*North Carolina State Bd. of Dental Exam’rs v. Federal Trade Comm’n* \_\_\_ U.S. \_\_\_ (2015)

JUSTICE KENNEDY delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board’s members are engaged in the active practice of the profession it regulates. The question is whether the board’s actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court’s decisions beginning with *Parker v. Brown*, 317 U. S. 341 (1943).

*[North Carolina law provides that the State Board of Dental Examiners is “the agency of the State for the regulation of the practice of dentistry.” The Board’s principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.*

*The act does not specify that teeth whitening is “the practice of dentistry,” but dentists started providing the service in the 1990s. By 2003, cosmetologists and other nondentists started charging lower prices
for the same services, and the dental board began to issue cease-and-desist letters warning that the unlicensed practice of dentistry is a crime. This and other threatening actions led nondentists to stop offering teeth whitening services, but some of them complained to the Federal Trade Commission (FTC), which began an investigation.*

*In 2010 the FTC filed administrative charges alleging that the dental board’s concerted action to exclude nondentists from the market for teeth whitening amounted to an anticompetitive and unfair method of competition under the Federal Trade Commission Act. The dental board moved to dismiss the complaint on the ground of “state-action immunity,” but the FTC denied that motion, ruling that even if the board had acted pursuant to a clearly articulated state policy, it must be actively supervised by the state to claim immunity, which it was not. This ruling was ultimately affirmed by the US Court of Appeals for the Fourth Circuit, and a petition for certiorari to the Supreme Court followed.]*

Federal antitrust law is a central safe- guard for the Nation’s free market structures. In this regard it is “as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.” The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public’s welfare. The States, however, [sometimes may] impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States’ power to regulate.

For these reasons, the Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. That ruling recognized Congress’s purpose to respect the federal balance and to “embody in the Sherman Act the federal- ism principle that the States possess a sig- nificant measure of sovereignty under our Constitution.”

In this case the Board argues [that] its members were invested by North Carolina with the power of the State and that, as a result, the Board’s actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: “first that ‘the challenged restraint . . . be one clearly articu- lated and affirmatively expressed as state policy,’ and second that ‘the policy . . . be actively supervised by the State.’” *[Citing the* Phoebe Putney *case, excerpted beginning on p.497)… Here, the board did not receive* active supervision by the State when it inter- preted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market partici- pants, [because] established ethical stan- dards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In conse- quence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy.
. . .

*[Citing* Phoebe Putney *and other cases, Justice Kennedy discusses the reasons to limit a state’s ability to delegate regulatory power to “active market participants.”]*

[L]imits on delegation must ensure that “[a]ctual state involvement, not deference
to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.” And [the] active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has “an incentive to pursue [its] own self-interest under the guise of implementing state policies.” . . . [T]he need for supervision [by the state] turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.

State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self- dealing [that the] supervision requirement was created to address.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when [the law] was passed. After receiving complaints from other dentists about the nondentists’ cheaper services, the Board’s dentist members—some of whom offered whitening services—acted to expel the dentists’ competitors from the market. In
so doing the Board relied upon cease-and- desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes “the practice of dentistry” and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its pow- ers under North Carolina law, there is no evidence here of any decision by the State
to initiate or concur with the Board’s actions against the nondentists.
. . .

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations
or hybrid agencies. If a State wants to rely on active market participants as regula- tors, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

1. Why did the majority believe that the state dental board violated the federal Sherman Act?

2. How can any state continue to regulate health care within its borders - and still comply with antitrust laws?