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To the Oregon Board of Psychologist Examiners:

After consulting with several lawyers, I have prepared a summary of legal issues with regard to Oregon's existing exemptions for unlicensed practitioners. It consists of four main points, which I am presenting as simply as I can, mostly drawing your attention to the key statutes, with a minimum of commentary. These four points are:

1. The overlap between the definitions of "practice of psychology," "professional counseling," and "marriage and family therapy."
2. The central exemption in the OBPE statutes.
3. The "educational exemption" for counselors and marriage and family therapists.
4. The recent (Feb 25) Supreme Court ruling against the North Carolina Board of Dentistry, for illegal anti-competitive practices against unlicensed practitioners.

Overlap Between "Practice of Psychology," "Professional Counseling," and "Marriage and Family Therapy"

It's probably best to start by simply showing these three definitions side by side:

Practice of Psychology	**Professional Counseling**	**Marriage & Family Therapy**
ORS 675.010(4) "Practice of psychology" means rendering or offering to render supervision, consultation, evaluation or therapy services to individuals, groups or organizations for the purpose of **diagnosing or treating behavioral, emotional or mental disorders.** "Practice of psychology" also includes delegating the administration and scoring of tests to technicians qualified by and under the direct supervision of a licensed psychologist.	ORS 675.705(7)(a) "Professional counseling" means the assessment, **diagnosis or treatment of mental, emotional or behavioral disorders** involving the application of mental health counseling or other psychotherapeutic principles and methods in the delivery of services to individuals, couples, children, families, groups or organizations.	ORS 675.705(6)(a) "Marriage and family therapy" means the assessment, **diagnosis or treatment of mental, emotional or behavioral disorders** involving the application of family systems or other psychotherapeutic principles and methods in the delivery of services to individuals, couples, children, families, groups or organizations.

If one were to read only the definition of "practice of psychology," it's possible to conclude that psychologists have the *exclusive* right to diagnose and treat behavioral, emotional, or mental disorders. Looking at all three definitions, this is clearly not the case. And, in fact, at least six professions are allowed to diagnose and treat mental disorders: psychologists, counselors, marriage and family therapists, licensed clinical social workers, psychiatrists, and psychiatric nurse practitioners.

The Central Exemption in the OBPE Statutes

If almost anyone providing mental health services fits multiple definitions -- counselor, psychologist, etc. -- which Board (if any) has authority? Fortunately, this was recently clarified by the Legislature at the request of the OBPE, eliminating the previous ambiguity. The key exemption is as follows. (The three words in bold were added during the 2013 Legislative session, and went into effect on January 1, 2014):

> 675.090 Application of ORS 675.010 to 675.150. (1) ORS 675.010 to 675.150 do not apply to: …
>
> (e) A person who is licensed, certified **or otherwise authorized** by the State of Oregon to provide mental health services, provided that the services are rendered within the person's lawful scope of practice and that the person does not use the title "psychologist" in connection with the activities described in this paragraph.

Notes on this exemption:

- ORS 675.010 to 675.150 covers the entirety of the OPBE statutes. Thus, this is a blanket exemption.
- Legally, the term "authorized" is broad: for example, an exemption is an authorization.

Thus, if an unlicensed practitioner is operating under any exemption provided elsewhere in Oregon statute, and does not use the title "psychologist," the OBPE has no authority.

The "Educational Exemption" for Counselors and Marriage and Family Therapists

This leaves us with the question of whether exemptions are provided elsewhere in Oregon statute. And, in fact, they are. Counseling and marriage and family therapy have exemptions that are broadly applicable to unlicensed practitioners. Because this exemption always surprises people on first reading, I will explain it in a moment (again, emphasis is mine):

> 675.825 Prohibited practices; exceptions; civil penalty…
>
> **(4) Nothing in ORS 675.715 to 675.835 limits or prevents the practice of a person's profession or restricts a person from providing counseling services or services related to marriage and family if the person:**
>
> **(a) Does not meet the requirements of ORS 675.715 (1)(b)**; or
>
> (b) Does not practice:
>
> (A) Marriage and family therapy as defined in ORS 675.705 (6)(a); or
>
> (B) Professional counseling as defined in ORS 675.705 (7)(a)

In short, one can be a counselor or marriage and family therapist, provided that the requirements of ORS 675.715 (1)(b) are **NOT** met.

The purpose of this seemingly odd exemption is, basically, to allow anyone in Oregon to practice professional counseling and marriage and family therapy without a license. The Oregon Legislature has consistently refused to require a license for counseling or marriage and family therapy. The Legislature's stance has always been, "You don't need a license, but if you meet the requirements, you can have one."

The "requirements of ORS 675.715 (1)(b)" are (emphasis is mine):

> 675.715 Application; fee; qualifications; examinations; licensing; rules. (1) In order to obtain a license as a professional counselor or a marriage and family therapist, an applicant shall make application on a form and in such a manner as the Oregon Board of Licensed Professional Counselors and Therapists prescribes, accompanied by the nonrefundable fee established pursuant to ORS 675.785. The board shall issue a license as a professional counselor or a marriage and family therapist to each applicant who furnishes satisfactory evidence to the board that the applicant meets the following qualifications:
>
> (a) Is not in violation of any of the provisions of ORS 675.715 to 675.835 and the rules adopted by the board.

(b) Has received:

(A) A graduate degree in counseling in a program approved by the Council for Accreditation of Counseling and Related Educational Programs of the American Counseling Association that includes training in the diagnosis of mental disorders;

(B) A graduate degree in marriage and family therapy in a program approved by the Commission on Accreditation for Marriage and Family Therapy Education of the American Association for Marriage and Family Therapy that includes training in the diagnosis of mental disorders;

(C) A graduate degree, under standards explicitly adopted by the board by rule that is determined by the board to be comparable in both content and quality to a degree approved under subparagraph (A) or (B) of this paragraph and that includes training in the diagnosis of mental disorders; or

(D) A graduate degree, determined by the board to meet at an acceptable level at least a majority of the board's adopted degree standards and that includes training in the diagnosis of mental disorders, and has completed additional graduate training obtained in a counselor or marriage and family therapy program at an accredited college or university to meet the remainder of the standards.

To summarize the effect of these statues:

- Anyone who does *not* meet the educational requirements for a license in professional counseling or marriage and family therapy can practice professional counseling or marriage and family therapy without a license.
- This exemption provides "authorization by the State of Oregon to provide mental health services," satisfying the exemption in the OBPE statutes at ORS 675.010 (1)(e).
- The other stipulation of ORS 675.010 (1)(e) is "... provided that the services are rendered within the person's lawful scope of practice and the person does not use the title 'psychologist' in connection with the activities described in this paragraph." Please note that:
  - The "lawful scope of practice" for counseling and marriage and family therapy are actually broader than that of psychology, as we saw on page 1. So it's hard to see how anything that exceeds a counselor or marriage and family therapist's scope of practice isn't also outside the OBPE's jurisdiction.
  - Thus, for practical purposes, the OBPE has authority only over its applicants, its licensees, and people using the title "psychologist."

The Recent Supreme Court Ruling

February 25, 2015, the Supreme Court upheld a ruling that the North Carolina State Board of Dental Examiners engaged in *illegal anticompetitive practices* under the Federal Trade Commission Act when it sent cease-and-desist letters to unlicensed practitioners offering teeth whitening services.

The Supreme Court also ruled that neither the Board as a whole, nor its individual members, gain protection from State immunity.

As you read the next three pages, I'm sure you'll see many parallels between the North Carolina Board's illegal unlicensed practitioner and OBPE unlicensed practitioner actions.

"The Board, which consisted largely of practicing dentists, 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 ruling is summarized below (cut and pasted from the Syllabus at the beginning of the ruling. For the full version, see http://www.supremecourt.gov/opinions/14pdf/13-534_19m2.pdf).

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 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, 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 nonsovereign 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 Cite as: 574 U. S. ____ (2015) 5 Syllabus 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., fi