No. 16-50017

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TELADOC, INCORPORATED; TELADOC PHYSICIANS, PHYSICIAN ASSISTANT; KYON HOOD; EMMETTE A. CLARKE,

Plaintiffs-Appellees,

v.

TEXAS MEDICAL BOARD; MICHAEL ARAMBULA, M.D., Pharm D., in his official capacity; MANUEL G. GUAJARDO, M.D., in his official capacity; JOHN R. GUERRA, D.O., M.B.A., in his official capacity; J. SCOTT HOLLIDAY, D.O., M.B.A., in his official capacity; MARGARET MCNEESE, M.D., in her official capacity, ALLAN N. SHULKIN, M.D., in his official capacity; ROBERT B. SIMONSON, D.O., in his official capacity; WYNNE M. SNOOTS, M.D., in his official capacity; KARL SWANN, M.D., in his official capacity; SURENDRA K. VARMA, M.D., in her official capacity; STANLEY WANG, M.D., J.D., MPH, in his official capacity; GEORGE WILLEFORD, III, M.D., in his official capacity; JULIE K. ATTEBURY, M.B.A, in her official capacity; PAULETTE BARKER SOUTHARD, in her official capacity,

Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Texas, Austin Division

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

RICHARD M. BRUNELL
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, DC 20036
(202) 600-9640

CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that amicus curiae American Antitrust Institute is a non-profit corporation and, as such, no entity has any ownership interest in it. The American Antitrust Institute has no financial interest in the outcome of this litigation.

s/ Richard M. Brunell

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The American Antitrust Institute (AAI) is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through education, research, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1] AAI has filed amicus briefs in several state-action cases to ensure that the state-action defense is properly limited and not used to immunize particular anticompetitive conduct that the State does not clearly intend to authorize, including *N.C. State Bd. of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015) and *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013). AAI takes no position on the merits of this case. It submits this brief to advance the sound development of the state-action defense as it applies to state regulatory boards comprised of market participants.

[1] All parties have consented to the filing of this brief. No counsel for a party has authored this brief in whole or in part, and no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than amicus curiae has made a monetary contribution to its preparation or submission. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions.

INTRODUCTION

This is an interlocutory appeal of the district court's denial of defendants' motion to dismiss an antitrust complaint on state-action grounds. Plaintiffs are Teladoc, Inc., a public company that provides "telehealth" services nationwide, Teladoc's associated Texas physicians group, and two Texas physicians who are members of the group (collectively, "Teladoc"). Defendants are the Texas Medical Board and the fourteen members of the Board who voted in favor of the principal rule at issue (collectively, "the Board"), twelve of whom are licensed physicians.[2]

According to the amended complaint, Teladoc has been wrangling with the Board for several years over the legality of Teladoc's business model. First, the Board amended its telemedicine rules to require an in-person visit with a patient before a physician may provide "telemedicine medical care," i.e. remote treatment using real-time video. 22 Tex. Admin. Code § 174.7. As a result, Teladoc ceased offering its members the option of video consultations in Texas, but continued offering telephone-only services, which were not specifically covered by the rule. Then, the Board claimed that Teladoc and its physicians were in violation of a general practice rule when they prescribe drugs without an in-person physical examination. Teladoc successfully challenged the Board's interpretation of the

[2] Teladoc withdrew its complaint against the medical board and board members in their individual capacities, as well as any claim for damages, and is seeking only injunctive and declaratory relief against board members in their official capacities. It also seeks attorneys' fees and costs.

rule under the Texas Administrative Procedure Act ("APA") on procedural grounds. In response, the Board adopted an "emergency" amendment to the rule, which a Texas court also struck down because there was no emergency. Thereafter, the Board engaged in a formal rulemaking, ultimately adopting an amendment to Rule 190.8, which provided that it was inconsistent with public health and welfare for a physician to issue a "prescription of any dangerous drug[3] or controlled substance without first establishing a defined physician-patient relationship," which must include, among other things, establishing a diagnosis based on a "physical examination that must be performed by either a face-to-face visit or in-person evaluation." 22 Tex. Admin. Code § 190.8(L). The Board adopted the rule by a vote of 14 to 1, with the dissenting vote coming from a non-physician member.

Rather than challenge the Board yet again in state court, Teladoc brought this case alleging that the adoption of the rules amounted to a conspiracy in restraint of trade among the members of the Board. Teladoc also brought a claim under 42 U.S.C. § 1983 on the theory that the rules violated the Dormant Commerce Clause. Teladoc sought and obtained a preliminary injunction to enjoin the enforcement of amended Rule 190.8. *Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529 (W.D. Tex. 2015). The district court held that Teladoc was likely to

[3] Any prescription medication is considered to be a "dangerous drug." *See* Tex. Health & Safety Code § 483.001(2).

succeed on the merits of its antitrust claim under a "quick look" or full rule-of-reason analysis.[4]

The district court denied the Board's motion to dismiss on state-action grounds. The parties agreed that because the controlling majority of Board members were active market participants, *North Carolina State Board of Dental Examiners* required the Board to satisfy both the clear-articulation and active-supervision prongs of the state-action defense. The district court concluded that the Board failed to show active supervision, rejecting the Board's argument that judicial or legislative review of its rules was adequate. Having reached this conclusion, the court declined to address the clear-articulation requirement. The court also rejected the Board's motion to dismiss the Dormant Commerce Clause claim, and held that Teladoc's challenge to Rule 174.7 was not untimely.

SUMMARY OF ARGUMENT

1. This Court lacks jurisdiction over the appeal because the collateral-order doctrine generally does not apply to orders denying state-action immunity. The Board's reliance on *Martin v. Memorial Hospital*[5] is misplaced because *Martin* applies only to a municipality or subdivision, and its reasoning has been called into question by subsequent Fifth Circuit and Supreme Court cases.

[4] For purposes of the motion for injunctive relief, the Board did not contest the existence of a conspiracy nor assert an immunity defense.

[5] *Martin v. Memorial Hosp.*, 86 F.3d 1391 (5th Cir. 1996).

2. If the Court reaches the merits of the appeal, the Board's clear-articulation argument is questionable. In particular, the Board's reliance on its general authority to regulate the practice of medicine is insufficient to establish that Texas has articulated a clear policy to allow the alleged anticompetitive rules. To the extent this Court's decision in *Earles v. State Board of Certified Public Accountants*[6] says otherwise, it has been implicitly overruled by a subsequent en banc decision of this Court and by a decision of the Supreme Court.

3. As to active supervision, we address only the role of judicial review. The district court reached the correct result in holding, on this record, that judicial review under Texas law does not satisfy the active-supervision requirement. However, our reasoning is different from the court's and Teladoc's. Prospective judicial review of an agency rule can constitute active supervision if it is sufficiently rigorous and may be readily obtained prior to the rule going into effect. While there is some prospect that judicial review under the Texas law would meet this standard, at this point it is unclear whether such rigorous review would be likely. Accordingly, the Board failed to meet its burden of proof on this issue.

[6] *Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033 (5th Cir. 1998).

ARGUMENT

I. THIS COURT LACKS JURISDICTION TO HEAR THE APPEAL

A. Appellants' Reliance on *Martin* to Establish Collateral Appealability is Misplaced

Appellants cite *Martin v. Memorial Hospital* for the proposition that they may collaterally appeal the district court's denial of state-action immunity. App. Br. 2. However, *Martin* is inapposite. This Court has construed "[t]he express holding of *Martin*" as limiting "extension of the collateral order doctrine to the denial of a claim of state action immunity to . . . a *municipality* or *subdivision*." *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 291 (5th Cir. 2000) (internal quotation marks omitted). *Acoustic Systems* held that orders denying state-action immunity to private parties are not collaterally reviewable. And the Supreme Court in *Dental Examiners* squarely placed members of regulatory boards controlled by active market participants in the "private" category requiring active supervision under *Midcal*, in contrast to municipal officials who lack "private incentives" to "pursue private interests while regulating." 135 S. Ct. at 1112-13. *Martin* should not be extended because denials of state-action immunity to regulatory boards controlled by active market participants do not satisfy the core criteria for appealability under the collateral order doctrine.

Martin also has been heavily criticized. The Antitrust Division of the Department of Justice has stated that "*Martin* was wrong when it was decided, and its reasoning has been undermined by later Supreme Court and Fifth Circuit decisions." Brief for the United States of America as Amicus Curiae Supporting Plaintiff-Appellee 20-26, SolarCity Corp. v. Salt River Project Agricultural Improvement and Power District, No. 15-17302 (9th Cir., filed June 7, 2016).

B. Appellants Have Not Met Their Burden to Show the Class of State-Action Orders Denying Immunity to Boards Controlled by Active Market Participants Satisfies the Collateral Order Doctrine

To establish this Court's jurisdiction under the collateral order doctrine, the appellant bears the burden of showing three "stringent" conditions: the district court's order must "[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 v. Hallock*, 546 U.S. 345, 349 (2006); *see also Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *Acoustic Systems*, 207 F.3d at 290. Appellants have failed to establish that orders denying state-action immunity to regulatory boards controlled by active market participants satisfy the second and third of those conditions.

An issue is not "completely separate from the merits of the action," *Will*, 546 U.S. at 349, if 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) (internal quotation omitted). State-action analysis often is "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567 (6th Cir. 1986); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 442-43 & n.7 (4th Cir. 2006) (the state-action inquiry is "inherently 'enmeshed' with the underlying [antitrust] cause of action"); *see also FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) (Breyer, J.) (holding that evaluation of state-action defense asserted by regulatory board required development of the facts as to the nature of the anticompetitive conduct at issue).[7]

An order is "effectively unreviewable on appeal from a final judgment," *Will*, 546 U.S. at 349, when the interest it protects 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). Such an interest is "the right not to be tried," *Midland Asphalt Corp. v. United States,* 489 U.S. 794, 801 (1989), but "any

[7] While *Martin* found on its facts that the immunity question could be determined independently of the merits, it recognized this was not always true in other cases. *See Martin*, 86 F.3d at 1396 (distinguishing *Huron Valley* on these grounds). Accordingly, *Martin* directly contradicts the Supreme Court's and this Circuit's repeated admonition that courts must evaluate the appealability of "the entire category to which a claim belongs," *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994), and "eschew[] a case-by-case approach to deciding whether an order is sufficiently collateral," *Cunningham v. Hamilton Cty.*, 527 U.S. 198, 206 (1999).

legal rule can be said to give rise to a 'right not to be tried' if failure to observe it requires the trial court to dismiss the indictment or terminate the trial." *Id*.

This Court has held that "the relevant inquiry in determining whether an 'immunity' is subject to immediate appeal under the collateral order doctrine is whether the asserted immunity is from suit or merely from liability." *Martin v. Halliburton*, 618 F.3d 476, 483 (5th Cir. 2010); *see Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 178 (5th Cir. 2009) ("There is a crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.").

The *Parker* doctrine "recognizes a 'defense' qualitatively different from the immunities described in *Will*." *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006). "Simply put, *Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.'" *Id.* This Court has recognized that "immunity is an inapt description [of the state-action doctrine], for its parentage differs from the qualified and absolute immunities of public officials." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc). Rather, "*Parker* immunity" is but "a convenient shorthand" and "more accurately a strict standard for locating the reach of the Sherman Act." *Id*.; *see also Acoustic Systems,* 207 F.3d at 292 n.3; *Huron*

Valley Hosp., 792 F.2d at 567 (state-action doctrine "more akin to a defense to the original claim").

Mindful that "section 1291 requires courts of appeals to view claims of a 'right not to be tried' with skepticism, if not a jaundiced eye," *Digital Equip. Corp.*, 511 U.S. at 873, this Court routinely holds that orders denying immunity merely from liability rather than from suit are not collaterally appealable. *See, e.g.*, *Fobbs v. Davis*, 515 F. App'x 330 (5th Cir. 2013); *Davalos v. Johns*, 460 F. App'x 396 (5th Cir. 2012); *Houston Cmty. Hosp. v. Blue Cross & Blue Shield of Tex., Inc.*, 481 F.3d 265 (5th Cir. 2007). The Court should do so here and dismiss this appeal for lack of jurisdiction. If there are grounds for interlocutory review in a particular case, discretionary review is available under 28 U.S.C. § 1292(b).

II. THE BOARD'S CLEAR-ARTICULATION ARGUMENT IS QUESTIONABLE

"Under *Midcal,* 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." *Dental Examiners*, 135 S. Ct. at 1112 (citations and brackets omitted). The Supreme Court has emphasized "the close relation between *Midcal*'s two elements," both "ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). "[G]iven the fundamental national

values of free enterprise and economic competition that are embodied in the federal antitrust laws," *Phoebe Putney*, 133 S. Ct. at 1010, both prongs ensure a real conflict between state regulatory policies and the antitrust laws before immunity is granted. *See* 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 221, at 55 (4th ed. 2013) ("[E]ven the strongest concern[] for federalism requires federal law to yield to state law only when the state has declared its contrary interest.").

A. The Board's General Power to Regulate the Medical Profession Is Insufficient to Establish That the Legislature Must Have Foreseen and Implicitly Endorsed the Anticompetitive Rules at Issue

The Board claims that the clear-articulation requirement is satisfied based on its general authority to regulate the medical profession and to take disciplinary action against physicians when they fail to comply with professional standards. App. Br. 35 (citing Tex. Occ. Code § 164.051(a)(6)). According to the Board, this Court's decision in *Earles* dictates this conclusion because it is a "'foreseeable result' of enacting such a statute that the Board *may* actually promulgate a rule that has anticompetitive effects." 139 F.3d at 1043 (emphasis added).[8] However, insofar as *Earles* stands for the proposition that a board's general authority to

[8] The Board argues that *Earles*' ruling on clear articulation is still good law notwithstanding that *Dental Examiners* overturned *Earles*' holding that active supervision for self-interested boards is not required. However, *Earles*' lack of concern as to the dangers of market-participant boards may have infected its clear-articulation analysis. *Cf.* Areeda & Hovenkamp, ¶ 224, at 106 ("Once the state has determined to place industry regulation in the hands of its practitioners," a court should "expect a clear authorization from the state not only recognizing the board's power, but also contemplating the challenged regulation.").

regulate a profession satisfies the clear-articulation requirement as to *any* anticompetitive regulation of the profession, it cannot be reconciled with the tighter standard of foreseeability adopted by this Court en banc in *Surgical Care Center* and by the Supreme Court in *Phoebe Putney*.

In *Surgical Care Center*, this Court made clear that a foreseeable anticompetitive effect cannot be inferred from "naked grants of authority," and it distinguished a statute that "*necessarily* contemplates the anticompetitive activity" from a state's "general grant to its agency of authority to conduct its affairs." 171 F.3d at 233, 235-36 (emphasis added). In *Phoebe Putney*, the Supreme Court similarly established that the foreseeability test is satisfied when "the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature," such that "the State must have foreseen and implicitly endorsed the anticompetitive effects [of the conduct at issue] as consistent with its policy goals." 133 S. Ct. at 1013. That a particular anticompetitive rule "may" be the result of delegated authority is insufficient. Moreover, an approach to clear articulation that relies on an agency's general authority to regulate the profession would make no sense because it could insulate blatantly anticompetitive—and unintended—conduct by boards, including those that do not require active supervision.

Indeed, the Board acknowledges that the Texas Legislature has circumscribed its authority to issue anticompetitive regulations. *See* App. Br. 6. The Legislature has expressly prohibited regulations restricting non-deceptive advertising, restricting competitive bidding, or adopting a fee schedule. Tex. Occ. Code §§ 153.002(a), 153.010. And anticompetitive occupational regulation that does not advance public health and welfare, as alleged here, is unauthorized, if not unconstitutional. *See Patel v. Tex. Dep't of Licensing & Regulation*, 469 S.W.3d 69, 88 (Tex. 2015); *cf. Monahan*, 832 F.2d at 689 (clear articulation not necessarily satisfied because Massachusetts pharmacy statutes "do not permit the Board, under the guise of regulation, and without legitimate purpose, simply to raise consumer prices or to inconvenience workers by making them travel farther for prescriptions"). Further, even if the Board's regulations improve the quality of medical care in some respects, the Board recognizes the "Legislature's mandate that state actors consider potential costs in occupational regulation." App. Br. 5. And, in the context of health care, the Texas Legislature has made it clear that increasing access to care and reducing medical costs are relevant considerations. *See, e.g., Fredericksburg Care Co. v. Perez*, 461 S.W. 3d 513, 523 (Tex. 2015) (discussing malpractice law designed to "make affordable medical and health care more accessible and available to the citizens of Texas") (citations and internal quotation marks omitted).

Accordingly, the Board is not supposed to unnecessarily restrict competition in the medical profession. *See* Tex. Gov't Code § 318.002(4). As the Board notes, "the Legislature has required consideration of least-restrictive-means factors." App. Br. 5. This consideration is evident in the Board's recognition that "if the professional standard of care for a given medical service does not require examining the patient, that service can be rendered remotely over the telephone." *Id.* at 14. Yet, inexplicably, the Board's rule requires an examination in every case before a physician may issue a prescription over the telephone regardless of the drug and even if an examination is not required by the standard of care in the circumstances.

B. Other Statutes Do Not Clearly Authorize the Challenged Rules

The Board cites statutes (Appellants' Br. 6-7, 35) that authorize rules to "ensure that patients using telemedicine medical services receive appropriate quality care." Tex. Occ. Code § 111.004(1). Yet more specific statutory language gives the Board authority to "require a face-to-face consultation between a patient and a physician providing a telemedicine medical service within a certain number of days following an initial telemedicine medical service only if the physician has never seen the patient." Tex. Occ. Code § 111.004(5). Teladoc has plausibly argued that this latter provision is inconsistent with the Board's rules because the statute presupposes that the initial telemedicine consultation need not be face-to-

face. *See also* Tex. Ins. Code § 1455.004(a) ("health benefit plan may not exclude a telemedicine medical service or a telehealth service from coverage under the plan solely because the service is not provided through a face-to-face consultation"). Moreover, the telemedicine provision arguably is not directly applicable to Teladoc's services provided over the phone. *See* Tex. Gov't Code § 531.001(8) (defining "Telemedicine medical services" as excluding "telephone or facsimile technology").

In sum, the basis for the Board's claim that its rules restrict competition in furtherance of a clearly articulated state policy is questionable. However, the fact that the rules at issue may be unauthorized does tend to support the argument that state judicial review may be adequate supervision. *See* part III.C*., infra*. Of course, if the rules were invalidated under state law, the antitrust case would be moot.

III. THE BOARD'S ACTIVE-SUPERVISION ARGUMENT BASED ON JUDICIAL REVIEW DOES NOT MEET ITS BURDEN OF PROOF

The Supreme Court has left open the question whether judicial review may constitute active supervision. In *Patrick v. Burget*, 486 U.S. 94, 104 (1988), the Court found judicial review to be too limited but expressly declined "to decide the broad question whether judicial review of private conduct ever can constitute active supervision." The Court in *Ticor* also rejected judicial review—of state agencies' review of private price fixing—as too limited "because of the state

agencies' limited role and participation." 504 U.S. at 638-39. In *Dental Examiners*, the Court did not reach the question of whether judicial review (or any other form of supervision) under North Carolina law would be sufficient.[9]

A. Judicial Review May Constitute Active Supervision If It Is Sufficiently Rigorous and May Be Obtained Prior to Any Anticompetitive Effect

In theory, judicial review should be able to satisfy the general requirements for active supervision laid out by the Court in *Dental Examiners* if it "provide[s] realistic assurance that a nonsovereign actor's anticompetitive conduct promotes state policy, rather than merely the party's individual interests." 135 S. Ct. at 1116 (citations and internal quotation marks omitted).[10] Judicial review may constitute adequate supervision when courts review an interested board's rulings "to determine whether such decisions comport with state regulatory policy and to

[9] In its *Dental Examiners* ruling on state action, the FTC noted that the Board had "evaded judicial review of its decision to classify teeth whitening as the practice of dentistry," and that "ex-post judicial, legislative, or executive review of a formal rule making or binding interpretation of the Dental Practice Act might constitute adequate supervision for state action purposes in some circumstances, [but] the Board chose to forgo these formal means to address non-dentist teeth whitening." Interlocutory Order, *In re N.C. Bd. of Dental Exam'rs*, 151 F.T.C. 607, 632-33 (2011).

[10] The Court did refer to "oversight by a politically accountable official," 135 S. Ct. at 1116, and it might be argued that judges are not politically accountable. That is hardly the case in Texas, where judges at every level are elected in partisan elections every four or six years. *See* National Center for State Courts, Methods of Judicial Selection, http://www.judicialselection.us/judicial_selection/methods/selection_of_judges.cfm?state (accessed June 10, 2016). In any event, the reference to "political accountability" seems intended as a shorthand for "speaks for the state rather than private interests." *Cf. Ticor*, 504 U.S. at 636 ("States must accept political responsibility for actions they intend to undertake."). In that sense, appointed judges applying state law would qualify. Presumably, the Court did not intend to encourage states to politicize bona fide health and safety determinations.

correct abuses." *Patrick*, 486 U.S. at 101. Importantly, however, such review must be available before a board's ruling has any anticompetitive effect. *See* Einer Elhauge, *The Scope of Antitrust Process*, 104 Harv. L. Rev. 667, 716 (1991) ("[T]here is no reason to view judges differently from agencies. . . . The key question . . . is not whether a court or agency provides the disinterested state process for controlling the terms of restraints, but whether that process occurs before or after the market injury."); Areeda & Hovenkamp, ¶ 226c, at 206 ("if there is no judicial procedure for testing a rule without violating it, unsupervised rules could have an in terrorem effect on competition"). Moreover, review cannot be deferential to the agency. Thus, judicial review that turns on *Chevron* deference would be too limited. *See Chevron, U.S.A., Inc. v. Nat. Res. Defense Council*, 467 U.S. 837, 844 (1984) (agency construction of statute it administers must be upheld if it is a reasonable interpretation of ambiguous language).

As a general matter, allowing states to police their regulatory boards' "anticompetitive" rules through well-established procedures for judicial review, at least in the first instance, reasonably accommodates federalism and Sherman Act concerns as long as state court review is sufficiently rigorous and attuned to conflicting economic interest of the regulators.[11] This is particularly true when the

[11] *See, e.g., Amalgamated Sugar Co. v. Vilsack*, 563 F.3d 822, 834 (9th Cir. 2009) ("Where an agency interprets or administers a statute in a way that furthers its own administrative or

rules are adopted through venerable notice and comment rulemaking procedures and involve health and safety considerations, which do not fit easily into antitrust analysis.[12] It does not mean that judicial review is a general, or the best, solution for states seeking to comply with the active supervision requirement, although it may have advantages over other solutions being considered.[13]

B. If Judicial Review of Agency Rulemaking Would Be Sufficiently Rigorous, the Fact That It Has Not Occurred Does Not Preclude It from Constituting Active Supervision

Teladoc's argument that judicial review should not count if it has not actually occurred is misplaced, at least unless the antitrust plaintiff has a good reason for not pursuing it.[14] Assuming, *arguendo*, that judicial review would be substantively adequate, a well-established *right* to invoke judicial review presumably provides the kind of "realistic assurance" against self-dealing that the

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financial interests, the agency interpretation must be subject to greater scrutiny to ensure that it is consistent with Congressional intent and the underlying purpose of the statute.").

[12] For example, Teladoc took the position that health and safety considerations were irrelevant to the antitrust analysis. The district court agreed, citing *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978). *See* 112 F. Supp. 3d at 540. Nonetheless, the court considered health and safety in the context of the Board's "improved quality of medical care" justification. *See id.* at 538-40; *see also* Final Commission Opinion and Order, *In re N.C. Bd. of Dental Exam'rs*, 152 F.T.C. 640, 2011 WL 11798463, at *26-28 (Dec. 2, 2011) (stating that public-safety defense was not cognizable but finding it not empirically supported in any event).

[13] States have taken a variety of approaches in responding to *Dental Examiners*, including funneling occupational licensing board actions through an executive official, and expanding review of agency rules by legislative committees. *See generally* Nat'l Conf. of State Legislatures, How is Your State Dealing with NC Dental?, http://www.ncsl.org/legislators-staff/legislative-staff/legal-services/dealing-with-nc-dental.aspx (last visited June 13, 2016).

[14] Prospective judicial review would be insufficient when the Justice Department or FTC bring an antitrust challenge, as they have no ability to seek such review. And consumers reasonably could not be expected to seek judicial review of an agency rule.

active-supervision requirement is intended to achieve. It does not mean that supervision is merely "potential" as *Dental Examiners* used that term.[15] Indeed, in *Patrick*, the Court considered the *general nature* of judicial review of Oregon hospital peer-review committees in deciding that its availability did not constitute active supervision, notwithstanding that no such review took place because the plaintiff had terminated the peer-review process.[16] Of course, as noted above, the right to judicial review must include the ability to obtain it *before* a board's action has any anticompetitive effect, and a state's procedures must enable affected entities to effectively vindicate their right to review. The absence of completed judicial review can complicate the matter because the degree of judicial scrutiny may be hard to predict in advance, particularly before the issues are joined, as the next part discusses.

C. It Is Unclear Whether Judicial Review of the Board's Rules Would Be Sufficiently Rigorous to Constitute Active Supervision

Under the Texas APA, a party adversely affected by an agency rule can obtain judicial review of the validity of a rule before it has any anticompetitive

[15] The Court's statement that the "mere potential for state supervision" is not adequate comes from *Ticor*. *Dental Examiners*, 135 S.Ct. at 1116. In *Ticor*, the Court rejected the argument that *actual* review by state insurance agencies of rates set by private rating bureaus constituted active supervision where the review was perfunctory; the "potential for state supervision was not realized in fact." 504 U.S. at 638. Likewise, if judicial review "on the books" is substantively adequate, but a state court does not exercise sufficient scrutiny in fact, then such review would not constitute active supervision.

[16] *See Patrick*, 486 U.S. at 97. Had the absence of actual review been determinative, the nature of the review would have been irrelevant.

effect. *See Tex. Dept. of Pub. Safety v. Salazar*, 304 S.W.3d 896, 903 (Tex. App.—Austin 2009) (purpose of § 2001.038 "'is to obtain a final declaration of a rule's validity *before* the rule is applied'" (quoting *Rutherford Oil Corp. v. General Land Office*, 776 S.W.2d 232, 235 (Tex. App.—Austin 1989)).[17] The district court held that such review is insufficient to constitute active supervision because it "is limited to inquiring whether the decision exceeded the statutory authority granted to the agency." MTD Order at 13. But a reviewing court's determination of whether a rule is within the authority of the agency may well be adequate to determine whether the rule "accorded with state regulatory policy." *Patrick*, 486 U.S. at 105. The fact that the reviewing court is not a policymaker and does not weigh the wisdom of a rule is not inconsistent with a court's determination that a rule is (or is not) in accord with state policy as expressed by statute. *Cf.* Opinion of the Commission, *In re Kentucky Household Goods Carriers Ass'n*, 139 F.T.C. 404, 422 (2005) (state agency supervision inadequate because agency failed to ensure that privately set "rates comport with the state's articulated policy objectives," where agency had no methodology for determining whether the rates "comply with the statutory standards").

[17] Review is obtained in an action for declaratory judgment brought in a Travis County district court, which may expedite the matter by transferring it to the court of appeals for the third district. Tex. Gov't Code § 2001.038. To be sure, a temporary injunction restraining the implementation of a rule is not automatic, so a board that wished to rely on judicial review as a means of active supervision would have to agree to stay the implementation of the rule pending judicial review.

For example, for its substantive authority to issue the rules in question the Board relies in part on a statute addressing telemedicine whose applicability Teladoc has questioned, as discussed above. Are the rules "'in harmony' with the general objectives of the legislation involved," or do they "impose additional burdens, conditions, or restrictions in excess of or inconsistent with relevant statutory provisions"? *Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n*, 452 S.W.3d 479, 486 (Tex. App.—Austin 2014). If a reviewing court answers this question involving specific authorization without deferring to the Board's interpretation of the law, then it would be adequately supervising whether the rules accord with state policy.[18] To be sure, if the Board's authority turns on a general statutory authorization to adopt legislative rules, then judicial review may be insufficient since the law itself leaves the Board with too much discretion. *Compare Dental Examiners*, 135 S. Ct. at 1112 ("policy may satisfy [clear articulation] test yet still be defined at so high a level of generality as to

[18] Texas courts review questions of statutory construction de novo, and frequently do not give deference to an agency's interpretation of the law. *See, e.g., Teladoc, Inc. v. Tex. Med. Bd.,* 453 S.W.3d 606, 622 (Tex. App.—Austin 2014) (rejecting Medical Board's construction of its own rules; noting "risk that agencies—whose legitimate authority and very existence must derive from the law and not merely perceived 'expediency'—will stray from their legal limitations"); *Physician Assistants Bus. All. of Tex., LLC v. Tex. Med. Bd*., 2015 WL 681010, at *3-4 (Tex. App.—Austin Feb. 13, 2015) (striking down aspects of Medical Board rule). However, if a statute is considered to be ambiguous, Texas courts "give 'serious consideration' to the construction of the statute by the administrative agency charged with its enforcement, so long as the construction is reasonable and does not conflict with the statute's language." *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Texas Med. Ass'n*, 458 S.W.3d 552, 555-56 (Tex. App.—Austin 2014) (internal quotation marks and citation omitted).

leave open critical questions about how and to what extent the market should be regulated"), *with Ticor,* 504 U.S. at 640 (citing *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 344 n.6 (1987) for proposition that "a statute specifying the margin between wholesale and retail prices may satisfy the active supervision requirement"), *and Gambrel v. Kentucky Bd. of Dentistry*, 689 F.2d 612, 618, 619 n.3 (6th Cir. 1982) (both *Midcal* prongs met where "the specific policy . . . is clearly expressed in the state statute itself").

Application of the Texas APA's "reasoned justification" requirement[19] may also provide a basis for adequate supervision. Under this requirement, Texas courts may take what amounts to a "hard look" at an agency's explanation to ensure that the agency "considered all the factors relevant to the objectives of the agency's delegated rulemaking authority, and engaged in reasoned decisionmaking." *Reliant Energy, Inc. v. Public Utility Comm'n*, 62 S.W.3d 833, 841 (Tex. App.—Austin 2001). "The agency fails to substantially comply if" its

[19] *See* Tex. Gov't Code § 2001.033 (requiring "a reasoned justification" that includes, *inter alia*, "a summary of the factual basis for the rule as adopted which demonstrates a rational connection between the factual basis for the rule and the rule as adopted"); *id.* § 2001.035(c) ("agency's reasoned justification [must] demonstrate[] in a relatively clear and logical fashion that the rule is a reasonable means to a legitimate objective"). The court will "review a challenge to the reasoned justification requirement using an 'arbitrary and capricious' standard and not presuming that facts exist to support the agency's order." *Lambright v. Tex. Parks & Wildlife Dept.*, 157 S.W.3d 499, 505 (Tex. App.—Austin 2005); *see also R.R. Comm'n of Tex. v. ARCO Oil & Gas Co.*, 876 S.W.2d 473, 492 (Tex. App.—Austin 1994) ("reasoned justification is more than simply a requirement to demonstrate the minimum rationality of the rule"); Dudley D. McCalla, *Deference (and Related Issues)*, 14 Tex. Tech. Admin. L.J. 363, 386 (2013) ("Though the . . . reasoned justification requirements are often referred to as procedural standards, they clearly have elements of substance by requiring agencies to demonstrate . . . why [a rule] is a reasonable means to a legitimate objective.").

reasoning "is vague, ambiguous, conclus[ory], or logically incomplete or inconsistent." Ronald L. Beal, 1 *Texas Adm. Practice & Proc.* § 4.5 (2015).[20]

Teladoc has argued that the Board's determination as to the public health and welfare is not based on any empirical evidence, that the Board failed to consider the cost of its rule in terms of reduced access to health care, increased expense, and reduced patient choice and convenience, and that it failed to reasonably address alternatives such as disciplining doctors on a case-by-case basis when a telephone-based diagnosis is medically inappropriate. *See* Am. Compl. ¶¶118, 129-131, 137. To the extent these contentions have merit, as the district court's preliminary injunction ruling suggests they do, then the Board's rule may not satisfy the reasoned-justification test and thereby not be in accord with state policy.

To be sure, Texas appellate courts have only sparingly struck down rules for failing to satisfy the reasoned-justification requirement. On the other hand, the Texas Supreme Court has recently shown a willingness to carefully scrutinize

[20] *See, e.g., Tex. Hosp. Ass'n v. Tex. Workers' Comp. Comm'n*, 911 S.W.2d 884, 888 (Tex. App.—Austin 1995) (striking down agency rule for lack of reasoned justification where order provides only "conclusory allegations that the rule will effectively achieve the Commission's statutory mandate"); *Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667, 670-71 (Tex. 1996) (striking down regulations declaring certain insurance practices to be unfair trade practices where explanation was "conclusory" and "failed to explain why the prohibited practices are unfairly discriminatory or what effect the rules will have on consumers and the insurance market").

health and safety justifications for occupational licensing requirements.[21] And if a reviewing court, casting a skeptical eye, concluded that the evidence before the Board logically supports a conclusion that the medical benefits of the rule outweigh the costs, then such review would suggest that the rule furthers a state policy of protecting the public health and welfare rather than the private interests of the medical profession. *Cf. Lambright*, 157 S.W.3 at 508 (upholding shrimping rule after careful review; "[g]iven [agency's] consideration of the scientific evidence, the challenged amendments constitute a reasonable means to a logical objective").

At this point, it is difficult to predict whether judicial review of the Board's rule would be sufficiently stringent to constitute active supervision.[22] And the fact

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[21] *See Patel*, 469 S.W.3d at 88-91 (striking down cosmetology education requirement on substantive due process grounds); *id.* at 92, 118 (Willett, J., joined by Lehrmann, J. and Devine, J., concurring) (lengthy disquisition on the dangers of occupational licensing; "Courts need not be oblivious to the iron political and economic truth that the regulatory environment is littered with rent-seeking by special-interest factions who crave the exclusive, state-protected right to pursue their careers.").

[22] Leading commentators have noted that, in the federal system:

> Hard look review is necessarily highly contextualized, based on the framework established by the relevant statute or statutes, the agency's program and policies, past and present, the issues in the particular case, the record, and the contentions advanced by those opposing the agency's action. These variations, along with the inherently open-textured character of "hard look" review, give courts considerable latitude in the intensity of their 'supervision' of agency exercise of discretion.

Stephen G. Breyer et al., *Administrative Law & Regulatory Policy: Problems, Text & Cases* 406-07 (7th ed. 2011); *see also* Bruce M. Kramer, *A Renaissance Year for Oil and Gas Jurisprudence: the Texas Supreme Court*, 18 Tex. Wesleyan L. Rev. 627, 635 (2012) ("The area of the appropriate scope of judicial review of agency actions is one rife with conflicting signals and standards.").

that Texas courts have not yet had occasion to review "anticompetitive" rules adopted by self-interested boards in light of *Dental Examiners* adds to the uncertainty. *Cf. Patel*, 469 S.W.3d at 107-08 (favorably discussing *Dental Examiners*) (Willet, J., concurring). Ultimately, however, because the burden of proving the state-action defense is on the defendant,[23] this uncertainty means that the district court did not err in rejecting the Board's claim of active supervision based on judicial review.

[23] *See, e.g., Yeager's Fuel, Inc. v. Pa. Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994); *cf. Phoebe Putney*, 133 S. Ct. at 1010 ("'state-action immunity is disfavored'" and only recognized "when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own'" (quoting *Ticor,* 504 U.S. at 635-36)).

CONCLUSION

This Court should dismiss the appeal because the Court lacks jurisdiction. If it reaches the merits, it should reject the Board's reliance on its general authority to regulate the practice of medicine as a basis for its clear-articulation argument. And it should affirm that the Board failed to establish that judicial review here would be sufficient to meet the active-supervision requirement, but recognize that under appropriate conditions, rigorous judicial review can be sufficient.

Respectfully submitted,

s/ Richard M. Brunell

RICHARD M. BRUNELL
RANDY M. STUTZ
AMERICAN ANTITRUST INSTITUTE
1730 Rhode Island Avenue, N.W.
Suite 1100
Washington, DC 20036
(202) 600-9640

Dated: June 27, 2016

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I hereby certify that on the 27th day of June, 2016, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this appeal are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

s/ Richard M. Brunell

Dated: June 27, 2016