

SENATE HEALTH & WELFARE COMMITTEE  
Monday, February 22, 2016

ATTACHMENT 1

**NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS**

*Petitioners*

*v.*

**FEDERAL TRADE COMMISSION**

**U.S. SUPREME COURT**

Argued October 14, 2014

Decided Feb 25, 2015



# PURPOSE

To provide information

about a U.S. Supreme Court Opinion

that increases the legal exposure

of Idaho's Regulatory Boards

to federal antitrust claims

# OUTLINE

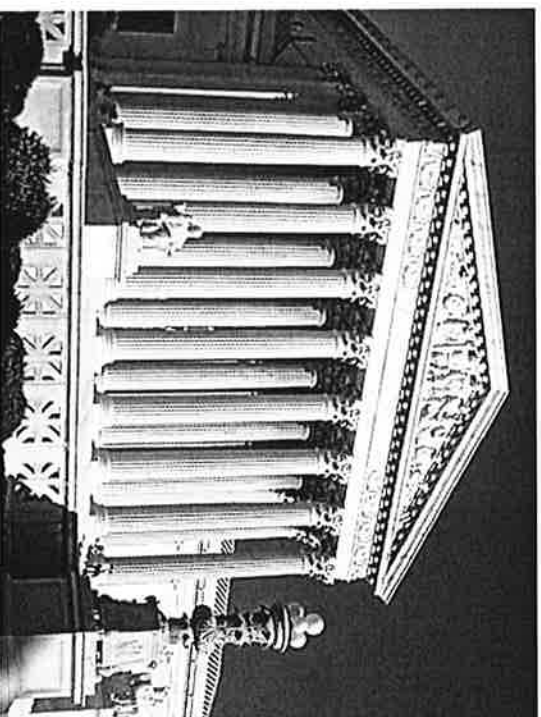
## INFORMATION BRIEFING

- Antitrust Overview
- Facts
- Procedural History
- Opinion
  - Majority
  - Dissent
- Issues to Consider
- Questions



# RULING

If a State uses active market participants as regulators, it must provide active supervision if the board is to qualify for state-action immunity from federal antitrust laws.





## FEDERAL ANTITRUST LAW

- “...is a central safeguard for the Nation’s free market structures.”
- “...is as important to the preservation of economic freedom...as the bill of rights is to the protection of our fundamental personal freedoms.”

U.S. Supreme Court



# PURPOSE OF ANTITRUST LAW

Promote competition to

- Lower prices
- Increase output
- Raise quality
- Expand innovation



# ANTITRUST STATUTES

- SHERMAN ACT prohibits
  - Restraint of Trade Agreements
  - Monopolies
- FEDERAL TRADE COMMISSION
  - Unfair competition
  - Deceptive practices
- CLAYTON ACT prohibits
  - Price discrimination
  - Tying arrangements
  - Mergers/acquisitions that lessen competition





## FEDERAL TRADE COMMISSION

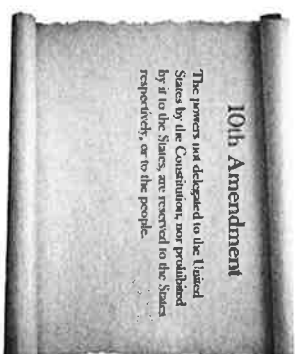
- Agency established 1914
- Mission: Promote consumer protection and prevent anti-competitive business practices.
- 5 commissioners nominated by President and confirmed by Senate
- Responsibilities:
  - Enforce antitrust laws
  - Review proposed mergers
  - Investigate business practices





## STATE ACTION IMMUNITY

- *Parker v. Brown*, U.S. Sup. Ct. (1943)
- Actions by a State are **NOT** subject to federal antitrust laws
- Local governments also immune if pursuing state's "clearly articulated policy to displace competition."
- Private entities may be immune if "actively supervised" by State



## FACTS

- 1990's – North Carolina dentists (including 8 of 10 board members) whiten teeth
- 2003 – nondentists whiten teeth at lower prices – dentists complain
- Board opens investigation
- Board concludes whitening = dentistry despite whitening's omission from NC Dental Practice Act.
- Nobody takes action to amend statute or rules.

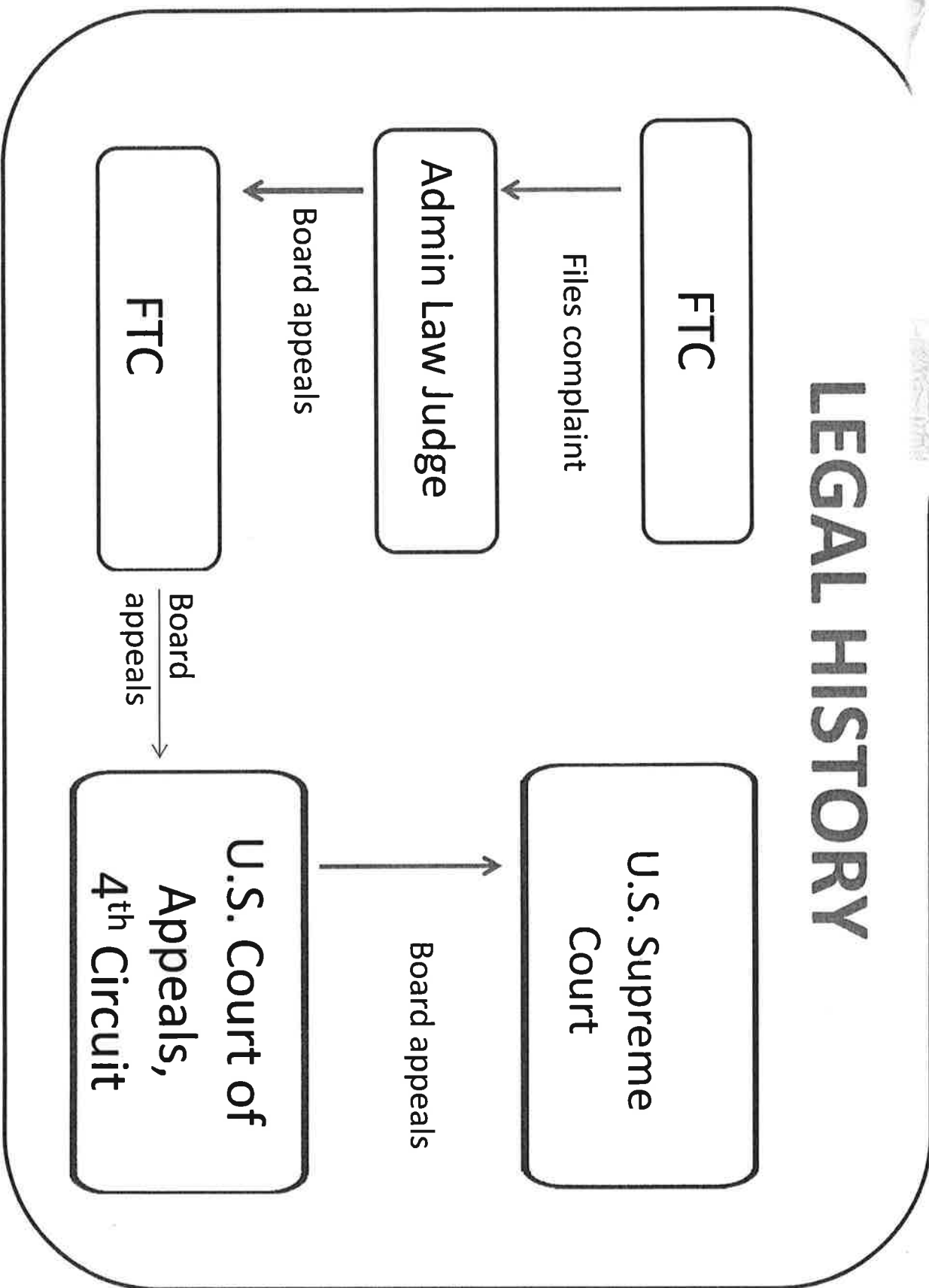
## FACTS (cont.)

- 2006 – Board issues 47 cease-and-desist letters
- Letters state or imply whitening = dentistry and warn that unlicensed practice = crime
- Board send letters to mall operators re kiosks and urge eviction
- Letters to other regulatory boards





# LEGAL HISTORY



## PRIMARY QUESTION

- Whether active market participants, acting as unsupervised state regulators, qualify for state-action immunity from antitrust law.

OR

- Is the NC State Board of Dental Examiners truly a state agency?

## OPINION

- Majority - Because “controlling number” of Board’s decision makers are “active market participants,” the Board is treated as a private actor and must show active State supervision.
- Dissent - North Carolina created a state agency and gave that agency the power to regulate.
- 6-3 decision (Alito, Scalia, & Thomas dissent)



## POINTS OF LAW

Government character of board not enough. Must be more than mere façade of state involvement to ensure political accountability.



## POINTS OF LAW (cont.)

A “nonsovereign actor”, controlled by active market participants, is immune only if:

1. Anticompetitive state policy clearly articulated
2. State actively supervises policy

## **POINTS OF LAW (cont.)**

- “state supervision” DOES NOT MEAN
  - day-to-day involvement in operations
  - micromanagement of every decision
- BUT...must be promotion of state policy vs. personal interests.

## POINTS OF LAW (cont.)

- State supervisor must
  1. Review substance of anti-competitive decision, not merely procedure;
  2. Have power to veto or modify decision
  3. Not be an active market participant
- Adequacy of supervision depends on circumstances.

## OBSERVATIONS

### IDAHO REGULATORY BOARDS

Nearly all of Idaho's boards controlled by active market participants (AMP), but...

- Governor appoints board members;
- Executive and Legislative branch reviews appropriations, fees, statutes, and rules;
- Bureau Chief / most Executive Directors not AMP;
- Board Counsel is not AMP;
- Investigators are not AMP;
- Prosecutors are not AMP;
- Hearing officers are not AMP;
- Right to judicial review;

## **WHAT NOW?**

- Idaho Attorney General (AG) issued Opinion 16-1.
- Governor proposing HB 480 & HB 482 to reduce exposure of boards and board members to federal anti-trust claims.

# QUESTIONS

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