

**ANTITRUST IMPLICATIONS OF SCOPE
OF PRACTICE AND OTHER REGULATORY ACTIONS
OF STATE BOARDS OF MEDICINE**

**A White Paper of the
Federation of State Medical Boards (FSMB)**

Prepared By:

**Jack R. Bierig
Sidley Austin LLP
One South Dearborn Street
Chicago, IL 60603**

**Adopted as policy by the Federation of State
Medical Boards on October 3, 2011**

CONTACT INFORMATION:

Lisa Robin
Chief Advocacy Officer

Federation of State Medical Boards
1110 Vermont Avenue NW | Suite 1000 | Washington, DC 20005
202-530-4872 direct | 202-530-4800 fax
lrobin@fsmb.org

Federation of
**STATE
MEDICAL
BOARDS** PROTECTING THE PUBLIC WITH HIGH STANDARDS
FOR MEDICAL LICENSURE AND PRACTICE

EXECUTIVE SUMMARY

The Federal Trade Commission has sued a State Board of Dentistry that has taken actions that the Commission regards as anticompetitive. It has injected itself into the regulatory process of State Boards of Medicine when it believes that that process may result in anticompetitive effects. The FTC takes the position that it has authority over State Boards of Medicine and Dentistry because these Boards are comprised exclusively or primarily of practitioners in the regulated profession.

The Federation of State Medical Boards respectfully submits that, for two independent reasons, the FTC cannot lawfully second-guess the considered regulatory judgments of State Boards of Medicine and Dentistry. First, the federal antitrust laws were not intended to outlaw, and do not outlaw, actions of state agencies such as State Boards of Medicine and Dentistry. Second, quite apart from the scope of the antitrust laws generally, the Federal Trade Commission does not have jurisdiction over such Boards.

With respect to the first point, application of the antitrust laws to actions of State Boards requires a balancing of two basic values in American society – (a) a commitment to vigorous competition and (b) respect for the sovereignty of the States in our system of federalism. As long ago as 1943, the Supreme Court ruled that nothing in the antitrust laws indicates that their purpose “was to restrain a state or its officers or agents from activities directed by its legislature.” *Parker v. Brown*, 317 U.S. 341, 350-351 (1943). Subsequently, while the issue has not been definitively decided by the Supreme Court, both the weight of authority and sound reasoning lead to the conclusion that the federal antitrust laws do not prohibit a State Board of Medicine from taking action that has anticompetitive effects – even if the Board consists entirely of practicing physicians – as long as four conditions are met:

1. The State Board was created by act of the legislature, and its members are selected in accordance with procedures established by the legislature;
2. The Board acts pursuant to a legislative grant of authority to define and regulate the practice of medicine even if there is not a specific legislative mandate to adopt a particular position;
3. The action of the State Board is subject to judicial review under state law and to overturning by act of the legislature; and
4. There is no substantial evidence that the Board sought to subvert the public interest.

The FTC's arguments to the contrary are predicated on the notion that State Boards of Medicine are not really state agencies, but rather are private conduct masquerading as state action. This argument fails for several reasons. First and foremost, every State Board is established by the state legislature, and its members are appointed or otherwise selected in accordance with procedures determined by the legislature. Significantly, its actions must accord with state administrative procedure acts and are subject to judicial review under state law. Moreover, these actions are subject to repeal or modification if the legislature does not agree with them. Not surprisingly, therefore, virtually every judicial decision to address the issue has held that a State Board of Medicine or a State Board of Dentistry is a legitimate state agency.

Turning to the jurisdiction of the Federal Trade Commission, Congress has limited that jurisdiction to natural persons, partnerships, and corporations that are organized to carry on business for the profit of themselves or their members. State Boards of Medicine are not natural persons or partnerships. Nor are they corporations organized to carry on business for profit. Rather, they are state agencies established to regulate the practice of medicine within the state pursuant to laws enacted by the state legislature.

Both of these reasons are discussed in detail in the FSMB's White Paper. As demonstrated in that Paper, the Federal Trade Commission's efforts to inject itself into decisions of State Boards of Medicine and Dentistry should be halted.

This White Paper addresses application of the federal antitrust laws to actions of a State Board of Medicine where three conditions are present:

1. The action is taken pursuant to a legislative grant of authority to the Board to regulate the practice of medicine and to define its scope, but the action is not specifically directed by the legislature;
2. The Board is comprised largely, or exclusively, of practicing physicians -- who have been elected or appointed through a procedure established by the legislature; and
3. The action may be alleged to have anticompetitive effects.

These issues arise when the Federal Trade Commission writes to a State Board objecting to a proposed rule which the Commission regards as anticompetitive (*see, e.g.*, November 3, 2010 letter from FTC staff to Patricia E. Shaver, General Counsel of the Alabama State Board of Medical Examiners regarding a proposed rule on interventional pain management) – and when the Commission sues a State Board over an action which the Commission sees as suppressing competition. *See, e.g., In re North Carolina State Board of Dental Examiners*, FTC Docket No. 9343 (alleging that action of N.C. Board in limiting to licensed dentists the provision of tooth whitening services violates § 5 of the Federal Trade Commission Act, 15 U.S.C. § 45(a)).

This issue is of significance to the Federation of the State Medical Boards (“FSMB”) and its member Boards because uncertainty as to proper application of the antitrust laws to actions of State Boards -- and concerns about becoming embroiled in protracted and highly expensive litigation with the FTC -- can deter a State Board from taking action that it regards as in the best interests of patients. For this reason, FSMB respectfully offers this White Paper for consideration by Congress, state legislatures, State Boards of Medicine, and courts.

SUMMARY

In essence, the conclusions of this White Paper are as follows: While the issue has not been definitely resolved by the Supreme Court and while the FTC and some courts have ruled to the contrary, the federal antitrust laws do not prohibit a State Board of Medicine from taking action that has anticompetitive effects -- even if the Board consists entirely of practicing physicians -- as long as four conditions are satisfied:

1. The State Board was created by act of the legislature, and its members are selected in accordance with procedures established by the legislature;
2. The Board acts pursuant to a legislative grant of authority to define and regulate the practice of medicine even if there is not a specific legislative mandate to adopt a particular position;
3. The action of the State Board is subject to judicial review under state law and to overturning by act of the legislature; and
4. There is no substantial evidence that the Board sought to subvert the public interest.

In addition, there is, at a minimum, substantial doubt as to whether the Federal Trade Commission even has jurisdiction over State Boards of Medicine. The reasons for these conclusions are set forth below.

DISCUSSION

I. ANTITRUST ANALYSIS

Application of the federal antitrust laws to actions of State Boards of Medicine requires a balancing of two basic values that are in tension with one another in this context. On one hand, as reflected in the Sherman, Clayton, and Federal Trade Commission Acts, our society is committed to vigorous competition. On the other hand, in our federal system of government, states are sovereign entities whose sovereignty must be accorded deference. For nearly seventy

years, the courts have struggled to harmonize these two values in specific cases. The result of this effort is referred to as the “state action doctrine.”

This section of the White Paper begins by discussing decisions of the Supreme Court under the state action doctrine. It then examines relevant decisions of federal appellate courts and the Federal Trade Commission. With these precedents as background, it proceeds to an analysis of the state action doctrine as applied to conduct of State Boards of Medicine.

A. Decisions of the Supreme Court

The first Supreme Court case to confront the tension between the federal antitrust laws and the role of the states in our system of federalism was *Parker v. Brown*, 317 U.S. 341 (1943). There, plaintiff sued to enjoin a California state agency from enforcing a state raisin marketing program that sought to stabilize prices under the auspices of the State’s Agricultural Prorate Act. Although the program was anticompetitive, the Supreme Court held that the program was immune from challenge under the Sherman Act because it “derived its authority ... from the legislative command of the State.” *Id.* at 350. The Court found nothing in the language or legislative history of the Sherman Act to suggest “that its purpose was to restrain a state or its officers or agents from activities directed by its legislature.” *Id.* at 350-351. Rather, “(i)n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state’s control over its officers and agents is not lightly to be attributed to Congress.” *Id.* at 350-151.

Thirty-seven years later, in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), the Supreme Court summarized its jurisprudence regarding the state action doctrine as follows: Where a non-governmental defendant raises that doctrine as a defense to an antitrust

action, the defendant must show that the challenged restraint was (a) imposed pursuant to a “clearly articulated and affirmatively expressed” state policy and (b) “actively supervised” by the State. *Id.* at 105-106. These two prongs of the *Midcal* test are referred to as the “clear articulation” and the “active state supervision” requirements.

Significantly, *Midcal* was a suit against private defendants -- not against a governmental entity. The Supreme Court has made clear that the two-prong test summarized in that case does not apply to conduct of a state legislature. *Southern Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 62-63 (1985). Nor does the *Midcal* test apply to actions of a state Supreme Court, and it probably does not apply to decisions by the Governor of a state. *See Hoover v. Ronwin*, 466 U.S. 558 (1984). Actions of these institutions are, *ipso facto*, not subject to the federal antitrust laws. *Id.* at 568.

A more difficult issue, however, relates to the antitrust consequences of actions of subordinate governmental entities such as municipalities or state agencies. The Supreme Court first considered an action against a subordinate governmental entity in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978). In that case, the Court rejected the notion that the state action doctrine extends to “all governmental entities, whether state agencies or subdivisions of a State ... simply by reason of their status as such.” *Id.* at 408. However, a plurality of the Court held that the state action doctrine exempts from the Sherman Act anticompetitive conduct of a municipality when that conduct is “pursuant to state policy to displace competition with regulation or monopoly public service.” *Id.* at 413. Notably, the plurality concluded that “an adequate state mandate for anticompetitive activities of cities and other governmental units exists when it is ‘found from the authority given a governmental entity

to operate in a particular area, that the legislature contemplated the kind of action complained of.” *Id.* at 915 (citation omitted).

Four years later, in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), the Supreme Court considered an attempt by a municipality to regulate cable television services pursuant to “home rule” powers delegated by the State. The Court held that a State may effectuate anticompetitive policies through cities as long as those policies are “clearly articulated and affirmatively expressed.” *Id.* at 51. However, no immunity was found in that case because the State had done nothing more than grant “home rule” authority. The State had taken a neutral stance on the challenged anticompetitive activities of the City of Boulder – neither expressly endorsing nor compelling the conduct in question. *Id.* at 55.

A subsequent Supreme Court decision relating to the antitrust implications of conduct by subordinate governmental entities – and the most important one for purposes of this White Paper -- is *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985). In that case, the City of Eau Claire was alleged to have violated the Sherman Act by acquiring a monopoly over sewage treatment services and tying the delivery of those services to its providing sewage collection and transportation services. This conduct was authorized, but not compelled, by the State of Wisconsin. Moreover it was not actively supervised by the State. Nevertheless, the Court upheld the challenged conduct under the state action doctrine.

Town of Hallie is significant for two reasons. First, the decision holds that, with respect to a municipality, the “clear articulation” prong of the *Midcal* test is satisfied where the enabling statute shows that “the legislature contemplated the kind of acts complained of.” *Id.* at 41-42 (citation omitted). In other words, if the legislature could foresee that anticompetitive effects might result from its delegation of authority to a municipality, the first prong of the *Midcal* test is

satisfied. *See also, City of Columbia v. Omni Outdoor Adv., Inc.*, 499 U.S. 365 (1991) (anticompetitive ordinance entitled to state action immunity because City acted within its state-delegated authority to pass zoning ordinances).

Second, the decision holds that the “active state supervision” prong of the *Midcal* test generally does not apply to municipalities. *Id.* at 47. The Supreme Court stated that it may be presumed “absent a showing to the contrary, that the municipality acts in the public interest.” *Id.* Notably, although the Court did not squarely address the conduct of state agencies, it observed in a footnote that where “the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue.” *Id.* at 46, n. 10.

B. Decisions Of Lower Courts And The FTC

Following *Town of Hallie*, the lower courts have generally addressed two issues in deciding whether the action of a subordinate governmental entity is exempt from the federal antitrust laws:

1. How specific must authorization from the State be to satisfy the “clear articulation” prong of the *Midcal* test; and
2. Does the “active state supervision” prong of the *Midcal* test apply to the governmental entity in question?

We address each of these issues in turn.

1. The “Clear Articulation” Requirement

With respect to the degree of specificity required to satisfy the “clear articulation” test, there is general agreement on certain basic points. Specifically, in enacting legislation that delegates regulatory authority to a political subdivision, a State need not say explicitly that it expects anticompetitive effects to occur from the exercise of that authority. *See Town of Hallie*, 471 U.S. at 41-43. Rather, the “clear articulation” prong is satisfied when “anticompetitive conduct is the foreseeable result of the legislation.” *Id. See, e.g., FTC v. Hospital Board of*

Directors, 38 F.2d 1184, 1188 (11th Cir. 1994) (rejecting the FTC’s “narrow definition of the term ‘foreseeable’ . . .”). *See also Danner Const. Co. v. Hillsborough County*, 608 F.3d 809, 813-14 (11th Cir. 2010).

There is disagreement, however, regarding how foreseeable the anticompetitive regulation must be. Many courts have found that a broad statutory authorization will suffice for this purpose. For example, in *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1031, 1043-44 (2d Cir. 1986), the Second Circuit ruled that an enabling statute meets the “clear articulation” requirement if it “affirmatively designate[s] a particular area to be regulated, provide[s] the methods of regulation, and create[s] grounds for a reasoned belief that some anticompetitive activity could be envisioned.” Similarly, in *Earles v. State Board of Certified Pub. Accountants*, 139 F.3d 1033, 1043 (5th Cir. 1998), the Fifth Circuit held that a general grant to the Board to regulate the practice of public accounting in the State of Louisiana satisfied the “clear articulation” prong of the *Midcal* test.

On the other hand, the Federal Trade Commission has taken the position that a general grant of authority to a state agency to regulate a particular trade or profession does not satisfy the “clear articulation” prong. Thus, in *South Carolina Board of Dentistry*, 138 F.T.C. 229, 251-52 (2004), the Commission ruled that “a state’s ‘general grant of power’ to a political subdivision, without more, is insufficient for purposes of clear articulation under the state action doctrine” (citation omitted). *See also* explanation of the consent decree in *Virginia Board of Funeral Directors & Embalmers*, 138 F.T.C. 645, 661-66 (2004). Most recently, in the pending case of *In re North Carolina Board of Dental Examiners* (FTC Docket 9343), complaint counsel filed a brief arguing that, to satisfy the first prong of the *Midcal* test, the challenged regulation must “‘ordinarily or routinely result’ from the authorizing legislation.” See Br. at 29, quoting 138

F.T.C. at 251-252. *See also* FTC Report of the State Action Task Force (FTC Task Force Report) (Sept. 2003), at 25-35.

The position of the FTC on this issue is not entirely without case support. In *FTC v. Monahan*, 832 F.2d 683, 689 (1st Cir. 1987) (Breyer, J.), for example, the First Circuit, in the context of a subpoena enforcement proceeding, questioned whether a grant to a State Board of Registration in Pharmacy to regulate pharmacy advertising and other practices of pharmacists permitted the Board to issue regulations that might raise consumer prices or inconvenience workers. In *Shames v. California Travel and Tourism Commission*, ___ F.3d ___, 79 U.S.L.W. 1737 (9th Cir. Nov. 24, 2010), the Ninth Circuit held that a statute creating a “nonprofit mutual benefit corporation” to expand the California tourism industry did not manifest sufficient legislative interest to displace competition among car rental companies to satisfy the “clear articulation” requirement. Indeed, the Court in that case wrote that the “state action immunity doctrine is ‘disfavored,’ and is to be interpreted narrowly, as a broad interpretation of the doctrine may inadvertently extend to anticompetitive activity which the states did not intend to sanction.” *Id.* at 1742 (citations omitted).

2. The “Active State Supervision” Requirement

Turning to the issue of whether state agencies must comply with the “active state supervision” prong of the *Midcal* test, the consensus seems to be that state agencies and other political units created by the State are exempt from this prong. *See, e.g., Charley’s Taxi Radio Dispatch v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 876 (9th Cir. 1987) (decisions of the Hawaii Dept. of Transportation and its director entitled to state action immunity); *Cine 42nd Street Theater Corp.*, 790 F.2d at 1047 (Urban Development Corporation authorized by state legislation need not satisfy the state supervision requirement); *Porter Testing Lab v. Board of Regents*, 993

F.2d 768, 772 (10th Cir. 1993) (showing of active supervision is unnecessary for the State Board of Regents to qualify for state action antitrust immunity).

However, there is a dispute over whether state agencies that consist largely or exclusively of members of the regulated profession – sometimes referred to as “hybrid actors” – are nonetheless subject to the “active state supervision” prong. Proponents of the view that such agencies must satisfy that prong argue that actions of agencies whose membership consists of regulated practitioners are really private actions masquerading as state actions. In support of this view, they point to the statement in *Midcal*, 445 U.S. at 106, to the effect that the active state supervision requirement is necessary to prevent a state from circumventing the federal antitrust laws “by casting ... a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.” They argue, in effect, that actions of state agencies made up of members of the regulated trade or profession are nothing more than anticompetitive activity of private parties clothed in a “gauzy cloak of state involvement.” See Areeda & Hovenkamp’s, *Antitrust Law*, at § 227b.

The majority view appears to be that state agencies composed of financially interested members are nonetheless state agencies and thus do not have to satisfy the active state supervision requirement. In *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989), for example, the Oregon State Bar was held not to be subject to the “active state supervision” requirement even though twelve of the fifteen members of its Board were attorneys. Similarly, in *Earles*, 139 F.3d at 1041, a State Board of CPAs was found to be not subject to the “active state supervision” requirement even though the Board was “composed entirely of CPAs who compete in the profession they regulate”

On this issue too, the Federal Trade Commission takes a contrary view. Specifically, in *Mass. Bd. Of Registration in Optometry*, 110 F.T.C. 549, 612 (1989), the Commission required an analysis of whether the state actively supervised the Board of Optometry because “a state agency, simply by reason of its status as such, does not, therefore, qualify as the state acting in its sovereign capacity.” *See also, South Carolina Bd. Of Dentistry*, 138 F.T.C. at 256-59; FTC Task Force Report, at 57, n. 21. Most recently, in *North Carolina Board of Dental Examiners* ___ F.T.C. ___ (2011), the Commission squarely held that a State Dental Board comprised primarily of practicing dentists is subject to the “active state supervision” requirement. *Op.* at 7. It stated that whether a governmental entity is “the state” for purposes of the state action doctrine “should not focus on the formalities of state, law ... but rather on the realities of the decision-maker’s independent judgment.” *Id.* at 9. In the view of the FTC, the active state supervision requirement assures that “the entity’s decision-making process is sufficiently independent from the interests of those being regulated.” *Id.*

Once again, the FTC position finds some support in the case law. *See Washington State Elec. Contractors Assn. v. Forrest*, 930 F.2d 736, 737 (9th Cir. 1991) (Apprentice Council may not be a “state agency” because “private members have their own agenda which may or may not be responsive to state labor policy.”); *FTC v. Monahan*, 832 F.2d at 689 (“Whether any ‘anticompetitive’ Board activities are ‘essentially those of private parties depends upon how the Board functions in practice, and perhaps upon the role played by its members who are private pharmacists”). Moreover, in their treatise, Professors Areeda & Hovenkamp assert (at § 224a) that “(w)ithout reasonable assurance that the body is far more broadly based than the very persons who are to be regulated, outside supervision seems required.”

C. Antitrust Analysis

With this discussion as background, this White Paper proceeds to an analysis of application of the federal antitrust laws to actions of State Boards of Medical Examiners that may have anticompetitive effects. As the foregoing discussion suggests, that analysis depends on resolution of two questions:

1. Is a general legislative grant of authority to regulate the practice of medicine in the State enough to satisfy the “clear articulation” prong of the *Midcal* test; and
2. Is a State Board, comprised largely or entirely of practicing physicians, subject to the “active state supervision” prong of the *Midcal* test?

We address each question in turn.

1. The Clear Articulation Requirement

The first question is whether a general delegation of authority to a State Board of Medical Examiners to regulate the practice of medicine is a sufficient grant of state authority to satisfy the “clear articulation” test of the state action doctrine. The FTC has suggested that a generalized grant of rule-making authority is inadequate – and that a more specific mandate from the legislature to engage in anticompetitive conduct is required. *See* pp. 6-7, *supra*. For the reasons set forth below, we believe that the FTC’s position is not justified.

Initially, a plurality of the Supreme Court in *City of Lafayette*, 435 U.S. at 415, held that, in order to assert a successful state action defense, a municipality need not “point to a specific, detailed legislative authorization.” Subsequently, in *Town of Hallie*, the Court directly addressed “how clearly a state policy must be articulated for a municipality to be able to establish that its anticompetitive activity constitutes state action.” 471 U.S. at 40. The Court rejected the proposition that, for the conduct of a municipality to qualify for immunity, the state legislature would have had “to have stated explicitly that it expected the City to engage in conduct that

would have anticompetitive effects.” *Id.* at 42. Rather, the Court held that it would be enough if “anticompetitive effects logically would result from the broad authority to regulate.” *Id.*

In reaching its conclusion that the “clear articulation” test was satisfied in *Town of Hallie*, the Court wrote as follows:

“The Towns’ argument amounts to a contention that to pass the ‘clear articulation’ test, a legislature must expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects. This contention embodies an unrealistic view of how legislatures work and of how statutes are written. No legislature can be expected to catalog all of the anticipated effects of a statute of this kind.”

Id. at 44. Similarly, in *Omni Outdoor Adv.*, 499 U.S. at 370-73, the Court held that a general grant of zoning power was a “clear articulation” of an intent to displace competition. Thus, a general delegation of authority by the legislature to a state agency to regulate a specific profession would appear to satisfy the “clear articulation” requirement.

Indeed, that is precisely the holding of the case most directly in point – *Earles*, 139 F.3d at 1033. There, the Fifth Circuit addressed whether a general grant of authority to the State Board of Certified Public Accountants, an agency comprised entirely of CPAs who competed in the profession regulated by the Board, satisfied the “clear articulation” prong. The Court held that a statute which authorized the Board to ““(a)dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the state of Louisiana”” was a sufficient expression of state policy to satisfy the “clear articulation” requirement. By the same token, a general grant of authority to a State Board of Medical Examiners to regulate the practice of medicine should likewise satisfy that requirement.

The conclusion reached in *Earles* follows from *Town of Hallie* and *Omni Outdoor Adv.* A general delegation of authority to regulate a specific profession is an expression – in the words of *City of Lafayette* – of a legislative intent “to displace competition with regulation.” 435 U.S. at 413. The foreseeable result of the establishment of a State Board of Medicine to define, and make rules for, the practice of medicine is that competition by those whose practices fall outside the regulatory definitions and rules will be foreclosed.

The notion that the legislature must make explicit reference in the enabling legislation to a specific issue “embodies an unrealistic view of how legislatures work.” *Town of Hallie*, 471 U.S. at 44. Rather, as the Supreme Court noted in *New Motor Vehicle Board v. Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978), a statute that provides regulatory structure inherently displaces unfettered business freedom. In any event, the FTC’s position pays little respect to the ability of state legislatures to undo conduct that they regard as contrary to the public interest – or, in the words of *Parker v. Brown*, to “control ... its officers and agents.” That position would displace the political process of the states with the administrative process of the FTC.

Of course, there are decisions that could be cited against this conclusion. Numerous cases have found inadequate legislative intent to displace competition for purposes of the “clear articulation” requirement. These cases have not, however, involved statutes authorizing regulation of a particular area of commerce by a state regulatory agency. For example, the decision of the Ninth Circuit in *Shames*, 79 U.S.L.W. 1737, was brought against the California Travel and Tourism Commission – a Commission that “is not a regulatory body” and that was empowered only to spend funds to promote California tourism. *Id.* at 1743. As the Court noted, there was “no authorization by the California legislature of anticompetitive regulation or monopoly in the rental car field.” *Id.*

Finally, critics of this Paper might invoke *Community Communications Co. v. City of Boulder*, 455 U.S. 40. In that decision, the Supreme Court held that a legislative grant of “home rule” authority to a municipality is insufficient to satisfy the “clear articulation” requirement on grounds that that grant of home rule was “neutral” on the issue of the regulation of cable television that was before the Court. These critics would analogize a grant of general rulemaking authority over a profession to delegation of home rule authority for purposes of the state action doctrine.

This analogy, however, was undercut by *Town of Hallie* and *Omni Outdoor Adv.* -- and squarely rejected in *Earles*. As the Supreme Court pointed out in *Town of Hallie*, 471 U.S. at 42, the Home Rule Amendment in *City of Boulder* “allocated only the most general authority to municipalities to govern local affairs.” The Court found that that was far different from a statute directed to a specific area of regulation, *e.g.* the practice of medicine. In *Omni*, the Court found a general power to engage in zoning to be a sufficiently “clear articulation” since zoning decisions could foreseeably have anticompetitive effects. And in *Earles*, 193 F.3d at 1033-34, the Court of Appeals held that a general grant of authority to regulate a specific profession is not “merely neutral statutory language” that is “inadequate to meet the standards of clear articulation and affirmative expression.” Based on this reasoning, we believe that a general grant of authority to a State Board of Medicine to regulate the practice of medicine satisfies the “clear articulation” requirement of the state action doctrine.

2. Active State Supervision

a. State Boards of Medicine Are State Agencies

As noted above, pp. 5-6 *supra*, although the Supreme Court has never decided the issue, it wrote in *Town of Hallie*, 471 U.S. at 46, n. 10, that “it is likely” that state agencies are not

subject to the “active state supervision” prong. Moreover, the general consensus of the Courts of Appeals following *Town of Hallie* is that state agencies are exempt from the second prong of the *Midcal* test. See pp. 7-8, *supra*. The first issue for the “active state supervision” prong of the state action doctrine, therefore, is whether decisions of State Boards of Medical Examiners are really actions of state agencies – or whether, as the FTC has suggested, they are the actions of private parties under the “gauzy cloak of state involvement.”

In reaching the conclusion that actions of that state regulatory boards comprised of market participants are not actions of the state, the FTC relies on two arguments:

1. Its conclusion follows from the decision of the Supreme Court in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975); and
2. Its assertion that whether a governmental entity is “the state” for purposes of the state action doctrine “should not focus on the formalities of state law ... but rather on the realities of the decision-maker’s independent judgment.”

Neither argument will withstand analysis.

First, the FTC’s reliance on *Goldfarb* is misplaced. That case involved a minimum fee schedule issued by a county bar association and backed up by ethical opinions of the Virginia State Bar. The Supreme Court held that the fee schedule was not protected by the state action doctrine even though the Virginia State Bar was, for certain purposes, an agency of the State Supreme Court. *Goldfarb* does not support the FTC’s position for two reasons. First, the fee schedule was issued by a private entity, the county bar association, that did not even purport to be a state agency. Second, although the Virginia State Bar was a state agency for some purposes, it was not acting as a state agency in issuing opinions that deviation from the county bar’s fee schedule was unethical.

The Commission’s argument that whether a governmental entity is the state for purposes of the state action doctrine “should not focus on the formalities of state law ... but rather on the realities of the decision-maker’s independent judgment” has three basic flaws. First, it is an *ipse dixit* which finds no support in Supreme Court precedent and which, if adopted by the courts, would mean that a state agency comprised primarily of market participants can never be the state. Second, it ignores the federalism considerations that underlie the state action doctrine. For federalism purposes, the “formalities of state law” – dismissed by the FTC – should be critical in determining whether a regulatory body is the state. Third, it is inconsistent with *Parker v. Brown* itself – where the agency in question appears to have been comprised substantially of market participants.

Contrary to the FTC position, we respectfully submit that a State Board of Medicine – even if comprised in whole or in part of licensed physicians – is a legitimate state agency for purposes of the state action doctrine. First and foremost, such a Board is established by action of the state legislature. Its members are appointed or otherwise selected in accordance with procedures determined by the legislature. Significantly, its actions must accord with state administrative procedure acts and are subject to judicial review under state law. Moreover, those actions are also subject to repeal or modification if the legislature is not in accord with them. Not surprisingly, therefore, virtually every decision to address the issue has held that a State Board of Medicine or a State Board of Dentistry is a legitimate state agency. *See, e.g., Bettencourt v. Bd. of Registration in Medicine*, 904 F.2d 772, 781 (1st Cir. 1990); *Neuwirth v. Louisiana State Bd. of Dentistry*, 845 F.2d 553, 555 (5th Cir. 1988); *Howard v. Miller*, 879 F.Supp. 340, 343 (N.D. Ga. 1994); *Connolly v. Becket*, 863 F.Supp. 1379, 1381 (D. Col. 1994).

The fact that a State Board may be composed entirely of practicing physicians does not change the analysis. The composition of a State Board is determined by act of the legislature – not by decree of a medical society or other private entity. In the circumstances, the position that the composition of a State Board undermines the Board’s status as a state agency is a frontal assault on the sovereignty of the State and its right to determine by legislation the nature of its regulatory bodies. Moreover, such a position would involve courts in subjective and unpredictable judgments regarding the extent to which membership of regulated persons on a state agency deprived that agency of status as a state agency for purposes of the state action doctrine.

In reaching the conclusion that State Boards of Medicine are state agencies for purposes of the state action doctrine, we are aware that two Courts of Appeals have issued decisions that could be cited to the contrary. Neither of these decisions alters our conclusion. First, the Ninth Circuit in *Washington State Elec. Contractors Assn.*, 930 F.2d at 737, expressed the view that an Apprentice Council of the State of Washington may not be a state agency under the state action doctrine because it includes private members that may have their own agenda. However, the one page per curiam decision in that case contains no reasoning and seems inconsistent with the Ninth Circuit’s own decision in *Hass*. In any event, the decision does not hold that the Apprentice Council is not a state agency; it merely remands the case to the district court for findings on this issue.

Second, the First Circuit in *Monahan*, 832 F.2d at 689, suggests that a State Board of Registration in Pharmacy may not be a state agency for purposes of the state action doctrine if it engages in activities outside its purview or if its actions were not justified by “legitimate regulatory purposes.” Significantly, *Monahan* arose in the context of a subpoena enforcement

proceeding, and courts are reluctant to decide jurisdictional issues in such proceedings. *Id.* at 690. Moreover, as in *Washington State Electrical Contractors*, the Court did not hold that the State Board was not a state agency – only that it was not prepared to decide that issue in the context of a subpoena enforcement proceeding.

In short, for the reasons set forth above, we conclude that a State Board of Medical Examiners, duly established by the state legislature, is a state agency for purposes of the “active state supervision” prong of the state action doctrine even if most or all of its members are practicing physicians. Of course, if a state court has held that a State Board of Medicine is not a state agency for state law purposes, this conclusion could be overcome in that state.

b. State Boards of Medicine Are Not Subject
To the Second Prong Of The *Midcal* Test

The conclusion that a State Board of Medical Examiners is a state agency for purposes of the state action doctrine undermines the argument that its actions are subject to the “active state supervision” prong. Indeed, once the action of a state regulatory agency is recognized as action of the state, the very concept of application of an “active state supervision” requirement makes little sense. In essence, it would amount to a requirement that the state supervise itself.

The difficulty of applying the “active state supervision” requirement in this context is reinforced by the FTC’s definition of “active state supervision.” In particular, in *North Carolina Board of Dental Examiners*, the Commission expressed its view (at p. 7) that three factors are relevant in determining whether there is active state supervision:

1. The development of an adequate factual record:
2. A written decision on the merits; and
3. A specific assessment – both quantitative and qualitative – of how the action in question comports with the substantive standards established by the legislature.

The most notable feature of these factors, of course, is that they have nothing to do with active state supervision. Quite to the contrary, the third factor is a thinly veiled effort to incorporate the “clearly articulated” prong through the back door of the “active state supervision prong. The fact that the Commission cannot articulate a specific form of active state supervision over conduct of state regulatory agencies provides further support for the impropriety of subjecting these agencies to the active state supervision doctrine.

To be sure, the holding of *Town of Hallie* that a municipality need not comply with the “active state supervision” requirement was based on this statement:

“We may presume, absent a showing to the contrary, that the municipality acts in the public interest.”

471 U.S. at 45 (emphasis supplied). Thus, a State Board might be subject to the “active state supervision” requirement if the plaintiff could overcome the presumption that the Board had acted in the public interest. But this presumption can be overcome only by proof that the agency sought to subvert the public interest in undertaking the conduct that it did. Permitting any lesser showing would be inconsistent with the respect for state sovereignty that lies at the heart of the state action doctrine. It would have the effect of allowing the FTC and the courts to substitute their policy preferences for those of the duly constituted state agency charged with determining the public interest.

II. FTC JURISDICTION

Quite apart from the substantive antitrust analysis, there is considerable doubt whether the Federal Trade Commission even has jurisdiction over State Boards of Medicine. Under § 5(a)(2) of the Federal Trade Commission Act, 15 U.S.C. § 45(a)(2), the Commission is empowered to prevent “persons, partnerships, or corporations” from using “unfair methods of competition in or affecting commerce.” A State Board of medicine is not a “person” or

“partnership” within the meaning of the Act. So, the issue is whether a State Board is a “corporation” for this purpose.

The term “corporation” is defined in § 4 of the Act, 15 U.S.C. § 44, “to include any company ... or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members.” A State Board of Medicine would not appear to satisfy this definition. It is neither a “company” nor an “association;” it is a state agency. It is not “organized to carry on business” at all. Rather, it is organized to regulate the practice of medicine within the State. And it neither seeks profit nor has members in any traditional sense.

To be sure, the Supreme Court held in *California Dental Association v. FTC*, 526 U.S. 756 (1999), that a state dental association which provides substantial economic benefits to its for-profit members is a “corporation” subject to the jurisdiction of the FTC. However, nothing in that decision suggests that a state regulatory agency is a “corporation” within the meaning of the Federal Trade Commission Act. Quite to the contrary, the legislative history of that Act gives absolutely no indication that sovereign states – or their agencies – were intended to come within the purview of the FTC.

In this connection, it is instructive to compare the FTC Act with the Clayton Act, both of which were passed in 1914. In particular, the 63d Congress made the Clayton Act, like the Sherman Act before it, applicable to all entities affecting commerce. By contrast, it carefully limited the jurisdiction of the FTC to persons, partnerships, and corporations. Juxtaposition of these two Acts confirms that Congress did not intend to subject state agencies to regulation by the Federal Trade Commission. See *United States v. American Bldg. Maint. Industries*, 422 U.S. 271, 277 (1975) (Clayton and FTC Acts to be construed together).

Indeed, it would be most surprising if Congress had intended to give the FTC jurisdiction over state agencies that regulate the professions. It has long been recognized that the States have a compelling interest in regulating “the practice of professions within their boundaries.” *In re Primus*, 436 U.S. 412, 422 (1978). As the Supreme Court noted in *Goldfarb*, the States “have broad power to establish standards for licensing practitioners and regulating the practice of professions.” 421 U.S. at 792-793. Given this fact, it seems highly unlikely that Congress would have intended to give the FTC power to second-guess the judgments of state agencies established by state legislatures to regulate the professions.

Conclusion

For the reasons set forth above, an action by a State Board of Medicine – even one composed entirely or largely of practicing physicians – is immune from the federal antitrust laws as long as four conditions are present:

1. The State Board was created by act of the legislature, and its members are selected in accordance with procedures established by the legislature;
2. The State Board acts pursuant to a legislative grant of authority to define and regulate the practice of medicine;
3. The regulatory action is subject to judicial review under state law and to overturning by act of the legislature; and
4. There is no substantial evidence that the Board sought to subvert the public interest in taking the action it did.

Moreover, there is considerable doubt as to whether the Federal Trade Commission even has jurisdiction over State Boards of Medicine.

October 3, 2011