"I'll Sue!"—
Where Agency Immunity Ends and Liability Begins

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I. Introduction: When Might an Administrative Adjudicator (or Tribunal) Violate a Citizen's Civil Rights?

Civil rights are an expansive and significant set of rights designed to protect individuals from unfair treatment, to guarantee them equal treatment, and to free them from discrimination based on legally-protected characteristics such as race, sex, age, disability, national origin, religion, or certain other characteristics. These protections extend to a number of settings—education, employment, housing, public accommodations, and more.

When an action initiated by an administrative agency becomes the subject of a hearing and the citizen protesting the action loses, there may be accusations of discrimination made against the administrative adjudicator. Most law guaranteeing and regulating civil rights originate at the federal level, through federal legislation. Administrative adjudicators acting in their official capacity are largely considered immune from civil suits. However, 42 USC §1983 declares that officials who work for state or local government "acting under color of law" are liable to any party they deprive of rights, privileges, or immunities secured by the Constitution and other laws.

Should we be concerned when citizens against whom we have ruled threaten to sue us for violating their civil rights? Probably not. Have there been instances where litigants filing suits of this type have prevailed? Yes, and familiarity with these cases is useful, reassuring, and is the subject of this presentation.

II. Pertinent Federal Regulations

42 USC § 1983 is one of the two pivotal sections of the Civil Rights Act. It provides, in part:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

42 USC § 1988 provides for award of attorney fees to those successful in actions under §1983:

> (a) Applicability of Statutory and Common Law
> The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of titles 13, 24, and 70 of the Revised Statutes for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses

against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty.

(b) Attorney's Fees
In any action or proceeding to enforce a provision of sections 1981, 1981a, 1982, 1983, 1985 and 1986 of this title, title IX of Public Law 92-318 [U.S.C. 1681 et. seq.], the Religious Freedom Restoration Act of 1993 [42 U.S.C. 2000bb et seq.], the Religious Land Use and Institutionalized Persons Act of 2000 [42 U.S.C. 2000cc et seq.], title VI of the Civil Rights Act of 1964 [42 U.S.C. 2000d et seq.], or section 12361 of title 34, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity such officer shall not be held liable for any costs, including attorney's fees, unless such action was clearly in excess of such officer's jurisdiction.

(c) Expert Fees
In awarding an attorney's fee under subsection (b) in any action or proceeding to enforce a provision of section 1981 or 1981a of this title, the court, in its discretion, may include expert fees as part of the attorney's fee."

III. *North Carolina State Board of Dental Examiners v. Federal Trade Commission*, 574 U.S. 494 (2015).

In this case, the U.S. Supreme Court, in a 6-3 decision, declared that a state licensing board composed of persons active in the market that it regulated has immunity from antitrust law only when it is actively supervised by the state. The North Carolina Board of Dental Examiners had relied on the *Parker* immunity doctrine, established by the U.S Supreme Court in 1943 in *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307, which held that actions by state governments acting in their sovereignty did not violate antitrust law.

Facts: The North Carolina State Board of Dental Examiners ("the Board") is created by North Carolina statute and is charged with the duty of creating, administering, and enforcing a licensing system for dentists. The Board consists of eight members, six of whom must be licensed, practicing dentists who are elected by their fellow dentists. The present case involves a process called "teeth whitening," and whether that process is "the practice of dentistry" over which the Board has jurisdiction. The Board had issued nearly fifty "cease and desist" orders to non-dentist teeth whitening service providers, sometimes mentioning that the unlicensed practice of dentistry was a crime. The key to the case was the fact that a number of licensed dentists also provided teeth whitening services, but the unlicensed practitioners were undercutting the licensed dentists' prices.

The Federal Trade Commission ("the FTC") filed an administrative complaint asserting that the action of the Board constituted an anticompetitive and unfair method of competition, and

therefore violated the Federal Trade Commission Act ("the Act"). An Administrative Law Judge sustained the FTC's complaint, and the Fourth Circuit Court of Appeals upheld that decision. The Board then sought review in the Supreme Court of the United States.

As it came to the Supreme Court, the case involved two issues: (1) was the Board, as an agency of the state, entitled to claim sovereign immunity from application of the Act, and, if not, (2) was the Board's action permissible under the Act?

As it turned out, determining the answer to the second question was unnecessary, because the answer to the first question was dispositive of the case. And that answer is important to this class, because such immunity (called, in the lingo of judicial review, "*Parker* immunity"), normally applies to state agencies that are prosecuting individuals accused of violating state laws or rules governing various economic activities.

It long had been understood that, as a general matter, a state's choice to regulate particular forms of economic activity within the state, even in situations in which that regulation was anticompetitive, was immune from federal government restrictions on private parties doing the same thing. (Sherman Anti-Trust Act; Federal Trade Commission Act.) However, as we shall explain, that rule was significantly modified in *N.C. Board of Dental Examiners*.

The Board's statutory authority included the right to establish what constituted the "practice of dentistry" and to require that such a practice be carried on only by licensed dentists. No statute defined "teeth whitening" as part of the practice of dentistry but, as that procedure became popular, a number of dentists (including some on the Board) began to offer that service. Apparently, the service was profitable. However, other, non-dentistry-licensed individuals also began to offer that same service, at prices that significantly undercut those charged by the licensed dentists. (In other words, competition was working.) A number of the licensed dentists protested to the Board, which issued a number of threatening letters to the non-licensed tooth-whiteners. Soon, the non-licensed providers of the service disappeared, leaving the field to the licensed dentists alone.

All of this activity eventually caught the eye of the Federal Trade Commission which, among other things, is charged with bringing civil proceedings against persons or entities that engage in unfair competition. The FTC deemed the Board's actions in threatening non-licensed providers to be anticompetitive, and ordered the Board to cease and desist. The Board asserted that, by virtue of its status as an agency of a sovereign state, it was immune from FTC jurisdiction by virtue of "*Parker* immunity," a doctrine adopted by the Supreme Court in 1943.[1] The FTC disagreed, and issued an order directing the Board to stop its threatening acts and to notify those who had already been subjected to those acts that the acts exceeded the Board's authority and that the recipients had a right to seek declaratory rulings in state court. The Board appealed to the Fourth Circuit Court of Appeals, which affirmed the FTC. The Board then sought, and was granted, review in the Supreme Court.

The Court, in a 6-3 decision,[2] agreed with the FTC. Its reasoning is important for this and similar Boards.

The Court began by acknowledging the *Parker* rule, and by endorsing it. However, the Court noted, that rule of immunity for state agencies, with its inherent restrictions on free competition, has its limits: It is not enough that a state has created the agency or generally

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[1] *Parker v. Brown*, 317 US 341, 63 SCt 307, 87 LEd 315 (1943).

[2] Kennedy, J., joined by Roberts, C.J., and Ginsburg, Breyer, Sotomayor and Kagan, JJ., wrote for the majority; Alito, J., dissented, joined by Scalia and Thomas, JJ.

authorized the agency to regulate a particular profession; the agency must be acting "in [the state's] sovereign capacity," *i.e.*, the agency must be carrying out functions specifically assigned to it by the legislature and subject to some sort of review—by the legislature or otherwise. As the Court explained it,

> An entity may not invoke Parker immunity unless the actions in question are an exercise of the State's sovereign power. [Citation omitted.] State legislation and "decisions 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. [Citation omitted.]
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> 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.* * *[Citation omitted.] For purposes of Parker, a non-sovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself. [Citation omitted.] State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity. See Goldfarb v. Virginia State Bar, 421 US 773, 95 SCt 2004, 44 LEd 2d 572 (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").
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> Limits on state-action immunity are most essential when the State seeks to delegate its regulatory powers to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern.* * *In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.

Turning from that explanation of the rationale behind both the *Parker* rule and its limitations, the Court turned to the question whether the anticompetitive conduct engaged in by the Board should be deemed state action that was immune from the antitrust laws. To do that, the Court relied on a "two part test" articulated in a case called *California Retail Liquor Dealers Assn v. Midcal Aluminum, Inc.*, 445 US 97, 105, 100 SCt 973, 63 LEd 2d 233 ( ). That test states that 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."

In the Board's case, it was clear that neither of the two requirements—*i.e.*, the "clear articulation" requirements and the "active supervision" requirement—were met in that case. As to the former, the North Carolina legislature had never defined any policy respecting "teeth whitening," and it had not granted authority to the Board to do so. (Moreover, the Board had not promulgated any rules regarding the activity.) As to the latter, it was clear that the Board's choice of action respecting teeth whitening by non-licensed persons directly furthered the financial interests of the then-existing licensed dentist community and, indeed, the personal interests of certain members of the Board, and that there was no active or regular examination of the Board's policy choice by actors (such as the legislature) who had the power to alter the choice. For both those reasons, therefore, the Board's practices were impermissibly

anticompetitive and not protected by *Parker* immunity. The FTC ruling to that effect was affirmed.[3]

IV. *Gibson v. Berryhill*, 411 U.S. 564, 93 S.Ct. 1689 (1973)

Appellees, licensed optometrists employed by Lee Optical Co., who were not members of the Alabama Optometric Association (Association), were charged by the Association with unprofessional conduct within the meaning of the state optometry statute because of their employment with the company. The complaint was filed with the Alabama Board of Optometry (Board), all members of which were Association members.

> "It is sufficiently clear from our cases that those with substantial pecuniary interest in legal proceedings should not adjudicate these disputes. Tumey v. Ohio, 273 U.S. 510, 47 S.Ct. 437, 71 L.Ed. 749 (1927). And Ward v. Village of Monroeville, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972), indicates that the financial stake need not be as direct or positive as it appeared to be in Tumey. It has also come to be the prevailing view that '(m)ost of the law concerning disqualification because of interest applies with equal force to . . . administrative adjudicators.' K. Davis, Administrative Law Text s 12.04, p. 250 (1972), and cases cited. The District Court proceeded on this basis and, applying the standards taken from our cases, concluded that the pecuniary interest of the members of the Board of Optometry had sufficient substance to disqualify them, given the context in which this case arose. As remote as we are from the local realities underlying this case and it being very likely that the District Court has a firmer grasp of the facts and of their significance to the issues presented, we have no good reason on this record to overturn its conclusion and we affirm it."

V. Discussion Questions

1. Does the agency, board, or commission for which you adjudicate suffer from the same structural infirmities that were a problem for the *North Carolina Board of Dental Examiners*?

2. Are there legislative or other measures that appear desirable, related to your agency, board or commission, in light of the *North Carolina Board of Dental Examiners* decision?

3. What is the scope of the disability created by the Supreme Court's decision in *North Carolina Board of Dental Examiners*? Would it apply to all agency, board, or commission actions? Only some? (And, if the latter, which ones?)

4. What is the role of "heightened scrutiny" and the "rule of necessity" in cases to which the *North Carolina Board of Dental Examiners* might apply?

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[3] As noted, there was a dissent in the case, but it is not the purpose of this summary to engage in an academic analysis of which side of the argument appears more correct, from the point of view of the law established by the Sherman Act. It is sufficient to note that the majority rule drew six votes, while the dissent has since lost the late Justice Scalia; the rule is very unlikely to be changed in the foreseeable future.

VI. Conclusion

If adjudicators are performing their duties on behalf of the agency, board, or commission, as defined by statute and regulations, they're acting as "arms of the state" and are protected from 1983 suits by 11th Amendment immunity unless their actions violate clearly established statutory or constitutional rights.

Adjudicators are entitled to discretionary-function immunity for functions not specified by statute or regulation if they meet two criteria:

(1) Disputed act must be discretionary (involves an element of judgment or choice)
(2) The judgment or choice is of the kind that the discretionary function of the exception was designed to shield (*i.e.*, actions based on considerations of social, economic, or political policy).

APPENDIX

Analyzing the History and Extent of 11th Amendment Immunity from 1983 Suits

Amendment XI: Suits Against States

"The Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State."

***Parker* Immunity Doctrine**

The *Parker* immunity doctrine is an exemption from liability for engaging in antitrust violations. It applies to the state when it exercises legislative authority in creating a regulation with anticompetitive effects, and to private actors when they act at the direction of the state after it has done so. The doctrine is named for the Supreme Court of the United States case in which it was initially developed, *Parker v. Brown*, 317 U.S. 341, 63 S.Ct. 307 (1943).

The rationale behind *Parker* immunity is that Congress, in enacting the Sherman Act, evidenced no intent to restrain state behavior. *Parker v. Brown* at 351.

For the doctrine to apply, the state must act as a sovereign, rather than as a "participant in a private agreement or combination by others for restraint of trade. *Parker* at 351-2. Antitrust laws do not bar anticompetitive restraints that sovereign states impose "as an act of government". See also, *Massachusetts School of Law at Andover, Inc. v. American Bar Association*, 107 F.3d 1026, 1035 (3d Cir. 1997). "The key question is whether the allegedly anticompetitive restraint may be considered the product of sovereign state action. If it is not, then even if sectors of state government are involved, the activity will not constitute "state action" under the *Parker* doctrine and will not receive immunity." *A.D. Bedell Wholesale Co., Inc. v. Philip Morris Inc.*

Moreover, the *Parker* court found that "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." *Parker* at 351. Instead, the anticompetitive conduct "must be compelled by direction of the State acting as a sovereign," not merely prompted by state action, to be immunized under the state action doctrine. *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 791 (1975).

"State action," as defined in cases granting *Parker* immunity, is qualitatively different from "state action" in other contexts such as the Fourteenth Amendment. While the Fourteenth Amendment can cover inadvertent or unilateral acts of state officials not acting pursuant to state policy the term "state action" in antitrust adjudication refers only to government policies that are articulated with sufficient clarity that it can be said that these are in fact the state's policies, and not simply happenstance, mistakes, or acts reflecting the discretion of individual officials.

Because it is grounded in federalism and respect for state sovereignty, this interest in protecting the acts of the sovereign state, even if anticompetitive, outweighs the importance of a freely competitive marketplace, especially in the absence of contrary congressional intent.

"State action" as defined by the *Parker* doctrine differs from the government "actions" which result from petitioning. The two are not coextensive. A finding of immunity from injury caused by government action under the *Noerr-Pennington* doctrine[4] does not require a finding of *Parker* state action. If the government "action" taken is the result of petitioning, *Noerr-Pennington* immunity attaches to a broader range of government action than does *Parker* immunity. *Noerr-Pennington* immunity protects petitioning, so long as it is not a sham. See *Subscription Television v. S. Cal. Theatre Owners Ass'n*, 576 F.2d 230, 233-34 (9th Cir. 1978) (holding defendants immune from antitrust liability under *Noerr-Pennington* even though their petitioning led to the passage of an unconstitutional initiative). Under *Noerr-Pennington* immunity, the government actions which flow from valid petitioning need not qualify as *Parker* "state action." Petitioning "would be considerably chilled by a rule which would require an advocate to predict whether the desired legislation would withstand a constitutional challenge in the courts and to expose itself to a potential treble antitrust action based on that prediction." *Subscription Television*, 576 F.2d at 233.

Without clear congressional intent to preempt, federal laws should not invalidate state programs. "In 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." *Parker* at 351. While individual anticompetitive acts of state governments may be considered unwise or counterproductive, the decision to make such choices lies within the sovereign power of the states. Congress did not intend to override important state interests in passing the Sherman Act. "The general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators." *City of Columbia v. Omni Outdoor Advertising*, 499 U.S. 365, 374 (1991)

The Sherman Act was enacted to address the unlawful combination of private businesses. See *Apex Hosiery Co. v. Leader*, 310 U.S. 469, 493 n.15 (1940). ("The history of the Sherman Act as contained in the legislative proceedings is emphatic in its support for the conclusion that 'business competition' was the problem considered and that the act was designed to prevent restraints of trade which had a significant effect on such competition."). "There is no suggestion of a purpose to restrain state action in the Act's legislative history." *Parker* at 313. The Sherman Act was passed "in the era of 'trusts' and of 'combinations' of businesses and of capital organized and directed to control of the market by suppression of competition in the marketing of goods and services, the monopolistic tendency of which had become a matter of public concern." *Apex*, 310 U.S. at 493. Given its focus on the problems of private monopolies and combinations, it is not surprising that the Sherman Act does not set out to curb clearly defined anticompetitive state actions. See *California Retail Liquor Dealers Assoc. v. Midcal Aluminum, Inc*., 445 U.S. 97, 104 (1980).

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[4] The doctrine is so named because it flows from both *Eastern Railroad Presidents Conference v. Noerr Motor Freight, Inc*, 365 U.S. 126, 135 (1961) and *United Mine Workers v. Pennington*, 381 U.S. 657, 670 (1965). Under the doctrine, private entities are immune from liability under the antitrust laws for attempts to influence the passage or enforcement of laws, even if the laws they advocate for would have anticompetitive effects. The doctrine is grounded in the First Amendment protection of political speech, and "upon a recognition that the antitrust laws, 'tailored as they are for the business world, are not at all appropriate for application in the political arena."

When a state clearly acts in its sovereign capacity, it avoids the constraints of the Sherman Act and may act anticompetitively to further other policy goals. See *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 54 (1985). For example, state governments frequently sanction monopolies to ensure consistent provision of essential services like electric power, gas, cable television, or local telephone service. But "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." *Parker*, 317 U.S. at 351 (states cannot authorize private parties to set a price and then enforce those prices without any evaluation of their reasonableness). Only an affirmative decision by the state itself, acting in its sovereign capacity, and with active supervision, can immunize otherwise anticompetitive activity.

Applying *Midcal* is unnecessary if the alleged antitrust injury was the direct result of a clear sovereign state act. *Massachusetts School of Law at Andover v. American Bar Association*, 107 F.3d 1026, 1036 (3d Cir. 1997); *Sessions Tank Liners, Inc. v. Joor Mfg., Inc.*, 17 F.3d 295, 299 (9th Cir. 1994) (finding immunity from antitrust liability where "injuries for which [the plaintiff] seeks recovery flowed directly from government action").

In *Massachusetts School of Law*, the Court held that where "the states are sovereign in imposing the bar admission requirements [the alleged anticompetitive restraints], the clear articulation and active supervision requirements . . . are inapplicable." 107 F.3d at 1036. There is less need for scrutiny "when the conduct is that of the sovereign itself . . . [because] the danger of unauthorized restraint of trade does not arise." *PTI, Inc. v. Philip Morris, Inc.*, 100 F.Supp. 2d 1179, 1196 (C.D. Ca.2000) Similarly, concerns about the legitimacy of the action are reduced. The test to determine sufficient state involvement as sovereign is unnecessary when the state legislature or state supreme court acts directly. As the Supreme Court explained: "Closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization.... When the conduct is that of the sovereign itself, on the other hand, the danger of unauthorized restraint of trade does not arise. When the conduct at issue is in fact that of state legislature or supreme court, we need not address issues of 'clear articulation' and 'active supervision.' *Hoover v. Ronwin*, 466 U.S. 558, 569 (1984).

However, when it is uncertain whether an act should be treated as state action for the purposes of *Parker* immunity, courts apply the test set forth in *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980) to "determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws." *Patrick v. Burget*, 486 U.S. 94, 100 (1988). "First, the challenged restraint must be one clearly articulated and affirmatively expressed as state policy; second, the policy must be actively supervised by the State itself." 445 U.S. 97, 105.

1. The Supreme Court has recognized state legislative and judicial action as sovereign under *Parker*. But "closer analysis is required" when the action is less directly that of the legislature or judiciary. *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984) (relying in part on *Midcal*). One Court of Appeals has decided that executive officers and agencies "are entitled to *Parker* immunity for actions taken pursuant to their constitutional or statutory authority, regardless of whether these

particular actions or their anticompetitive effects were contemplated by the legislature," without the need for *Midcal* analysis. *Charley's Taxi Radio Dispatch Corp. v. SIDA of Haw., Inc*., 810 F.2d 869, 876 (9th Cir. 1987).

2. *Parker*, by its own terms, immunizes only states. In order to give effect to *Parker i*mmunity, private parties to state action must also be immune. *Armstrong Surgical Ctr., Inc. v. Armstrong County Memorial Hospital*, 185 F.3d 154, 159 (3d Cir. 1999) ("If relief is sought solely for injury as to which the state would enjoy immunity under *Parker*, the private petitioner also enjoys immunity.") Otherwise, plaintiffs could sue only the private parties and by winning antitrust judgments against them, could thwart state policies as if there were no state immunity. No state could enter into an agreement with private groups, even to further clear state policies, because the potential liability of the private groups would prevent them from joining. Artful pleading should not frustrate state policy. *S. Motor Carriers Rate Conference, Inc., v. United States*, 471 U.S. 48, 56-57 (1985) (absent immunity for private parties, a "plaintiff could frustrate any [State] program merely by filing suit against the regulated private parties")."If *Parker* immunity attaches, it would also reach the private participants of the tobacco Multistate Settlement Agreement." *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)).

The Supreme Court, in *Midcal*, required that states meet two conditions before antitrust immunity will attach: "First, the challenged restraint must be 'one clearly articulated and affirmatively expressed as state policy'; second, the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105 (quoting *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 410 (1978)). This clearly articulated state policy may be inferred "if suppression of competition is the 'foreseeable result' of what the statute authorizes". *Omni*, 499 U.S. at 372-73 (quoting *Hallie v. Eau Claire*, 471 U.S. 34, 42 (1985)). Under *Midcal*, a state "may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details. Actual state involvement, not deference to private price-fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." *Federal Trade Comm'n v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

To qualify as state action under the *Midcal* test, "the challenged restraint must be one 'clearly articulated and affirmatively expressed as state policy.'" 445 U.S. at 104 (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (opinion of Brennan, J.)). A government entity need not "be able to point to a specific, detailed, legislative authorization" to assert a successful Parker defense. *Lafayette*, 435 U.S. at 415.But it must be evident that under the "clear articulation" standard the challenged restraint is part of state policy. As the Supreme Court has stated, "Midcal confirms that while a State may not confer antitrust immunity on private persons by fiat, it may displace competition with active state supervision if the displacement is both intended by the State and implemented in its specific details". *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992).

The second prong of the *Midcal* test is whether the resulting antitrust violation was "actively supervised" by the state. This standard is more problematic. The essential inquiry of the "actively

supervised" prong is to determine if the "anticompetitive scheme is the State's own". *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). The active supervision prong "requires 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 v. Burget*, 486 U.S. 94, 101 (1988)."Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." Id. at 100-01. "Such active state review is clearly necessary where private defendants are empowered with some type of discretionary authority in connection with the anticompetitive acts (*e.g.* to determine price or rate structures)." *Zimomra*, 111 F.3d at 1500. Rubberstamp approval of private action does not constitute state action. A state must independently review and approve the anticompetitive behavior to satisfy this prong of the *Parker* doctrine. *Patrick*, 486 U.S. at 101 ("The active supervision requirement mandates that the State exercise ultimate control over the challenged anticompetitive conduct."); *Ticor Title Ins. Co. v. FTC*, 998 F.2d 1129, 1139 (3d Cir. 1993).

A "hybrid restraint" is discussed by Justice Stevens in his concurrence in *Rice v. Norman Williams Co.*. 458 U.S. 654, 666-67 (1982). They are not purely private actions, nor are they entirely attributable to the state in the manner of a legislative act. Hybrid restraints are not the type of sovereign state action found in *Massachusetts School of Law* or *Zimomra*, that avoid *Midcal* treatment. Instead, hybrid restraints involve a degree of private action which calls for *Midcal* analysis. See *Rice*, 458 U.S. at 666 ("Hybrid restraints of this character require analysis that is different from a public regulatory scheme on the one hand, and a purely private restraint on the other.")

In ***Urbano v. Board of Managers*, 415 F.2d 247 (3d Cir.1969)**, *cert. denied*, 397 U.S. 948, 90 S.Ct. 967, 25 L.Ed.2d 129 (1970) the court devised a comprehensive, nine-factor test to determine whether an agency of the state was entitled to immunity from suit, including 1983 actions. The 9 factors, <u>no one of which is conclusive</u>, consisted of (*Urbano*, 415 F.2d at 251–52):

1. The local law and decisions defining the status and nature of the agency involved and its relation to the sovereign;
2. Whether, in the event plaintiff prevails, the payment of the judgment will have to be made out of the state treasury;
3. Whether the agency has the funds or the power to satisfy the judgment;
4. Whether the agency is performing a governmental or proprietary function;
5. Whether the agency has been separately incorporated;
6. The degree of autonomy the agency has over its operations;
7. Whether the agency has the power to sue and be sued and to enter into contracts;
8. Whether its property is immune from state taxation; and
9. Whether sovereign has immunized itself from responsibility for agency's operations.

In ***Fitchik v. New Jersey Transit Rail Operations, Inc.*, 873 F.2d 655, 659 (3d Cir. 1989)**, the court used the above factors to determine if railway workers who were injured in a crash could prevail in a personal injury action against a transportation corporation created by the state. The Court concluded:

> "[T]he state of New Jersey in 1979 chose to enter the mass transit business….by the practical means of establishing a transportation corporation sheltered from the perennial delays, costs, and frustrations of a governmental structure….[T]he state retained control over corporate policies and the power to select the members of the board. Moreover, so long as the state maintains its statutory policy to provide mass public transportation and exercises its powers of control over NJT, the state remains implicitly obligated to sustain the financial vitality of the corporation it created. Thus, NJT is the alter ego of the state and New Jersey never stripped it of eleventh amendment immunity. As such, NJTRO is entitled to eleventh amendment immunity in an action against it in federal court."

***Hof v. Janci*, 2017 WL 3923296 (U.S.Dist.Ct.D.New Jersey 09/07/2017)** distilled the nine "*Urbano* factors" into three "*Fitchik* factors" to determine whether the 11th Amendment provided immunity to suits alleging violations of state civil rights laws or 42 USC §§ 1983 and 1988:

> "11th Amendment's grant of sovereign immunity applies to § 1983 claims brought against a state. *See Quern v. Jordan*, 440 U.S. 332, 345 (1979). 11th Amendment immunity also extends to certain actions against state agencies and departments so long as the state itself is the real party in interest. *Fitchik v. N.J. Transit Rail Operations*, 873 F.2d 655, 659 (3d Cir. 1989). Similarly, the NJCRA has also been interpreted to grant immunity to "states and state officials acting in their official capacity." *Estate of Lagano v. Bergen Cnty. Prosecutor's Office*, 769 F.3d 850, 856 (3d Cir. 2014). In determining whether sovereign immunity applies, the Court must consider:
>
> (1) the source of the funds that would pay for the judgment;
> (2) the status of the entity under state law; and
> (3) the entity's degree of autonomy. *Fitchik*, 873 F.3d at 659."
>
> Held: Because all three *Fitchik* factors were satisfied, defendants were entitled to sovereign immunity. However, the 11th Amendment doesn't preclude suits brought against State officials in their *individual* capacities, even if the challenged conduct was part of their official duties. In *Hof v. Janci* the Defendants argued that Plaintiff's claims must be dismissed because Janci and his employees, *in their official capacity*, are not "persons" amenable to suit under § 1983. The Defendants further argued that local government bodies and their officials are "persons" under § 1983, but states, state agencies, and state officials acting in their official capacities are not.
>
> The court explains how/to what extent the 11th Amendment protects *individuals* from 1983 suits:
>
> > "42 USC § 1983 creates a cause of action against a "*person* acting under color of law." In this context, "person" likewise does not extend to the state itself or state agencies or officials in their official capacity. The

question thus becomes whether Defendants Janci and his employees were acting as arms of the state when performing the alleged offending conduct. *Coleman v. Kaye*, 87 F.3d 1491 (3d Cir. 1996), governs this analysis. When county prosecutors "engage in classic law enforcement and investigative functions, they act as officers of the state." *Coleman*, 87 F.3d at 1505. When, prosecutors perform administrative functions unrelated to the duties involved in criminal prosecutions, they are not acting as arms of the state but as county officials who remain subject to § 1983 suits. It is the *category* of the actions taken, not the alleged wrongfulness of the actions, that determines whether officials as individuals are subject to § 1983 suits."

***Glasford v. New York State Dept. of Social Serv*., 878 F.Supp. 384 (U.S. Dist., S.D. NY 1992):** Father brought civil rights action against state social service agency challenging placement of his name in register of suspected child abusers. On agency's motion to dismiss, the court held: (1) agency's placement of father's name in register of suspected child abusers did not deprive father of constitutionally protected liberty or property interest because his employment prospects had not suffered and his relationship with his family was not altered; and (2) even if father was deprived on constitutionally protected liberty and property interest, father received all process that was due—state statutes established a detailed process for investigation and review of abuse and gave the subject of the report the right to an administrative hearing upon completion of the investigation. At the administrative hearing, the hearing officer determined that "some evidence" existed to support the report. The court held that the state social services agency's use of "some evidence" standard of review to support placement of father's name in register of suspected child abusers was not impermissibly vague in violation of due process.

***Farrar v. Hobby*, 113 S.Ct. 566 (1992):** (1) Civil rights plaintiff who recovers damages in any amount qualifies as "prevailing party" under civil rights attorney fee provision; but (2) court should consider extent of plaintiff's recovery in fixing reasonable attorney fee award; (3) civil rights plaintiffs who recovered nominal damages of only one dollar on claim for $17 million in compensatory damages were not entitled to attorney fee award under civil rights statute.

***Connick v. Thompson*, 131 S.Ct. 1350 (2011):** Orleans Parish District Attorney's Office conceded that, in prosecuting respondent Thompson for attempted armed robbery, prosecutors violated *Brady v. Maryland*, 373 U.S. 83, 83 S.Ct. 1194, by failing to disclose a crime lab report. Because of his robbery conviction, Thompson elected not to testify at his later murder trial and was convicted. A month before his scheduled execution, the lab report was discovered. Reviewing court vacated both convictions and Thompson was found not guilty in a retrial on the murder charge. He filed suit against the district attorney's office under 42 U.S.C. § 1983, alleging that the *Brady* violation was caused by the office's deliberate indifference to an obvious need to train prosecutors to avoid such constitutional violations. Held: (1) Prior, unrelated Brady violations by attorneys in his office was insufficient to put district attorney on notice of need for further training, and (2) need for training was not so obvious that district attorney's office was

liable on failure-to-train theory when nondisclosure of blood-test evidence had resulted in defendant's wrongful conviction and in his spending 18 years in prison.

***Card et al v. Dempsey*[5], 445 F.Supp. 942 (U.S. Dist. E.D.Mich. 1978):** Action was brought claiming that state official and his agents violated constitutional and statutory rights in imposing a 90-day limit on retroactive food stamp benefits following administrative hearings. After a voluntary settlement was reached in which plaintiffs received all the relief they prayed for, plaintiffs move for award of attorney fees against the state. Held: (1) Eleventh Amendment was not a bar to an award of attorney fees against the state; (2) the fact that plaintiffs were represented by a federally funded legal services organization didn't preclude award of attorney fees; and (3) award of attorney fees was reasonable under the circumstances in the instant case.

***Sturgess v. Negley*, 761 F.Supp. 1089 (U.S. Dist. Delaware 1991):** Permanent part-time police officers, who could only be terminated for cause, brought § 1983 action alleging denial of procedural due process. Held: (1) Plaintiffs possessed property interest in their positions and no due process was provided to them prior to losing their jobs; (2) Town officials were not entitled to qualified immunity. Government officials performing discretionary functions are immune from liability for damages so long as their conduct does not violate clearly established statutory or constitutional rights which a reasonable person would know. Town officials should have known of clearly established rights of public employees to procedural due process prior to termination; (3) Even when quick removal of public employee is necessary, employee is still **entitled to oral or written notice of the charges** against him, **explanation of employer's evidence against him** and an **opportunity to present his side of the story** prior to being terminated.

Board/Agency May Be Awarded Attorney Fees Spent Defending Frivolous 1983 Cases

***Fox v. Vice*, 131 S.Ct. 2205 (2011):** When a plaintiff's civil rights lawsuit involved both frivolous and non-frivolous claims, a court may grant reasonable fees to the defendant under § 1988, but only for costs that the defendant would not have incurred but for the frivolous claims, abrogating *Balmer v. HCA, Inc*., 423 F.3d 606.

***Christianburg Garment Co. v. Equal Employment Opportunity Comm*., 98 S.Ct. 694 (1978)** Attorney's fees should be awarded to prevailing defendant when the plaintiff's action is shown to have been frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.

[5] Dempsey was director of Michigan Department of Social Services.