2021) ("[T]he cost of Invisalign treatment is similar to the cost of braces. Your doctor will determine the cost of your treatment … .").

[16]*But see* Invisalign, https://www.invisalign.com/invisalign-cost/how-to-pay-for-invisalign (last visited Dec. 26, 2021) (using the "My Invisalign app" to apply for consumer credit with which to pay the dentist).

[17]The American Association of Orthodontists phrases its concern as for the public welfare, because "[i]n some instances direct-to-consumer orthodontic companies do not involve the in-person evaluation and/or in-person supervision of … treatment by an orthodontist … which could lead to potentially irreversible and expensive damage such as tooth and gum loss, changed bites, and other issues." *Consumer Alert: What You May Be Missing with Direct-to-Consumer Orthodontic Treatment*, Am. Ass'n of Orthodontists, http://www.aaoinfo.org/wp-content/uploads/2021/04/AAO-Consumer-Alert-2021.pdf, (last visited Sept. 26, 2021). SDC, however, describes such statements as "nothing more than … unevidenced and misleading attempts by dental trade organizations … to thwart legitimate competition." *Smile Direct Club Issues Statement on Organized Dentistry's Anti-Competitive Legal Actions*, SmileDirectClub (Oct. 4, 2019), https://investors.smiledirectclub.com/node/6526/pdf.

[18]*Cf.* Mary Anne Bobinski, *Law and Power in Health Care: Challenges to Physician Control*, 67 Buff. L. Rev. 595, 606 (2019).

[19]*See* SmileDirectClub, LLC v. Ga. Bd., No. 18-cv-02328, 2019 WL 3557892, at *1 ("SmileDirectClub … is a dental service organization that provides services to contractually affiliated dentists in Georgia who wish to offer at-home clear teeth aligner treatment … ").

[20]*See* Bobinski, *supra* note 18, at 606 ("The doctrine … applies in a majority of states … [and] prohibits corporations from engaging in the practice of medicine by directly employing or otherwise controlling a physician's practice of medicine.").

[21]*See, e.g.*, Galkin v. SmileDirectClub, LLC, No. A-2867-19, 2021 N.J. Super. Unpub. LEXIS 1116, at *2 (N.J. Super. Ct. App. Div. June 11, 2021) ("Leeds [a dentist licensed in New Jersey] is the sole owner of Smile of New Jersey, P.A. (SNJ), a New Jersey company located in Tennessee that places advertisements on behalf of and contracts with dentists in New Jersey, but has no physical office in New Jersey… SDC sources clear aligners … and impression kits … for SNJ.").

[22]*Cf.* Vicky Nguyen & Lauren Dunn, *"Things Didn't Feel Right": Some SmileDirectClub Customers Report Health Problems*, NBC News (Feb. 18, 2020, 10:49 AM), https://www.nbcnews.com/health/health-news/things-didn-t-feel-right-some-smiledirectclub-customers-report-problems-n1134056 (reporting SDC's chief legal officer's statement that "SmileDirectClub's network of dentists, not the company itself, is responsible for treatment plans").

[23]*See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 500–01 (2015).

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State professional boards' legal basis, from *Dent* to *North Carolina Board*

Professional self-regulation as a twentieth-century tradition

Professional licensure as we know it emerged late in the nineteenth century.[24] Physicians united behind the notion that the states must institute licensure regimes—with a focus on confirming that candidates had proper diplomas—to stop "untrained practitioners" from harming the public.[25] The Supreme Court then adopted this position in *Dent v. West Virginia*.[26]

Dent, a physician, claimed that West Virginia abridged his Fourteenth Amendment right to Due Process when the Board of Health denied him a license for his lack of the "diploma of a reputable medical college" and for his failing the Board's examination.[27] While the Court agreed that "[i]t is … the right of every citizen of the United States to follow any lawful calling, business, or profession he may choose,"[28] it limited this liberty in holding that "[n]o one has a right to practice medicine without having the necessary qualifications of learning and skill."[29] The determination of such learning and skill the Court left up to the "power of the state to provide for the general welfare of its people," which "authorizes it to … secure them against the consequences of … deception and fraud."[30] The Court noted that this state interest in policing licensure is particularly strong in medical practice because "[f]ew professions require more careful preparation by one who seeks to enter it than that of medicine." Not only does this mean that unqualified practitioners pose a high risk to the state, but also that determining qualification requires special expertise: "[C]omparatively few can judge of the qualifications of learning and skill which [a physician] possesses," such that "[r]eliance must be placed upon the assurance given by his license, issued by an authority competent to judge … that he possesses the requisite qualifications."[31]

Both *Dent*'s focus on "necessary qualifications of learning"[32] and its hint toward self-regulating experts became the norm in medical education and licensure in the twentieth century. The Flexner report in medicine—and Gies report in dentistry—led to accreditation of professional schools, and with it stricter academic standards, university affiliation, commitment to science over anecdote, and the closure of inadequate schools.[33] The professions became self-regulating as state boards were given the authority not only to issue licenses but also to discipline licensees for "deficiencies in knowledge, skills, ethics, or capacity."[34] Over much of the twentieth century, the professions' exclusivity in the name of the state's interest in protecting the public, as balanced against the resulting "monopoly" in providing professional services, "reflect[ed] a grand bargain."[35] But a state-sanctioned monopoly might be abused by professionals acting in their own interests at the expense of the public, and one way to reduce this risk is through applying antitrust law. Does federal antitrust law have authority over state professional boards?

[24] *See* Bobinski, supra note 18, at 600.

[25] *Id.*

[26] 129 U.S. 114 (1889).

[27] *Id.* at 123.

[28] *Id.* at 121.

[29] *Id.* at 123.

[30] *Id.* at 122.

[31] *Id.* 122-23; s*ee* Bobinski, *supra* note 18, at 603 ("The primary justification for self-regulation is implicit in the Supreme Court's reasoning in *Dent*: the complex scientific and practice-oriented aspects of medical practice mean that establishing and applying regulatory standards requires the active involvement of members of the medical profession itself.").

[32] 129 U.S. at 123.

[33] *See* Bobinski, *supra* note 18, at 603.

[34] *Id.*

[35] *Id.* at 603-04 (citing Arnold S. Relman, *Professional Regulation and the State Medical Boards*, 312 New Eng. J. Med. 784, 785 (1985) ("[T]he medical profession has an implicit contract with the state, which grants it a licensed monopoly and a considerable degree of autonomy in exchange for a commitment to serve patients and maintain its own professional standards.")).

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Federal antitrust law expanded under Wickard v. Filburn's[36] *reading of the Commerce Clause*

The Sherman Act of 1890 criminalizes "monopoliz[ing], or attempt[ing] to monopolize, or combin[ing] or conspir[ing] with any other person or persons, to monopolize any part of the trade or commerce among the several states."[37] The Supreme Court, in keeping with its nineteenth-century interpretation of Congress's Commerce power, initially did not apply the Sherman Act to intrastate commerce.[38]

Federal Commerce power, however, increased over the decades until the Supreme Court—in *Wickard v. Filburn*—concluded that even crops grown and consumed within one state affected interstate commerce sufficiently to be within that federal power.[39] This put antitrust law on a collision course with professional self-regulation, because professional "trade" is commerce.[40] As such, federal Commerce power over the practice of medicine would seem to extend over state boards. However, an exception to broad federal antitrust power—state-action immunity—has influenced the ways in which courts apply antitrust law to state regulators.

Parker *immunity, misaligned interests, and* North Carolina Board

Because of the older understanding of Commerce power that excluded intrastate commerce, "[f]or the first half-century after the passage of the Sherman Act, there was no explicit recognition from the U.S. Supreme Court that the activities of a state government … might result in immunity for that conduct."[41] Then in *Parker v. Brown*, the Court upheld a regulatory scheme under the California Agricultural Prorate Act—which set and enforced caps on raisin production within the state—because the Sherman Act must not be "intended to restrain state action," as the Sherman Act "makes no mention of the states" as related to their own activity in regulating intrastate commerce.[42]

Parker thus holds both that Congress in its Commerce power *could* have applied antitrust law to the states, and that—in not explicitly including the states in antitrust law—Congress instead *chose* to defer to state sovereignty.[43] This reasoning has been described as a "(quasi-) constitutional" basis for state immunity to federal antitrust law; the justification is not a strict structural analysis or the Tenth Amendment as such, rather a "subconstitutional notion of respect for federalism."[44] Therefore, *Parker* immunity applied only to the acts of states themselves, but "a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful."[45] Since *Parker*, however, the Court has extended state-action immunity to the

[36]317 U.S. 111 (1942).

[37]15 U.S.C. § 2.

[38]*See* Spencer Weber Waller, *How much of Health Care Antitrust Is Really Antitrust*, 48 Loy. U. Chi. L.J. 643, 648 (2017) (citing United States v. E. C. Knight Co., 156 U.S. 1, 16-18 (1895) (holding that manufacturing was intrastate activity not covered by the Sherman Act)); Alexander Volokh, *Antitrust Immunity, State Administrative Law, and the Nature of the State*, 52 Ariz. St. L.J. 191, 211 (2020) [hereinafter Volokh, *Antitrust Immunity and the State*] ("Not only would the regulation of … tooth whiteners have been considered beyond Congress's [constitutional] powers—it wouldn't even have been subject to the statute in the first place because it wouldn't have been 'in restraint of trade or commerce among the several States.'" (quoting 15 U.S.C. § 2)).

[39]*See Parker*, 317 U.S. at 362 (1943) (state regulation of intrastate agriculture is not outside of federal Commerce power even if the regulation's effect on interstate commerce is "'indirect' rather than 'direct' … cf. Wickard v. Filburn."); *see also* Waller, *supra* note 38, at 648.

[40]*See* Bobinski, supra note 18, at 626–27 (citing Goldfarb v. Va. State Bar, 421 U.S. 773, 786–87 (1975)).

[41]Kintner et al., *supra* note 5, § 76.2.

[42]*Parker*, 317 U.S. at 346, 351 ("[A]n unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.").

[43]*See id.* at 351 (holding ours "a dual system of government in which, under the Constitution, the states are sovereign," yet, under the Commerce clause, "Congress may constitutionally subtract from [state] authority").

[44]Volokh, *Antitrust Immunity and the State*, *supra* note 38, at 210, 212.

[45]*Parker*, 317 U.S. at 351 (citing N. Sec. Co. v. United States, 193 U.S. 197, 332, 344–47 (1904)).

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activity of private actors when not merely authorized by the state but also under its "active supervision."[46]

One reason for this extension to certain private entities is "to prevent an end-run" around state immunity: a non-state party following state mandates that restrain trade would otherwise be open to suit under federal antitrust law, nullifying *Parker* immunity and Congress's will in deferring to state sovereignty.[47] On the other hand, the Court has required states' active supervision of immunized private entities[48] in an effort to prevent state mandates from granting blanket "immunity to [all] those who violate the Sherman Act by authorizing them to violate it."[49] Thus, the classic formulation for finding state-action immunity in private parties, the *Midcal* test,[50] has two prongs: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself."[51]

Unresolved however, until *North Carolina Board*, was how to classify state professional boards: as organs of the state with full *Parker* immunity, as private entities immunized from antitrust only if passing the *Midcal* test, or as something in between?[52] North Carolina's dental board had sent cease-and-desist letters to non-professionals engaged in tooth whitening, credibly claiming that such unlicensed practice of dentistry was against the state's dental practice act and against the state's clear policies of protecting the public and regulating dental practice. These state interests, however, did not align with the federal antitrust interest in forbidding private practitioners from acting as a monopoly. More starkly, there was a misalignment of state sovereignty in regulating its professions—which, in *Dent*, withstood scrutiny under the Fourteenth Amendment—with federal antitrust power under the Commerce Clause. In *North Carolina Board*, the Supreme Court concluded that the state dental board—unlike "designated … agenc[ies]" like a state's department of transportation—was not the state, because it was controlled by "active market participants," practicing dentists. Therefore, both *Midcal* prongs needed to be met for state-action immunity.

The Court found that North Carolina's dental board met only one requirement for state-action immunity—not both. The state practice act established a clearly articulated policy in favor of limiting competition through regulating the practice of dentistry. However, the Court found no active supervision, noting that the board itself admitted that the state did not actively supervise its decision to send cease-and-desist letters—endorsement after-the-fact by the Attorney General being no supervision at all.

SDC, in its claims against state dental boards, has asserted that *North Carolina Board* bears directly on its antitrust claims. The next Part examines how SDC, citing to *North Carolina Board*, describes board

[46]*Cf.* Patrick v. Burget, 486 U.S. 94, 100 (1988) (physicians on a hospital peer-review committee were not under Oregon's "active supervision" and consequently were not immune against federal antitrust law).

[47]Kintner et al., *supra* note 5, § 76.10 (citing S. Motor Carriers Rate Conf. v. United States, 471 U.S. 48, 56–57 (1985)).

[48]Kintner et al., *supra* note 5, § 76.10.

[49]*Parker*, 317 U.S. at 351.

[50]*See* California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980).

[51]*Id.* (quoting City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 410 (1978)); *see* Kintner et al., *supra* note 5, § 76.10. Some authors distinguish between the state's own *Parker* immunity and the "state-action doctrine," which extends to non-state actors fulfilling both prongs of the *Midcal* test. *E.g., id.* at n.159. ("*Parker* itself only applies to challenges under the antitrust law to conduct of the state or of state officials. The 'state action' doctrine, on the other hand, also extends immunity to certain private conduct taken pursuant to state command and supervision.").

[52]*See* Alexandra W. Jabs, Note, North Carolina State Board of Dental Examiners v. FTC*: When Will Enough Active State Supervision Be Enough?*, 75 Md. L. Rev. Endnotes 44, 57 (2016) ("[T]he Fourth Circuit's application of *Midcal*'s active supervision requirement [to the North Carolina board] created a circuit split between it and the Ninth and Fifth Circuits."); Alexander Volokh, *Are the Worst Kinds of Monopolies Immune from Antitrust Law?* FTC v. North Carolina Board of Dental Examiners *and the State-Action Exemption*, 9 NYU J.L. & Liberty 119, 126 (2015) [hereinafter Volokh, *The Worst Monopolies*] ("[T]he Fourth Circuit's holding creates a three-way circuit split … "); Peter C. Carstensen, *The Incoherent Justification for Naked Restraints of Competition: What the Dental Self-regulation Cases Tell Us About the Cavities in Antitrust Law*, 51 Loy. U. Chi. L.J. 679, 727 (2020) ("Because this decision created a circuit split, the Supreme Court granted review.").

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actions to which SDC objects as evidence that self-interested dentists, without active supervision, use the boards to subvert competition from SDC.

SDC litigation against state dental boards

Georgia Board of Dentistry

After the appearance in-state of SDC "SmileShops," where non-dentist employees of SDC take photographic scans of patients' teeth for remote review and treatment planning by Georgia-licensed dentists, the Georgia Board of Dentistry voted to change state dental regulations, now requiring that a licensed dentist be on premises for intraoral scans used in producing orthodontic appliances. This rule was endorsed by the Georgia Governor, but challenged by SDC.[53]

SDC sought declaratory judgment that scan-making is not professional practice and is therefore outside of the Board's authority. SDC also asked for injunctive relief, under the Sherman Act, against the Board and its members on the theory that the Georgia Board—just like the regulators in *North Carolina Board*—did not act within the state's sovereignty, and so receive no state-action immunity. SDC further claimed that the board violated its Fourteenth Amendment right to Equal Protection, as compared to non-SDC practitioners, and its right to Substantive Due Process.[54] The Georgia Board of Dentistry moved to dismiss all claims.[55]

Decision of the District Court for the Northern District of Georgia

The court dismissed the claim for declaratory relief: "[SDC]'s acts of taking digital scans of a patient's mouth for the purpose of having a dentist … approve of a treatment plan for correcting a malposition of the patient's teeth" are plainly "within the definition of the practice of dentistry" under the state's Practice Act.[56] But the Board did not fare as well on the antitrust claim. Although the *field* of regulation—intraoral scanning for orthodontics—was properly within the Board's authority, its regulatory *action* might have been illegal restraint of trade.

The district court arrived at this result by applying *North Carolina Board* to the antitrust question. Like North Carolina's board and many others,[57] Georgia's board is controlled by "market participants," and so must be treated in any state-action analysis like a private entity, albeit one potentially cloaked in the state's immunity. Georgia's Board failed the state-action analysis at the stage of pleadings because the Governor might have made the "Certification of Active Supervision" on factually inadequate supervision. Having found the Georgia Board ineligible for state-action immunity in its motion to dismiss, the court concluded on the facts as alleged—"concerted action on the part of the Board members," which action "unreasonably restrain[ed] trade" in the name of "a policy of excluding non-dentists from providing digital scans without the direct supervision of dentists"—that SDC sufficiently stated a claim against the board.[58]

The court also allowed the constitutional challenges to advance to the discovery stage. While noting that Fourteenth Amendment challenges subject the new regulation only to "rational-basis review," the court found SDC's claim that the regulation "creates an arbitrary distinction between persons or entities who offer digital scans" to state a claim "adequately set[ting] forth a plausible equal protection" action.[59] Similarly, the court decided that because SDC's allegation that the regulation was "merely designed to protect the business interests of traditional orthodontic practices" might be true, in which

[53]*See* SmileDirectClub, LLC v. *Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *5. (N.D. Ga. May 8, 2019).
[54]*Id.* at *6.
[55]Fed. R. Civ. P. 12(b)(6); *see Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *2.
[56]*Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *2.
[57]*See* Volokh, *Antitrust Immunity and the State*, *supra* note 38, at 194.
[58]*Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *4.
[59]*Id.* at *5.

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case "any purported health benefits [were] purely pretextual," SDC therefore stated a "viable due process claim."[60]

Comment

The Supreme Court has insisted that the actions of state-mandated professional regulatory boards might be deemed to violate antitrust law.[61] But here—where no factual challenge has been made to Georgia's active supervision of its Dental Board, and no one denies state endorsement of the Board's regulations—the Dental Board should be treated deferentially by a federal court.

Antitrust law *Georgia Board* is readily distinguishable from *North Carolina Board.* The Supreme Court found that the tooth-whitening kiosks in *North Carolina* did not violate a state regulation,[62] but SDC admits its practices would violate the newly clarified Georgia regulation.[63] North Carolina Board members sent out cease-and-desist letters admittedly without active supervision,[64] but the very regulation objected to by SDC had the Governor of Georgia's explicit blessing.[65] More critically, the Supreme Court accepted the FTC's finding of a conspiracy within North Carolina's dental board to limit competition beyond limits authorized by the state practice act. Here, however, SDC merely *alleges* a conspiracy, although the Board's lawful application of the Practice Act—which authorizes the Board to regulate "examination of 'any human oral cavity, teeth, gingiva … or [taking] an impression for the purpose of diagnosing, treating, or operating upon the same'"[66]—is a plausible explanation for its regulatory activity.

The district dourt, in ruling only on the Board's motion to dismiss, did not address these problems with SDC's antitrust claim. However, its analysis of the viability of SDC's allegations at the stage of pleadings was itself flawed. State-action immunity for a professional regulatory board dominated by market participants, following *North Carolina Board*, requires both the state's "clearly articulated … policy" favoring restraint of competition in favor of other state priorities, and that "the policy … be actively supervised by the State."[67] The state's policy favoring dental regulation, in the court's own view, was clearly articulated in the state's practice act. The district court also should have found no dispute of material fact as to active supervision, because the Governor signed the Board's new regulation.

Citing *Patrick v. Burget* [68]for the proposition that token supervision is not true active supervision,[69] the Northern District of Georgia accepted as plausible SDC's allegation that the governor's explicit

[60] *Id.* at *6.

[61] *See* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 496 (2015).

[62] *See id.* at 501-02; *but see* Brief for Petitioner at 7, *N.C. State Bd.*, 574 U.S. 494 (No. 13-534), 2014 WL 2212529, at *7 (arguing that tooth whitening was an activity within North Carolina's dental practice act); *see also* N.C. State Bd. of Dental Exam'rs v. FTC, 717 F.3d 359, 364 (4th Cir. 2013) ("Under the Dental Practice Act, a person 'shall be deemed to be practicing dentistry' if that person … '[r]emoves stains, accretions or deposits from the human teeth.'" (quoting N.C. GEN. STAT. § 90-29(b)(2))).

[63] *See Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *1. Although SDC, in requesting declaratory judgment, claimed that the board exceeded its statutory authority in regulating SDC, a non-dentist, the district court dismissed this claim because "[SDC's] acts of taking digital scans of a patient's mouth for the purpose of … correcting a malposition of the patient's teeth falls squarely within the definition of the practice of dentistry" under the state's practice act. *Id.* at *2.

[64] *N.C. State Bd.*, 574 U.S. at 514.

[65] *Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *5.

[66] *Id.* at *2 (quoting GA. CODE ANN. § 43-11-17(a)(5)). The district court itself noted that regulating "'attempts to correct a malposition' of the teeth (such as through the use of orthodontic appliances)" is within the Board's statutory authority. *Id.* (quoting GA. CODE ANN. § 43-11-17(a)(2)). The court equated dental scans with traditional dental impressions. *See id.* ("[D]igital scans of a patient's mouth for … correcting a malposition of the patient's teeth [are] squarely within … the practice of dentistry.").

[67] *N.C. State Bd.*, 574 U.S. at 504 (quoting California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. at 97, 105).

[68] 486 U.S. 94 (1988).

[69] *See id.* at 101.

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approval of the regulation in question was an ineffectual token of supervision: that his signature merely "rubberstamped" a Certification of Active Supervision.[70] The court found this claim—though supported only by allegations that "the Board [failed to] provide[] all relevant information to the Governor," and that the new regulation was not "subjected to any meaningful review by the Governor"—to amount to "a well-pleaded factual dispute that is not resolved by the Certification of Active Supervision," requiring discovery "and further factual development … to determine whether the Board members are entitled to *Parker* immunity."[71]

But there is no factual dispute that the Governor signed off on the new regulation; therefore, the Board properly raised the state-action defense at the pleading stage. *North Carolina Board* "identified only a few constant requirements of active supervision."[72] These constant requirements are that the supervisor must review the substance of a board's actions; must have the authority to veto a board's decisions; must not be a market participant; and must actually supervise the board, potential supervision being inadequate.[73] Here, these requirements are satisfied on the facts: by statute, a Georgia governor has "the authority and duty" to review regulations "[s]ubmitted by a professional licensing board for [her] review," and has power to "veto any [such] rule."[74] This Governor, who is presumably not a market participant, signed a statement approving the new regulation and certifying his active supervision. *North Carolina*'s constant requirements for active supervision are met under the facts and therefore SDC fails to rebut the Board's state-action defense at the stage of pleadings. What the court described as a "well-pleaded factual dispute" is couched as an allegation of the board's failure to fully inform the Governor, but in effect SDC alleges that the Governor was derelict in his duty to review a regulation he approved of, falsely signing a Certification of Active Supervision. This accusation has no factual basis; it contains only the conclusory allegation that because SDC claims that the Board engaged in conspiracy, it may also claim that this conspiracy succeeded in hoodwinking the Governor.

Moreover, SDC does not properly claim that the Board engaged in anticompetitive conspiracy in passing the new regulation. Although not a decision on the pleadings, *North Carolina Board*—in what amounted to addressing a threshold issue—found a proper antitrust claim in that the Court understood alleged "concerted [board] action to exclude non-dentists from the market for teeth whitening" to claim "an anticompetitive and unfair method of competition," because tooth whitening was not within North Carolina's practice act.[75] Here, however, where the district court found digital orthodontic scanning to be properly within Georgia's Practice Act, the Board acted lawfully in regulating this procedure. This regulation is not a conspiracy to restrain trade without the allegation of facts supporting such a characterization.[76] *North Carolina Board* does not establish that duly adopted professional regulation is evidence of illegal anticompetitive conspiracy merely because a plaintiff like SDC claims to be negatively impacted by the regulation.[77]

[70] *Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *5.

[71] *Id.*

[72] *N.C. State Bd.*, 574 U.S. at 515.

[73] *See id.*

[74] GA. CODE ANN. § 43-1C-3(a)(1) (2022).

[75] *N.C. State Bd.*, 574 U.S. at 500–01, 504 (2015) (the *Midcal* test, which the North Carolina Board failed on the active supervision prong, was triggered in the first place because "[w]hile North Carolina prohibits the unauthorized practice of dentistry … its Act is silent on whether that … prohibition covers teeth whitening," such that the board needed "active supervision by the state when it interpreted the act as addressing teeth whitening"); *cf.* Defendants' Motion To Dismiss Complaint (Fed. R. Civ. P. 12(b)(6)) at 15, *Sulitzer*, No. CV 19-8902 (C.D. Cal. Mar. 2, 2020) [hereinafter Tentative Ruling, *Sulitzer*, No. CV 19-8902] (finding an SDC antitrust suit against California regulators failed to state a claim even absent active supervision). Silence of a practice act on whether a specific service is within dental practice is not to be confused with a state's clearly articulated policy, read broadly, in favor of restricting competition in the dental field, which is a function of the state having a dental practice act in the first place. *See N.C. State Bd.*, 574 U.S. at 504.

[76] *See Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *4.

[77] SDC's complaint alleged an "agreement among [the Board members] *expressly stated* in [the new regulation,] Subparagraph (aa) of Rule 150-9-.02(3)," as "evidence of concerted action" taken to "exclud[e] non-dentists from providing digital scans

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To summarize, even accepting as factual SDC's allegation that the Board intended to hamper SDC's competitive position, the Board did so under Georgia's clearly articulated policy in favor of restricted competition in dentistry while under the Governor's direct supervision. SDC, therefore, does not claim a violation of antitrust law under the facts alleged, because the board acted with *Parker* immunity under the state-action doctrine. SDC's complaint, for which then there can be no relief, should not survive a Rule 12(b)(6) motion to dismiss even if there be a factual basis to its charge of "concerted action."[78] Actual conspiracy of private market participants, even if proved, would not detract from a state board having satisfied *North Carolina Board*'s tests of what regulatory activity is duly approved under the state's active supervision. The Georgia Governor's explicit endorsement of the regulation in question, which is not in dispute, surely must satisfy active supervision even at the pleading stage. And even if active supervision was lacking here, SDC has failed from the outset to allege facts sufficient to claim a conspiracy under antitrust law. The Board followed the state's directive, explicit in the Practice Act, to regulate orthodontic examination of patients, which does not amount to a violation of the Sherman Act.[79]

Constitutional law and summary SDC also fails to state a Due Process claim. The procedures for adoption of dental regulations, procedures that the state legislature enacted, should be presumed to conform with Due Process requirements subject only to rational basis review. While the Northern District of Georgia accepted rational basis as the proper standard of review here, the court nevertheless concluded that SDC's allegations—that the new regulation was "merely designed to protect the business interests of traditional orthodontic practices" and that the "purported health benefits [were] purely pretextual"— were "sufficient to state a viable due process claim."[80]

In finding a properly stated Due Process claim, the district court did not undertake the rational-basis review the court had stated to be appropriate for the Board's new regulation.[81] Reciting that the two prongs for rational basis review are "(1) whether the government has the power or authority to regulate the particular area in question, and (2) whether there is a rational relationship between the government's objective and the means it has chosen to achieve it,"[82] the district court proceeded to ignore these questions. The court had already addressed the first prong—legitimate government power/authority—when it found SDC "incorrect" in claiming "digital scan services" to be outside the state's practice act;[83] the new regulation, therefore should pass this first prong of rational basis review.

As for the second prong—the question of "a rational relationship" between the Board's purpose and the means it employed—the Board explicitly informed the court of just such a "relationship between the [Board's] objective and the means it has chosen to achieve it:" that the Board's new regulation requires a licensed dentist to be present during all digital oral scans for the purpose of

without the direct supervision of dentists, thereby harming competition in the Relevant Market." *Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *4 (emphasis added). The logical leap SDC's complaint makes, describing the Board's vote to pass the new regulation as evidence of conspiracy, amounts to mere speculation, which the district court should have dismissed on its own understanding of the Federal Rules of Civil Procedure. *See id.* at *2 (setting as the "Legal Standard" for a complaint to survive a Rule 12(b)(6) motion that "[t]he complaint must 'raise a right to relief above the speculative level'" (quoting Renfroe v. Nationstar Mortg. LLC, 822 F.3d 1241, 1244 (11th Cir. 2016) (quoting *Twombly*, 550 U.S. at 555))).

[78] *Cf. Ga. Bd.*, 2019 WL 3557892, at *4; *see Parker v. Brown*, 317 U.S. 341, 352 (1943) (because "the Sherman Act … must be taken to be a prohibition of individual and not state action," therefore state actions restraining competition are not equated with "conspiracy in restraint of trade," but are instead "restraint[s] as … act[s] of government which the Sherman Act did not undertake to prohibit").

[79] *Cf. id.* (state actions are not "conspiracy" under the Sherman Act); *see* N.C. State Bd. of Dental Exam'rs v. FTC, 574 U.S. 494, 500–01, 504 (2015) (North Carolina's board did not qualify for *Parker* immunity without active supervision, only because the regulatory undertaking in question was outside the state's practice act).

[80] *Ga. Bd.*, No. 18-cv-02328, 2019 WL 3557892, at *5–6.

[81] *Id.* at *5.

[82] *Id.* (quoting Blue Martini Kendall, LLC v. Miami Dade County, 816 F.3d 1343, 1351 (11th Cir. 2016)).

[83] *Id.* at *2.

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"promot[ing] health and safety."[84] Courts have long understood rational basis review to look merely into the presence of *any* rational basis,[85] like the one offered here by the Board, and not into whether a rational basis is "purely pretextual."[86] The court did not find the connection between the Board's legitimate objectives and its means to be irrational. Therefore, the court should have found that both prongs of rational basis review were met by the new regulation. SDC therefore fails to state a Due Process claim; its allegation of a different reason motivating the regulation is not significant to the inquiry.[87] The district court should have dismissed SDC's Due Process claim on the Board's Rule 12(b)(6) motion.[88]

Similarly, SDC's Equal Protection claim, also subject to rational basis review,[89] should have been dismissed. As with the Due Process claim, the new regulation satisfies Equal Protection on this basis because (1) the board "has the authority to regulate the particular area in question"—the scope of dental practice; and (2) "there is a rational relationship between the [board's] objective"—health and safety—"and the [classification] it has chosen," which is the requirement of *professional* supervision over a dental procedure.[90] Furthermore, the Board's new regulation applies equally to all actors within dentistry irrespective of the type of practice setting. When all those regulated by a state board—whether working with a corporation like SDC or in traditional dental practices—are subject to the same rules, a claim that the board violates Equal Protection becomes difficult to effectively assert.[91]

As a practical matter, heightened judicial review for constitutionality of every regulatory response to new technology is undesirable where such regulation rationally updates existing professional standards

[84]*Id.* at *5.

[85]*See, e.g.*, Williamson v. Lee Optical of Okla., Inc., 348 U.S 483, 491 (1955) (because a law banning eye examinations within a "retail store" might be rationally related to a "legislative program which aims to raise the treatment of the human eye to a strictly professional level," therefore "[w]e cannot say that the regulation … is beyond constitutional bounds." (citing Semler v. Or. State Bd. of Dental Exam'rs, 294 U.S. 608, 611 (1935) ("[T]he state may deny to corporations the right to practice [dentistry] … "))).

[86]*See Blue Martini*, 816 F.3d at 1351 ("A state is under no obligation to produce evidence supporting the rationality of the legislation and … need not even have actually been motivated by the rational reason presented to the court … .") (citing FCC v. Beach Commc'ns, Inc., 508 U.S. 307, 314–15 (1993)).

[87]The district court might have been concerned that SDC's allegation—of a regulation "designed" merely to protect entrenched business interests—possibly could be true, the court noting that "protecting a discrete interest group from economic competition is not a legitimate governmental purpose." *Ga. Bd.*, 2019 WL 3557892, at *6 (quoting Craigmiles v. Giles, 312 F.3d 220, 224 (6th Cir. 2002)). Even if this concern were well-founded, however, it is not relevant to a review of this regulation, which passes a rational basis inquiry because, as the district court did not deny, the regulation reasonably addresses the *legitimate* government interest in public safety. *See* Williams v. Pryor, 240 F.3d 944, 948 (11th Cir. 2001) ("[I]t is entirely irrelevant for constitutional purposes whether the conceived reason … actually motivated the legislature … .") (quoting *Beach Commc'ns,* 508 U.S. at 315).

[88]*See Williams*, 240 F.3d at 948 ("[A] legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." (quoting *Beach Commc'ns,* 508 U.S. at 315)); *see also* Tentative Ruling, *Sulitzer*, No. CV 19-8902 at 22 ("Plaintiffs' mere 'speculative and conclusory' no-legitimate-purpose allegation does not automatically make their claim viable." (citing Fields v. Palmdale Sch. Dist., 427 F.3d 1197, 1209–10 (9th Cir. 2005)).

[89]*See Ga. Bd.,* No. 18-cv-02328, 2019 WL 3557892, at *5 (citing *Blue Martini*, 816 F.3d at 1351).

[90]*Id.* (quoting *Blue Martini,* 816 F.3d at1351); *Blue Martini*, 816 F.3d at 1350 (rational basis review is the proper level of scrutiny for regulations neither "discriminat[ing] against a protected class, nor … implicat[ing] any fundamental constitutional right"). As the Northern District of Georgia found regarding the Board's authority, "taking digital scans of a patient's mouth for the purpose of having a dentist … approve of a treatment plan for correcting a malposition of the … teeth falls squarely within the definition of the practice of dentistry as set forth in" the Practice Act. *Id.* at *2. The court should have found such regulation rationally related to protecting the health and safety of patients from unsupervised dental practice, without recourse to further fact-finding on SDC's allegation that the scanning procedure itself, in isolation, "present[s] no health or safety risk." *See id.* at *6; *Williams*, 240 F.3d at 948 (the state "must be allowed leeway to approach a perceived problem incrementally," even if the approach it chooses tends to over-regulate within the legitimate scope of authority (quoting *Beach Commc'ns*, 508 U.S. at 316)).

[91]Instead of taking at face value the regulation's classification based on professional licensure status—and its equal application across the dental industry—the district court instead accepted SDC's allegation that the regulation distinguishes "persons or entities who offer digital scans by [unsupervised] technicians (such as SmileDirect) [from] those who offer digital scans by expanded duty dental assistants acting under the direct supervision of a licensed dentist." *Ga. Bd.*, 2019 WL 3557892, at *5.

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to emerging circumstances. Here, the new regulation—Rule 150-9-.02(3)(aa), "Digital scans for fabrication [of] orthodontic appliances and models."—simply extends Rule 150-9-.02(3)(p), "Make impressions for passive orthodontic appliances," to novel technological developments. This adjustment of Rule 150-9-.02(3) is proper to that rule's purpose in detailing which procedures require licensed supervision, "fall[ing] squarely within the definition of the practice of dentistry as set forth in" the Practice Act,[92] which act includes taking "impression[s] for the purpose of diagnosing, treating, or operating upon the same" among dental procedures.[93] SDC makes no argument to "negative" the Board's legitimate and rational purposes;[94] SDC's constitutional claims therefore should fail even at the stage of pleadings.[95]

In summary—contrary to the decision of the Northern District of Georgia, which rejected the state board's motion to dismiss—SDC has no viable antitrust or constitutional claims against the Georgia dental board. The board regulated SDC's activities reasonably and within the scope of its authority over dental practice. Relevant particularly to federal antitrust law under *North Carolina Board*, Georgia's board acted under the governor's direct supervision.

Other litigation involving SDC and state dental boards

Sulitzer v. Tippins

In conforming its structure to California law—particularly to a prohibition on the corporate practice of dentistry[96]—SDC leased its SmileShop scanning locations to licensed dentists and provided these affiliated dentists with "non-clinical, administrative services," SDC claiming "not itself [to be] engage[d] in the practice of dentistry."[97] An investigator for the California Board of Dentistry undertook what SDC describes as "coordinated raids" of SmileShops.[98] SDC filed its complaint with the Central District of California, alleging that the California Board targeted SDC, "its affiliated practices, and the direct-to-consumer model … [for no] legitimate concern about the public health," but instead to protect "the traditional delivery model" engaged in by the Board's licensed dentist members.[99] SDC's suit against the Board and its members charges them with violation of the Sherman Act, the Dormant Commerce Clause, Equal Protection, Substantive Due Process, and California's Unfair Competition Law.[100] The district court dismissed, without leave to amend, all of SDC's federal claims.[101]

While rejecting the Board's assertion of state-action immunity to antitrust suit—because the Board is dominated by market participants and "cannot demonstrate the active supervision *North Carolina State Board* appears to require"—the Central District of California nevertheless dismissed the federal antitrust claim because SDC did not allege facts describing a conspiracy in violation of the Sherman Act.[102] The court dismissed the Fourteenth Amendment claims on finding that the Dental Board's investigation of dental practices survives rational basis review.[103]

[92] *Id.* at *2.

[93] *Id.* (quoting Ga. Code Ann. § 43-11-17(a)(5) (2022)).

[94] *See Williams*, 240 F.3d at 948 (quoting *Beach Commc'ns*, 508 U.S. at 315).

[95] *See id.*

[96] Cal. Bus. & Prof. Code §§ 1800–08 (Deering 2021). For the corporate practice of medicine doctrine, see *supra* notes 20–21 and accompanying text.

[97] Tentative Ruling, *Sulitzer*, No. CV 19-8902, at 1–2.

[98] *Id.* at 2–3.

[99] *Id.* at 1–2.

[100] *Id.* at 1.

[101] Tentative Ruling, *Sulitzer*, No. CV 19-8902, at 1 C.D. Cal. Apr. 22, 2020) (dismissing federal claims and declining jurisdiction over state claim).

[102] Tentative Ruling, *Sulitzer,* No. CV 19-8902, at 13–16.

[103] *Id.* at 20 –22. The district court dismissed the Dormant Commerce Clause claim since the Board's "actions here clearly do not discriminate against out-of-state conduct." Hearing on Defendants' Motion To Dismiss Complaint at 3–5, *Sulitzer*, No. CV 19-8902 (C.D. Cal. Mar. 2, 2020) (hearing via telephone).

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Board of Dental Examiners of Alabama v. FTC[104]

The Alabama Board promulgated a new rule—similar to Georgia's new regulation—"amending the Alabama Code to prohibit the making of 'digital images' or 'digital impressions' of a patient's mouth without the 'direct supervision' of a dentist."[105] Reminiscent of *North Carolina Board*, the Alabama Board sent SDC a cease-and-desist letter "directing it to stop offering teledentistry services … because its 'SmileShop' did not have a dentist … on-site."[106]

The FTC issued the Board an official request for information regarding passage and enforcement of this new rule. The Board then asked the district court, on the theory of state-action immunity, to enjoin the FTC's investigation.[107] The Northern District of Alabama, while doubting that the board is exempt from FTC oversight, decided that in any case the "court lacks jurisdiction over this matter because an investigation … is not a 'final agency action' within the meaning of [5 U.S.C.]§ 704."[108]

This survey of litigation involving SDC and state dental boards shows that courts have not yet settled how *North Carolina Board* applies to state regulation of a corporation that directly, through corporate practice, or indirectly, through affiliated licensees, engages in dental practice. While courts are deciding relevant law, particularly how to work out conflict between state practice regulations and federal antitrust law, the courts should consider the significant matters of public policy intrinsic to the problem.

Public policy: reconciling misaligned interests

North Carolina Board did not settle regulatory misalignment between professional boards and antitrust enforcement.[109] Some commentators have read *North Carolina Board* as confirming that courts must treat licensed-professional markets no differently from the rest of the economy.[110] But *North Carolina Board* itself does not define "active supervision" so narrowly as to make all doctor-dominated boards into non-state market actors.[111] While strongly affirming the federal policy disfavoring private-sector monopolies, *North Carolina Board* allows that actively supervised self-regulating boards *are* state

[104]Bd. of Dental Examiners v. FTC, 519 F. Supp. 3d 1033 (N.D. Ala. 2021).

[105]*Id.* at 1036.

[106]*Id.*

[107]*Id.*

[108]*Id.* at 1039. The statute makes only "final agency actions," but not investigations, "subject to judicial review." *See* 5 U.S.C. § 704.

[109]A critic of professional self-regulation notes that *North Carolina Board* does not itself resolve the conflict between state boards and federal antitrust law. *Compare* Volokh, *The Worst Monopolies*, *supra* note 52, at 136 ("[A]ny doctrine [like *Parker*] that privileges government action through extra immunities should be viewed with skepticism and limited as far as possible – especially where, as [in the case of a state professional board], the government action involved is monopolization of the most pernicious kind."), *with* Volokh, *Antitrust Immunity and the State*, *supra* note 38, at 196 ("[W]hether [*North Carolina Board*] makes a difference depends on how the courts apply it going forward … . In particular, the lower courts are now dealing with … what constitutes 'active supervision.'").

[110]*See* Charles M. Key, *Preserving Competition in the Context of Professional Self-regulation;* North Carolina State Board of Dental Examiners v. FTC, 27 Health. Law. 42, 46 (2015) ("[*North Carolina Board*] again demonstrates that the antitrust laws … will be applied consistently to protect competition among professionals and within the healthcare industry, just as in the rest of the nation's economy."); Carstensen, *supra* note 52, at 699–700, 730, 741 (*North Carolina Board* fits the author's existing explanatory framework for how courts implicitly decide whether to apply antitrust exemptions like state-action immunity).

[111]*See* Jeffrey P. Gray, *In Defense of Occupational Licensing: A Legal Practitioner's Perspective*, 43 Campbell L. Rev. 423, 445 (2021) ("[*North Carolina Board*] did not go so far as to define … what state involvement was needed, writing, 'It suffices to note that the inquiry regarding active supervision is flexible and context dependent.'"); *see also* Jabs, *supra* note 52, at 64 ("[T]he Court could not delineate a clear standard for active supervision… . because the Board did not contend that it had active state supervision over its mailing of cease-and-desist letters."); *see also* Richard F. Walker III, *Cavity Filling or Root Canal? How Courts Should Apply* North Carolina State Board of Dental Examiners v. FTC, 66 Emory L. J. 443, 447 (2017) ("[I]t remains to be seen how expansively the FTC and lower courts will apply the decision."); *cf.* William M. Sage & David A. Hyman, *Antitrust as Disruptive Innovation in Health Care: Can Limiting State Action Immunity Help Save a Trillion Dollars?*, 48 Loy. U. Chi. L.J. 723, 737 (2017) ("[T]he Court did not specify the exact meaning of 'active supervision' … nor did it definitively resolve the dental board's legal status as public or private."); *cf.* Volokh, *Antitrust Immunity and the State*, *supra* note 38, at 196.

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actors.[112] Perhaps even an "inadequately" supervised board, acting in strict conformity to a state practice act, would not—under *North Carolina Board*—be held a conspiracy under the Sherman Act, but instead as law-abiding private citizens.[113]

In such instances, where a professional board's acts can be construed as state action or as implementing the state practice act, it is proper for courts to resolve the conflict between state health regulation and federal antitrust law in favor of a board.[114] The economic reasons motivating antitrust law are important,[115] but not always supreme:[116] absolute free markets will not as a rule protect patients.[117] Furthermore, patient harm itself has economic costs.[118]

Therefore, the tradition of professional self-regulation, which undergirds health law at the state level, should not be cast aside after *North Carolina Board.* Courts should not allow corporations like SDC to use antitrust law to escape state regulation. SDC itself is a sophisticated market actor whose bargaining power over consumer-patients puts the public at a disadvantage,[119] one for which antitrust law provides no remedy.[120] Courts also should resist a temptation to accept that plausible antitrust claims justify subjecting regulations and regulators to heightened scrutiny on Fourteenth Amendment claims.[121]

As long as professional regulation is under state sovereignty, antitrust federalism—under *Parker*—must temper the strict enforcement of free markets for healthcare.[122] *Dent* is still good law and is still good policy: SDC's employees do not have "a right to practice [dentistry] without having the necessary qualifications and skill," and those qualifications properly are set by "a body designated by the state as competent to judge."[123]

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[112]Some writers advocate that states create actively supervisory "review commissions." *See* Jabs, *supra* note 52, at 72; Key, *supra* note 110, at 43 & nn.19–20.

[113]*See supra* notes 75–77, 79 and accompanying text.

[114]*Cf.* Carstensen, *supra* note 52, at 730, 741 ("active supervision" is but a way to demonstrate a board's adherence to the state's "appropriate process").

[115]*See, e.g.*, Sage & Hyman, *supra* note 111, at 728 ("[O]nce one begins to see the affordability of high-quality professional services as an intrinsic … challenge, the use of antitrust law to constrain self-interest, reduce waste, and enhance consumer choice becomes much more attractive. This is particularly true for our health care system, which wastes approximately $1 trillion every year on overpriced, unnecessary, and ineffective services.").

[116]*See* Gray, *supra* note 111, at 475 ("[T]he licensing naysayers may be correct with their various economic theories … but if truth be known the American public may just want their government to protect them regardless."); Theodosia Stavroulaki, *Connecting the Dots: Quality, Antitrust, and Medicine*, 31 Loy. Consumer L. Rev. 175, 180 (2019) ("Since opportunistic behavior by physicians harms patients' trust in their physicians and generates anxieties harmful to the medical enterprise, there is good reason to consider whether a principled basis in competition law for deeming such claims compatible with a competitive regime is necessary.").

[117]*See* Stavroulaki, *supra* note 116, at 223 ("[B]ehavioral economics research indicat[es] that human beings in general and patients in particular do not necessarily … make the decisions that serve their interests."); Gray, *supra* note 111, at 454–55 ("[A] world without licensing would be frightening … because consumers need protecting.").

[118]*See* Stavroulaki, *supra* note 116, at 181–83 (in a truly free market for healthcare, information asymmetry means that patients cannot distinguish poor-quality providers from good-quality providers, therefore cost-cutting and low quality are economically incentivized) (citing George A. Akerlof, *The Market for "Lemons": Quality, Uncertainty and the Market Mechanism*, 84 Q.J. ECON., 488, 489 (1970)).

[119]*See* Nguyen & Dunn, *supra* note 22 ("If customers can show the treatment didn't work and want a refund outside the return window, SmileDirectClub requires they sign a confidentiality agreement, raising the possibility that there may be more complaints than have been made public.").

[120]*See id.* ("[O]f the complaints [about SDC to the Better Business Bureau] … dozens describe concerns about treatment results … like broken teeth and nerve damage.").

[121]*See* Tentative Ruling, *Sulitzer*, No. CV 19-8902 at 22 ("[T]he 'silence' that [SDC] perceives with respect to whether California law actually prohibits what they are engaged in here is a fact that … supports their argument against state-action immunity in connection with their Sherman Act claim. But the Court does not perceive how it helps them in connection with their substantive due process claim." (citation omitted)).

[122]*See* Stavroulaki, *supra* note 116, at 183 ("[I]f competition authorities have to decide whether a specific form of self-regulation … is pro- or anti- competitive, they should … weigh harm to competition against quality improvements.").

[123]Dent v. West Virginia, 129 U.S. 114, 123 (1889).

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Conclusion

Even the antitrust-favorable decision of *North Carolina Board* does not automatically push dental boards outside state-action immunity. SDC, therefore, should not be allowed to use its competitive business model and antitrust claims to end-run the rules all dentists must obey, to disregard state regulations with impunity. Similar analysis shows that SDC's Equal Protection and Due Process claims should fail even at the stage of pleadings. SDC is not a small-time unlicensed kiosk operator, the sort of market actor *North Carolina Board* protects from bullying by alleged monopolists; far from it, SDC is a national corporation with a claimed monopoly of its own over its methods.[124] Because the public depends on the states to protect it from unqualified or irresponsible healthcare providers and the states in turn depend upon the expertise of licensed professionals, professional self-regulation remains a public necessity. Unless and until federal law addresses the safety of patients with respect to direct-to-consumer dental treatment, courts should permit state dental regulators to fulfill their mandates and ensure that all dental providers comply with health regulations.

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[124] *See, e.g.*, cases cited *supra* note 14.

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