No. 16-50017

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TELADOC, INC. ET. AL.,
Plaintiffs-Appellees,

v.

TEXAS MEDICAL BOARD, ET. AL.,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(JUDGE ROBERT L. PITMAN)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLEES

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission both enforce the federal antitrust laws and have a strong interest in whether interlocutory orders refusing to dismiss an antitrust claim under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), are immediately appealable under the collateral order doctrine. Courts have dismissed immediate appeals from such orders in prior enforcement actions for lack of appellate jurisdiction. *See* Order, *United States v. Blue Cross Blue Shield of Mich.*, No. 11-1984 (6th Cir. Feb. 23, 2012), *reh'g en banc denied* (Mar. 28, 2012); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006).

The government also has a strong interest in the proper application of the state action doctrine. That doctrine protects the deliberate policy choices of sovereign states to displace competition with regulation or monopoly public service. Overly broad application of the state action doctrine, however, sacrifices the important benefits that

antitrust laws provide consumers and undermines the national policy favoring robust competition. [1]

We file this brief under Federal Rule of Appellate Procedure 29(a) and urge the Court to dismiss the appeal for lack of jurisdiction. If the Court finds jurisdiction, we urge the Court to reject application of the state action doctrine to this case because the "active supervision" requirement of the doctrine is not satisfied.[2]

STATEMENT OF ISSUES PRESENTED

Whether an order denying a motion to dismiss an antitrust claim under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), is immediately appealable as a collateral order.

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[1] FTC staff is investigating the underlying actions that are the subject of this appeal and also issued guidance regarding the application of the state action doctrine to state regulatory boards controlled by market participants. *See FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* (Oct. 14, 2015), available at https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

[2] The district court had no need to, and did not, reach the doctrine's "clear articulation" requirement. We take no position on whether Defendants-Appellants met their burden to satisfy that requirement or on the merits of Plaintiffs'-Appellees' claims.

Whether the active supervision requirement of the state action doctrine is satisfied.

STATEMENT

Plaintiff-Appellee Teladoc describes itself as providing "telehealth services," using telecommunication to provide medical care "for a fraction of the cost of a visit to a physician's office, urgent care center, or hospital emergency room." Amended Complaint ¶ 2. Teladoc's physicians (who are licensed by Texas but may be physically located outside of Texas), dispense medical advice and may prescribe medications to a person in Texas based on information provided by that person, the person's medical records, and a telephone consultation.

Defendant-Appellant Texas Medical Board (we refer to the Board and its members collectively here as "TMB") is a state agency that regulates the practice of medicine in Texas. Teladoc alleges that the TMB, which has 19 members, is "made up of a majority of active market participants in the profession the TMB regulates." Amended Complaint ¶¶ 9, 22. Teladoc further alleges that, beginning in 2010, the TMB revised and adopted several new rules under the Texas Administrative Code that significantly restrict competition from telehealth services.

Those actions culminated in the TMB's adoption of a rule on April 10, 2015, that requires a face-to-face contact between an individual and a physician before the physician can issue a prescription, regardless of whether face-to-face contact or a physical examination is medically necessary. Teladoc alleges that, "[o]f the 14 board members who voted in favor of the new rule, 12 are active physicians." *Id*. ¶ 12.

Teladoc alleges that two TMB rules, the 2015 rule and one adopted in 2010 that restricts video consultations, violate Section 1 of the Sherman Act, 15 U.S.C. § 1, by "dramatically restricting telehealth services in Texas" and raising prices. Amended Complaint ¶¶ 155-56. Teladoc requested a preliminary injunction barring the 2015 rule's enforcement, which the court granted. The TMB then moved to dismiss Teladoc's claims, contending that the state action doctrine bars the antitrust claim. That doctrine provides that federal antitrust law does not reach anticompetitive conduct that is (1) in furtherance of a clearly articulated state policy to displace competition, and (2) actively supervised by the state. In an Order filed December 14, 2015, the court denied the motion, ruling that the state action doctrine did not apply because the requirement of "active supervision" was not met.

On January 8, 2016, the TMB appealed, contending that the denial of its motion is immediately appealable as a final judgment under the collateral order doctrine.

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over this appeal. There is no final judgment resolving the underlying litigation, and an order denying a motion to dismiss an antitrust claim under the state action doctrine is not immediately appealable under the collateral order doctrine.

The collateral order doctrine applies only to a "small class" of rulings that satisfy "stringent" conditions. *Will v. Hallock*, 546 U.S. 345, 349 (2006). Interlocutory orders rejecting state action arguments do not fall into this small class. State action is a defense to antitrust liability predicated on the absence of any indication in the text or history of the Sherman Act that Congress sought to condemn state-imposed restraints of trade. Unlike qualified or sovereign immunity, the state action doctrine does not create a right to avoid trial. The state action doctrine thus does not satisfy the requirement that an order rejecting its application be "effectively unreviewable" on appeal from a

final judgment. Orders denying a state action defense also do not qualify for review under the collateral order doctrine because state action issues are not completely separate from the merits of the underlying antitrust action. The Fourth and Sixth Circuits have squarely held that denials of motions to dismiss predicated on the state action doctrine are not immediately appealable. *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986).

Although this Circuit has held that the collateral order doctrine applies to some state action orders, *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), that case is wrongly decided. *Martin* also is out of step with the Supreme Court's recent collateral order jurisprudence and was undermined by this Court's *en banc* discussion of *Parker* in *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1*, 171 F.3d 231 (5th Cir. 1999). It therefore should not be followed.

In any event, *Martin* does not control here. It held only that an interlocutory denial of a state action defense falls within the collateral order doctrine "to the extent that it turns on whether a municipality or

subdivision acted pursuant to a clearly articulated and affirmatively expressed state policy." 86 F.3d at 1397. That expressly limited holding does not apply to this case, which involves a different type of defendant—a state regulatory board dominated by active market participants—and a different element of the state action test—the "active supervision" requirement. The Supreme Court's decision in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), makes clear that such regulatory boards are not equivalent to municipalities for state action purposes. Indeed, to extend *Martin* to state regulatory boards would be inconsistent with *Dental Examiners*.

If this Court does find that it has jurisdiction, however, it should hold that the state action doctrine does not shield the TMB's rules from federal antitrust scrutiny because the TMB did not carry its burden to show active supervision. There is no evidence that any disinterested state official reviewed the TMB rules at issue to determine whether they promote state regulatory policy rather than TMB doctors' private interests in excluding telehealth—and its lower prices—from the Texas market. The legislative and judicial review mechanisms cited by the TMB do not satisfy the "constant requirements of active supervision"

that the Supreme Court has identified. *Dental Examiners*, 135 S. Ct. at 1116.

ARGUMENT

I. The Court Lacks Jurisdiction Because the District Court's Order Is Not Collaterally Appealable.

The collateral order doctrine is narrow and does not apply to an order denying a motion to dismiss an antitrust claim under the state action doctrine.[3] *Martin* was wrong to reason otherwise, but it does not control here and should not be extended to state regulatory boards controlled by active market participants.

A. The Collateral Order Doctrine Is Narrow.

The Supreme Court has identified a "small class" of collateral rulings that, although not disposing of the litigation, are appropriately deemed final and immediately appealable because they are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is

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[3] The TMB has the burden of establishing this Court's jurisdiction. *See* Fed. R. App. P. 28(a)(4); *Thibodeaux v. Vamos Oil & Gas Co.*, 487 F.3d 288, 293 (5th Cir. 2007).

adjudicated." *Will v. Hallock*, 546 U.S. 345, 349-51 (2006); *see Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009).

The "requirements for collateral order appeal have been distilled down to three conditions: that an order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349. An order that "fails to satisfy any one of these requirements . . . is not appealable under the collateral order exception to [28 U.S.C.] § 1291." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *see S.C. State Bd.*, 455 F.3d at 441.

The three conditions are "stringent" (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)), because otherwise "the [collateral order] doctrine will overpower the substantial finality interests [28 U.S.C.] § 1291 is meant to further," *Will*, 546 U.S. at 349-50, and "swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered," *Digital Equip.*, 511 U.S. at 868 (citation omitted). "Permitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration'

and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk*, 558 U.S. at 106 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

For these reasons, the Supreme Court repeatedly emphasized that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). "In case after case in year after year, the Supreme Court has issued increasingly emphatic instructions that the class of cases capable of satisfying this stringent test should be understood as small, modest, and narrow." *United States v. Wampler*, 624 F.3d 1330, 1334 (10th Cir. 2010) (internal quotation marks omitted). The Court's "admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 558 U.S. at 113 (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995)); *see also id.* at 113-14 (discussing relevant amendments to

the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, and Congress's enactment of 28 U.S.C. § 1292(e)).

Moreover, the collateral order doctrine's applicability to interlocutory rulings must be ascertained in light of the entire class of such orders and not based on the features of individual cases. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988). For this reason, courts are "cautious in applying the collateral order doctrine, because once one order is identified as collateral, *all* orders of that type must be considered collaterally." *United States v. Guerrero*, 693 F.3d 990, 997 (9th Cir. 2012) (internal quotation omitted).

B. An Order Denying a Motion to Dismiss an Antitrust Claim Under the State Action Doctrine Is Not Collateral.

1. State action determinations are not effectively unreviewable on appeal from a final judgment.

An order is "effectively unreviewable" when it protects an interest that would be "essentially destroyed if its vindication must be postponed until trial is completed." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-99 (1989). The quintessential such interest is a "right not to be tried," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800

(1989). But the Supreme Court has rejected arguments that a right to collateral appeal arises whenever a district court denies "an asserted right to avoid the burdens of trial." *Will*, 546 U.S. at 351. "[I]t is not mere avoidance of a trial, but *avoidance of a trial that would imperil a substantial public interest*, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at 353 (emphasis added).

As the Court explained in *Will*, "[p]rior cases mark the line between rulings within the class [of appealable collateral orders] and those outside." 546 U.S. at 350. "On the immediately appealable side" are orders denying: (1) absolute Presidential immunity; (2) qualified immunity; (3) Eleventh Amendment sovereign immunity; and (4) double jeopardy. *Id.* "In each case," the Court noted, "some particular [public] value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." *Id.* at 352-53.

An order denying a motion to dismiss an antitrust claim under the state action doctrine is materially different from these types of appealable collateral orders, because the state action doctrine is a defense to antitrust liability, not a right to be free from suit. *See Huron Valley Hosp.*, 792 F.2d at 567. In *Surgical Care Center*, this Court acknowledged *en banc* that the state action doctrine is an interpretation of the "reach of the Sherman Act" and has a "parentage [that] differs from the qualified and absolute immunities of public officials" and from Eleventh Amendment immunity. 171 F.3d at 234.

The Supreme Court based the *Parker* doctrine not on concerns about facing trial, but instead on the assumption that Congress did not intend the Sherman Act to include "an unexpressed purpose to nullify a state's control over its officers and agents." 317 U.S. at 351. *Accord S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985) (*Parker* was "premised on the assumption that Congress . . . did not intend to compromise the States' ability to regulate their domestic commerce."). The Supreme Court interprets the reach of the Sherman Act consistent with that assumption. Thus, the state action doctrine is not an "immunity" from suit but a "recognition of the limited reach of

the Sherman Act." *Acoustic Sys. Inc. v. Wenger Corp.*, 207 F.3d 287, 292 n.3 (5th Cir. 2000).

Despite this origin of the state action doctrine, this Court and others have continued to refer loosely to "*Parker* immunity" as a "convenient shorthand," while recognizing that "immunity" is "an inapt description" of the doctrine. *Surgical Care Ctr.*, 171 F.3d at 234. That shorthand labeling does not make state action rulings equivalent to the narrow classes of "immunity" cases that present the concerns that justify collateral appeal. As the Fourth Circuit observed: "*Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.' *Parker* therefore recognizes a 'defense' qualitatively different from the immunities described in *Will*, which focus on the harms attendant to litigation itself." *S.C. State Bd.*, 455 F.3d at 444. *See also Huron Valley Hosp.*, 792 F.2d at 567 ("the [state action] exemption is not an 'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim").

Claims that effective government will be disrupted by subjecting governmental defendants to the burdens of discovery do not warrant

expansion of the collateral order doctrine. That effect may occur in many cases, antitrust or non-antitrust, in which a state or federal government entity is a defendant. If an order were rendered "effectively unreviewable" merely because its denial led to litigation burdens for the government, the final judgment rule would be drastically reduced in scope. Thus, the Supreme Court explained in *Mohawk* "[t]hat a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . has never sufficed" to justify collateral order appeals. 558 U.S. at 107 (internal citations omitted; ellipsis in original).

If a district court erroneously rejects a state action defense in denying a motion to dismiss, and the defendant later is found liable, that judgment can be reversed on appeal. Again, that post-judgment appeal may afford only an "imperfect" remedy in some cases does not justify making all such orders immediately appealable as of right. *Mohawk*, 558 U.S. at 112. Moreover, a defendant who believes her state action defense was rejected because of a legal error "may ask the

district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)." *Id*. at 110-11.[4]

2. State action issues are not completely separate from the antitrust merits.

An issue is not completely separate from the merits when it "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). As explained in section B(1) above, state action issues overlap with the merits of an antitrust claim because the state action doctrine delineates, in part, the reach of the Sherman Act—that is, whether the challenged conduct falls within the statutory prohibition. If the state action requirements are met, then the conduct falls outside that prohibition, which is a paradigmatic merits determination. *Cf. Morrison v. Nat'l Australia Bank Ltd.*, 561

[4] The TMB recently did just that, asking the district court to certify for interlocutory appeal the portion of the December 14, 2015 order denying its motion to dismiss the antitrust claim under the state action doctrine. Defs.' Mot. to Certify Order for Appeal, No. 1:15-CV-00343-RP, Doc. No. 90 (July 6, 2016). On August 15, 2016, the court denied the motion.

U.S. 247, 253-254 (2010) (holding that the question of a securities statute's reach "is a merits question").

In any event, the state action determination requires a factual analysis of the nature of economic competition in the specific market at issue, together with the regulatory constraints on that competition, and thus, it overlaps with the merits question of whether the conduct is an unreasonable restraint of trade. "The analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct" typically is "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Huron Valley Hosp.*, 792 F.2d at 567; *S.C. State Bd.*, 455 F.3d at 442-43 & n.7 (the state action inquiry is "inherently 'enmeshed' with the underlying [antitrust] cause of action"). "[T]ime and again the Supreme Court has refused to find an order to be 'collateral' when entertaining an immediate appeal might require it to consider issues intertwined with—though not identical to—the ultimate merits inquiry." *S.C. State Bd.*, 455 F.3d at 441-42.

Moreover, it is immaterial whether a court sometimes can evaluate a state action defense without considering facts and circumstances relevant to the antitrust merits. The separateness determination must evaluate "the entire category to which a claim belongs," not the facts of particular cases, *Digital Equip.*, 511 U.S. at 868. The Court held in *Van Cauwenberghe,* 486 U.S. at 529, that *forum non conveniens* determinations were not collaterally appealable, although some do not "require significant inquiry into the [underlying] facts and legal issues," because "[i]n fashioning a rule of appealability . . . we [must] look to categories of cases, not to particular injustices" and there was substantial overlap "in the main."

C. This Court Should Disregard its *Martin* Decision.

In *Martin*, this Court reasoned that the state action doctrine serves the same purposes as Eleventh Amendment immunity and the absolute and qualified immunity afforded to public officials. 86 F.3d at 1395-96. Thus, orders denying state action protection to a municipality or state subdivision should be appealable as collateral orders in the same way that orders denying those immunities are treated as final judgments. *Martin* should not be followed, however, because the analogy it drew

between the state action doctrine and absolute, qualified, and Eleventh Amendment immunities is incorrect. In a subsequent decision, *Surgical Care Center,* this Court explained, *en banc* and unanimously, that "immunity" is an "inapt" description of the state action doctrine; the term "*Parker* immunity" is most accurately understood as "a convenient shorthand" for "locating the reach of the Sherman Act." 171 F.3d at 234. This Court went on to note, contrary to *Martin*, that *Parker* protection for state officials does not follow the Eleventh Amendment. *See id*.

Contrary to the supposition in *Martin*, the state action doctrine serves purposes entirely distinct from those underlying qualified, absolute, and Eleventh Amendment immunities afforded to public officials. The protections of the state action doctrine apply to conduct by private parties as well as governmental defendants. As the Fourth Circuit explained, the state action defense may be asserted in antitrust suits against municipalities, suits that seek purely equitable relief, and suits brought by the federal government. But such suits do not offend a state's dignity, and thus qualified or sovereign immunity is not available. *S.C. State Bd.*, 455 F.3d at 446-47. As explained above, the state action doctrine is not concerned with the dignity interests of the

states or the impact of damage suits on the functioning of government. Rather, its purpose is to permit states to engage in economic regulation and shield anticompetitive conduct when states enact deliberate policies to do so.

Martin thus failed to heed the Supreme Court's admonition to courts of appeals just two years earlier to "view claims of 'a right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equip.*, 511 U.S. at 873.

Martin also was decided several years before *Will* and *Mohawk* emphasized that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). *Martin* does not acknowledge the narrowness of the collateral order doctrine in any way, and it creates an entirely new class of collaterally appealable orders not recognized by the Supreme Court. *See Huron Valley Hosp.*, 792 F.2d at 568 ("We . . . decline to extend the right of immediate appeal any farther than the Supreme Court already has extended the right."). *Martin* therefore is out of step with the Supreme Court's collateral order jurisprudence.

D. In Any Event, *Martin* Does Not Control This Case.

Martin states as its holding that the denial of the state action exemption is immediately appealable "to the extent that it turns on whether a municipality or subdivision acted pursuant to a clearly articulated and affirmatively expressed state policy." 86 F.3d at 1397. That holding is readily distinguishable from this case. As this Court expressly recognized, *Martin*'s application of the collateral order doctrine is limited to situations in which appeal is taken by a "**municipality** or **subdivision**," as opposed to a private party. *Acoustic Sys.*, 207 F.3d at 291 (bold in original). The TMB is not a municipality, political subdivision, or other organ of local government. The Supreme Court in *Dental Examiners* treated state boards composed of market participants as "similar to private trade associations vested by States with regulatory authority[.]" 135 S. Ct. at 1114; *see also id*. at 1121 (Alito, J., dissenting) ("The Court thus treats these state agencies like private entities.").[5]

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[5] Because the Supreme Court treats state regulatory boards like private entities, this Court's holding in *Acoustic Systems,* that private defendants may not take collateral order appeals of denials of state action protection, 207 F.3d at 288, confirms the lack of appellate

Nor should *Martin*'s application of the collateral order doctrine be extended to appeals taken by state regulatory boards like the TMB. This Court explained that *Martin* was based on "concerns that public defendants would be subjected to the costs and general consequences associated with discovery and trial." *Acoustic Sys.,* 207 F.3d at 293. The policy basis of *Martin* was to shield public defendants from the burden of the judicial process.

But the Supreme Court in *Dental Examiners* rejected efforts to treat state regulatory boards like typical public defendants. Although municipalities "lack the kind of private incentives characteristic of active participants in the market," 135 S. Ct. at 1112, boards controlled by active market participants have structural incentives to engage in anticompetitive conduct. *See id*. at 1111. Therefore, a board controlled by active market participants seeking state action protection bears the additional burden of showing that its conduct was actively supervised by the state. *See id*. at 1114 (board controlled by active market

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jurisdiction here. To the extent that *Acoustic Systems* follows *Martin*'s analysis of the state action doctrine, however, *Acoustic Systems* is inconsistent with— and fails even to mention—the Court's *en banc* discussion of *Parker* in *Surgical Care Center.*

participants "must satisfy [the] active supervision requirement"); *id*. at 1122 (Alito, J., dissenting) (majority opinion puts the burden on a state board to "demonstrate that the State actively supervises its actions"). State regulatory boards like the TMB therefore cannot escape the judicial process.

II. The Active Supervision Requirement of the State Action Doctrine Is Not Satisfied Here.

State action protection from the antitrust laws "is disfavored, much as are repeals by implication." *Dental Examiners*, 135 S. Ct. at 1110. For state regulatory boards like the TMB, "active supervision" is required because licensing boards present the "structural risk of market participants' confusing their own interests with the State's policy goals." *Id*. at 1114, 1106. Here, Teladoc alleges that the private economic interests of some doctors, rather than state policy, unreasonably threaten to impede the innovative and cost-effective provision of medical care in Texas.

A. The TMB Is Controlled by Active Market Participants.

The district court was correct to apply the active supervision requirement when Teladoc alleged as a fact (that must be taken as true on a motion to dismiss) that a majority of the TMB's members are

active market participants. The Court in *Dental Examiners* explained that a critical feature of state regulatory boards, for purposes of the state action doctrine, is whether the board is controlled by active market participants, because this feature triggers a requirement that the board's actions be supervised by a disinterested state actor.

The district court properly disregarded the TMB's effort to distinguish *Dental Examiners* on the ground that the governor of Texas may appoint or remove the TMB's members (TMB Br. 38-39). The Court in *Dental Examiners* gave no weight to how the North Carolina dental board members were selected. The fact of overriding importance was that the board members were active market participants. The TMB nowhere explains how the manner of selection or removal negates the private economic interests that practicing doctors have while serving as Board members.

The purpose of the active supervision requirement is to ensure that an anticompetitive decision promotes state policy, not private interests. The Supreme Court did not suggest that, to be deemed an active market participant, an individual must have a personal financial interest in the specific subject matter at issue. Rather, the Court

described active market participants as those who have a "private interest" in the "occupation the board regulates." *Dental Examiners*, 135 S. Ct. at 1114. And actively practicing physicians, regardless of specialty, may have incentives to protect traditional office-based medical practices from the competitive threat posed by doctors offering tele-medicine services.

The district court recognized that the majority of TMB members are active participants in the "occupation" of medicine, and it therefore properly disregarded the TMB's argument that because the board members may be specialists they do not compete with Teladoc's physicians (TMB Br. 40).[6] The TMB regulates "the practice of medicine in Texas," 22 Tex. Admin. Code § 161.1; *see* § 174.1 (authorizing TMB to adopt rules "relating to the practice of medicine"), not just specialty

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[6] The TMB misleadingly quotes from *Dental Examiners* that the breadth of a regulator's mandate "reduce[es] the risk that it would pursue private interests while regulating any single field" (Br. 40). The Court used that language to describe a *municipal government* that regulates "across different economic spheres," 135 S. Ct. at 1113, whereas all fields subject to the TMB's rules are medical.

practices. The TMB members are properly deemed "active market participants," which triggers the requirement of active supervision.[7]

B. The TMB Has Not Demonstrated that the State Actively Supervised its Challenged Rules.

The district court correctly concluded that the TMB did not show that its 2010 and 2015 rules met the requirements of active supervision. Once it is determined that active supervision is necessary, as is the case here, the defendant must, at minimum, satisfy four "constant requirements" designed to ensure that the challenged actions of the state agency accord with state policy. *Dental Examiners*, 135 S. Ct. at 1116-17.

The TMB errs in suggesting (TMB Br. 35-36) that these requirements can be ignored in favor of a context-specific risk assessment. *Dental Examiners* explained that "limits" on the state

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[7] *Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado*, 2015 WL 9484490, *8 (D.P.R. Dec. 29, 2015), cited at TMB Br. 40, does not say that because regulatory board doctors could be specialists there is "less risk" of self-dealing than in *Dental Examiners*. The court there held that *Dental Examiners* did not apply because (i) the defendant workers' compensation Board of Directors was not controlled by active market participants, and (ii) although a majority of the Board's Industrial Medical Council were physicians, the Council was an advisory body and could not act without the Board's approval.

action doctrine "are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern." 135 S. Ct. at 1111. Whatever indicia of good faith might exist in a particular circumstance cannot alter the inherent "structural risk" that the Court identified and relied upon. *Id*. at 1114. The "flexibility" urged by the TMB cannot displace the specific factors that the Court identified in *Dental Examiners* and the precedents the Court followed. Those requirements are the foundation of the active supervision test, which is why the Court described them as "constant." Only if the "constant requirements" are satisfied will "the adequacy of supervision *otherwise* . . . depend on all the circumstances of a case." *Id*. at 1117 (emphasis added).

The first "constant requirement" of active supervision is review of the substance of the anticompetitive decision, not merely the procedures by which it was adopted. *Dental Examiners*, 135 S. Ct. at 1116 (supervisor must "review the substance" of the decision); *Patrick v. Burget,* 486 U.S. 94, 102 (1988) (Health Division's "statutory authority over peer review relates only to a hospital's procedures; that authority

does not encompass the actual decisions made by hospital peer-review committees").

The TMB contends that state court judicial review meets this requirement. The Supreme Court has not determined whether judicial review can provide the requisite active state supervision. It is clear, however, that traditional forms of judicial review of administrative actions, such as limited inquiries into whether an agency acted within its delegated discretion, followed proper procedures, or had some factual basis for its actions, are insufficient. *See Patrick* 486 U.S. at 105 ("constricted review does not convert the action of a private party . . . into the action of the State for purposes of the state-action doctrine"); *Shahawy v. Harrison*, 875 F.2d 1529, 1535-36 (11th Cir. 1989) (judicial review "for procedural error and insufficient evidence" was not active supervision).[8]

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[8] The TMB's out-of-context quotation from the FTC's brief in *Dental Examiners* does not advance the TMB's argument (Br. 36). The FTC did not say there that the dental board's action beyond its authority under state law was the reason the board's conduct was subject to antitrust scrutiny, nor did the FTC argue that judicial review would have been sufficient. Moreover, the Court's opinion makes clear that whether the dental board exceeded its authority is not the relevant supervisory question. 135 S. Ct. at 1116 ("Whether or not the Board

Applying this principle, the district court correctly rejected the TMB's reliance on Administrative Procedure Act-type review. The TMB cites cases supposedly showing that Texas courts engage in substantive review of agency rules (Br. 10-11, 45-47), but as the district court found (Order at 13), that review is limited to determining whether the decision exceeded the agency's statutory authority.[9] A Texas reviewing court "presume[s] that an agency rule is valid, and the party challenging the rule has the burden of demonstrating its invalidity." *Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n*, 452 S.W.3d 479, 481 (Tex. App. – Austin 2014, pet. dism'd). The courts do not evaluate whether agency rules are "wise, desirable, or

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exceeded its powers under North Carolina law" there was no evidence of state control of the board's actions).

[9] *Lambright v. Tex. Parks and Wildlife Dep't.*, 157 S.W.3d 499, 510 (Tex. App. – Austin 2005, no pet.) (issue is whether agency "exceeded its authority"); *Tex. Orthopedic Ass'n v. Tex. State Bd. of Podiatric Med. Exam'rs*, 254 S.W.3d 714, 722 (Tex. App. – Austin 2008, pet. denied) ("the Board exceeded its authority by promulgating the Rule"); *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 474 (Tex. App. – Austin 2012, pet. denied) (issues for decision "turn principally on whether the rules in question were within TBCE's statutory authority to adopt").

necessary." *Lambright*, 157 S.W.3d at 510-11. That is a constricted form of review, not a fully independent, substantive assessment. And simply having the statutory authority to act is not sufficient: the Court has explained that authority to act and authority to act anticompetitively are different issues. *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 372 (1991); *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1012 (2013).[10]

The second "constant requirement" is that "the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy." *Dental Examiners*, 135 S. Ct. at 1116. That is, the supervisor must possess authority to make an independent judgment to approve or disapprove the board's decision and need not defer to the board. *See also Pinhas v. Summit Health*, 894 F.2d 1024, 1030 (9th Cir. 1989) (judicial review was not active supervision where

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[10] The TMB also cites *Texas Medical Ass'n v. Texas Workers Compensation Comm'n*, 137 S.W.3d 342 (Tex. App. – Austin 2004, no pet.), which refers loosely to "substantive" challenges to a Commission rule. But the court's actual holdings on these challenges were (i) that the Commission did not unlawfully delegate its responsibility to a federal agency, and (ii) that the Commission's fee guidelines did not lack a legitimate factual or legal basis. The court did not evaluate the wisdom or policy of the Commission's decisions and did not substitute its judgment for that of the Commission.

"reviewing court may not reject the judgment of the governing board even if it disagrees with the board's decision") (citation omitted). The district court therefore properly rejected the TMB arguments based on judicial review limited to whether the decision exceeded the agency's statutory authority, or judicial review that defers to the agency. For example, Texas law provides that in judicial review of agency decisions under the substantial evidence rule (or when the law does not define the scope of judicial review), the court may not make an independent judgment "on the weight of the evidence on questions committed to agency discretion." Tex. Code Ann. § 2001.174.

The supervisor's exercise of independent judgment must be focused on the board's specific decision. *Dental Examiners*, 135 S. Ct. at 1116 (supervisor reviews "particular decisions to ensure they accord with state policy"). Here, the district court correctly recognized that a legislative review of whether the entire regulatory agency should continue to exist, as in the case of the Texas "sunset" statute cited by the TMB (Br. 43, 51), is not focused on the specific TMB decision at issue and therefore is insufficient. The same conclusion applies to the "sunshine" and ethics statutes cited by the TMB (Br. 42): None

provides review of the Board's specific anticompetitive rules at issue in this case, or offers a determination of whether the Board's rules accord with a clearly articulated state policy to displace competition.

The third "constant requirement" is that the active supervision must actually occur, not be merely possible. *Dental Examiners*, 135 S. Ct. at 1115-16 ("there is no evidence here of any decision by the State to initiate or concur with the Board's actions" and "mere potential for state supervision is not an adequate substitute for a decision by the State").

The TMB argues it is sufficient that judicial review is *available* by right. But if no one has both standing to sue and the willingness to undertake the burden of a state court challenge to a Board rule, the rule takes effect without the state making any supervisory "decision" whatsoever. That limited "mere potential" for review is insufficient. *Cf. FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 638 (1992) ("negative option," by which rates became effective if not rejected within a set time, was not active state supervision; there must be an actual "decision by the State"). Judicial review that is contingent on a plaintiff filing a lawsuit shifts the burden of initiating supervision away from the court. No challenge ever may be brought if the benefits of a successful lawsuit will

be shared by many but the costs must be borne by a party capable of seeking judicial review. Judicial review that is contingent provides no certainty that the state ever will make a reviewing "decision," and therefore is not "active supervision."[11]

Similarly, the district court properly rejected the TMB's reliance on Tex. Code Ann. § 2001.032, providing that proposed agency rules are referred to standing committees of the legislature, which "may" provide a statement (not binding on the TMB) to the agency "supporting or opposing adoption of a proposed rule." The statute does not mention, much less require, that any committee determine whether an agency rule promotes a state policy to displace competition rather than serves the private interests of market incumbents, which is the standard

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[11] Amicus curiae American Antitrust Institute's theory, that pre-implementation judicial review might suffice if available by right, does not bear scrutiny. First, under that theory, whether there is "active supervision" would depend on the identity of the antitrust plaintiff. *See* AAI Br. 18 n.14 (explaining that prospective judicial review would be "insufficient" in antitrust cases brought by the federal antitrust agencies or by consumers). Nothing in *Dental Examiners*, the Court's state action jurisprudence generally, or the federalism policies that underlie the doctrine supports making state action protection turn on the identity of the plaintiff who challenges a board rule. Second, like the TMB's position, judicial review that may be available but offers no certainty of a state decision is insufficient.

enunciated by *Dental Examiners*. In addition, Teladoc alleges as a fact that "[n]o statement was issued by a standing committee regarding New Rule 174 or New Rule 190.8." Amended Complaint ¶ 125.

The fourth "constant requirement" is that the state supervisor must not be an active market participant. *Dental Examiners*, 135 S. Ct. at 1117. The TMB gave the district court no evidence (nor does its brief on appeal offer any) that any disinterested state official ever substantively reviewed the Board rules challenged here to determine whether the rules promote a clearly articulated state policy to displace competition rather than the private interests of active market participants.[12]

Finally, the TMB contends (Br. 52-54) that the district court's judgment intrudes on state sovereignty. But *Dental Examiners* explains that "respect for federalism" is the very purpose of requiring adherence to the two-pronged test for state action. *See* 135 S. Ct. at

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[12] The TMB (Br. 48) quotes *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir. 1996), but that court later deleted all of the quoted language. *See* 86 F.3d 1028. As modified, that decision says only that the Florida Public Service Commission *actually did* supervise FPL through rulemaking and contested agency proceedings. *See* 86 F.3d at 1029.

1110. The active supervision requirement "is an essential prerequisite" (*id*. at 1113) precisely because it promotes federalism values, by "ensur[ing] that the States accept political accountability for anticompetitive conduct they permit and control." *Id*. at 1111. The district court's judgment thus protects, rather than violates, state sovereignty.

The TMB further implies that the district court's judgment would inhibit Texas from staffing its licensing boards with active market participants. But *Dental Examiners* also rejected that argument. *See* 135 S. Ct. at 1115. Active supervision "need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision." *Id*. at 1116. But *Dental Examiners* does require the TMB to show that its anticompetitive decisions are actively supervised. As the court correctly concluded, the TMB failed to do so.

CONCLUSION

The Court should dismiss this appeal for lack of appellate jurisdiction. If the Court finds jurisdiction, it should affirm the district court's order with respect to the state action doctrine.

Respectfully submitted.

September 9, 2016 /s/ Steven J. Mintz

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,950 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

September 9, 2016 /s/ Steven J. Mintz
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CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that on September 9, 2016, I electronically filed the foregoing Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellees with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the CM/ECF System. I also sent 7 copies to the Clerk of the Court by FedEx 2-Day Delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

September 9, 2016

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