No. 16-50017

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

TELADOC, INC.; TELADOC PHYSICIANS, PROFESSIONAL ASSOCIATION; KYON HOOD; EMMETTE A. CLARK, *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 his 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

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BRIEF OF *AMICI CURIAE* 55 ANTITRUST AND COMPETITION POLICY SCHOLARS IN SUPPORT OF PLAINTIFFS-APPELLEES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are 55 academics at leading universities. These include professors who have taught and written about antitrust and the economics of competition, and scholars who have helped develop antitrust caselaw. Their names and affiliations (for identification purposes only) appear in the Appendix.

SUMMARY OF ARGUMENT

This appeal involves an effort by a state administrative agency, the Texas Medical Board, to evade the substance of federal antitrust law. The basic purpose of antitrust law is to prevent markets from being manipulated anticompetitively—yet that is precisely what professional licensing boards dominated by market participants do. The Board argues that it is actively supervised and therefore qualifies for the narrow state-action immunity to antitrust law. But this active supervision is illusory, and this Court should not be fooled by the Board's attempt to argue otherwise.

The background for this dispute begins with *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), where the Supreme Court held that private parties are not immune from antitrust law unless (1) they

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[1] No person or entity other than *amici* or their counsel had any role in authoring this brief or made a monetary contribution intended to fund the brief's preparation or submission. All parties have consented to the filing this brief.

are acting pursuant to a clearly articulated anticompetitive state policy *and* (2) they are actively supervised by the State.

In particular, professional licensing boards dominated by market participants can have anticompetitive effects, and federal antitrust law plays a valuable role in controlling these effects. The Supreme Court recognized as much in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), holding that the *Midcal* test—in particular its second prong—applies to such boards, just as it applies to fully private parties: "[A] state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." *Id*. at 1114.

The Texas Board concedes that it is dominated by active market participants and that the active-supervision requirement therefore applies. However, it argues, first, that state judicial review satisfies this requirement. Second, it argues that because Texas law has mechanisms to limit Board members' self-dealing and promote accountability, the active-supervision requirement should be enforced less strictly than it would otherwise be. In effect, the Board contends that this Court should endorse a "sliding scale" approach to assessing state supervision.

Both arguments are mistaken.

For judicial review to count as active supervision, it must reach the merits of the specific anticompetitive decisions; it must be *de novo*; and it must be actual, not potential—that is, it must occur before anticompetitive harm is suffered, and it must not require victims to engage in costly litigation. *See N.C. Dental*, 135 S. Ct. at 1116 ("The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State.'" (citations omitted) (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992)). Yet state judicial review fails on all these dimensions. It goes only to whether Board decisions are adequately reasoned and within the broad bounds of the Board's authority, not to whether disinterested officials actually approve of the merits. It defers heavily to Board decisionmaking in areas of discretion. And it relies on costly litigation by the victims of Board action, which is not guaranteed to occur before harm is suffered.

Moreover, the "sliding scale" of review is supported by neither existing law nor good sense. The strength of the active-supervision inquiry does not depend on whether there are mechanisms to limit self-dealing and promote accountability. Such mechanisms are praiseworthy, but they do not ensure that disinterested officials actually approve of the specific Board decisions challenged here. The

reasoning of *N.C. Dental* does not support sliding-scale scrutiny of active-supervision depending on these factors, and such a sliding scale would not be judicially administrable.

Therefore, the Board should be denied state-action immunity.

ARGUMENT

I. THE PROBLEM OF OCCUPATIONAL LICENSING BOARDS DOMINATED BY MARKET PARTICIPANTS.

A. Market-Participant-Dominated Boards Have Anticompetitive Effects.

In recent decades, States have created many new licensing boards, often dominated by participants in the very markets that the boards regulate. Predictably, self-dealing and anticompetitive behavior run rampant: "[F]inancially interested parties cannot be trusted to restrain trade in ways that further the public interest." Einer Richard Elhauge, *The Scope of Antitrust Process*, 104 HARV. L. REV. 667, 696 (1991). Occupational licensing has been abused by incumbent market participants to exclude rivals and raise prices, through overly restrictive licensing requirements or aggressive and unjustified enforcement actions or delicensing proceedings. *See generally* Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093 (2014); Alexander Volokh, *The New Private-Regulation Skepticism:*

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"The most generally held view on the economics of occupational licensing is that it restricts the supply of labor to the occupation and thereby drives up the price of labor as well as of services rendered." Morris M. Kleiner, *Occupational Licensing*, J. ECON. PERSP., Fall 2000, at 189, 192. Licensing achieves this effect through several mechanisms, including: (1) establishing entry barriers, for instance requiring applicants to take certain courses and pass exams, or not recognizing out-of-state licenses, (2) restricting competition, such as by advertising bans, or (3) adopting expansive definitions of the profession they regulate, so as to acquire jurisdiction over—and ultimately oust—low-cost competitors that had previously been operating "at the fringes of their profession." Edlin & Haw, *supra*, at 1112.

These effects—restricted supply and increased price—do not imply that licensing necessarily violates antitrust law. But these effects exist; and when the licensing regime is administered by self-interested market participants, there is an increased probability that these price increases are not justified by improved quality and that the restrictions are on balance anticompetitive.

B. Health-Care Markets Are No Exception.

The anticompetitive effects of licensing boards—price increases without necessary quality improvements—also extend to health-care markets.

First, occupational licensing restricts practitioners' business strategies. "In many states, dentists cannot legally employ more than two hygienists each," a restriction that artificially limits how many patients dentists may serve. "And in some states, nurse practitioners must be supervised by a physician, even though studies show that nurse practitioners and physicians provide equivalent quality of care where their practices overlap." *Id.* at 1107-08 (footnotes omitted).

Second, licensing increases prices—in health-care markets as elsewhere. This has been documented in areas from dentistry to optometry. *Id.* at 1113-14. Thus, some consumers—especially poor ones—use fewer medical services than they otherwise would.

Third, quality improvements are not assured. Various studies have failed to find a positive effect of licensing on quality. The FTC has long played a leading role in pointing out the inefficiency of much licensing, including in health care. *See, e.g.*, *id.* at 1112 n.101, 1116-18; RONALD S. BOND, ET AL., STAFF REPORT ON EFFECTS OF RESTRICTIONS ON ADVERTISING AND COMMERCIAL PRACTICE IN THE PROFESSIONS: THE CASE OF OPTOMETRY 25 (FTC, Bur. of Econ., 1980).

C. The Need for Strong Antitrust Scrutiny of Market-Participant-Dominated Boards.

Antitrust review is appropriate for curbing the excesses of occupational licensing because licensing has a similar effect to traditional cartel activity. In the private sector, courts have used the Sherman Act to condemn combinations of

competitors using written tests to erect entry barriers, imposing advertising restrictions, and predicating membership in a trade association on having a "favorable business reputation." Edlin & Haw, *supra*, at 1132-33. But regulatory boards use these same techniques to suppress competition through licensing.

Making matters worse, licensing schemes are particularly durable. When *private* firms collude, they have to act secretly to avoid antitrust penalties; they have to deal with lone holdout firms who refuse to agree to the collusive scheme; they have to police whether their co-conspirators are abiding by the agreement and (again secretly) threaten credible penalties for non-compliers. Ultimately, cartels often fail to emerge, or break down, because the gains to cheating are high or because new firms enter—to the consumer's benefit. By contrast, licensing boards face few of these problems. By convincing the government to centralize decision-making in a regulatory board (which they dominate), competitors can impose an agreement on dissenting firms, prevent cheating by legal sanctions, and use licensing to control entry. *Id.* at 1133.

It has thus long been recognized that state boards are subject to antitrust law. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 791 (1975) (that "the State Bar is a state agency for some limited purposes does not create an antitrust shield that allows it to foster anticompetitive practices for the benefit of its members"). And while such bodies may benefit from the immunity recognized in *Parker v. Brown*, 317

U.S. 341 (1943), the Supreme Court has stressed that this immunity is interpreted narrowly. "[S]tate-action immunity is disfavored, much as are repeals by implication." *Ticor*, 504 U.S. at 636 (citing *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398-99 (1978)); *see also N.C. Dental*, 135 S. Ct. at 1110.

Moreover, *N.C. Dental* makes clear that boards dominated by market participants are particularly suspect. For these, the Supreme Court insists on both prongs of the *Midcal* test: not only (1) that the anticompetitive policies be clearly authorized by state law, but also (2) that the boards be actively supervised.

The active-supervision requirement is a necessary and independent requirement. "State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address. This conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants' confusing their own interests with the State's policy goals." *N.C. Dental*, 135 S. Ct. at 1114 (citing 1A PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION ¶ 227, at 226 (4th ed. 2013); *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988)).

And just as the anticompetitive effects of licensing boards apply generally, so, too, does antitrust scrutiny apply generally. There is no general health-care,

professional-standards, or safety exception to antitrust law. *See Goldfarb*, 421 U.S. at 787 ("In arguing that learned professions are not 'trade or commerce' the County Bar seeks a total exclusion from antitrust regulation. . . . We cannot find support for the proposition that Congress intended any such sweeping exclusion. The nature of an occupation, standing alone, does not provide sanctuary from the Sherman Act, nor is the public-service aspect of professional practice controlling in determining whether § 1 includes professions."); *Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978) ("[T]hat engineers are often involved in large-scale projects significantly affecting the public safety does not alter our analysis. Exceptions to the Sherman Act for potentially dangerous goods and services would be tantamount to a repeal of the statute."); *Va. Acad. of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 485 (4th Cir. 1980) ("[I]t is not the function of a group of professionals to decide that competition is not beneficial in their line of work[;] we are not inclined to condone anticompetitive conduct upon an incantation of 'good medical practice.'").

D. The Question Is Whether Disinterested State Officials Have Actually Approved the Agency's Specific Conduct.

A state Legislature's willingness to authorize regulation leaves a host of judgment calls that the Legislature has not made about a particular topic like telehealth—such as what are the safety benefits of in-person consultation, and whether any quality and safety gains justify the increased prices. Those judgment

calls are instead made by the Board, whose market participation makes it financially interested in exaggerating safety concerns and in perversely weighing increased prices as a positive rather than a negative. Thus—even if a Legislature clearly authorizes displacement of competition—if there is no active supervision, there is no assurance that disinterested officials endorsed the restraint at issue.

In *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985), the Supreme Court explained that a municipality, to obtain immunity, did not need to satisfy the active-supervision prong of *Midcal*, but could rely solely on the first prong—its clear authorization in state law. But this was because "there is little or no danger that [municipal officials are] involved in a *private* price-fixing arrangement"—unlike private parties who may be "acting to further [their] own interests, rather than the governmental interests of the State." *Id.* at 47.

But as *N.C. Dental* made clear, boards dominated by market participants are different: The presence of self-interest requires active supervision to guarantee that the specific "interstitial policies made by the entity claiming immunity" be "review[ed] and approve[d]" by the State. 135 S. Ct. at 1112; *see also id.* at 1111 ("*Parker* immunity requires that the anticompetitive conduct of nonsovereign actors, especially those authorized by the State to regulate their own profession, result from procedures that suffice to make it the State's own." (citing *Goldfarb*,

421 U.S. at 790; 1A AREEDA & HOVENKAMP, *supra*, ¶ 226, at 180)); *Ticor*, 504 U.S. at 635; *Patrick*, 486 U.S. at 100-01.

II. TEXAS ADMINISTRATIVE-LAW JUDICIAL REVIEW IS NOT ACTIVE SUPERVISION.

The Board relies on a single feature of Texas law that, in its view, constitutes active supervision: state-court administrative-law judicial review. Appellants' Br. at 36, 45 (calling such review "sufficient"). (Nonetheless, the Board spends many pages discussing other aspects of Texas law that it concedes are not active supervision; the (ir)relevance of that discussion is discussed in Part III, *infra*.)

But judicial review in Texas courts does not qualify as active supervision under *Midcal*. If judicial review is to be active supervision, it must at least address the merits of the specific anticompetitive decision; it must be *de novo*; and it must occur before the imposition of the market restraint without the need for costly litigation. *See N.C. Dental*, 135 S. Ct. at 1116; Elhauge, *supra*, at 716-17.

Texas judicial review fails this test, for the following two reasons.

First, it occurs only if someone incurs the substantial cost of state-court litigation. This cost means that state judicial review might never occur—in which case there is no reason to think that disinterested officials have actually approved the Board's specific decision. Moreover, such review is not guaranteed to occur

before antitrust harm is suffered. This makes state judicial review the "'mere potential for state supervision,'" which the *N.C. Dental* Court explicitly held inadequate. 135 S. Ct. at 1116 (quoting *Ticor*, 504 U.S. at 638).

But there is a second reason, which goes to the heart of administrative law: Judicial review, even the "substantive" kind, merely checks for adequate reasoning and consistency with the enabling statute sufficient to show that the rule is within the Board's authority, and defers to the Board's reasonable interpretations where there is ambiguity. But this is not the same as review of decisions "to ensure they accord with state policy," which the *N.C. Dental* Court wrote was necessary. *Id.* Judicial review must at least be *de novo* to count as adequate supervision.

A. State Judicial Review Cannot Confer Antitrust Immunity if It Requires Costly Litigation or if It Is Post-Injury.

First, state-court judicial review cannot confer antitrust immunity if it occurs only after costly litigation. State courts will not review a rule that no one challenges. But affected firms cannot always be expected to challenge Board rules. An aggrieved firm may decide that the expense of litigation is just too great. Sometimes, an agency rule may be a disguised form of cartel enforcement—for instance, benefiting all incumbent firms by setting a mandatory price. In such a case, the affected firms have no interest in challenging the rule. The cost of the rule falls on consumers, who (if they even have standing) usually cannot be counted on to challenge the rule: Each individual's harm may be too small to

justify the expense of litigation, and one cannot rely on the possibility of damages class actions. *See* Elhauge, *supra*, at 716 ("[T]he effort and time necessary to invoke state review can discourage and delay vindication of the right to a competitive market.").

That "the 'mere potential for state supervision is not an adequate substitute for decision by the State'" is one of the "few constants of active supervision." *N.C. Dental*, 135 S. Ct. at 1116 (quoting *Ticor*, 504 U.S. at 638). Even if judicial review can be active supervision, there can be no assurance that the Board's decision comports with state policy (as determined by disinterested officials) until after judicial review has been successfully completed.

Second, state-court judicial review cannot confer immunity if it occurs after injury is suffered. There is no guarantee of pre-implementation review: Like federal courts, Texas courts recognize the doctrine of ripeness, which "asks whether the facts have developed sufficiently so that an injury has occurred or is likely to occur, rather than being contingent or remote," and thus "serves to avoid premature adjudication." *Patterson v. Planned Parenthood of Houston & Se. Tex., Inc.*, 971 S.W.2d 439, 442 (Tex. 1998). Aggrieved parties thus might not be able to challenge Board rules until after implementation.

The prospect of having to suffer harm before incurring the additional expense of a lawsuit can discourage firms from challenging the rule to begin with:

They might simply conform their conduct to the (invalid) rule and never achieve the ripeness necessary for a challenge.

B. Judicial Review Is Deferential and Therefore Asks the Wrong Question.

1. Judicial Review Must Not Only Be "Substantive" but Must Also Focus on Whether the Board's Decision Accords with State Policy.

N.C. Dental teaches that purely procedural review cannot constitute active supervision and that "[t]he supervisor must review the substance of the anticompetitive decision . . . to ensure [it] accord[s] with state policy." *N.C. Dental*, 135 S. Ct. at 1116; *see also Patrick*, 486 U.S. at 102-05. At a minimum, judicial review must be substantive, and must focus on the merits of the anticompetitive aspects of the specific acts being challenged. *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 595 (1976); 1A AREEDA & HOVENKAMP, *supra*, ¶ 226c2, at 204-05.

Thus, to support its argument that state judicial review is sufficient, the Board points out that "the Texas APA allows both procedural and substantive" challenges. Appellants' Br. at 46 (citing *Tex. Med. Ass'n v. Tex. Workers Comp. Comm'n*, 137 S.W.3d 342, 346 (Tex. App. 2004)). But the mere label "substantive" is not enough for judicial review to be active supervision. The review must also ask the proper question: whether the Board's decision "accord[s] with state policy" as determined by disinterested officials.

A simple example will show why. Texas has its own antitrust statute, TEX. BUS. & COM. CODE ANN. §§ 15.01, *et seq.*, which resembles federal antitrust statutes. Suppose Texas grants a Board the power to control access to a profession, as long as that power is used consistently with the state antitrust Rule of Reason.

Anyone aggrieved by the Board's acts can go into state court and sue the Board under Texas antitrust law. Would the possibility of such state-court review constitute active supervision and thus (provided there was also clear authorization) preclude a later federal-court suit under the Sherman Act?

Obviously not. State antitrust review is of course substantive, not procedural. But it cannot constitute active supervision under *Midcal*. First, this would imply "the wholesale preclusion of federal antitrust law," which is "an untenable reading of the Sherman Act." Elhauge, *supra*, at 716. Second, the "substance" of this judicial review *focuses on the wrong issue*: whether the defendant's acts are unreasonable in an antitrust sense, not (as *Midcal* requires) whether the Board's acts comply with state policy as determined by a disinterested official. These are two different questions.

Thus, to be active supervision under *Midcal*, judicial review must not only be "substantive" in a generic sense, but in particular answer whether the merits of the Board's specific policy have been actually approved by disinterested officials. In most cases, Texas administrative-law review—like Texas antitrust-law review

in the hypothetical above—answers the wrong question. Administrative law cares whether a policy has means-ends rationality and is within the bounds of agency authority (which, in this case, is extremely broad). This is simply not the same question as whether the merits of the specific policy have been actually approved by disinterested officials.

In fact, in a sense, state judicial review asks *the opposite* of the correct question. Texas administrative law, like its federal counterpart, is characterized by deference to agencies when a statute is ambiguous. Deference regimes are founded on the belief that agencies are politically accountable and thus better able to fill statutory gaps. But when agencies are dominated by active market participants, *N.C. Dental* teaches that they are actually *unaccountable* because of the risk of self-dealing. Allowing self-interested agencies to fill gaps is the opposite of *N.C. Dental*'s insistence that their specific decisions be actually approved by disinterested officials. Therefore, deferential review is antithetical to active supervision.

2. Because Texas Judicial Review Is Deferential, It Does Not Truly Go to the Merits.

A glance at the cases cited by the Board shows how pervasive deference is.

The Board notes that the Texas APA allows "substantive" (as well as "procedural") challenges, and asserts that the purpose of such judicial review is to "ensure that agency rules are in accord with the policy objectives set by the

Legislature." Appellants' Br. at 46 (emphasis omitted) (citing *Gulf Coast Coalition of Cities v. PUC*, 161 S.W.3d 706, 712 (Tex. App. 2005)).

As *Gulf Coast Coalition* explains, however, a reviewing court determines whether the agency acted consistently with its statutory authority; and when statutes are ambiguous, agencies are granted deference. 161 S.W.3d at 711-12. This is similar to review of federal agency action under the federal APA. *See, e.g.*, *Motor Vehicle Mfrs. Ass'n v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29 (1983); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837 (1984).

The Board, at 47, also cites *Texas Orthopaedic Ass'n v. Texas State Board of Podiatric Medical Examiners*, 254 S.W.3d 714 (Tex. App. 2008). There, the court wrote: "An agency's construction of a statute that it is charged with enforcing is entitled 'to serious consideration by reviewing courts, so long as that construction is reasonable and does not contradict the plain language of the statute.'" *Id*. at 719 (citation omitted).

This, too, sounds like *Chevron* review. Indeed, the Texas Supreme Court has agreed that its standard is "similar" to *Chevron*. *R.R. Comm'n of Tex. v. Tex. Citizens for a Safe Future & Clean Water*, 336 S.W.3d 619, 625 (Tex. 2011).

Both state and federal administrative-law review are characterized by deference to agencies when there is ambiguity or discretion. As one commentator intimately familiar with Texas administrative law—now the Solicitor General of

Texas—has noted, Texas law may be somewhat less deferential than *Chevron*, but the two systems are "analogous." "[T]he issue of agency deference pervades our state's legal system," he writes; "[the Texas Supreme Court's] statements on agency deference suggest a series of decision rules that relate to the federal *Chevron* inquiry." Scott A. Keller, *Texas Versus* Chevron*: Texas Administrative Law on Agency Deference After* Railroad Commission v. Texas Citizens, TEX. BAR J., Dec. 2011, at 984, 986, 988.

The deferential posture of state judicial review shows that such review cannot suffice under *Midcal*. Recall the purpose of the active-supervision requirement: to ensure that disinterested officials actually approve of the agency's specific decision. But many statutes, including the ones here, are ambiguous. For example, one statute requires that physicians "practice medicine in an acceptable professional manner consistent with public health and welfare." TEX. OCC. CODE ANN. § 164.051(a)(6). Does this statute require examinations at an "established medical site"? Does it authorize disciplinary action for prescribing drugs as a result of an "online or telephonic evaluation by questionnaire"?

This is a far cry from the interpretation of unambiguous statutes, where the intent of the Legislature is clear—what federal law calls a "*Chevron* Step 1" issue—and administrative review is a straightforward matter of making sure agency action conforms to the statute. The Board cites a few such cases, where

courts struck down agency action because of an "evident" "mismatch" with legislative objectives. Appellants' Br. at 47 (citing *Tex. Orthopaedic*, 254 S.W.3d at 722; *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 475-88 (Tex. App. 2012)).

In such cases—where the agency's decision is so unreasonable that it is clearly inconsistent with legislative judgment and the agency's authority—judicial review tells us that the agency's decision does *not* comport with state policy. And if a statute is so clear that it grants no discretion, and the agency's action is exactly within that grant—in effect, if the Legislature *commanded* some act—then the agency's decision *is* that of the State and immunity properly applies. But in most interesting cases, courts defer to exercises of agency discretion within broad and ambiguous grants, where the State's decision on the precise issue is unknown.

The statute here is phrased broadly, using ambiguous language that authorizes many possible actions, depending on Board members' values. Texas law lets agencies choose any of these possibly contradictory policies, provided they are reasonable. As in federal law, there is no absolute bar against agencies' reversing their previous interpretations, if the new policy is also reasonable and the change is adequately explained. *See, e.g.*, *First Am. Title Ins. Co. v. Combs*, 258 S.W.3d 627, 645 & n.28 (Tex. 2008) (Hecht, J., dissenting) (citing Texas and federal cases supporting this rule).

Deferential review, which upholds agency action unless it is unreasonable, substantively irrational, or arbitrary and capricious, thus cannot be active supervision under *Midcal*. 1A AREEDA & HOVENKAMP, *supra*, ¶ 226c1, at 187. Though substantive, it answers the wrong question: Is the policy both adequately reasoned and somewhere within the large set of authorized policies? Having means-ends rationality and being not totally contrary to legislative policy are praiseworthy. But because many policies are both authorized and capable of being rationally justified, passing this test is not the same as being actually approved on the merits by disinterested officials.

Moreover, the premise of deference—that agencies are more accountable than the judiciary—is precisely inappropriate when agencies are dominated by self-interested actors. In such cases, *N.C. Dental* holds that there is no substitute for actual scrutiny of the merits of the specific anticompetitive decision. At a minimum, then, judicial review must be *de novo*. One can imagine judicial review without deference, but Texas law has squarely rejected such a vision.

III. THE FEATURES OF TEXAS LAW THAT SUPPOSEDLY CONTROL SELF-DEALING ARE IRRELEVANT TO WHETHER THERE IS ACTIVE SUPERVISION.

A. The Board Does Not Argue That These Features Constitute Active Supervision, Merely That They Should Lead to a Weaker Analysis.

Despite its view that judicial review is "sufficient" supervision, the Board spends many pages talking about other features of Texas law. For instance, the

fact that Board members are appointed by, and may be removed by, the Governor and Senate, and the fact that Board members are specialists from different fields, are supposedly "[f]eatures of the Board's membership [that] minimize the risk that [the Board] will forego its mandate and act with only a private purpose." Appellants' Br. at 38-41. Good-government laws and reporting requirements "further reduce the risk that the Board will shirk its official duties and pursue only private interests." *Id.* at 41-45. Later, the Board points to features of legislative oversight that "reinforce[]" or "buttress[]" active supervision, *id.* at 50-52.

The Board does not argue that these features themselves constitute active supervision. And wisely so: Such an argument would directly contravene the rule of *Patrick*, 486 U.S. at 102, *Ticor*, 504 U.S. at 633, and *N.C. Dental*, 135 S. Ct. at 1112, that active supervision must extend to the specific challenged actions. *See id.* ("The second *Midcal* requirement . . . seeks to avoid [the] harm [of private self-dealing] by requiring the State to review and approve interstitial policies made by the entity claiming immunity."); *id.* at 1116 ("The supervisor must review the substance of the anticompetitive decision, not merely the procedures followed to produce it; the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy; and the 'mere potential for state supervision is not an adequate substitute for a decision by the State.'" (citations omitted) (quoting *Ticor*, 504 U.S. at 638)); *see also* 1A AREEDA & HOVENKAMP,

supra, ¶ 226c1, at 185-87 ("Of course, the active supervision must extend to the anticompetitive aspects of challenged conduct.").

Rather, the Board argues that these features, because they control self-dealing and increase political accountability, should lead this Court to apply the active-supervision requirement less strictly than it otherwise would. *See* Appellants' Br. at 41 (arguing that "the necessary degree of active supervision" depends on the "risk that [the Board's] rulemaking does not pursue state policy," which is mitigated by "its political accountability and structure").

The argument of Part II, *supra*, implies that state judicial review is not active supervision at all, even under a weak standard, because it does not answer whether the merits of the specific Board decision have been actually approved by disinterested officials, it is not *de novo*, it does not occur before anticompetitive harm is suffered, and it relies on costly litigation by victims. So whether the active-supervision requirement should apply in watered-down form is not important here: The Board should be denied immunity regardless.

Nonetheless, the Board is incorrect that the active-supervision requirement should be watered down, for the following two reasons. First, *N.C. Dental* did not consider these institutional details relevant—rather, it broadly stressed the anticompetitive dangers posed by market-participant-dominated agencies. Second, a sliding scale of active-supervision analysis based on the estimated risk of self-

dealing or extent of political accountability in particular cases would be unadministrable.

B. The *N.C. Dental* Court's Reasoning and Holding Do Not Support an Active-Supervision Inquiry That Depends on the Risk of Self-Dealing.

1. The Risk of Self-Dealing Only Affects the Threshold Determination of Whether Active Supervision Is Required.

In *N.C. Dental*, the Supreme Court did look to "the risk that active market participants will pursue private interests in restraining trade." 135 S. Ct. at 1114. But it did not suggest that this risk affected the stringency of the active-supervision requirement. Rather, this risk informed the threshold question whether to require compliance with the active-supervision prong of *Midcal* at all. Self-interest determines whether a Board *needs* supervision, not whether it *is* supervised. And the Board has conceded that it *needs* supervision, since it is dominated by market participants. Bringing in self-interest at this stage, to determine whether the Board *is* supervised, would amount to relitigating that issue.

The Board states that required active supervision "is 'flexible' and 'context-dependent,'" and that "*[t]hat requires* a context-specific assessment" of the risk of self-dealing, Appellant's Br. at 35 (citing *N.C. Dental*, 135 S. Ct. at 1116, 1114) (emphasis added). But yoking these statements together with a "[t]hat requires" is misleading. The context-specific assessment of the risk of self-dealing is the reason that *Midcal*'s active-supervision prong applies at all; assessing the precise

degree of self-dealing risk is not part of the inquiry into how much supervision is enough. Moreover, *N.C. Dental* made clear that, despite the flexible and context-dependent nature of the test, there are a "few constants": The supervision must be on the merits, must be *de novo*, and must have actually occurred rather than being merely potential. *N.C. Dental*, 135 S. Ct. at 1116. None of those requirements is met here.

Thus, *N.C. Dental* explained that the actor in *Hallie* "was an electorally accountable municipality with general regulatory powers and no private price-fixing agenda," 135 S. Ct. at 1114. The risk of self-dealing was thus low. But that consideration led the Court to exempt municipalities from the active-supervision prong altogether.

Conversely, in *N.C. Dental* itself, the Board of Dental Examiners was an "agenc[y] controlled by market participants," which was "more similar to private trade associations vested by States with regulatory authority." *Id.* Therefore, that dental board was fully subject to the active-supervision prong—just as if it were a trade association or other private actor.

When the Court talked about self-dealing, it deliberately painted with a broad brush to encompass *all* market-participant-controlled agencies, because market participation inherently provides "private anticompetitive motives":

> Limits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants,

> for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor. In consequence, active market participants cannot be allowed to regulate their own markets free from antitrust accountability.

Id. at 1111. The Court added: "State agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*'s supervision requirement was created to address." *Id.* at 1114.

This is why the risk of self-dealing goes to the threshold question whether the active-supervision prong is required at all, not to how stringently to apply this prong. Market participation leads to (possibly unconscious) "[d]ual allegiances" and "private anticompetitive motives," *id.* at 1111, and private parties "may be presumed to be acting primarily on [their] own behalf," *Hallie*, 471 U.S. at 45. "*Midcal*'s supervision rule stems from the recognition that '[w]here a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State.'" *N.C. Dental*, 135 S. Ct. at 1112 (quoting *Patrick*, 486 U.S. at 100). The risk of self-dealing is why supervision is required; but once supervision is required, the only question is whether disinterested officials have actually approved of the merits of the specific anticompetitive policy.

The Supreme Court had the opportunity to introduce further gradations into the active-supervision prong, based on finely grained assessments of the risk of self-dealing for particular agencies, whether the agency officials were appointed or elected, or whether the particular agency was subject to good-government statutes like Public Records Acts and open-meetings laws. But it did not.

Instead, the Supreme Court held—in a sentence helpfully marked *The Court holds today*—that the same rule obtains for all market-participant-controlled boards: "The Court holds today that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." 135 S. Ct. at 1114. Since the absence of supervision was conceded in *N.C. Dental*, the Court did not commit itself to whether active supervision is governed by a sliding scale that depends on the precise extent of self-dealing and accountability; but *N.C. Dental*'s reasoning does not support an approach that depends on these factors.

(The Board cites the Areeda & Hovenkamp treatise to support the sliding scale idea. Appellants' Br. at 41 (citing 1A AREEDA & HOVENKAMP, *supra*, ¶ 227a, at 221 ("[T]he kind of supervision appropriate for a public body, even of the kind involved in *Hoover*, could well be far less than for an entirely private party."). But note the "could well" language: This is merely a suggestion of what

might be, based on issues left unresolved in *Hoover v. Ronwin*, 466 U.S. 558 (1984). Moreover, this pre-*N.C. Dental* language does not suggest that an agency can dispense with the "few constants of active supervision," 135 S. Ct. at 1116.)

2. Legislative Oversight Likewise Does Not Convert State-Court Judicial Review into Active Supervision.

The Board further notes two aspects of legislative oversight: first, the review of rules by a legislative committee; and second, the sunset-review process. The Board does not argue that these constitute active supervision. Appellants' Br. at 51 ("[E]ven if this legislative review of proposed rules does not amount to active supervision on its own . . . ."); *id.* at 52 (similar). But it suggests that legislative oversight nonetheless "buttresses the supervision provided by judicial review." *Id.* at 51; *see also id.* at 52 ("reinforces").

Legislative oversight thus plays a similar role to the other features of Texas law discussed above: In the Board's view, it can bolster an otherwise insufficient supervision regime.

But this purported oversight does not help the Board's case. A particular rule might never be scrutinized by a committee, because committees have other things on their agenda. If a committee does nothing, the rule takes effect; committee review is thus "mere potential" review and looks like the "negative option" disapproved in *Ticor*, 504 U.S. at 638. In fact, it is worse than the negative option: Even if these committees act (perhaps long after anticompetitive harm is

suffered), their only power is to "send to a state agency a statement supporting or opposing adoption of a proposed rule," TEX. GOV'T CODE § 2001.032(c), and even then a committee's view is not that of the State as a whole.

As for sunset review, the Board's last sunset review was in 2005 (before these rules were adopted), and the next one will be in 2017—after anticompetitive harm will have been suffered. Moreover, sunset review only reviews the enabling statute, not the agency's regulations or interpretations. This, too, is "mere potential" review at best.

The Board cites no authority for combining individually insufficient features. But regardless, every feature here is so weak that their sum still does not answer the question relevant to state-action immunity: whether the merits of the Board's specific anticompetitive actions have actually been approved by disinterested officials.

C. A Sliding Scale of Active-Supervision Scrutiny Depending on the Risk of Self-Dealing Would Be Unadministrable.

There is no one-size-fits-all approach to active supervision; the inquiry is "flexible" and "context-dependent." *N.C. Dental*, 135 S. Ct. at 1116. But the analysis is not therefore different for different types of market-participant-dominated agencies. (The Rule of Reason and the negligence rule are flexible and context-dependent, but there are not different rules for different entities.) An inquiry that depended on the risk of self-dealing and extent of accountability in

every case would be unadministrable. Moreover, it would increase uncertainty for state officials, who could not easily determine whether a particular supervisory regime would successfully avoid treble damages.

A uniform approach is a boon to practitioners and judges. It means that when a court hands down a decision holding whether a particular type of supervision is sufficient, that decision becomes useful precedent. But if the stringency of the inquiry depends on the agency-specific risks of self-dealing, every agency in every State is potentially unique, depending on the details of oaths, appointment and removal provisions, state APAs, and judicial review. Every precedent will be of limited value, and every case will require digesting a mass of cases that are not entirely on point and, to some extent, evaluating every agency's institutional constraints *de novo*.

The judiciary is ill-suited to estimating these fine gradations of risks of self-dealing. It is for similar reasons that the Supreme Court, in *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 374-78 & n.5 (1991), rejected a "conspiracy" or "corruption" exception to state-action immunity. *See also N.C. Dental*, 135 S. Ct. at 1113 (calling such an exception "vague and unworkable"). This is also why we have areas of per se illegality and of "quick look" review, *see, e.g.*, *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 109-10 & n.39 (1984); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999): Always requiring a full-

blown Rule-of-Reason analysis would be overwhelming, even if theoretically more accurate.

Thus, there are strong administrability reasons to treat the active-supervision requirement as applying equally to all actors subject to *Midcal*'s second prong.

IV. STATE SOVEREIGNTY AND COOPERATIVE FEDERALISM CONCERNS SHOULD NOT AFFECT THE RESOLUTION OF THIS CASE.

Finally, the Board argues, at 52-54, that immunity is necessary to maintain state sovereignty and cooperative federalism. It is true that denying immunity affects the organization of state government. But this has always been implicit in state-action immunity.

Parker immunity is based on the notion that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. *Midcal* recognized that "immunity for state regulatory programs is grounded in our federal structure." 445 U.S. at 103. *N.C. Dental*, even while denying immunity to a state agency, recognized that "[t]he Sherman Act protects competition while also respecting federalism." 135 S. Ct. at 1117.

Parker and *Midcal* have always represented a compromise between state autonomy and federal supremacy. Because the Court already considered both federalism and antitrust values in *Midcal* and *N.C. Dental*, one should not take

federalism into account *again* in individual cases. If one does not also simultaneously take antitrust (and federal supremacy) values into account in every case, the exercise is biased and therefore unfaithful to *Midcal* and *N.C. Dental*; but if one does consider antitrust values together with federalism values, one is merely replicating the *Midcal* and *N.C. Dental* inquiry, and the nature of precedent demands that one simply apply *Midcal* and *N.C. Dental* as straightforwardly as possible.

CONCLUSION

Therefore, the Board should be denied state-action immunity.

Respectfully submitted,

s/ Erik S. Jaffe

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CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing Brief of *Amici Curiae* 55 Antitrust and Competition Policy Scholars in Support of Plaintiffs-Appellees complies with the type-face requirements of Fed. R. App. P. 32(a)(5) & (6) and the 7,000 word type-volume limitation of Fed. R. App. P. 29(d) and 32(a)(7)(B) in that it uses Times New Roman 14-point type and contains 6950 words, excluding the table of contents, table of authorities, certificates of counsel, and appendix. The number of words was determined through the word-count function of Microsoft Word.

s/ Erik S. Jaffe
Erik S. Jaffe

CERTIFICATE OF SERVICE

I hereby certify that, on this 9th day of September, 2016, I caused the foregoing Brief of *Amici Curiae* 55 Antitrust and Competition Policy Scholars in Support of Plaintiffs-Appellees to be served via the CM/ECF system on all participants in this case.

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