NO. 16-50017

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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

Plaintiff-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.

Defendant-Appellants

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, AUSTIN DIVISION

BRIEF OF *AMICUS CURIAE* TEXAS CIVIL JUSTICE LEAGUE, INC. IN SUPPORT OF PLAINTIFF/APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.1 have an interest in the outcome of this case. These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal. All parties have consented to the filing of this amicus brief.

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/s/ George S. Christian
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RULE 26.1 DISCLOSURE STATEMENT

In compliance with Fed. R. App. P. 26.1, *amicus* the Texas Civil Justice League (TCJL) is a nonprofit corporation organized and operating under the laws of Texas. It has no parent corporation, and no publicly held company owns 10% or more of its stock.

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STATEMENT OF IDENTITY, INTEREST AND AUTHORITY TO FILE

The Texas Civil Justice League ("TCJL") is a non-profit association of Texas businesses, professional and trade associations, and individuals dedicated to maintaining a fair and balanced civil justice system. Since its inception in 1986, TCJL has advocated on behalf an efficient regulatory system that promotes the safety and welfare of Texas individuals and businesses without undue interference with free economic enterprise. TCJL also comments on matters before state and federal courts that have a substantial effect on entities and individuals doing business in Texas and on legal and policy questions affecting the state's economic climate.

TCJL's interest in the outcome of this appeal stems directly from its concern for maintaining an appropriate and consistent boundary between the legitimate exercise of regulatory authority and a person's constitutional right to pursue an occupation, trade, or business without discrimination. While TCJL recognizes the necessity of protecting public safety through reasonable regulation of the conditions under which medical services are provided, the Defendant-Appellant's regulatory actions raise a *bona fide* question of whether it has breached the boundary in this case.

TCJL (and no other person or entity) has funded the preparation and submission of this brief. All parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

The District Court correctly interpreted the "active supervision" requirement for invoking Parker immunity as enunciated by the United States Supreme Court in *N.C. Bd. Of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1111 (2015), and a number of prior cases. Texas law does not give the legislature or the courts the "power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Patrick vs. Burget*, 486 U.S. 94, 101, 108 S. Ct. 1658, 100 L. Ed. 2d 83 (1988).

ARGUMENT

I. Introduction.

The Texas Civil Justice League's (TCJL) membership is composed of businesses and individuals engaged in a wide array of economic activities, including the practice of regulated professions and occupations. These activities bring our members into frequent contact with regulatory agencies, boards, and commissions at the local, state, and federal levels. In the challenging day-to-day task of making the economy work in a world of intense global competition, the actions of regulators can tip the balance between a successful business that provides jobs and economic opportunity and one that fails because it cannot

compete with competitors in other locations operating in a different regulatory environment. Given the significant power of state agencies to influence market conditions, it is critical that regulations be specifically tailored to carry out clearly articulated and precisely defined public policy objectives established by the legislature. We must be vigilant in order to assure that regulatory action, particularly when taken by an agency substantially composed of participants in the regulated market itself, does not pick winners and losers in the economy as a whole. *See N.C. Bd. Of Dental Exam'rs v. Fed. Trade Comm'n*, 135 S. Ct. 1101, 1111 (2015).

TCJL believes this case raises an important question about the appropriate limits of regulatory action and the sufficiency of state oversight in the wake of the United States Supreme Court's ruling in *North Carolina Board of Dental Examiners*. Specifically, we do not agree with the State that the Texas Administrative Procedures Act (TEX. GOV. CODE, Ch. 2001) ("APA") affords businesses affected by the agency's rule in this case effective recourse to challenge the rule's anticompetitive effect nor that the APA review constitutes "active supervision" as required by the Supreme Court.

II. The Texas Legislature Does Not Actively Oversee Agency Rulemaking.

Unquestionably, regulatory agencies must face the complex and difficult challenge of balancing their responsibility to protect public health and safety with

the potentially adverse economic and competitive effects of proposed regulations on specific businesses and individuals or particular types of business activities. But the APA neither requires a state agency to consider these effects nor contemplates active legislative oversight necessary to determine whether a state agency rule strays into impermissible anticompetitive territory.

The only mention of economic considerations contained in the current APA is in §2001.022, Texas Government Code, which requires a state agency to "determine whether a rule may affect a local economy" and, if it determines that it may do so, prepare a "local employment impact statement." TEX. GOV. CODE §2001.022(a). As an initial matter, the state agency, not the legislature, is charged with conducting this analysis, and there is no legislative oversight of this process. But even then, the statute negates even this minimum requirement by providing that the "[f]ailure to comply with this section does not impair the legal effect of a rule adopted" under the APA. TEX. GOV. CODE §2001.022(c). In addition, in its notice of a proposed rule, an agency must, among other things, state "the probable economic cost to persons required to comply with the rule" for each of the first five years a rule will be in effect. TEX. GOV. CODE §2001.024(a)(5). Aside from charging the agency itself, and not the legislature, with this analysis, neither of these generic, boilerplate requirements provides any basis for a legislative or judicial analysis of the agency action's substantive anticompetitive effects. They

are merely *procedural* requirements, the first of which is unenforceable and, in any case, has no effect on the validity of the rule, and the second is satisfied by the barest assertion of "probable economic cost," a term undefined by statute and in the eye of the beholder.

Notably, the Texas APA explicitly recognizes that certain kinds of agency rules—namely, "major environmental rules"—may have such substantial effects on the state economy that the proposing agency must conduct a more comprehensive review and publish the results. The Texas Legislature has mandated that a state agency proposing a "major environmental rule" conduct a detailed regulatory analysis that: (1) identifies the problem the rule is intended to address; (2) determines whether the new rule is necessary to address the problem; and (3) considers the benefits and costs of the proposed rule in relationship to state agencies, local governments, the public, the regulated community, and the environment. TEX. GOV. CODE §2001.0225(a), (b). If a court (again, not the legislature) subsequently determines that the agency failed to comply with this requirement with respect to major environmental rules, the rule is invalid. TEX. GOV. CODE §2001.0225(f).

This legislative directive in environmental rulemaking demonstrates the undoubted ability of the legislature, if it so chooses, to require some economic analysis of specific categories of agency actions. But even this limited directive

with respect to environmental rulemaking allows only a *procedural objection* to the adoption of a rule, not a legislatively or judicially reviewable objection to the underlying substantive basis for the cost-benefit analysis itself. Such a review process simply does not exist under the APA.

Active legislative oversight of agency rulemaking is equally non-existent in Texas. To be sure, the APA requires the Texas House of Representatives and Senate to establish a process under which "the presiding officer of each house refers each proposed state agency rule to the appropriate standing committee for review before the rule is adopted." TEX. GOV. CODE §2001.032(a). The statute further provides that a majority of the committee may vote to "send to a state agency a statement supporting or opposing adoption of a proposed rule." TEX. GOV. CODE §2001.032(c). The current rules of the Texas Senate merely mirror the statutory language. *See* TEX. SENATE RULES 19.01, 19.02, 84th Reg. Session (2015). The House rules are silent. We are unaware of specific cases in which a House or Senate committee may have exercised this authority, but even if a legislative committee were to issue such a statement, the statute provides neither an enforcement mechanism nor any consequence for subsequent agency action (or inaction), much less a vehicle for an affected person to compel review of a proposed rule's anticompetitive effects. The only possible recourse an affected person may have in this situation is to ask the legislature in the *following* biennial

legislative session to pass a statute overturning or modifying a previously adopted agency rule, in which case the Legislature acts in the stead of the agency to which it has previously delegated rulemaking authority. Such belated and precarious recourse as this is hardly what the Supreme Court means by "active supervision."[1]

III. Reactive and Limited Judicial Review Under the APA is Not Active Supervision.

Reactive state-court judicial review of agency rules—which must be initiated in the first instance by an aggrieved party—does not constitutes *active* supervision. In *North Carolina*, the Supreme Court explained that "decisions of a state supreme court, ***acting legislatively rather than judicially***," may provide active supervision. *North Carolina*, 135 S. Ct. at 1110 (emphasis added). An example of a state supreme court acting in a legislative manner is when a state supreme court determines applicants' admission to practice law in the state. *See Hoover v. Ronwin*, 466 U.S. 558 (1984). In Texas, the state supreme court does not take any legislative or even quasi-legislative action with respect to agency rules. Indeed,

[1] The lack of active legislative oversight of agency action recently prompted some members of the Texas Legislature to seek passage of the "Texas REINS Act," an acronym for Regulations from the Executive in Need of Scrutiny. The REINS Act would "allow the Legislature to oversee and reject new rules or regulations proposed by state agencies that are made contrary to legislative intent." *See* Press Release from the Office of State Senator Van Taylor, Feb. 6, 2015, *available at* http://www.senate.state.tx.us/75r/senate/members/dist8/pr15/p020615a.htm. The Reins Act was filed as Senate Joint Resolution 9 on November 11, 2014, and referred to the Senate Business and Commerce Committee on February 2, 2015. *See* http://www.capitol.state.tx.us/BillLookup/History.aspx?LegSess=84R&Bill=SJR9. Among other things, the proposed Act would have authorized the legislature to "prescribe conditions for rules to take effect" and "for suspension, repeal, or expiration of rules." *See* http://www.capitol.state.tx.us/tlodocs/84R/billtext/pdf/SJ00009I.pdf - navpanes=0.

the state supreme court's only involvement with agency rules is when it acts, in its discretion and at the request of an aggrieved party, to accept a case for judicial review on a *post hoc* basis to determine whether the challenged rule complies with state law. This adjudicatory function, the U.S. Supreme Court has explained, is not active supervision by a court.

So what can a state court do when confronted with an adopted agency rule under the APA? As we have seen, very little. In *Texas Association of Psychological Associates v. Texas State Board of Medical Examiners*, 439 S.W.3d 597, 603 (Tex. App.—Austin 2015, no pet.), the Austin Court of Appeals explained that, to establish a rule's facial invalidity, a challenger must show that the rule: (1) contravenes specific statutory language; (2) runs counter to the general objectives of the underlying Act; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions. In conducting this analysis, courts "give[] a large degree of latitude" and deference to state agencies. *Id.* There is no requirement—or even an ability—for a court to consider the anticompetitive nature of a challenged rule. Indeed, the sole focus in a facial invalidity challenge is on the statutory language authorizing the agency to act, and not on the anticompetitive nature of the challenged rule. *See id.*

We know that a state agency must "issue a concise statement of the principal reasons for and against" the adoption of a rule, as well some rationale for

overruling objections to the rule. *See* TEX. GOV. CODE §2001.030. The APA further requires an agency order adopting a rule to include a "reasoned justification" supporting it. *See* TEX. GOV. CODE §2001.033. Judging by the paucity of Texas decisions remanding agency rules for failure to substantially comply with procedural requirements, state agencies rarely fail to provide some reasoned justification for a proposed rule. As one informed commentator has put it:

> Almost all Texas rule invalidations are on statutory construction grounds. There are only four Texas appellate opinions invalidating rules on this basis. Most reasoned justification challenges fail. This may be because . . . most Texas agencies are writing good-enough reasoned justifications. Or it may be because Texas reasoned justification review is much gentler than the "hard look" federal courts give federal agency rulemaking decisions.

Pete Schenkkan *The Trials and Triumphs of Texas Administrative Law*, State Bar of Texas, 17th Annual Advanced Administrative Law Course," Austin, Texas, September 22-23, 2005, Ch. 2, p. 18. As this expert points out, the reasoned justification standard simply does not penetrate very deeply, certainly not to the extent of affording an agency immunity from antitrust scrutiny in a case such as this one.

This high level of judicial deference to a regulatory body's broad rulemaking authority may be appropriate in a separation of powers analysis, but it sits awkwardly in the context of regulatory agencies' incursions into the economic competitiveness realm. In this case, contrary to the U.S. Supreme Court's requirement of an ability to "review particular anticompetitive acts" of agencies and "disapprove those that fail to accord with state policy," *North Carolina*, 135 S. Ct. at 1112, the judicial review in the APA context is limited, entirely reactive, and does not countenance a court analyzing a rule's compliance with state policy. This is the exact type of "potential" review the Court in *North Carolina* described as insufficient supervision. *Id.* At 1116 ("[T]he mere potential for state supervision is not an adequate substitute for a decision by the state.")

IV. In a Similar Rulemaking Context, the Texas Supreme Court Eschewed the APA to Invalidate Agency Rules with Anticompetitive Effects on State Constitutional Grounds.

Though perhaps not directly relevant to the posture of this case, TCJL believes it is instructive to point out a recent Texas Supreme Court decision demonstrating the procedural and reactive nature of the Texas judicial review mechanism under the APA and its inability to provide active oversight of regulatory agency rulemaking. In *Patel v. Texas Dep't of Licensing and Regulation, et al.*, 469 S.W.3d 69 (Tex. 2015), a declaratory judgment action, the court employed a substantive due process analysis to invalidate agency rules with

severe anti-competitive and discriminatory effects on certain practitioners and consumers of commercial eyebrow threading services. Just as the U.S. Supreme Court and federal courts have subjected the regulatory actions of state agencies, boards, and commissions to exacting scrutiny of the anticompetitive effects of regulation, the Texas Supreme Court has made it clear that even though a state agency may formally comply with the rulemaking process, the rules themselves must satisfy other important substantive public policy objectives established by the state constitution and legislature.

In *Patel*, the Court struck down regulations adopted by the Department requiring an excessive amount of training in order to qualify for a license to thread eyebrows on a commercial basis. The Court found that the regulations violated the Texas Constitution's guarantee that "No citizen of this State shall be deprived of life, liberty, property, privileges or immunities, or in any way disenfranchised, except by the due course of the law of the land." TEX. CONST. ART. 1, § 19. The Court stated that the Texas substantive due process clause was "intended to bear at least some burden for protecting individual rights that the United States Supreme Court determined were not protected by the federal Constitution." *Patel,* 369 S.W.3d at 87.

Associate Justice Johnson's majority opinion in *Patel* indicates that state agencies have neither state immunity nor unlimited discretion when adopting

regulations that affect one's right to practice a profession. The Court also emphasizes that although the state is entitled to a presumption of constitutionality, courts should not simply defer to an agency's general authority to "regulate" a profession but review the entire record, including evidence offered by affected parties, to determine whether a rule exceeds the limits of due process. *Patel,* 369 S.W.3d at 87.

While we are struck by the parallels between the issues in *Patel* and the present case, we bring *Patel* to the Court's attention primarily because it lends credence to what we believe is a growing public policy consensus to hold executive agencies strictly accountable for the rules they adopt, particularly if those rules differentially affect businesses that compete with one another in the same marketplace. TCJL thus views *North Carolina* and *Patel* as calling for more robust judicial *and* legislative oversight of agency actions.

V. Conclusion.

TCJL's members deeply appreciate the complexity the challenges faced by largely volunteer boards and commissions in promulgating reasonable and necessary regulations in the discharge of their legislatively appointed duties. They must balance often sharply competing interests and rely on the best available information in making difficult decisions on behalf of the citizens of this State. At the same time, however, businesses and individuals that must comply with those

regulations, often at substantial economic cost, are entitled to absolute assurance that a state agency is either actively supervised by the State or is subject to scrutiny in the absence of such supervision, especially when the agency's action favors one business model over another. We believe that the only way to provide that assurance in the present case, where active supervision is lacking, is to allow a federal court to assess the anticompetitive effects of the agency rule in question.

For the reasons set forth above, this Court should affirm the decision of the District Court denying the Defendant-Appellant's Amended Motion to Dismiss.

Respectfully submitted,

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Date: September 6, 2016

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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 3,076 words according to Microsoft Word, excluding the parts exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

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 it is in Times New Roman 14-point font.

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I hereby certify that on September 6, 2016, I caused the foregoing Brief of the Texas Civil Justice League, Inc. as Amici Curiae in Support of Plaintiffs-Appellees 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.

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