No. 16-50017

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

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

v.

TEXAS MEDICAL BOARD, ET AL.
Defendants-Appellants.

Appeal from the United States District Court
for the Western District of Texas
Case No. 1:15-cv-343

BRIEF OF FEDERATION OF STATE MEDICAL BOARDS AS *AMICUS CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

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CERTIFICATE OF INTERESTED PERSONS

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v.

TEXAS MEDICAL BOARD, ET AL.
Defendants-Appellants.

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the out-come of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal.

Defendants:
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INTEREST OF THE AMICUS CURIAE[1]

At issue in this appeal is whether the Texas Medical Board (the "Board") will be subject to plenary antitrust litigation, with all of its attendant costs and uncertainties, for issuing rules that require a physician to see a patient, either in person or by electronic means with a health care professional present with the patient, before prescribing dangerous or addictive drugs. The rules do not prevent physicians from providing telephone consultations. They do not prevent physicians from directing patients to take over-the-counter drugs on the basis of a telephone consultation. They do not prevent the prescription of dangerous drugs as long as the physician has previously established a relationship with the patient. And they were issued through a state administrative process that allowed for public notice and opportunity to comment.

More specifically, the question here is whether the Board is subject to sufficient state supervision to support the conclusion that the Board's duly-promulgated rules are "the State's own," *FTC v. Ticor Title Ins. Co.*,

[1] All parties have consented to the filing of this brief. No counsel for any party authored this brief in whole or in part, and no party or counsel for any party made a monetary contribution intended to fund the preparation or submission of this brief.

504 U.S. 621, 635 (1992), as opposed to rules generated by a group of private parties acting in their own self-interest. If the rules really are those of the State, then the Board is immune from full-blown federal antitrust review. By contrast, if the rules are nothing more than the product of market participants serving their own selfish ends rather than setting legitimate state health policy, and are not subject to the oversight mechanisms chosen by the state, then they are subject to plenary antitrust scrutiny.

The Federation of State Medical Boards has a direct interest in this issue. The Federation is a non-profit organization whose members are the seventy state medical licensing and disciplinary boards of the United States and its territories. Since 1912, its mission has been to improve the quality, safety, and integrity of health care by promoting high standards for physician licensure and practice and to support state medical boards in protecting the public. The purposes of the Federation include supporting the ability of state boards of medicine to issue regulations and take other

actions that such boards reasonably believe to be in the best interests of patients and the public health.

That is precisely what the Texas Medical Board did in this case. It engaged in a notice and comment rulemaking process in accordance with the Texas Administrative Procedure Act, a process which included extensive public participation. After considering the issue in light of all the comments received, the Board concluded that, given (a) the increased risks of misdiagnoses when a patient is prescribed dangerous drugs without first being examined, (b) the problems associated with the over-prescription of antibiotics when the prescription is based on nothing more than a telephone conversation, and (c) the realistic possibility of abuse and diversion of opioids when these addictive pharmaceuticals are available through a phone call, both the well-being of patients and the public health require that the physician examine the patient either in person or by acceptable electronic means before prescribing such drugs.

The decision of this Court will directly impact the ability of the Texas Medical Board to issue rules designed to protect patients and the public

from prescription of antibiotics, opioids, and other dangerous drugs without adequate examination of the patient by the physician. More generally, it is likely to have a significant impact on the ability of state medical boards across the country to issue regulations that they determine to advance the State's interest in protecting patients and the public—without exposing such boards to the costs and uncertainties of full-blown antitrust review.

The Board's decision was, and will continue to be, subject to the active supervision of other Texas governmental authorities, including the State's legislature and its judiciary. *See* pp. 22–34, *infra*. For this reason and others—as we explain below—the challenged rules represent the policy of the State of Texas. Teladoc's antitrust suit is, therefore, barred under the doctrine of state-action immunity first articulated by the Supreme Court in *Parker v. Brown*, 317 U.S. 341 (1943).

INTRODUCTION

Teladoc brought this suit in the wake of *North Carolina Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), invoking the federal antitrust laws

to override the considered decisions of the state agency charged by the legislature with making rules governing the practice of medicine in Texas. Using the available state judicial review mechanisms, Teladoc had successfully challenged an earlier version of the Board's efforts to regulate telemedicine under the Texas Administrative Procedure Act. *See Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606 (Tex. App. 2014). At that time, however, review of the Board's rules under the federal antitrust laws was foreclosed by this Court's precedent. *See Earles v. Bd. of Certified Public Accountants*, 139 F.3d 1033, 1041 (5th Cir. 1998) (holding that professional board acting within the scope of its regulatory authority enjoyed antitrust immunity, regardless of "active supervision").

The decision in *North Carolina Board of Dental Examiners* opened up the possibility that actions by state agencies, including regulations designed to protect the public health, might be overturned through actions for damages and injunctive relief under the antitrust laws. Significantly, however, *North Carolina Board of Dental Examiners* did not overrule *Parker v. Brown*. Nor did it hold that state health policy should be subordinated to

federal competition policy. Rather, the operative question for purposes of state-action immunity—now as before—is whether the challenged "scheme is the State's own." *Ticor Title*, 504 U.S. at 635.

After *North Carolina Board of Dental Examiners*, antitrust courts must engage in a context-dependent inquiry to determine whether the challenged act or policy of a state regulatory board that includes as few as one market participant is subject to sufficient "active supervision" by the State to conclude that the agency is carrying out state policy. 135 S. Ct. at 1112. Notably, the Court did not examine the various contexts in which the "active supervision" inquiry might arise.

This brief analyzes Supreme Court precedent to identify a framework for the context-dependent "active supervision" inquiry called for in *North Carolina Board of Dental Examiners*. That precedent reveals that there are two primary considerations in determining the nature of the "active supervision" that is required in a given context: (1) the identity of the actor (state agency versus purely private parties), and (2) the type of conduct at

issue (conduct that is unlawful *per se* versus conduct subject to the Rule of Reason).

The "active supervision" required to support a conclusion that the challenged conduct is "the State's own" is most intense in the context of price fixing or other *per se* conduct by purely private parties. In this context, the Supreme Court has required a particularly searching inquiry to ensure that such conduct is the State's own, rather than the self-serving actions of private actors cast in the "gauzy cloak of state involvement," *Cal. Retail Liquor Dealers Ass'n v. Midcal Alum., Inc.*, 445 U.S. 97, 106 (1980).

This case, by contrast, lies at the opposite end of the spectrum from private price-fixing cases such as *Midcal*. First, with respect to the identity of the actor, the challenged rules were duly promulgated by a state agency created by the State for the sole purpose of regulating state health policy in the public interest—not by purely private parties, as in *Midcal*.

Second, the challenged conduct does not implicate the *per se* rule. The Texas Medical Board's rules do not fix prices. Rather they have a legitimate basis in state policy. They address the issues of misdiagnoses,

over-prescription of antibiotics, and the possible abuse and diversion of addictive drugs, *see infra*—all of which may result from prescription of dangerous drugs by a physician who has never seen the patient either in person or electronically. Where, as here, the conduct under review involves a rule issued by a state agency after extensive public participation and comment—and does not involve a *per se* violation of the antitrust laws, a less robust form of "active supervision" is required to confirm that the conduct is the State's own.

At a minimum, if this Court does not reverse the decision below, it should make clear that the Rule of Reason inquiry in this context is broad enough to encompass, not only competitive considerations, but also such values as reduction of avoidable misdiagnoses, combating of over-prescription of antibiotics, minimization of misuse of addictive drugs, and other legitimate efforts to promote the public health and welfare *See* pp. 36–39, *infra*.

ARGUMENT

I. The Context of the Challenged Conduct—Involving Duly-Promulgated Regulations of a State Agency—Calls for a Less Searching Form of "Active Supervision."

Parker immunity applies only to actions that "are an exercise of the State's sovereign power." *North Carolina Board of Dental Examiners*, 135 S. Ct. at 1110. State legislation and judicial decisions automatically qualify for *Parker* immunity, "because they are an undoubted exercise of state sovereign authority," *id.*, but immunity does not always attach to the actions of state agencies. In particular, where a state agency is composed of market participants, it must satisfy both elements of *Midcal*'s two-part test to establish that the challenged actions are "the State's own." *Ticor*, 504 U.S. at 635; *see North Carolina Board of Dental Examiners*, 135 S. Ct. at 1111.

The *Midcal* test requires, "first, [that] the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, [that] the State provides active supervision of [the] anticompetitive conduct." *Ticor*, 504 U.S. at 631 (citing *Midcal*, 445 U.S. at 105). There can be no serious doubt that the "clear articulation" requirement is met here. The Supreme Court has explained that, "[i]n the usual case," clear

articulation "shows little more than that the State has not acted through inadvertence," *id.* at 636, and that all that "clear articulation" requires is a showing that "the displacement of competition" is the "inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *FTC v. Phoebe Putney Health Systems, Inc.*, 133 S. Ct. 1003, 1013 (2013).

One result of regulating the practice of medicine through licensure and disciplinary actions under the Texas Medical Practice Act, Tex. Occ. Code § 151.001 *et seq.*, is necessarily "to displace unfettered business freedom in a manner that regularly has the effect of preventing normal acts of competition, particularly on the part of new entrants." *Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 373 (1991). State regulatory boards are empowered to determine whether other social values, such as the avoidance of patient harm and consumer deception, outweigh the benefits of unfettered competition.

The key dispute in this case, and the focus of the decision below, concerns *Midcal*'s "active supervision" requirement. That requirement

"serves essentially an *evidentiary* function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy." *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985) (emphasis added); *see also Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 61 n.23 (1985) (noting that "active supervision" requires a state to "demonstrate[] its commitment to a program through its exercise of regulatory oversight"); FTC Office of Policy Planning, Report of the State Action Task Force (Sept. 2003), at 13, https://www.ftc.gov/sites/default/files/documents/advocacy_documents/report-state-action-task-force/stateactionreport.pdf ("The active supervision test operates by according state action protection only when the challenged conduct can be said to be that of the state rather than private actors."). But the nature and amount of "active supervision"required to establish that conduct is indeed the State's own varies depending on the context. Thus, as the Supreme Court noted, the nature of the "active supervision" requirement is "flexible and context-dependent." *North Carolina Board of Dental Examiners*, 135 S. Ct. at 1116.

A. The Intensity of the "Active Supervision" Requirement Lies on a Spectrum, with Private Price-Fixing at One End and Reasonable Regulation by a State Agency at the Other.

North Carolina Board of Dental Examiners teaches that the intensity of the active supervision requirement varies based on the context. The decision of the Supreme Court in *Ticor* reveals two of the key contextual considerations. *Ticor* focused on (1) "the gravity of the antitrust offense"—distinguishing cases involving a *per se* violation such as price fixing from those that would call for an analysis under the Rule of Reason—and (2) "the involvement of private actors throughout." 504 U.S. at 639.

In light of these factors, the conduct at issue in *Midcal* and *Ticor* lie at the far end of the spectrum, requiring the most intensive forms of "active supervision," because both cases involved price-fixing by purely private parties acting independently of the State. *Midcal* concerned "essentially a private price-fixing arrangement" among wine wholesalers. *Midcal*, 445 U.S. at 106. *Midcal* teaches that an arrangement among private parties to fix prices will not be saved from antitrust scrutiny merely "by casting [] a gauzy cloak of state involvement" over it. *Id.; see also Parker*, 317 U.S. at 351

("a state does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful"). Similarly, *Ticor* involved allegations of price fixing in fees for title searches and title examinations among title insurance companies. The *Ticor* Court emphasized that "[n]o antitrust is more pernicious than price fixing," and thus price-fixing arrangements among private parties require particularly extensive state involvement to justify antitrust immunity. 504 U.S. at 639.

Ticor and *Midcal* both involved "private actors throughout" and the "grave" antitrust offense of price fixing. *See Ticor*, 504 U.S. at 639. Eliminating either of these features would change the context in a significant way so that a less searching form of active supervision would be required. Thus, for example, price fixing by a state agency acting within the scope of its delegated authority (rather than by a private party) is more likely to be protected by *Parker* immunity. *Cf. Goldfarb v. Virginia State Bar*, 421 U. S. 773, 790–91 (1975) (analyzing price fixing by Virginia State Bar, which was a "state agency for some limited purposes" but not for the purpose of setting prices). The raisin output restrictions set by the State

Agricultural Prorate Advisory Commission in *Parker* itself are similar. Agreements to restrict output and price fixing are two sides of the same coin, and both are grave violations of the antitrust laws. But *Parker*, unlike *Ticor* or *Midcal*, involved output restrictions set by a state agency—and unlike in *Ticor* or *Midcal*, the Court extended antitrust immunity to the challenged conduct.

Similarly, where the conduct in question is *not* a *per se* violation but is instead subject to a Rule of Reason analysis, the "active supervision" required to trigger *Parker* immunity ought to be less extensive than in *Ticor* or *Midcal*—even if the conduct involves purely private parties. *Cf., e.g.*, *Patrick v. Burget*, 486 U.S. 94 (1988) (considering activities of private physicians on hospital peer-review committees).

Goldfarb, *Parker*, and *Patrick* are intermediate cases in one way or another. This case, however, lies at the extreme opposite end of the spectrum from *Ticor* and *Midcal*. The entity involved is a state agency acting within the scope of its delegated authority, and the conduct challenged is not a *per se* violation of the antitrust laws like price fixing. To

the contrary, this case involves a comprehensive regulatory program in a traditional area of state concern—*i.e.*, health policy—where the principles of federalism that animate *Parker* are at their strongest, and where, in the presence of strong and obvious public health considerations, antitrust law is at its most deferential to state policy. If the "active supervision" inquiry is to be context-dependent, then the present context calls for the most modest form of supervision to confirm that the challenged conduct is the State's own.

The following table illustrates the primary contextual considerations that drive the intensity of the active supervision requirement.

TABLE 1

INTENSITY OF "ACTIVE SUPERVISION" REQUIRED

Gravity of Offense	Nature of Actors Involved: Purely Private	Nature of Actors Involved: State Agencies
***Per se* Violation**	**Most intense** *Ticor*; *Midcal*	**Less intense** *Parker*; *Goldfarb*
Rule of Reason	**Less intense** *Patrick*	**Least intense** *Teladoc*

Of course, *North Carolina Board of Dental Examiners* also involved a state board whose conduct was not unlawful *per se* under the antitrust laws. But even before turning to the details of the active supervision involved—a question not addressed by the Supreme Court—there are two crucial differences between that case and this one. First, the North Carolina Dental Board did not act through any of the conventional "powers at [the Dental Board's] disposal that would invoke oversight by a politically accountable official." 135 S. Ct. at 1116. Instead, the Dental Board sought to shut down non-dentist teeth whiteners (operating, for example, in mall

kiosks) by sending cease-and-desist letters, which the Dental Board might not even have had authority to do under North Carolina law. *See id.* (noting question whether "the Board exceeded its powers under North Carolina law").

Second, the Texas Medical Board promulgated the rules at issue here after conducting a thorough inquiry into the necessity of such rules and finding that there are legitimate justifications to support them as matter of health policy. Misdiagnoses and over-prescription of antibiotics resulting from a failure to examine the patient before prescribing dangerous drugs are a serious public health problem, as are the risks of abuse and diversion of other dangerous drugs, such as opioids. *See, e.g.*, Sumathi Reddy, *Your Health: Antibiotics Do's and Don'ts—Doctors Too Often Prescribe "Big Guns*", Wall St. J., Aug. 20, 2013, at D1; Josh Hicks, *Report Calls for Stricter Opioid Rules*, Wash. Post, Nov. 17, 2015, at B03. Given these considerations, a state regulatory board, acting pursuant to appropriate administrative procedures, should have the ability to prohibit prescriptions that, in its reasonable judgment, increase these risks—without exposing that board to

plenary antitrust litigation—as long as there is some form of state supervision.

Reasonable minds can differ as to whether the challenged rules of the Texas Medical Board go too far, or not far enough, in addressing these risks. However, there can be no doubt that the rules resulted from a thoughtful and inclusive process and are designed to address serious and important public health and patient-well being issues. By contrast, and in the contravention of the norms of open government, there were simply no plausible health care policy considerations articulated in *North Carolina Board of Dental Examiners* when that Board took unilateral action against tooth whitening kiosks.

B. Teladoc Has Challenged Duly-Promulgated Rules that are Part of a Comprehensive Regulatory Regime.

Many of the leading cases denying *Parker* immunity involve what *Midcal* described as a "gauzy cloak of state involvement" over essentially private price-fixing arrangements, 445 U.S. at 106, where the State's role was more or less limited to authorizing private parties to set prices. *Midcal* (wine pricing) itself fits this pattern, as do *Ticor* (title services pricing) and

Goldfarb (fees for legal services). But *Midcal* contrasted such a hands-off approach with a program that would "completely control the distribution of liquor within [a state's] boundaries," noting that "[s]uch comprehensive regulation would be immune from the Sherman Act under *Parker*." *Id.* at 106 n.9.

This recognition in *Midcal* that "comprehensive regulation" is likely immune from antitrust scrutiny is necessary to harmonize the antitrust laws with state regulatory considerations. The active supervision requirement serves "an evidentiary function" to confirm that the conduct reflects "state policy," *Hallie*, 471 U.S. at 46. The more comprehensive and thorough the state regulatory program, the more likely it is that actions pursuant to that program reflect state policy rather than private collusion. *See, e.g., Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality opinion) (emphasizing that the challenged restraint was "part of a comprehensive regulatory system"); *Southern Motor Carriers*, 471 U.S. at 61 n.23 (noting that "active supervision" ensures that the "state has demonstrated its commitment to a program through its exercise of

regulatory oversight"); *DFW Metro Line Services v. Southwestern Bell Telephone Corp.*, 988 F.2d 601 (5th Cir. 1993) (affirming grant of immunity against backdrop of "comprehensive regulatory system").

The significance of a comprehensive regulatory scheme helps to explain why, for example, the Supreme Court held that California's resale price maintenance regime for wine was subject to antitrust scrutiny, but the State's regulation of car dealerships was not. *Compare Midcal*, 445 U.S. 97 (resale price maintenance), *with New Motor Vehicle Bd. v. Orrin W. Fox Co.*, 439 U.S. 96 (1978) (car dealerships). At issue in *Orrin W. Fox* was a California law that placed significant restrictions on the establishment of new car dealerships, allowing established businesses to delay or to block entry by complaining to the State. Notwithstanding the obvious anticompetitive effects of such a scheme, the Court held that *Parker* immunity barred an antitrust suit, because the "regulatory scheme" was a broad "system of regulation, clearly articulated and affirmatively expressed, designed to displace unfettered business freedom in the matter

of the establishment and relocation of automobile dealerships." 439 U.S. at 109.

In this case, the Texas Medical Board duly promulgated the challenged rules pursuant to its delegated authority under the Texas Medical Practice Act, which creates a comprehensive regulatory scheme governing the practice of medicine in Texas. In these circumstances, a less searching inquiry is required to confirm that the rules in fact reflect the policy of the State of Texas. The supervision that *is* provided is quite robust. It was designed by the State for the specifics of the regulatory structure, and with state involvement throughout—from appointment of the Board's members through judicial review of the Board's rules. It is more than adequate to "ensure [that] the State[] accept[s] political accountability for the anticompetitive conduct [it] permit[s] and control[s]." *North Carolina Board of Dental Examiners*, 135 S. Ct. at 1111.

II. The Board is Subject to Oversight that Satisfies the Active Supervision Requirement.

There can be no doubt that "New Rule 174" and "New Rule 190.8" are the policy of the State of Texas, because there was, and will continue to be, extensive supervision by state officials from start to finish.

Appointment. — The supervision of the Board begins at the time of appointment. Unlike the members of North Carolina Board of Dental Examiners, the majority of whom are elected by practicing dentists, *North Carolina Board of Dental Examiners*, 135 S.Ct. at 1108, the members of the Texas Medical Board are all appointed by the Governor of Texas with the advice and consent of the Senate. *See* Tex. Occ. Code § 152.002(a). And whereas the North Carolina Board had only one "public" member and seven market participants, 135 S.Ct. at 1108, seven of the nineteen members of the Texas Medical Board must "represent the public." Tex. Occ. Code § 152.002(a)(2). Both the appointment by the Governor and the involvement of several public members help to ensure that Board's decisions reflect state policy, and rather than simply the private preferences of market participants.

Notice and Comment. — Any new rule the Board wishes to promulgate, including the rules challenged here, must go through a notice-and-comment process under the Texas Administrative Procedure Act. *See* Tex. Gov't Code § 2001.023 (requiring notice of proposed rules); *id.* § 2001.029 (requiring an opportunity for public comment). Both of the rules challenged in this case were in fact the subject of extensive public comment—including from Teladoc—and of reasoned justifications by the Board offered in response, before becoming effective. In contrast, the decisions of the board in *North Carolina Board of Dental Examiners* "did not result in a formal rule or regulation reviewable by the independent Rules Review Commission." 135 S. Ct. at 1109.

"New Rule 174," for example, became effective in October 2010, but only after the Board received, reviewed, and responded to comments from a wide range of interested parties, from private parties on the one hand, to Texas state legislators and agencies on the other. *See* 35 Tex. Reg. 9085–91 (Oct. 8, 2010). In addition to Teladoc, the private parties whose comments were considered and addressed publicly by the Board include the Texas

Medical Association and the Texas Association of Business. *See id.* The state officials and agencies who commented on New Rule 174 included the Rural Caucus of the Texas Legislature; Senators Eddie Rodriguez and Carlos Uresti; Representative Jim Jackson; and the Texas Health and Human Services Commission. *See id.* And under the Texas Open Meetings Act, the agency's meetings were open to the public to ensure that Texas citizens could "observe how and why every decision [was] reached" at "every stage of the deliberations." *Acker v. Tex. Water Comm'n*, 790 S.W.2d 299, 300 (Tex. 1990).

Such meaningful public participation and transparency supports the conclusion that the rules promulgated by the Texas Medical Board are the State's own, not those of purely private market participants. *Cf. Hallie*, 471 U.S. at 45 n.9 (emphasizing, in granting *Parker* immunity, that municipal conduct is "more likely to be exposed to public scrutiny than is private conduct," including because municipalities are often "subject to 'sunshine' laws or other mandatory disclosure regulations"). This transparency and explanation of the reasons for the rules also mitigate the danger that

market participants, appointed by the State to regulate on the State's behalf, would use this delegation of state delegation of power to pursue private interests to restrain trade in lieu of implementing the State's policy goals. See *North Carolina Board of Dental Examiners*, 135 S. Ct. at 1112–13.

The notice-and-comment process for "New Rule 190.8" was even more robust, further insulating the rulemaking process from regulatory capture and ensuring the final decision of the Board reflected State policy. After providing notice of the proposed rule, the Board received written comments from the Texas Medical Association; Texas Tech University Health Science Center; University of Texas Medical Branch at Galveston; University of Texas System, Office of General Counsel; Texas e-Health Alliance; Texas Academy of Family Physicians; Texas Chapter of the American College of Physician Services; Texas Pain Society; Texas Osteopathic Medical Association; Texas Ophthalmological Association; American Telemedicine Association; Teladoc; and approximately 200 individuals, including patients, sellers of telehealth products, and physicians. 40 Tex. Reg. 3160 (May 29, 2015). Almost a dozen individuals

provided oral comments at a public hearing, including at least three individuals associated with Teladoc. *See id.* The Board considered these many comments and addressed them at length in the Texas Register in its final rule. *See id.* at 3160–69.

Although this Court's holding in *Earles* has been superseded by *North Carolina Board of Dental Examiners*, *Earles* is nonetheless instructive in pointing out that "the public nature of the Board's actions" in that case, as in this one, "means that there is little danger of a cozy arrangement to restrict competition." 139 F.3d at 1041. Thanks to the extensive back-and-forth with the public and with government officials in the case of New Rules 174 and 190.8 in particular, there is no reason to think that the Board's decision reflected a cozy arrangement among purely private market participants. Rather, it reflected considered state policy.

Legislative Review. — Some legislators participated in the notice-and-comment process to provide their views to the Board. *See* 35 Tex. Reg. 9085–91 (Oct. 8, 2010). In addition, there is a parallel mechanism by which the legislature had the ability to express disapproval of the challenged

rules. Specifically, under Texas law, any proposed rule must be provided "to the appropriate standing committee [of the House and Senate] for review before the rule is adopted," and either committee may "send to a state agency a statement supporting or opposing adoption of [the] proposed rule." Tex. Gov't Code § 2001.032(a), (c). Without more, this opportunity to comment but not to veto might fall short of being an "active" form of supervision, but in conjunction with the various other forms of government oversight and public accountability, the legislative review process provides further evidence that the challenged rules are "the State's own." *Ticor*, 504 U.S. at 635.

Judicial Review. — State supervision of the Board's rulemaking did not stop at the issuance of a final rule. Most importantly, the validity of every rule that the Board issues is subject to judicial review under the Texas Administrative Procedure Act. Tex. Gov't Code § 2001.038. Contrary to the ruling of the district court, such review is sufficient to confirm that the Board's rules reflect state policy.[2] *See, e.g.*, *Pruett v. Harris*

[2] When a court is asked to determine whether a given rule is within an agency's

Cnty. Bail Bond Bd., 249 S.W.3d 447, 452 (Tex. 2008) ("An agency may adopt only such rules as are authorized by and consistent with its statutory authority."); *Gerst v. Oak Cliff Sav. & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex. 1968) ("The determining factor in this and other decisions of our courts dealing with the question of whether or not a particular administrative agency has exceeded its rule-making powers is that the rule's provisions must be in harmony with the general objectives of the Act involved."). Where, as here, a Texas state agency has been created to displace competition in favor of state regulatory policy goals articulated in the agency's organic statute, judicial review serves to ensure that the agency's actions under its organic statute do indeed reflect the state policy goals the agency was created to serve.

Teladoc is well aware of the availability of judicial review to protect the public, as well as affected market participants, from Board rules that are inconsistent with the Board's delegated authority. Indeed, it is ironic that having brought a successful challenge to an earlier iteration of the

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delegated authority to advance a particular state policy, that is perforce an inquiry into whether the agency acted pursuant to state policy.

rules at issue here under the Texas Administrative Procedure Act, *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606 (Tex. App. 2014), Teladoc now argues that there is not sufficient active state supervision of actions of the Texas Medical Board to satisfy antitrust requirements.

Significantly, the *Teladoc* case is no outlier in this regard. The Texas state courts can, and routinely do, strike down agency rules that exceed the agency's delegated authority and thus do not reflect state policy. *See, e.g.*, *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 458 S.W.3d 552, 558-59 (Tex. App 2015) (affirming declaratory judgment that a Board of Marriage and Family Therapists rule relating to the "scope of practice" for such therapists was invalid); *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 466 (Tex. App. 2012) (adjudicating the validity of an agency rule "defining the scope of practice of chiropractic").

Further Review in Disciplinary Proceedings. — Independent review is also available in connection with the Board's disciplinary proceedings. If, for example, the Board were to determine that a given physician prescribed a dangerous drug *without* first establishing an appropriate

relationship with the patient—in violation of Rule 190.8—then the physician in question would have multiple opportunities to challenge not only the factual basis for that conclusion but also the legal authority of the Board to have promulgated its rule in the first place. *See* Tex. Gov't Code § 2001.174(2)(B) (providing for judicial review of whether the agency acted "in excess of the agency's statutory authority").

First, in any "contested case"—*i.e.*, any proceeding in which a party's legal rights, duties, or privileges are to be determined after an opportunity for an adjudicate hearing, Tex. Gov't Code § 2001.003(1)—the physician would have an opportunity to challenge the Board's conclusion before "an administrative law judge employed by the State Office of Administrative Hearings." Tex. Occ. Code. § 164.007(a). The administrative law judges in that office are independent from the Board, and the Board "may not change a finding of fact or conclusion of law or vacate or modify an order of the administrative law judge." *Id.* § 164.007(a–1). In other words, before a physician can have his or her license revoked for having violated the rules challenged in this case, the physician has an opportunity to challenge both

the validity of the rules and their factual application before a neutral government authority whose legal and factual determinations are final, subject only to judicial review in state court before yet another set of neutral government officials. *See id.* (permitting the Board to "obtain judicial review of any finding of fact or conclusion of law issued by the administrative law judge").

Second, even if the neutral administrative law judge were to conclude that the Board acted within the scope of its delegated authority, the physician would still have the opportunity to seek judicial review of that determination in the Texas courts. *See id.* § 164.009; Tex. Gov't Code § 2001.171.

Sunset Review. — Finally, on top of the various forms of neutral official oversight and public accountability set forth above, Texas law calls for a regular, comprehensive review by the legislature of the Board's authority and the state policies which the Board serves. Under this so-called "sunset review," the agency ceases to exist unless the legislature affirmatively reenacts its enabling statute. *See* Tex. Occ. Code § 151.004

(providing that the Board "is abolished" effective September 1, 2017 unless "continued in existence as provided" under the Texas Sunset Act, Chapter 325, Government Code).

Before the Board's enabling statute may be reenacted, the Sunset Advisory Commission—consisting of five senators, five members of the house, and two public members, Tex. Gov't Code § 325.003(a)—must carefully review the agency according to specified criteria and provide a written report, *id.* § 325.008(a)(3). Those criteria include, for example, "an identification of the mission, goals, and objectives intended for the agency" and "the extent to which the mission, goals, and objectives have been achieved." *Id.* § 325.011(2)(A), (B). Thus, the Board's very continued existence reflects a regular determination by the state legislature, as advised by the Sunset Advisory Commission, that the Board's rules reflect the state policy goals it was created to serve.

* * *

Each of the above forms of state supervision provides further evidence that the challenged rules are the policy of the State of Texas, not—

as in *Midcal* or *Ticor*—merely private agreements to set prices that are authorized by state law. Some forms of state supervision, such as notice-and-comment, have already been invoked in connection with the challenged rules; others, such as judicial review, have been shown to be readily available in connection with prior iterations of the challenged rules; and others remain available in the future.

North Carolina Board of Dental Examiners explains that "active supervision" is "flexible and context-dependent." 135 S. Ct. at 1116. In this context, where the Board duly promulgated rules as a part of a comprehensive regulatory regime in a traditional area of state concern, the many layers of government review and accountability are more than sufficient to immunize the Board from plenary antitrust review.

III. Subjecting the Duly-Promulgated Rules of a State Medical Board to Plenary Antitrust Review—in Addition to Established State Review Mechanisms—Would Undermine the Ability of States to Regulate the Health Professions.

The Texas legislature has determined that the best way to promote the health and welfare of its citizens is to create "an agency of the executive branch of the state government"—*i.e.*, the Board—and to empower that

agency "to regulate the practice of medicine" in the State. Tex. Occ. Code § 152.001(a). The duly-promulgated rules of this state agency have the force of law only after they have gone through the notice-and-comment process and have been presented to the legislature for its review, and they remain subject to judicial review even after becoming effective. And as the agency entrusted with the authority to regulate the practice of medicine in Texas, the Board's paramount concern is the promotion of state health policy and the protection of the public welfare.

Plenary antitrust review of the Board's duly-promulgated rules would subvert the Board's decision-making process and distort its regulation of the practice of medicine. Suppose, for example, that the Board is called upon to determine whether the performance of certain services by a non-physician clinician constitutes the unlicensed practice of medicine. The Board, after a thorough review, might well conclude that a non-physician would lack sufficient training and expertise to perform the services in question without exposing patients to significant and unjustified risks.

In the absence of any threat of plenary antitrust review, the Board might decide to promulgate a rule providing that the services constitute the practice of medicine and can only be performed by or under the supervision of a physician. But if the Board is exposed to the threat of antitrust liability, it is more likely to decide not to act, a decision that poses a risk to the public, for fear that the non-physician clinicians might choose to challenge the rule in a federal antitrust court rather than in the notice-and-comment process or through judicial review under the Texas Administrative Procedure Act.

The federal antitrust laws should not be construed to subvert medical decisions of state boards regarding what the boards believe in good faith to be in the best interests of patients and the public, particularly where such decisions are already subject to multiple layers of review to ensure that they reflect state policy. The public interest in the regulation of professionals by a state board is best protected by the state democratic process, by the notice-and-comment rule-making process, and by judicial review in the state courts. Application of federal antitrust laws to reasoned

decisions of state boards charged with regulation of the practice of medicine in the public interest is likely to come at the expense of patient health and sound medical considerations.

IV. If this Court Remands for a Determination on the Merits, It Should Emphasize that Any Antitrust Analysis Must Account for Values Other Than Competition.

This case should be dismissed on immunity grounds because the Board's duly-promulgated rules, subject to various forms of review, are the policy of the State of Texas. But if this Court determines that the case should proceed to a determination on the merits, it should emphasize that the antitrust laws apply differently to agencies charged by the State with advancing state health policy than they do in the ordinary commercial context.

The Supreme Court emphasized in *Goldfarb* that the "antitrust concepts" that originated in the business context may not apply, or may apply differently, to contexts that do not involve ordinary business activities. *See* 421 U.S. at 788 n.17. *Goldfarb* itself was a case involving the legal profession, and the Court's hesitation to "automatically" impose rules

developed in the business context to lawyers was in part rooted in the need to respect and promote the "public service aspect" of the legal profession. *See id.*

The reasoning in *Goldfarb*'s footnote 17 applies with even greater force in the context of actions of a state board of medicine. The actions of such a board must take into account and seek to advance a variety of values other than promoting competition. These actions should be designed to protect the public health, promote patient safety, avoid consumer deception, and reduce drug abuse and diversion. Any sensible antitrust analysis under the "Rule of Reason" cannot focus exclusively on competitive effect. Rather , it must account for the need to promote public health and protect the citizens of the State. A too-narrow focus on competition alone poses a serious risk that rules that are intended to protect patients and advance the public health will be struck down as violative of the antitrust laws..

The Seventh Circuit has made precisely this point. *See Wilk v. American Medical Ass'n*, 719 F.2d 207, 227 (7th Cir. 1983). In *Wilk*, the

Seventh Circuit emphasized that it was necessary to consider a "value independent of the values attributed to unrestrained competition" when analyzing an ethical rule adopted by the American Medical Association. *See also id.* at 227 (noting that the Sherman should not be construed to be "indifferent to, or even hostile to, the value of permitting medical doctors to honor in their practice what they perceive to be scientific method"). *Wilk* stands for the proposition that the antitrust laws have to account for a broader range of considerations, rather than merely the value of competition, when matters of public health are at issue.

That principle applies most strongly here, where the defendant is a state agency charged with the responsibility to regulate the practice of medicine and to protect the health and safety of patients. If the state boards of medicine are going to have their rules subjected to plenary antitrust review, then antitrust review—with its traditional singular focus on competition—must be flexible enough to account for the health of the citizens whom the state boards were created to protect. Otherwise, state boards will often have to choose between advancing federal competition

policy or promoting public health. Such choices should not have to be made.

CONCLUSION

For the foregoing reasons, the decision of the district court denying immunity should be reversed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitations of Fed. R. App. P. 32(a)(7)(B) and 29(d) because it contains 6898 words according to Microsoft Word, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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June 24, 2016 /s/ Jack R. Bierig

CERTIFICATE OF SERVICE

I hereby certify that on June 24, 2016, I caused the foregoing Brief to be electronically filed with the Clerk of Court using the CM/ECF filing system, which will send notice of such filing to all registered CM/ECF users.

/s/ Jack R. Bierig