

# Antitrust Actions Against State Regulatory Boards Are Becoming More Common

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Recently, in *SmileDirectClub, LLC v. Tippins*,<sup>1</sup> the Ninth Circuit held that individual members of the California Dental Board who are market participants can be personally liable for antitrust violations, even when their actions are consistent with the board's regulatory authority. SmileDirectClub sued the individual board members for monetary damages, alleging they conspired to prevent it from competing against them in the orthodontics market by harassing SmileDirectClub with unfounded investigations and subjecting it to an intimidation campaign designed to drive it from the market.<sup>2</sup> Like many occupational regulatory boards across the United States, the California Dental Board must include members who are licensed in the profession they regulate. The potential conflict of interest is obvious. Acknowledging this concern, the Ninth Circuit confirmed that market participant board members receive immunity from antitrust liability only if they meet stringent requirements for state action immunity.<sup>3</sup>

*SmileDirectClub* is not an outlier; it is part of a pattern of increased antitrust litigation against state occupational regulatory boards following the Supreme Court's decision in *North Carolina State Board of Dental Examiners v. FTC (Dental Board II)*.<sup>4</sup> There, the Supreme Court clarified that certain nonsovereign actors, such as state occupational regulatory boards whose members are active market participants, must satisfy a two-prong state action test to receive immunity from antitrust claims under *Parker v. Brown*, 317 U.S. 342 (1943).<sup>5</sup> Namely, they must show (1) the allegedly anticompetitive conduct is clearly articulated as state policy, and (2) the board is actively supervised by the state.<sup>6</sup> The Court based its rationale on the inherent conflict of interest between the active market participant members' own economic interests and those of the state and consumers,<sup>7</sup> rejecting the board's argument that it was exempt from the "active supervision" requirement merely because it had been designated as a state agency.<sup>8</sup>

Because *Dental Board II* made it more difficult for market-participant members of boards to claim state action immunity, there has been a sharp increase in antitrust suits filed against regulatory boards and their members. More than a dozen actions were filed in ten states between 2015 and 2017 alone.<sup>9</sup> These suits not only expose a state to financial liability, but the threat of personal liability and treble damages can discourage market participants from serving on boards.<sup>10</sup> The prospect of defending against even a baseless lawsuit may deter participation. Moreover, the outcome of these lawsuits will have repercussions for American workers subject to licensing and regulation by these boards. As of 2017, there were 1,790 state occupational licensing boards in the United States, with the average state having 39 boards.<sup>11</sup> The U.S. Bureau of Labor Statistics found that, in 2021, about 24% of U.S. employees worked in occupations with certification or licensing requirements.<sup>12</sup> If market participants are deterred from serving on boards because of potential liability, there could be *de facto* deregulation of the occupations they would have helped to regulate.<sup>13</sup>

*SmileDirectClub* and *Dental Board II* acknowledge the inherent tension that exists when market participants are designated to regulate market activity. Occupational licensing entities are supposed to protect consumers by (1) ensuring there are minimum qualifications to practice a vocation, (2) administering discipline to licensed members of the profession, and (3) establishing continuing education requirements.<sup>14</sup> State legislators often require some or all of the members of regulatory boards to be active participants in the profession that they regulate because this ensures the boards will have access to specialized knowledge about the occupation when making regulatory decisions. Current practitioners are better positioned to determine qualifications, assess competence, and stay on top of emerging threats to public welfare.<sup>15</sup> However, market participants may also prioritize their own interests over those of the public, enacting regulations that allow existing members to monopolize the occupation or stifle competitive innovations.<sup>16</sup>

This article discusses ways that states can incentivize active professionals to serve on regulatory boards while also deterring anticompetitive conduct.

### State Action Immunity

The application of federal antitrust laws to state governments raises concerns about federalism and the balance of governmental interests.<sup>17</sup> Federal antitrust laws establish a strong federal interest in free markets and the prohibition of cartels, price fixing, and conspiracies to restrain free trade.<sup>18</sup> However, a state, as a sovereign entity, also has a compelling interest in regulating professions within its borders.<sup>19</sup> Under this sovereign power, states have a right to pursue public objectives by imposing occupational restrictions that have the effect of limiting competition.<sup>20</sup>

In response to this tension, the Supreme Court in *Parker* created state action immunity. In *Parker*, the plaintiff alleged that the California Agricultural Prorate Act violated § 1 of the Sherman Act.<sup>21</sup> The Court disagreed, holding that the Sherman Act only applies to *private individuals* and did not evidence congressional intent to prohibit *states* from restraining trade through the exercise of their police power.<sup>22</sup> Thus, a state, when acting in its sovereign capacity, is immune from antitrust liability.<sup>23</sup> However, the Court went on to caution that “a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.”<sup>24</sup> With this ambiguous language, the Court left open the possibility that conduct authorized by the state may not be immune from liability because it too closely resembles private conduct. Subsequent cases relied on this language to differentiate a state acting with sovereign authority from the actions of substate entities acting pursuant to authority delegated by the state.

While an entity may invoke state action immunity only if the challenged conduct was an exercise of the state’s sovereign power,<sup>25</sup> substate entities with delegated authority can still receive immunity. When the state legislature enacts regulation or the state supreme court renders a decision, these acts “*ipso facto* are exempt from the operation of the antitrust laws’ because they are an undoubted exercise of state sovereign authority.”<sup>26</sup> However, the determination becomes more difficult when the state delegates its regulatory control over a market to a nonsovereign actor.<sup>27</sup> To determine if challenged conduct constitutes state action, and is thus immune from liability, courts employ different standards depending on the likelihood of self-dealing by these actors.

In *California Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*,<sup>28</sup> the Court considered whether state action immunity extended to protect private regulators empowered by the state. It found that state statutes delegating price-fixing authority to private wine sellers provided insufficient state involvement to establish “*ipso facto*” antitrust immunity.<sup>29</sup> Instead, when a state delegates regulatory authority to private parties, they receive immunity if the regulation is “clearly articulated and affirmatively expressed as state policy” to displace competition and its implementation is “actively supervised” by the state.<sup>30</sup> This is known as the two-prong *Midcal* test. The Court has explained that “[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive

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motives in a way difficult even for market participants to discern.”<sup>31</sup> “In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.”<sup>32</sup>

However, these concerns are diminished with respect to some substate entities that enact regulations. For example, “[w]here the actor is a municipality, there is little or no danger that it is involved in a *private* price-fixing arrangement.”<sup>33</sup> Accordingly, in *Hallie*, the Court determined that municipalities are not required to show active supervision, the second prong of the *Midcal* test, to receive immunity.<sup>34</sup> The Court reasoned that municipalities, although not state actors for many purposes, are not truly private because they are subject to public scrutiny through elections and mandatory disclosures.<sup>35</sup> The Court left open the question whether state agencies staffed by market participants are sufficiently public that they only need to show the first prong of the *Midcal* test to receive immunity.

### State Regulatory Board Controlled by Market Participants

In *North Carolina State Board of Dental Examiners v. Federal Trade Commission (Dental Board I)*,<sup>36</sup> the Fourth Circuit considered whether the state dental board could be liable for § 1 violations. The Federal Trade Commission (FTC), in administrative proceedings, found that the board improperly used cease-and-desist letters to drive all nondentist teeth-whitening providers from the market.<sup>37</sup> The board argued that, “as a state agency, it was a substate governmental entity that only had to show its actions were authorized by a clearly articulated state policy,” the first prong of the *Midcal* test.<sup>38</sup> The Fourth Circuit disagreed, explaining that the dental board must show active state supervision because it was comprised of and controlled by practicing dentists—private-citizen market participants elected by other dentists.<sup>39</sup> The court held that the board was not entitled to immunity because it could not show state supervision; its actions were taken without state oversight or judicial authorization.<sup>40</sup>

The Supreme Court affirmed, holding that a state board on which a controlling number of decisionmakers are active market participants must satisfy both prongs of the *Midcal* test to receive immunity.<sup>41</sup> The Court explained that “the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade.”<sup>42</sup> “State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*’s supervision requirement was created to address”: that market participants would confuse their own interests and those of the state.<sup>43</sup> The Court thus reasoned that these were more similar to the private organizations addressed in *Midcal* than the municipalities at issue in *Hallie*.<sup>44</sup>

The Court also addressed concerns about imposing liability on board members.<sup>45</sup> It acknowledged that a state has a sovereign interest in structuring its government and may legitimately conclude there are benefits to having experts—including market participants—on agency boards.<sup>46</sup> The board expressed concerns that imposing liability on board members would discourage well-respected members of the profession from public service.<sup>47</sup> The Court responded by noting that states could protect board members by adopting clear policies and providing active supervision (thereby giving them immunity) or by indemnifying them.<sup>48</sup> The Court left open the question whether board members could be liable for money damages; the FTC had sought an injunction only, so no issue of damages was before the Court.<sup>49</sup>

### Recent Decision—*SmileDirectClub, LLC v. Tippins*

In *SmileDirectClub*, the Ninth Circuit held that antitrust liability for damages extends to individual board members, citing the *Dental Board* decisions.<sup>50</sup> Unlike the FTC in *Dental Board I*, the *SmileDirectClub* plaintiffs were market participants whose business was harmed by the action of state regulators.<sup>51</sup> They sued the California Dental Board members and employees directly, in both their personal and official capacities, for money damages.<sup>52</sup> The California Dental Board is comprised of both actively practicing dental professionals and members of the public,

all of whom are appointed by either the governor or the legislature.<sup>53</sup> The board asserted state action immunity, but the district court declined to find immunity until the parties conducted further discovery.<sup>54</sup> The court did dismiss the Sherman Act claim for failure to state a claim, ruling the complaint only alleged an agreement between board members that was consistent with the board’s regulatory purpose, which the court found could not be an unreasonable restraint on trade as a matter of law.<sup>55</sup> SmileDirectClub appealed.

The Ninth Circuit reversed as to the dentist board members but affirmed as to the civilian members. The court held that the district court erred by ruling that the board members could not violate the Sherman Act by engaging in conduct that was consistent with the agency’s regulatory duties; board member conduct is not lawful simply because it is consistent with the board’s regulatory authority.<sup>56</sup> Such a low standard would effectively grant state action immunity to board members without requiring them to meet the standards articulated in *Dental Board II*.<sup>57</sup> Rather, “the Board Actors’ concerted action can be unreasonable under the Sherman Act—even if they seek to achieve their anticompetitive aims through the exercise of valid regulatory authority.”<sup>58</sup> Thus, the court held that SmileDirectClub plausibly alleged that the market participant board members had engaged in a conspiracy to restrain trade in violation of § 1 by harassing SmileDirectClub with “aggressive and unreasonable ‘raids’ that were ‘designed to maximize . . . interference, disruption, and public spectacle’” and by beginning “a ‘retaliatory’ administrative proceeding to possibly revoke [the] dental license” of a SmileDirectClub dentist.<sup>59</sup> Under these circumstances, the dentist board members’ “governance role is sufficient, when coupled with the congruence between the board’s actions and their own self-interest, to allow a plausible inference of active participation.”<sup>60</sup> However, the allegations that the board members conspired to protect their business interests were insufficient to show that the *non-dentist* members participated in the conspiracy beyond being on the board.<sup>61</sup>

### Looking Forward—Providing Guidance to State Boards

As discussed above, litigants and courts have expressed concern that subjecting state regulatory boards and their members to antitrust liability will deter needed experts from becoming board members. While the Court in *Dental Board II* left open the question of damages,<sup>62</sup> a state board, as part of a state agency, is likely entitled to Eleventh Amendment immunity from damages actions when the judgment would be paid by the state.<sup>63</sup> Additionally, claims against board members *in their official capacities*, are essentially claims against the state and would be entitled to the same Eleventh Amendment immunity.<sup>64</sup> But board members sued in their *individual capacities*, like the ones in *SmileDirectClub*, can be personally liable for treble damages.<sup>65</sup> Below are several ways state legislatures can protect board members from personal liability, thereby encouraging board membership, while also reducing the potential conflict of interest inherent when market participants serve.<sup>66</sup>

First, states can protect board members by ensuring that they qualify for state action immunity. Because the Court designed the state action immunity standards specifically to address concerns about conflicts of interest, providing the necessary policy directives or supervision needed for immunity to apply will also reduce the opportunity for board members to engage in activity that improperly restrains trade. To achieve this, the state can either structure the board to be closer to a public entity that qualifies for immunity under *Hallie* by meeting only the first prong of the *Midcal* test, or it can provide sufficient guidance and oversight to meet both prongs of the *Midcal* test.

To be considered similar to a municipality, the board must be structured in a way that diminishes the chances it will act on its own anticompetitive interest. In *Dental Board II*, the Court ruled that the board was more like a private organization because a “controlling number of decisionmakers are active market participants in the occupation the board regulates.”<sup>67</sup> There, the board was made up of six licensed dentists, one licensed dental hygienist, and one consumer.<sup>68</sup> The North Carolina Dental Board is not alone; in 2017, at least 85% of boards were controlled by active market participants.<sup>69</sup> These board members would be better protected, and the chance of self-dealing would be decreased, if states increased the number of consumer members on the boards so that *active* market participants are in the minority. States could achieve this result by using *retired* market participants or public researchers in the field who do not have a financial motive.<sup>70</sup> Active market participants, even if the

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minority, may also be considered controlling if they have veto power or are otherwise given additional authority.<sup>71</sup> Additionally, if board members are elected by the public, rather than appointed, and have to make public disclosures, courts are more likely to find that the entity is sufficiently public to dispense with requiring the second prong of the *Midcal* test under *Hallie*.<sup>72</sup>

Second, if states want to continue to rely on active market participants, there are ways to ensure the board members can still receive state action immunity. The state should ensure that its delegation of authority to the board includes a “clearly articulated and affirmatively expressed” state policy to displace competition.<sup>73</sup> Such a policy does not need to explicitly state that the legislature expected anticompetitive conduct, but such conduct must have been “clearly contemplate[d]” as the “foreseeable result” of legislation.<sup>74</sup> For example, the Court concluded that “suppression of competition in the billboard market was the foreseeable result of a state statute authorizing municipalities to adopt zoning ordinances regulating the construction of buildings and other structures.”<sup>75</sup> However, a state statutory scheme that created special-purpose public entities that could acquire hospitals was insufficient to show the state affirmatively contemplated the entities would diminish competition by consolidating hospitals.<sup>76</sup> “[G]eneral powers routinely conferred by state law” do not contemplate anticompetitive effects.<sup>77</sup>

Additionally, a state must continue to actively supervise licensing boards. This second prong of the *Midcal* test serves to protect against self-dealing by ensuring “that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, in the judgment of the State, actually further state regulatory policies.”<sup>78</sup> To achieve this result, the board supervisor should not be an active market participant and “must have the power to veto or modify particular [board] decisions to ensure they accord with state policy” and actually exercise that power to review the merits of the board’s regulations.<sup>79</sup>

Finally, federal legislation could provide protection for board members. In 2020, the House introduced a bill that would eliminate personal liability for state occupational regulatory board members if the board met certain criteria intended to ensure government oversight to protect against anticompetitive conduct.<sup>80</sup> The authors of the bill reiterated courts’ concerns that “state boards struggle to find qualified board members willing to risk significant personal liability and the personal financial costs of defending themselves in litigation even when courts ultimately find lawsuits against them to be unfounded.”<sup>81</sup> By expressly protecting board members from liability, without them having to establish state action immunity in court, legislation like this provides the most comprehensive protection for board members. And, if the bill includes appropriate safeguards against self-dealing, it strikes a good balance between the competing interest of the state, the board members, consumers, and Congress.

Finally, to provide an additional incentive for market participants to serve on occupational regulatory boards, states can agree to fully defend them against all claims seeking legal and equitable remedies regardless of the liability theories that are pleaded, and to indemnify them from liability for non-egregious misconduct. Alternatively, states can secure D&O insurance policies that provide these benefits to occupational regulatory board members.

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<sup>1</sup> 31 F.4th 1110 (9th Cir. 2022).

<sup>2</sup> *Id.* at 1116–17.

<sup>3</sup> *See id.* at 1117.

<sup>4</sup> 574 U.S. 494 (2015).

<sup>5</sup> *Dental Board II*, 574 U.S. at 503–04.

<sup>6</sup> *Id.*

<sup>7</sup> *Id.* at 505–06.

<sup>8</sup> *Id.* at 510.

<sup>9</sup> Rebecca H. Allensworth, *Foxes at the Henhouse: Occupational Licensing Boards Up Close*, 105 Cal. L. Rev. 1567, 1579 (2017).

<sup>10</sup> *See* 15 U.S.C. § 15; *Dental Board II*, 574 U.S. at 513; *Hoover v. Ronwin*, 466 U.S. 558, 580 n.34 (1984) (“There can be no question that the threat of being sued for damages [under the Sherman Act]—particularly where the issue turns on subjective intent or motive—will deter ‘able citizens’ from performing this essential public service.”).

<sup>11</sup> Allensworth, *supra* note 9, at 1569 n.4, 1570.

<sup>12</sup> Bureau of Labor Statistics, *Certification and licensing status of the employed by occupation, 2021 annual averages*, Current Population Survey (Jan. 20, 2022), <https://www.bls.gov/cps/cpsaat53.pdf>.

<sup>13</sup> Whether such *de facto* deregulation of certain occupations is more beneficial than harmful (e.g., by decreasing the consumer cost for services or increasing the options consumers have) is beyond the scope of this article. *See, e.g.*, Allensworth, *supra* note 9, at 1569–70; Amelia Janaskie et al., *The Right to Work and Occupational Licensing*, Am. Inst. for Econ. Rsch. (Mar. 4, 2021), <https://www.aier.org/article/the-right-to-work-and-occupational-licensing/>. *But see* Jeffery P. Gray, *In Defense of Occupational Licensing: A Legal Practitioner’s Perspective*, 43 Campbell L. Rev. 423, 435–41, 447–55 (2021) (contending the anti-licensing movement is an “echo chamber” because it relies on the research of a single academic; discussing economic and safety benefits). We assume for purposes of this article that the actions of properly constituted regulatory boards are beneficial to consumers.

<sup>14</sup> Gray, *supra* note 13, at 432.

<sup>15</sup> Ingram Weber, Comment, *The Antitrust State Action Doctrine and State Licensing Boards*, 79 Univ. Chi. L. Rev. 737, 755 (2012).

<sup>16</sup> *Id.*; *see SmileDirectClub*, 31 F.4th at 1115.

<sup>17</sup> *Dental Board II*, 574 U.S. at 503.

<sup>18</sup> *Id.* at 502.

<sup>19</sup> *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (“We recognize that the States have a compelling interest in the practice of professions within their boundaries, and that as part of their power to protect the public health,

safety, and other valid interests they have broad power to establish standards for licensing practitioners and regulating the practice of professions.”).

[20](#) *Dental Board II*, 574 U.S. at 502–03.

[21](#) *Parker*, 317 U.S. at 344. Section 1 of the Sherman Act (15 U.S.C.

§ 1) prohibits agreements or conspiracies to restrain trade. To state a claim under § 1, plaintiffs must show (1) a contract or

conspiracy between two or more persons or business entities,

(2) which was intended to restrain or harm trade. *SmileDirectClub*, 31 F.4th at 1117–18.

[22](#) *Parker*, 317 U.S. at 350–51.

[23](#) *Id.* at 351 (“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.”).

[24](#) *Id.*

[25](#) *Dental Board II*, 574 U.S. at 504.

[26](#) *Id.* (citation omitted).

[27](#) See *Goldfarb*, 421 U.S. at 791 (“The fact that the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members.”)

[28](#) 445 U.S. 97 (1980).

[29](#) *Id.* at 103.

[30](#) *Id.* at 105 (citation omitted).

[31](#) *Dental Board II*, 574 U.S. at 505.

[32](#) *Id.*

[33](#) *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985), *superseded by statute on other grounds*, Local Government Antitrust Act of 1984, Pub. L. No. 98-544, 98 Stat. 2750.

[34](#) *Id.* at 46.

[35](#) *Id.* at 45 & n. 9.

[36](#) 717 F.3d 359 (4th Cir. 2013).

[37](#) *Id.* at 365.

[38](#) *Id.* at 368.

[39](#) *Id.* at 368–70.

[40](#) *Id.* at 370; see also *id.* at 371–72 (finding board members, as separate economic actors with distinct economic interest, could enter into a conspiracy).

[41](#) See *Dental Board II*, 574 U.S. at 511–12.

[42](#) *Id.* at 510.

[43](#) *Id.*

[44](#) *Id.* at 511.

[45](#) *Id.* at 512.

[46](#) *Id.*

[47](#) *Id.* at 513.

[48](#) *Id.* at 513–14.

[49](#) *Id.* at 513.

[50](#) 31 F.4th at 1121–22.

[51](#) *Id.* at 1116.

[52](#) Appellees’ Brief at 26–27, *SmileDirectClub*, 31 F.4th 1110 (No. 20-55735), 2021 WL 416250.

[53](#) Cal. Bus. & Prof. Code § 1601.1(a) (West 2012); Cal. Bus. & Prof. Code § 1603(d) (West 2012) (“The Governor shall appoint three of the public members, the dental hygienist member, the dental assistant member, and the eight licensed dentist members of the board. The Senate Committee on Rules and the Speaker of the Assembly shall each appoint a public member.”).

[54](#) Appellants’ Opening Brief at 30, *SmileDirectClub*, 31 F.4th 1110 (No. 20-55735), 2020 WL 7063279.

[55](#) *SmileDirectClub*, 31 F.4th at 1117.

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[56](#) *Id.* at 1120.

[57](#) *See id.*

[58](#) *Id.*

[59](#) *Id.* at 1121 (citation omitted).

[60](#) *Id.* at 1119.

[61](#) *Id.* at 1119–20.

[62](#) *Dental Board II*, 574 U.S. at 513.

[63](#) *See Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 100 (1984) (“It is clear, of course, that in the absence of consent a suit in which the State or one of its agencies or departments is named as the defendant is proscribed by the Eleventh Amendment.”); *Kaul v. Fed’n of State Med. Bds.*, No. 19-cv-3050, 2020 WL 7042821, at \*11–14 (D.D.C. Dec. 1, 2020) (finding Mississippi and California state boards of medical examiners were entitled to immunity).

[64](#) *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 71 (1989), *abrogated on other grounds by Alden v. Maine*, 527 U.S. 706, 735–36 (1999).

[65](#) *See* 15 U.S.C. § 15; *Hafer v. Melo*, 502 U.S. 21, 27 (1991).

[66](#) States can also indemnify board members against antitrust liability. *Dental Board II*, 574 U.S. at 513. However, indemnification only shifts the financial liability to the state and could encourage board members to enact unlawful anticompetitive regulations.

[67](#) *Dental Board II*, 574 U.S. at 511–12.

[68](#) *Dental Board I*, 717 F.3d at 364.

[69](#) *See* Allensworth, *supra* note 9, at 1570. For example, the Dental Board of California is comprised of a majority of practicing dentists. *See* Cal. Bus. & Prof. § 1601.1(a) (“The board shall consist of eight practicing dentists, one registered dental hygienist, one registered dental assistant, and five public members.”). Other California health care boards have similar licensure membership requirements. *See, e.g.*, Cal. Bus. & Prof. Code §§ 2001, 2007 (West 2019) (Medical Board); *id.* at §§ 2462–2463 (Board of Podiatric Medicine), 2603 (Physical Therapy Board), 3010.5–3011 (Board of Optometry), 3505 (Physician Assistant Board), 3600–3601 (Osteopathic Medical Board).

[70](#) *But see* Brief for West Virginia et al. as Amici Curiae Supporting Petitioner, *Dental Board II*, 574 U.S. 494 (No. 13-534), 2014 WL 2506625, at \*10 (arguing that relying on inactive professionals diminishes the value of having experts on boards, especially in industries that change quickly).

[71](#) Fed. Trade Comm’n, Bureau of Competition, FTC Staff Guidance on Active Supervision of State Supervision, at 8 (Oct. 2015) [hereinafter FTC Guidance].

[72](#) *Hallie*, 471 U.S. at 45 & n. 9; *Dental Board I*, 717 F.3d at 370.

[73](#) *Midcal*, 445 U.S. at 105 (citation omitted).

[74](#) *Hallie*, 471 U.S. at 41–42.

[75](#) *FTC v. Phoebe Putney Health System, Inc.*, 568 U.S. 216, 227 (2013).

[76](#) *Id.*

[77](#) *Id.*

[78](#) *Patrick v. Burget*, 486 U.S. 94, 101 (1988).

[79](#) *Dental Board II*, 574 U.S. at 1116; *see generally* FTC Guidance, *supra* note 71, at 9–10.

[80](#) Occupational Licensing Board Antitrust Damages Relief Act of 2020, H.R. 8680, 116th Cong. (2d sess. 2020); *see, e.g.* Jennifer Huddleston, *If You Want To Fight Monopolies, Fight Occupational Licensing*, Reason (Jan. 21, 2022, 4:25 p.m.), [https://reason.com/2022/01/21/want-to-fight-monopolies-fight-occupational-licensing/?utm\\_medium=email](https://reason.com/2022/01/21/want-to-fight-monopolies-fight-occupational-licensing/?utm_medium=email).

[81](#) *Raskin, Cicilline, Conaway Introduce Legislation to Reform State Occupational Licensing Boards*, Office of Jamie Raskin (Oct. 23, 2020), <https://raskin.house.gov/2020/10/raskin-cicilline-conaway-introduce-legislation-reform-state-occupational>.