

**NO. 16-50017**

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***In the United States Court of Appeals for the Fifth Circuit***

**TELADOC, INCORPORATED; 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 HER OFFICIAL CAPACITY; STANLEY  
WANG, M.D., J.D., MPH, IN HIS OFFICIAL CAPACITY; GEORGE WILLEFORD, III,  
M.D., IN HIS OFFICIAL CAPACITY; JULIE K. ATTEBURY, M.B.A., IN HER OFFICIAL  
CAPACITY; PAULETTE BARKER SOUTHARD, IN HER OFFICIAL CAPACITY,  
*Defendants-Appellants.***

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

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**BRIEF OF TEXAS ASSOCIATION OF BUSINESS  
AS AMICUS CURIAE IN SUPPORT OF  
TELADOC, INC. ET AL., PLAINTIFFS-APPELLEES**

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**IDENTITY AND INTEREST OF AMICUS CURIAE**

The Texas Association of Business (TAB) is an organization committed to improving the climate for business in Texas and ensuring the strength and viability of the Texas economy. It is a broad-based, bipartisan organization representing a diverse group of businesses, both large and small, that form the backbone of Texas' economy. The 4600 member companies and over 200 member chambers of commerce provide jobs for millions of Texans. The TAB's member businesses employ some of the more than 2.5 million Texans who have access to telehealth today. These businesses are vitally interested in how agency rules and regulations affect Texas businesses and are committed to promoting the economic health of Texas for themselves, their employees, and all Texans. To facilitate this economic health, it is imperative that the business climate foster growth and innovation such as the telehealth industry. And it is equally important that businesses not be subjected to rules and regulations adopted by self-interested licensing boards that have the effect of unfairly restricting trade and competition. Not only does the rule at issue promulgated by the Texas Medical Board fail to support these goals, it effectively eliminates a cost-effective and competitive option to traditional health-care modalities. TAB, therefore, writes to highlight the negative impact of the TMB rule on the Texas business climate, and on employers in particular, who face

many challenges in providing economical and efficient health care options for employees.

Pursuant to Fifth Circuit Rule 29.1 and Fed. R. App. P. 29(a), all parties have consented to the filing of this amicus brief. No party or party's counsel authored this brief in whole or part or made a monetary contribution intended to fund preparation of this brief.

## **SUMMARY OF ARGUMENT**

By amendments to its regulatory rules, the Texas Medical Board (Board) has attempted to stymie the growth of an important innovation in health care available to Texas businesses and consumers. These actions taken by the Board, which is comprised primarily of active participants in the health-care industry, smack of self-interest and raise serious antitrust implications given the lack of active supervision of the Board by the State of Texas. The effect of the amended rule, New Rule 190.8, is to restrict fair competition in the provision of health-care services and remove a cost-effective health-care option from the reach of Texas businesses and their employees. This Court, therefore, should uphold the district court's order precluding the Board from taking any action to implement or enforce the offending rule.

## **ARGUMENT**

### **I. Innovative Companies Like Teladoc Foster A Strong Business Climate By Providing Cost-Effective Services Beneficial To Employers And Employees.**

People's day-to-day lives have profoundly changed over the last couple of decades as a consequence of mobile technologies and the internet. Virtually no sector of business, including the practice of medicine, has remained untouched by this technological evolution. Many changes relevant to health-care providers pertain to health care documentation, such as use of online patient portals and

electronically created and stored health records. The use of telehealth, however, has the potential to have an even more robust effect on the practice of medicine by offering business consumers a cost-effective and efficient business model for health care to supplement traditional health-care options.

The TAB has a vital interest in supporting innovations like that which Teladoc provides. Teladoc, a Texas-based company, is one of the largest providers of telehealth services in the country. It has undergone a rigorous, evidence-based review process to become certified by the National Committee for Quality Assurance, a non-profit organization dedicated to improving health care quality. *See* NCQA, “About NCQA,” <http://ncqa.org/about-ncqa> (last visited Aug. 31, 2016). Teladoc engages board-certified, state-licensed, and experienced physicians to provide medical services. And Teladoc has a proven record in Texas of protecting patient safety without a single malpractice claim having been lodged against it.

Telehealth is not, and does not purport to be, a replacement for primary care physicians or emergency rooms. It is a practical and beneficial supplement to these traditional health-care options—and is one that takes into consideration the realities of modern life and business economics. Using telehealth, employees have direct access to a board-certified physician twenty-four hours a day, seven days a week, 365 days a year to address non-emergent common ailments, such as colds,

flu, sinus infections, and allergies, with a board-certified physician. The flexibility and availability afforded by this health-care model provide significant benefits to businesses and their employees.

With medical costs continuing to climb, affordable health care is a primary concern of businesses and their employees alike. Indeed, to address the increasing financial burden of health care, many businesses have turned to consumer-driven health plans that increase out-of-pocket expenses for the plan participants. Telehealth helps make health care affordable. The average cost for a Teladoc consultation is approximately \$40, much less than half the usual \$150 cost of an office visit.

Beyond the obvious cost savings, telehealth also improves employee productivity and reduces absenteeism. Telehealth consultations are far less time-consuming than routine doctor appointments, which generally are scheduled during working hours and involve both transportation time to and from the appointment as well as time spent in waiting rooms.<sup>1</sup> This absenteeism is compounded for employees who are caregivers and must coordinate care for themselves as well as children and elderly relatives.

The irony of the Board's action is that it would limit not only business consumers' health-care choices, it would limit physicians' options as well. With

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<sup>1</sup> In addition, time spent in waiting rooms may expose employees to other illnesses that may, in turn, require further absenteeism from work.



telehealth, physicians may choose to work remotely during off hours or to work remotely part-time as an alternative to retirement. It thus provides a larger pool of resources for consumers and employment opportunities in the medical profession. As such, telehealth creates a win-win situation for Texas business consumers, their employees, and physicians alike.

Telehealth's streamlined access to health care reduces lost work time and lowers health-care costs. Texas businesses have an interest in promoting such innovations, which are essential to the Texas economy. The Board's short-sighted actions, besides having anticompetitive implications, *see infra* Pt. II, are bad for health-care providers and consumers alike, bad for business in general, and bad for Texas, which should be in the forefront of the telehealth industry.

## **II. The Texas Medical Board's Actions, Left Unchecked, Would Squelch Competition In The Health-Care Marketplace And Increase Health-Care Costs For Texas Businesses And Employees.**

Despite Teladoc's benefits to the Texas business economy, both as an innovative business and as a provider of benefits to employers and employees, the Board, has consistently attempted to thwart Teladoc's business model. Its first attempt, in 2010 through amendments to Texas Board Rule 174, caused Teladoc to eliminate video consultations in Texas. *See* 22 Tex. Admin. Code § 174. Teladoc

nonetheless was able to operate with a more limited set of services.<sup>2</sup> Apparently unhappy with Teladoc's continued operation, the Board next sent a letter threatening disciplinary action against Teladoc's physicians if they failed to conduct face-to-face examinations with patients. Once again, Teladoc avoided the Board's actions, this time by successfully challenging the letter in Texas state court. That successful challenge led to the Board's adoption of the 2015 revisions to Rule 190.8, which was the catalyst for Teladoc's filing of the underlying lawsuit. *See* 22 Tex. Admin. Code § 190.8.

The Board repeatedly suggests that any disagreement Teladoc may have with the Board's rules should be handled pursuant to the Texas Administrative Procedure Act as a rule challenge in state court. *See, e.g.*, Board Brief at 1, 10, 12, 18. But these statements deflect from the limitations on review available under administrative proceedings and the significant antitrust issues that stem from a self-interested licensing board's actions, as recognized by the Supreme Court in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015).

The Board's course of conduct, when viewed against the backdrop of the burgeoning national telehealth industry and Teladoc's positive track record, leads to but one conclusion—the physician-driven Board is attempting to minimize competition it believes would be detrimental to its members who are active

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<sup>2</sup> It seems ironic that a board whose professed purpose for amending the rules is to protect health and safety would remove visual assessment as a tool available to a telehealth provider.

participants in the health-care industry. To avoid this logical conclusion, the Board argues its actions, ostensibly based on protecting the health and safety of Texans, are protected by state action immunity. But neither its plea to protect “health and safety” of Texans nor its reliance on immunity for its actions can excuse its anticompetitive behavior.

State action immunity does not, and should not, apply to state boards dominated by active market participants when there is no active supervision by the state. *N.C. Dental Board*, 135 S. Ct. at 1114. The reasons are self-evident. The Supreme Court, in likening licensing boards to private trade associations, has acknowledged that private trade associations “often have economic incentives to restrain competition and that the product standards set by such associations have a serious potential for anticompetitive harm.” *Id.* at 1114 (quoting *Allied Tube & Conduit Corp. v Indian Head, Inc.*, 486 U.S. 492, 500 (1988)). Without a state mechanism to oversee active-market-participant board members’ actions, any board could cloak self-serving regulations in the mantle of health and safety, as the Board has done here. Such justification of the regulations is particularly suspect here where Teladoc’s record evidences a viable and safe option to protect health in non-emergent circumstances and provides a health-care option to individuals who otherwise may not seek treatment because of cost or inconvenience.

On the heels of *North Carolina Dental Board*, the Federal Trade Commission (FTC) published guidance on how it determines whether active supervision of state regulatory boards controlled by market participants exists for purposes of antitrust scrutiny. See FTC Bureau of Competition, *FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants*, [https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active\\_supervision\\_of\\_state\\_boards.pdf](https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf) (Oct. 2015). The FTC acknowledged that its evaluation of the adequacy of such supervision should be “flexible and context-dependent.” *Id.* at 10 (quoting *N.C. Dental Board*, 135 S.Ct. at 1116-17). The FTC also acknowledged, however, that its evaluation would be premised on the guiding principle that the purpose of the active supervision evaluation “‘is to determine whether the State has exercised sufficient independent judgment and control’ such that the details of the regulatory scheme ‘have been established as a product of deliberate state intervention’ and not simply by agreement among the members of the state board.” *Id.* at 9 (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634-635 (1992)).

In an effort to immunize the anticompetitive effect of its actions, the Board has attempted to create an illusion of State active supervision by arguing that various attenuated actions of the State collectively equate to active supervision. It argues that the fact that a rule *can* be subject to judicial review *if* challenged

constitutes active supervision. *See* Board Br. at 45. But active supervision by its plain terms is not passive or something that that can or might be done.<sup>3</sup> As the district court recognized, to be effective and serve as a basis for immunity, the active supervision must precede implementation of any alleged anticompetitive actions. The fact that a State official appoints members of the Board similarly offers no evidence of State exercise of judgment and control over the specific rule at issue. *See* Board Br. at 38-39. The Board also advocates that various permutations of Texas legislative review processes provide some assurance that the Board is acting within the State’s oversight. *See* Board Br. at 50. But this effort to cobble together active supervision cannot create what does not exist, even under a flexible and context-driven analysis.

The Board can point to nothing that shows “the State has played a substantial role in determining the specifics” of the regulations at issue to provide assurance that the Board has not engaged in self-interested actions instead of promoting state policy. *Ticor*, 504 U.S. at 635. Therefore, this Court should uphold the district court’s finding in this case. To hold otherwise would set a dangerous precedent where self-interested boards’ actions are unconstrained by the State oversight necessary for the good of all Texans, including its businesses.

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<sup>3</sup> “Active” means being engaged in or participating in an activity or being in a state of action. AMERICAN HERITAGE DICTIONARY (3d ed. 1993). “Supervision” is the act of “having the charge and direction of; superintend[ing].” *Id.*

## **CONCLUSION**

Telehealth saves businesses and consumers money and streamlines health-care access. Further, given the multitude of state regulatory boards that have a majority of board members who are of the same profession the board regulates, it is critical to Texas business that their actions be subject to the “active supervision” by the State the law requires. The Board’s effort here to severely restrict or remove telehealth as a health-care option in Texas is at odds with the TAB’s mission—advancing innovation in business with healthy and fair competition in the marketplace. The TAB therefore urges this Court to uphold the district court’s order so that Texas businesses and their employees can continue to have access to effective and efficient telehealth options.

Respectfully submitted,

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**CERTIFICATE OF COMPLIANCE WITH RULE 32**

Certificate of Compliance with Type-Volume Limitation,  
Typeface Requirements, and Type Style Requirements

1. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) because this brief contains 2,212 words, excluding the parts exempted by FED. R. APP. P. 32(a)(7)(B)(iii).
2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in proportionally spaced typeface using Microsoft Office Word 2007 in 14-point Times New Roman font (12-point Times New Roman font for footnotes).

/s/ Lisa A. Paulson

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**Texas Association of Business**

Dated: September 9, 2016

**CERTIFICATE OF SERVICE**

I hereby certify that on this 9th day of September 2016, I electronically filed this brief with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. To the best of my knowledge, all parties to this appeal are represented by counsel who are registered CM/ECF users and will be served electronically by the appellate CM/ECF system.

/s/ Lisa A. Paulson

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Dated: September 9, 2016