16-50017

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.

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

BRIEF FOR *AMICUS CURIAE* TEXAS NURSE PRACTITIONERS IN SUPPORT OF PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that amicus curiae Texas Nurse Practitioners is a non-profit corporation and that no entity has ownership interest in it. Texas Nurse Practitioners has no financial interest in the outcome of this litigation.

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INTEREST OF AMICUS CURIAE[1]

Texas Nurse Practitioners (TNP) is a nonprofit association representing the needs of over 15,000 nurse practitioners across the state of Texas. TNP seeks to advance and support the role of nurse practitioners and to promote accessible and quality healthcare across the state. A "nurse practitioner" in Texas is a registered nurse who has advanced education and clinical training in a healthcare specialty. Nurse practitioners frequently serve as primary healthcare providers for both children and adults, and can perform a multitude of services including: physical examinations; ordering and interpreting laboratory and diagnostic studies; family planning; health risk evaluations; psychological counseling; and coordination of healthcare services and health education. Nurse practitioners' services are particularly important in areas that are underserved by primary care physicians. *See* INST. OF MED., NAT'L ACAD. OF SCI., THE FUTURE OF NURSING: LEADING CHANGE, ADVANCING HEALTH (2011) [hereinafter IOM REPORT]; U.S. FED. TRADE COMM'N, COMPETITION AND THE REGULATION OF ADVANCED PRACTICE NURSES (2014), https://www.ftc.gov/reports/policy-perspectives-competition-regulation-advanced-practice-nurses [hereinafter FTC REPORT].

[1] All parties have consented to the filing of this brief. No counsel for any party has authored any part of this brief, nor has any such counsel or party contributed monetarily to the preparation or submission of this brief. *See* FED. R. APP. P. 29(c).

Texas is just such an underserved area—ranking 41st nationally in physicians per capita and 47th in primary care physicians per capita. N. TEX. REG'L EXTENSION CTR., THE PHYSICIAN WORKFORCE IN TEXAS, at 3 (2015), http://www.merritthawkins.com/UploadedFiles/MerrittHawkings/Surveys/Merritt_Hawkins_NTREC_Physician_Workforce_Survey.pdf. In fact, one report estimated that it would require nearly 13,000 additional physicians just to bring Texas up to the national average. *Id.* The sheer magnitude of the physician shortage understates the problem of healthcare access, as patients in remote areas would remain isolated even with a massive influx in physicians. *See id.*

As a critical component of the team of healthcare providers seeking to fulfill patients' primary care needs, TNP has a strong interest in the revisions to the Texas Administrative Code § 190.8(1)(L) (New Rule) at issue in this proceeding. The plain language of the New Rule would not only prohibit nurse practitioners from providing telehealth services, but, by excluding reputable and proven telehealth providers like Teladoc, Inc. (Teladoc), it would also add to the already significant burden facing nurse practitioners. TNP submits this brief in support of Teladoc and in favor of affirmance of the district court's decision, for the reasons developed below.

SUMMARY OF ARGUMENT

Across the nation—but particularly in a state with as dramatic an access problem as Texas—increasing access to affordable medical care is a compelling goal. As the Federal Trade Commission (FTC) has recognized, achieving increased access requires fostering innovative methods of providing safe and effective care, including telehealth services provided by licensed practitioners. *See* U.S. FED. TRADE COMM'N & DEP'T OF JUSTICE, IMPROVING HEALTH CARE: A DOSE OF COMPETITION, ch. 2, pp. 31 (2004), http://www.ftc.gov/reports/healthcare/040723healthcarerpt.pdf [hereinafter FTC & DOJ HEALTH CARE REPORT] (recognizing "telemedicine can give physicians and other healthcare professionals the ability to provide high quality medical services to rural or other underserved areas," and "can significantly reduce a range of health-care-related costs, including travel expenses"); *see also* U.S. DEP'T OF HEALTH & HUMAN SERVS., REPORT TO CONGRESS: E-HEALTH AND TELEMEDICINE, at 4 (2016), https://aspe.hhs.gov/sites/default/files/pdf/206751/TelemedicineE-HealthReport.pdf ("In general, telehealth holds promise as a means of increasing access to care and improving health outcomes.") [hereinafter HHS 2016 REPORT]; IOM REPORT at 27-28.

The New Rule, however, would effectively foreclose innovative telehealth providers like Teladoc from entering the market at all, while also limiting the services other healthcare providers may offer. It would do so by imposing "scope of practice"

restrictions on physicians[2] who are already subject to considerable licensing and certification requirements. "Scope of practice" restrictions regulate the range of procedures and services a provider may offer; for example, when and how nurse practitioners are allowed to operate their own practices or to write prescriptions, or, in this case, the precise kind of physician-patient interaction that must occur before a licensed physician is permitted to provide medical advice.

Scope of practice restrictions have been intensively studied, and have overwhelmingly and consistently been found to reduce competition, diminish access, and harm consumers—particularly when those restrictions are implemented by self-interested actors and not narrowly tailored to remedy particularized harms. The deleterious effects of such restrictions are well understood by regulators, such as the FTC, who study these problems, and by the economists who study their impact. Self-interested medical boards tend to produce restrictions that reduce supply, increase prices, diminish quality, and chill innovation—all to the detriment of patients in need of medical care.

The New Rule is just this kind of pernicious restriction. It impedes the ability of licensed physicians to provide affordable and convenient medical care to patients in

[2] TNP notes that the text of the New Rule would also restrict other licensed providers, including nurse practitioners, but focuses this brief upon its impact on physicians, as physicians comprise the plaintiff party, and much of the defendant party, in this matter.

need. And it does so only in service of self-interested actors unwilling to compete. As such, antitrust review is necessary to prevent substantial patient harm.

Antitrust review is warranted here, in particular, because Appellants were not actively supervised, as demonstrated by their institution of self-interested rules that restrict competition and prevent patients from receiving safe and effective care. Indeed, Appellants' imposition of a series of onerous and unnecessary restrictions upon competitive primary care alternatives has erected nearly insurmountable barriers to access.

ARGUMENT

I. THE NEW RULE THREATENS TO INFLICT SIGNIFICANT ANTICOMPETITIVE HARM IN THE FORM OF REDUCED ACCESS, HIGHER PRICES, LOWER QUALITY, AND LESS INNOVATIVE CARE

A. Restrictions on the Provision of Safe and Effective Health Services May Anticompetitively Harm Consumers by Raising Prices, Diminishing Output and Quality, and Reducing Innovation

It is well understood that restrictions upon the provision of safe and effective health services may harm the very patients they are purportedly implemented to protect, often without realizing the theorized benefits. *See, e.g.*, U.S. DEP'T OF TREASURY, OFFICE OF ECON. POL'Y, COUNCIL OF ECON. ADVISORS, & DEP'T OF LABOR, OCCUPATIONAL LICENSING: A FRAMEWORK FOR POLICYMAKERS (2015), https://www.whitehouse.gov/sites/default/files/docs/licensing_report_final_nonembar

go.pdf [hereinafter WHITE HOUSE REPORT]; CAROLYN COX & SUSAN FOSTER, BUREAU OF ECON., FED. TRADE COMM'N, THE COSTS AND BENEFITS OF OCCUPATIONAL REGULATION (1990), http://www.ramblemuse.com/articles/cox_foster.pdf; Morris M. Kleiner, *Occupational Licensing*, 14 J. ECON. PERSP. 189, 191-92 (2000).[3] Such restrictions increase the cost of providing healthcare services, thereby increasing costs to patients, reducing the availability (or supply) of services, diminishing the quality of those services, reducing innovation in the provision of services, or inflicting any combination of these harmful outcomes. As such, the purported benefits of such restrictions would need to be substantial to offset their significant harms. But evidence indicates these purported benefits rarely come to fruition in practice, particularly when self-interested actors are the ones establishing the restrictions and erecting the barriers to entry. *See, e.g.*, FTC REPORT at 15; George J. Stigler, *The Theory of Economic Regulation*, 2 J. ECON. & MGMT. SCI. 3, 13-14 (1971); Gordon

[3] *See also* Daniel J. Gilman, *Physician Licensure and Telemedicine: Some Competitive Issues Raised by the Prospect of Practising Globally While Regulating Locally*, 14 J. HEALTH CARE L. & POL'Y 87 (2011); Edward S. Sekscenski et al., *State Practice Environments and the Supply of Physician Assistants, Nurse Practitioners, and Certified Nurse-Midwives*, 331 N. ENGL. J. MED. 1266 (1994) (finding stringent restrictions upon nurse practitioners and specialized advanced practice registered nurses are associated with fewer per capita practitioners); Eugene R. Declercq et al., *State Regulation, Payment Policies, and Nurse-Midwife Services*, 17 HEALTH AFFAIRS 190 (1998) (finding rules "supportive" of nurse midwife practice associated with increased distribution of nurse midwives and their services); Morris M. Kleiner & Robert T. Kurdle, *Does Regulation Affect Economic Outcomes? The Case of Dentistry*, 43 J.L. & ECON. 547, 575-76 (2000) (finding that "tougher licensing does not improve outcomes, but it does raise prices for consumers and the earnings of practitioners").

Tullock, *The Welfare Costs of Tariffs, Monopolies and Theft*, 5 W. ECON. J. 224 (1967).[4]

The FTC, for instance, has devoted significant resources to analyzing the economic effects of such restrictions, including the impact of these restrictions on access to healthcare. *See, e.g.*, Comment from FTC Staff to the Hon. Rodney Ellis & Hon. Royce West, Senate of the State of Tex. (May 11, 2011), http://www.ftc.gov/os/2011/05/V110007texasaprn.pdf; Comment from FTC Staff to the Hon. Thomas P. Willmott & Hon. Patrick C. Williams, La. House of Representatives (Apr. 20, 2012), http://www.ftc.gov/os/2012/04/120425louisianastaffcomment.pdf; Written Testimony from FTC Staff to Subcomm. A of the Joint Comm. on Health of the State of W. Va. Legislature (Sept. 10-12, 2012),

[4] MILTON FRIEDMAN, CAPITALISM AND FREEDOM 142-43 (U. Chi. Press, 1962); Research Reports, *Occupational Licensure Laws: A Review of Some Findings*, 8 AM. INST. ECONOMIC RESEARCH 71, 72, https://www.aier.org/sites/default/files/Files/Documents/Research/899/RR199015.pdf ("The pressure to regulate occupations historically has come from the groups that stand to lose from competition. Occupational licensure laws raise barriers to entry and prevent many otherwise qualified individuals from entering the trade or profession."); Amy Humphris, Morris M. Kleiner, & Maria Koumenta, *How Does Government Regulate Occupations in the UK and US? Issues and Policy Implications*, *in* LABOUR MARKET POLICY FOR THE 21ST CENTURY (Oxford U. Press, 2010) (online copy), http://lgi.umn.edu/centers/freeman/pdf/Kleinerpaper.pdf ("Governments and regulatory bodies are advised to carefully scrutinize any proposals for occupational licensing given that the evidence demonstrates the existence of a strong element of self-interest behind requests by occupations to be licensed.").

http://www.ftc.gov/os/2012/09/120907wvatestimony.pdf.[5] The FTC is an expert antitrust agency with extensive experience in the healthcare industry. Indeed, the FTC's particular healthcare interest dates back nearly to its establishment over 100 years ago. Daniel J. Gilman & Julie Fairman, *Antitrust and the Future of Nursing: Federal Competition Policy and the Scope of Practice*, 24 HEALTH MATRIX 143, 149 (2014).

Recently, the FTC has analyzed the specific effects that scope of practice restrictions placed on advanced practice registered nurses (APRNs)—including nurse practitioners—have upon the cost, provision, and availability of healthcare services. The FTC's research culminated in a report which concluded, "Regulatory choices that affect APRN scope of practice may have a direct impact on health care prices, quality, and innovation, often without countervailing benefits." FTC REPORT at 19.

As a preliminary matter, the FTC noted that these "scope of practice" restrictions are implemented *in addition to* the licensing and certification requirements

[5] *See also* FTC Staff Comment Before the Mass. House of Representatives Regarding House Bill 2009 Concerning Supervisory Requirements for Nurse Practitioners and Nurse Anesthetists (Jan. 17, 2014), https://www.ftc.gov/sites/default/files/documents/advocacy_documents/ftc-staff-comment-massachusetts-house-representatives-regarding-house-bill-6-h.2009-concerning-supervisory-requirements-nurse-practitioners-nurse-anesthetists/140123massachusettnursesletter.pdf; Comment from FTC Staff to the Hon. Theresa W. Conroy, Conn. House of Representatives (Mar. 19, 2013), http://www.ftc.gov/os/2013/03/130319aprnconroy.pdf; Comment from FTC Staff to the Hon. Paul Hornback, Commonwealth of Ky. State Senate (Mar. 26, 2012), http://www.ftc.gov/os/2012/03/120326ky_staffletter.pdf.

already in place. FTC REPORT at 1, 3-4. Accordingly, the marginal value to society of scope of practice restrictions includes only those benefits over and above the value attributable to licensing and certification. Because APRNs are already subject to comprehensive licensing and certification requirements, the FTC seriously questioned whether the additional value of scope of practice restrictions was likely to be significant in practice. *See, e.g.*, FTC REPORT at 2, 3-4, 14-15.

Indeed, the FTC found considerable reason to be skeptical of the competitive impact of scope of practice restrictions on APRNs, and other similar restrictions. The FTC concluded, for instance, that "when additional and unnecessary restrictions are imposed on APRNs, access problems are more likely to be exacerbated, with patients deprived of basic care." FTC REPORT at 27. The FTC found that the effects of scope of practice restrictions may be "especially striking" in underserved areas—as reducing such restrictions yields significant patient benefits, but increasing such restrictions often means cutting patients off from access to valuable healthcare services. *See* FTC REPORT at 4. These conclusions are aligned with the wide-ranging literature examining the patient welfare effects of scope of practice restrictions. *See* WHITE HOUSE REPORT, at 12, 56; Cox & Foster, *supra*; Kleiner, *supra*; *supra* nn.3-5.

Moreover, the FTC found little evidence to support the view that restrictions on access could generate potential benefits capable of offsetting their likely negative

competitive effects. It concluded, for instance, not only that the alleged safety concerns prompting the implementation of scope of practice restrictions were often pretextual and unsubstantiated, but further that the restrictions themselves were not likely to be tailored to address the purported concerns. FTC REPORT at 36 ("Specifically, our research did not identify significant evidentiary support for either the claim that independent APRN practice gives rise to significant safety concerns or the claim that mandatory supervision requirements redress such concerns."). This result is not surprising in the context of self-interested competitors using their position of power to disadvantage their competitors and to erect barriers to entry. *See* FTC REPORT at 15; Stigler, *supra*, at 13-14; Tullock, *supra*; *supra* n.4.

Accordingly, for scope of practice restrictions to offer a meaningful value-add—*i.e.*, to *help*, rather than harm, patients—they must be narrowly tailored to an identified and substantiated harm. FTC REPORT at 39. Absent clear and specific guidance, such restrictions may anticompetitively impede patient access to healthcare without offering any countervailing benefit. These harmful effects are especially likely when self-interested actors play a role in crafting or enacting the restrictions.

B. The Restrictions at Issue Here Closely Resemble those the FTC has Found Likely to Harm Competition and Consumers

The New Rule at issue in this dispute bears all the hallmarks of the kind of scope of practice restrictions that are inevitably detrimental to patients. As a threshold issue, the New Rule seeks to limit the scope of *physician*'s practices—physicians who have already had years of education and training, who are already certified to practice in the State of Texas, and who are already required to comply with the standard of care. Given the inevitable negative impact upon Texas consumers in the form of reduced access to healthcare, the relevant question, then, is whether further regulating these already extensively-regulated physicians offers any tangible value to underserved patients.

The answer is that any such value would be very little to none. Quite to the contrary, the New Rule would yield significant patient harm. *See Teladoc, Inc. v. Tex. Med. Bd.*, 112 F. Supp. 3d 529, 537-38 (W.D. Tex. 2015) (discussing the myriad harms the New Rule would generate, including higher costs ($145 or $1,957 on average for a physician or emergency room visit, respectively, versus $40 for a Teladoc consultation), increased travel and wait times, and patients simply foregoing treatment). The New Rule would seriously curtail output, as it would throttle the ability of Teladoc physicians—and others—to provide patient care. Services like

Teladoc's are particularly instrumental to the Texas patient population, which suffers not only from a shortage in the raw number of physicians, but which is also widely dispersed, with many patients residing in remote or rural areas without easy or affordable access to a primary care physician. *See id.* (noting the particular importance of the New Rule's reduction of physician services "in light of the evidence presented by Plaintiffs that Texas suffers from a shortage of doctors, particularly in rural areas, and that approximately 50% of Teladoc's client patients do not have a regular physician."). By stifling an innovative competitor in this market (Teladoc), the New Rule would create an environment hostile to new entry in general and, in particular, to entrepreneurial, risk-taking, and innovative services offered to satisfy the unmet demand of Texas patients for affordable healthcare.

Moreover, the New Rule is neither narrowly tailored nor addressed to a legitimate and particularized harm. Instead, it is an overbroad rule adopted by competitors in the name of addressing the general "harms" all incumbents experience from competition. Finally, the New Rule was implemented by a board comprised of self-interested physicians who are biased towards protecting their incumbent market position at the expense not only of new entrants but also of patients seeking access to affordable medical care. *See* FTC REPORT at 15; Stigler, *supra*, at 13-14; *supra* n.4; Section II, *infra*.

As such, antitrust review is not only appropriate, but necessary to prevent the New Rule from introducing significant consumer welfare losses, including reduced patient access to care, higher healthcare prices, lower quality of care, and reduced innovation.

II. TEXAS MEDICAL BOARD'S IMPLEMENTATION OF THESE HARMFUL RULES IS NOT PROTECTED BY THE STATE ACTION DOCTRINE

As the Parties have noted, Appellants must demonstrate that their conduct was both (1) actively supervised by the State and (2) pursuant to a clearly articulated policy for the state action doctrine to apply. *See* Appellants' Br. 24-25, 28; Appellees' Br. 22; *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1112 (2015) [hereinafter *N.C. Dental*]. Appellants cannot and have not met this burden.

Appellees have clearly demonstrated that Appellants are not subject to active state supervision. As Appellees have developed the Supreme Court has already considered and roundly rejected Appellants' argument that they are unwaveringly committed to public service and entirely rid of any self-interested incentives or behaviors simply because they are physicians.[6] *N.C. Dental*, 135 S. Ct. at 1113-114 ("The similarities between agencies controlled by active market participants and private trade associations are not eliminated simply because the former are given a

[6] Appellants' additional arguments likewise fail for the reasons Appellees have articulated.

formal designation by the State, vested with a measure of government power, and required to follow some procedural rules."); Appellees' Br. at 24-25.

Indeed, Appellants' long history of acting in their own self-interest, even when doing so harms patients, is of particular relevance to amicus curiae TNP. While Appellants' argue that they do in fact—and should be unquestioningly trusted to—act in the public interest (*see* Appellants' Br. 40-41), the proposition that self-interested medical boards act to restrict competition is surprising neither to the FTC nor to scholars who have studied the topic extensively. *See, e.g.*, FTC REPORT at 15; Stigler, *supra*, at 13-14; Tullock, *supra*; *supra* n.4.

As competing providers of primary care services, nurse practitioners have firsthand experience with this self-interested, patient-harming behavior. Appellants have, for instance, instituted rigid restrictions on how and when APRNs in Texas may write certain prescriptions—and, outside of the proper rule-making procedure, purportedly amended these rules to further restrict APRNs via an online statement in a "Frequently Asked Questions" forum, which asserted that APRN prescriptions could only be filled in hospital pharmacies. These actions not only evidenced the clear absence of any active state supervision, but further exacted direct harm onto patients by curtailing their ability to fulfill their primary care needs with nurse practitioners.

Likewise, the New Rule would foreclose Teladoc from the market, limit the ability of other providers to offer an important and effective form of care, and dramatically diminish patients' access to affordable care, all while protecting Appellants' incumbent position. As Appellees have noted, Teladoc expands output to affordable medical care. Appellees' Br. at 8-12; *see also Teladoc*, 112 F. Supp. 3d at 537 ("[A] study conducted in California concluded 'Teladoc appears to be expanding access to patients . . .'" (quoting Def. Resp. Ex. 5, at 3)). And, as the FTC has explained, for underserved areas, "the benefits of expanding supply are clear: consumers will have access to services that were otherwise unavailable." FTC REPORT at 26 ("Even in well-served areas, the supply expansion will tend to lower prices for any given level of demand, thus lowering healthcare costs."). Texas is an especially underserved area and its patient population would derive serious benefits from the expansion of safe and affordable healthcare. *See* HHS 2016 REPORT, at 4 ("Of special concern are rural individuals who have higher mortality rates; a greater chance of being unnecessarily hospitalized; and have one-third as many specialists per capita as do persons living in cities.").

The New Rule, however, would eviscerate these clear benefits, and offer no countervailing value to patients. As such, the New Rule is clearly *not* designed to enhance patient experience or outcomes, but rather was crafted by self-interested

actors solely to protect themselves from competition from highly trained and experienced—but competing—professionals.

Appellants' actions in establishing the New Rule stand in stark contrast to the goal of expanding patient access to safe and affordable healthcare, and were not subject to any active state oversight. This kind of rogue, biased behavior does not warrant protection from antitrust scrutiny.

CONCLUSION

For the foregoing reasons, TNP respectfully requests this Court affirm the lower court's decision and hold that Appellants are not protected by the state action doctrine in this matter.

Dated: September 9, 2016

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 3,424 words according to Microsoft Word, excluding sections 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 (12 point for footnotes).

Dated: September 9, 2016

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CERTIFICATE OF SERVICE

16-50017

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