UNITED STATES OF AMERICA
BEFORE FEDERAL TRADE COMMISSION

DOCKET NO. 9311

IN THE MATTER OF

SOUTH CAROLINA STATE BOARD OF DENTISTRY

COMPLAINT COUNSEL'S OPPOSITION TO THE SOUTH CAROLINA STATE BOARD OF DENTISTRY'S MOTION TO DISMISS

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Introduction

This case challenges anticompetitive action by a state board controlled by practicing dentists, which reimposed restraints on competition in the delivery of school-based preventive dental care services after the state legislature had eliminated those same restraints. In 2000, the South Carolina General Assembly enacted legislation removing a statutory requirement that prohibited dental hygienists from performing cleanings or applying dental sealants in school settings unless a dentist had examined the child within the previous 45 days. The governor hailed the new law, noting that it "removes a regulation that hindered access to dental care." The following year, however, the South Carolina State Board of Dentistry reimposed the very same requirement.

The complaint in this case charges that the Board's action unreasonably deprived consumers of the benefits of the new competition that the legislature sought to encourage, and, in so doing, deprived thousands of economically-disadvantaged South Carolina children of needed preventive dental care, in violation of Section 5 of the FTC Act. The Complaint further alleges that, despite cessation of the Board's unlawful action and further action by the state legislature in May 2003, the Board has made statements indicating that it believes the dentist preexamination requirement is still warranted under the new statutory scheme.

The Board has moved to dismiss the complaint, seeking to avoid an examination of the antitrust merits of its conduct on two grounds: first, that the 2003 statute renders the case moot; and second, that the Board is exempt from antitrust scrutiny by virtue of the state action doctrine. Neither claim is well-founded.

As to mootness, the Board's arguments rest on an effort to contest well-pleaded factual allegations that, if proven at trial, would support the conclusion that prospective relief is needed

to guard against a recurrent violation. The complaint alleges facts going to the likelihood of future unlawful conduct under the 2003 statutes. The only thing that has changed since the complaint issued is the Board's recently-crafted resolution objecting to those allegations and offering a different interpretation of prior events. Only an evidentiary record will permit resolution of an issue that plainly involves disputed issues of fact. The Commission need not and should not accept at face value either the Board's gloss on its prior statements or its promises of future compliance timed for use in a motion to dismiss.

The Board's state action defense, while presenting a legal issue amenable to resolution at this point in the proceedings, fails because there is no state policy that comes close to providing such a defense. Given the General Assembly's actions in 2000, it should not be surprising that first and foremost the Board claims to be sovereign and exempt from the "clear articulation" test of the state action doctrine. The Commission and the courts, however, have squarely rejected such claims by state licensing boards. To avail itself of the state action doctrine, the Board must show that a clearly articulated policy of the legislature shields its conduct, and it cannot do so. In trying to defend action taken in direct opposition to state legislative policy, the Board resorts to various arguments that either are fundamentally at odds with the basic tenets of the Supreme Court's state action jurisprudence, or rest on entirely implausible interpretations of South Carolina law.

As a threshold matter, we note that the Board has submitted various documents along with its motion, many of which are offered in support of factual assertions that go beyond the complaint or seek to contest its allegations. Accordingly, as we discuss below, these materials are inappropriate on a motion to dismiss, and the Commission should decline to consider them.

Background

In May 2000, the South Carolina General Assembly enacted legislation to eliminate barriers to dental hygienists' providing preventive dental services in schools.[1] While, for more than a decade, specific statutory provisions had authorized hygienists to practice in schools under certain conditions, by 2000, mounting evidence demonstrated that a substantial portion of South Carolina school children still were not receiving preventive dental care services. To address this need, the General Assembly acted in 2000 to remove various restrictions governing dental hygienists' delivery of preventive dental care in schools, including the requirement that a dentist examine the child before these services were provided.[2]

Prior to the 2000 amendments, South Carolina Code Annotated Section 40-15-80(C) (1999) (Tab 4) required not only that a dental hygienist have permission from the student's parent and prior authorization from a dentist when applying dental sealants and performing oral prophylaxis (cleanings) in schools, but also mandated "a preexamination and written authorization by the authorizing dentist, no more than forty-five days before treatment is administered."[3]

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[1] Act of May 23, 2000, 2000 S.C. Acts No. 298 (codified as amended at S.C. Code Ann. §§ 40-15-80, 85 (2003)) (Tab 2).

[2] Compl. ¶¶14, 15, 18, 19; *infra* note 3.

[3] The entire text of Section 40-15-80(C) provided:

In school settings, application of sealants and oral prophylaxis are subject to the following restrictions:

> (1) A student with unmet oral needs may have a sealant applied or a prophylaxis performed upon written permission of the student's parent or guardian.
>
> (2) A licensed dental hygienist must receive authorization from a licensed dentist who is

The 2000 amendments eliminated the mandate for a dentist examination within forty-five days of the dental hygienist's providing cleanings and sealants.[4] Instead, a dental hygienist could provide cleanings, sealants, and fluoride treatments in schools "under general supervision" by a licensed dentist or the South Carolina Department of Health and Environmental Control's public health dentist. S.C. Code Ann. § 40-15-80(B) (2000) (Tab 6); *Id.* § 40-15-85(B) (2000) (Tab 7). General supervision under the new law meant that a dentist merely had to have "authorized the procedures to be performed." *Id.* § 40-15-85(B) (2000). By contrast, in defining "direct supervision," the South Carolina General Assembly required "that a dentist is in the dental office, personally diagnoses the condition to be treated, personally authorizes the procedure, and before dismissal of the patient, evaluates the performance of the auxiliary." *Id.* § 40-15-85(A) (2000).

Reflecting the increased responsibility granted dental hygienists under the new law, the General Assembly also specified that dental hygienists practicing under the general supervision standard applicable to schools and other public health settings had to maintain their own professional liability insurance. *Id.* § 40-15-80(G) (2000). No such requirement was applied to hygienists practicing under direct supervision. Finally, the legislation expressly stated that the general supervision standard it was adopting for public health settings did not apply to hygienists

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> either his employer or supervising dentist before placement of sealants or a prophylaxis is provided.
>
> (3) A preexamination and written authorization by the authorizing dentist, to occur no more than forty-five days before treatment is administered, is required before any student receives sealant application or oral prophylaxis or both. Treatment cannot be authorized for a student who is an active patient of another dentist.

[4] Compl. ¶¶ 18, 19.

practicing in a private dental office. *Id.* § 40-15-85(B) (2000). South Carolina – like several other states – chose to place fewer conditions on dental hygienist practice in school settings in order to address unmet needs among school-age children.[5] South Carolina's governor hailed the passage of the 2000 amendments and stated: "This new law removes a regulation that hindered access to dental care."[6]

In response to the new legislation, a dental hygienist established Health Promotion Specialists to deliver dental hygiene services, including cleanings, sealants, and topical fluoride, to children in schools.[7] HPS employed dental hygienists to provide this preventive care and contracted with a dentist who authorized hygienists to treat the school children.[8] Without the dentist exam requirement, HPS could provide preventive services in schools in a manner that was cost-effective and convenient for the families of the children served.[9] By July 2001, HPS had performed oral screenings on over 19,000 children and provided preventive services to over

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[5] *See, e.g.*, Haw. Admin. Code § 16-79-2(2) (2003) (certain supervision requirements generally applicable do not apply to public health programs); Minn Stat. Ann. § 150A.10 (West 2003) (dental hygienists permitted to provide cleanings, topical fluoride, and sealants in certain settings under a collaborative agreement with a dentist without a dentist's diagnosis); Mo. Ann. Stat. § 332.311(2) (West 2003) (dental hygienists permitted to provide cleanings, topical fluoride, and sealants in public health settings without the supervision of a dentist); 49 Pa. Code §§ 33.1, 33.205(d)(2) (2003) (setting forth a special definition of general supervision applicable only in public health settings, and providing that "a single authorization may, when appropriate, apply to one or more classes or categories or students/patients").

[6] Compl. ¶ 20.

[7] *Id.* ¶ 22, 23.

[8] *Id.* ¶ 22.

[9] *Id.* ¶ 23.

4,000 students, including over 3,000 Medicaid-eligible children.[10] This new form of dentist-dental hygienist collaboration, permitted by law and adopted by HPS, stimulated competition in the provision of dental care services in schools.[11] Dentists operating in traditional private office models risked losing patients to this new competition.[12]

The Board obstructed this new competitive threat by adopting a regulation in July 2001 that reimposed the same dentist preexamination requirement that the General Assembly had just abolished.[13] Adopted as an "emergency" regulation while the General Assembly was not in session, it remained in effect for six months,[14] the maximum time allowed by law,[15] expiring in January 2002. Reinstating the dentist preexamination requirement had a drastic effect on the ability of school-based dental care programs, like the one developed by HPS, to compete in providing preventive dental care. As a result, the emergency regulation deprived thousands of South Carolina children of the dental services they needed.[16]

HPS promptly brought suit in state court and sought an injunction against enforcement of

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[10] *Id.*

[11] *See id.* ¶¶ 23, 24.

[12] *Id.* ¶ 23.

[13] *Id.* ¶¶ 25, 27.

[14] Standards for Dentists to Authorize Certain Procedures to be Performed by Dental Hygienists Under General Supervision, 25-7 S.C. Reg. 79 (July 27, 2001) (Tab 1); Compl. ¶¶ 25, 26.

[15] S.C. Code Ann. § 1-23-130(C) (2003).

[16] Compl. ¶ 28.

the regulation.[17] In that proceeding, the Board argued that the 2000 amendments were intended merely to clarify the standards for hygienists operating in school settings, not to change prior practice.[18] The Court of Common Pleas denied the plaintiffs' request for a temporary restraining order, holding that the plaintiffs had failed to exhaust their administrative remedies. The court also adopted the Board's argument that the 2000 amendments did not change the standards for hygienist practice in schools.[19] A state court of appeals later affirmed the denial of the temporary restraining order, but only on the ground that the plaintiffs had failed to exhaust administrative remedies.[20]

The Board also proposed a permanent regulation that paralleled the emergency rule.[21] Under South Carolina Law, an administrative law judge was required, after a public hearing, to determine whether the proposed permanent regulation was a reasonable exercise of the Board's

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[17] Bd. Mem. in Supp. of Mot. to Dismiss (Oct. 21, 2003) [hereinafter Bd. Br.] at 10.

[18] Mem. in Opp'n to Pls.' Mot. for T.R.O., *Health Promotion Specialists, LLC v. S.C. Bd. of Dentistry*, Civ. A. No. 01-CP-0-3148 (S.C. Ct. Com. Pl. Aug. 9, 2001) [hereinafter *HPS v. Bd.*] at 4-6 (SC 00085-87) (Tab 11). The Commission may take official notice of statements made in briefs or other court filings, not for the truth of the matter asserted, but for the position a party has taken. 5A Charles A. Wright and Arthur R. Miller, *Federal Practice and Procedure* §§ 1364, 1366 (2d ed.1990); *Southmark Prime Plus L.P. v. Falzone*, 776 F. Supp. 888, 892 (D. Del. 1991); *see, e.g.*, *Concordia v. Bendekovic*, 693 F.2d 1073, 1076 (11th Cir. 1982) (taking judicial notice of counterclaim in prior action). On a motion to dismiss, the Commission may consider matter subject to official notice. *See infra* note 33.

[19] Order Den. Pls.' Mot. for T.R.O., *HPS v. Bd.* (Aug. 21, 2001) (Tab 12). The Commission can take official notice of judicial decisions. *In re AMA*, 94 F.T.C. 701, 900 (1979) (initial decision). *See also infra* note 33.

[20] *HPS v. Bd.*, No. 2003-UP-232 (S.C. Ct. App. Mar. 26, 2003) (unpublished opinion) (Tab 13). The plaintiffs recently filed suit in federal district court alleging violations of the Sherman Act. Civil Dkt. for Case No. 03-CV-3230, *Health Promotion v. S.C. Bd. of Dentists* (D.S.C. 2003), *available at* www.pacer.psc.uscourts.gov (Tab 14).

[21] Compl. ¶ 30.

authority.[22] In that hearing, the Board renewed its argument that the 2000 amendments were merely intended to clarify, not to change, prior practice.[23] The ALJ, however, rejected the Board's argument. He found the statutory language, and in particular the removal of the preexamination requirement from the statute, to be "strong evidence" that the General Assembly did not intend to maintain such a requirement.[24] In addition, he noted the context for the General Assembly's 2000 amendments, including the shortage of dentists in many counties, particularly dentists who would accept Medicaid patients, and the evidence of substantial unmet need for preventive dental care, particularly among Medicaid-eligible school children in South Carolina.[25] Relying on established principles of statutory construction articulated by South Carolina courts, he concluded that the Board's reinstatement of a requirement that "the legislature purposely eliminated when enacting [the 2000 amendments]" conflicted with the intent of the statute.[26]

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[22] *Id.* ¶ 31.

[23] Admin. Hr'g, *In re: Supervision of Dental Hygienists' Services*, Dkt. No. 01-ALJ-11-0348-RH (Oct. 10, 2001) at 10 (SC 00218) (Tab 15). The Commission may take official notice of, and therefore consider, a transcript that is a public record. *Locicero v. Leslie*, 948 F. Supp. 10, 12 (D. Mass. 1996) (considering transcript of prior proceeding in context of Rule 12(b)(6) motion); *see also Zdrok v. V Secret Catalogue, Inc.*, 215 F. Supp. 2d 510, 513-14 (D.N.J. 2002).

[24] Pub. Hr'g Report of the Administrative Law Judge, *In re: Proposed Regulation*, Doc. No. 2644, Dkt. No. 01-ALJ-11-0348-RH (Feb. 11, 2002) at 17 (SC 00314) (deletion of the provision requiring a dentist examination prior to the provision of preventive services is "strong evidence that [the legislature] no longer were going to require such. Otherwise, they would have left that provision in the statute.") (Tab 16). The Commission may take official notice of administrative reports and decisions. *See infra* note 33; *see, e.g.*, *In re Midcon Corp.*, 112 FTC 93, 160 n.16 (1989).

[25] ALJ Report, *supra* note 24, at 12, 16, 17 (SC 00309, 313, 314).

[26] *Id.* at 9-10, 18 (SC 00306-07, 315); *accord* Compl. ¶¶ 32, 33.

For the regulation to become permanent, the Board had to forward it along with the ALJ's reports to the state legislature for review.[27] Instead, the Board abandoned the permanent regulation and decided to seek a legislative change.[28] The General Assembly ultimately enacted legislation in May 2003.[29] The new statute preserved the ability of dental hygienists to provide cleanings, sealants, and topical fluoride without a prior dentist examination when working in schools and other public health settings under contract with the Department of Health and Environmental Control. S.C. Code Ann. § 40-15-102(D) (2003) (Tab 9). It also added a provision stating that a dentist billing for services provided by a dental hygienist in a public health setting "is clinically responsible for the care and treatment of the patient." *Id.* § 40–15-102(E). In addition, for the first time, it permitted dental hygienists working in private dental offices to provide certain services under general supervision, but gave the term a more stringent definition in that context, adding various requirements not contained in the prior statute (including a dentist examination within the previous twelve months). *Id.* § 40-15-102(C).

Prior to passage of the 2003 amendments, the Board considered bill language that was later enacted, including the requirement that a dentist billing for services of a dental hygienist in a public health setting be "clinically responsible" for the care and treatment of the patient. In connection with this language, Board members agreed that "a dentist has to see the patient" in all settings:

Discussion followed as to whether or not a dentist sees a patient in a public health setting.

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[27] Compl. ¶ 31.

[28] *Id.* ¶ 34; Bd. Br. at 12.

[29] Act of May 28, 2003, 2003 S.C. Acts No. 45 (codified at S.C. Code Ann. §§ 50-15-82, 85, 102, 110 (2003)) (Tab 3); Compl. ¶ 37.

> Mr. Alvey explained the Board's position as stated in a letter written by a past president, Dr. Barrett, that indicated that in all settings, regardless of whether it was public health or in a private practice setting, whether direct supervision or general supervision, that a licensed dentist has to diagnose and provide a treatment plan which requires a dentist to see the patient. Mr. Alvey asked if any of the Board members felt any differently. The Board members indicated they agreed.[30]

The Commission issued its complaint in this matter on September 15, 2003. In Paragraph 38, the Complaint alleges that the Board has interpreted language in the 2003 amendments to mean that in all settings – public or private – a dentist must examine the patient and provide a treatment plan before a dental hygienist may provide treatment. On October 23, 2003, the Board filed a motion to dismiss the Complaint. Along with its motion, the Board submitted an October 16, 2003, Board "resolution," which disputes the description in Complaint Paragraph 38 of the Board's March 2003 discussion and represents that the Board intends to abide by the terms of Paragraph 1 of the Notice of Contemplated Relief.

I. The Commission Should Reject the Board's Effort to Rely on Matters Outside the Complaint that are Not Properly Raised in a Motion to Dismiss

The standard for a motion to dismiss is clear.[31] To meet its burden, the Board must show that, as a matter of law, the Board's conduct is protected by the state action doctrine, the case is moot, or that the Complaint's allegations are legally insufficient to establish a need for relief. On a motion to dismiss for failure to state a claim, the decision-maker "must accept all well-

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[30] Minutes, S.C. Bd. of Dentistry (Mar. 6, 2003) at 4 (SC 01006) (Tab 17); Compl. ¶ 38. When minutes are a matter of public record, courts can take judicial notice of their contents. *See Cash Inn of Dade, Inc. v. Metropolitan Dade Cty.*, 938 F.2d 1239, 1243 (11th Cir. 1991); *TAAG Linhas Aereas de Angola v. Transamerica Airlines*, 915 F.2d 1351, 1353 (9th Cir. 1990).

[31] Although the Commission's Rules do not explicitly discuss a motion to dismiss for failure to state a claim, Commission practice has followed the same standards as federal courts in deciding motions to dismiss under Federal Rule 12(b)(6). *See* cases cited, *infra* note 32.

pleaded facts as true" and "review them in the light most favorable to the plaintiff."[32] The Commission may consider documents referenced in the Complaint and matters subject to official notice, such as judicial decisions and records and reports of administrative bodies, as long as they concern facts "that are not subject to reasonable dispute."[33] Beyond those limited exceptions, a motion to dismiss may not rely on factual assertions outside the pleadings.

The Board's brief proffers various factual assertions well beyond the scope of a dismissal motion. Rather than accepting the allegations of the Complaint, the Board cites to affidavits and documents and asserts inferences in its favor. For example, in connection with its state action argument, the Board relies on a marketing brochure, a letter, and a statement on the South Carolina Dental Hygiene Association's web site, none of which are matters subject to official notice. Such statements from private citizens are not proper aids to statutory construction.[34] Moreover, the Board is attempting to draw inferences from those documents, documents that do not purport to offer a legal analysis of the 2000 amendments.

Because the Board's brief contains factual assertions that are inappropriate on a motion

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[32] *Green v. State Bar of Tex.*, 27 F.3d 1083 (5th Cir. 1994) (applying standard in a state action case). Commission practice has consistently followed this standard. *See In re TK-7 Corp.*, 1989 FTC LEXIS 32 at *3 (1989) (citing *Miree v. DeKalb Cty.*, 433 U.S. 25, 27 n.2 (1977)).

[33] *United States v. Ritchie*, 342 F.3d 903, 908-09 (9th Cir. 2003) (quoting Fed. R. Evid. 201(b)); *see also* 2 James Wm. Moore, Moore's Federal Practice § 12.34[2] (Matthew Bender 3d ed. 2003) (discussing materials courts consider in deciding whether to dismiss for failure to state a claim); 5A Wright and Miller, *supra* note 18, at §§ 1357 n.1, 1364, 1366 n.20; *Nix v. Fulton Lodge No. 2*, 452 F.2d 794 (5th Cir. 1971), *cert. denied*, 406 U.S. 946 (1972) (holding copies of judicial decisions attached to motion not outside scope of motion to dismiss); *Barron v. Reich*, 13 F.3d 1370 (9th Cir. 1994) (administrative reports and records).

[34] 2A N. Singer, *Sutherland Statutory Construction* § 48:11, at 461 (6th ed. 2000) ("Statements from nonofficial sources having no special connection with the preparation and proposal of a bill are not generally considered for interpretation purposes.").

to dismiss, the Commission should expressly exclude those matters from its consideration of the Board's motion.[35] Although federal courts may convert a motion to dismiss to a motion for summary judgment,[36] there is no reason to covert this motion (assuming such a procedure is available under the Commission rules). Conversion would not facilitate resolution of either of the issues raised by the Board's dismissal motion.[37] On the one hand, the Board's state action argument presents a purely legal issue, as does the claim that the 2003 amendments by themselves necessarily render this case moot. Facts beyond the Complaint are irrelevant to these questions. On the other hand, the Board's broader arguments about mootness and relief, which concern the likelihood it that would engage in future illegal conduct, involve intensely factual

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[35] In an Article III court, a motion to dismiss for mootness falls under Federal Rule of Civil Procedure 12(b)(1) (a motion to dismiss for lack of subject matter jurisdiction), not Rule 12(b)(6) (motion to dismiss for failing to state a claim). For an administrative agency however, mootness is not a jurisdictional issue. *Tenn. Gas Pipeline Co. v. Fed. Power Comm'n.*, 606 F.2d 1373, 1380 (D.C. Cir. 1979) ("The limitations imposed by article III on what matters federal courts may hear affect administrative agencies only indirectly. The subject matter of agencies' jurisdiction naturally is not confined to cases or controversies inasmuch as agencies are creatures of article I."). "Rather, an agency has 'substantial discretion' to decide whether to hear issues which might be precluded by mootness." *R.T. Communications, Inc. v. FCC*, 201 F.3d 1264, 1267 (10th Cir. 2000). Therefore, the Board's motion to dismiss the Complaint as moot should also be treated similar to a motion under Rule 12(b)(6).

[36] Rule 12(b)(6) allows a federal court to convert a dismissal motion to a summary judgment motion so that it can consider matters beyond the scope of the Complaint. Such a decision is always within the discretion of the court, *see Poole v. County of Otero*, 271 F.3d 955, 957 n.2 (10th Cir. 2001), and the court must give the opposing party the opportunity to develop a factual record. *See Gay v. Wall*, 761 F.2d 175, 177 (4th Cir. 1985). The Commission has no corollary rule.

[37] *Reich v. Hoy Shoe Co., Inc.*, 32 F.3d 361, 364 (8th Cir. 1994) (explaining summary judgment appropriate if "upon viewing the facts in the light most favorable to the non-moving party, and giving him or her the benefit of all reasonable inferences, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law"); *Flying Diamond Corp. v. Pennaluna & Co., Inc.*, 586 F.2d 707, 713 (9th Cir. 1978) ("[S]ummary judgment is proper where the facts are undisputed and only one conclusion may reasonably be drawn from them.").

questions that make summary decision inappropriate at this point in the proceedings. The Board's attack on Paragraph 38 of the Complaint plainly raises disputed issues of material fact. It is, of course, generally inappropriate to consider a summary decision motion prior to the parties conducting necessary discovery.[38] That principle is particularly relevant here, where the Commission, at the Board's request, has stayed all discovery pending the resolution of the claimed defenses of mootness and state action.

If the Commission does not clearly explain how it is treating this motion and what extrinsic material it is considering, the Board may later claim that its motion was effectively one for a summary decision and that any fact not explicitly disputed is admitted by complaint counsel.[39] To avoid any potential confusion, we ask that the Commission clarify that (1) it is treating the Board's motion as a motion to dismiss for failure to state a claim and (2) based on its rules and procedures, it is considering only the following categories of information: the factual allegations in the Complaint; all inferences that may reasonably be drawn in complaint counsel's favor; and matters that are subject to official notice. We also ask that the Commission not consider the following materials submitted with the Board's motion: Exhibits 1, 5, 6, 7 in their entirety; Exhibit 3 (and Exhibits A & part of C attached thereto); Exhibit 4 (and Exhibits 2 & 6 attached thereto).[40]

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[38] *See* 16 C.F.R. § 3.24(a)(4); *cf. Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 425 U.S. 738, 746 (1976) ("[I]n antitrust cases . . . dismissals prior to giving the plaintiff ample opportunity for discovery should be granted very sparingly.") (citation omitted).

[39] *See* 16 C.F.R. § 3.24(a)(4).

[40] For a specific discussion on each exhibit, see Appendix A.

II. The Board Has Not Demonstrated that the Case Is Moot or that Complaint Counsel Cannot Support a Claim for Relief

"Simply stated, a case is moot when the issues presented are no longer 'live' or the parties lack a legally cognizable interest in the outcome."[41] Even when allegedly illegal conduct has ceased, a case is moot only if the defendant demonstrates that "subsequent events ma[k]e it absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur."[42] The burden on a defendant to prove mootness is a "heavy one."[43]

When a case is not moot, but the conduct at issue has ceased, injunctive relief ultimately may be denied if the record shows no "cognizable danger of recurrent violation."[44] The determination whether such a danger exists is committed to the discretion of the fact finder, and "the character of past violations," "the effectiveness of the discontinuance," and "the bona fides of the expressed intent to comply" are all factors to be considered.[45]

While mootness and need for relief are distinct concepts with different burdens of proof, the central issue in both is the likelihood of recurrence. On a motion to dismiss, where the allegations are taken as true and all inferences are drawn in favor of complaint counsel, the issues are functionally the same. The question is whether the allegations in the complaint, if established, show a cognizable danger of recurrence. Unless it can be shown that there is no set

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[41] *Powell v. McCormack*, 395 U.S. 486, 496 (1969).

[42] *United States v. Concentrated Phosphate Export Ass'n, Inc.*, 393 U.S. 199, 203 (1968).

[43] *United States v. W.T. Grant Co.*, 345 U.S. 629, 633 (1953); *In re Coca-Cola Co.*, 117 F.T.C. 795, 917 (1994).

[44] *Grant*, 345 U.S. at 633.

[45] *Id.*

of facts that could be proved to support a claim for injunctive relief, a motion to dismiss based on the absence of a cognizable danger of recurrent violation should be denied.[46]

The Board raises two legal arguments in support of its motion: (1) the 2003 amendments make a future violation impossible and (2) the emergency regulation has lapsed and the Board, just before filing its motion to dismiss, promised not to reimpose a dentist examination requirement. Given the allegations of the Complaint, however, the Board's arguments fail to establish that it is "absolutely clear" that the Board will not violate the law again, or that the Complaint's allegations are insufficient as a matter of law to establish a "cognizable danger" of recurrence.

To bolster its argument, the Board contests (1) the allegation that it maintains there is a need for a dentist preexamination in all situations and (2) the inference that this belief creates a danger that the Board will impose such a requirement despite the 2003 statute. The Board, however, may not use a motion to dismiss to contest allegations in the Complaint. The Board's "resolution" does nothing more than establish a factual dispute, which only a trial can resolve.

A. The Statutory Change Does Not Eliminate the Danger of a Recurrent Violation

The Board's argument that the 2003 amendments to the dental practice act make the case moot rests on various cases in which some change in law led to dismissal of the suit. None of these cases, however, suggests that the statutory change in this matter makes the likelihood of a recurrent violation here so remote as to warrant dismissal of the complaint.

First, the Board relies on federal court cases where suits seeking invalidation of a statute

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[46] *See, e.g., Dyer v. Schecter*, 77 F.R.D. 696, 698 (N.D. Ohio 1977); *Securities and Exchange Commission v. Nat'l Student Mktg. Corp.*, 360 F. Supp. 284, 296 (D.D.C. 1973).

were deemed moot after repeal of the challenged statute because there was nothing left for a court to enjoin.[47] The 2003 statute, however, did not repair some infirmity in the 2000 statute that formed the basis for the Commission's complaint.[48] Rather, the complaint challenges the Board's decision to require a dentist preexamination; the 2003 statute changes neither the Board's incentives nor its ability to repeat its misconduct.

The Board also cites two Commission cases that withdrew complaints in response to legislative changes, but neither supports the Board's argument. In *In re City of New Orleans*, 105 F.T.C. 1 (1985), the complaint was withdrawn after the Louisiana legislature enacted a statute to confer state action immunity on the conduct challenged by the Commission, thereby making effective relief impossible. Thus, the case has nothing to do with the question whether a statutory change makes it unlikely that unlawful conduct will recur. In *In re City of Minneapolis*, 105 F.T.C. 304, 308-09 (1985), Minneapolis repealed or amended certain municipal ordinances after the complaint issued. The Commission withdrew the complaint not

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[47] *Valero Terrestrial Corp. v. Paige*, 211 F.3d 112 (4th Cir. 2000) (challenge to constitutionality of state statutes held moot after statutes changed); *Citizens for Responsible Gov't State Political Action Comm. v. Davidson*, 236 F.3d 1174 (10th Cir. 2000); *Esposito v. S.C. Coastal Council*, 939 F.2d 165, 171 (4th Cir. 1991) (after district court enjoined enforcement of state statute against certain plaintiffs, court of appeals held that "the injunctive remedy granted by the district court has become pointless because the enjoined statute has been superceded by a significantly amended statutory scheme and is no longer in effect"). In another case on which the Board relies, *Native Village of Noatak v. Blatchford*, 38 F.3d 1505, 1514 (9th Cir. 1994), the court held that the only relief not precluded by the Eleventh Amendment was a declaration that certain regulations under a revenue sharing statute were unconstitutionally discriminatory and that such declaratory relief was not available since the statute and regulations had been repealed.

[48] Further, as the Commission observed in *In re Rubbermaid, Inc.*, 87 F.T.C. 676, 705 (1976): "That a case may become moot upon the repeal of the statute that is challenged as unconstitutional does not mean a case is mooted by the repeal of a statute which, at most, provided respondent with a colorable defense."

on grounds of mootness, but rather based on its administrative determination that there no longer existed a public interest in proceeding with the case. There was no suggestion that there was any issue as to a risk that the challenged conduct would recur.

In sum, the issue here is not whether the South Carolina General Assembly is likely to reinstate a statute that it repealed, as it was in many of the cases the Board cites. Instead, the question is the existence of a cognizable danger that the Board will once again act to impose a dentist examination requirement in contravention of state legislative policy. The Complaint contains factual allegations that indicate a likelihood of recurrence. That is sufficient to defeat the Board's motion to dismiss.

B. The October 16 Board Resolution Does Not Moot this Case or Foreclose Relief

Well after receiving a draft of the Complaint, including Paragraph 38, and weeks after the Commission issued the Complaint, the Board apparently decided to offer a written statement, purporting to clarify its view of the 2003 amendments.[49] The Board's mootness argument fails because, based on the allegations of the Complaint, there is evidence that the Board will repeat the challenged conduct. The Complaint charges, for example, that the Board has acted contrary to legislative directives in the past and is likely to engage in similar conduct in the future under the current statute. It further alleges that the Board is composed almost entirely of dentists who have the incentive (either directly or on behalf of their dentist constituents) to eliminate competition from dentists and hygienists who provide school-based preventive services without a dentist preexamination.

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[49] Oct. 16 Resolution (Bd. Mot. to Dismiss (Oct. 21, 2003) [hereinafter Bd. Mot.] Attach. A to Ex. 13).

Most importantly, the Complaint alleges that the Board previously has interpreted the 2003 amendments as maintaining a dentist preexamination requirement in all settings. Paragraph 38 charges:

> [W]hen the Board in March 2003 considered the statutory revisions that the General Assembly later enacted, it maintained that in all settings where a dental hygienist provides treatment – whether public health or private practice – a licenced dentist has to see the patient and provide a treatment plan.

This allegation leads to the logical inference of a significant risk that the Board will reimpose an exam requirement under the 2003 statute. The Complaint's allegations in Paragraph 38, and the reasonable inferences herein described, must be accepted as true on a motion to dismiss[50] and are sufficient to defeat the Board's claim of mootness. They plainly belie the Board's argument that reimposition of an examination requirement in public health settings is legally impossible from the Board's perspective or is unlikely to occur.

Moreover, the Board's October 16 resolution deserves no weight. First, despite ample time to announce its policy regarding the 2003 amendments (which became effective in June), the Board waited until October (after it was sued) to adopt this resolution. And, in drafting the resolution, the Board simply copied word-for-word the Commission's notice of contemplated relief. As a result, the resolution makes no sense since it includes the phrase "after the date the order becomes final."[51] Such timing and lack of care call into question the bona fides of the Board's assurances.[52]

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[50] *See supra*, Part I.

[51] Oct. 16 Resolution, *supra* note 49.

[52] The Board's resolution is essentially no different than a voluntary cessation of challenged conduct. Such a cessation has little relevance when it occurs in the shadow of an enforcement action. *Coca-Cola*, 117 F.T.C. at 917 ("It was established long ago that voluntary

Second, the Board could abandon its resolution at any time. And, while courts tend to give more deference to state officials who promise to discontinue challenged conduct, that "tendency to trust public officials is not complete, however, nor is it invoked automatically."[53] Even public defendants "cannot be trusted with the power to moot judicial proceedings simply by professing that they have mended their ways."[54] Furthermore, the Board is a special type of governmental entity, one controlled by practicing dentists who stand to benefit from additional anticompetitive conduct.

C. The Board's Self-Serving Interpretation of the March 2003 Minutes Is Inappropriate on a Motion to Dismiss

The Board's recent resolution also includes a statement contesting the factual allegation in Paragraph 38 of the Complaint. This allegation is based on minutes of a March 2003 Board meeting. To support its motion, the Board says that the discussion referred to in these minutes related solely to the 2000 amendments and not the proposed 2003 amendments. Whether by argument or by resolution, the Board may not use a motion to dismiss to attack the factual allegations in the Complaint or the inferences that complaint counsel draws from those allegations. The factual dispute concerning what the Board was discussing in March 2003, when it asserted dentist preexaminations were required in all settings, is a matter for discovery and

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cessation of illegal activities, even if accomplished before the Commission issues a complaint, is not a defense."); *In re Zale Corp.*, 78 F.T.C. 1195, 1240 (1971) ("Where, as here, the abandonment took place only after the Commission's hand was on the respondent's shoulder, the courts are clear that abandonment of the practices under such circumstances will not support a conclusion that the practices will not be resumed."); *see also Grant*, 345 U.S. at 632 n.5.

[53] 13A Charles A. Wright et al., *Federal Practice and Procedure* § 3533.7, at 354-55 (2d ed. 1984); *see also In re Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988) (rejecting claims by a state licensing board that it had abandoned its illegal conduct).

[54] 13A Wright, *supra* note 53, § 3533.7, at 359.

resolution as the case proceeds. The purpose of a motion to dismiss is not to resolve contested factual issues.

III. The Board's Challenged Actions Are Not Protected by the State Action Doctrine

Competition is "the fundamental principle governing commerce in this country."[55] Therefore, the state action doctrine, like an implied repeal, is disfavored and narrowly construed.[56] First articulated in *Parker v. Brown*, 317 U.S. 341, 350-51 (1943), the state action doctrine is premised on the Court's holding that the Sherman Act was not intended to "restrain a state or its officers or agents from activities directed by its legislature." Later cases have made it clear that a state can choose to displace the overarching policy of competition with regulation but that choice must be a "deliberate and intended" policy of the state.[57] Consequently, the Court has required a showing that the state, acting as sovereign, has "clearly articulated" a policy to displace competition with regulation.[58]

The clear articulation test strikes a balance between competition and federalism in three distinct ways. First, it assures that the state has actually made a decision to supplant competition with regulation. Second, it allows the state to impose even fairly pervasive regulation without

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[55] *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398 (1978) (plurality).

[56] *Federal Trade Commission v. Ticor Title Ins. Co.*, 504 U.S. 621, 635-36 (1992).

[57] *Id.*, 504 U.S. at 636.

[58] *Ticor*, 504 U.S. 633 (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)). In *Midcal*, the Supreme Court set out a two-part test for the state action defense: first, the challenged conduct must be undertaken pursuant to a clearly articulated state policy to displace competition; and second, the conduct must be actively supervised by state officials. Because there is no clearly articulated state policy that protects the Board's conduct, the Commission need not address the issue of active supervision.

inadvertently providing an antitrust immunity.[59] Finally, it assures that "[s]tates . . . accept political responsibility for actions they intend to undertake."[60] Although courts have articulated various formulations of the test, the analysis is not just whether the state has generally displaced competition with regulation, but whether the displacement encompasses the challenged conduct.

The issue here is whether a state licensing board composed of competing dentists can disregard the state legislature's removal of a statutory barrier to competition and reimpose the very same restraint. The Board offers four arguments in an effort to establish its defense that its decision to flaunt the legislature's will is protected by the state action doctrine: (1) its status as a state agency exempts it from the antitrust laws; (2) its general regulatory authority represents a clearly articulated policy in favor of its conduct; (3) the 2000 statute actually required a dentist preexamination; and (4) any conflict between its challenged conduct and state policy is a mere error of state administrative law. The Supreme Court's teachings reject the first two arguments; the plain meaning of the 2000 statute contradicts the third argument; and the fourth argument seeks to expand a legitimate principle far beyond its proper bounds. Having failed to identify a clearly articulated state policy that exempts its conduct from antitrust scrutiny, the Board has no state action defense.[61]

A. The Board's Status as a State Agency Does Not Give it Automatic State Action Protection

In the first instance, the Board avoids the question of whether it was acting pursuant to a

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[59] *Ticor*, 504 U.S. at 636-37.

[60] *Id.* at 636.

[61] *See, e.g., Lafayette*, 435 U.S. 389 (placing burden on defendant to establish state action defense).

clearly articulated policy, arguing instead that it is the sovereign and therefore an entity capable of articulating a policy to displace competition.[62] The Board is a regulatory body composed almost entirely of members of the regulated industry and is far outside the limited sphere defined as the sovereign capable of clearly articulating a policy to displace competition. In *Mass. Board*, 110 F.T.C. at 612-13, the Commission considered and rejected a claim by a state licensing board that it had sovereign status, and the Commission's position is supported by well-established Supreme Court precedent.

The state action doctrine protects the right of the states to choose to displace the national policy favoring competition with a program of state regulation, but only when such a choice is made by "the [s]tate acting as sovereign."[63] The Supreme Court has consistently looked to enactments of the state legislature[64] for the requisite state policy, or, in the case of the legal profession, to the state supreme court acting in a legislative capacity.[65] Thus, as the Court observed in *Hoover*, 466 U.S. at 568, "[c]loser analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization." Cases challenging action by a "nonsovereign state representative" require a showing that the conduct can be traced to a clearly articulated policy of the sovereign to displace

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[62] Bd. Br. at 24.

[63] *Goldfarb v. Va. State Bar*, 421 U.S. 773, 790 (1975).

[64] *See, e.g.*, *Southern Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48 (1985); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985); *Parker*, 317 U.S. 341.

[65] *See, e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984) (state supreme court "acting legislatively rather than judicially" is sovereign); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 360 (1977).

competition with regulation.[66]

As early as *Goldfarb*, 421 U.S. at 789-92, the Court held that a state agency, the Virginia State Bar, violated the Sherman Act by issuing an ethical opinion encouraging adherence to a minimum fee schedule, because neither the state legislature nor the state supreme court, exercising legislative authority over the legal profession, had decided to restrain price competition among lawyers. Subsequent cases confirmed this treatment of state agencies.[67] And in *Southern Motor Carriers*, 471 U.S. at 63, the Supreme Court again emphasized that "*Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself" and that state agencies are not "the State" for *Parker* purposes. As the Court explained, a state action defense for collective rate making would lie "only if collective ratemaking is clearly sanctioned by the legislatures of the four [s]tates in which the rate bureaus operate."[68] Although the state public service commissions permitted collective rate making, the state agencies, "acting alone . . . could not immunize private anticompetitive conduct."[69]

The Board's claim to automatic state action immunity rests on a view expressed in a distinct minority of lower court decisions that certain state executive agencies are sovereign for

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[66] *Hoover*, 466 U.S. at 569.

[67] *See, e.g.*, *Southern Motor Carriers*, 471 U.S. at 60-61 ("'*Goldfarb* . . . made it clear that, for purposes of the *Parker* doctrine, not every act of a state agency is that of the State as sovereign.'") (quoting *Lafayette*, 435 U.S. at 410 (Brennan, J.)); *Lafayette*, 435 U.S. at 410 (plurality) (observing that in *Goldfarb*, the absence of an expression of such a policy by either the legislature or the court meant that "it could not be said that [the Bar's challenged conduct was] directed by the State acting as sovereign").

[68] *Southern Motor Carriers*, 471 U.S. at 63.

[69] *Id.* at 62-63.

state action purposes. The Board's reliance on these decisions is misplaced for two reasons. First, even assuming *arguendo* that some types of executive branch entities might properly be treated as the sovereign for state action purposes, it does not follow that the Board would be entitled to such status. The Board's cases involve executive departments, not industry licensing and regulatory boards. In contrast to the executive departments occasionally deemed to be the sovereign, the Board is composed of dentists who compete in the market they regulate – and who are elected to their positions by, and as representatives of, their fellow dentists in their respective congressional districts.[70] Thus, unlike typical state officials, the board members have a direct and substantial personal stake in competitive conditions in the market that they regulate.[71]

In *Hoover*, the Supreme Court specifically dismissed the suggestion that state licensing boards are sovereign, stating that, "[o]ur attention has not been drawn to any trade or other profession [i.e., other than law] in which the licensing of its members is determined directly by the sovereign itself."[72] Lower court rulings in cases involving self-regulatory state boards have not granted such entities an automatic state action exemption by virtue of their status as state agencies, but have looked to state policy as articulated in enactments of the legislature.[73]

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[70] S.C. Code Ann. § 40-15-20 (2003).

[71] The Board's effort to wrap itself in the mantle of the Department of Licensing and Regulation (Bd. Br. at 23) is to no avail. That the Department employs and supervises the Board's support staff does not transform the Board's actions into those of the Department itself. The Board did not need the Department's approval to issue its regulation, and the Department had no authority to revoke regulations adopted by the Board.

[72] *Hoover*, 466 U.S. at 580 n.34.

[73] *See, e.g.*, *Federal Trade Commission v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) (Breyer, J.) (state pharmacy board was not sovereign, but rather a subordinate governmental unit); *Benson v. Ariz. State Bd. of Dental Exam'rs*, 673 F.2d 272, 275 (9th Cir. 1982); *Gambrel v. Ky. Bd. of Dentists*, 689 F.2d 612, 618-20 (6th Cir. 1982); *Brazil v. Ark. Bd.*

Second, the cases on which the Board relies are based on a misunderstanding of the state action doctrine as set forth by the Supreme Court. They misread the Supreme Court's suggestion in *Hoover* that a governor might in some cases be treated as sovereign[74] as a suggestion that the state executive branch might be entitled to *ipso facto* immunity.[75] But the Court's post-*Hoover* decision in *Southern Motor Carriers* dispels this broad interpretation. The Court made it clear at the outset that state agencies are subject to the clear articulation test:

> The circumstances in which *Parker* immunity is available to private parties, *and to state agencies or officials regulating the conduct of private parties*, are defined most specifically by our decision in [*Midcal*].[76]

Moreover, the cases relied on by the Board are based on the incorrect reasoning that the executive is a co-equal branch of government and thus entitled to the same state action treatment as the other branches. But the suggestion that sovereign status applies to the legislative and judicial *branches* is plainly wrong. Duly enacted statutes of a state legislature are acts of the sovereign but not any act of a legislative committee or officer. Likewise, sovereign status has been accorded to "a decision of a state supreme court[] acting legislatively rather than

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of Dental Exam'rs, 593 F. Supp. 1354, 1361-68 (E.D. Ark. 1984), *aff'd per curiam*, 759 F.2d 674 (8th Cir. 1985).

[74] *Hoover*, 466 U.S. at 568 n.17 ("This case does not present the issue whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine.").

[75] *See Neo Gen Screening, Inc. v. New England Newborn Screening Program*, 187 F.3d 24, 28 (1st Cir. 1999) (stating the Supreme Court reserved decision as to "state-level executive branch departments or agencies"); *Charley's Taxi Radio Dispatch Corp. v. SIDA of Hawaii, Inc*., 810 F.2d 869 (9th Cir. 1987); *Deak-Perera Hawaii, Inc. v. Dept. of Transp.*, 745 F.2d 1281, 1282 (9th Cir. 1984) (executive branch).

[76] 471 U.S. at 57 (emphasis added).

judicially,"[77] not to all actions of the judicial branch.

These cases also rely on the immunity afforded state agencies under the Eleventh Amendment and, in so doing, effectively grant constitutional protection in circumstances where it was never intended to apply. But the Supreme Court has not made Eleventh Amendment standards the test of sovereignty for a *Parker* defense. Indeed, in *Parker*, the Court balanced competing state and federal interests to arrive at a doctrine that displaces federal antitrust law only if the state's highest authority has chosen to do so. (The Eleventh Amendment is no bar in this case, of course, since it does not apply to suits by the federal government.)

In sum, the Board is plainly a "nonsovereign state representative." Its authority over the practice of dentistry and dental hygiene is not the ultimate power of the state, but is derived from and granted by the South Carolina General Assembly. Accordingly, to prevail on its state action defense, the Board must demonstrate that its challenged conduct was undertaken pursuant to a clearly articulated policy of the General Assembly to supplant the type of competition that its anticompetitive actions foreclosed.

B. The Board's General Authority to Regulate Does Not Supply the Requisite Clearly Articulated Policy to Displace Competition

The Board's claim to state action protection based on its general regulatory powers and on *Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir. 1998), likewise ignores Supreme Court case law. Most obviously, it fails in light of the specific policy expressed by the General Assembly in removing the dentist preexamination requirement from the statute in 2000. Given this legislative action, there is no basis to conclude that the General

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[77] *Hoover*, 466 U.S. at 568.

Assembly intended or contemplated that the Board would reinstate the repealed preexamination requirement. No such circumstances were present in *Earles*, and the Board cites no case where a state agency that imposed competitive restraints that the state legislature had repealed was granted a state action exemption.

Furthermore, inferring a broad intent to displace competition from the Board's general authority to regulate the practice of dentistry and dental hygiene goes too far. Indeed, under the Board's logic, it could bar price competition among dentists and not be subject to antitrust scrutiny for its conduct. On the contrary, the Supreme Court has made it clear that, although a policy to displace competition need not be explicit, the mere existence of a regulatory scheme in the industry will not necessarily establish the requisite state policy. As the Court noted in *Southern Motor Carriers*,[78] both *Goldfarb*[79] and *Cantor*[80] involved an extensive regulatory structure, but because there was no evidence of a legislative intent to displace the type of competition at issue, the state action defense was rejected in both cases.

A legislature clearly articulates an intent to displace competition if it adopts a regulatory scheme that provides that the operative issue will be decided by government officials rather than market forces. This was the case in *Southern Motor Carriers*, where the requisite clear articulation for private parties' collective rate making was provided by a statutory scheme that required a state agency to prescribe rates for common carriers based on statutorily enumerated

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[78] 471 U.S. at 60.

[79] *Goldfarb*, 421 U.S. at 790-91 (state supreme court regulated lawyers, but no evidence that it intended to do away with price competition).

[80] *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 584 (1976) (Michigan legislature imposed "pervasive" regulation of distribution of electricity but had not indicated an intent to displace competition in the sale of light bulbs).

factors.[81] Similarly, in *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 373 (1991), the Court found that a city's moratorium on new billboard construction was protected, given a state law authorizing cities to engage in zoning regulation, regulation which necessarily displaces competition with respect to entry into the market.

A legislature also articulates a policy to displace competition when it expressly authorizes conduct that would "foreseeably" result in anticompetitive effects. Thus, in *Hallie*, 471 U.S. at 43, Wisconsin statutes expressly authorized cities to condition the provision of sewage treatment services on an outlying area's agreement to annexation. The Court held that such statutes protected the city's tying of sewage treatment to its sewage collection and transportation services. The legislature had delegated "express authority to take action that foreseeably will result in anticompetitive effects" and it did not need to expressly state that it anticipated anticompetitive results from such conduct.[82]

No clearly articulated policy protects the Board's conduct. By eliminating restrictions on certain forms of dentist-dental hygienist collaborations in schools, the legislature determined that competition, not government regulators, would determine if and when dentist preexaminations would occur. The South Carolina General Assembly did not specifically authorize the challenged restraints; rather, it eliminated them. The legislature's general grant of authority to regulate the dental and dental-hygiene professions in no way suggests that the legislature would have foreseen or contemplated that the Board would effectively override its specific repeal of the preexamination requirement.

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[81] 471 U.S. at 63-65.

[82] *Hallie*, 471 U.S. at 42-43.

Rather, although South Carolina has clearly articulated a policy to displace certain types of competition in the practice of dentistry and dental hygiene (such as by limiting entry via licensing), it opened a window to competition in 2000 in the hopes of expanding access to preventive dental services. Once the state has opened that window, the Board may not shut it.

C. The Board Cannot Demonstrate Clear Articulation Through its Plainly Erroneous Interpretation of South Carolina Statutes Governing Dental Hygienists

The 2000 amendments clearly eliminated the dentist preexamination requirement. The Board, nevertheless, purports to find that the same preexamination requirement remained in the 2000 statute. That reading of South Carolina law is plainly erroneous.

1. The 2000 Amendments Eliminated the Dentist Preexamination Requirement in School Settings

The 2000 amendments' impact on dental hygienists providing preventive services in school settings is clear. Prior to 2000, before a dental hygienist could provide preventive services, South Carolina required parental consent, authorization by a supervising dentist, a preexamination by the dentist, and no evidence that the student was an active patient of another dentist.[83] In 2000, the South Carolina General Assembly kept two of those requirements, parental consent and authorization, almost verbatim,[84] but removed the dentist preexamination requirement. The only logical conclusion is that the legislature eliminated the preexamination

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[83] S.C. Code. Ann. § 40-15-80 (1999).

[84] *Compare* S.C. Code Ann. § 40-15-80(C)(1) (1999) *with* § 40-15-80(B) (2000) (parental consent); *Compare* S.C. Code Ann. § 40-15-80(C)(3) (1999) *with* § 40-15-85(B) (2000) (defining general supervision as requiring authorization).

requirement in a school setting.[85]

The Board asserts[86] that a legislative intent to eliminate the dentist preexamination requirement would have been inconsistent with the directive that there be no independent dental hygiene practice, set forth in South Carolina Code Annotated Section 40-15-80(F) (2000). But that would be true only if the legislature deemed hygienists' practicing preventive services in schools with prior authorization but without a dentist examination to be the equivalent of independent practice. The Board's recent concession that the 2003 statute permits hygienists in public health settings to provide sealants, cleanings, and fluoride without a dentist preexamination – while the ban on independent practice remains on the books – effectively refutes any such argument.

2. The Board's Interpretation of the 2000 Amendments Would Create Absurd Results

To reach its position that the 2000 amendments maintained a dentist preexamination requirement, the Board must assert not only that removal of the specific language imposing the exam requirement did not eliminate that requirement, but also that the 2000 amendments' sole purpose was to eliminate a different, unstated requirement the Board claims to have found. According to the Board, "it is clear that those amendments [in 2000] were directed only at removing the requirement that the dentist be physically present when the procedures were

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[85] *See Vernon v. Harleysville Mut. Cas. Co.*, 135 S.E.2d 841, 844 (S.C. 1964) ("It will be presumed that the Legislature in adopting an amendment to a statute intended to make some change in the existing law."), *cited with approval in Harrell v. Pineland Plantation, Ltd.*, 523 S.E.2d 766, 775 (S.C. 1999). 1A N. Singer, *Sutherland Statutory Construction* § 22:30 (6th ed. 2000).

[86] Bd. Br. at 28.

performed."[87] Leaving aside the fact that this "clear" meaning only recently occurred to the Board – which until recently claimed that the 2000 amendments were not meant to change prior practice at all with regard to cleanings and sealants[88] – the argument is untenable and absurd.

The Board concedes, as it must, that a physical presence requirement under pre-2000 law must be "derived"[89] from a different section of South Carolina law, S.C. Code Ann. § 40-15-85 (1999) (Tab 5), that defines direct supervision. But nowhere does the statute say that direct supervision applies to hygienists practicing in school settings.[90] Thus, the Board must mean that the direct supervision requirements apply except where specifically excepted. This argument, however, leads to obviously illogical results. For example, the statutory section authorizing hygienists to perform oral screenings and apply fluoride does not expressly exempt them from the direct supervision requirement that the dentist "personally diagnose," that is examine, the patient. Under the Board's reasoning, however, a dentist would have to conduct an examination before a hygienist could perform an oral screening. Further, the Board does not explain why the legislature needed to require a dentist examination within forty-five days if the dentist had to be present anyway when cleanings and sealants were provided. A 1993 report by the South

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[87] Bd. Br. at 28.

[88] In state court litigation, the Board took the position that the 2000 amendments were merely intended to clarify the law, not to change it. *See* Opp'n Mem., *supra* note 18, at 5. The Board's administrator, Mr. Rion Alvey, testified before an administrative law judge that the 2000 amendments did not change the standards that were to apply to hygienist practice in schools. *See* Admin. Hr'g, *supra* note 23, at 82-83 (SC 00236).

[89] Bd. Br. at 3.

[90] Compare the absence of this language with South Carolina Code Annotated Section 40-15-177(D) (1999) (requiring that a dental hygienist holding a restricted volunteer license may practice "only under the direct supervision of a licensed dentist").

Carolina Legislative Audit Council confirms that the pre-2000 code did not require a dentist to be present when a hygienist provided sealant or cleanings in a school setting.[91] Indeed, the Board's construction of South Carolina law as it existed before 2000 is not remotely plausible.[92]

The Board's interpretation of the 2000 amendments would lead to a number of absurdities. Under that law, the public health dentist of the South Carolina Department of Health and Environmental Control can provide general supervision of dental hygienists, yet the single public health dentist could not possibly examine all the children who require preventive services. It defies common sense and logic for South Carolina to have envisioned the public health dentist's conducting examinations all over the state as part of general supervision. The Board's reading also makes another requirement superfluous. Under the amended law in 2000, a dental hygienist working under the general supervision of the public health dentist had one additional requirement for placing sealants: "If a licensed dentist is available, an examination and

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[91] S.C. Legis. Audit Council, *Report to the General Assembly, 1993 Sunset Reviews* (June 1993) at H-5 ("In school settings, hygienists may for certain students, clean teeth and apply sealants without a dentist on the premises.") (Tab 18). The Legislative Audit Council is an official oversight agency created by the South Carolina General Assembly (S.C. Code Ann. § 2-15-10 (2003)) and therefore the Commission can take official notice of its public reports. *See supra* note 33; *see also Pueblo v. United States*, 50 F.3d 856, 862 n.6 (10th Cir. 1995); *In re Beatrice Food Co.*, 67 F.T.C. 473, 516 n. 29 (1965) (taking official notice of a report by the State of California) (initial decision).

[92] The Board's attempt to bolster its illogical argument by referencing documents attached to its motion (in an effort to claim that at the time of enactment "interested parties" construed the statutory change as removing a physical presence requirement, not the forty-five day preexamination requirement) is as misguided as it is improper. None of the documents purport to be comprehensive explanations of the statute. Moreover, it simply defies logic to suggest that dental hygienists and their supervising dentist would undertake a program of school-based dental care using a model that they believed to be illegal. In any event, documents from private citizens are not a tool for statutory construction. *See supra* note 34.

diagnosis must be made by him before a sealant is placed on a tooth."[93] There would be no need for this additional requirement if general supervision required an exam.

If the Board were correct, the 2000 amendments would have made the provision of fluoride treatments more, not less, difficult. Under the pre-2000 statute, a hygienist could provide fluoride treatments in a school setting without a dental preexamination.[94] The 2000 amendments changed the law so that fluoride treatments, cleanings, and sealants were treated the same: all require general supervision. If the Board is correct, the 2000 amendments imposed an examination requirement for fluorides where none had existed before. Even the Board, however, has never contended that the purpose of the 2000 amendments were to make it more difficult to provide fluoride treatments in a school setting.

3. The ADA Definition of General Supervision Does Not Support the Board's Position

The Board also argues that the 2000 amendments maintained the dentist preexamination requirement because "general supervision" is a "term of art" in the dental profession and was widely understood to have the meaning ascribed to it by the American Dental Association. Bd. Br. at 5, 27-28. In fact, however, states can and do craft their own definitions of general supervision.[95] The General Assembly knows how to adopt ADA standards when it wishes to do so, for it chose to follow the ADA's definition of direct supervision.[96] But, it used its own

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[93] S.C. Code Ann. § 40-15-110 (2000) (Tab 8).

[94] S.C. Code Ann. § 40-15-80(B) (1999).

[95] *See, e.g.*, 49 Pa. Code § 33.205(d)(2) (2003) (general supervision in public health setting allows a single authorization for one or more classes of students or patients).

[96] *Compare* S.C. Code Ann. § 40-15-85 (2003) *with* ADA Comprehensive Policy on Dental Auxiliaries (Bd. Mot., Ex. C to Ex. 3 at SC 00151 (ADA definition of direction

definition of general supervision, not that of the ADA.[97] Moreover, the circumstances made it logical for the General Assembly to have crafted its own definition of general supervision. The ADA definition applies broadly to "dental auxiliaries" (that is, not only dental hygienists, but also dental technicians and dental assistants), while South Carolina law draws a distinction among dental auxiliaries, and allows general supervision only for dental hygienists.[98] In addition, in the 2000 amendments, South Carolina was using general supervision only in public health settings, while the ADA definition is not so limited. States have frequently taken this same course and adopted different, more relaxed standards for dental hygienists working in public health settings.[99] Also, the ADA expresses the view that general supervision does not protect the public, a view apparently rejected by the many states that have adopted forms of general supervision, including South Carolina.[100]

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supervision)); *see also* S.C. Code Ann. §§ 40-15-220, 250, 260 (2003) (all specifically referring to ADA standards or requirements).

[97] The ADA states that general supervision means:

> A dentist is not required to be in the dental office or treatment facility when procedures are being performed by the auxiliary, but has personally diagnosed the condition to be treated, has personally authorized the procedures and will evaluate the performance of the dental auxiliary.

ADA Policy, *supra* note 96, at SC00151-52.

[98] Dental hygienists must be licensed (S.C Code Ann. § 40-15-120 (2003) (Tab 10)), and only dental hygienists may perform certain auxiliary services, such as oral prophylaxis (*Id.* § 40-15-80(G) (2003)) and administration of local infiltration anesthesia (*Id.* § 40-15-80(E) (2003)).

[99] *Supra* note 5.

[100] ADA Policy, *supra* note 96, at SC 00152 ("General supervision is not acceptable to the American Dental Association because it fails to protect the health of the public.").

Finally, the Board never explains why "authorizes the procedures to be performed" – the language that the General Assembly actually used to define general supervision – should be equated with an ADA standard that expressly requires far more, that is, that the dentist "has personally diagnosed the condition to be treated, has personally authorized the procedures and will evaluate the performance of the dental auxiliary."[101]

4. The Board's Reliance on the State Trial Court Decision Is Misplaced

Aside from its statutory arguments, the Board claims the Court of Common Pleas' opinion denying HPS's request for a temporary restraining order is "a binding and effective declaration on the issue of the Board's authority to promulgate the emergency regulation." Bd. Br. at 31. In fact, that opinion is not binding, nor is it even persuasive evidence of the legislative intent of the 2000 amendments.

Even where federal courts apply state law in diversity cases, it is well established that they are not bound by state trial court opinions, absent special circumstances. Indeed, *King v. Order of United Commercial Travelers of America*, 333 U.S. 153, 159-61 (1948), specifically considered the role of South Carolina's county courts of common pleas, holding that decisions of such courts are not binding on federal courts, and noting that they are not even binding on other South Carolina courts. The Fourth Circuit recently reiterated that a decision of a South Carolina county court of common pleas "is not an authoritative statement of state law."[102]

While federal courts give proper regard to rulings of lower state courts,[103] here the trial

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[101] *Id.* at SC 00151-52 (ADA definition of general supervision).

[102] *Simpson v. Duke Energy Corp.*, 1999 U.S. App. LEXIS 21553 at *15 (4th Cir. 1999) (unpublished).

[103] *See King*, 333 U.S. at 159-161, 162.

court decision deserves no weight. It suffers from two fundamental flaws. First, it is based in substantial part on an argument that the Board has now abandoned – that the 2000 amendments were not intended to change the prior practice of hygienists in school settings at all. Second, the court also accepted the Board's representation that the legislature had adopted "a recognized definition of 'general supervision.'"[104] But as discussed above, the definition used by the South Carolina General Assembly is vastly different from that of the ADA.

Not surprisingly, the Board attempts to dismiss the significance of the administrative law judge's conclusion that imposition of the dentist examination requirement conflicted with the intent of the 2000 amendments. The Board's criticisms of that judge's analysis, however, are off the mark. A review of his report shows that he paid careful attention to the statutory language and legislative history, as well as state law cases setting forth principles of statutory construction. The charge that the report is "nonbinding" is of no moment here. The issue is its persuasive force. The administrative law judge's report was sufficiently weighty to prompt the Board to seek a change in the statute rather than proceed with a proposed regulation.

In sum, the Board attempts to show that the 2000 statute reflects a policy to displace competition by arguing that the statute requires a preexamination. Because the Board's various attempts to show that the 2000 amendments did not eliminate the dentist preexamination requirement in prior law are plainly erroneous, its state action argument fails. As a result, the Board's claim to a state action defense ultimately comes down to its contention discussed below, that at most its conduct was simply an error of state law that was not sufficiently egregious to subject it to antitrust scrutiny.

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[104] Order Den. Pl.'s Mot. for T.R.O., *supra* note 19, at 5 (SC 00038).

D. The Conflict Between the Board's Action and the Policy of the General Assembly Cannot Be Dismissed as Mere State Administrative Law Error

The critical state action question in cases involving non-sovereign state representatives is the existence of a state policy that contemplates anticompetitive conduct of the type challenged.[105] Once it is shown that state statutes express such a policy, ordinary errors in the implementation of that policy will not negate a state action defense. Thus, where governmental officials can show the requisite state policy to displace competition, courts will not deny state action protection when confronted with allegations that those officials failed to follow procedural rules,[106] misapplied substantive statutory standards in a particular case,[107] or acted in bad faith or with improper motive.[108]

The Board relies on this principle – that an error in state law will not negate an otherwise valid state action defense – while skirting the fundamental issue of the state's policy. This is not

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[105] *See Hoover*, 466 U.S. at 568-69.

[106] *See, e.g.*, *Llewellyn v. Crothers*, 765 F.2d 769, 773-74 (9th Cir. 1985) (where state statutes specifically authorized Oregon Worker's Compensation Department to set rates to be paid for medical services provided under the worker's compensation law, Department's adoption of a fee schedule was protected from antitrust challenge despite violation of applicable rulemaking procedures).

[107] *See, e.g.*, *Boone v. Redevelopment Agency of San Jose*, 841 F.2d 886, 891-92 (9th Cir. 1988) (where state redevelopment act expressed a policy to permit anticompetitive acts, allegation that city had erroneously designated downtown San Jose a "blighted area" under standards of state statutes did not defeat state action defense).

[108] *See, e.g.*, *Omni*, 499 U.S. at 371-72 (holding allegation that city zoning ordinance was adopted for improper purpose under relevant state enabling law cannot not defeat state action exemption); *Fisichelli v. City Known as Town of Methuen*, 956 F.2d 12, 15 (1st Cir. 1992) (holding plaintiffs' allegation that town denied industrial revenue bond application for improper, anticompetitive reason did not alter state action analysis and observing that in *Omni*, "an improper, anticompetitive motive, whether or not sufficient under *state law* to invalidate the act, made no *antitrust* difference").

a case that seeks to "mak[e] antitrust liability depend on an undiscriminating and mechanical demand for 'authority' in the full administrative law sense."[109] Such an argument might be apt where, for example, a plaintiff sought to defeat a state action defense solely on a claim that the Board promulgated an emergency regulation without an adequate basis for satisfying the emergency criteria of the rulemaking statute. Here, however, the Board has not made a threshold showing that state statutes clearly articulate an intent to displace the type of competition that the Board suppressed.

The Board thus takes a limited principle – that not every error of state law will cause a defendant to forfeit an otherwise valid state action defense – and transforms it beyond recognition. It seeks to use its tortured reading of the 2000 amendments to *create* a state policy in its favor, and, failing that, argues that finding a lack of state policy would be equivalent to subjecting it to antitrust liability for a mere imperfect exercise of its authority. Under the Board's view, a state agency is always immune when its actions violate state law. No case supports such a result.

The Board attempts to distinguish the Commission's decision in *Mass. Board* on the basis that *Mass. Board* involved an express state policy in favor of competition.[110] But, the state action doctrine does not require that a legislature expressly declare its intent to permit competition. Such a requirement would turn the law on its head, by demanding that states

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[109] *Omni*, 499 U.S. at 372 (quoting 1 Phillip E. Areeda and Herbert Hovenkamp, *Antitrust Law* § 212.3b, at 145 (Supp. 1989)).

[110] In *Mass. Board*, the Massachusetts Legislature had expressly stated that state licensing boards were not permitted to restrict truthful, nondeceptive advertising. *Mass. Board*, 110 F.T.C. at 614.

express an intent to permit competition rather than an intent to displace it.

* * *

In conclusion, there can be no clearly articulated policy to displace the very competition that the General Assembly had just sanctioned. Therefore, the Commission should deny the Board's motion to dismiss.

Respectfully Submitted,

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Counsel Supporting the Complaint

Dated: November 25, 2003

CERTIFICATE OF SERVICE

I, Emily R. Pitlick, hereby certify that on November 25, 2003:

I caused one original and twelve copies of Complaint Counsel's Opposition to the South Carolina State Board of Dentistry's Motion to Dismiss to be served by hand delivery, and one copy to be served by electronic mail, upon the following-

Office of the Secretary
Federal Trade Commission - Room 159
600 Pennsylvania Avenue, N.W.
Washington, D.C. 20580

I caused a copy of Complaint Counsel's Opposition to the South Carolina State Board of Dentistry's Motion to Dismiss to be served by electronic mail and Federal Express upon the following-

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