No. 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 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

Brief of the Cato Institute as *Amicus Curiae* in Support of Plaintiffs-Appellees

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Supplemental Certificate of Interested Persons

Case 16-50017, *Teladoc, Inc. et al. v. Texas Medical Board et al.*

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

Person or Entity	Connection to Case
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Cato Institute	*Amicus curiae*

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/s/ Ilya Shapiro

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INTEREST AND INDEPENDENCE OF *AMICUS CURIAE*[1]

The Cato Institute is a nonpartisan public policy research foundation dedicated to advancing individual liberty, free markets, and limited government. Cato's Center for Constitutional Studies was established in 1989 to help restore the principles of constitutionalism that are the foundation of liberty. This case concerns *amicus* because protecting the constitutional right to earn a living lies at the heart of its mission. An interested board of professionals should not be immune from antitrust liability merely because the state created it to regulate the profession.

SUMMARY OF ARGUMENT

Justice Douglas once said that "the right to work . . . was the most precious liberty that man possesses." *Barsky v. Bd. of Regents*, 347 U.S. 442, 472 (1954) (Douglas, J., dissenting). Indeed, the right was recognized at common law and even as one of Magna Carta's protections. *See Allen v. Tooley*, (1614) 80 Eng. Rep. 1055, 1055 (K.B.). The Supreme Court has often cited it among the fundamental liberties guaranteed by the Constitution. *See, e.g.*, *Meyer v. Nebraska*, 262 U.S. 390, 399 (1923).

[1] No one other than *amicus* and its counsel wrote any part of this brief or paid for its preparation. The parties have consented to this filing.

While constitutional scrutiny of agency action is a backstop to the antitrust laws, that fundamental right to earn a living is at the heart of this case. Here we have one of the many situations where existing firms hijack licensing laws to prevent competition. Such abuses harm not only workers but consumers, by raising prices and lowering quality. It is to protect both workers and consumers that unsupervised licensing boards must be subject to antitrust scrutiny—which is fully consistent with state sovereignty because it permits states to make broad delegations of authority without enabling regulatory bodies to act anticompetitively.

The Supreme Court has long held that private parties can assert state-action immunity only where their anticompetitive actions are not only on behalf of the state, but are actively supervised by state officials. This active-supervision requirement prevents "purely parochial interests" from "disrupt[ing] the Nation's free-market goals" under the color of state law. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 416 (1978) (plurality opinion). The active-supervision standard may be "flexible and context-dependent," *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1116 (2014), but it is not flimsy and porous—and its "few constant requirements," *id*. at 1116, were not met here.

ARGUMENT

I. THE CONSTITUTIONAL RIGHT TO EARN A LIVING IS A LONGSTANDING ONE THAT PROTECTS BOTH WORKERS AND CONSUMERS

Among the essential rights guaranteed by the Constitution is the right to earn a living at a trade or profession without unreasonable interference from the government. *Greene v. McElroy*, 360 U.S. 474, 492 (1959). This right is "objectively, deeply rooted in this Nation's history and tradition," *Washington v. Glucksberg*, 521 U.S. 702, 703 (1997), and the Supreme Court has long listed it among the fundamental rights the Constitution protects. Thus, in a case recognizing the right of parents to control the upbringing of their children, the Court began not with that right but with the right to earn a living, stating that the Fourteenth Amendment's due process protection of liberty:

> Without doubt . . . denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Meyer, 262 U.S. at 399.

This right to earn a living dates back as far as the English common law. In 1614, Sir Edward Coke, England's chief justice, stated that the Magna Carta and the common law protected the right of "any man to use any trade thereby to maintain himself and his family." *Allen v. Tooley*, 80 Eng. Rep. at 1055. Nor, it should be said, did the right end with the *Lochner* era. Instead, the Supreme Court has continued to name it among those liberties the Due Process Clause guarantees, repeatedly quoting the above list from *Meyer v. Nebraska*. *See, e.g.*, *Bd. of Regents of State Colleges v. Roth*, 408 U.S. 564, 572 (1972); *Roe v. Wade*, 410 U.S. 179, 214 (1973) (Douglas, J., concurring).

And indeed the right to earn a living ought to be acknowledged and protected given its centrality to a person's life. As Frederick Douglass remarked about first earning money after escaping slavery:

> I was not long in accomplishing the job when the dear lady put into my hand two silver half dollars. To understand the emotion which swelled in my heart as I clasped this money, realizing that I had no master who could take it from me—that it was mine—that my hands were my own, and could earn more of the precious coin—one must have been in some sense himself a slave. . . . I was not only a freeman but a free-working man, and no Master Hugh stood ready at the end of the week to seize my hard earnings.

Frederick Douglass, *The Life and Times of Frederick Douglass*, reprinted in *Douglass: Autobiographies* 654 (Henry Louis Gates Jr. ed., 1994). Abolitionist Senator Charles Sumner put the evil of slavery in similar terms, noting that it "*compel[led] the labor of fellow-men without wages*" by "excluding them from that property in their own earnings, which the law of nature allows, and civilization secures." Cong. Globe, 36th Cong., 1st Sess. 2592 (1860) (statement of C. Sumner) (emphasis in original).

The right has thus not surprisingly played a major role in many cases involving the infringement of other fundamental rights. For instance, in 1848, the Tennessee Supreme Court struck down a city ordinance that prohibited blacks from being out in public after 10pm when a free black was arrested while walking home from work. *Mayor & City of Memphis v. Winfield*, 27 Tenn. 707, 708–09 (1848). Noting that "[t]he lot of a free negro is hard enough at best," the slave state's supreme court recognized the importance of one's ability to earn a living, stating, "He must live, and, in order to do so, he must work." *Id.* at 709.

Likewise, in *Yick Wo v. Hopkins*, 118 U.S. 356, 368 (1886), the U.S. Supreme Court struck down a San Francisco ordinance that required laundries in wood buildings—which were primarily operated by

Chinese persons—to be licensed by a city official who had complete discretion to grant or deny permits. The Court explained that "the very idea that one man may be compelled to hold his life, or the means of living, or any material right essential to the enjoyment of life, at the mere will of another, seems to be intolerable in any country where freedom prevails, as being the essence of slavery itself." *Id.* at 370.

II. LICENSING LAWS ARE FREQUENTLY ABUSED BY EXISTING MARKET PLAYERS, TO THE DETRIMENT OF COMPETITION AND CONSUMERS

As long ago as the early 17th century, English courts were confronted with the exact problem presented in this case: market participants' using the power of the state to prohibit new competition from entering the fray. This dynamic barred entrepreneurs from earning a living and forced consumers to pay more, for fewer options. English courts regularly struck down these cartels, holding that licensing regulations were valid only if they protected public, and not private, interests. *See, e.g.*, *The Case of the Bricklayers*, (1624) 81 Eng. Rep. 871, 872 (K.B.); *The Ipswich Tailors' Case*, (1615) 77 Eng. Rep. 1218, 1219 (K.B.).

To emphasize: *the state's sovereign power is a powerful tool by which private actors restrain trade*. Existing firms only invest time and

resources in obtaining and enforcing barriers to entry because they stand to recoup those costs through above-market prices that are made possible only by government's power to prohibit new firms from competing against them. Without that power to exclude, new firms could enter the market whenever existing firms fixed prices, reduced quality, or tried to limit consumer choices. *See* Dominick T. Armentano, Antitrust and Monopoly: Anatomy of a Policy Failure 42 (2d ed. 1990) ("Government franchises, certificates of public convenience, licenses . . . are all instances of monopoly power for the firms protected from open competition . . . . [G]overnment, and not the free market, would be the actual source of resource-misallocating monopoly.").

Indeed, studies have shown that licensing laws frequently harm both workers and consumers, by harming entrepreneurs' ability to enter the field and by raising prices and reducing quality. The federal antitrust laws reflect "a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services." *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978). For these reasons, state licensing boards that are not actively supervised must be subject to antitrust liability.

A. When a state puts established players in charge of licensing, it sets the stage for regulatory capture.

"[T]he King," declared the court in *The City of London's Case*, (1610) 77 Eng. Rep. 658, 663 (K.B.), "may erect *guildam mercatoriam*, i.e., a fraternity or society or corporation of merchants, to the end that good order and rule should be by them observed for the increase and advancement of trade and merchandise, and *not for the hindrance of it*." (emphasis added). This and similar decisions formed the basis of the Whig antimonopoly tradition, and led to the enactment of the British Statute of Monopolies, 1623, 21 Jac. 1, c. 3 (Eng.), an early model for American antitrust legislation. *See further* William Letwin, Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act 22–32 (Univ. of Chicago Press 1981) (1965).

Sadly, as this case demonstrates, cartels of existing businesses still use licensing laws to protect themselves against competition by newcomers. By staffing licensing and regulatory agencies with established practitioners who have a vested private interest in excluding competition, states routinely enable those firms to use government power to restrict entrepreneurs' right to earn a living, increase prices, and limit consumer choice. While Professors Aaron Edlin and Rebecca

Haw call these entities “the new cartels,” *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. Pa. L. Rev. 1093 (2014), there is nothing new about it: the actions at issue in this case are actually among the oldest abuses of government power known to our constitutional tradition.

The Supreme Court has repeatedly held that the Constitution forbids states from blocking people from earning a living pursuant to licensing restrictions that lack a reasonable connection to one’s fitness or capacity to engage in that trade. *See Schware v. Bd. of Bar Exam’rs*, 353 U.S. 232, 238–39 (1957); *Dent v. West Virginia*, 129 U.S. 114, 122 (1889); *New State Ice Co. v. Liebmann*, 285 U.S. 262, 278 (1932). But when trade cartels operating under the aegis of the state are granted antitrust immunity under *Parker v. Brown*, 317 U.S. 341 (1943), the very entities most likely to create monopolies and engage in the most harmful forms of anticompetitive behavior are shielded from scrutiny.

The Supreme Court held in *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209 (1993), that predatory-pricing schemes are exceedingly unlikely to work unless some barrier to entry enables the alleged predator to prevent new firms from entering the industry as

soon as the predator tries to raise prices above market rates. *Id.* at 227–28. If "new entry is easy," *id.* at 226, new firms will start up and prevent the predator from recouping its losses, thus defeating the predatory pricing scheme. *See also* Frank H. Easterbrook, *Predatory Strategies and Counterstrategies*, 48 U Chi. L. Rev. 263, 272 (1981) ("barriers to entry and postpredation monopoly are necessary to recoupment"); Stephen Breyer, Regulation and Its Reform 32 (1982) ("regulation can make predatory pricing easier, since it often provides the barriers to entry necessary for a potential predatory pricer to succeed").

In the same way, barriers to entry are an invaluable tool in the hands of established firms seeking to exclude rivals for self-interested purposes. Exempting private actors from antitrust liability whenever they enlist the power of the state in their anticompetitive efforts is simply unreasonable. Economists long ago recognized that existing firms try to persuade government to raise barriers to entry in a trade to protect themselves against competition. "The justification" for such laws, wrote Milton and Rose Friedman,

> is always the same: to protect the consumer. However, the reason is demonstrated by observing who lobbies . . . for the imposition or strengthening of licensure. The lobbyists are invariably representatives of the occupation in question ra-

> ther than of the customers . . . . [I]t is hard to regard altruistic concern for their customers as the primary motive behind their determined efforts to get legal power to decide who may be a plumber.

Free to Choose 240 (rev. ed. 1980).

Or, as Sir Edward Coke put it point four centuries ago, businesses seeking licensure are like a man rowing a boat: "they look one way, and row another: they pretend public profit, intend private." *Quoted in* R.H. Coase, The Firm, The Market, and The Law 196 (1988) (spelling modernized). Letting states immunize private conduct from antitrust liability whenever that conduct involves regulatory power makes no sense.

If "[t]he antitrust laws were enacted for 'the protection of competition, not competitors,'" *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 352 (1990) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)), and were meant to "embod[y]" the "fundamental national values of free enterprise and economic competition," *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013), then private parties acting with state authority should be particularly suspect. It is precisely by exploiting state power that existing firms engage in anticompetitive behavior. "When a group of competitors or a single firm influence governmental process for the purpose of restraining trade or mo-

nopolizing the market, the statutory objectives of the [antitrust laws] are placed in serious jeopardy." Gary Minda, *Interest Groups, Political Freedom, and Antitrust: A Modern Reassessment of the Noerr-Pennington Doctrine*, 41 Hastings L.J. 905, 909 (1990).

Instances of trade associations using state laws to restrict their own competition—for no genuine consumer benefit—abound. For example, in the 1980s, the American Society of Interior Designers (ASID) began a campaign to obtain regulations in various states which would require a government license to engage in the trade of interior design—*i.e.*, advising clients on how to decorate their homes or businesses more attractively. There is, of course, no realistic danger to the public from unlicensed persons advising clients on where to place tables and what color drapes to buy. Yet ASID spent some $275,000 in 1986 on the effort to obtain licensing laws, *see Move to License Interior Designers*, N.Y. Times, Jan. 23, 1986, at C3, and since then has continued to spend handsomely pushing for licensing laws. *See generally* Dick M. Carpenter II, Institute for Justice, *Designing Cartels: How Industry Insiders Cut Out Competition* 9–24 (2007), http://goo.gl/p90QIu. Today, 19 states prohibit people from calling themselves "interior designers" without

government permission and three states and the District of Columbia forbid a person from advising clients on how to decorate a home or business without a license. *Id.* at 7; *see also State Licensing Regulations*, American Society of Interior Designers, https://goo.gl/TPRSjy (last visited Aug. 19, 2016). Obtaining such licenses is expensive and time-consuming, so licensing laws typically block economic opportunity to precisely those lower-income applicants most in need of the opportunity. *See* David E. Harrington & Jaret Treber, Institute for Justice, *Designed to Exclude: How Interior Design Insiders Use Government Power to Exclude Minorities & Burden Consumers* (2009), https://goo.gl/3Jr2Wi.

Another example is Certificate of Public Convenience and Necessity (CPCN) laws, which bar competition in such industries as household goods moving, solely to protect established insiders against competition. *See generally* Timothy Sandefur, *A Public Convenience and Necessity and Other Conspiracies Against Trade: A Case Study from the Missouri Moving Industry*, 24 Geo. Mason Univ. Civ. Rts. L.J. 159 (2013). Under a typical CPCN law, anyone wishing to enter a trade must first notify existing firms and give them the opportunity to object to the opening of a new business. When an objection is filed, the applicant must prove to

a government agency that new competition is warranted—an obstacle that is usually extremely difficult to overcome, largely because most such laws provide no criteria or only extremely vague criteria for proving this. Existing firms use their objection power as a "competitor's veto" to bar new firms from entering—without any concern for public health and safety, or an applicant's skills, qualifications, or experience.

For instance, Missouri's CPCN law was systematically exploited by existing moving companies to block competition between 2005 and 2010. *See id.* at 180. Of the 17 people who sought permission to operate a statewide moving company during those years, all were protested by existing firms, which stated as the sole basis for objection that allowing a new moving company would cause "diversion of traffic or revenue" from them. *Id.* at 181. None ever identified any concern relating to public safety, and no consumer ever filed an objection. *Id.* Yet the state's Transportation Department routinely denied even fully qualified applicants the right to start moving companies, solely because existing firms did not desire competition. *See id.* at 183–84. The state repealed its

CPCN law in 2012,[2] but this history demonstrates how empowering existing firms to prohibit potential competition established a cartel that harmed entrepreneurs by denying them the right to earn a living, and harmed consumers by raising prices and restricting the availability of services—all for exclusively private benefit.

Given that private parties "may be presumed to be acting primarily" for self-interested reasons even when wielding state regulatory powers, *Hallie v. Eau Claire*, 471 U.S. 34, 45 (1985), extending state-action immunity is likely to exempt precisely those actions most likely to constitute monopolistic behavior. This Court should follow the Supreme Court's lead and rule against such immunity. *See Phoebe Putney*, 133 S. Ct. at 1016–17 (rejecting invitation to presume immunity).

B. Studies have shown that licensing laws are frequently abused and are harming both workers and consumers.

In the most recent season of Orange is the New Black, Daya dashes her mother's hopes of opening a nail salon when she gets out of prison by telling her that the plan is "make-believe" because she would have to get a cosmetology license and rent a place and buy supplies, all of

[2] Missouri's law was the target of a 42 U.S.C. § 1983 lawsuit, *Munie v. Koster*, No. 4:10-cv-01096 AGF (E.D. Mo. filed June 18, 2010), which was dismissed as moot when the state repealed the law after argument on the summary judgment motion.

which cost money. *Orange is the New Black: Friends in Low Places* (Netflix June 17, 2016). The characters may be fictional, but the harm that licensing laws inflict on workers is real. A recent *New York Times* article told the story of Jestina Clayton, a young Utah woman who started a traditional African hair-braiding business using the skill she learned growing up in Sierra Leon. Jacob Goldstein, *So You Think You Can Be a Hair Braider. . .*, N.Y. Times, June 17, 2012, at MM20. Jestina soon learned that her small business required a cosmetology license, which would cost her two years in school and $16,000. *Id.* She asked the licensing board to grant her an exemption, but the board—mostly comprising licensed barbers and cosmetologists—declined. *Id.*

Licensing laws harm not only workers but also consumers, by raising prices and lowering quality. Studies have shown that barriers to entry, like exams and education requirements, increase the costs of services, one recent study estimating an 18% increase in hourly wages resulting from licensing. *See*, *e.g.*, Edlin & Haw, *Cartels by Another Name*, 162 U. Pa. L. Rev. at 1113. The practice restrictions licensing boards place on industries also lead to higher prices for consumers: for example, one study estimated that restrictions on the number of hygienists a

dentist may hire increased the cost of dental visits for consumers by $700 million in a single year. *Id.* at 1114. Some studies also suggest that licensing laws may, perhaps counterintuitively, decrease the quality of services provided. *Id.* at 1117. And then there are those would-be consumers who cannot afford services of any quality because licensing laws have increased prices beyond their means. *Id.* at 1114–15.

C. If states choose not to supervise self-interested licensing boards, then those boards must be subject to antitrust scrutiny.

"The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 695. Competition, in other words, is the best system available for ensuring that consumers have wide ranges of high-quality and low-cost alternatives to choose from, and that new and existing market players have the incentives to pursue innovation and implement more efficient methods. Luckily, the goal of antitrust law is to promote such robust competition.

Telemedicine, in particular, is a burgeoning field currently competing with the traditional healthcare industry, and bringing about new levels of efficiency while improving access for patients. Because of the many positive benefits competitive markets and free enterprise bestow upon consumers, and in this case, patients, state-action immunity from federal antitrust laws for sub-state governmental entities is always disfavored. *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992).

There is no special softening of this competition-favoring rule for healthcare regulators merely because they oversee an industry whose business is tending to people's health. *See, e.g.*, *Phoebe Putney*, 133 S. Ct. 1003; *Dental Exam'rs*, 135 S. Ct. 1101. In *Phoebe Putney*, for instance, a state hospital authority argued that its anticompetitive actions should not be subject to the presumption against immunity partially because "hospital authorities are granted unique powers and responsibilities to fulfill the State's objective of providing all residents with access to adequate and affordable health and hospital care." 133 S. Ct. at 1014. The Court unanimously rejected that argument because the "state legislature's objective of improving access to affordable health care does not logically suggest that the State intended that hospital au-

thorities pursue that end through mergers that create monopolies. . . . Particularly in light of our national policy favoring competition, these restrictions should be read to reflect more modest aims." *Id.* at 1015.

Healthcare providers are subject to the same commercial incentives as are, say, the pharmaceutical companies that produce medications or the energy companies that provide electricity to hospitals. Although cartelized or captured healthcare regulators and other defenders of the status quo may fly the flags of "promoting public health" or "protecting public safety," competition is just as important for innovating and improving outcomes in healthcare as it is elsewhere. *See Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 694-95 (rejecting "public safety and health" antitrust defenses regarding the licensing of engineers); *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 462-63 (1986) (same regarding dentists).

III. REFUSING SELF-INTERESTED BOARDS IMMUNITY FROM ANTITRUST LIABILITY IS FULLY CONSISTENT WITH FEDERALISM

"Federal antitrust law . . . is 'as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms.'" *Dental Exam'rs*, 135 S. Ct. at 1109 (quoting *United States v. Topco Assocs., Inc.*,

405 U.S. 596, 610 (1972)). Every business, regardless of its size, is guaranteed the freedom "to assert with vigor, imagination, devotion, and ingenuity whatever economic muscle it can muster." *Topco*, 405 U.S. at 610. Antitrust laws—particularly the Sherman Act—are "the Magna Carta of free enterprise," and play a crucial role in upholding the national policy of economic freedom for anyone wishing to compete in the marketplace. *Id*.

In line with this national policy, the states clearly have an interest in preventing anticompetitive behavior and fostering robustly competitive markets within and across their borders. State governments also have an interest in reserving the ability to create regulatory subdivisions to which they can delegate some of their authority to accomplish specific tasks. At times, the states may deem it appropriate to design a regulatory body to deliberately exempt it from antitrust laws to achieve a specialized purpose.

States may confer antitrust liability on regulatory bodies—but only under certain conditions. Applying the state-action immunity doctrine too broadly and giving private actors a limitless ability to claim antitrust immunity for themselves would empower state-created cartels

to "make economic choices counseled solely by their own parochial interests and without regard to their anticompetitive effects," disrupting the free enterprise system that protects the national policy of economic freedom. *Lafayette*, 435 U.S. at 408.

Furthermore, broad application of the *Parker*-immunity doctrine would actually undermine the states' ability to effectively delegate authority to specialized or local regulatory bodies by endowing these bodies with an antitrust immunity that state governments may have never meant to give them. "Neither federalism nor political responsibility is well-served by a rule that essential national policies are displaced by state regulations intended to achieve more limited ends." *Ticor*, 504 U.S. at 636. The doctrine enables states to create regulatory subdivisions that do not interfere with the interest in preserving the benefits of competition. By "adhering in most cases to fundamental and accepted assumptions about the benefits of competition within the framework of the antitrust laws," courts actually increase rather than diminish the states' regulatory flexibility. *Id.* State legislatures may wish to make broad delegations of authority to their political subdivisions in order to maximize the benefits of the specialized governance those bodies offer—

but that does not necessarily mean that state legislatures always want to give those entities the ability to violate the federal antitrust laws.

"When a state grants power to an inferior entity, it presumably grants the power to do the thing contemplated, but not to do so anti-competitively." Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 225a, at 131 (3d ed. 2006). Relying on the backdrop of the national policy favoring competition, states may enact such broad delegations that are nevertheless intended to create specific and narrow, rather than general and wide-reaching, regulatory schemes. Giving regulatory agencies state-action immunity too readily would undermine states' ability to do so, creating the hazard that legislatures will inadvertently authorize anticompetitive conduct. State legislatures cannot possibly anticipate every potential anticompetitive consequence of these delegations of authority and explicitly disavow antitrust immunity for every one. "'No legislature . . . can be expected to catalog all of the anticipated effects' of a statute delegating authority to a substate governmental entity." *Phoebe Putney*, 133 S. Ct. at 1012 (quoting *Hallie*, 471 U.S. at 43).

If a state intends a specific anticompetitive result, it may clearly articulate that result—or make it plainly foreseeable, *see id.* at 1011—

giving voters the chance to oppose immunity-creating legislation before it becomes law and making it easier to hold legislators accountable. Otherwise, states would be impeded in their freedom of action because they would have to act "in the shadow of state-action immunity whenever they enter[ed] the realm of economic regulation." *Ticor*, 504 U.S. at 636. The limited and careful application of the state-action immunity doctrine gives states the most freedom in delegating power and crafting regulatory entities, ensuring legislatures that they will not accidentally confer immunity and allow regulatory bodies to go rogue with anticompetitive conduct that deviates from the states' interest of preserving robust marketplace competition for the benefit of their residents.

Nor is it necessary for a state wishing to obtain the specialized knowledge of professionals to establish a regulatory system that merely rubber-stamps the often self-interested assertions of these professionals. One can easily imagine such alternatives. *See* Edlin & Haw, *Cartels by Another Name*, 162 U. Pa. L. Rev. at 1155. The agency could be staffed by independent state officials who invite comment and input from professionals while retaining final decision-making authority in official hands. (Agencies already routinely do this.) Or, agencies could be

made up of retired members of the profession, or could include existing members without their making up the majority of the board. States could adopt private certification requirements, an alternative to statutory licensing that allows consumers to choose what services to purchase and what practitioners to patronize. These and other "active supervision" alternatives would easily accommodate the state's legitimate interests in obtaining specialized knowledge while also resisting the danger of private exploitation of public power.

Ultimately a state-empowered but non-sovereign entity like a licensing board—essentially, a private actor for whom the temptation to engage in cartel behavior is all too great—cannot merely declare by fiat that it automatically deserves antitrust immunity in regard to any anticompetitive restraint it may wish to issue. These entities may be tasked with executing state policy, but courts must rigorously demand that they do so without simply using their regulatory power as a shield to pursue their own parochial interests and restrict others' economic freedom. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Neither these regulatory bodies nor the states themselves may "thwart the national policy in favor of competition"

simply by "casting . . . a gauzy cloak of state involvement" over the self-interested cartel behavior of private actors. *Id.* at 106.

IV. PRIVATE PARTIES SHOULD BE HELD IMMUNE ONLY WHERE THE STATE ACTIVELY SUPERVISES THEIR USE OF THE RESTRAINT IN QUESTION

To give the states an avenue to indicate clearly when they intend to confer *Parker* immunity on a non-sovereign actor, the Supreme Court has outlined two requirements: the restraint must be both "clearly articulated and affirmatively expressed as state policy" as well as "actively supervised" by the state itself. *Midcal*, 445 U.S. at 105. This test cannot be satisfied "when the State's position is one of mere *neutrality*" toward the anticompetitive conduct in question, and thus a state's simply general grant of power to a non-sovereign actor cannot be read to confer immunity. *Cmty. Commc'ns Co., Inc. v. City of Boulder*, 455 U.S. 40, 55 (1982). States must exercise "sufficient independent judgment and control" to ensure that the anticompetitive acts in question are the "product of deliberate state intervention," *Ticor*, 504 U.S. at 634 (emphasis added), instead of the private self-interest of existing firms.

"[T]he [active supervision] analysis asks whether the State has played a substantial role in determining the specifics of the economic

policy." *Id.* Although the inquiry is "flexible and context-dependent," the underlying question is always whether the state's review mechanisms "provide 'realistic assurance' that a non-sovereign actor's anticompetitive conduct 'promotes state policy, rather than merely the party's individual interests.'" *Dental Exam'rs*, 135 S. Ct. at 1106–07.

The anticompetitive conduct of non-sovereign actors, "*especially those authorized by the State to regulate their own profession*," must result from procedures "that suffice to make it the State's own." *Id.* at 1105 (emphasis added). So far, the constant conditions the Court has identified to satisfy the "active supervision" requirement include: the state supervisor must review the actual substance of the anticompetitive decision, and not allow the entity to make anticompetitive decisions of its own accord; the supervisor must have the power to veto or modify decisions to make sure they faithfully accord with state policy; and the state merely having the potential to supervise is not an adequate substitute for an actual state decision. *Id.*

Under such programs of active supervision, through which state officials have and do exercise the power "to review particular anticompetitive acts of private parties and disapprove those that fail to accord

with state policy," states must provide "realistic assurance that a private party's anticompetitive conduct" is actually promoting state policy, "rather than merely the party's individual interests." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). Ensuring that active supervision actually exists gives states the opportunity to indicate clearly that they want a state regulatory body to engage in anticompetitive behavior for a specific state purpose, if indeed that is the true purpose of a given policy.

The Supreme Court has acknowledged the obvious conflict of interest existing market participants have when regulating their industry: "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." *Dental Exam'rs*, 135 S. Ct. at 1111. The telemedicine regulations at issue here were essentially the Board's veto of potential competitors, so the mover-licensing laws discussed above are again instructive.

The states there claimed that allowing existing firms the power effectively to veto their own competition was a necessary means of obtaining the specialized knowledge of industry professionals. But these pro-

fessionals far more often exploited their role in the process to block competition, rather than to supply information to the regulatory agency. *See, e.g.*, Sandefur, *Public Convenience*, *supra*, at 181. The Appellees have alleged that the Board adopted the new regulations in response to complaints about the competition they posed to traditional medical professionals, *see* Amend. Compl. at 23-29, and the regulations' exemptions for doctors with cross-coverage arrangements provide further evidence that concerns about competition rather than public safety motivated the Board. The Board even initially took action via letters to Appellees and their clients just like the North Carolina State Board of Dental Examiners did. *See id.* at ¶¶ 104, 109; *Dental Exam'rs*, 135 S. Ct. at 1108.

The active supervision requirement guards against the readily apparent danger of self-interested action by regulatory agencies dominated by private actors, enabling states to obtain specialized knowledge while ensuring compliance with the antitrust statutes. As the Supreme Court explained in *Patrick v. Burget*, 486 U.S. at 101, active supervision is designed to allow states flexibility in their regulatory policies within the boundaries of federal law: it requires that state officials have and exercise power to review particular anticompetitive acts of private par-

ties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

Contrary to the Federation of State Medical Boards' argument that "active supervision" varies with the nature of the board and the gravity of the antitrust offense, it is not that the test varies in the circumstances but that it may be satisfied in varying ways. Although the active-supervision test "need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision," certain "constant requirements" still must be met. *Dental Exam'rs*, 135 S. Ct. at 1116. The Supreme Court has never suggested that the level of judicial scrutiny in a given case depends on a particular factual situation.

Courts must always scrutinize the alleged supervision of regulatory agencies but states need not adopt the same form of active supervision in every case. For example, a state could actively supervise its medical board by having a legislative committee review—with power to veto or modify—regulations before they take effect and actively supervise its bar by having the state supreme court enact rules for the legal profes-

sion after the bar has submitted a proposal. There may be more than one way to skin a cat, but in the end the cat must in fact be skinned.

The submissions of what qualifies as active supervision made by the Appellants and the Federation are a far cry from "day-to-day involvement" or "micromanagement." *See* Brief of Appellants at 41–52; Brief of Federation of State Medical Boards as *Amicus Curiae* in Support of Defendants-Appellants at 22–32. Despite the length of these arguments, the "supervision" they suggest is neither "active" nor truly supervision. Active supervision simply requires more than what the Board has to offer, which amounts to a distant possibility of future supervision and flies in the face of the Court's clear statement that the "mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.* (quoting *Ticor*, 504 U.S. at 638).

CONCLUSION

Amicus urges the Court to affirm the district court.

Respectfully submitted,

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 6,103 words, excluding the parts of the brief 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 it was prepared using Word 2016 and uses a proportionally spaced typeface, Century Schoolbook, in 14-point type for body text and 12-point type for footnotes.

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On September 9, 2016, I filed this *Brief of the Cato Institute as Amicus Curiae* using the CM/ECF System, which will send a Notice of Filing to all counsel of record.

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