ON THE HOOK: THE EVOLUTION OF THE STATE-ACTION IMMUNITY DOCTRINE AND POTENTIAL CONSEQUENCES FOR NEBRASKA HEALTHCARE LICENSURE BOARDS

I. INTRODUCTION

In Parker v. Brown,1 when the United States Supreme Court decided that the Sherman Antitrust Act2 did not restrict the ability of a state or its agents to enforce the will of its legislature, the Court effectively carved out a state-action immunity from federal antitrust liability.3 Since the Parker decision, state professional licensure boards have enjoyed protection from antitrust litigation for their actions restraining professional activity.4 However, the Supreme Court's recent ruling in North Carolina State Board of Dental Examiners v. FTC5 made clear that the states may not shield their licensure boards from antitrust liability by involving themselves superficially in board activities.6 As the statutory scheme creating licensure boards in practically every state demonstrates varying degrees of superficial state involvement, state licensure boards and the states themselves may now risk exposure to federal antitrust actions.7

1. 317 U.S. 341 (1943).
3. See Parker v. Brown, 317 U.S. 341, 350-51 (1943) (noting that "we find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature."); see also Cal. Retail Liquor Dealers Ass'n v. Mical Aluminum, Inc., 445 U.S. 97, 105 (1980) (setting forth the "two standards for antitrust immunity under Parker v. Brown").
4. See N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101, 1110 (2015) (involving state licensure board's argument 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").
6. See N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1111 (determining that "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity . . . [i]mmunity for state agencies, therefore, requires more than a mere façade of state involvement . . . .").
7. See Letter from Robert C. Fellmeth, Executive Director, Center for Public Interest Law, et al., to the Hon. Kamala Harris, Attorney General of the State of California (May 4, 2015) (on file with the author) (warning that the Court's decision in N.C. State Bd. of Medical Examiners "renders unlawful what has become the common regulatory practice across all 50 states" and that the recipient state's "board and commission members are theoretically vulnerable to federal felony prosecution and civil treble damages - and [the state's] indemnifying state budget may be similarly exposed"); see also Marcia Coyle, State AGs Urged to Enforce Licensing Board Decision, The National Law Journal, May 6, 2015 (explaining that "[t]hree to four years from now, a few of my friends will file antitrust actions against individual board members and there will be a $10 million or $20 million judgment. And then others will do it. I have friends in that..."
This Note will first review the history of the *Parker* state-action immunity doctrine, its development and articulation in *California Retail Liquor Dealers Association v. Mical Aluminum, Inc.*, and the United States Supreme Court's recent decision in *North Carolina State Board of Dental Examiners*. This Note will then examine the statutes organizing the structure of Nebraska licensure boards. Next, this Note will explore the significance of the *North Carolina State Board of Dental Examiners* decision upon Nebraska's licensure board scheme. Finally, this Note will suggest possible changes to the Nebraska statutes which govern licensure boards in order to realign Nebraska's boards with the requirements of *Parker* state-action immunity as articulated in the *North Carolina State Board of Dental Examiners* decision.

II. BACKGROUND

A. *Parker v. Brown: The Supreme Court Established that States are Immune from Federal Antitrust Law for Anticompetitive Conduct when the State Acts in its Sovereign Capacity*

In *Parker v. Brown*, a California producer and packer of raisins challenged the California Agricultural Prorate Act (the "CAP Act") in federal court. Brown brought suit to enjoin the State Director of Agriculture, the members of the State Agricultural Prorate Advisory Committee for Raisin Proration Zone No. 1, and other individuals tasked with the administration of the CAP Act from enforcing its provisions against Brown. The United States District Court for the Southern District of California ruled that the marketing program, adopted under the CAP Act for the 1940 raisin crop, constituted an illegal interference and undue burden upon interstate commerce.

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community and they are already salivating at the prospect.”) (quoting Robert C. Fellmeth).

9. See infra notes 13-147 and accompanying text.
10. See infra notes 148-161 and accompanying text.
11. See infra notes 162-200 and accompanying text.
12. See infra notes 201-232 and accompanying text.
17. Id.
The case reached the United States Supreme Court on direct appeal from the district court's decision.\(^\text{18}\)

The CAP Act authorized state officials to establish programs for the purpose of marketing agricultural commodities produced in California.\(^\text{19}\) Its purpose included the conservation of the state's agricultural resources and the prevention of economic waste in the agricultural industry.\(^\text{20}\) The effect of the CAP Act also restrained competition among agricultural producers and maintained the prices charged to the packers of agricultural commodities.\(^\text{21}\) The CAP Act allowed for the creation of an Agricultural Prorate Advisory Commission (the "Prorate Commission"), which consisted of nine members, including the Director of Agriculture.\(^\text{22}\) The Prorate Commission also included eight other members—appointed by the Governor and confirmed by the state Senate—for four-year terms.\(^\text{23}\)

Pursuant to the CAP Act, a group of ten producers could gather and petition for the creation of a prorate marketing plan for any agricultural product contained within a defined production zone.\(^\text{24}\) The marketing plan creation process included a public hearing, economic findings, and required a showing that the plan would further the goals of the CAP Act without resulting in excessive profits for producers.\(^\text{25}\) Upon approval, the Director of Agriculture would then establish a program committee comprised of nominees selected by qualified producers from within the production zone.\(^\text{26}\) Once established, the committee would create a marketing program for the commodity produced in the zone, subject to the approval of the Prorate Commission, which could modify the program.\(^\text{27}\) Following the Prorate Commission's approval, the program would be instituted upon the consent of sixty-five percent of producers in the zone owning fifty-one percent of the acreage allocated to the regulated commodity.\(^\text{28}\)

Under the Sherman Antitrust Act,\(^\text{29}\) any combination or conspiracy that results in a restraint of commerce in the United States is

\(^{18}\) See id. at 344-45 (appealing directly from district court by statute).

\(^{19}\) Id. at 346.

\(^{20}\) Id.

\(^{21}\) Id.

\(^{22}\) Id. The Court noted that the Director of Agriculture was "ex-officio" a member of the Prorate Commission. Id.

\(^{23}\) Id.

\(^{24}\) Id.

\(^{25}\) Id. If the plan satisfied the requirements, the Prorate Commission had the authority to grant the petition. Id.

\(^{26}\) Id.

\(^{27}\) Id. at 347.

\(^{28}\) Id.

expressly illegal.\textsuperscript{30} The purpose of the Sherman Antitrust Act is to prohibit the unreasonable restraints of commerce between the states, and to provide protection from the negative influences of monopolies.\textsuperscript{31} Since enactment of the Sherman Antitrust Act in 1890, there have been few statutory changes, and the development of antitrust law has occurred in the courts.\textsuperscript{32} The framework of antitrust law developed with decisions by the United States Supreme Court that applied an antitrust analysis.\textsuperscript{33} In 1911, the Supreme Court announced that the Sherman Antitrust Act only prohibits restraints of trade that are deemed to be unreasonable.\textsuperscript{34}

The plaintiff in \textit{Parker v. Brown} asserted that under the Sherman Antitrust Act, the CAP Act was unconstitutional.\textsuperscript{35} Prior to the adoption of a program controlling a raisin marketing zone, the plaintiff had entered into various contracts to sell raisins from his 1940 crop.\textsuperscript{36} The complaint alleged that unless the Prorate Commission was enjoined

\textsuperscript{30} See Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (providing that "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.").

\textsuperscript{31} See Appalachian Coals, Inc. v. United States, 288 U.S. 344, 360 (1933) overruled on other grounds by Copperweld Corp. v. Indep. Tube Corp., 467 U.S. 752 (1984) (noting that the provisions of the Act "call for vigilance in the detection and frustration of all efforts unduly to restrain the free course of interstate commerce, but they do not seek to establish a mere delusive liberty either by making impossible the normal and fair expansion of that commerce or the adoption of reasonable measures to protect it from injurious and destructive practices and to promote competition upon a sound basis."); see also Apex Hosiery Co. v. Leader, 310 U.S. 469, 492-93 (1940) (explaining that the Sherman Antitrust Act "was enacted in the era of ‘trusts’ and of ‘combinations’ of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, and the monopolistic tendency of which had become a matter of public concern.").

\textsuperscript{32} See R. Hewitt Pate, U.S. Department of Justice Antitrust Division, Remarks at the British Institute of International and Comparative Law Conference: Antitrust Law in the U.S. Supreme Court (May 11, 2004) (stating that "Congress chose not to enact detailed prescriptions for antitrust enforcement, relying instead on the courts to apply the broad statutory principles to particular fact situations.").

\textsuperscript{33} See id. (noting that "American antitrust law began to take shape only when the Supreme Court began to build the basic framework of antitrust analysis in its decisions. In 1911, it decided the landmark Standard Oil case, in which the United States sought to break up the famed oil conglomerate.").

\textsuperscript{34} Id.; see also Standard Oil Co. v. United States, 221 U.S. 1, 64 (1911) (stating that when fixing a standard in antitrust cases, the Sherman Antitrust Act "leave[s] it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute.").

\textsuperscript{35} Parker, 317 U.S. at 348-49.

\textsuperscript{36} Id. at 349.
from carrying out the program, he would be prevented from marketing his 1940 crop, honoring his contracts, and engaging in interstate raisin commerce. 37 Specifically, the record indicated that the plaintiff produced roughly 200 tons of raisins, contracted to sell 762.5 tons, and expected to sell, had the program not been in effect, 3,000 tons at a rate of $60 a ton. 38

The Court prefaced its analysis of the antitrust challenge by explaining that the Sherman Antitrust Act makes unlawful any contract, combination, or conspiracy to restrain trade among the various states. 39 Similarly, the Sherman Antitrust Act outlaws any monopoly, attempted monopoly, or conspiracy with other persons to create such a monopoly. 40 The Court assumed for the sake of argument that the prorate program would constitute a violation of the Sherman Antitrust Act if it had been created via contract, combination, or conspiracy among private persons. 41 However, the challenged program was never intended to operate as the fruit of an individual agreement or combination; rather, the program derived its authority from the legislative mandate of the state. 42 The Court found nothing in the text of the Sherman Antitrust Act, or its legislative history, that would support the notion that the goal's act was to restrain states or their agents. 43

The Court explained that The Sherman Antitrust Act neither mentions states, nor hints that its purpose was to restrain state or official action mandated by the state. 44 The Court pointed to the act's history, noting that the sponsor of the bill declared that it was meant to prevent business combinations. 45 According to the Court, the Sherman Antitrust Act's legislative history supports the notion that it was intended to combat combinations and monopolies by individuals or corporations that restrained competition. 46 The Court acknowledged, however, that a state cannot impart immunity to violators of the Sher-

37. Id.
38. Id.
39. Id. at 350.
40. Id.
41. Id. The Court noted that "persons" for the sake of Sherman Antitrust analysis could be individual or corporate. Id. at 351.
42. Id. at 351.
43. Id. at 350-51. The Court explained that "[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 351.
44. Id.
45. Id.
46. Id.; see also Sherman Antitrust Act, 15 U.S.C. §§ 1-7 (explaining that the purpose of the Act was to "protect commerce and trade from unlawful restraints and monopolies").
man Antitrust Act by simply placing its stamp of approval on their actions. However, the Court noted, the state’s instruction to the Prorate Commission and the program committee of the CAP Act was not a violation of the Sherman Antitrust Act, which must be viewed as a prohibition upon individual—rather than state—action.

While producers organized the challenged prorate zone pursuant to a petition, and those same producers approved the prorate program, it was the state of California, with the Prorate Commission as its vehicle, that adopted and enforced the program. The approval process and referendum by a predetermined number of producers did not constitute an imposition of the producers’ will upon a minority group in a manner prohibited by the Sherman Antitrust Act. Rather, it was the state itself that employed its legislative arm to promulgate the regulation and to prescribe its conditions. Affirming the district court, the Court determined that the challenged state action was not proscribed by the Sherman Antitrust Act.

B. **California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.: The Supreme Court Set Forth a Two-Pronged Test for Parker State-Action Immunity**

In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, the United States Supreme Court addressed an antitrust challenge to California’s resale price maintenance and posting statutes for the wholesale wine industry. Pursuant to section 24866(b) of the California Business and Professions Code, all producers, wholesalers, or rectifiers of wine in the state of California were required to file all fair trade contracts or price schedules with the state. In the event that a wine producer did not set its prices through a fair trade contract, wholesalers were required to post resale price schedules for

47. Parker, 317 U.S. at 351. The Court noted that “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 . . . .” Id.
48. Id. at 352.
49. Id.
50. Id.
51. Id.
52. Id. The Court noted that “[t]he state in adopting and enforcing the prorate program made no contract or agreement and entered into no conspiracy in restraint of trade or to establish monopoly but, as sovereign, imposed the restraint as an act of government which the Sherman Act did not undertake to prohibit.” Id.
that particular producer’s brands.\textsuperscript{57} Further, all state licensed wine sellers were required to sell to retailers at a price set either in a price schedule or in a fair trade contract.\textsuperscript{58} The state of California lacked any direct control over the wine prices, and did not have mechanisms by which to review the prices set by wine dealers.\textsuperscript{59}

The California Department of Alcoholic Beverage Control charged Mideal Aluminum, Inc. ("Mideal"), a southern California wholesale distributor of wine, with unlawfully selling twenty-seven cases of wine at prices less than those set by the effective price schedule of another winery.\textsuperscript{60} Mideal stipulated to the truthfulness of the allegations and then filed a writ of mandate in the California Court of Appeals, seeking injunctive relief from the state’s wine pricing structure.\textsuperscript{61} The court of appeals struck down the pricing scheme as a violation of the Sherman Antitrust Act, relying exclusively upon a decision by the California Supreme Court striking down similar restrictions on the distilled liquor trade.\textsuperscript{62} The court of appeals enjoined the Department of Alcoholic Beverage Control from enforcing the resale price scheme for the wine trade.\textsuperscript{63} The California Retail Liquor Dealers Association (the "Association") intervened and brought an appeal, which the California Supreme Court denied.\textsuperscript{64} The Association then petitioned the United States Supreme Court, which granted certiorari.\textsuperscript{65}

The Court prefaced its analysis by explaining that the key question was whether California’s wine pricing scheme constituted a violation of the Sherman Antitrust Act.\textsuperscript{66} The Court noted that for a time, the Miller-Tydings Act of 1937\textsuperscript{67} allowed states to enforce resale price maintenance, with the protection of small retailers as the goal of the Act.\textsuperscript{68} However, the Miller-Tydings Act had since been repealed, and the Sherman Antitrust Act once more proscribed resale price mainte-
nance unless the actor or program had the benefit of antitrust immunity.69

The Court flatly stated that California’s pricing scheme amounted to a violation of the Sherman Antitrust Act.70 It reasoned that under California’s scheme, the wine producer held the power to restrain price competition by directing wholesalers to sell at whatever price they saw fit.71 Such vertical control, the Court explained, was as destructive of horizontal competition as if the wholesalers were to form a monopoly or combination by virtue of an agreement amongst themselves.72 Moreover, the contested state action could not be construed as merely intrastate action outside the ambit of the Sherman Antitrust Act.73 Thus, the Court explained, the true inquiry was whether California’s involvement in the pricing scheme was such that the Court’s decision in Parker v. Brown74 would allow the state to claim antitrust immunity.75

The Court commenced its Parker analysis by noting that antitrust immunity for state regulatory programs is founded upon the structure of the federal government.76 The Court explained that under a dual system of government, established by the Constitution, a state’s sovereign authority may only be reduced by Congress, and an intention to erode a state’s control over its agents will not be readily attributed to Congress.77 In Parker, the Court ruled that the Sherman Antitrust Act contained no discernable purpose to invalidate a state’s powers, and consequently, state regulatory programs could not possibly run afoul of it.78 The Court warned, however, that without the state oversight present in Parker, the result in Parker could have been different.79 Echoing its decision in Parker, the Court noted that a state may not clothe a violator of the Sherman Antitrust Act in state-action immunity merely by permitting them to violate it or by sanctioning their actions as lawful.80

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70.  *Id.* at 103.
71.  *Id.*
72.  *Id.* The Court quoted from its decision in Dr. Miles Med. Co. v. John D. Park & Sons Co., 220 U.S. 373, 408 (1911), noting that “such vertical control destroys horizontal competition as effectively as if wholesalers ‘formed a combination and endeavored to establish the same restrictions . . . by agreement with each other.’” *Midcal*, 445 U.S. at 103.
73.  *Id.*
74.  317 U.S. 341 (1943).
76.  *Id.*
77.  *Id.* at 103-04.
78.  *Id.* at 104.
79.  *Id.*
80.  *Id.*
Pointing to a recent decision in Goldfarb v. Virginia State Bar, the Court emphasized that it is not sufficient for an anticompetitive act to result from state prompting; rather, the state must compel the act by virtue of its sovereign power. As a further example, the Court cited to a case where state action was immune from antitrust challenges because the state clearly articulated its policy and the action was subject to review by the policymaker. Yet another instance of state action immune from antitrust challenges involved a program which provided that the state would conduct hearings to address protests by members of the local industry concerning the state action. In that instance, the state served an active role and had expressed a clearly articulated goal of state policy.

The Court in Midcal determined that its precedent established two standards for Parker antitrust immunity. First, the challenged state action alleged to restrain trade must be clearly and affirmatively articulated as a facet of state policy. Second, the state policy must be subject to active supervision by the state itself. As the legislative policy behind the challenged state action in Midcal was clear in its purpose, the action satisfied the clear articulation prong of the test. However, because the action failed to meet the active state supervision prong of the test, it was not entitled to Parker antitrust immunity. Rather than proactively overseeing the pricing scheme, the state of California merely authorized it; the state did not review the prices for reasonableness, nor did it police the terms of the fair trade contracts. Consequently, the Court determined, public policy in favor of competition was not overcome by the state’s claim that it was entitled to state-action immunity.

82. Midcal, 445 U.S. at 104.
83. Id. at 105 (citing Bates v. State Bar of Ariz., 433 U.S. 350, 362 (1977)).
84. Id. (citing New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co., 439 U.S. 96, 99 (1978)).
85. Id.
86. Id.
87. Id. Although the Court determined that the State of California satisfied the first requirement, it noted that the California wine pricing system was not actively supervised by the state. Id. at 105-06.
88. Id. at 105. The Court set forth the two-pronged test as involving anticompetitive restraint both (1) "clearly articulated and affirmatively expressed as state policy" and (2) "actively supervised by the State itself." Id.
89. Id.
90. Id.
91. Id. at 105-06.
92. Id. at 106. The Court determined that “[t]he national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing agreement.” Id.
C. North Carolina State Board of Dental Examiners v. Federal Trade Commission: The Supreme Court Reaffirmed its Holding in Midcal, Ruling that a State Regulatory Board Not Supervised by the State is Not Entitled to Parker Antitrust Immunity

In North Carolina State Board of Dental Examiners v. FTC, the United States Supreme Court reviewed an antitrust challenge to the actions of the North Carolina state regulatory board. In North Carolina State Board of Dental Examiners, a majority of the board's members were participating in the active practice regulated by the board. Pursuant to the North Carolina Dental Practice Act (the "Dental Practice Act"), the practice of dentistry was characterized as a matter of public concern, and consequently subject to regulation by the State Board of Dental Examiners (the "NC Dental Board"). The NC Dental Board's principal functions were to create, administer, and enforce a licensing scheme for North Carolina dentists. By virtue of the Dental Practice Act, the NC Dental Board wielded authority over licensed dentists in that state, though its power over unlicensed individuals was more limited.

The Dental Practice Act provided that licensed dentists actively engaged in the practice of dentistry must comprise six of the NC Dental Board's eight members. These six actively practicing dentists are elected by other licensed North Carolina dentists during elections managed by the Board. The seventh member is required to be a licensed, actively practicing dental hygienist, elected by other practicing dental hygienists; the eighth member is identified by the Dental Practice Act as a consumer appointed by the Governor. The NC Dental Board is vested with the power to promulgate rules and regulations concerning the practice of dentistry in North Carolina, subject to the limitation that they are consistent with the Dental Practice Act and are approved by the North Carolina Rules Review Commission.

95. N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1107.
97. N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1107.
98. Id.
99. Id.
100. Id. at 1108.
101. Id.
102. Id.
103. Id. The North Carolina Rules Review Commission's members are appointed by the North Carolina State legislature. Id.
The dispute in *North Carolina State Board of Dental Examiners* arose when the practice of teeth whitening came to the state.\(^{104}\) Dentists began to offer teeth whitening, receiving significant fees in exchange for these services.\(^{105}\) When non-dentists began to offer similar services, however, North Carolina dentists promptly complained to the NC Dental Board, concerned about the lower prices charged by the non-dentists.\(^{106}\) The NC Dental Board’s investigation was spearheaded by one of the NC Dental Board’s dentist members, with the hygienist and consumer members not participating.\(^{107}\) Notably, the NC Dental Board’s inquiry did not result in a rule or regulation capable of review by the independent North Carolina Rules Review Commission.\(^{108}\) Beginning in 2006, the NC Dental Board issued no fewer than forty-seven cease-and-desist letters to the non-dentists involved in the teeth whitening trade.\(^{109}\) The letters effectively ended the practice of teeth whitening by non-dentists in North Carolina.\(^{110}\)

The Federal Trade Commission filed a complaint, alleging that the NC Dental Board had violated Section 5 of the Federal Trade Commission Act,\(^{111}\) as a consequence of the NC Dental Board’s actions.\(^{112}\) The FTC argued that the NC Dental Board’s concerted efforts to expel non-dentists from the practice of teeth whitening in North Carolina amounted to unfair competition.\(^{113}\) The NC Dental Board moved to dismiss the action, arguing that it was entitled to state-action immunity, but an administrative law judge denied the motion.\(^{114}\) On appeal, the FTC upheld the judge’s ruling, reasoning that as the NC Dental Board could not show that it was actively supervised, it was not entitled to state-action immunity.\(^{115}\) After a hearing on the merits of the case, the judge ruled that the NC Dental Board had violated antitrust law by unreasonably restraining trade,

\(^{104}\) *Id.*

\(^{105}\) *Id.*

\(^{106}\) *Id.*

\(^{107}\) *Id.* The Court noted that “[t]he Board’s chief operations officer remarked that the Board was ‘going forth to do battle’ with nondentists.” *Id.*

\(^{108}\) *Id.*

\(^{109}\) *Id.*

\(^{110}\) *Id.* Many of the cease-and-desist letters “directed the recipient to cease ‘all activity constituting the practice of dentistry,’ warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes ‘the practice of dentistry.’” *Id.*


\(^{112}\) *N.C. State Bd. of Dental Exam’rs*, 135 S. Ct. at 1108-09.

\(^{113}\) *Id.* at 1109.

\(^{114}\) *Id.*

\(^{115}\) *Id.* The FTC noted that “even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a ‘public/private hybrid’ that must be actively supervised by the State to claim immunity.” *Id.*
and the FTC once again sustained the judge’s ruling on appeal.\textsuperscript{116} The proceedings culminated in an order by the FTC commanding the NC Dental Board to discontinue sending cease-and-desist notices.\textsuperscript{117} On appeal, the United States Court of Appeals for the Fourth Circuit affirmed the FTC’s ruling, and the United States Supreme Court granted certiorari.\textsuperscript{118}

The Court began its discussion by explaining that while the Sherman Antitrust Act functions to promote competition, states are not absolutely bound by its prohibition against the restraint of trade.\textsuperscript{119} The Court noted that a system in which the states were subject to the full force of the Sherman Antitrust Act would involve an impermissible burden upon the ability of the states to self-regulate.\textsuperscript{120} Pointing to its holding in \textit{Parker v. Brown}, the Court emphasized that the Sherman Antitrust Act embodied a respect for federalism and the ability of the states to maintain their sovereignty.\textsuperscript{121} Relying upon the \textit{Parker} decision, the NC Dental Board argued that its actions were entitled to state-action immunity.\textsuperscript{122} The Court rejected the NC Dental Board’s argument, echoing the FTC’s ruling that the NC Dental Board was not entitled to state-action immunity because it was not subject to active supervision by the state.\textsuperscript{123}

Explaining that \textit{Parker} immunity is not unlimited, the Court noted that an actor may not claim the immunity unless its actions can be classified as an extension of the state’s sovereign power.\textsuperscript{124} Though a state may have immunity from Sherman Antitrust Act challenges

\textsuperscript{116} \textit{Id.}  \\
\textsuperscript{117} \textit{Id.} Additionally, the FTC ordered the Board “to issue notices to all earlier recipients of the Board’s cease-and-desist orders advising them of the Board’s proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.” \textit{Id.}  \\
\textsuperscript{118} \textit{Id.}  \\
\textsuperscript{119} \textit{Id.}  \\
\textsuperscript{120} \textit{Id.} The Court ruled that in some spheres [states] 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. \textit{Id.}  \\
\textsuperscript{121} \textit{Id. at 1110.}  \\
\textsuperscript{122} \textit{Id.}  \\
\textsuperscript{123} \textit{Id.} The Court explained that [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 articulated and affirmatively expressed as state policy, and second that the policy . . . be actively supervised by the State. \textit{Id.} (internal quotation marks omitted).  \\
\textsuperscript{124} \textit{Id.}
for anticompetitive conduct, such immunity will not extend to situations where the state has delegated authority over the market to a non-sovereign actor.\textsuperscript{125} Importantly, the Court explained that state agencies are not, by virtue of their governmental character alone, sovereign actors for purposes of \textit{Parker} antitrust immunity analysis.\textsuperscript{126} Rather, for a state agency to qualify for \textit{Parker} immunity, it is necessary for the state to take responsibility for the anticompetitive actions it permits.\textsuperscript{127} The Court emphasized that limits on state-action immunity become increasingly crucial when, such as in North Carolina, the state takes steps to delegate regulatory authority to active market participants.\textsuperscript{128} Put simply, antitrust principles require that active market participants are prevented from exercising regulatory power over their own markets.\textsuperscript{129}

Under the \textit{Parker} immunity framework, the wisdom, efficiency, or utility of the challenged anticompetitive conduct is irrelevant; rather, the proper inquiry is whether the anticompetitive conduct may be considered state action.\textsuperscript{130} The Court explained that in order to resolve the state action question, an application of the two-pronged test established in \textit{California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.} is appropriate.\textsuperscript{131} \textit{Midcal} established that in order for a law or regulatory scheme to qualify for \textit{Parker} antitrust immunity, the state must first clearly articulate a policy calling for the anticompetitive conduct, and secondly, the state must provide active supervision of that conduct.\textsuperscript{132} Under \textit{Midcal}, a state may satisfy the clear articulation requirement where the anticompetitive conduct is an inherent, logical, or ordinary consequence of the state's exercise of the authority granted to it by the legislature.\textsuperscript{133} Lastly, the active supervision prong of the \textit{Midcal} test requires that state officials are involved in

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\item \textsuperscript{125} \textit{Id.} The Court noted that "[f]or purposes of \textit{Parker}, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself." \textit{Id.} at 1111 (citing Goldfarb v. Va. State Bar, 421 U.S. 773 (1975)).
\item \textsuperscript{126} \textit{Id.} at 1111-12.
\item \textsuperscript{127} \textit{Id.} at 1112. The Court's phrasing of the \textit{Midcal} test differed slightly from its original form in the \textit{Midcal} opinion. \textit{Id.}
\item \textsuperscript{128} \textit{Id.} at 1111-12.
\item \textsuperscript{129} \textit{Id.}
\item \textsuperscript{130} \textit{Id.}
\item \textsuperscript{131} \textit{Id.}
\item \textsuperscript{132} \textit{Id.}
\item \textsuperscript{133} \textit{Id.} The Court explained that "\textit{Midcal}'s clear articulation requirement is satisfied 'where the displacement of competition is the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.'" (quoting FTC v. Phoebe Putney, Inc., 133 S. Ct. 1003, 1013 (2013)).
\end{itemize}
the review of the anticompetitive actions of private parties, and that they take action to remedy conduct that deviates from the clearly articulated state policy.\textsuperscript{134}

The Court warned that meeting the clear articulation prong of the \textit{Midcal} test does not, by itself, definitively establish that an anticompetitive scheme is in reality an exercise of state power.\textsuperscript{135} There is a danger, the Court explained, that actors claiming to represent the interests of the state and its policy may depart from the state's vision.\textsuperscript{136} Any such deviation potentially encourages private self-dealing, a reality which the active supervision prong of the \textit{Midcal} test aims to combat.\textsuperscript{137} Rather, \textit{Midcal}'s active state supervision requirement calls for a realistic assurance that the anticompetitive conduct is, in fact, the execution of the state's policy rather than a result of a private actor's self-interests.\textsuperscript{138}

Rejecting the NC Dental Board's arguments that state agencies should be exempt from \textit{Midcal}'s active supervision requirement, the Court explained that the need for supervision relates to the risk of self-serving active market participants, rather than hinging upon any formal designation afforded to an agency by the state.\textsuperscript{139} Further, the Court noted, active market participants in particular represent the very threat of self-dealing that precipitated the \textit{Midcal} active supervision requirement in the first place.\textsuperscript{140} Importantly, state agencies subject to the control of active market participants bear a resemblance to privately owned trade organizations to which the states have delegated regulatory power.\textsuperscript{141} The Court determined that a state board comprised of a controlling number of active market participants cannot invoke \textit{Parker} antitrust immunity without first satisfying the \textit{Midcal} active supervision requirement.\textsuperscript{142}

Nothing in the record indicated that the state of North Carolina involved itself with the NC Dental Board's anticompetitive conduct.

\textsuperscript{134} Id.
\textsuperscript{135} Id. The Court emphasized that [t]he two requirements set forth in \textit{Midcal} provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated.

\textsuperscript{136} Id.
\textsuperscript{137} Id. The Court noted that \textquote{[t]he resulting asymmetry between a state policy and its implementation can invite private self-dealing.} \textit{Id.}
\textsuperscript{138} Id.
\textsuperscript{139} Id. at 1113-14.
\textsuperscript{140} Id. at 1114.
\textsuperscript{141} Id.
\textsuperscript{142} Id.
targeting non-dentists. Further, the NC Dental Board did not contend North Carolina had actively overseen its conduct. As a result, the Court explained, there was a possibility that North Carolina officials were oblivious to the anticompetitive actions of the NC Dental Board with respect to teeth whitening. Consequently, the Court did not have the opportunity to review any form of active state supervisory system, though it noted that the inquiry is both flexible and context-dependent. Affirming the Fourth Circuit, the Court decided that if a state seeks to utilize active market participants, it must provide them with the requisite active state supervision as set forth in the Midcal opinion.

D. NEBRASKA UNIFORM CREDENTIALING ACT

Healthcare professionals in Nebraska are licensed under the Uniform Credentialing Act ("UCA"), the purpose of which is to ensure the health and safety of the residents of Nebraska through the regulation and licensure of practitioners. During the 2012-2013 fiscal year, over 168,000 individuals held a credential under the UCA. Some professions covered under the UCA include medicine and sur-

143. Id. at 1116.
144. Id.
145. Id.
146. Id.

The Court has identified only a few constant requirements of active supervision: the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it[,] . . . the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy[,] . . . and the "mere potential for state supervision is not an adequate substitute for a decision by the State[,]" . . . [T]he state supervisor may not itself be an active market participant.

Id. (quoting FTC v. Ticor Title Ins. Co., 504 U.S. 621, 638 (1992)); see also Letter from Robert C. Felmeth, Executive Director, Center for Public Interest Law, et al., to the Hon. Kamala Harris, Attorney General of the State of California (May 4, 2015) (on file with the author) (warning of the potential for state licensure boards to expose themselves to federal antitrust liability).

147. Id. at 1117.
149. Uniform Credentialing Act, Neb. Rev. Stat. §§ 38-101 to 38-1,141 (2012). The purposes of the Uniform Credentialing Act are:

   (1) to protect the public health, safety, and welfare by (a) providing for the credentialing of persons and businesses that provide health and health-related services and environmental services which are made subject to the act and (b) the development, establishment, and enforcement of standards for such services and (2) to provide for the efficient, adequate, and safe practice of such persons and businesses.


surgery, nursing, emergency medical services, and dentistry.\textsuperscript{151} A majority of the professions credentialed under the UCA are governed by a licensure board.\textsuperscript{152} In total, twenty-seven of the credentialed professions under the UCA are regulated by licensure boards, each comprised of members appointed by the Nebraska State Board of Health.\textsuperscript{153}

The Nebraska State Board of Health has the authority to remove any member of any licensure board for reasons that include: (1) physical or mental incapacity; (2) continued neglect of duty; (3) incompetency; (4) acting outside of the member’s scope of authority; (5) malfeasance in office; (6) failure to maintain the necessary qualifications for the practice of dentistry in the state of Nebraska; and (7) for any cause for which the credential may be revoked or suspended.\textsuperscript{154} Examples of actions that constitute grounds for suspension or revocation of a credential under the Nebraska UCA include conviction of a felony or misdemeanor which is rationally related to the ability to practice the profession; practicing beyond a profession’s scope of practice; the use of deceptive or misleading advertisements; and practicing with gross negligence or incompetence.\textsuperscript{155} The Nebraska State Board of Health is comprised of seventeen members who are appointed by the Governor and confirmed by the state legislature.\textsuperscript{156} The Governor of Nebraska retains the authority to remove members of the Nebraska

\textsuperscript{151} \textit{Nebr. Rev. Stat.} § 38-121. The health and environmental professions that require a credential in Nebraska are:

- acupuncture;
- advanced practice nursing;
- alcohol and drug counseling;
- asbestos abatement, inspection, project design, and training;
- athletic training;
- audiology;
- speech-language pathology;
- body art;
- chiropractic;
- cosmetology;
- dentistry;
- dental hygiene;
- electrology;
- emergency medical services;
- esthetics;
- funeral directing and embalming;
- genetic counseling;
- hearing instrument dispensing and fitting;
- lead-based paint abatement, inspection, project design, and training;
- licensed practical nurse-certified massage therapy;
- medical nutrition therapy;
- medical radiography;
- medicine and surgery;
- mental health practice;
- nail technology;
- nursing;
- nursing home administration;
- occupational therapy;
- optometry;
- osteopathy;
- perfusion;
- pharmacy;
- physical therapy;
- podiatry;
- psychology;
- radon detection, measurement, and mitigation;
- respiratory care;
- veterinary medicine and surgery;
- public water system operation;
- constructing or decommissioning water wells and installing water well pumps and pumping equipment.

\textit{Id.} (alteration to original formatting); \textit{see also} Dentistry Practice Act, \textit{Nebr. Rev. Stat.} §§ 38-1101 to 38-1151 (2012) (arising under the UCA and regulating the practice of dentistry in Nebraska).

\textsuperscript{152} \textit{See Nebr. Rev. Stat.} § 38-167 (designating 27 boards); \textit{see also Nebr. Rev. Stat.} § 38-121 (listing 41 professions subject to credentialing requirements under the UCA).

\textsuperscript{153} \textit{Id.}; \textit{see also Nebr. Rev. Stat.} § 38-158 (providing that “[t]he State Board of Health shall appoint members to the boards designated in section 38-167 except the Board of Emergency Medical Services and the Water Well Standards and Contractors’ Licensing Board.”).


State Board of Health for inefficiency, neglect, failure to maintain the minimum qualifications for the position, or misconduct in office.\textsuperscript{157} Under the Nebraska UCA, each licensure board must have at least one public member, and for boards comprised of more than eleven members, there must be no fewer than three public members.\textsuperscript{158} Public members are appointed to each board in order to represent the viewpoints and interests of the public, and may not hold an active license in any profession regulated by the Nebraska UCA.\textsuperscript{159} Further, a public member cannot have a material financial interest in the healthcare profession regulated by the board or be a relative of any person presently regulated by the board.\textsuperscript{160} The healthcare licensure boards have the authority to promulgate rules and regulations covering minimum licensure standards and continuing competency requirements, designating credentialing examinations and minimum scores, and defining unprofessional conduct.\textsuperscript{161}

III. ARGUMENT

A. **JUST AS NORTH CAROLINA LICENSURE STATUTES EXPOSED NORTH CAROLINA BOARDS TO FEDERAL ANTITRUST LIABILITY, ELEMENTS OF THE NEBRASKA UNIFORM CREDENTIALING ACT ALSO POSE A RISK OF LIABILITY TO NEBRASKA HEALTHCARE LICENSURE BOARDS**

When determining whether actions by Nebraska licensure boards are protected by the state action antitrust immunity doctrine, it is necessary to assess whether the boards, comprised of non-sovereign actors who are practicing market participants, are actively supervised by the state of Nebraska.\textsuperscript{162} To do so, one must examine how the Nebraska Uniform Credentialing Act structures such boards, focusing on the statutory authority given to licensure boards and the degree of supervision the state exercises over those boards.\textsuperscript{163} In other words, when a Nebraska licensure board acts, the critical inquiry is whether


\textsuperscript{160} Id.

\textsuperscript{161} Neb. Rev. Stat. § 38-126.

\textsuperscript{162} See N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1113 (2015) (explaining that “[t]he lesson is clear: \textit{Mukul’s} active supervision test is an essential prerequisite of \textit{Parker} immunity for any nonsovereign entity—public or private—controlled by active market participants.”). 

it is acting as a state regulatory agency or as a group of self-interested market competitors.\textsuperscript{164}

\section*{Distinctions and Similarities Between the Structure of Dental Boards in North Carolina and Nebraska}

As a threshold matter, there are both distinctions and similarities between the statutory structure of licensure boards in North Carolina and Nebraska.\textsuperscript{165} In North Carolina, the Board of Dental Examiners (the "NC Dental Board") is comprised of six licensed dentists, a dental hygienist, and a public member.\textsuperscript{166} In Nebraska, the Board of Dentistry is comprised of two public members, six dentists licensed in the state of Nebraska, and two licensed dental hygienists.\textsuperscript{167} Neither the dental hygienist nor the public member in North Carolina may participate in any actions of the NC Dental Board that concern the issuance, renewal, or revocation of the license to practice dentistry, and dentists serving on the Board are elected by other dentists.\textsuperscript{168} In contrast to North Carolina, the public members and the dental hygienists serving on the Nebraska Dental Board are not prohibited from participating in actions concerning the licensure or discipline of dentists, and board members are appointed by the Nebraska Board of Health.\textsuperscript{169} Further, there is no statutory mechanism providing for the removal of

\textsuperscript{164} Compare Cal. Retail Liquor Dealers Ass'n v. Midal Aluminum, Inc., 445 U.S. 97, 104 (1980) (explaining that "[i]t is not enough that . . . anticompetitive conduct is "prompted" by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign.") (quoting Goldfarb v. Va. State Bar, 421 U.S. 773, 791 (1975)), with N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1117 (determining that "[t]he 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.").

\textsuperscript{165} Compare N.C. Gen. Stat. Ann. § 90-22 (2012) (requiring that the North Carolina dental board be comprised of "six dentists who are licensed to practice dentistry in North Carolina, one dental hygienist who is licensed to practice dental hygiene in North Carolina and one person who shall be a citizen and resident of North Carolina and who shall be licensed to practice neither dentistry nor dental hygiene."), with Neb. Rev. Stat. § 38-1114 (2012) (specifying that "[t]he [Nebraska] [dental] board shall have ten members . . . two public members; six licensed dentists, including one official member of the instructional staff from each accredited school or college of dentistry in this state; and two licensed dental hygienists.").


\textsuperscript{167} Neb. Rev. Stat. § 38-1114.


\textsuperscript{169} Compare Nebraska Dentistry Practice Act, Neb. Rev. Stat. §§ 38-1101 to 38-1151. (2012) (omitting any restrictions on public member participation on licensure or discipline actions), and Neb. Rev. Stat. § 38-158 (2012) (granting the Nebraska State Board of Health the authority to appoint members of the Nebraska Board of Dentistry), with N.C. Gen. Stat. Ann. § 90-22 (providing that "[t]he dental hygienist or the consumer member cannot participate or vote in any matters of the Board which involves the issuance, renewal or revocation of the license to practice dentistry in the State of North Carolina.").
a member of the NC Dental Board by a public official.¹⁷⁰ This is not
the case in Nebraska, where the Nebraska State Board of Health may
remove a member of a licensure board for reasons such as incapacity,
neglect of duty, malfeasance, or failure to maintain a credential to
practice dentistry in Nebraska.¹⁷¹

In both North Carolina and Nebraska, there are licensure boards
comprised primarily of active market participants that have statutory
authority to regulate their profession.¹⁷² In North Carolina, the NC
Dental Board has statutory authority to deny an application for a li-
cense to practice dentistry; to refuse to renew a license to practice; to
suspend or revoke a license to practice; and may take other discipli-
nary measures it deems fit and proper against an applicant or licensee
who has engaged in various acts of misconduct.¹⁷³ By contrast, the
Nebraska Department of Health and Human Services ("NDHHS"),
rather than the professional boards, makes decisions on initial and
renewal licensure applications.¹⁷⁴ The Nebraska Attorney General
files petitions for discipline with the NDHHS Director of Public
Health, who has the authority to impose disciplinary limitations on a
credential; to censure a credential holder; to suspend or revoke a li-
cense to practice; or to impose a civil penalty.¹⁷⁵

¹⁷⁰ See N.C. Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1108 (2015) (noting
that "[t]he Act does not create any mechanism for the removal of an elected member
of the Board by a public official.") (citing N.C. GEN. STAT. ANN. § 90-22 (2012)).


¹⁷² Compare N.C. GEN. STAT. ANN. § 90-22 (providing for a majority of active mar-
tet participants on the North Carolina Board of Dental Examiners), and N.C. GEN.
STAT. ANN. § 90-41 (2003) (setting forth the disciplinary authority of the North Carolina
Board of Dental Examiners), with Neb. Rev. Stat. § 38-1114 (requiring eight of the ten
members of the Nebraska Board of Dentistry to have active licenses), and Neb. Rev.
Stat. § 38-126 (2012) (allowing regulatory boards, including the Nebraska Board of
Dentistry, to set licensure eligibility, continuing competency requirements, and define
unprofessional conduct).


shall have jurisdiction of proceedings (a) to deny the issuance of a credential, (b) to
refuse renewal of a credential, and (c) to discipline a credential holder."); see also Neb.
Rev. Stat. § 38-185 (2012) (stating that "[t]o deny or refuse renewal of a credential, the
[NDHHS] shall notify the applicant or credential holder in writing of the action taken
and the reasons for the determination.").

nism by the Nebraska Attorney General); see also Neb. Rev. Stat. § 38-192 (2012)
(granting discretion to the NDHHS Director of Public Health to consult with the ap-
propriate licensure board in order to determine appropriate disciplinary measures); Neb.
Rev. Stat. § 38-196 (2012) (allowing the NDHHS Director of Public Health to impose
various sanctions against the credential holder).
2. Authority of the North Carolina and Nebraska Dental Boards to Issue Cease and Desist Letters

In North Carolina State Board of Dental Examiners v. FTC, the United States Supreme Court observed that although North Carolina law delegates regulation of the practice of dentistry to the NC Dental Board, the statute is silent on the issue of teeth whitening. When the NC Dental Board began receiving complaints from other licensed dentists about the cheaper teeth whitening services offered by non-dentists, the chief operations officer of the NC Dental Board took aggressive action against the non-dentists to expel them from the market.

Under the North Carolina Dental Practice Act, the practice of dentistry without a license constitutes a Class 1 misdemeanor, and each day of unlicensed practice is a separate offense. The North Carolina Attorney General, the district attorneys, the NC Dental Board, or any resident of the state of North Carolina is capable of filing an action to enjoin an individual from practicing dentistry without a license. However, there is no authority in the North Carolina Dental Practice Act for the Board of Dental Examiners to issue cease-and-desist orders. Nonetheless, rather than pursuing available statutory avenues to address the issue, such as seeking an injunction, the NC Dental Board issued a minimum of forty-seven cease-and-de-
sist letters on official Board letterhead to providers of teeth whitening services.  

As the decision of the NC Dental Board to issue cease-and-desist letters to non-dentists was the focus of the Supreme Court’s ruling in _North Carolina State Board of Dental Examiners_, it is appropriate to first examine the authority of licensure boards in Nebraska to issue cease-and-desist orders. Section 38-140 of the Nebraska UCA provides that in the event of complaints of unauthorized practices or the unauthorized operation of a business, a state board may issue an order to cease-and-desist the unauthorized activity prior to the official involvement of the Nebraska Attorney General. The unauthorized practice of a profession or the unauthorized operation of a business without a credential after the receipt of a cease-and-desist order constitutes a Class III felony in the State of Nebraska.

In _North Carolina State Board of Dental Examiners_, the Court noted that because the NC Dental Board did not claim that the state of North Carolina had exercised active supervision over its actions against non-dentists who were performing teeth whitening services, the Court could not review the systems in place in North Carolina for state supervision. By contrast, because licensure boards in Nebraska can unilaterally issue cease-and-desist orders to individuals whom they believe are engaged in the unlicensed practice of a profes-

182. _See N.C. State Bd. of Dental Exam’rs_, 135 S. Ct. at 1104 (indicating “the Board issued at least 47 official cease-and-desist letters to nondentists.”); _see also id_. at 1116 (noting that “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.”); _see also N.C. GEN. STAT. ANN_. § 90-40.1 (2012) (providing that “[t]he Attorney General for the State of North Carolina, the district attorney of any of the superior courts, the North Carolina State Board of Dental Examiners in its own name, or any resident citizen may maintain an action in the name of the State of North Carolina to perpetually enjoin any person from so unlawfully practicing dentistry and from the doing, committing or continuing of such unlawful act.”).

183. _N.C. State Bd. of Dental Exam’rs_, 135 S. Ct. at 1110.

184. _See Neb. Rev. Stat._ § 38-140 (2012) (providing, _inter alia_, that a “department may, along with other law enforcement agencies, investigate such reports or other complaints of unauthorized practice or unauthorized operation of a business. The appropriate board may issue an order to cease and desist the unauthorized practice of such profession or unauthorized operation of such business as a measure to obtain compliance with the applicable credentialing requirements by the person or business prior to referral of the matter to the Attorney General for action.”).

185. _See id_. (explaining that “[p]ractice of such profession or operation of such business without a credential after receiving a cease and desist order is a Class III felony.”); _see also Neb. Rev. Stat._ § 28-105 (2012) (providing that conviction of a Class III felony may result in a maximum of four years imprisonment or a twenty-five thousand dollar fine, or both).

186. _See N.C. State Bd. of Dental Exam’rs_, 135 S. Ct. at 1116 (explaining that “[t]he Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here.”).
sion, it is necessary to examine whether the state of Nebraska exercises active supervision over the state licensure boards in matters concerning the issuance of cease-and-desist orders.\textsuperscript{187} This inquiry is important because in \textit{North Carolina State Board of Dental Examiners}, the NC Dental Board conceded that there was no state supervision over its decision to issue cease-and-desist orders to non-dentists engaged in teeth whitening, and as a result, the Court determined that the NC Dental Board had not satisfied the requirements for \textit{Parker} state-action immunity.\textsuperscript{188}

The Supreme Court explained in \textit{North Carolina State Board of Dental Examiners} that active state supervision analysis must be both flexible and context-dependent.\textsuperscript{189} The Court also noted that its precedent provides for several constant requirements of active supervision, including: (1) analysis of the nature of the anticompetitive decision; (2) the power of the supervising body to ensure conformity with state policy by exercising veto powers; and (3) the requirement that the supervisor must not be an active market participant.\textsuperscript{190} Based upon the requirement of active state supervision outlined in \textit{North Carolina State Board of Dental Examiners} and \textit{California Retail Liquor Dealers Ass'n v. Mيدal Aluminum Inc.},\textsuperscript{191} Nebraska licensure boards that issue cease-and-desist orders against individuals who may be practicing a profession without a license are arguably engaging in unfair restraint of trade in violation of federal antitrust statutes.\textsuperscript{192}

\textsuperscript{187} See \textit{N.C. State Bd. of Dental Exam'rs}, 135 S. Ct. at 1120-21 (Alito, J., dissenting) (explaining that "[t]he Court crafts a test under which state agencies that are 'controlled by active market participants' . . . must demonstrate active state supervision in order to be immune from federal antitrust law."); see also \textit{Neb. Rev. Stat.} § 38-140 (allowing for Nebraska licensure boards to issue cease-and-desist orders).

\textsuperscript{188} \textit{N.C. State Bd. of Dental Exam'rs}, 135 S. Ct. at 1116-17.

\textsuperscript{189} See \textit{N.C. State Bd. of Dental Exam'rs}, 135 S. Ct. at 1116 (holding that "[i]t suffices to note that the inquiry regarding active supervision is flexible and context-dependent.").

\textsuperscript{190} See id. at 1116, 1117 (noting that "[t]he Court has identified only a few constant requirements of active supervision: the supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; . . . the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; . . . and the 'mere potential for state supervision is not an adequate substitute for a decision by the state' . . . [f]urther, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.") \textit{Id.}

\textsuperscript{191} 445 U.S. 97 (1980).

\textsuperscript{192} \textit{Compare Cal. Retail Liquor Dealers Ass'n v. Mideal Aluminum, Inc.}, 445 U.S. 97, 105 (1980) (explaining that "[f]irst, 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."); \textit{with Goldfarb v. Va. State Bar}, 421 U.S. 773, 791 (1975) (deciding that "[i]t is not enough that . . . anticompetitive conduct is 'prompted' by state action; rather, anticompetitive activities must be compelled by direction of the State acting as a sovereign."); see also \textit{N.C. State Bd. of Dental Exam'rs}, 135 S. Ct. at
As the Court pointed out in *North Carolina State Board of Dental Examiners*, the NC Dental Board could have exercised statutory authority to address allegations of unlicensed practice of dentistry, with oversight by a politically accountable official.\textsuperscript{193} Likewise, in Nebraska, a politically accountable official, the Attorney General, has the authority to initiate an action against an individual engaged in the unauthorized practice of a profession.\textsuperscript{194} Nebraska licensure boards have the ability to address the unauthorized practice of a profession by referring the matter to the Nebraska Attorney General for action pursuant to Nebraska Revised Statute § 38-1,114, which provides that an individual engaging in the unauthorized practice of a profession or business may be restricted by temporary or permanent injunctions.\textsuperscript{195} Further, the NDHHS may request that the Attorney General pursue a civil or criminal action against any individual who violates any provision found in the Nebraska UCA.\textsuperscript{196} If a member of a Nebraska licensure board becomes aware that an individual is engaged in the unauthorized practice of a profession, that board member must report the matter to the NDHHS, which in turn can refer the matter to the Attorney General.\textsuperscript{197}

Although the decision in *North Carolina State Board of Dental Examiners* focused upon cease-and-desist orders issued by a state licensure board, the ruling has broader implications.\textsuperscript{198} In light of the fact that lawsuits against state medical boards on antitrust grounds have already been filed and are proceeding through the court system,

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\textsuperscript{1117} (affirming the finding of the Federal Trade Commission that the NC Dental Board violated federal antitrust law by issuing cease-and-desist letters to non-dentists without active state supervision).

\textsuperscript{193} See *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1116 (explaining that “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.”).

\textsuperscript{194} See *Neb. Rev. Stat.* § 38-1,114 (2012) (providing that “[a]ny person engaging in the practice of any profession or business without the appropriate credential may be restrained by temporary and permanent injunctions.”); see also *Neb. Rev. Stat.* § 38-1,139 (2012) (providing that the Nebraska Attorney General shall institute civil or criminal actions at the request of the Department of Health and Human Services for violations of the Uniform Credentialing Act).

\textsuperscript{195} *Neb. Rev. Stat.* § 38-1,114.

\textsuperscript{196} *Neb. Rev. Stat.* § 38-1,139.

\textsuperscript{197} *Id.*; see also *Neb. Rev. Stat.* § 38-178(10) (2012) (providing that a credential holder may be disciplined for “[l]icensing, aiding, or abetting the practice of a profession or the performance of activities requiring a credential by a person not credentialed to do so . . .”).

\textsuperscript{198} See Letter from Robert C. Fellmeth, Executive Director, Center for Public Interest Law, et al., to the Hon. Kamala Harris, Att’y General of the State of California (May 4, 2015) (on file with the author) (warning that the Court’s decision in *North Carolina State Board of Medical Examiners* “renders unlawful what has become the common regulatory practice across all 50 states . . . ”).
\end{flushleft}
it is prudent to evaluate the activities of Nebraska healthcare licensure boards by applying the active supervision analysis. This evaluation is critical because Nebraska’s licensure boards that issue cease-and-desist orders run the risk of exposing themselves to federal antitrust prosecution and civil treble damages, which the state of Nebraska may be required to absorb through indemnification of board members.

B. STATUTORY CHANGES TO THE STRUCTURE OF NEBRASKA LICENSURE BOARDS COULD INSULATE BOARDS FROM ANTITRUST CHALLENGES BY RE-ESTABLISHING PARKER STATE-ACTION IMMUNITY

The United States Supreme Court made it clear in North Carolina State Board of Dental Examiners v. FTC, that a state licensure board, comprised of a majority of non-sovereign, active market participants, will not be entitled to immunity from federal antitrust liability unless that board is actively supervised by the state. Further, the state must implement mechanisms to review anticompetitive decisions by licensure boards, and must have the ability to alter or otherwise veto decisions by the boards to ensure that they appropriately reflect state policy. Therefore, the challenge for the state of Nebraska in the wake of the decision is to ensure that the licensure of healthcare professionals is carried out with active state supervision over licensure boards. Nebraska could ensure that the licensure of


203. See N.C. Stat. Bd. Of Dental Exam’rs, 135 S. Ct. at 1116 (noting that the state must “review the substance of the anticompetitive decision, not merely the procedures followed to produce it” and must have the authority to “veto or modify particular decisions to ensure they accord with state policy . . . ”).

204. See id. at 1112 (emphasizing that “under Midcal, ‘a state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of the anticompetitive conduct.””)
healthcare professionals is carried out with active state supervision over licensure boards with amendments to the Nebraska UCA.\textsuperscript{205}

1. \textit{Proposed Changes to the Nebraska Uniform Credentialing Act in Response to the North Carolina State Board of Dental Examiners Decision}

As noted earlier, state licensure boards in Nebraska have statutory authority to issue cease-and-desist orders to address complaints of unlicensed practice of a profession, without oversight or approval by the NDHHS or the Nebraska Attorney General.\textsuperscript{206} Various licensure boards have issued cease-and-desist orders to individuals that were determined to have been practicing their respective professions without a license, including cease-and-desist orders by the Nebraska Board of Dentistry to individuals who were engaged in teeth-whitening and the sale of custom “grills.”\textsuperscript{207} It was the issuance of similar orders by the NC Dental Board that triggered allegations of unreasonable restraint of trade by the FTC.\textsuperscript{208} Under Nebraska Revised Statute § 38-1,124(2), a licensure board may issue a cease-and-desist order to anyone engaged in the unauthorized practice of a profession in order to enforce compliance with the credentialing requirements of the Nebraska UCA.\textsuperscript{209} Continuing to practice after the issuance of a cease-and-desist order by a licensure board exposes the recipient of the order to future criminal prosecution.\textsuperscript{210}

Another area of concern in light of the recent Supreme Court ruling is the ability of Nebraska state licensure boards, without active

\textsuperscript{205} See Maureen K. Ohlhausen, FTC, Remarks at the Heritage Foundation: Reflections on the Supreme Court’s North Carolina Dental Decision and the FTC’s Campaign to Rein in State Action Immunity (March 31, 2015) (transcript available at the FTC official government website) (stating that an option for states that want to continue having licensure boards comprised of a majority of active market participants would be to have “ultimate regulatory decisions [that] are made by legislative committees, umbrella state agencies, . . . or other disinterested state officials.”).


\textsuperscript{207} See Letter from Nebraska Board of Dentistry, to Peggy Serl (May 14, 2010) (on file with the author) (ordering recipient to cease providing teeth whitening services); Letter from Nebraska Board of Dentistry, to Jack Rodrock (August 28, 2008) (on file with the author) (ordering recipient to cease offering teeth whitening services at the Nebraska State Fair); Letter from Nebraska Board of Dentistry, to Jason Cramer (June 10, 2008) (on file with the author) (stating that the sale of custom “grills” constituted the unlicensed practice of dentistry); see also Grille, Merriam-Webster Dictionary, http://www.merriam-webster.com/dictionary/grille (last visited Nov. 10, 2015) (defining “grille” or “grill” as “a set of metallic covers for the teeth”).

\textsuperscript{208} N.C. State Bd. of Dental Exams v. FTC, 135 S. Ct. 1101, 1104 (2015).

\textsuperscript{209} See Neb. Rev. Stat. § 38-1,124(2) (providing that a board may issue cease-and-desist orders in order to “obtain compliance with the applicable credentialing requirements by the person prior to referral of the matter to the Attorney General for action.”).

\textsuperscript{210} See id. (providing that “[p]ractice of such profession . . . without a credential after receiving a cease and desist order is a Class III felony.”).
state supervision, to, *inter alia*: (1) promulgate regulations specifying minimum educational standards required for a credential; (2) determine eligibility for undergoing the credentialing examination; (3) set the passing score of credentialing examinations; (4) establish continuing competency requirements; and (5) specify acts which constitute unprofessional conduct.211 In other words, licensure boards, comprised of a majority of licensed market participants, have the authority to decide who is competent to enter their profession and who is not, and which acts will result in a credential-holder being disciplined.212

The healthcare industry is unique in that entry into the field through mandatory licensure is closely controlled by what are essentially trade guilds, like the American Medical Association ("AMA") and the American Dental Association ("ADA").213 For example, in order to be licensed to practice as a physician in every state, an applicant must have graduated from an accredited medical school.214 Although this accreditation comes from state licensure boards, in reality it is the AMA's accrediting body that approves medical schools.215 Professional organizations like the ADA and the AMA have been known to utilize regulatory mechanisms to eliminate competition from other qualified healthcare practitioners, such as when the AMA—mainly comprised of physicians trained in allopathic medicine—attempted to prevent physicians trained in osteopathic medicine from qualifying for licensure.216 Because of the AMA's successful lobbying efforts, the licensure of physicians was limited to graduates of allopathic medical schools accredited by the AMA, and osteopathic physicians were unable to be licensed in any state in the country until 1974.217

In Nebraska, in order to be licensed to practice dentistry, an individual must meet licensure requirements determined by the Nebraska

213. See Erik B. Smith, Note, *Dental Therapists in Alaska: Addressing Unmet Needs and Reviving Competition in Dental Care*, 24 Alaska L. Rev. 105, 133-134 (2007) (noting that "[h]ealthcare is a unique industry, because information deficits and asymmetries persist at every level. These asymmetries and deficiencies result in a high degree of trust in healthcare professionals for information, and consequently professionals have been able to achieve very comprehensive control over healthcare regulation. This control includes tight control over occupational licensing and an unusually high deference being afforded to self-regulatory bodies like the ADA and AMA.").
215. Id.
216. Smith, supra note 213, at 134-35.
217. Id. at 135.
Board of Dentistry.²¹⁸ Critically, not all of the requirements that are set forth in the dentistry regulations are grounded in public safety concerns.²¹⁹ For example, under the regulations governing professional advertising by dentists—promulgated by the Nebraska Board of Dentistry—a dentist cannot affirmatively represent his or her practice as being superior to that of other dental practitioners.²²⁰ Offenses involving economic concerns often mirror requirements found in the ethical codes of state medical societies and at times have been challenged under antitrust statutes.²²¹ Notably, the economic offenses that were subject to legal challenge were those that were contained in medical society ethical codes, rather than those found in state statutes or regulations because of the Parker state action exemption.²²² That, of course, has changed with the ruling in North Carolina State Board of Dental Examiners v. FTC,²²³ and state licensure boards that promulgate and enforce regulations prohibiting offenses such as fee-splitting and improper advertising may not enjoy immunity from antitrust liability unless the board is subject to active state supervision.²²⁴

2. Steps to Insulate Nebraska Licensure Boards from Liability

One solution to the challenges posed by the decision in North Carolina State Board of Dental Examiners v. FTC,²²⁵ would be to structure healthcare licensing under the UCA so that the final decisions concerning who will be allowed to practice a profession—including decisions on which licensure examinations will be accepted, minimum test scores, continuing education requirements, and definitions of unprofessional conduct—would be made by the state Director of Public Health or the Chief Medical Officer after consultation with licensure boards for guidance and recommendations.²²⁶ Oversight by a state

²¹⁸ NEB. REV. STAT. §§ 38-126(1)(a).
²¹⁹ See generally 172 NEB. ADMIN. CODE ch. 54 (2012) (regulating professional advertising by dentists).
²²⁰ See 172 NEB. ADMIN. CODE ch. 54, § 54-001 (2012) (providing that a dentist cannot "hold himself, his staff, his service, or method of delivery of dental services as being superior to that of other dental practitioners.").
²²² Id. at 461.
²²⁴ N.C. State Bd. of Dental Exam'rs, 135 S. Ct. at 1113.
²²⁶ See Maureen K. Ohlhausen, FTC, Remarks at the Heritage Foundation: Reflections on the Supreme Court's North Carolina Dental Decision and the FTC's Campaign to Rein in State Action Immunity (March 31, 2015) (transcript available at the FTC official government website) (noting that an option for states that want to continue having licensure boards comprised of a majority of active market participants would be to have "ultimate regulatory decisions [that] are made by legislative committees, umbrella state agencies, ... or other disinterested state officials."); but see NEB. REV. STAT. § 38-
official such as the Nebraska Director of Public Health or the Chief Medical Officer would satisfy the requirement of active state supervision. 227 This type of active state supervision already exists in the context of the disciplining of healthcare professionals in Nebraska, where the decision to file a petition for disciplinary action rests with the Attorney General after consultation with the appropriate licensure board, and discipline may be imposed by the Director of Public Health.228 Notably, at least one state, Alabama, has already taken proactive measures to respond to the decision in North Carolina State Board of Dental Examiners.229

Objections to amendments to the UCA that result in active state supervision over the decisions of Nebraska licensure boards are likely to arise from professional healthcare organizations like the AMA and ADA, and also from professional members of licensure boards; in part because of the belief that healthcare professionals are best regulated by other healthcare professionals who possess knowledge of and experience in the practice of their profession.230 While this may be a valid concern, it should be noted that courts routinely recognize, and grant deference to, the knowledge and expertise of medical professionals in matters related to the provision of healthcare.231 For example, in a

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126 (2012) (currently allowing for regulatory boards, rather than a public official, to make regulatory decisions governing the credentialing requirements).

227. See N.C. State Bd. of Dental Exam'r's v. FTC, 135 S. Ct. 1101, 1116 (2015) (explaining that there are "only a few constant requirements of active supervision," including requirements that "[t]he supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it . . . [and] the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy . . . ").


229. See Breaking: Alabama Board of Medical Examiners Repeals Telehealth Rules Based On U.S. Supreme Court Ruling (American Academy of Physician Assistants, Alexandria, VA) Sept. 14, 2015 (discussing the decision by the Alabama State Board of Medical Examiners to initiate an emergency suspension of its potentially anticompetitive telehealth regulations "in light of the United States Supreme Court decision in North Carolina State Board of Dental Examiners v. FTC . . . ").

230. See Brief of the American Dental Association, the American Medical Association, et al. as Amici Curiae Supporting Petitioner at 1, N.C. State Bd. of Dental Exam'r's v. FTC, 135 S. Ct. 1101 (2015) (No. 13-354) (declaring that the ADA and the AMA "have a strong interest in supporting the determination by state legislatures that the health professions should be regulated by knowledgeable health care professionals who have practical experience in the profession that they are regulating"); see also Brief of the American Association of Nurse Anesthetists, American Nurses Association, American Association of Nurse Practitioners, et al. as Amici Curiae Supporting Petitioner at 29, N.C. State Bd. of Dental Exam'r's v. FTC, 135 S. Ct. 1101 (2015) (No. 13-354) (stating that "[h]ealthcare practitioners provide invaluable insight and knowledge on questions related to quality, safety, and the practicality of rules or standards, based on their intimate knowledge of current technology and practice.").

231. See Cal. Dental Ass'n v. FTC, 526 U.S. 756, 772 (1999) (noting the inability of lay persons to assess or monitor the quality of services provided by dentists, and the specialized knowledge needed to evaluate the quality of professional services).
malpractice action alleging physician negligence, whether or not the defendant met a minimum standard of care is determined by expert testimony provided by a member of the medical profession. A policy like this not only ensures that the acceptable standard of care is defined by those who possess the required level of education, training, and skill, but also provides juries—comprised of laymen who do not have the technical expertise to evaluate medical practices—with the information required to make decisions on the appropriate standard of medical care. Active state supervision, with final decisions made by state officials with participation by licensure boards, would allow for the licensure and regulation of healthcare professionals in Nebraska without the restraint of trade.

IV. CONCLUSION

In deciding North Carolina State Board of Dental Examiners v. FTC, the United States Supreme Court reinited the application of Parker state-action immunity to the actions of state licensure boards by reinforcing the requirements of active state supervision and the articulation of a clear policy in favor of the anticompetitive conduct by the licensure boards. The current statutory trend among the fifty states regarding the structure of professional licensure boards fails to satisfy the newly articulated Parker state-action immunity standard. Specifically, Nebraska’s Uniform Credentialing Act, in its current form, falls short of meeting the active state supervision requirement articulated in the California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc. and North Carolina State Board of Dental Examiners decisions. By making relatively painless adjustments to

232. See W. Page Keeton et al., PROSSER AND KEETON ON THE LAW OF TORTS § 32, 188 (5th ed. 1984) (explaining that “[s]ince juries composed of laymen are normally incompetent to pass judgment on questions of medical science or technique, it has been held in the great majority of malpractice cases that there can be no finding of negligence in the absence of expert testimony to support it.”).
233. McCormack, supra note 212 at 142.
234. See N.C. State Bd. of Dental Exam’rs, 135 S. Ct. at 1113 (explaining that “[t]he lesson is clear: Midcal’s active state supervision test is an essential prerequisite of Parker immunity for any nonsovereign entity—public or private—controlled by active market participants.”).
236. N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1113 (2015); see also supra notes 93-147 and accompanying text.
237. See Letter from Robert C. Fellmeth, Exec. Dir., Ctr. for Pub. Interest Law, et al., to the Hon. Kamala Harris, Att’y General of the State of California (May 4, 2015) (on file with the author) (warning that the Court’s decision in North Carolina State Board of Medical Examiners “renders unlawful what has become the common regulatory practice across all 50 states.”).
239. See supra notes 148-200 and accompanying text.
the Uniform Credentialing Act, Nebraska can re-align itself with the requirements of the *Parker* state-action immunity doctrine.²⁴⁰ In this, Nebraska can avoid liability under the Sherman Antitrust Act and its attendant civil damages.²⁴¹

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²⁴⁰ *See supra* notes 201-232 and accompanying text.

²⁴¹ *See* Letter from Robert C. Fellmeth, Executive Director, Center for Public Interest Law, et al., to the Hon. Kamala Harris, Attorney General of the State of California (May 4, 2015) (on file with the author) (noting that California is “theoretically vulnerable to federal felony prosecution and civil treble damages—and [California’s] indemnifying state budget may be similarly exposed.”).