

Supreme Court takes a bite of N.C. teeth-whitening case

By Michael Doyle
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North Carolina dentists began teeth-whitening services in the 1990s. By 2003, non-dentist providers began offering the same service in spas and salons. They charged less, prompting dentists to complain to the state board, which subsequently issued cease-and-desist orders to the non-dentists.

WASHINGTON — Supreme Court justices Tuesday chewed over North Carolina’s management of the teeth-whitening business, in a surprisingly juicy case with implications that go well beyond dentistry.

During an hour-long oral argument, justices incisively questioned whether the dentist-controlled North Carolina State Board of Dental Examiners may be unfairly restricting competition for the lucrative whitening work. The court’s eventual decision could affect other licensed industries, as well.

“This is, for me, a very difficult case,” acknowledged Justice Stephen Breyer.

Still, several justices suggested Tuesday that the dentists who dominate the state board may be acting for their own economic benefit more than the public good, and may therefore be subject to antitrust oversight.

Justice Sonia Sotomayor observed that the dentists “have a self-interest that’s inherent in their occupation,” while Justice Anthony Kennedy likewise questioned whether the federal government has a stake “in making sure regulators do not pursue their self-interest.”

“This board of all dentists – is there a danger that it’s acting to pursue its own interests rather than the governmental interests of the state?” Justice Elena Kagan asked rhetorically, before adding, “In this case, that seems to be self-evidently true.”

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The state board also wrote malls and other businesses, urging them not to lease space to non-dentists who provided teeth whitening. Some letters warned that the unauthorized practice of dentistry was a misdemeanor subject to criminal prosecution.

While North Carolina state law defines the practice of dentistry to include the “removal of stains, accretions or deposits from the human teeth,” the state law is silent about the modern use of peroxide to whiten teeth.

The Federal Trade Commission filed a complaint against the North Carolina board in 2010.

“The object of the antitrust laws is to prevent private individuals who compete with each other in business from getting together and making agreements,” Breyer said. “That kind of interest seems present here.”

Federal antitrust law generally prohibits individuals or businesses from collaborating to keep out competition. But in a 1943 case involving California raisins, the Supreme Court specified that state-authorized entities could be exempt from the usual antitrust limitations. To qualify, the entity, such as a regulatory board, must pursue a “clearly articulated state policy” and must be “actively supervised” by the state.

The crucial 1943 case allowed the raisin industry, acting through the state, to regulate the handling and pricing of the crop.

The North Carolina State Board of Dental Examiners has certain state elements. It is overseen by a state legislative committee, the board members swear oaths and they file financial disclosure statements. Currently, the board has licensed about 5,600 dentists and about 7,500 dental hygienists.

However, the board is funded by industry fees rather than taxpayer dollars, and six of the eight members are dentists selected by industry representatives. Supporters say it makes sense to have dentists watch over their own industry, because they bring both expertise and cost-savings.

“States obtain valuable benefits from using market participants as part-time public officials,” attorney Hashim M. Mooppan, representing the state dental board, told the court Tuesday.

Mooppan further stressed that the state dental board members are “subject to a state law duty” and that courts should not “second guess” a state’s determination of how to set up regulatory boards. The argument resonates in some circles, as 23 states – including Florida, Kentucky and South Carolina – have allied themselves with North Carolina.

The proliferation of regulatory boards across these many states poses potential problems for judges who have to write rules for oversight.

“I really am not attracted to the idea of federal courts looking at state regulatory agencies to determine if they are really serving the public interest or they are serving some private interest,” said Justice Samuel Alito.

Licensing boards, called by some critics “cartels by another name,” now regulate some 800 professions, according to a legal brief filed by the group Public Citizen. The Sacramento, Calif.-based Pacific Legal Foundation and the libertarian Cato Institute noted, for instance, that 19 states require licenses for interior designers.

“There’s no problem with boards being staffed by active participants,” Deputy Solicitor General Malcolm L. Stewart told the court, “as long as they’re adequately supervised.”

Justice Clarence Thomas, as is his custom, was the only one of the nine justices not to speak or ask questions during the oral argument. A decision is expected by the end of June.