No. 11-1160

In the Supreme Court of the United States

FEDERAL TRADE COMMISSION,
Petitioner,
v.

PHOEBE PUTNEY HEALTH SYSTEM, INC., ET AL.,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN MEDICAL ASSOCIATION AND THE MEDICAL ASSOCIATION OF GEORGIA IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICI CURIAE*[1]

The American Medical Association (AMA) is the largest professional association of physicians, residents, and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in the AMA's House of Delegates, substantially all United States physicians, residents, and medical students are represented in the AMA's policy making process. The objectives of the AMA are to promote the science and art of medicine and the betterment of public health. AMA members practice in every medical specialty area and in every state, including Georgia.

The Medical Association of Georgia (MAG) is a professional association representing more than 6,500 physicians, residents, and medical students in the State of Georgia. Founded in 1849, MAG is the leading advocate in Georgia for the medical profession. Its physician members represent every medical specialty in every practice setting. The mission of MAG is to enhance patient care and the health of the public by advancing the art and science of medicine and by representing physicians and patients in the policy making process.

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[1] This brief is submitted with the consent of both parties. The FTC filed with the Court its blanket consent to participation by *amici* in support of either or neither party. *Amici* have also received consent of Respondents. Pursuant to Rule 37.6, *amici* represent that no party or its counsel authored any part of this brief, that no party or counsel made a monetary contribution to *amici* in connection with the preparation or submission of this brief, and that the only persons who contributed financially to the preparation and submission of this brief are the *amici* themselves.

The AMA and the MAG (together, the "Medical Associations") submit their brief on their own behalves and as representatives of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia. Its purpose is to represent the viewpoint of organized medicine in the courts.

The Medical Associations have two principal interests in this case. The AMA and MAG are comprised of physicians whose ability to care for their patients can be adversely affected by anticompetitive consolidation of hospitals. Specifically, where competition among hospitals is unlawfully reduced, it becomes easier for hospitals to dictate economic terms or to impose constraints on physician decision-making that are likely to increase prices and reduce the quality of care for patients. For this reason, the Medical Associations share the concerns of the Federal Trade Commission about the potential anticompetitive effects of hospital mergers.

Precisely because the competitive concerns raised by hospital mergers are quite real, this case may present the Court with an opportunity to hold that the state action doctrine first announced in *Parker v. Brown*, 317 U.S. 341 (1943), does not limit the authority of the FTC to challenge anticompetitive conduct of a public hospital authority established by a state legislature. The Medical Associations take no position on that issue. Rather, the Medical Associations are concerned about the potential for a decision in this case to impact the application of the state action doctrine to actions taken by professional licensure boards.

The Medical Associations believe that the federal antitrust laws, including the Federal Trade Commission Act, were not intended to apply to actions of state professional licensure boards established by state legislatures. In particular, the Associations strongly oppose the notion that professional licensure boards, such as state Boards of Medicine and Dentistry, which are comprised of practitioners with knowledge of the patient care issues that are implicated by their decisions, are not covered by the state action doctrine. Yet that is a notion that the FTC has advocated elsewhere and that its arguments in this case might suggest.[2]

We offer this brief to urge the Court, in its consideration of this case, to distinguish between the application of the state action doctrine to the respondent Hospital Authority and its application to a professional licensure board established by a state legislature such as a Board of Medicine or Dentistry. We ask this Court to craft its ruling carefully so as not to create broad precedent that may be improperly applied to factual situations not before the Court.

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[2] *See, e.g.*, Letter from F.T.C. to Alabama State Board of Medical Examiners, www.ftc.gov/os/2010/11/101109alabamabrdme.pdf (Nov. 3, 2010). The FTC also has sued State Boards over actions which the Commission sees as suppressing competition. *See, e.g.*, *N.C. Bd. of Dental Examiners*, 151 F.T.C. 607 (2011); *Va. Bd. of Funeral Dirs. & Embalmers*, 138 F.T.C. 645 (2004); *S.C. State Bd. of Dentistry*, 138 F.T.C. 229 (2004); *Mass. Bd. of Registration in Optometry*, 110 F.T.C. 549 (1988); *Okla. State Bd. of Veterinary Medical Examiners*, 113 F.T.C. 138 (1990).

SUMMARY OF ARGUMENT

The action of the FTC in this case is understandable because anticompetitive mergers of hospitals, including public hospitals, can have an adverse impact on the cost of patient care and the ability of physicians to deliver quality care. At the same time, the FTC's challenge to the merger at issue in this case raises important issues under the state action doctrine because the Hospital Authority was created by the Georgia legislature. However, the Authority has neither regulatory power over a particular line of commerce nor express legislative authorization to operate as a monopoly. Further, according to the FTC, the Authority functioned as little more than a "notary public" for the negotiations of private parties concerning the transaction at issue.

Amici take no position on how the state action issues should be resolved in this case. However, we urge this Court to distinguish this case from cases in which the FTC has challenged regulatory decisions of professional licensure boards such as state Boards of Medicine and Dentistry – decisions which are four square within the state action doctrine. Unlike the legislation which created the Hospital Authority in this case, state professional licensure boards (such as Boards of Medicine or Dentistry) are typically created by state statutes which envision a displacement of competition. Moreover, Boards of Medicine and Dentistry are not private parties but are agents of the state responsible for taking actions to protect patient health and safety.

Regardless of how this Court may decide this case, *amici* respectfully request that it do so in a manner

that does not empower the FTC to encroach on the states' longstanding authority to regulate the practice of medicine and dentistry within their borders through Boards consisting of practitioners in those fields. In particular, we ask that the Court leave no doubt that the presence of regulated professionals on state Boards of Medicine and Dentistry does not undercut the applicability of the state action doctrine to those Boards. Any other result would undermine the respect for state sovereignty on which the state action doctrine is based.

ARGUMENT

I. Anticompetitive Mergers of Hospitals, Including Public Hospitals, Adversely Affect the Ability of Physicians to Care for Patients

Anticompetitive mergers and acquisitions by public hospitals may undermine the ability of physicians to provide the care that their patients deserve. These transactions can compromise the ability of physicians to provide high quality care at hospitals – and to refer their patients for such care – because the absence of competition allows the dominant hospital to increase the prices it charges and to lower the quality of care it provides to patients. Anticompetitive hospital mergers can also harm patient care by driving physician resources away from the affected markets. *See* Martin Gaynor & Robert Town, *The Impact of Hospital Consolidation – Update*, http://www.rwjf.org/pr/product.jsp?id=74582 (Robert Wood Johnson Found.).

Of course, hospitals do not compete on price alone, but also on the quality of their services. That quality depends on a host of factors, including the hospital's

level of investment in modernizing and maintaining its physical plant and equipment, the quality and experience of the nurses and other professionals who practice there, and the resources it makes available to patients and practitioners. Too much consolidation may reduce the incentive of hospitals to compete on these factors, allowing the merged hospitals in a concentrated market to provide sub-optimal care for patients.

The potential harm to patients from anticompetitive conduct by public hospitals does not end there. Where hospitals compete, a physician considering hospital employment may weigh alternative offers and negotiate an equitable agreement. Absent competition, however, the dominant hospital can unilaterally set compensation for its employed physicians below a competitive level. Likewise, in a competitive market, a hospital's decision to "close" a department leaves "excluded" physicians the option of practicing at other hospitals in the community. *See Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2 (1984). In the long run, hospital monopsony power may drive physicians from the market. This development would, of course, exacerbate an existing and well-recognized shortage of physicians in many communities, particularly those in rural areas.

In sum, anticompetitive acquisitions by hospitals may threaten patient care through higher prices and lower quality of care for patients. However, the fact that the transaction at issue in this case was entered into by a Hospital Authority established by legislative act of the State of Georgia raises the threshold issue of

the applicability of the state action doctrine. It is to that issue that we now turn.

II. This Court Should Not Decide this Case in a Way That Calls into Question the Immunity from the Federal Antitrust Laws of Actions by State Professional Licensure Boards Such as State Boards of Medicine and Dentistry – Regardless of the Composition of Such Boards

A. The State Action Doctrine and its Application to Professional Licensure Boards

This Court first announced the "state action doctrine" in *Parker v. Brown*, 317 U.S. 341 (1943). There, plaintiff sued under the Sherman Act to enjoin a California state agency from enforcing a raisin marketing program that sought to stabilize prices under the auspices of the State of California's Agricultural Prorate Act. Although the program was anticompetitive, this Court held that the program was immune from challenge under the Sherman Act because it "derived its authority . . . from the legislative command of the State." *Id*. at 350.

The Court found nothing in the language or legislative history of the Sherman Act to suggest "that its purpose was to restrain a state or its officers or agents from activities directed by the legislature." *Id*. at 350-51. Rather, "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress 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." *Id*. at 351.

Thus, the Court concluded that the actions of a duly constituted state agency are not subject to the federal antitrust laws.

Thirty-seven years later, in *California Liquor Dealers v. Midcal Aluminum*, 445 U.S. 97 (1980), this Court held that, where a non-governmental defendant raises the state action doctrine as a defense to an antitrust action, the defendant must show that the challenged restraint was (a) imposed pursuant to a "clearly articulated and affirmatively expressed" state policy and (b) "actively supervised" by the state. *Id*. at 105-106. By contrast, the state action doctrine provides absolute immunity when invoked by a state to defend conduct by its legislative, judicial, or executive branches. For example, the Court has made clear that the two-prong *Midcal* test does not apply to conduct of a state legislature. *S. Motor Carriers Rate Conference v. United States*, 471 U.S. 48, 62-63 (1985). Nor does the *Midcal* test apply to actions of a state Supreme Court, or, most likely, to decisions by the Governor of a state. *See Hoover v. Ronwin*, 466 U.S. 558, 568 & n.17 (1984). Indeed, it would make little sense to examine whether these institutions acted under state authority or supervision since they *are* the state. *Id*. at 568.

The same conclusion holds true when a state agency exercises a legislative mandate to regulate conduct by private parties competing in a particular area of commerce. Indeed, those were precisely the circumstances in *Parker*. There the actions of a state agency, the California Agricultural Prorate Advisory Commission, were held to be immune from scrutiny under the Sherman Act because the state had "exercise[d] its legislative authority in making the

regulation" and "created the machinery" by which the Commission established the challenged prorate program. 317 U.S. at 352.

Subsequently, in *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978), a plurality of this Court held that the state action doctrine exempts from the federal antitrust laws anticompetitive conduct of a municipality when that conduct is "pursuant to state policy to displace competition with regulation or monopoly public service." *Id*. at 413. Notably, the plurality concluded that "an adequate state mandate for anticompetitive activities of cities and other governmental units exists when it is 'found from the authority given a governmental entity to operate in a particular area, that the legislature contemplated the kind of action complained of.'" *Id*. at 415 (citation omitted).

This Court has since adopted the plurality's holding in *City of Lafayette* that, to satisfy the "clear articulation prong" of the state action doctrine, it is enough that a governmental agency is acting pursuant to state legislation authorizing the agency to establish monopoly public service or regulate competitors in a specific area of commerce. Thus, in *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Court rejected the proposition that, for the conduct of a municipality to qualify for immunity, the state legislature would have had "to have stated explicitly that it expected the City to engage in conduct that would have anticompetitive effects." *Id*. at 42. Rather, it is enough if "anticompetitive effects logically would result from the broad authority to regulate." *Id*. Similarly, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court held

that a general grant of zoning power was a "clear articulation" of an intent to displace competition. *Id.* at 373.

Significantly, in *Town of Hallie*, the Court held that municipalities operating under clear state authorization are not required to show that their challenged activities are subject to "active state supervision" – as would be required of private parties under *Midcal*. Rather, "[o]nce it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality's execution of what is a properly delegated function." 471 U.S. at 47. Notably, although the Court did not squarely address the conduct of state agencies, it observed in a footnote that where "the actor is a state agency, it is likely that active state supervision would also not be required, although we do not here decide that issue." *Id.* at 46 n.10.

In the past two decades, this Court has not considered the state action doctrine in the context of an antitrust challenge to the activities of a state regulatory agency. However, federal appellate courts have applied the Court's precedents to hold that, when exercising a mandate to regulate an area of commerce, state professional licensure boards are operating under a "clearly articulated" state policy to displace competition. For example, in *Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir. 1988), the Fifth Circuit addressed whether a general grant of authority by the State of Louisiana to its Board of Certified Public Accountants, an agency comprised entirely of CPAs who competed in the profession regulated by the Board, satisfied the "clear articulation" prong. *Id.* at 1042. The Court held that

a statute which authorized the Board to "[a]dopt and enforce all rules and regulations, bylaws, and rules of professional conduct as the board may deem necessary and proper to regulate the practice of public accounting in the State of Louisiana" was a sufficient expression of state policy to satisfy the "clear articulation" requirement. *Id*. Other federal appellate courts have reached the same conclusion in cases concerning similar state legislation governing regulatory agencies. *See, e.g.*, *Porter Testing Lab v. Board of Regents*, 993 F.2d 768, 772 (10th Cir. 1993) (Board of Regents); *Hass v. Oregon State Bar*, 883 F.2d 1453, 1460 (9th Cir. 1989) (Oregon State Bar); *Cine 42nd Street Theater Corp. v. Nederlander Org.*, 790 F.2d 1032, 1043-44 (2d Cir. 1986) (Urban Development Corporation); *Charley's Taxi Radio Dispatch v. SIDA of Hawaii, Inc.*, 810 F.2d 869, 876 (9th Cir. 1987) (Hawaii Department of Transportation).

In addition, these appellate courts have held that political units tasked by the state to regulate the actions of competitors in a particular area of commerce are not required to show that they are actively supervised by the state to invoke state action immunity. *See*, *e.g.*, *Charlie's Taxi*, 810 F.2d at 876; *Cine 42nd Street Theater Corp.*, 790 F.2d at 1047; *Porter Testing Lab*, 993 F.2d at 772. As these cases reflect, where a state agency acts pursuant to "duly delegated authority," *Town of Hallie*, 471 U.S. at 47, the very concept of applying an "active state supervision" requirement makes little sense. In essence, it would amount to a requirement that the state supervise itself.

Notably, neither this Court nor federal appellate courts have regarded it as relevant whether the state

professional licensure board is comprised of full time government employees or of practitioners knowledgeable about the area which they are regulating as a state agency. Indeed, federal appellate courts have held that a state regulatory agency is not required to show active state supervision to invoke the state action doctrine – even if the agency is composed of participants in the regulated industry. For example, in *Hass*, the Oregon State Bar was held not to be subject to the "active state supervision" requirement even though twelve of the fifteen members of its Board were practicing attorneys. 883 F.2d at 1460. Similarly in *Earles*, a state Board of CPAs was found to be not subject to the "active state supervision" requirement even though the Board was "composed entirely of CPAs who compete in the profession they regulate . . . ." 139 F.3d at 1041.

Nonetheless, in its challenges to the actions taken by state Boards of Medicine and Dentistry, the FTC has contended that state agencies comprised, as required by the state legislature, of participants in the regulated industry are not entitled to the same deference as state agencies not so constituted. *See, e.g.*, *N.C. Bd. of Dental Examiners*, 151 F.T.C. 607, 620 (Feb. 3, 2011). The FTC cites in support this Court's decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). However, the FTC's reliance on *Goldfarb* is misplaced.

That case involved a minimum fee schedule issued by a county bar association and backed up by ethical opinions of the Virginia State Bar. This Court held that the fee schedule was not protected by the state action doctrine even though the Virginia State Bar was, for certain purposes, an agency of the Supreme

Court of Virginia. *Goldfarb* does not support the FTC's position for three reasons. First, the challenged fee schedule was issued by a private entity, the county bar association, that did not even purport to be a state agency. Second, although the Virginia State Bar was a state agency for some purposes, it was not acting as a state agency in issuing opinions that deviation from the county bar's fee schedule was unethical. Third, unlike state regulatory agencies, the bar associations in *Goldfarb* were not acting pursuant to an explicit directive from the state legislature.[3]

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[3] The lower court opinions cited by FTC are equally inapposite because none involved a state regulatory board acting on matters squarely within its legislative grant of authority. For example, although in *Washington State Elec. Contractors Ass'n v. Forest*, 930 F.2d 736 (9th Cir. 1991), the Ninth Circuit expressed the view that an Apprentice Council of the State of Washington may not be a state agency under the state action doctrine because it includes private members that may have their own agenda, the one page *per curiam* decision contains no reasoning, on its face is inconsistent with the Ninth Circuit's decision in *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), where the Oregon State Bar was held not to be subject to the "active state supervision" requirement even though twelve of the fifteen members of its Board were attorneys, and in any event does not hold that the Apprentice Council is not a state agency, but merely remands the case to the district court for findings on this issue. *Id*. at 737. In *F.T.C. v. Monahan*, 832 F.2d 688 (1st Cir. 1987), the First Circuit suggests, not surprisingly, that a State Board of Registration in Pharmacy may not be a state agency for purposes of the state action doctrine if it engages in activities outside of its purview or if its actions are not justified by legitimate regulatory purposes. *Id*. at 689. In *Norman's on the Waterfront, Inc. v. Wheatley*, 444 F.2d 1011 (3d Cir. 1971), it was not actions of the Board of Alcoholic Beverages that the court declared unlawful, but the law passed by the Legislature of the Virgin Islands, on the grounds that it violated the prohibition in § 3 of the Sherman Act against price fixing by imposing a mandatory price stabilization scheme.

Equally importantly, the FTC's position runs contrary to this Court's decision in *City of Columbia*. There, this Court rejected an argument that courts should inquire into the subjective motives of state regulators because doing so "would require the sort of deconstruction of the governmental process and probing of the official 'intent' that we have consistently sought to avoid." *Id*.

B. Application of the State Action Doctrine in this Case

On the basis of the state action doctrine, the lower courts in this case have held that the Hospital Authority is immune from federal antitrust laws. However, it should be noted that, in enacting the Hospital Authorities Law, the State of Georgia did not manifest an intention to displace competition by creating a system to regulate the conduct of third parties in the market. Indeed, other than the power to take property by eminent domain, Ga. Code Ann. § 31-7-75(12), a power not invoked in this case, Georgia law does not confer upon the Hospital Authority any power to compel or prohibit conduct by third parties. Rather, the Authority is authorized to

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Id. at 1016. Finally, in *Asheville Tobacco Bd. v. F.T.C.*, 263 F.2d 502 (4th Cir. 1959), this Court held that the local tobacco board of trade involved there was not a state agency because under the applicable state statute such a board "is organized primarily for the benefit of those engaged in the business; its articles of association and bylaws constitute a contract amongst the members by which each member consents to reasonable regulations pertaining to the conduct of the business." *Id*. at 509. This description of the nature of the local tobacco board of trade is not remotely applicable to Boards of Medicine or Dentistry.

"operate projects," *id*. § 31-7-75(4), which include hospitals, *id*. § 31-7-71(5); to "construct, reconstruct, improve, alter and repair projects," *id*. § 31-7-75(5); to "establish rates and charges for the services and use of the facilities of the authority," *id*. 31-7-75(10); to "sue and be sued," *id*. §31-7-75(1); to "exchange, transfer, assign, pledge, mortgage, or dispose of any real or personal property or interest therein," *id*. § 31-7-75(14); to "borrow money for any corporate purpose," *id*. § 31-7-75(17); to "acquire by purchase, lease, or otherwise … projects," *id*. § 31-7-75(4); to "lease … for operation by others any project," *id*. § 31-7-75(7); to "exercise any or all powers now or hereafter possessed by private corporations performing similar functions," *id*. § 31-7-75(21); and to "make and execute contracts and other instruments necessary to exercise the[se] powers," *id*. § 31-7-75(3). None of these powers can fairly be read to "clearly articulate" the State of Georgia's expectation that the Hospital Authority would regulate competition by independent hospitals within its geographic domain.

Thus, the facts of this case are more like those presented in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), than are the facts when a Board of Medicine or Dentistry regulates the practice of medicine or dentistry. In that case, the Court considered an attempt by a municipality to regulate cable television services pursuant to "home rule" powers delegated by the state. No immunity was found because the state had done nothing more than grant the city general powers of "home rule." *Id*. at 55. As this Court later made clear, the grant of "only the most general authority to municipalities to govern local affairs" is insufficient to satisfy the "clear

articulation" requirement of the state action doctrine. *Town of Hallie*, 471 U.S. at 47.

Similarly, other cases cited by the FTC have denied state action immunity to subordinate state entities that were granted authority to enter into contracts or manage their business affairs – but that did not have regulatory authority such as a state Board of Medicine or Dentistry or a zoning board. *See Surgical Care Ctr. of Hammond, L.C. v. Hospital Serv. Dist. No. 1*, 171 F.3d 231, 236 (5th Cir. 1999); *First Am. Title Co. v. Devaugh*, 480 F.3d 438, 456 (6th Cir. 2007); *Lancaster Cmty. Hosp. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397 (9th Cir. 1991); *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039 (10th Cir. 2011).

The FTC also alleges that in this case the challenged action was taken entirely by non-governmental parties, without involvement by the Hospital Authority, save for a perfunctory blessing of the final result. In these circumstances, the FTC argues, "active state supervision would be necessary to ensure that this transaction advances the State's regulatory policies, rather than . . . private interests." Petr.'s Br. 48.

All of these factors distinguish this case from cases brought against state licensure boards. In addition, it should be noted that the membership of a state-established professional licensure board is typically dictated by the state itself. Thus, an action taken by a professional licensing board (such as a state Medical or Dentistry Board) – including the role played by private practitioner members thereof – is the product of the regulatory "machinery" created by the state itself. *City of Lafayette*, 317 U.S. at 352. To require a

state actively to supervise a Board in this context would be effectively to bar it from choosing to regulate the practice of medicine and dentistry through the "machinery" it has chosen. By contrast, as noted above, Georgia has not placed the Hospital Authority, let alone the private corporations with which it does business, in the role of a state regulatory agency.

The Medical Associations do not express a view on the question of whether the Georgia Hospital Authorities Law "clearly articulates" a state policy allowing local Hospital Authorities, or private entities acting with their imprimatur, to establish a monopoly in hospital services within their geographic areas. We do note, however, that neither *City of Boulder* nor any of the federal appellate court decisions cited by the FTC concerned a state law that does more than simply confer existence and general authority upon a subordinate agency. None of these cases concerned state legislation that displaces unfettered competition by authorizing a state agency to regulate the conduct of third parties operating in a specific area of state commerce or that clearly authorizes the agency to operate a monopoly.

In these circumstances, *Parker*, *Town of Hallie*, and *City of Columbia* dictate that the actions taken by the state agency under such a mandate are exempt from the federal antitrust laws. Regardless of how this Court may decide the case before it, the Medical Associations urge the Court to recognize the distinctions between this case and other cases in which the conduct of a state professional licensure board is at issue.

CONCLUSION

For the foregoing reasons, the Medical Associations urge the Court, in resolving the issues before it, to distinguish this case from cases involving challenges to actions taken by state professional licensure boards such as state Boards of Medicine and Dentistry.

Respectfully submitted,

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