No. 11-1679

In the United States Court of Appeals
for the Fourth Circuit

NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS,
Plaintiff-Appellant,

v.

FEDERAL TRADE COMMISSION,
Defendants-Appellees.

On Appeal from the United States District Court for the Eastern District of North Carolina Western Division

BRIEF OF APPELLANT

NOEL L. ALLEN
M. JACKSON NICHOLS
ALFRED P. CARLTON, JR.
CATHERINE E. LEE
NATHAN E. STANDLEY
BRIE A. ALLEN, OF COUNSEL
ALLEN, PINNIX & NICHOLS, P.A.
POST OFFICE DRAWER 1270
RALEIGH, NORTH CAROLINA 27602
(919) 755-0505
(919) 829-8098 FAX
nallen@allen-pinnix.com

Counsel for Appellant

ORAL ARGUMENT REQUESTED

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT
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   If yes, identify all parent corporations, including grandparent and great-grandparent corporations:

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STATEMENT OF SUBJECT MATTER AND APPELLATE JURISDICTION

This action arises under the Constitution and laws of the United States. At issue is whether the U.S. District Court for the Eastern District of North Carolina has federal question jurisdiction over this action by operation of Article III of the Constitution and 28 U.S.C. § 1331. The question presented is whether that court properly had jurisdiction to resolve a state's constitutional challenge of a federal agency's assertion of subject matter jurisdiction. The federal agency sought to preempt state public protection statutes despite the federal agency's lack of Congressional authorization, despite seventy years of contrary Supreme Court precedence and despite a contrary Executive Order.[1] This action is brought pursuant to the federal Declaratory Judgment Act, 28 U.S.C. §§ 2201 (Creation of Remedy), 2202 (Further Relief); 28 U.S.C. § 1651 (Writs); the implied non-statutory review procedure provided by 28 U.S.C. § 1331 (Federal Question); 28 U.S.C. § 1361 (Action to Compel an Officer of the United States to Perform His Duty); and the Administrative Procedure Act, 5 U.S.C. § 500 *et seq*.

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[1] Exec. Order No. 13132 (Aug. 4, 1999) ("The constitutional relationship among sovereign governments, State and national, is inherent in the very structure of the Constitution and is formalized in and protected by the Tenth Amendment to the Constitution."). See also Presidential Memorandum for the Heads of Exec. Dep'ts & Agencies (May 20, 2009) ("The purpose of this memorandum is to state the general policy . . . that preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with a sufficient legal basis for preemption.")

The Federal Trade Commission Act ("FTC Act"), 15 U.S.C. §§ 14 *et seq.*, contains no waiver of sovereign immunity by North Carolina or any other state, as is unmistakably clear in the language of the statute. Without waiving its sovereign immunity under the Tenth Amendment, the North Carolina State Board of Dental Examiners ("State Board") seeks judicial determination of the Federal Trade Commission ("FTC" or "Commission")'s lack of subject matter jurisdiction to force a bona fide state agency to submit to an unprecedented administrative proceeding, contrary to the heart of the balance of federal and state sovereignty assured in the Tenth Amendment to the U.S. Constitution, as well as Article I, Section 8, Clause 3 (the Commerce Clause) and Article III, Section 2, Clause 2 (original jurisdiction over actions against states).

The Fourth Circuit Court of Appeals has jurisdiction over this matter pursuant to 28 U.S.C. § 1291. In addition, jurisdiction exists under 28 U.S.C. § 1651. See Jamison v. Wiley, 14 F.3d 222, 234 (4th Cir. 1994) (court may treat notice of appeal as petition for a writ of mandamus).

The Honorable Louise W. Flanagan issued her Order dismissing the State Board's complaint for declaratory judgment for lack of subject matter jurisdiction on May 3, 2011. Order p. 149. The judgment memorializing this Order was entered on May 9, 2011. Judgment p. 159. The State Board filed its notice of appeal on June 27, 2011. Notice of Appeal p. 160. This appeal was timely

pursuant to Rule 4(a)(1)(B) of the Federal Rules of Appellate Procedure, which provides that a notice of appeal may be filed with the district court within sixty days after the order was entered. The State Board asserts that its appeal is taken from a final order/judgment of the district court that disposes all of the parties' claims.

STATEMENT OF THE ISSUES

1) Does a district court have jurisdiction over an action challenging the jurisdiction of the Commission when it has acted unconstitutionally, contrary to its authorizing statute, and when relief is not otherwise available to the State Board?

2) Under the general language of Sections 4 and 5 of the Federal Trade Commission Act, can the Commission assert jurisdiction over a bona fide state agency acting to preempt state statutes regarding the definition of a profession within that state and regarding the statutory composition of the state agency?

3) Under Article I, Section 8 of the U.S. Constitution, can the Commission prevent the State Board from protecting the health, safety, and welfare of its citizens absent more specific congressional authorization and absent Commission rulemaking?

4) Under the Tenth Amendment of the U.S. Constitution, can the Commission, without first resorting to the judiciary, subject a bona fide state

agency, acting as a sovereign, to a federal agency tribunal over a matter generally reserved to the states for regulation and not expressly regulated by Congress?

STATEMENT OF THE CASE

The State Board brought its action against the Commission because the federal agency violated the State Board's U.S. Constitution, the Commission's authorizing statute, and nearly seven decades of established, unquestioned, and unchallenged U.S. Supreme Court jurisprudence. On February 1, 2011, the State Board filed a Complaint for Declaratory Judgment and Preliminary and Permanent Injunction against the Commission ("Complaint"). On February 2, 2011, the State Board filed a Motion for Temporary Restraining Order and Other Equitable Relief, which sought to restrain and enjoin the Commission from further prosecution of its administrative action against the Board. The Motion for Temporary Restraining Order was denied by the District Court on February 9, 2011.

On February 28, 2011, the Commission responded to the State Board's Complaint by filing a Motion to Dismiss and Memorandum of Law in Support of Motion to Dismiss ("Motion to Dismiss"). The Motion to Dismiss was predicated on the argument that the District Court lacked subject matter jurisdiction over the State Board's Complaint because the Commission had not yet rendered its final agency decision in the ongoing administrative enforcement action against the State

Board. On May 3, 2011, the Commission's Motion to Dismiss for lack of subject matter jurisdiction was granted. Thereafter, the State Board filed a timely appeal.

STATEMENT OF THE FACTS

The State Board is a bona fide agency of the State of North Carolina. Complaint p. 12. It was created by the North Carolina General Assembly under the North Carolina Dental Practice Act ("Act" or "Dental Practice Act") to regulate the practice of dentistry in North Carolina and protect the public health, safety, and welfare. Complaint p. 10; N.C. Gen. Stat. § 90-22(a). The General Assembly also provided that the Act "be liberally construed to carry out these objects and purposes." Complaint p. 10; N.C. Gen. Stat. § 90-22(a).

The State Board and its members are sworn state officials, and thus both are entitled to sovereign immunity. As the Ninth Circuit has indicated, state officials and state agencies, acting pursuant to their statutory mandate, are no less sovereign than a state. Deak-Perera Hawaii, Inc. v. Dept. of Transp., 745 F.2d 1281 (9th Cir. 1984). In the Perera case, the court stated that "[w]e see no reason why a state executive branch, when operating within its constitutional and statutory authority, should be deemed any less sovereign than a state legislature, or less entitled to deference under principles of federalism." Id. at 1283. The same approach has been taken with regards to state officials. See Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc., 810 F.2d 869, 876 (9th Cir. 1987) ("When state

executive[s] ... act within their lawful authority, their acts are those of the sovereign"). This is analogous to the case at bar because the State Board is an agency of the state created by statute. It has and continues to operate within its statutory mandate under Chapter 93B of the North Carolina General Statutes and the North Carolina Dental Practice Act.

Occupational licensing boards, board members, and board employees are granted sovereign immunity under North Carolina law. See N.C. Gen. Stat. 93B-16(b) ("Occupational licensing boards shall be deemed State agencies for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes, and board members and employees of occupational licensing boards shall be considered State employees for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes."). Thus, the actions of the State Board, its members, and its employees, are actions of the state and are considered by the state of North Carolina to be entitled to sovereign immunity.

The Act sets forth the State Board's structure and mandates its activities. This includes requiring that the State Board be comprised of a majority of licensed dentists. Complaint p. 12; N.C. Gen. Stat. § 90-22(b). The Act also mandates that the State Board limit the practice of dentistry to licensed dentists. Complaint p. 10; N.C. Gen. Stat. § 90-22(b). Dental hygienists may also perform certain procedures such as stain removal from teeth under the supervision of a licensed dentist. N.C.

Gen. Stat. § 90-233(a). Most significantly, the Act clearly and unambiguously defines the practice of dentistry as the removal of stains from the human teeth and the offering to perform such services. Complaint pp. 18-19; N.C. Gen. Stat. § 90-29(b)(2).[2]

Acting on complaints that it received from members of the teeth whitening industry, the Commission opened an investigation into the State Board's enforcement activities in 2008. Complaint p. 22. During the ensuing two years, the State Board provided responses to ten multi-part specifications that also required the production of thousands of pages of documents. The State Board also endured six investigational hearings during this time period. Complaint p. 22.

Despite the total absence of legislative or judicial authority for its assertion that the State Board is subject to the FTC Act, the Commission filed an administrative complaint against the State Board on June 17, 2010. See FTC Complaint pp. 47-53. In its administrative complaint, the Commission alleged that members of the State Board "colluded" to engage in violations of the FTC Act. FTC Complaint p. 47; Board Response p. 54. Specifically, the Commission predicated its administrative enforcement action on allegations that the State Board

[2] See also, N.C. Gen. Stat. § 90-29(b)(11), which defines the practice of dentistry as owning, managing, supervising, controlling, or conducting any enterprise where any of the prohibited practices are done or attempted to be done; N.C. Gen. Stat. § 90-29(b)(13), which also includes in the definition of the practice of dentistry representing to the public the ability or qualification to do or perform any of the prohibited practices.

sent cease and desist letters to non-licensed providers of teeth whitening services within the state of North Carolina, such as spas and mall kiosks, and discouraged non-dentists from opening teeth whitening businesses in the state. FTC Complaint p. 50; Board Response p. 68. The Commission also took the State Board to task for sending letters to the owners or management companies of North Carolina shopping malls where teeth whitening services were likely to be offered to North Carolina consumers. FTC Complaint p. 50; Board Response p. 68. These mall letters explained that stain removal services constituted the practice of dentistry in North Carolina, and thus could only be performed by licensed dentists. Board Response p. 68-69.

The Commission also alleged in its administrative complaint that, solely because the majority of the members of the State Board are licensed dentists—as required by North Carolina statute—the State Board members' activities were motivated by financial interest and, therefore, the State Board was not entitled to the defenses available under the "state action immunity" doctrine. FTC Complaint p. 47. Shortly before the administrative hearing began, the Commission, on February 8, 2011, issued an opinion on the State Board's Motion to Dismiss and Complaint Counsel's Motion for Partial Summary Decision. See In the Matter of The North Carolina [State] Board of Dental Examiners, slip opinion, http://www.ftc.gov/os/adjpro/d9343/110208commopinion.pdf. The opinion held

that the State Board was controlled by licensed dentists who might act in their own self-interest and active supervision was lacking; therefore, the Board was not entitled to state action immunity. See In the Matter of The North Carolina [State] Board of Dental Examiners, Order at 17, http://www.ftc.gov/os/adjpro/d9343/110208commopinion.pdf.

An administrative hearing on the matter commenced on February 17, 2011 and concluded on March 16, 2011. The State Board moved to dismiss at the close of Complaint Counsel's evidence; that motion was denied on March 30, 2011. See In the Matter of The North Carolina [State] Board of Dental Examiners, Order, http://www.ftc.gov/os/adjpro/d9343/110330aljorddenyrespmodismissclose.pdf. On July 14, 2011, Administrative Law Judge D. Michael Chappell rendered his initial decision. See In the Matter of The North Carolina [State] Board of Dental Examiners, Initial Decision, http://www.ftc.gov/os/adjpro/d9343/110719ncb-decision.pdf. The initial decision held that the State Board's actions constituted a violation of Section 1 of the Sherman Act and unfair competition in violation of Section 5 of the FTC Act. See In the Matter of The North Carolina [State] Board of Dental Examiners, Initial Decision at 118, http://www.ftc.gov/os/adjpro/d9343/110719ncb-decision.pdf. The State Board appealed the initial decision to the full Commission on July 28, 2011. See In the Matter of The North Carolina [State]

Board of Dental Examiners, Notice of Appeal, http://www.ftc.gov/os/adjpro/d9343/110728respnotoceofappeal.pdf.

SUMMARY OF THE ARGUMENTS

This federal action is not a *sub rosa* interlocutory appeal nor an attempt by a private party to subvert an administrative proceeding regarding a matter clearly within the province of a federal agency. This case is not collateral attack on due process grounds against an administrative proceeding (though the due process grounds in this case are disturbing in number and kind). Nor is the focus of this case substantive antitrust analysis of alleged restraints of trade. The fundamental question in this suit is whether a bona fide sovereign state agency must submit to the jurisdiction of a federal agency

This action does not concern Commission regulation of a trade association or non-government entity, nor does it concern a state agency's internal policy or agency-created rules. Price-fixing and commercial speech are also not at issue. This action is also not a direct restraint on interstate commerce. Instead, the issue in this case is statutory definition of dentistry and the statutory composition of a state licensing agency created and controlled by state law, comprised of state officials, and funded by state funds. These state officials are bound by oaths of office, state ethics laws, and the state constitution to leave behind their private interests in their roles as state regulators. Failure to do so may result in removal

from office and prosecution. As a bona fide state agency, the Board members must comply with open meetings, public records, ethics legislation, and administrative procedure laws.

The question before this court is whether the Commission can, without specific congressional authorization, extend its own reach to preempt state statutes. Absent federal legislative or judicial authorization, the Commission's basis for this preemption is its own debatable economic/political theory, not adopted by Congress nor developed through Commission rulemaking. This case therefore raises the critical question: may a federal agency theory force a state into administrative proceedings and preclude the Courts from first determining whether the Article III and the Tenth Amendment rights of sovereign states apply.

The fundamental issue in this action is whether a state can seek judicial determination of constitutional issues when a federal agency attempts to displace state statutes in the contradiction of express or implied Congressional intent to do so, or whether the state must first defend itself in a federal agency tribunal. The Commission has engaged in an impermissible administrative proceeding against the State Board in violation of the Constitution and its own enabling statute. The Commission has clearly stated that its aim in this action is to achieve an expansion of its jurisdiction. Given the virtual impossibility of obtaining any relief or remedy

from the Commission in this matter, the State Board was forced to bring a direct action in the District Court.

The Commission's actions are unconstitutional under the Tenth Amendment of the U.S. Constitution, which only permits the preemption of state law under certain limited circumstances; none of which exist here. Further, Article I, Section 8, Clause 3 of the U.S. Constitution (the Commerce Clause) vests in the legislative branch -- not the executive branch -- the power to regulate interstate commerce. An executive branch agency may only regulate commerce pursuant to a delegation of congressional authority; no such delegation can be found in the FTC Act.

This action was dismissed in error by the District Court for lack of subject matter jurisdiction. This is a direct suit, not an interlocutory appeal. The Commission's ongoing administrative proceedings against the State Board are irrelevant, and any cases cited by the District Court to the contrary are easily distinguishable. In a case such as this one, where a federal agency acts unconstitutionally and contrary to its authorizing statute, the federal courts are the only avenue for relief for a state agency.

ARGUMENT

I. Standard of Review

The standard of review for the District Court's Order granting the Commission's Motion to Dismiss pursuant to Federal Rule of Civil Procedure

12(b)(1) is *de novo*. Simmons v. United Mortg. & Loan Inv., LLC, 634 F.3d 754, 762 (4th Cir. 2011) (citing Pitt County v. Hotels.Com, L.P., 553 F.3d 308, 311 (4th Cir. 2009)). Further, this Court should "review [the] district court's jurisdictional findings of fact on any issues that are not intertwined with the facts central to the merits of the plaintiff's claims under the clearly erroneous standard of review." 634 F.3d at 762 (citing United States ex rel. Vuyyuru v. Jadhav, 555 F.3d 337, 347-48 (4th Cir. 2009)); see also In re Block Shim Dev. Company-Irving, 939 F.2d 289, 291 (5th Cir. 1991).

II. The District Court Erred by Refusing to Invoke Its Jurisdiction to Protect the Constitutional Rights of the State Board from a Federal Agency Acting Outside the Scope of Its Authority.

Direct suits in federal court, such as this suit brought by the State Board, are permitted as necessary to ensure that a party may obtain an adequate remedy. Cavalier Tel., LLC v. Va. Elec. & Power Co., 303 F.3d 316, 323 (4th Cir. 2002) (citing McCarthy v. Madigan, 503 U.S. 140, 146 (1992)) (holding that "federal courts must balance the interest of the individual in retaining prompt access to a federal judicial forum against countervailing institutional interests favoring exhaustion"). A direct suit is necessary in this case because the State Board cannot otherwise compel the Commission to act within the bounds of the U.S. Constitution and its own authorizing statutes.

The Constitution does not provide for administrative agencies in the Executive Branch to make constitutional determinations or decisions on their own limited statutory authorizations. There is no remedy available for the State Board within the Commission's administrative proceeding because the Commission does not have, and cannot have, the authority to investigate or act against a state agency behaving pursuant to a clearly articulated state statute. Federal court review of the Commission's actions on appeal from a final Commission decision is also inadequate. The issue in this matter is not the eventual decision by the Commission, but the basic fact that the Commission does not have jurisdiction in this matter. The Commission cannot make a final decision on the question of whether it has jurisdiction in this matter; only a federal court can settle that issue. Therefore, the federal courts are the exclusive avenue for the protection of the State Board's rights, and subject matter jurisdiction in this matter was properly before the District Court.

The State Board's circumstances meet the standards of the following well-recognized exceptions to the general requirement that a party exhaust all remedies before bringing suit against a federal agency: (1) allowing a direct federal suit to address a defendant's act of brazen defiance in the face of its authorizing statute; and (2) allowing a direct federal suit to address a substantial showing that a plaintiff's constitutional rights have been violated. See Baltimore v. Mathews, 562

F.2d 914 (4th Cir. 1977), cert. denied, 439 U.S. 862 (1978); Am. Gen. Ins. Co. v. FTC, 496 F.2d 197, 199-200 (5th Cir. 1974) (citing Fay v. Douds, 172 F.2d 720 (2d Cir. 1949); Leedom v. Kyne, 358 U.S. 184 (1958)). As demonstrated in a number of cases where these exceptions applied, federal courts hear direct challenges to federal agency actions when necessary to prevent and stop those agencies' constitutional violations and *ultra vires* actions.

While some courts have expressed concern that allowing a private party to commence litigation prior to exhausting remedies may open the flood gates, this is inapposite here. In Free Enterprise, Justice Breyer noted in his dissenting opinion that:

> any person similarly regulated by a federal official who is potentially subject to the Court's amorphous new rule will be able to bring an "implied private right of action directly under the Constitution" "seeking ... a declaratory judgment that" the official's actions are "unconstitutional and an injunction preventing the" official "from exercising [his] powers."

Free Enter. Fund v. Pub. Co. Accounting Oversight Bd., 130 S. Ct. 3138, 3181 (2010). This concern does not apply here because the plaintiff parties would be sovereign states seeking to uphold the separation of powers in the absence of preemption. It follows that "[a] fear of abuse by litigants in other cases should never deter a federal court from its unfailing duty to provide a forum for vindication of constitutional protections." Gupta v. SEC, No. 11 CIV 1900 (JSR), 2011 U.S. Dist. LEXIS 74092, at *25 (S.D.N.Y. July 11, 2011).

By pursing its administrative enforcement action against the State Board, the Commission is engaging in acts that violate the State Board's rights under the Commerce Clause (Article I, Section 8, Clause 3) and the Tenth Amendment to the U.S. Constitution. The Commission also is engaging in *ultra vires* actions by exceeding its limited statutory authorization set forth in the FTC Act and the many decades of case law interpreting its own enabling statute. As a result of these constitutional and statutory violations, the State Board is not required to exhaust its administrative remedies before bringing this lawsuit against the Commission. See, e.g., Leedom, 358 U.S. 184; R.I. Dep't of Envtl. Mgmt. v. United States, 304 F.3d 31 (1st Cir. 2002). Since the District Court has jurisdiction, the Commission's arguments regarding mootness and exhaustion of remedies fail.

A. Subject Matter Jurisdiction Was Properly Vested in the District Court.

The District Court sidestepped jurisdiction in this matter by granting the Commission's motion for a Rule 12(b)(1) dismissal for lack of subject matter jurisdiction. The District Court decided that jurisdiction was not properly before it because the Commission was subjecting the State Board to an "ongoing" administrative proceeding. Order p. 157. Essentially, the District Court contends that a party can never prevent or stop an illegal and unconstitutional assertion of power by a federal agency until that federal agency has made its final decision in a case. This is incorrect; as detailed below, there are a number of circumstances in

which a party may properly bring suit against a federal agency based on that agency's illegal and unconstitutional actions.

1. The District Court Had Jurisdiction in This Matter Regardless of Any Ongoing Administrative Proceeding.

The U.S. Constitution vests in the federal courts "judicial Power [extending] to all Cases, in Law and Equity, arising under this Constitution [and] the Laws of the United States." U.S. CONST. art. III, § 2, cl. 1. The federal courts are not just appellate courts; federal district courts have first instance jurisdiction over cases involving violations of the Constitution and federal laws. 28 U.S.C. § 1331. It is irrelevant that the Commission was pursuing a federal administrative action against the State Board or that the initial decision in that action is currently on appeal to the full Commission. The power of federal courts to hear cases "does not depend upon 'prior action or consent of the parties.'" Am. Fire & Cas. Co. v. Finn, 341 U.S. 6, 17-18 (1951).

The federal courts are responsible for hearing not just appeals from federal agency decisions, but also deciding matters of constitutional and statutory interpretation to protect the separation of powers. "When judicial action is needed to serve broad public interests -- as when the Supreme Court acts, not in derogation of the separation of powers, but to maintain their proper balance or to vindicate public interest ... -- the exercise of jurisdiction has been held warranted." Nixon v. Fitzgerald, 457 U.S. 731, 754 (1982). This Court is therefore faced with a case

where the constitutional and statutory rights of a state must be protected by preventing a federal agency action until the constitutional issues are resolved.

The State Board is not required to exhaust all administrative remedies prior to seeking judicial relief when the Commission has acted outside of its limited authority and violated the State Board's constitutional rights. Indeed there is no remedy available in the Commission's tribunal to address the constitutional wrongs raised by the State Board. The Commission is in no position to adjudicate whether it has the authority to displace state laws and threaten the composition of state licensing boards.

The threshold issue of jurisdictional determination is one that the First Circuit has held was not within the purview of the Commission. In the case of New England Motor Rate Bureau v. FTC, 908 F.2d 1064 (1st Cir. 1990), the Commission sought to invoke its jurisdiction over a private actor, the New England Motor Rate Bureau, and asserted that it was entitled to deference and the ability to determine its own jurisdiction from the outset of the action.[3] Id. at 1071-72. The

[3] This case differs from the instant case in that the New England Motor Rate Bureau did not challenge the Commission's actions in a direct suit, but rather an appeal. A direct suit may not have been appropriate in New England Motor Rate Bureau but is necessary here. The Commission's complaint against the Bureau was initiated in 1983, prior to the Supreme Court's delineation in Town of Hallie of state action immunity for state agencies acting pursuant to state law. Therefore, the Commission in New England Motor Rate Bureau did not act contrary to several decades of case law uniformly granting immunity to non-price fixing state agencies acting pursuant to state law.

First Circuit declared that the court, not the Commission, was in the best position to adjudicate whether the Commission's jurisdiction attached in the case.

> We do not agree with the FTC that the question of state action is one on which this court should defer to that agency, either because of its expertise or its statutory fact-finding authority. The Commission is not here interpreting the statute as it has been charged with administering (i.e., the [FTC Act]) but instead is resolving a judicially-created principle of immunity that, if applicable, bars the Commission's jurisdiction. Cf., Chevron U.S.A. v. Natural Resources Defense Council, 467 U.S. 837, 842-45 (1984). ... [S]tate action immunity is a threshold issue that must be decided before the FTC's own jurisdiction attaches. Rather than an outgrowth of the statute the FTC administers, the state action doctrine was developed by the Supreme Court to give expression to considerations of federalism and comity; the FTC's authoritative role commences only after it has been decided that the challenged activities are not immune.

Id.

Rather than deal with these fundamental and threshold issues, the District Court merely dismissed the constitutional basis for this action and claimed that the State Board had "not made any showing ... that its constitutional rights have been or are being violated." Order p. 156-57. This assertion is erroneous because the State Board outlined the constitutional violations that have been perpetrated by the Commission and the harm that has resulted. The State Board brought to the District Court's attention the cases of Am. Gen. Ins. Co. v. FTC, 496 F.2d 197 (5th Cir. 1974), Fay v. Douds, 172 F.2d 720 (2nd Cir. 1949), and Leedom v. Kyne, 358 U.S. 184 (1958). These opinions outline the exceptions to the exhaustion doctrine

and are applicable in this case. Furthermore, the Commission has acted well outside the scope of its limited authority. Therefore, the State Board is not required to exhaust all administrative remedies.

2. The District Court Erroneously Treated This Action as an Interlocutory Appeal, and Not a Direct Suit.

The District Court incorrectly characterized this action as an interlocutory appeal and an effort to circumvent an administrative proceeding to obtain a "state action exemption" from an Article III court. Order pp. 152 & 154 (citing S.C. State Bd. of Dentistry v. FTC, 455 F. 3d 436 (4th Cir. 2006)). Instead, this action is a direct suit based on the fundamental legal principle that the Commission lacked jurisdiction over the State Board. Lack of subject matter jurisdiction can be raised at any time in any proper forum.

The instant case and South Carolina State Board of Dentistry are vastly different. South Carolina State Board of Dentistry addressed the viability of an interlocutory appeal following the Commission's denial of state action immunity. South Carolina Board of Dentistry focused solely on the state action doctrine; this case goes far beyond that doctrine. This case is about a state's ability to assert its constitutional rights in an Article III court when a federal agency takes unconstitutional actions against it without any authorization or consent to do so.

The District Court also relied upon a footnote in Travelers Insurance Co. v. Davis as support for its conclusion that "[a] declaratory judgment or mandamus

action cannot be used to substitute for an appeal." Order p. 154; Travelers, 490 F.2d 536, 544 n.34 (3rd Cir. 1974). However, as previously stated, this is a direct action on a jurisdictional question; this is not an appeal. The note in Travelers references a Pennsylvania case where a defendant was convicted of murder in state court and, instead of proceeding through the normal appellate process, he filed a declaratory judgment action in federal district court seeking a declaration of his constitutional rights with regards to post-trial motions. United States ex rel. Roberts v. Pennsylvania, 312 F. Supp. 1 (D. Pa. 1969). The instant case does not even remotely compare to the Roberts case. The State Board is not attempting to "short-circuit" a state court (or federal agency) appeals process, as the District Court labels it. The State Board is bringing a direct suit to protect North Carolina's right to enact statutes, and a state agency's right to enforce those statutes.

Finally, the District Court cites In re United Steelworkers, 595 F.2d 958 (4th Cir. 1979), to assert that the State Board is using a declaratory judgment or mandamus action as a substitute for an appeal. Again, this is incorrect. The United Steelworkers case stands for the principle that a circuit court should not stay a district court's order requiring the National Labor Relations Board ("NLRB") to grant a litigant full party status when mandamus would have no present effect on the rights of the parties. There, the district court had invoked its

jurisdiction to require the NLRB to grant full party status to a collective bargaining association whose rights may be impacted by the proceedings. In denying mandamus and a stay of the district court's order, this Court held that the issue as to whether the petitioners "may intervene as a full party [in the NLRB] hearing ... may properly be decided by this court if review is sought from a final decision of the [NLRB]." Id. at 960. Further, this Court stated that "mandamus would have no present effect on the rights of the parties." Id. (emphasis added). This is a dramatic difference from the case at bar because the Commission has infringed and continues to infringe upon a state's ability to lawfully carry out its statutes. The Commission's actions threaten the composition and legislated mandate of North Carolina's professional licensing boards. United Steelworkers actually weighs in favor of the State Board because it is another example of a district court invoking its jurisdiction to protect the constitutional rights of a private party. Here, the State Board is seeking the court's assistance with protecting the constitutional and statutory rights of a state, not just a private party.

It follows that the District Court misconstrued a direct suit over constitutional and statutory violations as an interlocutory appeal. Forcing a state agency acting directly pursuant to state statutes to submit to a Commission investigation and trial irreparably compromises states' constitutionally protected rights. Forcing the State Board to submit to the federal agency's unconstitutional

and *ultra vires* tribunal without the opportunity to obtain an independent judicial determination of jurisdiction is a direct infringement of the Federal Trade Commission Act, the Tenth Amendment, the Separation of Powers Clause, and Article III of the Constitution. Therefore, the District Court had original jurisdiction to hear this case and erred by granting the Commission's Motion to Dismiss.

B. The District Court Erred by Relying on Inapposite Case Law That Does Not Control This Action.

In an effort to avoid the jurisdiction issue, the District Court's Order cites non-controlling case law to reduce a sovereign state's rights to that of a trade association or a private corporation, notwithstanding the Tenth Amendment. In its Order, the District Court places great reliance on South Carolina Board of Dentistry. Order p. 153. By primarily relying on the South Carolina Board of Dentistry case, the District Court appears to have confused that case with the one at bar because the parties are similar and there are some overlapping issues relating to subject matter jurisdiction. However, as previously introduced, the South Carolina Board of Dentistry case is neither on point nor controlling in this case.

South Carolina Board of Dentistry was an interlocutory appeal focused on whether a denial of Parker immunity could be immediately appealed. See S.C. State Bd. of Dentistry, 455 F.3d at 439; Parker v. Brown, 317 U.S. 341 (1943). There, the South Carolina Board of Dentistry ("South Carolina Board") passed an

emergency regulation (not a state statute, but a Board-created rule) prohibiting oral hygienists from performing certain dental services in schools when a dentist had previously examined the students. However, this rule directly contradicted a clearly worded state statute permitting hygienists to perform such services. In response, the Commission commenced an administrative proceeding and ordered the Board to cease and desist. The South Carolina Board asserted that it was entitled to Parker immunity and, therefore, the Commission must refrain from its administrative proceeding. After the Commission denied Parker immunity, the South Carolina Board filed an interlocutory appeal with the Fourth Circuit seeking relief on the sole basis of state action immunity.

In the case at bar, the District Court failed to recognize that this case does not involve an interlocutory appeal. This case is not simply about whether Parker immunity can be immediately appealed. Rather, it is a direct suit that operates independent of the ongoing administrative proceeding. The crux of this direct action centers around the State Board's argument that, absent a specific act of Congress, sovereign states can still regulate the practice of professions within their borders in ways those states see fit. The South Carolina Board was not instituting a direct action to vindicate its constitutional rights; rather, it was seeking to have this Court overturn the Commission's denial of its request for Parker immunity. In addition, the instant case involves the State Board's enforcement of a clearly

articulated statute whereas the South Carolina Board was promulgating an agency-created rule that was contrary to a clearly worded state statute. While the South Carolina Board's action may appear similar because of the names of the parties involved and the jurisdictional questions, it does not control this action.

The District Court's reliance on South Carolina State Board of Dentistry is further misguided given this Court's approach to the South Carolina Board's state action immunity claim. The South Carolina Board argued that the state action immunity doctrine provided it with *ipso facto* immunity regardless of whether the Board was acting pursuant to state law or under active state supervision. This Court actually considered the possibility that *ipso facto* immunity might be permitted, as it has been by some federal courts, even though the South Carolina Board was acting contrary to a clearly articulated state statute (unlike the North Carolina State Board). S.C. State Bd. of Dentistry, 455 F.3d at 442 n.6. It is surprising, then, that the District Court would rely on a case which did not rule on whether *ipso facto* immunity exists, in rejecting the State Board's argument that less than *ipso facto* immunity is statutorily required.

The District Court also misinterpreted the Ukiah case, which involved an interlocutory appeal of an administrative agency's actions. Ukiah Adventist Hosp. v. FTC, 981 F.2d 543 (D.C. Cir. 1991). Again, this case is inapposite here because the State Board has sought a direct action to vindicate its constitutional rights; it

did not file an interlocutory appeal of a final agency decision. The District Court appears to have cherry-picked from the Ukiah case the statement that the "relevant statute [at issue in the case] 'commits review of [the] agency action to the Court of Appeals [and] any suit seeking relief that might affect the Circuit Court's future jurisdiction is subject to the *exclusive* review of the Court of Appeals.'" Order p.154; Ukiah at 549 (quoting Telecomms. Research & Action Ctr. v. FCC, 750 F.2d 70, 75 (1984)).

In doing so, the District Court failed to mention that Ukiah was solely based on statutory grounds, not a constitutional challenge. The Court of Appeals for the District of Columbia stated that "we intimate no view on whether a constitutional challenge ... would be committed exclusively to the courts of appeals." Id. at 550. The court proceeded to state that it *had not decided* "whether the constitutional challenge at issue [in Ticor Title Ins. Co. v. FTC, 814 F.2d 731 (D.C. Cir. 1987)] could ever be so separate from the underlying agency proceedings that the district court could exercise original jurisdiction over the action." Ukiah at 550 (emphasis added). These pronouncements underscore the fact that the circuit court had not ruled on, and had expressly left open, the issue of whether a district court could entertain original jurisdiction over an action that is separate from the underlying agency proceeding. This issue arises here because the direct action in this case is

independent of the ongoing administrative proceeding and the District Court has original jurisdiction to rule as to the violation of a state's constitutional rights.

The District Court further relied upon two cases to establish that it lacked jurisdiction to enjoin ongoing administrative enforcement proceedings such as the one at issue here. Order p. 154. This reliance was misguided as these two cases, Ewing v. Mytinger & Casselberry, Inc., 339 U.S. 594 (1950) and Gallanosa v. United States, 785 F.2d 116 (4th Cir. 1986), are vastly different from the instant case. In Gallanosa, the district court granted injunctive relief to bar the appellees' deportation and this Court subsequently vacated the injunction because the appellees failed to exhaust their administrative remedies. However, this Court stated that "this want of jurisdiction was not cured by the claim involving the citizen child's medical needs, as this claim did not rise to the level of a substantial constitutional question." Gallanosa, 785 F.2d at 117. As this Court correctly noted, substantial constitutional questions, such as the one before the court in this case, can and should be considered outside the scope of administrative remedies.

Further, in Ewing, the U.S. Supreme Court was faced with the question of whether the District Court for the District of Columbia had jurisdiction to enjoin an administrative action initiated by the Food and Drug Administration ("FDA"). Congress, via the Food and Drug Act, granted the FDA the authority, upon determining the existence of probable cause, to prevent a company from branding

or labeling an article pending an administrative review of whether the branding or labeling is fraudulent or misleading. The Petitioner sought to have the district court enjoin the FDA's preliminary administrative action until a hearing could be held. The Supreme Court stated that "[j]udicial review of this preliminary phase of the administrative procedure does not fit the statutory scheme nor serve the policy of the Act." Ewing, 339 U.S. at 600. However, in Ewing, Congress expressly provided the FDA the authority to determine probable cause as to whether an article may mislead the public. Id. at 601-02. In this case, Congress has granted no such authority as to the Commission's unlawful actions against the State Board. To the contrary, Congress has never granted the Commission the power to displace state statutes and to impermissibly interfere with a state agency's lawful actions in protecting the citizens within its borders. Rather than deal with the real issue in this case, the District Court decided to force this case into a mold of case law that is not persuasive here.

Since the Supreme Court's decision in Hoover v. Ronwin, the Court has not been faced with a state agency claiming state action immunity. 466 U.S. 558 (1984). However, this has not prevented the lower courts from extending immunity when they have been faced with the issue. In fact, in reliance on Parker and Hoover, federal courts have repeatedly granted state agencies immunity from federal antitrust legislation. See, e.g., Hass v. Oregon State Bar, 883 F.2d 1453

(9th Cir. 1989); Benson v. Az. State Bd. of Dental Examiners, 673 F.2d 272 (9th Cir. 1982); Gambrel v. Ky. Bd. of Dentistry, 689 F.2d 612 (6th Cir. 1982); Neo Gen Screening, Inc. v. New England Newborn Screening Program, 187 F.3d 24 (1st Cir. 1999); Saenz v. Univ. Interscholastic League, 487 F.2d 1026 (5th Cir. 1973); see also Brazil v. Ark. Bd. of Dental Examiners, 593 F. Supp. 1354 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985); Nassimos v. N.J. Bd. of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376 (D.N.J. Apr. 4, 1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996). The Commission has pointed to cases involving private actions under color of state laws, rules or policy, suggesting that the mere fact that the state statutes provides for a licensee majority on the Board converts the state action into a private action. The *stare decisis* effect of those cases and the facts are to the contrary. Aside from the long-standing court presumption that such Board members are acting in good faith, there are specific state statutory and state constitutional mandates requiring the licensee members to eschew conflicts of interest and act only as state officials. Neither Congress nor the courts have suggested otherwise.

III. The Commission Cannot Displace the North Carolina Dental Practice Act or Interfere with the Composition of the State Board Absent Statutory and Constitutional Authority.

The District Court disregarded the fact that the Commission acted in brazen defiance of its statutory mandate, exceeding the scope of its limited authority

expressly granted by Congress and the Constitution. In its Order, the District Court misunderstood that the State Board is not asking this Court or the District Court to interject into a decision of fact or law within the province of the Commission. Instead, the State Board's position is that the actions of the Commission have been, and continue to be, beyond the scope of its authorizing statute and an unprecedented infringement upon the constitutional rights of a state agency.

A. The Commission's Action Is Not Authorized by Section 4 of the FTC Act.

Under Section 4 of the FTC Act, the Commission is only authorized to enforce the FTC Act against "persons, partnerships or corporations ... from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce." 15 U.S.C. § 45. The State Board is not a person, partnership, or corporation; therefore, the Commission does not have jurisdiction over it. Therefore, in its pretrial brief in the administrative action, the Commission put together the implausible argument that an arm of the State of North Carolina can be a "person" under the meaning of Section 4 of the FTC Act because it is an "agent of the state." In support of this contention, Complaint Counsel cited In re Mass. Bd. of Registration in Optometry, 110 F.T.C. 549, 1988 FTC LEXIS 34 (1988). However, starting with the seminal state action immunity case of Parker, numerous courts have concluded that the very test for whether a

party is immune from federal antitrust law is whether or not the party is an agent of the state.

> 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. In 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.

317 U.S. at 350-51 (emphasis added); see also, Deak-Perera Hawaii, Inc. v. Dept. of Transp., 553 F. Supp. 976, 979 (D. Haw. 1983) ("For the [Department of Transportation] to have state-action immunity in its grant of the exclusive concession here in question, it must either show that ... it is an agent or instrumentality of the state acting as sovereign and as such is entitled to state-action immunity.") (emphasis added).

The State Board is not a partnership or corporation. It is an "agent of the state," and therefore it is not subject to Commission jurisdiction. To argue that the State Board can be an "agent of the state" and therefore subject to Commission jurisdiction when the Supreme Court has held that "agents of the state" are immune from Commission jurisdiction is both implausible and in violation of a "clear statutory mandate." Order p. 156 (citing Long Term Care Partners, LLC v. United States, 516 F.3d 225, 234 (4th Cir. 2008) ("If the agency offered a 'plausible'

interpretation of the relevant statute, we will find that it did not 'violate a clear statutory mandate,' and Leedom jurisdiction will not lie")).

Contrary to the District Court's conclusion, this is a settled area of the law. Order p. 156 (citing N.C. State Bd. of Registration for Prof'l Eng'rs & Land Surveyors v. FTC, 615 F. Supp. 1155, 1161 (E.D.N.C. 1985) (declining to apply the "brazen defiance" doctrine where "the case law setting the parameters of [the] agency's authority is presently unsettled")). The Commission's attempts to assert jurisdiction over the State Board therefore violate Section 4 of the FTC Act.

B. The Commission's Action Is Contrary to Section 5 of the FTC Act.

Section 5 of the FTC Act delineates and prohibits certain "unfair methods of competition" and empowers the Commission to act against "persons, partnerships, or corporations" engaged in such unfair competition. 15 U.S.C. § 45(a). However, the State Board has not engaged in any "unfair methods of competition," and the Commission does not have jurisdiction to take any action against it. As previously stated, the State Board is immune from the enforcement of the FTC Act because it is a state agency acting pursuant to state law. This fact was not contradicted by either the Commission or the Administrative Law Judge in their reviews of this case. As a state agency, the State Board is not required to show that its enforcement of state law was actively supervised by the state.

The Supreme Court itself has stated it is "likely" that state agencies are immune from antitrust law so long as they act pursuant to state statute. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 46 (1985). According to every single court that has contemplated the issue since the Town of Hallie opinion was rendered, the Commission does not have jurisdiction over state agencies acting pursuant to state law. See, e.g., Hass v. Or. State Bar, 883 F.2d 1453, 1461 (9th Cir. 1989); Gambrel v. Ky. Bd. of Dentistry, 689 F.2d 612, 616-18 (6th Cir. 1982); see also Brazil v. Ark. Bd. of Dental Examiners, 593 F. Supp. 1354, 1362 (E.D. Ark. 1984), aff'd, 759 F.2d 674 (8th Cir. 1985); Nassimos v. Bd. of Examiners of Master Plumbers, No. 94-1319, 1995 U.S. Dist. LEXIS 21376, at *10 (D.N.J. Apr. 4,1995), aff'd, 74 F.3d 1227 (3rd Cir. 1995), cert. denied, 517 U.S. 1244 (1996). According to numerous district and circuit court decisions, the issue of state supervision of a state agency's enforcement of the law is irrelevant to the question of whether that state agency is immune.[4] The only question before the courts in

[4] Unlike state actors, private parties must show "active supervision" by the state for each of their actions to be permitted. See Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980). Even if state agencies were required by law to show "active supervision," they demonstrate such supervision when they act pursuant to state statutes to supervise the actions of private actors. Flav-O-Rich, Inc. v, N.C. Milk Comm'n, 593 F. Supp. 13, 18 (E.D.N.C. 1983) (concluding that, although the Commission was a state agency, it demonstrated active supervision of a clearly-articulated state law by holding "regular meetings" and by its monitoring of private milk producers' "flow of price and cost information," as required by state statutes).

these cases was whether the state agency acted pursuant to clearly articulated state law; if they did, the agency was immune.[5]

Therefore, the Commission cannot act against the State Board without unmistakably clear legislative intent directing the federal government to remove from the states the power that they have traditionally held and exercised. See, e.g., Will v. Mich. Dep't of State Police, 491 U.S. 58, 63 (1989) (internal citations omitted) ("In traditionally sensitive areas, such as legislation affecting the federal balance, the requirement of clear statement assures that the legislature has in fact faced, and intended to bring into issue, the critical matters involved in the judicial decision"); see infra, discussion of Cal. State Bd. of Optometry, 910 F.2d 976 (D.C. Cir. 1990). There is no legislative intent to allow the Commission to regulate a state agency acting pursuant to a clearly articulated state law.

Congress has had decades to amend the FTC Act to add an active supervision requirement contrary to existing case law; it has not done so.[6]

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[5] The District Court Order mentions FTC v. Monahan, in which that court declined to reach a conclusion on the existence of active supervision for a state agency. 832 F.2d 688, 689-90 (1st Cir. 1987). Monahan involved a commercial speech restriction; the State Board has explained that price restrictions and commercial speech restrictions by state agencies are held to a greater level of scrutiny by federal courts.

[6] Congress has actually chosen to eliminate state sovereign immunity in other circumstances, but not for state agencies. See e.g. Genentech, Inc. v. Regents of the Univ. of Cal., 143 F.3d 1446, 1449 (Fed. Cir. 1998); see, also 137 Cong. Rec. 53930-02 (daily ed. Mar. 21, 1991) (citing Public Law 102-560, enacted in 1992,

Moreover, "Congress is presumed to be aware of an administrative or judicial interpretation of a statute." Lorillard, Div. of Loew's Theatres, Inc. v. Pons, 434 U.S. 575, 580 (1978). The Supreme Court has had opportunities to put forth an interpretation of the FTC Act requiring active supervision of state agencies; it has not done so. The legislative and judicial branches will not budge from their grant of immunity to state agencies acting pursuant to state law, so the executive branch is apparently acting *ultra vires* to create a new law. A final decision by the full Commission on this matter is not needed; the State Board is seeking immediate relief from the Commission's unauthorized interpretation of its authorizing statute.

C. The Commission Is Attempting to Achieve a Result Through *Ultra Vires* Action that It Cannot Achieve Through Lawful Rulemaking.

It is widely known and documented that the Commission has spent years lobbying for expanded jurisdiction over state agencies, and arguing for an end to state action immunity for majority-licensee state agencies acting pursuant to state law. See, e.g., FTC, *Report of the State Action Task Force*, at 37 *et seq.* (2003), http://www.ftc.gov/os/2003/09/stateactionreport.pdf. In fact, the Commission has actually attempted to circumvent state action immunity by its own internal rulemaking. Such a blatant power grab was overturned by the federal courts, just as this circumvention of federal law and the Constitution should be.

"for the purpose of abrogating Eleventh Amendment immunity in patent cases, to close a 'sovereign immunity loophole'").

In California Optometry, the Commission investigated restrictions imposed by the California State Board of Optometry ("California Board"), which the Commission claimed "resulted in higher prices and reduced the quality of eye care available to the public." Cal. State Bd. of Optometry, 910 F.2d 976 (D.C. Cir. 1990). Deciding to act on the subject without congressional authorization, the Commission then enacted a rule that purported to create a defense to any proceeding initiated against an optometrist for violating certain state restrictions on the practice of optometry. In other words, the Commission sought to preempt by its own internal rulemaking a state agency's enforcement of a restriction on a licensed profession. The California Board therefore presented the D.C. Circuit the issue of "whether a State acting in its sovereign capacity is subject to the [FTC] Act." Id. at 980.

Rejecting the Commission's purported jurisdiction, the D.C. Circuit opined that it is "clear, under the 'state action' doctrine enunciated in Parker, that when a State acts in a sovereign rather than a proprietary capacity, it is exempt from the antitrust laws even though those actions may restrain trade." Id. at 981. The court found nothing in the federal antitrust laws "that could be construed as an explicit congressional authorization to reach the sovereign acts of the States. This silence is especially compelling in view of Congress's more than thirty years of experience with the state action doctrine at the time [Congress] enacted section 18(a)(1)." Id.

at 982. The court determined that "[a]n agency may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it." Id. at 982 (emphasis added). This authority was not granted to the Commission when California Optometry was decided, and it certainly has not been granted since.

Congress has given no indication of any intention to permit the Sherman Act or the FTC Act to generally preempt state regulation of the definition of the practice of dentistry or the composition of licensing boards. Whenever Congress has been so inclined to authorize federal agencies to exercise authority over sovereign states, it has done so clearly and specifically. See Cal. State Bd. of Optometry, 910 F.2d at 981-82. The California Optometry decision and the subsequent passage of the Fairness to Contact Lens Consumers Act illustrate the degree to which the Commission is acting outside of its constitutional and statutory authority. 15 U.S.C. § 7601. As discussed herein, California Optometry declared that "the FTC lacked the statutory authority to promulgate the rule [at issue] because Congress did not authorize the Commission to regulate the sovereign acts of the States." California Optometry, 910 F.2d at 978. Thereafter, Congress took action to enact a law which enabled the Commission to issue rules such as the one that it had previously been prohibited from issuing. See 15 U.S.C. § 7607. In the Fairness to Contact Lens Consumers Act, Congress continued to acknowledge the

role of state licensing boards in defining professional practices. See, e.g., 15 U.S.C. § 7610(2) (defining prescriber as "an ophthalmologist, optometrist, or other person permitted under State law to issue prescriptions for contact lenses"). This illustration is applicable here because the Commission has attacked a state statute and threatened the composition of a state board absent any authority to do so. Congress has not acted to authorize the Commission to displace state statutes regulating the profession of dentistry. Moreover, the Commission has no grounds on which it can base its actions and, to the contrary, has even defied the Constitution, U.S. Supreme Court jurisprudence, and Presidential Orders.

The Commission may not, by its internal rulemaking procedures or its internal administrative proceedings, act beyond the scope of its statutory authority. There is no evidence that Congress intended to confer upon the Commission the statutory authority to prevent states from regulating licensed professions and protecting public health and safety.

D. The Commission Is Violating the State Board's Rights Under the Commerce Clause of the U.S. Constitution.

The Commerce Clause, Article I, Section 8, Clause 3 of the U.S. Constitution, precludes the Commission from pursuing its administrative enforcement action against the State Board. In essence, the Commission is attempting to dictate how the State Board may regulate the practice of dentistry in North Carolina. It is the constitutional province of the legislative branch—not the

executive branch—to regulate interstate commerce. An executive branch agency is only permitted to regulate commerce under the delegation of congressional authority. While the FTC Act permits the Commission to address antitrust violations by persons, corporations and partnerships, no such right exists regarding sovereign states acting pursuant to a clearly articulated statute. See Parker, 317 U.S. at 359-60 ("The governments of the states are sovereign within their territory save only as they are subject to the prohibitions of the Constitution or as their action in some measure conflicts with powers delegated to the National Government, or with congressional legislation enacted in the exercise of those powers.").

Further, even assuming *arguendo*, that the Commission did have a direct grant of authority from the legislative branch, the State Board's enforcement activities are outside the reach of the Commerce Clause. As recently noted by the U.S. Supreme Court:

> [t]he dormant Commerce Clause is not a roving license for federal courts to decide what activities are appropriate for state and local government to undertake, and what activities must be the province of private market competition. . . . "The Commerce Clause significantly limits the ability of States and localities to regulate or otherwise burden the flow of interstate commerce, but it does not elevate free trade above all other values."

United Haulers Ass'n v. Oneida-Herkimer Solid Waste Mgmt. Auth., 550 U.S. 330, 343-44 (2007) (quoting Maine v. Taylor, 477 U.S. 131, 151 (1986)). In

United Haulers Association, the U.S. Supreme Court affirmed the Second Circuit's holding that certain ordinances requiring private haulers to obtain permits from the defendant state agency to collect solid waste did not violate the Commerce Clause, when such ordinance benefitted a public facility but treated both in-state and out-of-state private parties in the same manner. The Supreme Court held that the ordinances at issue did not discriminate against interstate commerce and that any incidental burden the ordinances may have placed on interstate commerce did not outweigh the benefits conferred on the state citizen; therefore, no violation of the Commerce Clause occurred. 550 U.S. at 334.

The Court in Parker reached a similar conclusion permitting indirect interstate commerce effects by a state. In Parker, as is the case here, there were matters of "local concern" to the state agency that were not in and of themselves interstate commerce "even though the exercise of those powers may materially affect [interstate commerce]." 317 U.S. at 360. Chief Justice Stone opined that state regulations falling outside the power of federal Commerce Clause regulation yet directly or indirectly affecting interstate commerce should be upheld when:

> upon a consideration of all the relevant facts and circumstances it appears that the matter is one which may appropriately be regulated in the interest of the safety, health and well-being of local communities, and which, because of its local character, and the practical difficulties involved, may never be adequately dealt with by Congress.

Parker, 317 U.S. at 362. In Parker, ninety-five percent of the products regulated by California's state statute were ultimately sold outside the state. Yet the Court did not find any Commerce Clause violation stemming from the state law. Id. at 359.

In the instant action, the statute under which the State Board acted to enforce prohibitions against the unauthorized practice of dentistry does not discriminate against interstate commerce, and the benefits of the statute outweigh any incidental burden that it places on interstate commerce. The State of North Carolina could have left the regulation of dentistry entirely up to the free market, but it made a deliberate choice to vest such responsibility with the State Board and empowered its members to take action to uphold their statutory duties. Hass, 883 F.2d at 1462. North Carolina law restricts the performance of stain removal services to licensed dentists and dental hygienists under the supervision of licensed dentists. See N.C. Gen. Stat. § 90-22(b) (restricting the practice of dentistry to licensed dentists), N.C. Gen. Stat. § 90-29(b)(2) (defining the performance and offering to perform "stain removal" as the practice of dentistry), and N.C. Gen. Stat. § 90-233(a) (requiring that a dental hygienist practice only under the supervision of a licensed dentist). The statutorily-mandated duty of the State Board to ensure the health and safety of consumers of teeth whitening services far outweighs any incidental effects on interstate commerce. As recognized in United Haulers Association:

> [G]overnment is vested with the responsibility of protecting the health, safety, and welfare of its citizens. ... These important

> responsibilities set state and local government apart from a typical private business. ... Given these differences, it does not make sense to regard laws favoring local government and laws favoring private industry with equal skepticism.

550 U.S. at 342-43 (internal citations omitted); Metro. Life Ins. Co. v. Massachusetts, 471 U.S. 724, 756 (1985) ("States traditionally have had great latitude under their police powers to legislate as to the protection of the lives, limbs, health, comfort, and quiet of all persons."); Hawkins v. N.C. Dental Soc'y, 355 F.2d 718, 720 (4th Cir. 1966) (Board of Dental Examiners is a "creature[] of the State of North Carolina" and its functions are "concededly public functions of the state").

In addition, the Commission can make no argument that the FTC Act is intended to preempt the North Carolina state statutes at issue in this case. As recognized by the Fourth Circuit, federal law only can preempt state law under three circumstances: "(1) when Congress has clearly expressed an intention to do so ('express pre-emption'); (2) when Congress has clearly intended, by legislating comprehensively, to occupy an entire field of regulation ('field pre-emption'); and (3) when a state law conflicts with federal law ('conflict pre-emption')." Med-Trans Corp. v. Benton, 581 F. Supp. 2d 721, 730 (E.D.N.C. 2008) (quoting College Loan Corp. v. SLM Corp., 396 F.3d 588, 595-96 (4th Cir. 2005)) (internal citations omitted). The "starting presumption is that Congress does not intend to supplant state law," and this presumption is "even stronger against preemption of state

remedies ... when no federal remedy exists." 396 F.3d. at 597 (internal citations omitted). Further, the Fourth Circuit has determined that the decision on "whether a federal statute preempts a state statute ... is a constitutional question." Am. Petroleum Inst. v. Cooper, 681 F. Supp. 2d 635, 641 (E.D.N.C. 2010) (internal citation omitted) (finding that a federal law did not preempt a North Carolina statute because the state law "did not stand as an obstacle" to the federal law). Therefore, it is a question properly put to this Court, not an issue to be addressed in an administrative proceeding.

In this case, as discussed above, there is nothing in the legislative history of the FTC Act to suggest that Congress intended to preempt North Carolina's laws on the regulation of the practice of dentistry. Even if the Commission could argue that the FTC Act is intended to preempt North Carolina's ability to regulate the practice of dentistry as it best sees fit, such preemption would be unconstitutional. Petersburg Cellular P'ship v. Bd. of Supervisors of Nottoway County, 205 F.3d 688 (4th Cir. 2000). The plaintiff private business in Petersburg Cellular Partnership applied for a conditional use permit to construct a communications facility. The defendant, a county board, recommended approval of the permit, subject to certain conditions, including approval by the Federal Aviation Administration ("FAA"). Even though the FAA ultimately approved the application for the permit, the defendant board rejected the application due to

concerns expressed by county citizens. Plaintiff filed a federal lawsuit seeking a mandatory injunction to enforce the terms of the Telecommunications Act by ordering the approval of its permit application. The Fourth Circuit reversed the district court's grant of mandamus, rejecting the plaintiff's arguments that the federal law permissibly preempted the state's licensing standards. The Fourth Circuit noted that:

> Preemption involves the *direct* federal governance of the people in a way that supersedes concurrent state governance of the same people, not a federal usurpation of state government or a "commandeering" of state legislative or executive processes for federal ends. ... The deliberate choice that Congress made not to preempt, but to use, state legislative processes for siting towers precludes the federal government from instructing the states on how to use their processes for this purpose.

Id. at 703-04. In this case, Congress has made the deliberate choice to not preempt the states' ability to regulate the practice of dentistry, and the Commission is precluded from now attempting to assert the FTC Act as an offensive measure to usurp such control from North Carolina.

In sum, even if the Commission had been delegated the power to apply the FTC Act to a state agency acting pursuant to state law, the State Board's enforcement of North Carolina law would be outside the reach of federal Commerce Clause regulation.

E. The Commission Is Violating the State Board's Rights Under the Tenth Amendment.

It is well-established that the principles of federalism embodied in the Tenth Amendment to the U.S. Constitution prohibit the federal government from instructing states to take federally-mandated actions. New York v. United States, 505 U.S. 144, 161 (1992) (internal citations omitted) (invalidating a federal law provision because "Congress may not simply commandeer the legislative processes of the States by directly compelling them to enact and enforce a federal regulatory program").

The federal government cannot bypass this fundamental prohibition by attempting to direct the actions of state officials. Printz v. United States, 521 U.S. 898, 929 (1997) (requiring state officers "to perform discrete, ministerial tasks specified by Congress" violates the federalism principles under the Tenth Amendment). Significantly, in Printz, the Court specifically rejected the United States' argument that requiring state officers "to perform discrete, ministerial tasks specified by Congress does not violate the principle of New York because it does not diminish accountability of state or federal officers." Id. at 929-30. As aptly stated by Justice Scalia,

> It is an essential attribute of the States' retained sovereignty that they remain independent and autonomous with their proper sphere of authority. It is no more compatible with this independence and autonomy than their officers be "dragooned" . . . into administering federal law, than it would be compatible with the independence and

> autonomy of the United States that its officers be impressed into service for the execution of state laws.

Id. at 928 (internal citations omitted).

Here, both the FTC Complaint and Initial Decision of the Administrative Law Judge are challenging the authority of the State Board to use Cease and Desist Orders; both contend that the State Board must instead apply to state courts for injunctive relief. FTC Complaint p. 52. Assuming an inevitable Commission Order to that effect, both New York and Printz prohibit such an effort. Contrary to the District Court's finding as to a lack of "showing that [the Board's] constitutional rights have been or are being violated," the State Board's authority has been curtailed by dampening its enforcement authority by prohibiting the use of cease and desist letters, and their use will be barred in the future.

Not only is the federal government prohibited from directing states' officers to act, the federal government also cannot prescribe the qualifications of state officials. In Gregory v. Ashcroft, the U.S. Supreme Court refused to apply a federal law prohibiting age discrimination to certain state judges, as the pertinent state law required those judges to retire by the age of 70 and the federal law did not "plainly cover" those judges. 501 U.S. 452, 467 (1991). The Court recognized that, "[t]o give the state-displacing weight of federal law to mere congressional *ambiguity* would evade the very procedure for lawmaking on which [Garcia v. San Antonio Metropolitan Transit Authority] relied to protect states' interests." Id. at

464 (citing L. Tribe, American Constitutional Law § 6-25, p. 480 (2d ed. 1988)) (emphasis in original).

The Commission has predicated its administrative enforcement action on the assumption that, simply because the majority of the members of the State Board are required to be licensed dentists pursuant to N.C. Gen. Stat. § 90-22(b), the members of the State Board are "colluding" to violate antitrust laws. Such an assumption ignores the presumption of proper action by public officials, established in case law, statutes, and the standards set forth in North Carolina's State Government Ethics Act, General Statute Chapter 138A. See N.C. Gen. Stat. § 150B-40(b); see also Withrow v. Larkin, 421 U.S. 35, 47 (1975). Therefore, according to the Commission, North Carolina must either change its statutes so that the State Board is not "dominated" by licensed dentists, or North Carolina must take steps to provide additional oversight to the State Board's enforcement activities.

These attempts to dictate the qualifications of the members of the State Board represent still another violation of the Tenth Amendment. The North Carolina statute mandating that the majority of State Board members be licensed dentists exists for good reason: the North Carolina legislature wishes to ensure that the regulation of the practice of dentistry is conducted by individuals with the knowledge to do so competently. In fact, North Carolina courts give deference to

the State Board's expertise to the exclusion of expert witnesses. See, e.g., Leahy v. N.C. Bd. of Nursing, 346 N.C. 775, 780-81 (1997). The Commission cannot point to any evidence that Congress intended to give the Commission the power to preempt this state statute. Therefore, absent such preemption, the actions of the Commission are unconstitutional.

The Commission's attempts to direct the manner in which North Carolina and the State Board regulate the practice of dentistry is still another violation of the Tenth Amendment. As discussed above, such attempts are contrary to the prohibitions set forth in New York and Printz. Those prohibitions are even more important to the sovereignty of North Carolina in the instant case, since the power to regulate the practice of dentistry inherently resides with the State. As the U.S. Supreme Court has held:

> That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may require licenses and establish supervision by an administrative board, is not open to dispute. … The State may thus afford protection against ignorance, incapacity, and imposition. … We have held that the State may deny to corporations the right to practice, insisting upon the personal obligations of individuals, … and that it may prohibit advertising that tends to mislead the public in this respect.

Semler v. Or. State Bd. of Dental Examiners, 294 U.S. 608, 611 (1935) (internal citations omitted).

Not only is the Commission's proceeding beyond any expression of Congressional intent, but it is also contrary to a directive of the Executive Branch.

Indeed, the Commission has directly violated a Presidential Order that expresses the general policy of the Executive Branch relating to the preemption of state laws. On May 29, 2009, President Obama sent a memorandum to the heads of executive departments and agencies instructing that "preemption of State law by executive departments and agencies should be undertaken only with full consideration of the legitimate prerogatives of the States and with sufficient legal basis for preemption." Contrary to this memo, the Commission has continued to perpetrate an unprecedented campaign to preempt the enforcement of an unambiguous state statute enacted to protect the citizens of North Carolina.

In sum, the Commission is clearly trampling upon the State Board's Tenth Amendment rights. The Commission has no authority to dictate the steps that must be taken by the State Board to enforce North Carolina's Dental Practice Act. Nor does it have the authority to infer collusion merely because a licensee is serving on an occupational licensing board. Asserting such authority is a violation of the Tenth Amendment, and this Court should invalidate such assertion of authority in the absence of any evidence of preemption.

CONCLUSION

Wherefore, Appellant respectfully requests this Honorable Court to reverse the judgment of the District Court and order the Commission to dismiss its

administrative proceeding. Alternatively, Appellant requests remand of this action for further proceedings.

REQUEST FOR ORAL ARGUMENT

The State Board hereby respectfully requests oral argument of the issues presented in its brief. These are novel issues that would benefit from oral argument before this Honorable Court.

/s/ Noel L. Allen

Noel L. Allen
M. Jackson Nichols
Alfred P. Carlton, Jr.
Catherine E. Lee
Nathan E. Standley
Brie A. Allen, of counsel
ALLEN, PINNIX & NICHOLS, P.A.
Post Office Drawer 1270
Raleigh, North Carolina 27602
Telephone: 919-755-0505
Facsimile: 919-829-8098
Email: nallen@allen-pinnix.com
mjn@allen-pinnix.com
acarlton@allen-pinnix.com
clee@allen-pinnix.com
nstandley@allen-pinnix.com
ballen@allen-pinnix.com

Counsel for Appellant

CERTIFICATE OF COMPLIANCE

The undersigned counsel of record for Appellant affirms and declares as follows:

This brief complies with the type-volume limitation of Fed. R. App. 29(d) and Fed. R. App. P. Rule 32(a)(7) for a brief utilizing proportionally-spaced font, because the length of this brief is 12,140 words, excluding the parts of the brief exempted by Fed. R. App. P. Rule 32(a)(7)(B)(iii).

This brief also complies with the type-face requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6), because this brief has been prepared in proportionally-spaced typeface using Microsoft Word 2007 in 14-point Times New Roman font.

Executed this 6th day of October, 2011.

s/ Noel L. Allen

Noel L. Allen

Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing brief with the Clerk of the Court for the United States Court of Appeals for the Fourth Circuit by using the Appellate CM/ECF System on September 29th, 2011.

I certify that all parties to this case are registered CM/ECF users and that service will be accomplished by the Appellate CM/ECF System.

Executed this 6th day of October, 2011.

s/ Noel L. Allen

Noel L. Allen

Attorney for Appellant

ADDENDUM

U.S. Constitution Provisions

Article I, Section 8, Clause 3 (the Commerce Clause)

Power of Congress to regulate commerce:

To regulate Commerce with foreign Nations, and among the several States, and with the Indian Tribes;

Article III, Section 2, Clause 1

Subjects of Jurisdiction

The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;--to all Cases affecting Ambassadors, other public Ministers and Consuls;--to all Cases of admiralty and maritime Jurisdiction; --to Controversies to which the United States shall be a Party; --to Controversies between two or more States; --between a State and Citizens of another State;--between Citizens of different States, --between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

Article III, Section 2, Clause 2 (original jurisdiction over actions against states)

Jurisdiction of Supreme Court:

In all Cases affecting Ambassadors, other public Ministers and Consuls, and those in which a State shall be Party, the supreme Court shall have original Jurisdiction. In all the other Cases before mentioned, the supreme Court shall have appellate Jurisdiction, both as to Law and Fact, with such Exceptions, and under such Regulations as the Congress shall make.

Tenth Amendment

Powers reserved to states or people:

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

United States Code

15 U.S.C. § 44. Definitions

The words defined in this section shall have the following meaning when found in this Act, to wit:

"Commerce" means commerce among the several States or with foreign nations, or in any Territory of the United States or in the District of Columbia, or between any such Territory and another, or between any such Territory and any State or foreign nation, or between the District of Columbia and any State or Territory or foreign nation.

"Corporation" shall be deemed to include any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, which is organized to carry on business for its own profit or that of its members, and has shares of capital or capital stock or certificates of interest, and any company, trust, so-called Massachusetts trust, or association, incorporated or unincorporated, without shares of capital or capital stock or certificates of interest, except partnerships, which is organized to carry on business for its own profit or that of its members.

…

15 U.S.C. § 45. Unfair methods of competition unlawful; prevention by Commission

(a) Declaration of unlawfulness; power to prohibit unfair practices; inapplicability to foreign trade.

> (1) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are hereby declared unlawful.
>
> (2) The Commission is hereby empowered and directed to prevent persons, partnerships, or corporations, except banks, savings and loan institutions described in section 18(f)(3) [15 USCS § 57a(f)(3)], Federal credit unions described in section 18(f)(4) [15 USCS § 57a(f)(4)], common carriers subject to the Acts to regulate commerce, air carriers and foreign air carriers subject to the Federal Aviation Act of 1958 [49 USCS §§ 40101 et seq.], and persons, partnerships, or corporations insofar as they are subject to the Packers and Stockyards Act, 1921, as amended [7 USCS §§ 181 et seq.], except as provided in section 406(b) of said Act [7 USCS § 227(b)], from using unfair methods of competition in or affecting commerce and unfair or deceptive acts or practices in or affecting commerce.

…

North Carolina Statutes

N.C. Gen. Stat. § 90-22(a) & (b). Practice of dentistry regulated in public interest; Article liberally construed; Board of Dental Examiners; composition; qualifications and terms of members; vacancies; nominations and elections; compensation; expenditures by Board

(a) The practice of dentistry in the State of North Carolina is hereby declared to affect the public health, safety and welfare and to be subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the dental profession merit and receive the confidence of the public and that only qualified persons be permitted to practice dentistry in the State of North Carolina. This Article shall be liberally construed to carry out these objects and purposes.

(b) The North Carolina State Board of Dental Examiners heretofore created by Chapter 139, Public Laws 1879 and by Chapter 178, Public Laws 1915, is hereby continued as the agency of the State for the regulation of the practice of dentistry in this State. Said Board of Dental Examiners shall consist 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. The 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. The consumer member cannot participate or vote in any matters of the Board which involve the issuance, renewal or revocation of the license to practice dental hygiene in the State of North Carolina. Members of the Board licensed to practice dentistry in North Carolina shall have been elected in an election held as hereinafter provided in which every person licensed to practice dentistry in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Each member of said Board shall be elected for a term of three years and until his successor shall be elected and shall qualify. Each year there shall be elected two dentists for such terms of three years each. Every three years there shall be elected one dental hygienist for a term of three years. Dental hygienists shall be elected to the Board in an election held in accordance with the procedures hereinafter provided in which those persons licensed to practice dental hygiene in North Carolina and residing or practicing in North Carolina shall be entitled to vote. Every three years a person who is a citizen and resident of North Carolina and licensed to practice neither dentistry nor dental hygiene shall be appointed to the Board for a term of three years by the Governor of North Carolina. Any vacancy occurring on said Board shall be filled by a majority vote of the remaining members of the Board to serve until the next regular election conducted by the Board, at which time the vacancy will be filled by the election process provided for in this Article, except that when the seat on the Board held by a person licensed to practice neither dentistry nor dental hygiene in North Carolina shall become vacant, the vacancy shall be filled by appointment by the Governor for the period of the unexpired term. No dentist shall be nominated for or elected to membership on said Board, unless, at the time of such nomination and election such person is licensed to practice dentistry in North Carolina and actually engaged in the practice of dentistry. No dental hygienist shall be nominated for or elected to membership on said Board unless, at the time of such nomination and election, such person is licensed to practice dental hygiene in North Carolina and is currently employed in dental hygiene in North Carolina. No person shall be nominated, elected, or appointed to serve more than two consecutive terms on said Board.

…

HISTORY: 1935, c. 66, s. 1; 1957, c. 592, s. 1; 1961, c. 213, s. 1; 1971, c. 755, s. 1; 1973, c. 1331, s. 3; 1979, 2nd Sess., c. 1195, ss. 1-5; 1981, c. 751, ss. 1, 2; 1987, c. 827, s. 1.

N.C. Gen. Stat. § 90-29. Necessity for license; dentistry defined; exemptions.

(a) No person shall engage in the practice of dentistry in this State, or offer or attempt to do so, unless such person is the holder of a valid license or certificate of renewal of license duly issued by the North Carolina State Board of Dental Examiners.
(b) A person shall be deemed to be practicing dentistry in this State who does, undertakes or attempts to do, or claims the ability to do any one or more of the following acts or things which, for the purposes of this Article, constitute the practice of dentistry:

…

(2) Removes stains, accretions or deposits from the human teeth;

…

(7) Takes or makes an impression of the human teeth, gums or jaws;

…

(11) Owns, manages, supervises, controls or conducts, either himself or by and through another person or other persons, any enterprise wherein any one or more of the acts or practices set forth in subdivisions (1) through (10) above are done, attempted to be done, or represented to be done;

…

(13) Represents to the public, by any advertisement or announcement, by or through any media, the ability or qualification to do or perform any of the acts or practices set forth in subdivisions (1) through (10) above.

…

HISTORY: 1935, c. 66, s. 6; 1953, c. 564, s. 3; 1957, c. 592, s. 2; 1961, c. 446, s. 2; 1965, c. 163, ss. 1, 2; 1971, c. 755, s. 2; 1977, c. 368; 1979, 2nd Sess., c. 1195, ss. 10, 15; 1991, c. 658, s. 1; c. 678, ss. 1, 2; 1997-481, ss. 5, 6; 2002-37, s. 8.

N.C. Gen. Stat. § 90-233(a). Practice of dental hygiene

(a) A dental hygienist may practice only under the supervision of one or more licensed dentists. This subsection shall be deemed to be complied with in the case of dental hygienists employed by or under contract with a local health department or State government dental public health program and especially trained by the Dental Health Section of the Department of Health and Human Services as public health hygienists, while performing their duties for the persons officially served by the local health department or State government program under the direction of a duly licensed dentist employed by that program or by the Dental Health Section of the Department of Health and Human Services.

…

HISTORY: 1945, c. 639, s. 12; 1971, c. 756, s. 13; 1973, c. 476, s. 128; 1981, c. 824, ss. 2, 3; 1989, c. 727, s. 219(6a); 1997-443, s. 11A.23; 1999-237, s. 11.65; 2007-124, s. 2.

N.C. Gen. Stat. § 93B-16. Occupational board liability for negligent acts.

…

(b) Occupational licensing boards shall be deemed State agencies for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes, and board members and employees of occupational licensing boards shall be considered State employees for purposes of Articles 31 and 31A of Chapter 143 of the General Statutes. To the extent an occupational licensing board purchases commercial liability insurance coverage in excess of one hundred fifty thousand dollars ($ 150,000) per claim for liability arising under Article 31 or 31A of Chapter 143 of the General Statutes, the provisions of G.S. 143-299.4 shall not apply. To the extent that an occupational licensing board purchases commercial insurance coverage for liability arising under Article 31 or 31A of Chapter 143 of the General Statutes, the provisions of G.S. 143-300.6(c) shall not apply.

...

HISTORY: 2002-168, s. 1.

N.C. Gen. Stat. § 150B-40(b). Conduct of hearing; presiding officer; ex parte communication.

…

(b) Except as provided under subsection (e) of this section, hearings under this Article shall be conducted by a majority of the agency. An agency shall designate one or more of its members to preside at the hearing. If a party files in good faith a timely and sufficient affidavit of the personal bias or other reason for disqualification of any member of the agency, the agency shall determine the matter as a part of the record in the case, and its determination shall be subject to judicial review at the conclusion of the proceeding. If a presiding officer is disqualified or it is impracticable for him to continue the hearing, another presiding officer shall be assigned to continue with the case, except that if assignment of a new presiding officer will cause substantial prejudice to any party, a new hearing shall be held or the case dismissed without prejudice.

…

HISTORY: 1985, c. 746, s. 1; 1985 (Reg. Sess., 1986), c. 1022, ss. 1(1), 6(3), 6(4).