

State Board of Embalmers and Funeral Directors

March 16-17, 2015

Drury Inn & Suites – Brentwood
8700 Eager Road
Brentwood, MO 63144

OPEN AGENDA

Monday, March 16, 2014 – 2:00p.m.

1. Call to Order
 2. Roll Call
 3. Approval of Agenda
 4. Election of Officers
- CLOSED

Tuesday, March 17, 2014 – 8:00a.m.

5. Financial Examination Committee Appointment effective January 1, 2015
6. (Tab 1) Executive Director Report
 - Staffing Update
 - Financial Report
 - License Reports (new, closed/ceased, disciplined)
 - Conference Updates
 - 2015 FARB Forum – January 22-25, 2015 – Tucson, AZ
 - The Conference – February 25-26, 2015 - Dallas Texas
 - Department of Health and Senior Services – Vital Statistics – Lexi Hall
 - Next Meeting Dates/Location
- 7.(Tab 2) The International Conference of Funeral Service Examining Boards Model Practice Act
8. (Tab 3)Legal Counsel Report
 - Update on National Prearranged Services litigation
 - Update on North Carolina State Board of Dental Examiners v Federal Trade Commission

8:45a.m.

9. St. Louis Community College Presentation – David Coughran
10. Open Session/Discussion
11. CLOSED

10:15a.m.

- 12.(Tab 4) Gregory Crocker – Funeral Director – Disciplinary Hearing - Case #14-1545 EM
Micah Wynes - Preneed Agent – Settlement Modification Hearing – Case EMB 15-004
Leland Kolkmeyer – Embalmer, Funeral Director, Preneed Funeral Director Agent – Disciplinary Hearing – Case #14-1160 EM
13. CLOSED
14. Adjourn

**Board of Embalmers
Financial Statement - FY 2015
as of January 31, 2015**

	Year-To-Date	Projected	Remaining
FY 2014 Beginning Fund Balance	3,009,200.72		
Revenue	752,923.00	704,565.00	(44,437.00)
Expense and Equipment	59,466.42	164,200.00	119,148.42
Total Transfers & Licensure System	403,460.21	939,819.42	593,455.99
Ending Fund Balance	3,299,197.09		

Line	Description	FY 2015 Actual												FY 2014 Projections			
		July	August	September	October	November	December	January	February	March	April	May	June	Lapsed July	YTD Total	Projected	Remaining (Projected - YTD Total)
1	Embalmers - 0633																
2	FY 2015 Monthly Fund Balance Sheet																
3																	
4	Beginning Fund Balance	3,009,200.72	2,850,315.64	2,881,889.95	2,871,853.07	3,328,390.27	3,334,759.32	3,366,787.71	3,299,197.09	3,299,197.09	3,299,197.09	3,299,197.09	3,299,197.09	3,299,197.09	704,655.00	704,655.00	(46,839.00)
5	Revenue	10,161.00	5,529.00	35,163.00	524,575.00	163,388.00	8,184.00	3,921.00	0.00	0.00	0.00	0.00	0.00	0.00	752,923.00	752,923.00	(46,839.00)
6	Start-up Loan Transfer - Lender's Revenue	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
7	Total Revenue	10,161.00	5,529.00	35,163.00	524,575.00	163,388.00	8,184.00	3,921.00	0.00	0.00	0.00	0.00	0.00	0.00	752,923.00	752,923.00	(46,839.00)
8	Total Funds Available	3,019,361.72	2,855,844.64	2,928,052.95	3,896,428.07	3,491,778.27	3,442,983.32	3,370,708.71	3,299,197.09	3,299,197.09	3,299,197.09	3,299,197.09	3,299,197.09	3,299,197.09	3,713,765.72	3,713,765.72	0.00
9	Appropriation Costs:																
10	Expense and Equipment	6,052.10	3,772.13	2,403.35	7,570.25	6,913.54	18,330.21	14,414.84	0.00	0.00	0.00	0.00	0.00	0.00	59,466.42	59,466.42	104,733.58
11	Personal Service and Per Diem	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
12	Total Appropriation Costs	6,052.10	3,772.13	2,403.35	7,570.25	6,913.54	18,330.21	14,414.84	0.00	0.00	0.00	0.00	0.00	0.00	59,466.42	59,466.42	104,733.58
13	Licensure System Cost (PR Transfer)	0.00	0.00	0.00	0.00	0.00	0.00	12.41	0.00	0.00	0.00	0.00	0.00	0.00	12.41	12.41	(12.41)
14	Licensure System Cost (Appropriation 8428)	0.00	0.00	0.00	0.00	0.00	0.00	1,195.39	0.00	0.00	0.00	0.00	0.00	0.00	1,195.39	1,195.39	(1,195.39)
15	Total Licensure System Cost	0.00	0.00	0.00	0.00	0.00	0.00	1,207.80	0.00	0.00	0.00	0.00	0.00	0.00	1,207.80	1,207.80	(1,207.80)
16	PR Appropriated Transfers (HB 7,540):																
17	Rent	0.00	1,746.16	585.51	0.00	585.52	614.59	613.20	0.00	0.00	0.00	0.00	0.00	0.00	4,145.00	7,138.90	2,993.90
18	DIFP Department Cost Allocation	574.72	0.00	0.00	574.72	0.00	0.00	574.72	0.00	0.00	0.00	0.00	0.00	0.00	1,724.16	2,298.99	574.74
19	Licenses Refunds	0.00	0.00	0.00	200.00	0.00	0.00	319.00	0.00	0.00	0.00	0.00	0.00	0.00	519.00	1,500.00	981.00
20	Start-up Loan - Borrower's Expense	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
21	Division PR Transfer:																
22	Purchasing Staff	0.00	2,388.43	1,758.17	1,662.87	1,686.27	1,694.09	1,828.26	0.00	0.00	0.00	0.00	0.00	0.00	10,998.09	39,693.11	27,695.02
23	Personal Services	0.00	50.10	55.37	56.08	51.82	51.78	51.81	0.00	0.00	0.00	0.00	0.00	0.00	316.46	502.65	186.19
24	FRPT Staff	0.00	765.17	1,344.40	766.93	614.53	493.08	386.61	0.00	0.00	0.00	0.00	0.00	0.00	4,310.72	7,759.71	3,441.99
25	Legal Team	0.00	2,955.08	4,903.11	3,399.23	3,039.27	3,758.19	3,650.77	0.00	0.00	0.00	0.00	0.00	0.00	21,415.65	68,055.44	46,639.79
26	CRR Staff	0.00	294.77	291.78	301.57	298.37	314.54	338.45	0.00	0.00	0.00	0.00	0.00	0.00	1,639.48	4,011.26	2,171.78
27	Boiler Specialist:																
28	Expense/Equipment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
29	Personal Services	0.00	30,973.00	30,230.04	29,399.99	27,437.37	32,319.08	28,126.55	0.00	0.00	0.00	0.00	0.00	0.00	178,486.03	410,409.02	231,922.99
30	Fringe Benefits	0.00	14,435.60	14,435.60	14,187.04	12,844.47	13,107.69	13,059.88	0.00	0.00	0.00	0.00	0.00	0.00	82,081.98	200,648.97	118,566.99
31	Technical Support Staff	0.00	445.38	896.96	825.29	476.42	394.85	262.55	0.00	0.00	0.00	0.00	0.00	0.00	3,261.45	3,960.75	699.30
32	Central Mail Processing	0.00	142.51	137.22	118.04	131.18	135.96	132.56	0.00	0.00	0.00	0.00	0.00	0.00	797.47	1,505.06	707.59
33	CIT Investigations	0.00	6,985.34	5,047.52	4,283.38	3,421.98	4,662.33	3,421.98	0.00	0.00	0.00	0.00	0.00	0.00	26,794.08	65,154.09	38,360.01
34	Total Division PR Transfer	0.00	59,436.38	59,127.80	54,940.42	49,479.89	55,651.24	52,355.19	0.00	0.00	0.00	0.00	0.00	0.00	330,990.92	809,065.26	478,074.34
35	Total PR Appropriated Transfers (HB 7,540)	574.72	61,182.56	59,713.31	55,715.14	50,065.44	56,255.83	53,862.11	0.00	0.00	0.00	0.00	0.00	0.00	337,379.08	820,003.06	482,623.98
36	GR Transfer (HB 7,535):																
37	Attorney General	0.00	0.00	0.00	3,343.41	0.00	1,580.57	59.87	0.00	0.00	0.00	0.00	0.00	0.00	4,983.85	41,000.00	36,016.15
38	Administrative Hearing Comm.	0.00	0.00	1,218.25	0.00	0.00	49.00	559.00	0.00	0.00	0.00	0.00	0.00	0.00	1,795.25	5,000.00	3,204.75
39	Total GR Transfer	0.00	0.00	1,218.25	3,343.41	0.00	1,599.57	617.87	0.00	0.00	0.00	0.00	0.00	0.00	6,779.10	46,000.00	39,220.90
40	Other Transfers:																
41	Workers Compensation	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
42	Unemployment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
43	Board Staff Fringe Benefits	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
44	Biennium Sweep	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
45	OA Cost Allocation Transfer	1,409.00	0.00	0.00	1,409.00	0.00	0.00	1,409.00	0.00	0.00	0.00	0.00	0.00	0.00	4,227.00	5,636.72	1,409.72
46	FY 2014 Transfers Carried Over:																
47	FY 2014 June PR Transfer	60,715.26	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	60,715.26	60,715.26	0.00
48	FY 2014 July Lapse PR Transfer	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
49	FY 2014 PR Transfer Adjustment	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
50	FY 2014 Final Rent Transfer Adj	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
51	FY 2014 Final DIFP Transfer Adj	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00
52	FY 2014 AG - June	285.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	285.00	285.00	0.00
53	Total FY 2013 Transfers Carried Over	61,000.26	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	0.00	61,000.26	61,000.26	0.00
54	Total Transfers	62,983.98	61,182.56	59,798.53	60,467.54	50,065.44	57,865.40	57,096.78	0.00	0.00	0.00	0.00	0.00	0.00	403,460.21	939,819.42	536,359.21
55	Total Appropriation Costs and Transfers	69,046.08	64,954.69	56,201.88	68,037.80	56,978.95	76,195.61	71,511.62	0.00	0.00	0.00	0.00	0.00	0.00	60,715.26	1,104,019.42	641,092.79
56	Ending Fund Balance	2,950,315.64	2,851,889.95	2,871,853.07	3,328,390.27	3,491,778.27	3,442,983.32	3,370,708.71	3,299,197.09	3,299,197.09	3,299,197.09	3,299,197.09	3,299,197.09	3,299,197.09	704,655.00	704,655.00	(46,839.00)
57	Total PR Transfer - HB 7,540	61,269.98	61,182.56	59,580.26	55,715.14	50,065.44	56,255.83	53,862.11	0.00	0.00	0.00	0.00	0.00	0.00	330,990.92	809,065.26	478,074.34
58	Total GR Transfer - HB 7,535	285.00	0.00	0.00	3,343.41	0.00	1,599.57	617.87	0.00	0.00	0.00	0.00	0.00	0.00	6,779.10	46,000.00	39,220.90
59	Total	61,574.98	61,182.56	59,580.26	59,058.55	50,065.44	57,865.40	54,482.98	0.00	0.00	0.00	0.00	0.00	0.00	399,037.92	24,316,389.32	24,118,561.50



Contact: Dalene Paul
Executive Director, The International Conference of Funeral Service Examining Boards, Inc.
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479-442-7076 Ext. 9

FOR IMMEDIATE RELEASE: December 12, 2014

The Conference Announces Settlement of AAMI Litigation and Return to Regular Testing Schedule for AAMI Students in May 2015

The International Conference of Funeral Service Examining Boards ("The Conference"), the American Academy McAllister Institute of Funeral Service, Inc. ("AAMI"), and Mary Margaret Dunn are pleased to announce the resolution of the litigation filed by the Conference in the Southern District of New York against AAMI and Ms. Dunn.

In its lawsuit, the Conference alleged copyright infringement and misappropriation of trade secrets related to the National Board Examination ("NBE") program, as well as tortious interference with test takers' confidentiality obligations to the Conference. AAMI has denied the allegations. The Parties have entered into a confidential settlement agreement resolving the litigation. AAMI has agreed to a permanent injunction prohibiting the activities alleged in the lawsuit and has instituted processes to promote the integrity of the NBE and the licensure process. This includes the creation of a Director of Academic Integrity position within the school, whose duties will include the preparation and implementation of an academic integrity program. AAMI looks forward to working with the Conference to better ensure the security of the NBE and to clarify the lines between educational curricula and preparation for entry-level licensure examinations.

The parties recognize and agree that the integrity of the examination and licensure process undertaken by Conference member boards is paramount to the public-protection mission of all parties involved. The Conference has committed considerable resources to replacing questions retired from the item bank and will continue to take all necessary measures to ensure the validity, reliability and defensibility of the NBE examination program.

The Conference is also pleased to announce that, as of May 2015, the standard continuous testing schedule for the administration of the NBE will be available to AAMI candidates.

Questions can be directed to the Executive Director of The Conference.

###

Board Name**Embalmers & Funeral Directors**

Licensee Name	License #	Orig Issue Date
Weeks, Avery Anne	2014042907	12/12/2014
Davis, Madeleine Carla	2015001303	1/15/2015
Monzyk, Jared Michael	2015004233	2/10/2015
Cole, Andrew Neal	2015004795	2/18/2015
Tezon, John Charles, III	2015005461	2/20/2015
McIntyre, Sara Jane	2015006312	2/26/2015
Northern, Donald Joe, II	2015007047	3/4/2015

Embalmer Apprentice

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Licensee Name	License #	Orig Issue Date
Lancaster, Kyle Otis	2014041894	12/3/2014
Green, Lacey Michael	2014044083	12/26/2014
LoBaido, Christine Elizabeth	2014044183	12/29/2014
Vann, Michael Anthony	2015001806	1/22/2015

Embalmer

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Licensee Name	License #	Orig Issue Date
Ruiz, Stacie Lynn	2014044413	1/1/2015
McClain, Schyler David	2015000052	1/1/2015
Quernheim, Jacob Douglas	2015001338	1/20/2015
Hathaway, Karin Paige	2015001446	1/20/2015
Dobson, Payton Lindsey	2015003918	2/5/2015

Embalmer Practicum

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Licensee Name	License #	Orig Issue Date
Hamilton, Russell Warren	2014041897	12/3/2014
Jenkins, Jerry Dean	2014042020	12/4/2014
Dirickson, Kristen Marie	2014042499	12/9/2014
Vowell, Andrew David	2014044186	12/29/2014
McGinnis, Luke M.	2014044187	12/29/2014
Gibson, Tyler Wade	2014044188	12/29/2014
Havard, Tara Nicole	2014044192	12/29/2014
Harbison, Timothy Michael	2014044399	12/31/2014
Smith, Joshua M.	2015000988	1/13/2015
Wedel, Corey Jason	2015004634	2/12/2015
Olsen, Kaycee Elizabeth	2015005526	2/23/2015
Bagley, Colleen Marnae	2015007278	3/6/2015
Hodgdon, Jason Brewster	2015007280	3/6/2015

Funeral Director Apprentice

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Licensee Name	License #	Orig Issue Date
Hutchens, Mark Steven	2014042506	12/9/2014
Newcomb, Paul DeWayne	2014043279	12/17/2014

3/6/2015

**Original Licenses Issued
Between 12/01/2014 and 03/06/2015**

Board Name**Embalmers & Funeral Directors**

Licensee Name	License #	Orig Issue Date
Harris, Tiara Charon	2014043791	12/23/2014
Green, Lacey Michael	2014044084	12/26/2014
Thompson, Teresa Jo	2015001026	1/13/2015
Hilker, Stephanie Rena	2015001308	1/15/2015
Vann, Michael Anthony	2015001772	1/22/2015
Lewis, Charlotte Irene	2015006128	2/25/2015
Walker, Michelle Dawnette	2015006135	2/25/2015
Northern, Donald Joe, II	2015007070	3/4/2015

Funeral Director**10**

Licensee Name	License #	Orig Issue Date
Kalmer Memorial, LLC	2014042481	12/9/2014
Islamic Foundation of Greater St. Louis, Inc.	2014042802	12/11/2014
Bibb-Veach Funeral Homes, LLC	2014044531	12/31/2014
Bibb-Veach Funeral Homes, LLC	2014044532	12/31/2014
Bellefontaine Cemetery Association	2015000635	1/8/2015
Funeral Directors Service, Inc.	2015002918	1/30/2015
MVP Investment Group, LLC	2015004846	2/18/2015

Funeral Establishment**7**

Licensee Name	License #	Orig Issue Date
Martin, Brian David	2014042497	12/9/2014
VonAllmen, Dennis Keith	2014042963	12/15/2014
VonAllmen, Judy Lynett	2014042965	12/15/2014
Zwyer, Ryan James	2014043278	12/17/2014
Foster, Anna Maire	2014043314	12/17/2014
Boudinot, Tom Lawrence	2014043782	12/23/2014
Lane, Stephen Raymond	2014044076	12/26/2014
Hurt, Zachary Paul	2014044085	12/26/2014
Pollard, Vanessa E.	2014044086	12/26/2014
Hines, Danna La' Trice	2014044403	12/31/2014
Gatlin-Barnard, A'Gia Charisse	2015000142	1/5/2015
May, Holwell James	2015000736	1/9/2015
Llewellyn, Ronald James	2015000792	1/12/2015
Robinson, John Edward	2015001051	1/13/2015
Lindner, Andrew Evan	2015001329	1/15/2015
Swallows, Alfred Lee	2015002020	1/23/2015
Hanson, Charles Melvin	2015002350	1/27/2015
Moore, Andrew Trammel	2015004845	2/18/2015
Wix, Jason Douglas	2015005462	2/20/2015

3/6/2015

Original Licenses Issued
Between 12/01/2014 and 03/06/2015

Board Name

Embalmers & Funeral Directors

Licensee Name	License #	Orig Issue Date
Baker, Beth Ann	2015005756	2/23/2015
Nace, Randy Francis	2015006439	2/27/2015
Murray, Michael D.	2015006440	2/27/2015

Preneed Agent Funeral Director 22

Licensee Name	License #	Orig Issue Date
Harbison, Timothy Michael	2014041771	12/2/2014
Stevens, Donald Lee	2014041784	12/2/2014
Jones, Robert Lee	2014043781	12/23/2014
Meyers, Kourtney Jayne	2014043784	12/23/2014
Lawrence, Nathaniel Hylton, Jr	2014044073	12/26/2014
Puyear, Timothy Hugh	2014044182	12/29/2014
Morris, Robert Eric	2014044402	12/31/2014
Geller, David Jonathan	2015001777	1/22/2015
Cordry, Raymond Theo	2015002808	1/30/2015
James, Jacqueline Denise	2015002810	1/30/2015
Ryan, Kimberly	2015005754	2/23/2015
Kintner, Kirk Henry	2015005755	2/23/2015

Preneed Agent 12

Licensee Name	License #	Orig Issue Date
Kalmer Memorial, LLC	2014042480	12/9/2014
Bibb-Veach Funeral Homes, LLC	2014044533	12/31/2014
MVP Investment Group, LLC	2015004847	2/18/2015
Hillview Memorial Gardens	2015006031	2/25/2015

Preneed Provider 4

Licensee Name	License #	Orig Issue Date
Charles M. Hanson	2014042829	12/11/2014
Bibb-Veach Funeral Homes, LLC	2014044530	12/31/2014
MVP Investment Group, LLC	2015004848	2/18/2015

Preneed Seller 3

Total count for the Embalmers & Funeral Directors board: 87

**Closed Funeral Establishments, Predeceased Providers, and Preneed Sellers
Between 12/1/2014 and 3/6/2015**

Funeral Establishment	Name	Lic Number	Address	License Status	Exp Date	Closed Date
Mudd-Veach Funeral Homes LLC		2009037967	606 W Main	Closed/Change of Owner	12/31/2015	12/31/2014
SCI Missouri Funeral Services, Inc.		002416	Bowling Green, MO 63334 10507 Holmes Road	Active	12/31/2015	2/19/2015
Mudd-Veach Funeral Homes LLC		2009037966	Kansas City, MO 64131 11S First St	Closed/Change of Owner	12/31/2015	12/31/2014
Kolkmeier Funeral Homes, Inc.		2003031662	Silex, MO 63377 401 Walnut St	Closed/Out of Business	12/31/2015	1/9/2015
Preneed Provider						
Mudd-Veach Funeral Homes, LLC		2009037792	Wellington, MO 64097 606 W. Main	Closed/Change of Owner	10/31/2015	12/31/2014
Kolkmeier Funeral Homes, Inc		2009038281	Bowling Green, MO 63334 401 Walnut St	Closed/Out of Business	10/31/2014	1/9/2015
SCI Missouri Funeral Services, Inc		2009038945	Wellington, MO 64097 10507 Holmes Road	Active	10/31/2015	2/19/2015
Kalmer Memorial LLC		2013027614	Kansas City, MO 64131 5444 US Hwy 61-67	Closed/Change of Location	10/31/2015	12/9/2014
Preneed Seller						
Mudd-Veach Funeral Homes, LLC		2009037794	Imperial, MO 63052 606 W. Main	Closed/Change of Owner	10/31/2015	12/31/2014
Kolkmeier Funeral Homes, Inc		2009038282	Bowling Green, MO 63334 401 Walnut St	Closed/Out of Business	10/31/2014	1/9/2015
Cantion Prearranged Services		2009037754	Wellington, MO 64097 P.O. Box 993	Closed/Out of Business	10/31/2014	1/2/2015
			Buffalo, MO 65622			

3/6/2015

Disciplinary Actions Initiated
Between 12/01/2014 and 03/06/2015

Board Name

Embalmers & Funeral Directors

Embalmer

2006032649	Shannon, Matthew Shane	Probation
Total Revoked: 0		Total Revoked 324.010: 0
Total Suspension: 0		Total Suspended 324.010: 0
Total Probation: 1		Total Other: 0
Total Suspension/Probation: 0		

Funeral Director

2010023693	Hayes, Kassondra K	Probation
2013013358	Morgan, Matthew B	Probation
006070	Polley, Toby L	Probation
2005038187	Shannon, Matthew S	Probation
Total Revoked: 0		Total Revoked 324.010: 0
Total Suspension: 0		Total Suspended 324.010: 0
Total Probation: 4		Total Other: 0
Total Suspension/Probation: 0		

Funeral Director Apprentice

2014019513	Brown, David Charles	Suspended 324.010
2014011325	Smith, Shawn Demont	Suspended 324.010
Total Revoked: 0		Total Revoked 324.010: 0
Total Suspension: 0		Total Suspended 324.010: 2
Total Probation: 0		Total Other: 0
Total Suspension/Probation: 0		

Funeral Establishment

2014042481	Kalmer Memorial, LLC	Issued Probated License
2007008991	Polley Funeral Home LLC	Probation
2007008989	Polley Funeral Home LLC	Probation
2006025730	Polley Funeral Homes LLC	Probation
Total Revoked: 0		Total Revoked 324.010: 0
Total Suspension: 0		Total Suspended 324.010: 0
Total Probation: 3		Total Other: 1
Total Suspension/Probation: 0		

Preneed Agent Funeral Director

2013025158	Morgan, Matthew Blake	Probation
2010001031	Shannon, Matthew Shane	Probation
Total Revoked: 0		Total Revoked 324.010: 0
Total Suspension: 0		Total Suspended 324.010: 0
Total Probation: 2		Total Other: 0
Total Suspension/Probation: 0		

Preneed Provider

2014042480	Kalmer Memorial, LLC	Issued Probated License
2009039724	Polley Funeral Home, LLC	Probation
2009039722	Polley Funeral Home, LLC	Probation

3/6/2015

Disciplinary Actions Initiated
Between 12/01/2014 and 03/06/2015

Board Name

Embalmers & Funeral Directors

reneed Provider

2009039721 Polley Funeral Home, LLC Probation

Total Revoked: 0 **Total Revoked 324.010: 0**

Total Suspension: 0 **Total Suspended 324.010: 0**

Total Probation: 3 **Total Other: 1**

Total Suspension/Probation: 0

Preneed Seller

2009038563 Evelyn Michel Probation

2009037728 Neil Travis & Randy Travis Probation

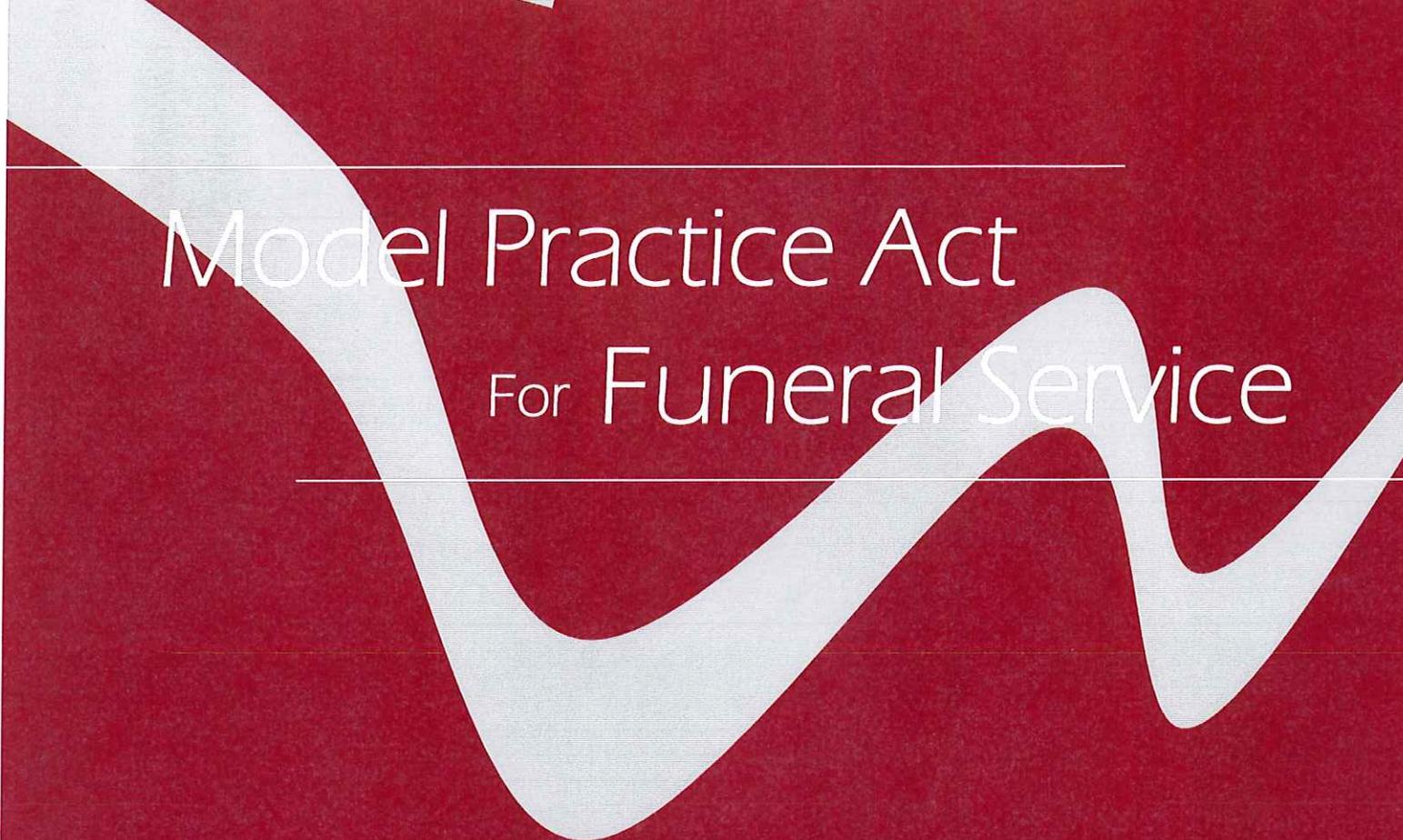
2009039723 Polley Funeral Home LLC Probation

Total Revoked: 0 **Total Revoked 324.010: 0**

Total Suspension: 0 **Total Suspended 324.010: 0**

Total Probation: 3 **Total Other: 0**

Total Suspension/Probation: 0



Model Practice Act
For Funeral Service

Presented By:

The Conference

THE INTERNATIONAL CONFERENCE OF
FUNERAL SERVICE EXAMINING BOARDS

MPAFS 2015

Conference Model Practice Act for Funeral Service

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Conference Model Practice Act for Funeral Service

INTRODUCTION

The International Conference of Funeral Service Examining Boards (Conference or ICFSEB) is pleased to introduce its *Conference Model Practice Act for Funeral Service*. *The Conference Model Act* serves as a guideline to the legislature, regulatory officials, and members of the profession seeking to adopt or amend the laws governing mortuary arts and funeral services. The purpose of this Model Act is to facilitate the protection of the public by providing legal mechanisms that establish and provide for the enforcement of uniform standards. The provisions and language contained in this Model Act represent currently accepted standards, practices and terms and represents the collective wisdom of the funeral service regulatory community.

With the primary goal of consumer protection in mind, the wide-spread uniform adoption of the Model Act will facilitate standardization of terminology and regulation, which promotes increased public trust and understanding. Standardization also promotes consistency in compliance, enforcement and legal decisions related to licensure, renewal, discipline and other state sponsored activities. While uniformity in laws may be desired or helpful, The Conference recognizes that each state has a unique process and every body of law makers will have different goals or policies, which can result in alterations or only portions of the Act being enacted. Nevertheless, consistency in a regulatory system and adoption of generally accepted standards strengthens the profession and will assist in assuring greater compliance.

The members of the Model Act Committee were appointed by the Conference Board of Directors in June 2013 and included representatives from nine funeral service states serving as licensees, administrators, and consumers. Following their appointment, the Committee worked for over a year and a half with two in-person meetings, several conference calls, and individual research to develop the language in this Model Act. In order to be inclusive of all relevant stakeholders, The Conference solicited and considered input from funeral service regulatory Boards, professional associations, accredited mortuary colleges, and counterparts from other regulatory professions. With the able assistance of the ICFSEB Staff, a final draft of the Conference Model Act was approved by the Committee on January 7, 2015, the Board of Directors on January 20, 2015 and will be presented for adoption at the 111th Annual Meeting on February 26, 2015.

The Conference Model Act includes sections on standards and the regulation of specific professions, provision of related services, and practices associated with funerals and the proper care of human remains. Some Model Act sections are followed by notes that provide additional information, such as comments, background or suggested alternatives. In reviewing the Model Act, readers are strongly encouraged to consider this additional information. If your state is considering licensure or another form of regulation affecting individuals or businesses engaged in funeral services or handling human remains, please contact The Conference for additional assistance.



Title and Definitions

Conference Model Practice Act for Funeral Service

Article I

Title and Definitions

Section 101. Title of Act.

This Act shall be known as the "The International Conference of Funeral Service Examining Boards (Conference) Model Practice Act for Funeral Service."

Section 102. Legislative Declaration.

The practice of funeral service in the _____ of _____ is declared a professional practice affecting the public health, safety, and welfare and is subject to regulation and control in the public interest. It is further declared to be a matter of public interest and concern that the practice of funeral service, as defined in this Act, merit and receive the confidence of the public and that only qualified persons be permitted to engage in the practice of funeral service in the _____ of _____. This Act shall be liberally construed to carry out these objectives and purposes.

Section 103. Statement of Purpose.

It is the purpose of this Act to promote, preserve, and protect the public health, safety, and welfare by and through the effective control and regulation of persons, in or out of the state that practice funeral service within this state.

Section 104. Definitions.

(a) **Alkaline Hydrolysis** means technical process that reduces Human Remains to bone fragments using heat, water and chemical agents.

(b) **Approved Provider of Continuing Education** means any professional association, university, or college, corporation or other entity that has met the requirements of the Board to provide educational courses that are designed to maintain, improve, or enhance funeral or embalming practice.

(c) **Approved Supervisor** means a Funeral Director or Embalmer who has been approved by the Board to provide instruction and Direct Supervision to Interns.

(d) **Associated Location** means any garage or other facility where any vehicle may be stored or sheltered, or office space used, in the conduct of a transport business.

(e) **Board of Funeral Service (Board)** means the entity created and empowered under this Act.

(f) **Board Members** means professional or consumer members of a Board.

(g) **Certificate or Certificate Holder** means a credential issued by the Board authorizing a person to engage in the practice defined under this Act.

(h) **Consumer Board Member** means a representative of the public in general who does not hold any license or certification issued by the board and meets the qualifications as stated under section 203 (b) of this Act.

Conference Model Practice Act for Funeral Service

Section 104. Definitions.

- (i) **Continuing Education** means education and training designed to maintain, improve, or enhance funeral or embalming practice.
- (j) **Conviction** means a conviction of a crime by a court of competent jurisdiction and shall include a finding or verdict of guilt whether or not the adjudication of guilt is withheld or not entered on an admission of guilt, a no contest plea, a plea of nolo contendere, or a guilty plea.
- (k) **Cremation** means the technical process that reduces Human Remains to bone fragments through incineration.
- (l) **Crematory** means a building or area that houses one or more cremation chambers where Cremation takes place and includes an area to properly hold a body in preparation for Cremation.
- (m) **Crematory Operator** means any certified person who operates a Crematory.
- (n) **Direct Supervision** means as used in connection with direct supervision, the Approved Supervisor is immediately and physically available (also known as mentor, preceptor, trainee supervisor, etc.).
- (o) **Embalmer** means any person licensed to engage in the business, practice, science or profession of Embalming.
- (p) **Embalming** means the process of chemically treating the dead human body by arterial injection, cavity treatment and/or, when necessary, hypodermic tissue injection to reduce the presence and growth of microorganisms to temporarily slow organic decomposition, and restore acceptable physical appearance.
- (q) **Examination** means a standardized test assessing entry-level competence of applicants seeking licensure under this Act and approved by the Board.
- (r) **Felony** means a criminal act defined by this state or any other state or by definition under federal law.
- (s) **Final Adverse Action** means any action taken or order entered by the Board, even if an appeal is pending, whether through a consent agreement, as a result of a contested hearing, issued through a letter of reprimand/admonition/warning, or other action against any person or entity that is public information under applicable law. Final adverse actions also include, without limitation denial of application for licensure or renewal and surrender of licensure.
- (t) **Full-time Employment** means working a minimum of 32 hours each week.

Notes on Full-time Employment. MPA committee had several discussions regarding full-time employment and its (federal) interpretation. State boards should adapt as necessary to meet the needs of their respective jurisdiction.

Conference Model Practice Act for Funeral Service

Section 104. Definitions.

(u) **Funeral Director** means any person licensed to engage in the business, practice or profession of Funeral Directing.

(v) **Funeral Directing** means preparing for the transportation, burial or disposal of Human Remains; directing and supervising for transportation or burial or disposal of Human Remains; providing for the care and shelter of Human Remains, and may include arranging and directing funerals, memorials or other services.

(w) **Funeral Establishment** means any place of business licensed by the Board to be used exclusively for storing and embalming Human Remains; preparing Human Remains for disposition; viewing Human Remains; and may include conducting funeral or memorial services and making funeral arrangements.

(x) **Funeral Home Supervisor** means a Funeral Director designated to serve as the supervisor responsible for the overall operations of the Funeral Establishment.

(y) **Human Remains** means the body of a deceased person, regardless of its stage of decomposition, and cremated remains.

(z) **Intern** means any person registered to engage in the business, practice or profession of interning under the instruction and Direct Supervision of a Funeral Director or Embalmer.

(aa) **Internship** means a period of training during which the Intern gains practical and documented experience in Funeral Directing or Embalming under the direction of an Approved Supervisor licensed by the Board.

(bb) **License** means a credential issued by the Board authorizing a person or entity to engage in the practice defined under this Act.

(cc) **Licensee** means a person or entity duly licensed under this Act.

(dd) **Mortuary Science Program** means a curriculum in an accredited mortuary science program approved by the Board.

(ee) **Person** means any individual, firm, partnership, association, joint venture, cooperative, corporation, or any other group or combination acting in concert; and whether or not acting as an individual, principal, trustee, fiduciary, receiver, or as any kind of legal or personal representative, or as the successor in interest, assignee, agent, factor, servant, employee, director, officer, or any other representative of such person.

(ff) **Practice of Funeral Service** means the professional practice of arranging for and providing funeral merchandise and services to consumers in a Funeral Establishment or other location in order to effect disposition of Human Remains.

Conference Model Practice Act for Funeral Service

Section 104. Definitions.

(gg) **Professional Board Member** means a person holding a current license issued by the Board, who is currently engaged in the practice of embalming or funeral service in this state and meets the qualifications as stated under section 203 (a) of this Act.

(hh) **Registrant** means a credential issued by the Board authorizing a person to engage in the practice defined under this Act.

(ii) **Storage** means a place to properly hold a body for preparation of final disposition. (should only occur in a Funeral Establishment or Crematory)

(jj) **The Conference** means the International Conference of Funeral Service Examining Boards.

(kk) **Transporter** means a certified person who engages in the transportation of Human Remains.



Board of Funeral Service

Conference Model Practice Act for Funeral Service

Article II

Board of Funeral Service

Section 201. Designation.

The responsibility for enforcement of the provisions of this Act is hereby vested in the Board of Funeral Service (Board). The Board shall have the duties, powers, and authority as set forth in Section 210.

Section 202. Membership.

The Board shall consist of _____ members of which at least _____ shall be Consumer Members with the remainder of the Professional Board Members being Licensees whom also possess the qualifications specified in Section 203. Professional and Consumer Members may be collectively referred to as Board members.

Notes on Section 202. *After reviewing the size of Boards, the MPA committee recommends that the number of Board Members should be an odd number, due to voting purposes, of at least nine members with one-third being Consumer Members.*

Section 203. Qualifications.

(a) Professional Board Members shall at all times during service to the Board:

- (1) Be a resident of this state for not less than five years prior to appointment to the Board;
- (2) Be currently licensed and in good standing as a Funeral Director or Embalmer in this state; and
- (3) Have had at least five (5) years of licensed experience in the Practice of Funeral Service in this state.

(b) Consumer Members of the Board shall:

- (1) Be a resident of this state;
- (2) Be at least twenty-one (21) years of age;
- (3) Shall not be, and never have been, a Licensee;
- (4) Shall not employ or be employed by, or professionally or financially associated with a Licensee.

Section 204. Appointment, Terms of Office, and Officers.

(a) Board Members shall be appointed by the Governor in accordance with this Act and the state constitution.

(b) Board Members shall serve for a term of ____ years and such terms shall be staggered to provide for continuity of service. Board Members may serve until a successor is duly appointed.

(c) Board Members shall serve no more than two (2) full consecutive terms.

(d) Board Members who are appointed to fill vacancies which occur prior to the expiration of a former member's full term shall serve the remaining portion of the term to which the former member was appointed.

(e) The Board shall annually elect from its members a Chairperson and such other officers as it deems appropriate and necessary for the conduct of its business.

Notes on Section 204. *MPA Committee recommends Board Members be appointed for a term of four years. The term of years was based on the experience needed to become an effective member coupled with the taxing demand placed on governor's offices to appoint more frequently. Ideally, the member should serve two terms, with an eight year maximum. Terms should be staggered so the experience levels are maintained, while no more than one-fourth shall expire in any year.*

Conference Model Practice Act for Funeral Service

Section 205. Removal.

In accordance with applicable law, a Board Member may be removed on one or more of the following grounds:

- (a) The refusal or inability to perform Board duties in an efficient, responsible, and professional manner;
- (b) The misuse of the Board Member position in order to obtain financial gain or seek personal advantage for self or others;
- (c) A final adjudication or determination by any lawful authority wherein the Board Member has been found guilty or otherwise sanctioned for a violation of any laws substantially related to any practice governed by this Act;
- (d) For other just and reasonable causes.

Section 206. Compensation of Board Members.

Board Members shall receive as compensation the sum of \$_____ for each day in which the member is engaged in the performance of official duties of the Board and shall be reimbursed for all reasonable and necessary expenses incurred in connection with the discharge of such official duties.

Section 207. Meetings.

- (a) The Board shall meet at least twice a year.
- (b) The Board shall meet at such time and place as it may determine. The place for each meeting shall be determined prior to giving notice of such meeting and shall not be changed after such notice is given without adequate prior notice.
- (c) Notice of all meetings of the Board shall be given in the manner and pursuant to requirements prescribed by law.
- (d) A majority of the members of the Board shall constitute a quorum for the conduct of a Board meeting and all actions of the Board shall be by a majority of a quorum.
- (e) All meetings of the Board shall be subject to the state's open meeting laws.

Section 208. Employees.

The Board may, in its discretion, employ an Executive Director and other persons as deemed necessary for the proper conduct of Board business and the fulfillment of the Board's responsibilities as set forth by the Act.

Section 209. Rules.

The Board shall make, adopt, amend, and repeal such regulations as may be deemed necessary by the board from time to time for the proper administration and enforcement of this Act. Such rules shall be promulgated in accordance with state law.

Conference Model Practice Act for Funeral Service

Section 210. Powers and Duties.

(a) The Board shall be responsible for the control and regulation of the Practice of Funeral Service in this state including but not limited to the authority to:

- (1) Grant licenses by examination, endorsement, temporary or provisional recognition, reinstate, and renew licenses of Persons who the Board determines are qualified to engage in the Practice of Funeral Service under the regulations of this Act;
- (2) License and renew Funeral Establishments under this Act;
- (3) Establish and enforce standards for Continuing Education to maintain, improve, or enhance funeral or embalming practice;
- (4) Establish and enforce compliance with professional standards and rules of conduct for Licensees, Certificate Holders, or Registrants engaged in the Practice of Funeral Service or practice of Embalming within this state;
- (5) Determine and establish educational standards for licensure in this state;
- (6) Take Final Adverse Action against Persons or Funeral Establishments identified under this Act to suspend, revoke, restrict, or place on probation Licenses to engage in the Practice of Funeral Service;
- (7) Seek to enjoin, prevent, discipline or otherwise sanction the unauthorized Practice of Funeral Service by any Person or entity;
- (8) Take all available action necessary to collect and maintain data concerning professional demographics;
- (9) Investigate any Person or facility for the purpose of determining compliance with the provisions of the laws governing the Practice of Funeral Service;
- (10) Conduct compliance inspections of Funeral Establishments;
- (11) Subpoena Persons and documents in the same manner as prescribed and for the same purposes allowed under (*insert appropriate state law applicable to civil cases in the courts of this state*). Any member of the Board, hearing officer, or administrative law judge conducting a hearing under this Act shall have power to administer oaths;
- (12) Assess costs, inclusive of attorney's fees;
- (13) Issue fines.

(b) The Board shall have such other duties, powers, and authority as may be necessary to the enforcement of this Act and to the enforcement of Board rules made pursuant thereto, which shall include, but are not limited to the following:

- (1) The Board may be a member of a national regulatory organization that promotes the public's health, safety, and welfare through development of national licensing requirements, licensing examinations and other regulatory activities;
- (2) The Board may establish committees;
- (3) The Board, its staff, officers, inspectors, and representatives shall cooperate with all agencies charged with the enforcement of the laws of the United States, of this state, and of all other states relating to the Practice of Funeral Service;
- (4) The Board may promulgate regulations to establish, charge and collect fees;

(c) The Board shall have continuing jurisdiction to initiate or continue a disciplinary proceeding against any licensee, registrant or certificate holder when the license, registration, or certification has been suspended, expired, or forfeited provided.



Licensing Qualifications

Conference Model Practice Act for Funeral Service

Article III. Unlawful Practice & Qualifications

Introductory Comment to Article III.

The Model Act Committee concluded, for the protection of the public, each applicant (whether applying for a license, certification, or internship) must submit to a criminal background check. Such investigations will be performed during the initial application process or during the application process for reciprocity (endorsement) from another state.

Section 301. Unlawful Practice

It is unlawful for any Person or entity to engage in the practice of Funeral Directing; practice of Embalming; practice as an Intern; operate a Crematory; or transport Human Remains or hold themselves out as qualified to engage in the practice of Funeral Directing; practice of Embalming; practice of interning; operating a Crematory; or transportation of Human Remains without a valid license, certification or registration issued by the Board.

Section 302. Qualifications for Licensure by Examination as a Funeral Director

To obtain a License as a Funeral Director, an applicant for licensure bears the burden of substantiating to the satisfaction of the Board the following:

- (a) Submit a completed application as required by the Board;
- (b) Be a minimum of eighteen (18) years of age;
- (c) Possession of an associate degree in _____, or the equivalent, approved by the Board;
- (d) Within the last five years, passing an entry level Examination administered by The International Conference of Funeral Service Examining Boards or examinations determined by the Board;
- (e) Payment of all applicable fees;
- (f) Within the last five years, completion of an Internship as defined under this Act;
- (g) Be of good moral character. As one element of good moral character, the Board shall require each applicant for licensure to submit a full set of fingerprints for the purpose of obtaining state and federal criminal records checks, pursuant to *(insert reference to authorizing state statute)* and applicable federal law. The *(state agency responsible for managing fingerprint data e.g. the department of public safety)* may submit fingerprints to and exchange data with the Federal Bureau of Investigation. All character information, including the information obtained through the criminal records checks, shall be considered in licensure decisions to the extent permissible by all applicable laws.

Notes on Section 302. *The associate degree requirement provides the student the basic core curriculum needed to gain fundamental knowledge of the requirements to succeed (communication, writing, mathematical) in a business setting. Candidates for licensure shall have attained the age of majority (18) in the state in which they intend to practice, allowing them to enter into or be the signatory in contractual agreements on behalf of the firm. Continuing education is not required for initial licensing. The requirements in states that require CE vary greatly as to the number of hours, content, subject matter etc.*

Conference Model Practice Act for Funeral Service

Section 303. Qualifications for Licensure by Examination as an Embalmer

To obtain a license as an Embalmer, an applicant for licensure bears the burden of substantiating to the satisfaction of the Board the following:

- (a) Submit a completed application as required by the Board;
- (b) Be a minimum of eighteen (18) years of age;
- (c) Graduation from a Mortuary Science Program approved by the Board and accredited by the American Board of Funeral Service Education or its equivalent;
- (d) Within the last five years, completion of an Internship as defined under this Act;
- (e) Within the last five years, passing the National Board Examination administered by The International Conference of Funeral Service Examining Boards or examinations determined by the board;
- (f) Payment of all applicable fees;
- (g) Be of good moral character. As one element of good moral character, the Board shall require each applicant for licensure to submit a full set of fingerprints for the purpose of obtaining state and federal criminal records checks, pursuant to *(insert reference to authorizing state statute)* and applicable federal law. The *(state agency responsible for managing fingerprint data e.g. the department of public safety)* may submit fingerprints to and exchange data with the Federal Bureau of Investigation. All character information, including the information obtained through the criminal records checks, shall be considered in licensure decisions to the extent permissible by all applicable laws.

Notes on Section 303. *Candidates for licensure shall have attained the age of majority (18) in the state in which they intend to practice, allowing them to enter into or be the signatory in contractual agreements on behalf of the firm.*

Conference Model Practice Act for Funeral Service

Introductory Comment to Section 304.

The MPA Committee had a lengthy discussion on how to properly identify this person whether it be: an Intern, apprentice, registrant, trainee, etc. Ultimately, the group determined that the terms can be used interchangeably and that "Intern" was a universal, professional term.

Section 304. Qualifications for Internship as a Funeral Director

(a) To qualify for an Internship as a Funeral Director; an applicant must meet the following criteria:

- (1) Submit a completed application as required by the Board, identifying the Approved Supervisor under whom the applicant will Intern;
- (2) Be a minimum of eighteen (18) years of age;
- (3) Be a graduate of high school or the equivalent;
- (4) Pay all applicable fees;
- (5) Be of good moral character. As one element of good moral character, the Board shall require each applicant for licensure to submit a full set of fingerprints for the purpose of obtaining state and federal criminal records checks, pursuant to *(insert reference to authorizing state statute)* and applicable federal law. The *(state agency responsible for managing fingerprint data e.g. the department of public safety)* may submit fingerprints to and exchange data with the Federal Bureau of Investigation. All character information, including the information obtained through the criminal records checks, shall be considered in licensure decisions to the extent permissible by all applicable laws.

(b) Interns must:

- (1) Under the Direct Supervision of an Approved Supervisor, complete at least 2,000 hours during a two-year period of formal training, and complete the minimum number of cases;
- (2) Under the Direct Supervision of an Approved Supervisor, assist in the arranging/directing of (insert #) funerals; and
- (3) Under the Direct Supervision of an Approved Supervisor, submit Internship report(s) as required by the Board.

(c) If the Internship as a Funeral Director is terminated or interrupted prior to completion or if there is a change to Approved Supervisor or site, the Intern and Approved Supervisor shall submit a written report indicating the number of hours completed and the cause of the termination, interruption, or change.

Notes on Section 304. *The time restriction for the Internship is based on the need for the Intern to complete a minimum case volume. It is critically important for the Intern to be exposed to the many non-quantifiable experiences only attainable by participating in the day-to-day funeral environment over a period of time.*

The committee concluded that daytime and nighttime employment shall be acceptable so long as the Intern receives training in all aspects of the license sought.

MPA committee recommends assisting in the arranging/directing of 50 funerals for Internship duties for a Funeral Director. The committee was mindful that industry changes, geographic locations, and dual licensure may affect these numbers and time frames.

Conference Model Practice Act for Funeral Service

Section 305. Qualifications for Internship as an Embalmer

- (a) To qualify for an Internship as an Embalmer; an applicant must meet the following criteria:
- (1) Submit a completed application as required by the Board, identifying the Approved Supervisor under whom the applicant will Intern;
 - (2) Be a minimum of eighteen (18) years of age;
 - (3) Be a graduate of high school or the equivalent;
 - (4) Pay all applicable fees;
 - (5) Be of good moral character. As one element of good moral character, the Board shall require each applicant for licensure to submit a full set of fingerprints for the purpose of obtaining state and federal criminal records checks, pursuant to *(insert reference to authorizing state statute)* and applicable federal law. The *(state agency responsible for managing fingerprint data e.g. the department of public safety)* may submit fingerprints to and exchange data with the Federal Bureau of Investigation. All character information, including the information obtained through the criminal records checks, shall be considered in licensure decisions to the extent permissible by all applicable laws.
- (b) Interns must:
- (1) Under the Direct Supervision of an Approved Supervisor, work at least 2,000 hours during a two-year period of training, and complete the minimum number of cases;
 - (2) Under the Direct Supervision of an Approved Supervisor, embalm at least (insert #) bodies; and
 - (3) Under the Direct Supervision of an Approved Supervisor, submit Internship report(s) as required by the Board.
- (c) If the Internship as an Embalmer is terminated or interrupted prior to completion or if there is a change to Approved Supervisor or site, the Intern and Approved Supervisor shall submit a written report indicating the number of hours completed and the cause of the termination, interruption, or change.

Notes on Section 305. *The time restriction for the Internship is based on the need for the Intern to complete a minimum case volume. It is critically important for the Intern to be exposed to the many non-quantifiable experiences only attainable by participating in the day-to-day funeral environment over a period of time.*

The committee concluded that daytime and nighttime employment shall be acceptable so long as the Intern receives training in all aspects of the license sought.

MPA committee recommends Embalming at least 50 bodies for Internship duties for an Embalmer. The committee was mindful that industry changes, geographic locations, and dual licensure may affect these numbers and time frames.

States may want to determine the inclusion of a number of cases required to embalm after an autopsy. MPA committee did not include because it could be very limiting.

Conference Model Practice Act for Funeral Service

Section 306. Approved Supervisor Requirements

(a) To be an Approved Supervisor, an applicant bears the burden of substantiating to the satisfaction of the Board the following:

- (1) Be a Licensee in good standing;
- (2) Submit a completed application as required by the Board;
- (3) Practiced as a Funeral Director or practiced as an Embalmer Full-Time for a minimum of five years before the date of the application;
- (4) Currently employed by a Funeral Establishment;

(b) An Approved Supervisor may only supervise one Intern at a time.

Notes on Section 306. *Interns may be supervised by more than one Approved Supervisor.*

Conference Model Practice Act for Funeral Service

Introductory Comment to Section 307.

The MPA Committee concluded the term “certification” should be used opposed to “license” for a Crematory Operator and Transporter. Both positions engage in specific, limited activity which has a lower risk to the public than the activities that require full licensure (e.g. Funeral Directors; Embalmers).

Section 307. Qualifications for Crematory Operator Certification

(a) To obtain a certificate as a Crematory Operator, an applicant bears the burden of substantiating to the satisfaction of the Board the following:

- (1) Submit a completed application as required by the Board;
- (2) Be a minimum of 18 years of age;
- (3) Be a graduate of high school or equivalent;
- (4) Pay all applicable fees;
- (5) Completion of a (six hour minimum) approved course in crematory operator training approved by the Board;
- (6) Documented training in Occupational Safety and Health Administration standards for universal precautions and blood-borne pathogens approved by the Board;
- (7) Be of good moral character. As one element of good moral character, the Board shall require each applicant for licensure to submit a full set of fingerprints for the purpose of obtaining state and federal criminal records checks, pursuant to *(insert reference to authorizing state statute)* and applicable federal law. The *(state agency responsible for managing fingerprint data e.g. the department of public safety)* may submit fingerprints to and exchange data with the Federal Bureau of Investigation. All character information, including the information obtained through the criminal records checks, shall be considered in licensure decisions to the extent permissible by all applicable laws.

Notes on Section 307. *MPA Committee recommends the operator successfully complete manufacturer-developed training specific to the crematory equipment, regardless of the length of the course, in addition to on-the-job training specific to company policies and procedures.*

The addition of OSHA training was included as well due to the contact between the operator and Human Remains. Such training will protect certificate holder.

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Introductory Comment to Section 308.

The MPA Committee concluded the term "certification" should be used opposed to "license" for a Crematory Operator and Transporter. Both positions engage in specific, limited activity which has a lower risk to the public than the activities that require full licensure (e.g. Funeral Directors; Embalmers).

Section 308. Qualifications for Transporter Certification

(a) All Transporter certificate holders must submit to inspections by the Board of any records, any vehicles used to remove or transport Human Remains, and any associated location. A holder of a Transporter Certification shall not engage in the practice of Funeral Directing, Embalming or arranging for the final disposition of Human Remains or to hold itself out as a business used in the care or preparation for final disposition of Human Remains. A Transporter certificate holder shall not store Human Remains.

(b) To obtain a certificate as a Transporter, an applicant bears the burden of substantiating to the satisfaction of the Board the following:

- (1) Submit a completed application as required by the Board;
- (2) Be a minimum of 21 age years old;
- (3) Be a graduate of high school or equivalent;
- (4) Possess and maintain a valid driver's license issued by this state and provide proof of the minimum liability insurance required for the registration of any vehicle in which the person intends to engage in the business of the removal or transportation of a dead human body;
- (5) Affirmatively state under oath that the person has read and understands the statutes and regulations relating to the removal and transportation of dead Human Remains and any regulations as may be adopted by the Board;
- (6) Documented training in Occupational Safety and Health Administration standards for universal precautions and blood-borne pathogens approved by the Board;
- (7) Be of good moral character. As one element of good moral character, the Board shall require each applicant for licensure to submit a full set of fingerprints for the purpose of obtaining state and federal criminal records checks, pursuant to *(insert reference to authorizing state statute)* and applicable federal law. The *(state agency responsible for managing fingerprint data e.g. the department of public safety)* may submit fingerprints to and exchange data with the Federal Bureau of Investigation. All character information, including the information obtained through the criminal records checks, shall be considered in licensure decisions to the extent permissible by all applicable laws.

Notes on Section 308. *The increased age requirement of 21 for the Transporter is due to the primary responsibility of transporting Human Remains, which requires less professional education, but greater driving experience and higher insurance coverage. MPA Committee surveyed membership on the amount of liability insurance and a consistent standard does not exist. Therefore, the amount or level of liability is left up to state. The addition of OSHA training was included as well due to the contact between the Transporter and Human Remains. Such training will protect certificate holder.*

Licensed persons are excluded from requiring a Transporter Certification.

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Introductory Comment to Section 309.

Continuing Education activities, approved by the Board, shall be required as a condition of renewal of Funeral Director and Embalmer licenses, in order to maintain and improve the quality of their services to the public.

Section 309. Continuing Education Requirements

(a) Persons seeking to be an Approved Provider of Continuing Education bear the burden of substantiating to the satisfaction of the Board the following:

- (1) Submit a completed application as required by the Board;
- (2) Submit written evidence that demonstrates the applicant meets the standards and requirements established by the Board;
- (3) Payment of all applicable fees.

(b) Entities and persons seeking approval of a Continuing Education course bear the burden of substantiating to the satisfaction of the Board the following:

- (1) Submit a completed application as required by the Board;
- (2) Submit evidence that the offering, course or program met the Continuing Education standards established by the regulations of the Board; and
- (3) Payment of all applicable fees.

(c) The Approved Provider shall retain records of all persons attending or satisfactorily completing such Continuing Education courses for a period of time determined by the Board. The Board may require Approved Providers or Licensees to submit copies of such records, as it deems necessary, to ensure compliance with Continuing Education requirements. The Approved Provider shall furnish written certification to Licensees of the Board attending and completing Continuing Education course(s), indicating the satisfactory completion of an approved Continuing Education course.

(d) Any Licensee required to complete Continuing Education requirements shall retain the certification issued by the Approved Provider for a period of time determined by the Board.

Notes on Section 309. *The MPA committee concluded it important to leave the number of hours of CEU to each Board to specify. Additionally, the Board should be responsible to determine the applicability of a Continuing Education course to each states needs, not the MPA Committee.*

A recommendation by the committee for approved providers is listed below:

Unless disqualified by action of the Board, Continuing Education courses offered by the following providers are approved:

1. *local, state or federal government agencies;*
2. *regionally accredited colleges and universities; or*
3. *Board recognized national, regional, state, and local associations or organizations.*

MPA committee recommends a year beyond state's annual renewal cycle for record retention for Approved Providers and Licensees.

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Introductory Comment to Section 310.

Each state regulates Funeral Establishments and branches differently. The MPA Committee recommends the following Funeral Establishment standards which provide a guideline for states to use.

Section 310. Business Licensure

(a) All Funeral Establishments must have a physical address for each location and are subject to inspection as determined by the Board. A Funeral Establishment having more than one location at which it performs funeral services shall not be required to maintain more than one preparation room.

(b) To obtain a license as a Funeral Establishment, an applicant bears the burden of substantiating that it has met the following criteria to the satisfaction of the Board:

- (1) Submit a completed application as required by the Board;
- (2) Payment of all applicable fee(s);
- (3) Designate a Funeral Director who will serve as the manager of record;
- (4) Maintain a preparation and storage room; and
- (5) Satisfactory completion of an inspection by the Board.

(c) All Funeral Establishments must:

- (1) Comply with all provisions of this Act;
- (2) Employ a Funeral Director who shall serve as manager of record. Such manager shall:
 - (i) be and remain employed Full-Time by such Funeral Establishment at the designated location;
 - (ii) be responsible and accountable for the Funeral Establishment;
 - (iii) be responsible for any and all activities performed on the premises;
 - (iv) responsible for reports and documents prescribed by the Board;
 - (v) responsible to report any changes of information to the Board; and
 - (vi) have a license in good standing as a Funeral Director;
- (3) Disclose the location and method of storage of Human Remains to the person who has right to control those remains;
- (4) Be available for inspections as determined by the Board;
- (5) Conspicuously display all current and valid licenses; and
- (6) Ensure all licenses are renewed timely.

(d) A Funeral Establishment license shall not be transferable. If the Funeral Establishment changes ownership or there is more than a 50% change in equitable ownership, the person or entity acquiring such ownership or control bears the burden of substantiating that it has met the following criteria to the satisfaction of the Board:

- (1) Submit a completed application at least 30 days prior to change of ownership as required by the Board;
- (2) Payment of all applicable fees;
- (3) Meet all the requirements outlined as qualifications for licensure Section 310 (b);

Conference Model Practice Act for Funeral Service

Section 310. Business Licensure cont.

- (4) Notify in writing prior to change of ownership all existing prearrangement funeral service contracts holders; and
- (5) Satisfactory completion of an inspection by the Board.

(e) The person or entity acquiring a change of location bears the burden of substantiating that it has met the following criteria to the satisfaction of the Board:

- (1) Submit a completed application at least 30 days prior to change of location as required by the Board;
- (2) Payment of all applicable fees;
- (3) Meet all the requirements outlined as qualifications for licensure Section 310 (b);
- (4) Notify in writing prior to change of location all existing prearrangement funeral service contracts holders; and
- (5) Satisfactory completion of an inspection by the Board.



Discipline

Conference Model Practice Act for Funeral Service

Article IV. Discipline

Introductory Comment to Section 401.

General powers are phrased in such a way as to allow the Board a wide range of actions, including the refusal to issue or renew a License, and the use of License restrictions or limitations. The penalties outlined in this section give the Board the ability to make the disciplinary action fit the offense. References to time intervals can be determined by the Board.

Section 401. Grounds

(a) The Board may refuse to issue or renew, or may suspend, revoke, censure, reprimand, restrict or limit the License of, or fine any person pursuant to the Administrative Procedures Act (APA) upon one or more of the following grounds as determined by the Board:

- (1) Unprofessional conduct in the practice of any Persons or Funeral Establishments regulated under this Act;
- (2) Violating any of the provisions of this Act or any rules adopted by the Board or other federal, state, or local laws relating to conduct under this Act;
- (3) The commission of any act involving moral turpitude relating to the practice of the person's profession or operation of the person's business, whether the act constitutes a crime or not;
- (4) Misrepresentation or concealment of a material fact related to obtaining or renewing a License;
- (5) Fraud or misrepresentation in any aspect of the business or profession conducted pursuant to this Act;
- (6) Advertising that is false, deceptive, or misleading;
- (7) Incompetence, negligence, or malpractice that creates an unreasonable risk of harm or damage to another;
- (8) Failure to practice in accordance with the provisions identified in Section 210 (a) (4);
- (9) Conduct which violates the security of any licensure examination materials;
- (10) Failure to treat Human Remains with respect at all times;
- (11) Refusal to promptly surrender the custody of Human Remains upon the expressed order of the person lawfully entitled to such custody;

Notes on Section 401 (a) (9). Such content may include, but is not limited to: removing from the examination room any examination materials without authorization; the unauthorized reproduction by any means of any portion of the actual licensing examination; aiding by any means the unauthorized reproduction of any portion of the actual licensing examination; paying or using professional or paid examination-takers for the purpose of reconstructing any portion of the licensing examination; obtaining examination questions or other examination material, except by specific authorization either before, during or after an examination; or using or purporting to use any examination questions or materials which were improperly removed or taken from any examination; or selling, distributing, buying, receiving, or having unauthorized possession of any portion of a future, current, or previously administered licensing examination; Communicating with any other examinee during the administration of a licensing examination; copying answers from another examinee or permitting one's answers to be copied by another examinee; having in one's possession during the administration of the licensing examination any books, equipment, notes, written or printed materials, or data of any kind, other than the examination materials distributed, or otherwise authorized to be in one's possession during the examination; or impersonating any examinee or having an impersonator take the licensing examination on one's behalf.

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Section 401. Grounds cont.

- (12) Solicitation of Human Remains by the Licensee, certificate holder, registrant, or agent of the Licensee, whether the solicitation occurs after death or while death is impending. Solicitation may include employment of solicitors, payment of commission, bonus, rebate, or any form of gratuity or payment of a finder's fee, referral fee or other consideration given for the purpose of obtaining or providing the services for Human Remains or where death is impending;
- (13) Acceptance by any employee or agent of a Funeral Establishment of a commission, bonus, rebate, or gratuity in consideration of directing business to a cemetery, Crematory, mausoleum, columbarium, florist, or other person providing goods and services to the disposition of Human Remains, without the required disclosure to the next of kin or authorizing agent;
- (14) Any Final Adverse Action issued by this or another Board in or out of this state;
- (15) Failure to cooperate or interfering with the Board in the course of an investigation, audit, or inspection authorized by law;
- (16) Failure to comply with an order issued by the Board;
- (17) Aiding or abetting unlicensed activity or operating a Funeral Establishment without the License(s) required by this Act;
- (18) Practice or operation of a business or profession beyond the scope of practice permitted under this Act;
- (19) Failure to adequately supervise or oversee auxiliary licensed or unlicensed staff, employees, agents, or contractors as required by this Act or the rules of the Board;
- (20) Disclosure by a licensee, certificate holder or registrant of confidences, privacies, confidential facts, confidential opinions or secrets of the life of any person, persons or family members, the knowledge of which was acquired through professional relationship with said person, persons or family members;
- (21) Allowing the Licensee's signature and/or License number to be placed on a death certificate or any other official form of Human Remains, as the Funeral Director, if the Licensee did not prepare the body or supervise the final disposition of that body; knowingly making any false statement on a certificate of death;
- (22) Using any funeral merchandise previously used, with the exception of a casket or merchandise that is explicitly designated for reuse, without informing the person selecting and/or paying for the use of the merchandise, that the merchandise has been used;
- (23) Failure to provide funeral goods that the consumer selected, or substitution of funeral goods or services without the consumer's knowledge or consent; or
- (24) Failure to follow the directions of the person or persons with the right to control disposition.

Section 402. Penalties

- (a) Any of the actions under this section may be totally or partly stayed by the Board. In determining what action is appropriate, the Board must first consider what sanctions are necessary to ensure public protection. After protection of the public has been addressed, the Board may consider and impose by order requirements designed to rehabilitate the License holder. All costs associated with compliance with orders issued under this section are the obligation of the Licensee, Intern or Certificate holder.
- (b) Upon the substantiation of wrongdoing under Section 401, the Board has the authority to issue an order providing for one or any combination of the following:
 - (1) Revocation of the License, Certificate, or Registration;
 - (2) Suspension of the License, Certificate, or Registration for a fixed or indefinite term;
 - (3) Restriction or limitation on the License, Certificate, or Registration or use thereof;

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Section 402. Penalties cont.

- (4) Satisfactory completion of a specific program of remedial education or treatment;
- (5) Monitoring of the practice in a manner directed by the board;
- (6) Censure or reprimand;
- (7) Probation and required compliance with conditions of probation for a designated period of time;
- (8) Impose a fine for each violation found by the board, not to exceed \$_____ per violation;
- (9) Denial of an initial or renewal application;
- (10) Assessment of costs related to the investigation, prosecution and adjudication of the administrative matter, including attorney's fees; or
- (11) Issue an order to cease and desist.

Notes on Section 402. *Boards who want to collect cost recovery for administrative disciplinary actions or sanctions should refer to their applicable Government Codes for their respective state to determine if an Administrative Procedure Act governs their administrative discipline process. Boards who want to impose a monetary administrative fine as part of an order should promulgate regulations to identify minimum and maximum fine amounts associated with specific violations. When determining reinstatement petitions of a License, the Board is encouraged to promulgate regulations for rehabilitative criteria to include factors such as length of time since the act occurred, evidence of rehabilitation, restitution to consumers, mitigating circumstances, and any other specific requirements for license issuance by the licensing state.*

Section 403. Unlicensed Practice

(a) In addition to any other penalty authorized under this Act, any Person or entity who after a hearing has been found to have engaged in the unlicensed practice of _____ shall be subject to a fine not to exceed \$___ for each offense as well as any other sanctions authorized under this Act.



Arkansas, Illinois, Kansas, Kentucky, Missouri, Oklahoma, and Texas. These individual guaranty associations, as well as those represented by NOLHGA, are statutory entities created by state legislatures to provide protection for resident policyholders in the event that a member insurance company becomes insolvent. Plaintiffs represent that these state guaranty associations have been assigned or subrogated to the claims of funeral homes and consumers arising out of dealings with NPS through (1) each state guaranty association's enabling act; (2) the NPS / Lincoln / Memorial Liquidation Plan approved by the Texas Receivership Court on September 22, 2008; or (3) express assignments received from recipients of death benefits paid by a state guaranty association.

Prior to the institution of the Texas proceedings, NPS was in the business of selling pre-need funeral service contracts, which were sold to consumers through funeral homes. Lincoln and Memorial were issuers of life insurance policies. NPS represented to these consumers that the necessary funds would be available when the pre-need beneficiary died and the funeral home's claim became due. In accordance with state law, this process was accomplished in certain states by requiring the purchaser to simultaneously apply for a life insurance policy issued by Lincoln or Memorial in an amount corresponding to the amount of the pre-need contract. In other states, the pre-need trust itself purchased the life insurance policies.

On May 3, 2012, Plaintiffs herein filed their Third Amended Complaint, asserting a wide variety of claims against various defendants, including, but not limited to, claims for violations of the Racketeer Influenced and Corrupt Organizations ("RICO") Act, 18 U.S.C. §§ 1961-1968, violations of the Lanham Act, 15 U.S.C. §§ 1051-1141n, state law claims concerning intentional

Minnesota, Mississippi, Montana, Nebraska, Nevada, New Mexico, North Dakota, Ohio, Oregon, Rhode Island, South Dakota, Tennessee, Utah, Washington, West Virginia, Wisconsin, and Wyoming.

and negligent fraudulent misrepresentations, negligence and gross negligence, breach of fiduciary duties, and violations of the Texas Receivership Act, Tex. Ins. Code §§ 443.202-443.205 [ECF No. 916]. The Third Amended Complaint alleges the fraudulent scheme's ultimate goal was to siphon funds away from NPS, Lincoln, and Memorial for the personal use of certain defendants, a scheme that ultimately left more than \$600 million in liabilities to be satisfied by the SDR, NOHLGA, and the state life and health guaranty association Plaintiffs.

There are over forty defendants named in Plaintiffs' Third Amended Complaint, with varying degrees of alleged involvement in what Plaintiffs characterize as a scheme to defraud individual consumers and funeral homes in the sale of NPS's pre-need funeral contracts. Many of these defendants have since been dismissed.

Plaintiffs are asking the Court to rule as a matter of law on two issues: (1) the recipients of funeral services, funeral homes, and NPS are beneficiaries of the preneed trusts; and (2) the independent investment advisor appointed by the seller must be independent of the seller of the preneed contracts and grantor of the preneed trust.¹

II. SUMMARY JUDGMENT STANDARD

A court shall grant a motion for summary judgment only if the moving party shows "there is no genuine dispute as to any material fact and that the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). By definition, material facts "might affect the outcome of the suit under the governing law," and a genuine dispute of material fact is one "such that a reasonable jury could return a

¹ Plaintiffs have styled their motion as a motion for rulings as a matter of law. However, Plaintiffs cite to the summary judgment standard and Federal Rule of Civil Procedure 56. Local Rule 7-4.01 requires a statement of uncontroverted material facts be attached to the party's memorandum in support of a motion for summary judgment. Because the issues presented are legal in nature and do not require a determination of facts to be decided, the Court will rule on the motion without the required statement of uncontroverted facts.

verdict for the nonmoving party.” *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). If the non-moving party has failed to “make a showing sufficient to establish the existence of an element essential to that party’s case, . . . there can be ‘no genuine issue as to any material fact,’ since a complete failure of proof concerning an essential element of the non-moving party’s case necessarily renders all other facts immaterial.” *Celotex*, 477 U.S. at 322-23.

The moving party bears the initial burden of proof in establishing “the non-existence of any genuine issue of fact that is material to a judgment in his favor.” *City of Mt. Pleasant, Iowa v. Associated Elec. Co-op., Inc.*, 838 F.2d 268, 273 (8th Cir. 1988). The moving party must show that “there is an absence of evidence to support the nonmoving party’s case.” *Celotex*, 477 U.S. at 325. If the moving party meets this initial burden, the non-moving party must then set forth affirmative evidence and specific facts that demonstrate a genuine dispute on that issue. *Anderson*, 477 U.S. at 250. When the burden shifts, the non-moving party may not rest on the allegations in its pleadings, but, by affidavit and other evidence, must set forth specific facts showing that a genuine dispute of material fact exists. Fed. R. Civ. P. 56(c)(1); *Stone Motor Co. v. Gen. Motors Corp.*, 293 F.3d 456, 465 (8th Cir. 2002). To meet its burden and survive summary judgment, the non-moving party must “do more than simply show that there is some metaphysical doubt as to the material facts.” *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586 (1986). Instead, the non-moving party must demonstrate sufficient favorable evidence that could enable a jury to return a verdict for it. *Anderson*, 477 U.S. at 249. “If the non-moving party fails to produce such evidence, summary judgment is proper.” *Olson v. Pennzoil Co.*, 943 F.2d 881, 883 (8th Cir. 1991).

In ruling on a motion for summary judgment, the Court may not “weigh the evidence in the summary judgment record, decide credibility questions, or determine the truth of any factual

issue.” *Kampouris v. St. Louis Symphony Soc.*, 210 F.3d 845, 847 (8th Cir. 2000). The Court instead “perform[s] only a gatekeeper function of determining whether there is evidence in the summary judgment record generating a genuine issue of material fact for trial on each essential element of a claim.” *Id.* The Court must view the facts and all reasonable inferences in the light most favorable to the nonmoving party. *Reed v. City of St. Charles*, 561 F.3d 788, 790 (8th Cir. 2009).

III. DISCUSSION

In their Motion, Plaintiffs request the Court find the consumers who will receive funeral services under the preneed contracts, the funeral homes providing the services, and NPS are beneficiaries of the preneed trusts. Plaintiffs also request the Court find the investment advisor appointed by the seller must be independent from the seller. The Court addresses each argument as follows.

A. Beneficiaries of the Preneed Trusts

In gaining a better understanding of whether a consumer, funeral home, or provider of funeral services is a beneficiary under the trust agreement or statute, and how a beneficial interest is determined in interpreting and applying language in trust agreements and statutes, as they relate to the pre-need funeral industry, it is helpful to follow the flow of money from when the funeral agreements are signed through distribution of the money by the Trustee. The language in the trust agreements and Chapter 436 show the principal purpose of both is to protect the interests of the purchaser of preneed services and the consumer, funeral homes, and providers of funeral services are beneficiaries of the pre-need trusts. The Court will examine the pre-need agreements, the trust agreements, and Chapter 436 in its analysis.

1. The Pre-Need Funeral Agreement

The pre-need funeral agreement involves the funeral home provider, the purchaser or beneficiary, and NPS. The trust agreements define the parties of the funeral agreements. The “owner” is the “person who shall execute a Funeral Agreement with the Seller for the purchase of the funeral services, articles and facilities agreed to be furnished thereunder and either the person designated as his successor (or if there is no designation) his legal representation.” The “seller” shall mean National Prearranged Services, Inc., as the seller and any successor thereto who agree to accept and discharge the obligations of the Seller under its outstanding Funeral Agreements.” “Funeral Agreement” is the “written agreement between the Owner and Seller entered into for the purpose of providing the Beneficiary thereof with funeral or burial services, by the terms of which Seller has agreed to deposit into this trust a portion of amounts paid to it thereunder.” “Provider” is the “person obligated to provide the disposition and funeral and/or burial services, facilities, and merchandise described in the Funeral Agreement.”

In a common occurrence, the funeral agreement is provided to funeral homes or other providers of funeral services to use in their contracts [ECF No. 1769-3].² The agreement includes services for the purchaser to choose from and areas for the provider to write in the price of the services. A total amount of services is provided and boxes to check if the purchaser paid in full or an installment agreement is attached. The preneed purchaser signs the agreement as well as the “Counselor” who is listed as the “Funeral Director appointed by NPS as its agent.” Part VI of the agreement includes four references to Chapter 436 of the Revised Missouri Statutes which is dedicated to “Special Purpose Funeral Contracts.” Part VI states, in part,

“In conformity with Chapter 436 of the laws of the State of Missouri, National Prearranged Services, Inc., shall deposit all payments required to be placed in trust to secure the performance of the Prearranged Funeral Agreement [stating

² The Court used Ex. 63 to the Trustees’ Motion for Summary Judgment as an example Funeral Agreement.

name of trust bank] pursuant to the trust agreement of [stating date of trust agreement] as amended as provided by Chapter 436 of the Laws of the State of Missouri.”

The Court discerns from the earliest opportunity NPS interacts with a purchaser, it represents there is protection of the purchaser’s money “to secure the performance of the Preneed Funeral Agreement.” The purchaser pays the funeral home or provider of funeral services who then gives the money to NPS. NPS is required to deposit the amount in the trusts and upon the death of a beneficiary; NPS shall pay the provider of the funeral services, as is outlined below in the Court’s analysis of the trust agreement and statute. It is reasonable to assume, salesmen³ motivated to sell agreements would tell prospective customers their money will be safe in a trust. The concept of a safe harbor for money in a trust is well known and respected.

2. *Beneficiary under the Trust Agreement*

Plaintiffs state the trust agreements⁴ designate the beneficiaries of the preneed trusts as consumers who will receive the funeral services (“consumers”) and funeral homes who provide the services (“funeral homes”). Plaintiffs cite to several sections within the trust agreement to support their proposition. Defendants National City Bank and U.S. Bank (“Trustees”) claim NPS is the sole beneficiary under the trust agreement because NPS is the only entity with an interest in the trust property, and the trust agreement gives all rights in the trust property to NPS.

In Missouri, “the intention of a trust instrument is to be ascertained from reading its provisions as a whole.” *Funsten v. C.I.R.*, 148 F.2d 805, 808 (8th Cir. 1945) (citing *Krause v.*

³ Salesmen include those individuals working directly for NPS and individuals in funeral homes or providers of funeral services who collect money under the funeral agreements for NPS.

⁴ There are individual trust agreements governing each of the preneed trusts at issue in this case. All of the trust agreements are substantially similar. For simplicity, the Court references the trust agreement between NPS and Mark Twain Bank, created on February 22, 1989, and is attached to the Missouri Trustees’ Motion for Partial Summary Judgment [ECF No. 1763-1].

Jeannette Inv. Co., 62 S.W.2d 890, 892 (Mo. 1933)). Reading the trust agreement as a whole, it is clear the beneficiary of the trust was intended to be the consumers, funeral homes and seller.

Section 1.5 of the trust agreement defines “beneficiary” as “the person designated in writing by the Owner of a Funeral Agreement as the person who is to be the subject of the disposition and is to receive the funeral and/or burial services therein described, or if no such person is designated then the Owner thereof.” There is no clearer indicator of who the intended beneficiary is than the definition of beneficiary. The Trustees argue the trust agreement is defining beneficiary of the funeral contract, not beneficiary of the trust. The most logical reading of the definitions of a trust agreement is to assume it is defining terms in this agreement, not terms in other contracts or agreements. If beneficiary was defining something other than the beneficiary of the trust, this would mean the trust agreement names no beneficiary. It seems more likely the creators of the trust agreement would name a beneficiary rather than none at all, especially when beneficiary is a defined term in the agreement.

The only other provision in the trust agreement which references “beneficiary” is Section 3.2(a) “Death of a Beneficiary.” This section states as follows:

“Upon presentation to the Trustee of the Provider’s notarized affidavit to the effect (i) that a Funeral Agreement has matured as the result of the death of the Beneficiary thereof, and (ii) that all the terms and conditions of the Funeral Agreement applicable to such Beneficiary have been fully performed by Provider, or that Provider has provided alternative funeral benefits for the Beneficiary pursuant to special arrangements made with the Owner, accompanied by a copy of the death certificate of the Beneficiary, the Trustee shall distribute and pay to the Seller all amounts which have been theretofore deposited into the Trust as respects said Funeral Agreement.”

This section does not provide assistance in determining who is a beneficiary of the trusts.

3. *Beneficiary under the Statute*

Chapter 436 of the Missouri Revised Statutes governs funeral contracts.⁵ When interpreting a statute, the Court must consider the words in the statute in their plain and ordinary meaning. *Laclede Gas Co. v. Labor and Indus. Relations Comm. of Mo.*, 657 S.W.2d 644, 650 (Mo. Ct. App. 1983) (citing *City of Willow Springs v. Mo. State Librarian*, 596 S.W.2d 441, 445-46 (Mo. banc 1980)). The duty of the court is to give the statute the effect the legislature intended. *Hyde v. City of Columbia*, 637 S.W.2d 251, 262 (Mo. Ct. App. 1982). To do so, the Court looks to “the evil the enactment means to remedy, the assumption that the legislative purpose was a reasonable one, the presumption that the law was passed for the welfare of the community, [and] that an effective law was intended.” *Id.* (citing *Cohen v. Poelker*, 520 S.W.2d 50 (Mo. banc 1975)).

Plaintiffs assert Chapter 436 supports the conclusion consumers are beneficiaries of the trusts. To begin, Plaintiffs reference the definitions section. Section 436.005(1) defines “beneficiary” as “the individual who is to be the subject of the disposition and who will receive funeral services, facilities or merchandise described in a preneed contract.” The analysis of this definition is different than under the trust agreement. This statute governs funeral contracts and includes the establishment of preneed trusts but it is not solely referencing trusts when it defines beneficiary unlike the trust agreement. Thus, the definition of beneficiary under the statute does not carry the same weight as it did in the trust agreement.

The statute requires a trust be created by the seller into which at least eighty percent of the amount of every contract is deposited. Mo. Rev. Stat. §§ 436.007.1(4), 436.021.1(2), 436.027. A preneed trust is defined as “a trust established by a seller, as grantor, to receive

⁵ At all times when referencing Missouri Revised Statute Chapter 436, the Court refers to the statute as written in 1989 which was in effect until 2008 when the statute was substantially revised.

deposits of, administer, and disburse payments received under preneed contracts by such seller, together with income thereon.” Mo. Rev. Stat. § 436.005(6). When a beneficiary dies, the seller shall pay the provider of the funeral services the amount equal to the contract amount and then, upon receipt, the trustee shall distribute the same amount to the seller. Mo. Rev. Stat. § 436.045.

Although the seller has a right to the income of the trust, other provisions of the statute and the purposes of the statute indicate consumers and funeral homes are beneficiaries. A consumer is entitled to a refund at any time from the seller for all payments paid into the trust under the consumer’s contract and if the seller is unwilling to provide the refund, the consumer can make a demand upon the trustee for the distribution. Mo. Rev. Stat. §§ 436.035(1), 436.048. These provisions indicate the consumer has an interest in the trust assets which is a key indicator of a person being a beneficiary of a trust. *See* Restatement (Second) of Trusts § 127 (1959).

An important purpose of the statute is to protect the consumers and funeral homes that will need these funds in the future. Specific statutes were enacted across the country to prevent the sellers of future funeral services from using the money for improper purposes. If consumers and funeral homes were not beneficiaries, they would be left with few options for recovering their payments. Making the consumers and funeral homes beneficiaries of the trusts protects their payments and gives them powerful options for enforcing those protections should someone try to improperly access or use those funds. It is clear the statute establishes the trust to hold the funds for the benefit of the consumers which satisfies the definition of a beneficiary. *See* Restatement (Second) of Trusts § 3. If NPS were the sole beneficiary of the trusts, as the Trustees suggest, it would eviscerate the protections of the statute because NPS would be able to dissolve the trust assets at any time as the sole beneficiary. *See* Restatement (Second) of Trusts § 339. The statute could have been drafted to allow for the seller, NPS, to receive all of the funds

placed in the trust, but under the clear language of the statute, seller is only entitled to a portion of the funds.

The providers of funeral services benefit from the trust as well, in knowing money will be paid to them when they have provided funeral services. Funeral homes and providers can be assured they will be able to collect in the future from protected money known to be in trust.

From the time money leaves the hand of a person desiring to have a preneed funeral, as it passes to the seller then to the trustee, and eventually leaves the trustee, it is intended to be used to pay for a funeral of a named beneficiary. The trust does not exist solely for the benefit of the seller and the seller is not the sole beneficiary of the trust.

The Court, after considering the parties excellent briefs, hearing superb arguments of counsel, after considering the most persuasive authority cited, and after applying a modicum of common sense, concludes NPS is not the exclusive beneficiary under the Missouri statutory scheme and the trust agreements. The Court agrees with Plaintiffs, recipients of funeral services and providers of funeral services are beneficiaries of the preneed trusts.

B. Independent Investment Advisor

Chapter 436 allows an investment advisor be appointed to manage investment of the trust assets. Mo. Rev. Stat. § 436.031(2). The statute states:

“A preneed trust agreement may provide that when the principal and interest in a preneed trust exceeds two hundred fifty thousand dollars, investment decisions regarding the principal and undistributed income may be made by a federally registered or Missouri-registered independent qualified investment advisor designated by the seller who established the trust; provided that title to all investment assets shall remain with the trustee and be kept by the trustee to be liquidated upon request of the advisor of the seller. In no case shall control of said assets be divested from the trustee nor shall said assets be placed in any investment which would be beyond the authority of a reasonably prudent trustee

to invest in. The trustee shall be relieved of all liability regarding investment decisions made by such qualified investment advisor.”⁶

The statute requires the investment advisor to be independent. The issue raised is from whom must the investment advisor be independent, the seller, the trustee, or both? Plaintiffs assert the investment advisor must be independent from the seller. Plaintiffs argue the seller is prevented from having control over trust funds by the statute and it would not make sense if the seller then was allowed to appoint an investment advisor that was not independent because this would allow the seller to gain control of the trust funds. The Missouri Trustees disagree and argue the statute does not specify the entity from which the investment advisor must be independent, and the only logical reading of the entire statute is for the investment advisor to be independent from the trustee. The Trustees reason a trustee’s liability for investment decisions hinges on whether the investment advisor is independent and a trustee can only be confident the investment advisor is independent from itself not from the seller.

An investment advisor must be independent from the trustee and the pre-need seller. The statute does not explicitly state from whom the investment advisor must be independent. If a statute is ambiguous, the Court should construe the statute to be consistent with the legislative intent and the purpose of enacting the law. *Estate of Williams v. Williams*, 12 S.W.3d 302, 306 (Mo. 2000). As stated previously, the purpose of this statute is to protect the consumers’ funds so they are available at a future date when needed for funeral services. If the trustee is to be relieved of liability for the investment advisor’s decisions, it makes sense the investment advisor be independent from the trustee. If this was not required, the trustee would be able to easily

⁶ The trust agreement’s language mirrors the statute in relation to appointment of an investment advisor. Section 2.2 of the agreement states “The Trustee shall have the exclusive management and control of the Trust and its funds; provided that when the principal and interest of this pre-need trust exceeds \$250,000, the Seller at its discretion may appoint an independent qualified investment advisor so long as the requirements of Missouri law are met, and the Trustee shall have no liability for any investment decision made by such investment advisor.”

circumvent its duties by controlling the investment advisor's decisions and then state it had no liability for those decisions because they were made by the investment advisor.

The investment advisor must also be independent of the seller. If the seller was allowed to appoint any investment advisor, it could appoint one over which it had control and then would have access and control of the trust assets, eviscerating the protections of the statute. To be consistent with the legislative intent of the statute, the statute must be read as to require the investment advisor be independent of both the trustee and the pre-need seller.⁷

The parties also raise the issue of whether the statute relieves the trustee of all liability for investment decisions made by the investment advisor, assuming the investment advisor was properly independent. Plaintiffs claim a trustee has obligations under the statute even if an investment advisor is appointed. According to Plaintiffs, these obligations include the trustee keeping all title to the investment assets, keeping control of the assets, and ensuring the assets not be placed in any investment beyond the authority of a reasonably prudent trustee. The Missouri Trustees assert the statute relieves them of all liability for the investment advisor's decisions. They argue no "rational trustee" would give authority for investment decisions to a third party it did not select, if it could later be held liable for those decisions.

The statute relieves the trustee of all liability regarding investment decisions made by the investment advisor if the investment advisor is federally registered or Missouri-registered, qualified, independent, control of the assets remains with the trustee, and the assets are not placed in any investment which would be beyond the authority of a reasonably prudent trustee to invest in. The statute's language is clear: "In no case shall control of said assets be divested from

⁷ The Court will not decide if the investment advisor was independent of either the trustee or NPS. This is a genuine dispute of material fact which must be decided by the jury.

the trustee nor shall said assets be placed in any investment which would be beyond the authority of a reasonably prudent trustee to invest in.” The Court reads the statute to require these obligations whether an investment advisor is appointed or not. The last two sentences must be read together. If the Court were to read the statute as relieving the trustees of any liability for investment of the trust assets, it would make the previous sentence superfluous. A trustee always has an overarching duty to protect the trust assets and reading the statute as the Court has fulfills both the purpose of the statute and the trustee’s duties.

Accordingly,

IT IS HEREBY ORDERED that “Plaintiffs’ Motion for Rulings as a Matter of Law as to Beneficiary Status Under Preneed Trusts and Independence of Investment Advisor Under Mo. Rev. Stat. § 436.031(2)” [ECF No. 1754] is **GRANTED in part, and DENIED in part.**

So Ordered this 9th Day of January, 2015.



E. RICHARD WEBBER
SENIOR UNITED STATES DISTRICT JUDGE



Syllabus

NOTE: Where it is feasible, a syllabus (headnote) will be released, as is being done in connection with this case, at the time the opinion is issued. The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U. S. 321, 337.

SUPREME COURT OF THE UNITED STATES

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**NORTH CAROLINA STATE BOARD OF DENTAL
EXAMINERS v. FEDERAL TRADE COMMISSION****CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR
THE FOURTH CIRCUIT**

No. 13–534. Argued October 14, 2014—Decided February 25, 2015

North Carolina’s Dental Practice Act (Act) provides that the North Carolina State Board of Dental Examiners (Board) is “the agency of the State for the regulation of the practice of dentistry.” The Board’s principal duty is to create, administer, and enforce a licensing system for dentists; and six of its eight members must be licensed, practicing dentists.

The Act does not specify that teeth whitening is “the practice of dentistry.” Nonetheless, after dentists complained to the Board that nondentists were charging lower prices for such services than dentists did, the Board issued at least 47 official cease-and-desist letters to nondentist teeth whitening service providers and product manufacturers, often warning that the unlicensed practice of dentistry is a crime. This and other related Board actions led nondentists to cease offering teeth whitening services in North Carolina.

The Federal Trade Commission (FTC) filed an administrative complaint, alleging that the Board’s concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition under the Federal Trade Commission Act. An Administrative Law Judge (ALJ) denied the Board’s motion to dismiss on the ground of state-action immunity. The FTC sustained that ruling, reasoning that even if the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board must be actively supervised by the State to claim immunity, which it was not. After a hearing on the merits, the ALJ determined that the Board had unreasonably restrained trade in violation of antitrust law. The FTC again sustained the ALJ, and the Fourth Circuit affirmed the FTC in

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all respects.

Held: Because a controlling number of the Board's decisionmakers are active market participants in the occupation the Board regulates, the Board can invoke state-action antitrust immunity only if it was subject to active supervision by the State, and here that requirement is not met. Pp. 5–18.

(a) Federal antitrust law is a central safeguard for the Nation's free market structures. However, requiring States to conform to the mandates of the Sherman Act at the expense of other values a State may deem fundamental would impose an impermissible burden on the States' power to regulate. Therefore, beginning with *Parker v. Brown*, 317 U. S. 341, this Court interpreted the antitrust laws to confer immunity on the anticompetitive conduct of States acting in their sovereign capacity. Pp. 5–6.

(b) The Board's actions are not cloaked with *Parker* immunity. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if “the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy,” and . . . ‘the policy . . . [is] actively supervised by the State.’” *FTC v. Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105). Here, the Board did not receive active supervision of its anticompetitive conduct. Pp. 6–17.

(1) An entity may not invoke *Parker* immunity unless its actions are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374. Thus, where a State delegates control over a market to a nonsovereign actor the Sherman Act confers immunity only if the State accepts political accountability for the anticompetitive conduct it permits and controls. Limits on state-action immunity are most essential when a State seeks to delegate its regulatory power to active market participants, for dual allegiances are not always apparent to an actor and prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. Accordingly, *Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own. *Midcal*'s two-part test provides a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for entities purporting to act under state authority might diverge from the State's considered definition of the public good and engage in private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this

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harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity. Pp. 6–10.

(2) There are instances in which an actor can be excused from *Midcal*'s active supervision requirement. Municipalities, which are electorally accountable, have general regulatory powers, and have no private price-fixing agenda, are subject exclusively to the clear articulation requirement. See *Hallie v. Eau Claire*, 471 U. S. 34, 35. That *Hallie* excused municipalities from *Midcal*'s supervision rule for these reasons, however, all but confirms the rule's applicability to actors controlled by active market participants. Further, in light of *Omni*'s holding that an otherwise immune entity will not lose immunity based on ad hoc and *ex post* questioning of its motives for making particular decisions, 499 U. S., at 374, it is all the more necessary to ensure the conditions for granting immunity are met in the first place, see *FTC v. Ticor Title Ins. Co.*, 504 U. S. 621, 633, and *Phoebe Putney, supra*, at _____. The clear lesson of precedent is that *Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants. Pp. 10–12.

(3) The Board's argument that entities designated by the States as agencies are exempt from *Midcal*'s second requirement cannot be reconciled with the Court's repeated conclusion 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. State agencies controlled by active market participants pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. See *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 791. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. While *Hallie* stated "it is likely that active state supervision would also not be required" for agencies, 471 U. S., at 46, n. 10, the entity there was more like prototypical state agencies, not specialized boards dominated by active market participants. The latter are similar to private trade associations vested by States with regulatory authority, which must satisfy *Midcal*'s active supervision standard. 445 U. S., at 105–106. The similarities between agencies controlled by active market participants and such associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie, supra*, at 39. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. Thus,

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the Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal's* active supervision requirement in order to invoke state-action antitrust immunity. Pp. 12–14.

(4) The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. But this holding is not inconsistent with the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State. Further, this case does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. Of course, States may provide for the defense and indemnification of agency members in the event of litigation, and they can also ensure *Parker* immunity is available by adopting clear policies to displace competition and providing active supervision. Arguments against the wisdom of applying the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity must be rejected, see *Patrick v. Burget*, 486 U. S. 94, 105–106, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. Pp. 14–16.

(5) The Board does not contend in this Court that its anticompetitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis. The Act delegates control over the practice of dentistry to the Board, but says nothing about teeth whitening. In acting to expel the dentists' competitors from the market, the Board relied on cease-and-desist letters threatening criminal liability, instead of other powers at its disposal that would have invoked oversight by a politically accountable official. Whether or not the Board exceeded its powers under North Carolina law, there is no evidence of any decision by the State to initiate or concur with the Board's actions against the nondentists. P. 17.

(c) Here, where there are no specific supervisory systems to be reviewed, it suffices to note that the inquiry regarding active supervision is flexible and context-dependent. The question is whether the State's review mechanisms provide "realistic assurance" that a non-sovereign actor's anticompetitive conduct "promotes state policy, rather than merely the party's individual interests." *Patrick*, 486 U. S., 100–101. The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, see *id.*, at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the "mere potential for state

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supervision is not an adequate substitute for a decision by the State,” *Ticor, supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case. Pp. 17–18.

717 F. 3d 359, affirmed.

KENNEDY, J., delivered the opinion of the Court, in which ROBERTS, C. J., and GINSBURG, BREYER, SOTOMAYOR, and KAGAN, JJ., joined. ALITO, J., filed a dissenting opinion, in which SCALIA and THOMAS, JJ., joined.

Opinion of the Court

NOTICE: This opinion is subject to formal revision before publication in the preliminary print of the United States Reports. Readers are requested to notify the Reporter of Decisions, Supreme Court of the United States, Washington, D. C. 20543, of any typographical or other formal errors, in order that corrections may be made before the preliminary print goes to press.

SUPREME COURT OF THE UNITED STATES

No. 13–534

**NORTH CAROLINA STATE BOARD OF DENTAL
EXAMINERS, PETITIONER v. FEDERAL
TRADE COMMISSION**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE KENNEDY delivered the opinion of the Court.

This case arises from an antitrust challenge to the actions of a state regulatory board. A majority of the board’s members are engaged in the active practice of the profession it regulates. The question is whether the board’s actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court’s decisions beginning with *Parker v. Brown*, 317 U. S. 341 (1943).

I

A

In its Dental Practice Act (Act), North Carolina has declared the practice of dentistry to be a matter of public concern requiring regulation. N. C. Gen. Stat. Ann. §90–22(a) (2013). Under the Act, the North Carolina State Board of Dental Examiners (Board) is “the agency of the State for the regulation of the practice of dentistry.” §90–22(b).

The Board’s principal duty is to create, administer, and enforce a licensing system for dentists. See §§90–29 to

90-41. To perform that function it has broad authority over licensees. See §90-41. The Board's authority with respect to unlicensed persons, however, is more restricted: like "any resident citizen," the Board may file suit to "perpetually enjoin any person from . . . unlawfully practicing dentistry." §90-40.1.

The Act provides that six of the Board's eight members must be licensed dentists engaged in the active practice of dentistry. §90-22. They are elected by other licensed dentists in North Carolina, who cast their ballots in elections conducted by the Board. *Ibid.* The seventh member must be a licensed and practicing dental hygienist, and he or she is elected by other licensed hygienists. *Ibid.* The final member is referred to by the Act as a "consumer" and is appointed by the Governor. *Ibid.* All members serve 3-year terms, and no person may serve more than two consecutive terms. *Ibid.* The Act does not create any mechanism for the removal of an elected member of the Board by a public official. See *ibid.*

Board members swear an oath of office, §138A-22(a), and the Board must comply with the State's Administrative Procedure Act, §150B-1 *et seq.*, Public Records Act, §132-1 *et seq.*, and open-meetings law, §143-318.9 *et seq.* The Board may promulgate rules and regulations governing the practice of dentistry within the State, provided those mandates are not inconsistent with the Act and are approved by the North Carolina Rules Review Commission, whose members are appointed by the state legislature. See §§90-48, 143B-30.1, 150B-21.9(a).

B

In the 1990's, dentists in North Carolina started whitening teeth. Many of those who did so, including 8 of the Board's 10 members during the period at issue in this case, earned substantial fees for that service. By 2003, nondentists arrived on the scene. They charged lower

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prices for their services than the dentists did. Dentists soon began to complain to the Board about their new competitors. Few complaints warned of possible harm to consumers. Most expressed a principal concern with the low prices charged by nondentists.

Responding to these filings, the Board opened an investigation into nondentist teeth whitening. A dentist member was placed in charge of the inquiry. Neither the Board's hygienist member nor its consumer member participated in this undertaking. The Board's chief operations officer remarked that the Board was "going forth to do battle" with nondentists. App. to Pet. for Cert. 103a. The Board's concern did not result in a formal rule or regulation reviewable by the independent Rules Review Commission, even though the Act does not, by its terms, specify that teeth whitening is "the practice of dentistry."

Starting in 2006, the Board issued at least 47 cease-and-desist letters on its official letterhead to nondentist teeth whitening service providers and product manufacturers. Many of those letters directed the recipient to cease "all activity constituting the practice of dentistry"; warned that the unlicensed practice of dentistry is a crime; and strongly implied (or expressly stated) that teeth whitening constitutes "the practice of dentistry." App. 13, 15. In early 2007, the Board persuaded the North Carolina Board of Cosmetic Art Examiners to warn cosmetologists against providing teeth whitening services. Later that year, the Board sent letters to mall operators, stating that kiosk teeth whiteners were violating the Dental Practice Act and advising that the malls consider expelling violators from their premises.

These actions had the intended result. Nondentists ceased offering teeth whitening services in North Carolina.

C

In 2010, the Federal Trade Commission (FTC) filed an

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administrative complaint charging the Board with violating §5 of the Federal Trade Commission Act, 38 Stat. 719, as amended, 15 U. S. C. §45. The FTC alleged that the Board's concerted action to exclude nondentists from the market for teeth whitening services in North Carolina constituted an anticompetitive and unfair method of competition. The Board moved to dismiss, alleging state-action immunity. An Administrative Law Judge (ALJ) denied the motion. On appeal, the FTC sustained the ALJ's ruling. It reasoned that, even assuming the Board had acted pursuant to a clearly articulated state policy to displace competition, the Board is a "public/private hybrid" that must be actively supervised by the State to claim immunity. App. to Pet. for Cert. 49a. The FTC further concluded the Board could not make that showing.

Following other proceedings not relevant here, the ALJ conducted a hearing on the merits and determined the Board had unreasonably restrained trade in violation of antitrust law. On appeal, the FTC again sustained the ALJ. The FTC rejected the Board's public safety justification, noting, *inter alia*, "a wealth of evidence . . . suggesting that non-dentist provided teeth whitening is a safe cosmetic procedure." *Id.*, at 123a.

The FTC ordered the Board to stop sending the cease-and-desist letters or other communications that stated nondentists may not offer teeth whitening services and products. It further ordered the Board to issue notices to all earlier recipients of the Board's cease-and-desist orders advising them of the Board's proper sphere of authority and saying, among other options, that the notice recipients had a right to seek declaratory rulings in state court.

On petition for review, the Court of Appeals for the Fourth Circuit affirmed the FTC in all respects. 717 F. 3d 359, 370 (2013). This Court granted certiorari. 571 U. S. ____ (2014).

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II

Federal antitrust law is a central safeguard for the Nation's free market structures. In this regard it is "as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms." *United States v. Topco Associates, Inc.*, 405 U. S. 596, 610 (1972). The antitrust laws declare a considered and decisive prohibition by the Federal Government of cartels, price fixing, and other combinations or practices that undermine the free market.

The Sherman Act, 26 Stat. 209, as amended, 15 U. S. C. §1 *et seq.*, serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare. See *FTC v. Ticor Title Ins. Co.*, 504 U. S. 621, 632 (1992). The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition. While "the States regulate their economies in many ways not inconsistent with the antitrust laws," *id.*, at 635–636, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives. If every duly enacted state law or policy were required to conform to the mandates of the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate. See *Exxon Corp. v. Governor of Maryland*, 437 U. S. 117, 133 (1978); see also Easterbrook, *Antitrust and the Economics of Federalism*, 26 J. Law & Econ. 23, 24 (1983).

For these reasons, the Court in *Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity. See 317 U. S., at 350–351. That ruling

recognized Congress' purpose to respect the federal balance and to "embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Community Communications Co. v. Boulder*, 455 U. S. 40, 53 (1982). Since 1943, the Court has reaffirmed the importance of *Parker's* central holding. See, e.g., *Ticor, supra*, at 632–637; *Hoover v. Ronwin*, 466 U. S. 558, 568 (1984); *Lafayette v. Louisiana Power & Light Co.*, 435 U. S. 389, 394–400 (1978).

III

In this case the Board argues its members were invested by North Carolina with the power of the State and that, as a result, the Board's actions are cloaked with *Parker* immunity. This argument fails, however. A nonsovereign actor controlled by active market participants—such as the Board—enjoys *Parker* immunity only if it satisfies two requirements: "first that 'the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,' and second that 'the policy . . . be actively supervised by the State.'" *FTC v. Phoebe Putney Health System, Inc.*, 568 U. S. ___, ___ (2013) (slip op., at 7) (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97, 105 (1980)). The parties have assumed that the clear articulation requirement is satisfied, and we do the same. While North Carolina prohibits the unauthorized practice of dentistry, however, its Act is silent on whether that broad prohibition covers teeth whitening. Here, the Board did not receive active supervision by the State when it interpreted the Act as addressing teeth whitening and when it enforced that policy by issuing cease-and-desist letters to nondentist teeth whiteners.

A

Although state-action immunity exists to avoid conflicts

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between state sovereignty and the Nation's commitment to a policy of robust competition, *Parker* immunity is not unbounded. "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state action immunity is disfavored, much as are repeals by implication.'" *Phoebe Putney, supra*, at ____ (slip op., at 7) (quoting *Ticor, supra*, at 636).

An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U. S. 365, 374 (1991). State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. *Hoover, supra*, at 567–568.

But while the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism, it does not always confer immunity where, as here, a State delegates control over a market to a non-sovereign actor. See *Parker, supra*, at 351 ("[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"). For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. See *Hoover, supra*, at 567–568. State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See *Goldfarb v. Virginia State Bar*, 421 U. S. 773, 791 (1975) ("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"). Immunity for state agencies, therefore, requires more than a mere facade of state involvement, for it is necessary in light of

Parker's rationale to ensure the States accept political accountability for anticompetitive conduct they permit and control. See *Ticor*, 504 U. S., at 636.

Limits 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 motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability. See *Midcal, supra*, at 106 (“The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement”). Indeed, prohibitions against anticompetitive self-regulation by active market participants are an axiom of federal antitrust policy. See, e.g., *Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U. S. 492, 501 (1988); *Hoover, supra*, at 584 (Stevens, J., dissenting) (“The risk that private regulation of market entry, prices, or output may be designed to confer monopoly profits on members of an industry at the expense of the consuming public has been the central concern of . . . our antitrust jurisprudence”); see also Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 672 (1991). So it follows that, under *Parker* and the Supremacy Clause, the States’ greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants. See Garland, *Antitrust and State Action: Economic Efficiency and the Political Process*, 96 Yale L. J. 486, 500 (1986).

Parker immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State’s own.

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See *Goldfarb, supra*, at 790; see also 1A P. Areeda & H. Hovencamp, *Antitrust Law* ¶226, p. 180 (4th ed. 2013) (Areeda & Hovencamp). The question is not whether the challenged conduct is efficient, well-functioning, or wise. See *Ticor, supra*, at 634–635. Rather, it is “whether anti-competitive conduct engaged in by [nonsovereign actors] should be deemed state action and thus shielded from the antitrust laws.” *Patrick v. Burget*, 486 U. S. 94, 100 (1988).

To answer this question, the Court applies the two-part test set forth in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97, a case arising from California’s delegation of price-fixing authority to wine merchants. Under *Midcal*, “[a] state law or regulatory scheme cannot be the basis for antitrust immunity unless, first, the State has articulated a clear policy to allow the anticompetitive conduct, and second, the State provides active supervision of [the] anticompetitive conduct.” *Ticor, supra*, at 631 (citing *Midcal, supra*, at 105).

Midcal’s clear articulation requirement is satisfied “where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature. In that scenario, the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.” *Phoebe Putney*, 568 U. S., at ____ (slip op., at 11). The active supervision requirement demands, *inter alia*, “that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy.” *Patrick, supra*, U. S., at 101.

The two requirements set forth in *Midcal* provide a proper analytical framework to resolve the ultimate question whether an anticompetitive policy is indeed the policy of a State. The first requirement—clear articulation—rarely will achieve that goal by itself, for a policy may

satisfy this test yet still be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated. See *Ticor*, *supra*, at 636–637. Entities purporting to act under state authority might diverge from the State’s considered definition of the public good. The resulting asymmetry between a state policy and its implementation can invite private self-dealing. The second *Midcal* requirement—active supervision—seeks to avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity.

Midcal’s supervision rule “stems from the recognition that [w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.” *Patrick*, *supra*, at 100. Concern about the private incentives of active market participants animates *Midcal*’s supervision mandate, which demands “realistic assurance that a private party’s anticompetitive conduct promotes state policy, rather than merely the party’s individual interests.” *Patrick*, *supra*, at 101.

B

In determining whether anticompetitive policies and conduct are indeed the action of a State in its sovereign capacity, there are instances in which an actor can be excused from *Midcal*’s active supervision requirement. In *Hallie v. Eau Claire*, 471 U. S. 34, 45 (1985), the Court held municipalities are subject exclusively to *Midcal*’s “clear articulation” requirement. That rule, the Court observed, is consistent with the objective of ensuring that the policy at issue be one enacted by the State itself. *Hallie* explained that “[w]here the actor is a municipality, there is little or no danger that it is involved in a private price-fixing arrangement. The only real danger is that it will seek to further purely parochial public interests at the

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expense of more overriding state goals.” 471 U. S., at 47. *Hallie* further observed that municipalities are electorally accountable and lack the kind of private incentives characteristic of active participants in the market. See *id.*, at 45, n. 9. Critically, the municipality in *Hallie* exercised a wide range of governmental powers across different economic spheres, substantially reducing the risk that it would pursue private interests while regulating any single field. See *ibid.* That *Hallie* excused municipalities from *Midcal*’s supervision rule for these reasons all but confirms the rule’s applicability to actors controlled by active market participants, who ordinarily have none of the features justifying the narrow exception *Hallie* identified. See 471 U. S., at 45.

Following *Goldfarb*, *Midcal*, and *Hallie*, which clarified the conditions under which *Parker* immunity attaches to the conduct of a nonsovereign actor, the Court in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U. S. 365, addressed whether an otherwise immune entity could lose immunity for conspiring with private parties. In *Omni*, an aspiring billboard merchant argued that the city of Columbia, South Carolina, had violated the Sherman Act—and forfeited its *Parker* immunity—by anticompetitively conspiring with an established local company in passing an ordinance restricting new billboard construction. 499 U. S., at 367–368. The Court disagreed, holding there is no “conspiracy exception” to *Parker*. *Omni, supra*, at 374.

Omni, like the cases before it, recognized the importance of drawing a line “relevant to the purposes of the Sherman Act and of *Parker*: prohibiting the restriction of competition for private gain but permitting the restriction of competition in the public interest.” 499 U. S., at 378. In the context of a municipal actor which, as in *Hallie*, exercised substantial governmental powers, *Omni* rejected a conspiracy exception for “corruption” as vague and unworkable, since “virtually all regulation benefits some

segments of the society and harms others” and may in that sense be seen as “corrupt.” 499 U. S., at 377. *Omni* also rejected subjective tests for corruption that would force a “deconstruction of the governmental process and probing of the official ‘intent’ that we have consistently sought to avoid.” *Ibid.* Thus, whereas the cases preceding it addressed the preconditions of *Parker* immunity and engaged in an objective, *ex ante* inquiry into nonsovereign actors’ structure and incentives, *Omni* made clear that recipients of immunity will not lose it on the basis of ad hoc and *ex post* questioning of their motives for making particular decisions.

Omni’s holding makes it all the more necessary to ensure the conditions for granting immunity are met in the first place. The Court’s two state-action immunity cases decided after *Omni* reinforce this point. In *Ticor* the Court affirmed that *Midcal*’s limits on delegation must ensure that “[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law.” 504 U. S., at 633. And in *Phoebe Putney* the Court observed that *Midcal*’s active supervision requirement, in particular, is an essential condition of state-action immunity when a nonsovereign actor has “an incentive to pursue [its] own self-interest under the guise of implementing state policies.” 568 U. S., at ___ (slip op., at 8) (quoting *Hallie*, *supra*, at 46–47). The lesson is clear: *Midcal*’s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.

C

The Board argues entities designated by the States as agencies are exempt from *Midcal*’s second requirement. That premise, however, cannot be reconciled with the Court’s repeated conclusion that the need for supervision

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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.

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. See *Areeda & Hovencamp* ¶227, at 226. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals. See *Patrick*, 486 U. S., at 100–101.

The Court applied this reasoning to a state agency in *Goldfarb*. There the Court denied immunity to a state agency (the Virginia State Bar) controlled by market participants (lawyers) because the agency had “joined in what is essentially a private anticompetitive activity” for “the benefit of its members.” 421 U. S., at 791, 792. This emphasis on the Bar's private interests explains why *Goldfarb*, though it predates *Midcal*, considered the lack of supervision by the Virginia Supreme Court to be a principal reason for denying immunity. See 421 U. S., at 791; see also *Hoover*, 466 U. S., at 569 (emphasizing lack of active supervision in *Goldfarb*); *Bates v. State Bar of Ariz.*, 433 U. S. 350, 361–362 (1977) (granting the Arizona Bar state-action immunity partly because its “rules are subject to pointed re-examination by the policymaker”).

While *Hallie* stated “it is likely that active state supervision would also not be required” for agencies, 471 U. S., at 46, n. 10, the entity there, as was later the case in *Omni*, was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda. In that and other respects the municipality was more like prototypical state agencies, not specialized boards dominated by active market participants. In important regards, agencies controlled by market partici-

pants are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered. And as the Court observed three years after *Hallie*, “[t]here is no doubt that the members of such associations often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.” *Allied Tube*, 486 U. S., at 500. For that reason, those associations must satisfy *Midcal*’s active supervision standard. See *Midcal*, 445 U. S., at 105–106.

The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a formal designation by the State, vested with a measure of government power, and required to follow some procedural rules. See *Hallie*, *supra*, at 39 (rejecting “purely formalistic” analysis). *Parker* immunity does not derive from nomenclature alone. When a State empowers a group of active market participants to decide who can participate in its market, and on what terms, the need for supervision is manifest. See *Areeda & Hovencamp* ¶227, at 226. The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*’s active supervision requirement in order to invoke state-action antitrust immunity.

D

The State argues that allowing this FTC order to stand will discourage dedicated citizens from serving on state agencies that regulate their own occupation. If this were so—and, for reasons to be noted, it need not be so—there would be some cause for concern. The States have a sovereign interest in structuring their governments, see *Gregory v. Ashcroft*, 501 U. S. 452, 460 (1991), and may conclude there are substantial benefits to staffing their

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agencies with experts in complex and technical subjects, see *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U. S. 48, 64 (1985). There is, moreover, a long tradition of citizens esteemed by their professional colleagues devoting time, energy, and talent to enhancing the dignity of their calling.

Adherence to the idea that those who pursue a calling must embrace ethical standards that derive from a duty separate from the dictates of the State reaches back at least to the Hippocratic Oath. See generally S. Miles, *The Hippocratic Oath and the Ethics of Medicine* (2004). In the United States, there is a strong tradition of professional self-regulation, particularly with respect to the development of ethical rules. See generally R. Rotunda & J. Dzienkowski, *Legal Ethics: The Lawyer's Deskbook on Professional Responsibility* (2014); R. Baker, *Before Bioethics: A History of American Medical Ethics From the Colonial Period to the Bioethics Revolution* (2013). Dentists are no exception. The American Dental Association, for example, in an exercise of “the privilege and obligation of self-government,” has “call[ed] upon dentists to follow high ethical standards,” including “honesty, compassion, kindness, integrity, fairness and charity.” American Dental Association, *Principles of Ethics and Code of Professional Conduct* 3–4 (2012). State laws and institutions are sustained by this tradition when they draw upon the expertise and commitment of professionals.

Today's holding is not inconsistent with that idea. The Board argues, however, that the potential for money damages will discourage members of regulated occupations from participating in state government. Cf. *Filarsky v. Delia*, 566 U. S. ____, ____ (2012) (slip op., at 12) (warning in the context of civil rights suits that the “the most talented candidates will decline public engagements if they do not receive the same immunity enjoyed by their public employee counterparts”). But this case, which does not

present a claim for money damages, does not offer occasion to address the question whether agency officials, including board members, may, under some circumstances, enjoy immunity from damages liability. See *Goldfarb*, 421 U. S., at 792, n. 22; see also Brief for Respondent 56. And, of course, the States may provide for the defense and indemnification of agency members in the event of litigation.

States, furthermore, can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce those policies, the States may provide active supervision. Precedent confirms this principle. The Court has rejected the argument that it would be unwise to apply the antitrust laws to professional regulation absent compliance with the prerequisites for invoking *Parker* immunity:

“[Respondents] contend that effective peer review is essential to the provision of quality medical care and that any threat of antitrust liability will prevent physicians from participating openly and actively in peer-review proceedings. This argument, however, essentially challenges the wisdom of applying the antitrust laws to the sphere of medical care, and as such is properly directed to the legislative branch. To the extent that Congress has declined to exempt medical peer review from the reach of the antitrust laws, peer review is immune from antitrust scrutiny only if the State effectively has made this conduct its own.” *Patrick*, 486 U. S. at 105–106 (footnote omitted).

The reasoning of *Patrick v. Burget* applies to this case with full force, particularly in light of the risks licensing boards dominated by market participants may pose to the free market. See generally Edlin & Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?* 162 U. Pa. L. Rev. 1093 (2014).

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E

The Board does not contend in this Court that its anti-competitive conduct was actively supervised by the State or that it should receive *Parker* immunity on that basis.

By statute, North Carolina delegates control over the practice of dentistry to the Board. The Act, however, says nothing about teeth whitening, a practice that did not exist when it was passed. After receiving complaints from other dentists about the nondentists' cheaper services, the Board's dentist members—some of whom offered whitening services—acted to expel the dentists' competitors from the market. In so doing the Board relied upon cease-and-desist letters threatening criminal liability, rather than any of the powers at its disposal that would invoke oversight by a politically accountable official. With no active supervision by the State, North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes “the practice of dentistry” and sought to prohibit those who competed against dentists from participating in the teeth whitening market. Whether or not the Board exceeded its powers under North Carolina law, cf. *Omni*, 499 U. S., at 371–372, there is no evidence here of any decision by the State to initiate or concur with the Board's actions against the nondentists.

IV

The Board does not claim that the State exercised active, or indeed any, supervision over its conduct regarding nondentist teeth whiteners; and, as a result, no specific supervisory systems can be reviewed here. It suffices to note that the inquiry regarding active supervision is flexible and context-dependent. Active supervision need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision. Rather, the question is whether the State's review mechanisms provide “realistic assurance” that a nonsovereign actor's anticom-

petitive conduct “promotes state policy, rather than merely the party’s individual interests.” *Patrick, supra*, at 100–101; see also *Ticor*, 504 U. S., at 639–640.

The Court has identified only a few constant requirements of active supervision: The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it, see *Patrick*, 486 U. S., at 102–103; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy, see *ibid.*; and the “mere potential for state supervision is not an adequate substitute for a decision by the State,” *Ticor, supra*, at 638. Further, the state supervisor may not itself be an active market participant. In general, however, the adequacy of supervision otherwise will depend on all the circumstances of a case.

* * *

The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies. If a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.

The judgment of the Court of Appeals for the Fourth Circuit is affirmed.

It is so ordered.

ALITO, J., dissenting

SUPREME COURT OF THE UNITED STATES

No. 13–534

**NORTH CAROLINA STATE BOARD OF DENTAL
EXAMINERS, PETITIONER *v.* FEDERAL
TRADE COMMISSION**

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF
APPEALS FOR THE FOURTH CIRCUIT

[February 25, 2015]

JUSTICE ALITO, with whom JUSTICE SCALIA and JUSTICE THOMAS join, dissenting.

The Court’s decision in this case is based on a serious misunderstanding of the doctrine of state-action antitrust immunity that this Court recognized more than 60 years ago in *Parker v. Brown*, 317 U. S. 341 (1943). In *Parker*, the Court held that the Sherman Act does not prevent the States from continuing their age-old practice of enacting measures, such as licensing requirements, that are designed to protect the public health and welfare. *Id.*, at 352. The case now before us involves precisely this type of state regulation—North Carolina’s laws governing the practice of dentistry, which are administered by the North Carolina Board of Dental Examiners (Board).

Today, however, the Court takes the unprecedented step of holding that *Parker* does not apply to the North Carolina Board because the Board is not structured in a way that merits a good-government seal of approval; that is, it is made up of practicing dentists who have a financial incentive to use the licensing laws to further the financial interests of the State’s dentists. There is nothing new about the structure of the North Carolina Board. When the States first created medical and dental boards, well before the Sherman Act was enacted, they began to staff

them in this way.¹ Nor is there anything new about the suspicion that the North Carolina Board—in attempting to prevent persons other than dentists from performing teeth-whitening procedures—was serving the interests of dentists and not the public. Professional and occupational licensing requirements have often been used in such a way.² But that is not what *Parker* immunity is about. Indeed, the very state program involved in that case was unquestionably designed to benefit the regulated entities, California raisin growers.

The question before us is not whether such programs serve the public interest. The question, instead, is whether this case is controlled by *Parker*, and the answer to that question is clear. Under *Parker*, the Sherman Act (and the Federal Trade Commission Act, see *FTC v. Ticor Title Ins. Co.*, 504 U. S. 621, 635 (1992)) do not apply to state agencies; the North Carolina Board of Dental Examiners is a state agency; and that is the end of the matter. By straying from this simple path, the Court has not only distorted *Parker*; it has headed into a morass. Determining whether a state agency is structured in a way that militates against regulatory capture is no easy task, and there is reason to fear that today's decision will spawn confusion. The Court has veered off course, and therefore I cannot go along.

¹S. White, *History of Oral and Dental Science in America* 197–214 (1876) (detailing earliest American regulations of the practice of dentistry).

²See, e.g., R. Shrylock, *Medical Licensing in America* 29 (1967) (Shrylock) (detailing the deterioration of licensing regimes in the mid-19th century, in part out of concerns about restraints on trade); Gellhorn, *The Abuse of Occupational Licensing*, 44 U. Chi. L. Rev. 6 (1976); Shepard, *Licensing Restrictions and the Cost of Dental Care*, 21 J. Law & Econ. 187 (1978).

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I

In order to understand the nature of *Parker* state-action immunity, it is helpful to recall the constitutional landscape in 1890 when the Sherman Act was enacted. At that time, this Court and Congress had an understanding of the scope of federal and state power that is very different from our understanding today. The States were understood to possess the exclusive authority to regulate “their purely internal affairs.” *Leisy v. Hardin*, 135 U. S. 100, 122 (1890). In exercising their police power in this area, the States had long enacted measures, such as price controls and licensing requirements, that had the effect of restraining trade.³

The Sherman Act was enacted pursuant to Congress’ power to regulate interstate commerce, and in passing the Act, Congress wanted to exercise that power “to the utmost extent.” *United States v. South-Eastern Underwriters Assn.*, 322 U. S. 533, 558 (1944). But in 1890, the understanding of the commerce power was far more limited than it is today. See, e.g., *Kidd v. Pearson*, 128 U. S. 1, 17–18 (1888). As a result, the Act did not pose a threat to traditional state regulatory activity.

By 1943, when *Parker* was decided, however, the situation had changed dramatically. This Court had held that the commerce power permitted Congress to regulate even local activity if it “exerts a substantial economic effect on interstate commerce.” *Wickard v. Filburn*, 317 U. S. 111, 125 (1942). This meant that Congress could regulate many of the matters that had once been thought to fall exclusively within the jurisdiction of the States. The new interpretation of the commerce power brought about an expansion of the reach of the Sherman Act. See *Hospital*

³See Handler, The Current Attack on the *Parker v. Brown* State Action Doctrine, 76 Colum. L. Rev. 1, 4–6 (1976) (collecting cases).

Building Co. v. Trustees of Rex Hospital, 425 U. S. 738, 743, n. 2 (1976) (“[D]ecisions by this Court have permitted the reach of the Sherman Act to expand along with expanding notions of congressional power”). And the expanded reach of the Sherman Act raised an important question. The Sherman Act does not expressly exempt States from its scope. Does that mean that the Act applies to the States and that it potentially outlaws many traditional state regulatory measures? The Court confronted that question in *Parker*.

In *Parker*, a raisin producer challenged the California Agricultural Prorate Act, an agricultural price support program. The California Act authorized the creation of an Agricultural Prorate Advisory Commission (Commission) to establish marketing plans for certain agricultural commodities within the State. 317 U. S., at 346–347. Raisins were among the regulated commodities, and so the Commission established a marketing program that governed many aspects of raisin sales, including the quality and quantity of raisins sold, the timing of sales, and the price at which raisins were sold. *Id.*, at 347–348. The *Parker* Court assumed that this program would have violated “the Sherman Act if it were organized and made effective solely by virtue of a contract, combination or conspiracy of private persons,” and the Court also assumed that Congress could have prohibited a State from creating a program like California’s if it had chosen to do so. *Id.*, at 350. Nevertheless, the Court concluded that the California program did not violate the Sherman Act because the Act did not circumscribe state regulatory power. *Id.*, at 351.

The Court’s holding in *Parker* was not based on either the language of the Sherman Act or anything in the legislative history affirmatively showing that the Act was not meant to apply to the States. Instead, the Court reasoned that “[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Con-

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gress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U. S., at 351. For the Congress that enacted the Sherman Act in 1890, it would have been a truly radical and almost certainly futile step to attempt to prevent the States from exercising their traditional regulatory authority, and the *Parker* Court refused to assume that the Act was meant to have such an effect.

When the basis for the *Parker* state-action doctrine is understood, the Court's error in this case is plain. In 1890, the regulation of the practice of medicine and dentistry was regarded as falling squarely within the States' sovereign police power. By that time, many States had established medical and dental boards, often staffed by doctors or dentists,⁴ and had given those boards the authority to confer and revoke licenses.⁵ This was quintessential police power legislation, and although state laws were often challenged during that era under the doctrine of substantive due process, the licensing of medical professionals easily survived such assaults. Just one year before the enactment of the Sherman Act, in *Dent v. West Virginia*, 129 U. S. 114, 128 (1889), this Court rejected such a challenge to a state law requiring all physicians to obtain a certificate from the state board of health attesting to their qualifications. And in *Hawker v. New York*, 170 U. S. 189, 192 (1898), the Court reiterated that a law

⁴Shrylock 54–55; D. Johnson and H. Chaudry, *Medical Licensing and Discipline in America* 23–24 (2012).

⁵In *Hawker v. New York*, 170 U. S. 189 (1898), the Court cited state laws authorizing such boards to refuse or revoke medical licenses. *Id.*, at 191–193, n. 1. See also *Douglas v. Noble*, 261 U. S. 165, 166 (1923) (“In 1893 the legislature of Washington provided that only licensed persons should practice dentistry” and “vested the authority to license in a board of examiners, consisting of five practicing dentists”).

specifying the qualifications to practice medicine was clearly a proper exercise of the police power. Thus, the North Carolina statutes establishing and specifying the powers of the State Board of Dental Examiners represent precisely the kind of state regulation that the *Parker* exemption was meant to immunize.

II

As noted above, the only question in this case is whether the North Carolina Board of Dental Examiners is really a state agency, and the answer to that question is clearly yes.

- The North Carolina Legislature determined that the practice of dentistry “affect[s] the public health, safety and welfare” of North Carolina’s citizens and that therefore the profession should be “subject to regulation and control in the public interest” in order to ensure “that only qualified persons be permitted to practice dentistry in the State.” N. C. Gen. Stat. Ann. §90–22(a) (2013).
- To further that end, the legislature created the North Carolina State Board of Dental Examiners “as the agency of the State for the regulation of the practice of dentistry in th[e] State.” §90–22(b).
- The legislature specified the membership of the Board. §90–22(c). It defined the “practice of dentistry,” §90–29(b), and it set out standards for licensing practitioners, §90–30. The legislature also set out standards under which the Board can initiate disciplinary proceedings against licensees who engage in certain improper acts. §90–41(a).
- The legislature empowered the Board to “maintain an action in the name of the State of North Carolina to perpetually enjoin any person from . . . unlawfully practicing dentistry.” §90–40.1(a). It authorized the Board to conduct investigations and to hire legal

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counsel, and the legislature made any “notice or statement of charges against any licensee” a public record under state law. §§ 90–41(d)–(g).

- The legislature empowered the Board “to enact rules and regulations governing the practice of dentistry within the State,” consistent with relevant statutes. §§90–48. It has required that any such rules be included in the Board’s annual report, which the Board must file with the North Carolina secretary of state, the state attorney general, and the legislature’s Joint Regulatory Reform Committee. §93B–2. And if the Board fails to file the required report, state law demands that it be automatically suspended until it does so. *Ibid.*

As this regulatory regime demonstrates, North Carolina’s Board of Dental Examiners is unmistakably a state agency created by the state legislature to serve a prescribed regulatory purpose and to do so using the State’s power in cooperation with other arms of state government.

The Board is not a private or “nonsovereign” entity that the State of North Carolina has attempted to immunize from federal antitrust scrutiny. *Parker* made it clear that a State may not “give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful.” *Ante*, at 7 (quoting *Parker*, 317 U. S., at 351). When the *Parker* Court disapproved of any such attempt, it cited *Northern Securities Co. v. United States*, 193 U. S. 197 (1904), to show what it had in mind. In that case, the Court held that a State’s act of chartering a corporation did not shield the corporation’s monopolizing activities from federal antitrust law. *Id.*, at 344–345. Nothing similar is involved here. North Carolina did not authorize a private entity to enter into an anticompetitive arrangement; rather, North Carolina created a state agency and gave that agency the power to regulate a particular subject affecting public health and

safety.

Nothing in *Parker* supports the type of inquiry that the Court now prescribes. The Court crafts a test under which state agencies that are “controlled by active market participants,” *ante*, at 12, must demonstrate active state supervision in order to be immune from federal antitrust law. The Court thus treats these state agencies like private entities. But in *Parker*, the Court did not examine the structure of the California program to determine if it had been captured by private interests. If the Court had done so, the case would certainly have come out differently, because California conditioned its regulatory measures on the participation and approval of market actors in the relevant industry.

Establishing a prorate marketing plan under California’s law first required the petition of at least 10 producers of the particular commodity. *Parker*, 317 U. S., at 346. If the Commission then agreed that a marketing plan was warranted, the Commission would “select a program committee *from among nominees chosen by the qualified producers.*” *Ibid.* (emphasis added). That committee would then formulate the proration marketing program, which the Commission could modify or approve. But even after Commission approval, the program became law (and then, automatically) only if it gained the approval of 65 percent of the relevant producers, representing at least 51 percent of the acreage of the regulated crop. *Id.*, at 347. This scheme gave decisive power to market participants. But despite these aspects of the California program, *Parker* held that California was acting as a “sovereign” when it “adopt[ed] and enforc[ed] the prorate program.” *Id.*, at 352. This reasoning is irreconcilable with the Court’s today.

III

The Court goes astray because it forgets the origin of the

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Parker doctrine and is misdirected by subsequent cases that extended that doctrine (in certain circumstances) to private entities. The Court requires the North Carolina Board to satisfy the two-part test set out in *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U. S. 97 (1980), but the party claiming *Parker* immunity in that case was not a state agency but a private trade association. Such an entity is entitled to *Parker* immunity, *Midcal* held, only if the anticompetitive conduct at issue was both “clearly articulated” and “actively supervised by the State itself.” 445 U. S., at 105. Those requirements are needed where a State authorizes private parties to engage in anticompetitive conduct. They serve to identify those situations in which conduct *by private parties* can be regarded as the conduct of a State. But when the conduct in question is the conduct of a state agency, no such inquiry is required.

This case falls into the latter category, and therefore *Midcal* is inapposite. The North Carolina Board is not a private trade association. It is a state agency, created and empowered by the State to regulate an industry affecting public health. It would not exist if the State had not created it. And for purposes of *Parker*, its membership is irrelevant; what matters is that it is part of the government of the sovereign State of North Carolina.

Our decision in *Hallie v. Eau Claire*, 471 U. S. 34 (1985), which involved Sherman Act claims against a municipality, not a State agency, is similarly inapplicable. In *Hallie*, the plaintiff argued that the two-pronged *Midcal* test should be applied, but the Court disagreed. The Court acknowledged that municipalities “are not themselves sovereign.” 471 U. S., at 38. But recognizing that a municipality is “an arm of the State,” *id.*, at 45, the Court held that a municipality should be required to satisfy only the first prong of the *Midcal* test (requiring a clearly articulated state policy), 471 U. S., at 46. That municipalities

are not sovereign was critical to our analysis in *Hallie*, and thus that decision has no application in a case, like this one, involving a state agency.

Here, however, the Court not only disregards the North Carolina Board's status as a full-fledged state agency; it treats the Board less favorably than a municipality. This is puzzling. States are sovereign, *Northern Ins. Co. of N. Y. v. Chatham County*, 547 U. S. 189, 193 (2006), and California's sovereignty provided the foundation for the decision in *Parker, supra*, at 352. Municipalities are not sovereign. *Jinks v. Richland County*, 538 U. S. 456, 466 (2003). And for this reason, federal law often treats municipalities differently from States. Compare *Will v. Michigan Dept. of State Police*, 491 U. S. 58, 71 (1989) (“[N]either a State nor its officials acting in their official capacities are ‘persons’ under [42 U. S. C.] §1983”), with *Monell v. City Dept. of Social Servs., New York*, 436 U. S. 658, 694 (1978) (municipalities liable under §1983 where “execution of a government’s policy or custom . . . inflicts the injury”).

The Court recognizes that municipalities, although not sovereign, nevertheless benefit from a more lenient standard for state-action immunity than private entities. Yet under the Court’s approach, the North Carolina Board of Dental Examiners, a full-fledged state agency, is treated like a private actor and must demonstrate that the State actively supervises its actions.

The Court’s analysis seems to be predicated on an assessment of the varying degrees to which a municipality and a state agency like the North Carolina Board are likely to be captured by private interests. But until today, *Parker* immunity was never conditioned on the proper use of state regulatory authority. On the contrary, in *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U. S. 365 (1991), we refused to recognize an exception to *Parker* for cases in which it was shown that the defendants had

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engaged in a conspiracy or corruption or had acted in a way that was not in the public interest. *Id.*, at 374. The Sherman Act, we said, is not an anticorruption or good-government statute. 499 U. S., at 398. We were unwilling in *Omni* to rewrite *Parker* in order to reach the allegedly abusive behavior of city officials. 499 U. S., at 374–379. But that is essentially what the Court has done here.

III

Not only is the Court's decision inconsistent with the underlying theory of *Parker*; it will create practical problems and is likely to have far-reaching effects on the States' regulation of professions. As previously noted, state medical and dental boards have been staffed by practitioners since they were first created, and there are obvious advantages to this approach. It is reasonable for States to decide that the individuals best able to regulate technical professions are practitioners with expertise in those very professions. Staffing the State Board of Dental Examiners with certified public accountants would certainly lessen the risk of actions that place the well-being of dentists over those of the public, but this would also compromise the State's interest in sensibly regulating a technical profession in which lay people have little expertise.

As a result of today's decision, States may find it necessary to change the composition of medical, dental, and other boards, but it is not clear what sort of changes are needed to satisfy the test that the Court now adopts. The Court faults the structure of the North Carolina Board because "active market participants" constitute "a controlling number of [the] decisionmakers," *ante*, at 14, but this test raises many questions.

What is a "controlling number"? Is it a majority? And if so, why does the Court eschew that term? Or does the Court mean to leave open the possibility that something less than a majority might suffice in particular circum-

stances? Suppose that active market participants constitute a voting bloc that is generally able to get its way? How about an obstructionist minority or an agency chair empowered to set the agenda or veto regulations?

Who is an "active market participant"? If Board members withdraw from practice during a short term of service but typically return to practice when their terms end, does that mean that they are not active market participants during their period of service?

What is the scope of the market in which a member may not participate while serving on the board? Must the market be relevant to the particular regulation being challenged or merely to the jurisdiction of the entire agency? Would the result in the present case be different if a majority of the Board members, though practicing dentists, did not provide teeth whitening services? What if they were orthodontists, periodontists, and the like? And how much participation makes a person "active" in the market?

The answers to these questions are not obvious, but the States must predict the answers in order to make informed choices about how to constitute their agencies.

I suppose that all this will be worked out by the lower courts and the Federal Trade Commission (FTC), but the Court's approach raises a more fundamental question, and that is why the Court's inquiry should stop with an examination of the structure of a state licensing board. When the Court asks whether market participants control the North Carolina Board, the Court in essence is asking whether this regulatory body has been captured by the entities that it is supposed to regulate. Regulatory capture can occur in many ways.⁶ So why ask only whether

⁶See, *e.g.*, R. Noll, *Reforming Regulation* 40-43, 46 (1971); J. Wilson, *The Politics of Regulation* 357-394 (1980). Indeed, it has even been

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the members of a board are active market participants? The answer may be that determining when regulatory capture has occurred is no simple task. That answer provides a reason for relieving courts from the obligation to make such determinations at all. It does not explain why it is appropriate for the Court to adopt the rather crude test for capture that constitutes the holding of today's decision.

IV

The Court has created a new standard for distinguishing between private and state actors for purposes of federal antitrust immunity. This new standard is not true to the *Parker* doctrine; it diminishes our traditional respect for federalism and state sovereignty; and it will be difficult to apply. I therefore respectfully dissent.

charged that the FTC, which brought this case, has been captured by entities over which it has jurisdiction. See E. Cox, "The Nader Report" on the Federal Trade Commission vii–xiv (1969); Posner, Federal Trade Commission, *Chi. L. Rev.* 47, 82–84 (1969).

