UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TELADOC, INC., TELADOC PHYSICIANS, P.A., KYON HOOD, and EMMETTE A. CLARK,	§	
Plaintiffs,	§	
	§	Civil Action No. 1:15-cv-00343-RP
v.	§	
MICHAEL ARAMBULA, JULIE K. ATTEBURY, MANUEL G. GUAJARDO, JOHN R. GUERRA, J. SCOTT HOLLIDAY, MARGARET C. MCNEESE, ALLAN N. SHULKIN, ROBERT B. SIMONSON, WYNNE M. SNOOTS, PAULETTE B. SOUTHARD, KARL W. SWANN, SURENDA K. VARMA, STANLEY S. WANG, and GEORGE WILLEFORD III, in their capacities as members of the Texas Medical Board,	§	
Defendants.	§	

Plaintiffs' Supplemental Opposition to Defendants' Motion to Dismiss the Amended Complaint

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Federal Cases

State Cases

Docketed Cases

Federal Statutes

State Statutes

Other Authorities

INTRODUCTION

Defendant members of the Texas Medical Board ("TMB") have worked together to adopt and enforce rules designed to eliminate an affordable and accessible form of healthcare. This Court granted a preliminary injunction against enforcement of Defendants' latest anticompetitive rule. Yet Defendants now ask this Court to dismiss the case entirely, raising a "state action" defense in an effort to shield their anticompetitive conduct from judicial scrutiny.

Defendants' state action defense fails because their adoption of the anticompetitive rules at issue was not done pursuant to a clearly articulated state policy to allow anticompetitive conduct, nor was it actively supervised by the State. The State of Texas has no clearly articulated policy to harm competition or reduce access to medical care. And, as to active supervision, Defendants' actions took effect automatically, without state supervision or intervention. Defendants argue that their anticompetitive acts might be supervised in the *future* by a potential challenge under the Texas Administrative Procedure Act or by a "sunset review" that occurs approximately once every twelve years and evaluates only whether a licensing board should continue to exist. But the Supreme Court has held that potential supervision is not active supervision and, for this and other reasons, Defendants fail to establish a state action defense.

In addition to violating the antitrust laws, the challenged rules discriminate against interstate commerce in violation of the Commerce Clause of the United States Constitution. State action is no defense to a Commerce Clause violation. Plaintiffs have plausibly alleged both that the challenged rules are designed to benefit in-state economic interests by burdening out-of-state competitors and that the practical effect of the rules gives a preference to in-state physicians.

Finally, Defendants' limitations argument with respect to the 2010 amendment to Rule 174 fails for several reasons, including because some of the Plaintiffs were not adversely affected until 2013 and because the rule was but one step in Defendants' continuing violation of the law.

For these reasons, Defendants' motion should be denied.

BACKGROUND

I. Factual Background

Teladoc connects patients with board-certified physicians by phone or video, 24 hours a day, 365 days a year, for a fraction of the cost of an in-person visit to a physician. Am. Compl. ¶¶ 2, 46-47, ECF No. 55 ("AC").[1] Teladoc's telehealth service expands patient access to healthcare by making care more affordable and convenient, reducing healthcare spending by millions of dollars annually. *Id.* ¶¶ 47, 52, 64, 67. Despite these obvious benefits, the TMB has repeatedly attempted to prevent Teladoc from providing healthcare to Texas patients who need it.

Teladoc, Inc. was founded in Texas in 2002, and it has provided telehealth services in Texas since 2005. Although the TMB has known about Teladoc's operations since 2005, *id.* ¶ 95, the TMB did not attempt to prohibit telehealth until 2010, *id.* ¶¶ 96-101. Since then, the TMB has repeatedly attempted to prohibit telehealth services to shield "brick-and-mortar" physicians from this new form of competition.

First, in October 2010, the TMB adopted New Rule 174, by changing its rules for "telemedicine medical services" (remote treatment using real-time video) to add a requirement for in-person physical examinations by a qualified "site presenter." *See* 35 Tex. Reg. 9085, 9090

[1] Plaintiffs are Teladoc, Inc., Teladoc Physicians, P.A., Kyon Hood, M.D., and Emmette Clark, M.D. (collectively "Teladoc").

(Oct. 8, 2010) (adopting revisions to 22 Tex. Admin. Code § 174 ("New Rule 174")). At the same time, the TMB created exceptions permitting remote video treatment without an in-person exam for any physician with an "established" relationship with the patient or by any other physician with whom the first physician has a "cross-coverage" arrangement. *See id.* at 9091 (adopting 22 Tex. Admin. Code §§ 174.7, .11). This exception illustrates the anticompetitive and protectionist nature of the rule, and shows that any safety rationale is pretextual, because Texas physicians may offer remote video treatment *without a physical exam* as long as they have the requisite "cross-coverage" relationship with another physician. New Rule 174 has prevented Teladoc from offering Texans the option of video consultations, even though Teladoc offers this option to patients in nearly all other states. AC ¶ 100. Teladoc has nonetheless continued to offer telehealth services in Texas without real-time video, using its sophisticated technology platform combining phone- and internet-based service.[2] *Id.* ¶ 102.

The TMB then took several more steps in its sustained effort to prevent competition from telehealth. These included two improper rulemakings reinterpreting Rule 190.8 to require physical exams in all cases, which would have ended Teladoc's ability to provide services to Texas patients. The state courts invalidated these attempts on procedural grounds. *See Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 623 (Tex. App.—Austin 2014, pet. pending); Temp. Inj. Order, *Teladoc, Inc. v. Tex. Med. Bd.*, No. D-1-GN-15-000238 (Travis Cty. Feb. 6, 2015). Even

[2] Defendants incorrectly say Teladoc offers "telemedicine" under Section 174. *See* Am. Mot. to Dismiss, at 27 n.27, ECF No. 64 ("MTD"). Defendants offer no basis for this counter-textual assertion, which contradicts both the TMB's longstanding position, *see, e.g.*, TMB's Response in Opposition to Plaintiff's Motion to Supersede Judgment Pending Appeal at ¶ 7 (arguing Teladoc is not a telemedicine provider because it does not offer a video connection or a "site presenter"), and the position of the Texas Medical Association ("TMA"), *see* Amicus Br. of the Texas Medical Association, at 3, ECF No. 33-1 (describing Teladoc's services as "not telemedicine").

when the state court stayed the first invalid rulemaking, the TMB tried to stop Teladoc from providing medical services by telling its clients that Teladoc was violating Rule 190.8. AC ¶ 109.

Then, in April 2015, the TMB voted to amend Rule 190.8(1)(L) to require an in-person examination in all cases before a physician may treat a patient. *See* 40 Tex. Reg. 3159, 3169 (May 29, 2015) (adopting revisions to 22 Tex. Admin. Code § 190.8(1)(L) ("New Rule 190.8")). The TMB adopted this rule over the objection of one (non-physician) member of the TMB, who noted that there was no record evidence supporting the adoption a mandatory in-person examination requirement and thereby prevent Texas patients from having access to low-cost, accessible medical care. *See* AC ¶ 13.

Although New Rule 190.8 prohibits Teladoc from offering sophisticated phone-based treatment, the TMB has taken the position that the rule does **not** prohibit Texas physicians from treating patients over the phone **without a physical exam**, as long as the physicians have a "call coverage" relationship with another physician. Aff. of Scott M. Freshour Ex. C, at 5, ECF No. 21-12. This again demonstrates that Defendants' professed safety concerns regarding phone-based consultations are pretextual.

Defendants' amendments to Rules 174 and 190.8 took effect automatically, without any review by a state actor with the power to modify or veto them.

II. Procedural Background

On April 29, 2015, Teladoc filed an application for a preliminary injunction against enforcement of New Rule 190.8 and a complaint alleging Defendants' efforts to implement a categorical in-person examination requirement violate the antitrust laws and the Commerce

Clause of the U.S. Constitution. *See* Mot. for Prelim. Inj., ECF No. 10; Compl., ECF No. 1. After briefing and a hearing, the Court granted the preliminary injunction. Order, ECF No. 44.

On June 19, 2015, Defendants moved to dismiss the complaint. *See* Mot. to Dismiss, ECF No. 51. Teladoc amended the complaint, and, on July 30, Defendants filed the pending motion to dismiss the Amended Complaint.

STANDARD OF REVIEW

Federal Rule of Civil Procedure 12(b)(6) governs all of Defendants' arguments raised in the Motion to Dismiss. The allegations in the Amended Complaint must therefore be taken as true and viewed in the light most favorable to Plaintiffs. *See, e.g., Brand Coupon Network, L.L.C. v. Catalina Mktg. Corp.*, 748 F.3d 631, 634 (5th Cir. 2014). Defendants' motion faces a high bar, which Defendants fall far short of meeting. *Cliff Food Stores Inc. v. Kroger Inc.*, 417 F.2d 203, 205 (5th Cir. 1969) ("[A] motion to dismiss on the basis of the pleadings alone should rarely be granted."); *U.S. v. Bollinger Shipyards, Inc.*, 775 F.3d 255, 262-63 (5th Cir. 2014); *Scanlan v. Texas A&M Univ.*, 343 F.3d 533, 536-37 (5th Cir. 2003) (similar); *Test Masters Educ. Servs., Inc. v. Singh*, 428 F.3d 559, 570 (5th Cir. 2005) ("Motions to dismiss are viewed with disfavor and are rarely granted.").

Defendants' State Action Defense is Not Jurisdictional. Defendants argue that their "state action" defense to the antitrust claims is jurisdictional and should therefore be reviewed under Rule 12(b)(1). *See* MTD at 4-5. Defendants are mistaken. Courts apply Rule 12(b)(6) to state action defenses raised in a motion to dismiss. *See, e.g., Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Par.*, 171 F.3d 231, 232-33 (5th Cir. 1999) (en banc). Defendants cite no authority for their assertion that "state action" is an "immunity" and

must be jurisdictional. *See* MTD at 5.[3] Indeed, the Fifth Circuit has expressly rejected Defendants' starting premise: "Though the state action doctrine is often labeled an immunity, that term is actually a misnomer because the doctrine is but a recognition of the limited reach of the Sherman Act . . . ." *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 292 n.3 (5th Cir. 2000) (citing *Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395 (5th Cir. 1996)). The doctrine defines whether a plaintiff has a Sherman Act claim, not whether a court has power to hear the case. *See id.; see also Surgical Care*, 171 F.3d at 234 ("'[State action] immunity' is more accurately a strict standard for locating the reach of the Sherman Act.").

Moreover, because "'state action' immunity is in the nature of an affirmative defense; the party claiming immunity has the burden of proof." *Destec Energy, Inc. v. S. Cal. Gas Co.*, 5 F. Supp. 2d 433, 445 (S.D. Tex. 1997) (collecting Supreme Court and circuit court cases); *see also Expert Masonry, Inc. v. Boone Cty., Ky.*, 440 F.3d 336, 345-46 (6th Cir. 2006) (same); *Yeager's Fuel, Inc. v. Pa. Power & Light Co.*, 22 F.3d 1260, 1266 (3d Cir. 1994) (same). In fact, Defendants themselves have pled "state action" as an affirmative defense. *See* Answer ¶ 172, ECF No. 65. Defendants must establish each element of their defense. *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986) (affirmative defense must appear "clearly on the face of the pleadings" for dismissal on 12(b)(6) motion); *Simon v. Telsco Indus. Emp. Benefit Plan*, No. Civ.A. 3:01-CV-1148-D, 2002 WL 628656, at *1 (N.D. Tex. Apr. 17, 2002) (similar).

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[3] Defendants reference *Martin* and *Danner Construction Co. v. Hillsborough County, Fla.*, 608 F.3d 809 (11th Cir. 2010), *see* MTD at 6, but those cases are about whether there can be an interlocutory appeal of a rejection of a state action defense. The cases have nothing to do with whether the defense affects a court's subject matter jurisdiction. *See Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391, 1395-96 (5th Cir. 1996); *Danner*, 608 F.3d at 812 n.1.

Defendants Challenge to Plaintiffs' Dormant Commerce Clause Claims is Reviewed under Rule 12(b)(6). Defendants acknowledge that Rule 12(b)(6) governs their motion to dismiss the dormant Commerce Clause claims. *See* MTD at 33-34 & n.39.

ANALYSIS

I. Defendants' Motion to Dismiss The Antitrust Claims Fails Because Defendants Cannot Satisfy The Requirements of The "State Action" Defense.

Defendants concede, as they must, that to establish a "state action" defense they must meet *both* parts of the test set forth in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). Defendants must establish that: (1) the "State has articulated a clear policy to allow the anticompetitive conduct"; *and* (2) the "State provides active supervision of [the] anticompetitive conduct." *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1112 (2015) (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) (citing *Midcal*, 445 U.S. at 105)). As Defendants put it, "State Action Immunity Requires Active State Supervision." MTD at 6.[4] We address the active supervision requirement first because it is the focus of Defendants' brief. Because Defendants cannot satisfy either element of a state action defense—much less both—their motion to dismiss should be denied.

[4] Both parts of the *Midcal* test apply to actions by a licensing board where, as here, "a controlling number of decisionmakers are active market participants in the occupation the board regulates." *Dental Exam'rs*, 135 S. Ct. at 1114; AC ¶ 22 ("The board consists of 19 members, 12 of whom are licensed physicians.") (citing Tex. Occ. Code § 152.002); Answer ¶ 22 (admitting allegation). Although there is no dispute on this point, Defendants repeatedly suggest Teladoc believes that a board can *never* have a state action defense. MTD at 2, 6. This has never been Teladoc's view, and Defendants offer no citation to any statement by Teladoc to this effect.

A. Defendants Were Not Actively Supervised by the State.

As the Supreme Court recently reiterated in *Dental Examiners*, active supervision by the State has four "constant requirements":

1. "The supervisor **must review the substance** of the anticompetitive decision, **not merely the procedures** followed to produce it." *Dental Exam'rs*, 135 S. Ct. at 1116 (emphasis added).

2. "[T]he supervisor must have the **power to veto or modify** particular decisions to ensure they accord with state policy." *Id.* (emphasis added).

3. "[T]he '**mere potential for state supervision is not an adequate substitute** for a decision by the State.'" *Id.* (quoting *Ticor*, 504 U.S. at 638) (emphasis added).

4. "[T]he state supervisor may not itself be an active market participant." *Id.* at 1117.

These requirements help "ensure that the state-action doctrine will shelter only the particular anticompetitive acts of private parties that, **in the judgment of the State**, actually further state regulatory policies." *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988) (emphasis added). If the requirements are not satisfied, there can be no "realistic assurance" that Defendants' anticompetitive conduct promotes the interests of the state. *Dental Exam'rs*, 135 S. Ct. at 1116 (quoting *Patrick*, 486 U.S. at 101).

Tellingly, when Defendants describe *Dental Examiners*, they assert that the "only requirements" identified by the Court for active supervision are requirements 1, 2, and 4 above. Defendants omit the third constant requirement: the mere *potential* for state supervision is not adequate. *See* MTD at 8 ("The only requirements identified by the Supreme Court are that the state supervising authority 'must review the substance of the anticompetitive decision, . . .; . . . must have the power to veto or modify particular decisions to ensure they accord with state policy; and . . . may not itself be an active market participant.'") (quoting *Dental Exam'rs*, 135 S. Ct. at 1116) (ellipses by Defendants). This omission is significant. The purported sources of

supervision advanced by Defendants reflect at most the **potential** for the State to review some portion of Defendants' conduct.

Defendants identify two sources of potential supervision: (1) Texas state courts, which under the Texas Administrative Procedure Act ("APA") could review a challenge to New Rules 174 or 190.8, if one is filed; and (2) the Texas legislature, through a sporadic "sunset review" in which it considers whether the TMB should continue to exist. These sources do not satisfy the four baseline requirements for active supervision.

1. The Judicial Review Identified by Defendants Is Merely Reactive and Too Narrow to Provide Active Supervision.

Defendants do not claim that a state court has actually supervised the anticompetitive rules at issue. Rather, their primary argument is that the state courts have the **potential** to supervise these rules under the APA. *See* MTD at 10. No court, however, has ever found that the potential for judicial review is sufficient to constitute active supervision. *See* MTD at 11-15 (failing to cite a single case holding that judicial review was active supervision). Judicial review under the APA is no exception. Defendants' conduct was not actively supervised because, among other things, the APA: (a) offers at most the **potential** for review; and (b) provides a **limited review** that is focused on compliance with procedures and does not involve determining whether the anticompetitive conduct at issue promotes state policy.

(a) The Potential For APA Review Is Insufficient Because Potential Review Is By Definition Not Active Supervision

The APA does not give courts the authority to initiate *sua sponte* review of agency rules. *See* Tex. Gov't Code § 2001.038. There is no dispute that New Rules 174 and 190.8 have never been subjected to APA review, much less affirmatively determined by a Texas court to promote

state policy.[5] Defendants thus cannot point to a single judicial decision establishing that "the State effectively has made this conduct its own." *Dental Exam'rs*, 135 S. Ct. at 1116 (quoting *Patrick*, 486 U. S. at 105-106). Recognizing this fatal flaw, Defendants argue that future APA litigation brought by an injured party **might** provide supervision. But, as the courts have repeatedly held, the "mere potential for state supervision is not an adequate substitute for a decision by the state." *Dental Exam'rs*, 135 S.Ct. at 1116 (quoting *Ticor*, 504 U.S. at 638); *see also DFW Metro Line Servs. v. Sw. Bell Tel., Corp.*, 988 F.2d 601, 606 (5th Cir. 1993) ("Alone, however, . . . potential for supervision does not satisfy the second prong of the *Midcal* test. The [supervisor] must actually fulfill the active role granted to it . . . ."). This is the rule because the potential for supervision provides no "realistic assurance" that the state has actually reviewed the anticompetitive conduct and determined that it promotes state policy. *Dental Exam'rs*, 135 S. Ct. at 1112 (quoting *Patrick*, 486 U.S. at 101). Instead, the party asserting the defense "must show that state officials **have undertaken** the necessary steps" to supervise the anticompetitive conduct. *Ticor*, 504 U.S. at 638 (emphasis added). Defendants cannot satisfy this requirement here, and this alone is fatal to all of Defendants' arguments regarding potential APA review as a source of active supervision.

(b) APA Review Is Not Active Supervision Because APA Review Is Too Narrow in Substance.

Even if APA review had occurred, which it did not, it would still not be sufficient. Active supervision requires that a state supervisor "review the substance of the anticompetitive

[5] Teladoc's APA litigation predating New Rule 190.8 was a **procedural** challenge alleging that the TMB attempted to adopt new rules without notice-and-comment rulemaking. Moreover, the state courts agreed with Teladoc that the TMB in fact had not followed the necessary procedures and invalidated the prior rulemaking. *See Teladoc v. Tex. Med. Bd.*, 453 S.W.3d at 623.

decision, not merely the procedures followed to produce it," and make a "decision" about whether the act "promotes state policy." *Dental Exam'rs*, 135 S. Ct. at 1116-17; *see also DFW Metro*, 988 F.2d at 606 ("[S]tate officials must be vested with the power to review particular anti-competitive acts and to disapprove those actions that do not comply with state policy."). APA review, however, does not reach the policy merits of an anticompetitive action. *Cf., e.g., Patrick*, 486 U.S. at 102-03 (holding that judicial review of procedures is not active supervision and that the state must both have "and exercise" ultimate authority over the determination).

The courts have repeatedly held that judicial review is too narrow to provide active supervision. For example, when the Supreme Court considered the assertion that judicial review was sufficient, it squarely rejected the argument. *See Patrick*, 486 U.S. at 104-06 (holding that judicial review of hospital-privilege determinations "falls far short" of satisfying active supervision requirement). Lower courts have uniformly followed *Patrick* in holding that judicial review is too narrow to provide active supervision. *See, e.g., Pinhas v. Summit Health Ltd.*, 894 F.2d 1024, 1030 (9th Cir. 1989) (judicial review did not constitute active supervision even where court had power to determine whether rule was "contrary to established public policy," because such review was still too "constricted"); *Shahawy v. Harrison*, 875 F.2d 1529, 1535-36 (11th Cir. 1989) (judicial review for procedural error and sufficiency of the evidence was nonetheless too narrow to constitute "active supervision").[6]

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[6] *See also Islami v. Covenant Med. Ctr., Inc.*, 822 F. Supp. 1361, 1380 (N.D. Iowa 1992) (judicial review limited to questions of procedural fairness is not "active supervision"); *Shah v. Mem'l Hosp.*, No. 86-0063-D, 1988 WL 161175, at *3 (W.D. Va. July 27, 1988) (judicial review of whether decisions were supported by appropriate reasons is not "active supervision"). The inadequacy of APA review is further demonstrated by comparison to state review of proposed ratemaking. The Fifth Circuit has held that review of proposed rates is active supervision where the utility commission comprehensively reviews the substance of proposed rates prior to

The Texas APA is similar to administrative procedure acts in other states: It is narrow and deferential, and focuses on ensuring that an agency or board followed appropriate procedures, not on second-guessing policy judgments by the agency. *McCarty v. Tex. Parks & Wildlife Dep't*, 919 S.W.2d 853, 854 (Tex. App—Austin 1996, no writ) ("Agency rules are presumed valid"); *Pharmserv, Inc. v. HHS Comm'n*, No. 03-12-00526-CV, 2015 Tex. App. LEXIS 3452, at *12 (Tex. App.—Austin Apr. 9, 2015, no pet.) (discussing deferential review). Defendants cite three sections of the APA as purportedly giving courts authority that might be used to review their conduct: (i) § 2001.038; (ii) § 2001.035; and (iii) § 2001.174. *See* MTD at 12-16. None of these provides active supervision.

(i) Section 2001.038 review is too narrow.

Defendants argue that, under § 2001.038, a "rule of the TMB is subject to direct judicial review . . . as exceeding the board's **authority** under state law." MTD at 12 (emphasis added). But such review, if it had occurred, would not be active supervision because it would fail two more of the Court's constant requirements: § 2001.038 does not allow courts to (1) review the substance of the TMB's anticompetitive rulemakings to determine whether the rule promotes state policy or (2) veto or modify rules to ensure that they promote state policy.

Section 2001.038 allows parties to challenge the validity of a rule "on procedural and constitutional grounds," not whether the rule promotes the interests of the State. *See Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 104 S.W.3d 225, 232, 234 (Tex. App.—Austin 2003, no pet.) (noting court's role is not to "weigh the wisdom of a particular policy"); *see also*

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adoption, modifying or rejecting unreasonable proposals, so the state "control[s] the initial establishment of rates." *DFW Metro*, 988 F.2d at 607.

Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins., 925 S.W.2d 667, 670 (Tex. 1996) ("[T]he judiciary is assigned the task of policing the *process* of rulemaking").

As Defendants recognize, review under § 2001.038 addresses whether a rule "exceed[s] the board's authority under state law." MTD at 12; *see also id.* at 13 ("Texas courts have not hesitated to invalidate state regulations when they are found to exceed the agencies' statutory authority."). To establish that a rule exceeds a board's authority, "a challenger must show that the rule: (1) contravenes specific statutory language; (2) is counter to the general objectives of the statute; or (3) imposes additional burdens, conditions, or restrictions in excess of or inconsistent with the relevant statutory provisions." *Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n*, 452 S.W.3d 479, 481 (Tex. App.—Austin 2014, pet. filed) (cited at MTD 13). Defendants contend that this review – particularly the question of whether the rule runs counter to the objectives of the statute – means the court "must determine whether the members of the board are promoting state policy rather than any other interest." MTD at 13.

Defendants are wrong. They cite no case in which a Texas court evaluating a validity challenge determined whether a board was "promoting state policy rather than any other interest." *Id.* In fact, Texas courts are clear that they lack the power to make such determinations: "This Court **does not decide matters of policy**." *Gulf Coast Coal. of Cities v. Pub. Util. Comm'n of Tex.*, 161 S.W.3d 706, 712 (Tex. App.—Austin 2005, no pet.) (emphasis added); *see also id.* at 713 ("[W]e do not consider the merits of the Commission's new policy . . . .").[7] Instead of making broad policy judgments, the courts in the cases that

[7] *See also Tex. Dep't of Human Res. v. Tex. State Emps. Union CWA/AFL-CIO*, 696 S.W.2d 164, 174 (Tex. App.—Austin 1985, no writ.) ("Whether the Department acted wisely . . . is not, however, a matter within the power of the judicial department to decide.").

Defendants cite interpreted specific statutory language to decide whether a board or agency exceeded its authority. *See, e.g.*, *Harlingen*, 452 S.W.3d at 482 ("The dispute, therefore, turns principally on the construction of a statute . . . ."); *City Pub. Serv. Bd. of San Antonio v. Pub. Util. Comm'n of Tex.*, 96 S.W.3d 355, 360 (Tex. App.—Austin 2002, no pet.) ("In order to be invalid, [a rule] must, on its face, contravene the legislative grant of power.").[8]

Active supervision, in contrast, requires the state to determine not whether a board had the authority to make an anticompetitive decision, but rather whether that particular decision promotes state policy. *See, e.g.*, *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 465 (1986); *Pinhas*, 894 F.2d at 1030. The state must review the "particular anticompetitive acts" to determine whether to harm competition in order to promote other state policies. *See, e.g., Ticor*, 504 U.S. at 634; *Patrick*, 486 U.S. at 100-01. The distinction between having statutory authority to act and exercising that authority in a way that promotes the state's interests is critical. As the Supreme Court has explained, a licensing board may very well have authority to act, but that authority might "be defined at so high a level of generality as to leave open the critical questions about how and to what extent the market should be regulated." *Dental Exam'rs*, 135 S. Ct. at 1112. As a result, a board's actions might be within its authority but "diverge from the State's considered definition of the public good." *Id.* The active supervision requirement "seeks to

[8] *See also, e.g., Tex. Orthopaedic Ass'n v. Tex. State Bd. of Podiatric Med. Exam'rs*, 254 S.W.3d 714, 722 (Tex. App.—Austin 2008, pet. denied) (invalidating attempt by board to define "foot" to include parts of the leg, because it was outside board's authority); *Harlingen*, 452 S.W.3d at 482 (discussing board's statutory authority to impose a pre-notice payment hold for Medicaid program violations); *Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 458 S.W.3d 552, 556, 558-59 (Tex. App.—Austin 2014, pet. filed) (discussing authority of board to interpret "evaluation" to include "diagnosis"); *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 480-82 (Tex. App.–Austin 2012, no pet.) (holding that board did not have authority to interpret "incisive" to exclude a procedure involving insertion of bevel-edged needles into muscle tissue) (all cases cited at MTD 13-14).

avoid this harm by requiring the State to review and approve interstitial policies made by the entity claiming immunity." *Id.* A court reviewing under § 2001.038, however, may determine **only** whether the TMB acted within its authority, leaving the critical questions about how the market should be regulated to the sole province of a board controlled by market participants. Every Supreme Court case on active supervision, from *Midcal* to *Dental Examiners*, rejects the state action defense in such circumstances. *Id.* at 1112, 1116-17.

In sum, if a rule is within the scope of the board's statutory authority, § 2001.038 leaves courts powerless to veto the rule, or even modify it to mitigate any anticompetitive effects. Without giving the state control over whether—and to what extent—to restrain trade, § 2001.038 cannot provide "realistic assurance" that the state endorses the resulting harm to competition. Section 2001.038 thus fails to provide even the potential for active supervision.

(ii) Review under Section 2001.035 is purely procedural.

Defendants next argue in a footnote that active supervision under the APA is "facilitate[d]" by § 2001.035, which provides for "contest[ing] a rule on the ground of noncompliance with the procedural requirements of Sections 2001.0225 through 2001.034." *See* MTD at 13 n.10. This fails for the reasons discussed above. Most important, it provides for only procedural review, which is categorically insufficient. To qualify as active supervision, a state actor "must review the substance of the anticompetitive decision, not merely the procedures followed to produce it." *Dental Exam'rs*, 135 S. Ct. at 1116; *cf. Shahawy*, 875 F.2d at 1535-36

(rejecting claim that Florida administrative law provides active supervision because the review focused on procedural compliance and sufficiency of the evidence).[9]

(iii) Review under Section 2001.174 is too narrow.

Finally, the TMB argues that § 2001.174 of the APA provides active supervision because, under this provision, a court may review a challenge to a disciplinary action enforcing a board rule following a review by the State Office of Administrative Hearings ("SOAH"). MTD at 14-16.[10] Far from providing even the potential for active supervision, however, an appeal from a SOAH hearing is concerned only with whether "substantial evidence" supported a finding of a rule violation. The "substantial evidence" review "gives significant deference to the agency" and "does not allow a court to substitute its judgment for that of the agency." *R.R. Comm'n of Tex. v. Torch Operating Co.*, 912 S.W.2d 790, 792-93 (Tex. 1995). Section 2001.174 explicitly *prohibits* a court from making policy judgments: "[A] court may not substitute its judgment for the judgment of the state agency on the weight of the evidence on questions committed to agency

[9] Moreover, the only procedural requirement Defendants suggest is relevant—the requirement to publish a written justification for a rule—is reviewed under an "arbitrary and capricious" standard. *Gulf Coast*, 161 S.W.3d at 713. A court has no authority under § 2001.035 to determine whether a board's action promotes state policy. *See id.*

[10] We do not understand Defendants to be arguing that the SOAH review *itself* constitutes active supervision, nor could they so argue: It is well-established that the SOAH may not declare an agency rule invalid on any grounds. *See, e.g., Tex. Dep't of Licensing & Regulation v. ProScout Talented*, 452-07-0741, 2007 TX SOAH LEXIS 243, at *29 (May 9, 2007) ("[T]his administrative hearing is not the appropriate forum to challenge a duly adopted agency rule or to seek it's revision or repeal."); *Appeal of Julia Dyer from Rescission of Dependent Health, Dental & Life Ins. Coverage & Benefits*, No. 327-06-1672, 2007 TX SOAH LEXIS 137, at *42 (Apr. 12, 2007); Tex. Gov't Code § 2001.058. Instead, the SOAH's sole function is to determine whether there has been a violation of a rule as written.

discretion . . . ."[11] The potential for review under § 2001.174 thus provides no assurance that the State has made a considered decision to harm competition. Not surprisingly, other courts have consistently rejected claims that judicial review of disciplinary actions is active supervision. *See, e.g.*, *Pinhas*, 894 F.2d at 1030; *Shahawy*, 875 F.2d at 1536; *Islami*, 822 F. Supp. at 1374; *Miller v. Ind. Hosp.*, 930 F.2d 334, 338 (3d Cir. 1991); *Shah*, 1988 WL 161175 at *3.

2. Defendants Were Not Actively Supervised by the Legislature.

Defendants separately argue that they were actively supervised by the legislature based on (1) the "sunset review" process and (2) a provision requiring the legislature to be notified of proposed rule changes. *See* MTD at 16-22. These sources do not constitute active supervision.

(a) The Sunset Review Process Is Not Active Supervision.

Defendants argue that the sunset review process provides active supervision in two ways: First, Defendants argue that the last sunset review of the TMB in 2005 provided active supervision of New Rule 190.8. *See* MTD at 18. Second, Defendants argue that the upcoming sunset review of the TMB in 2017 will provide active supervision. *See id.* at 20. Neither argument comes close to showing active supervision.

First, past sunset review was not active supervision. New Rule 190.8 was adopted in 2015 and New Rule 174 was adopted in 2010. Defendants suggest that the legislature "ratified" these rules "through the sunset review process" that took place in 2005. MTD at 16-17 & n.14

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[11] Likewise, "[a] 'court cannot modify an agency order without usurping the agency's authority and thereby violating the separation of powers doctrine.'" *Buddy Gregg Motor Homes, Inc. v. Motor Vehicle Bd.*, 179 S.W.3d 589, 603 (Tex. App.—Austin 2005, pet. denied) (quoting *City of Stephenville v. Tex. Parks & Wildlife Dep't*, 940 S.W.2d 667, 668 (Tex. App.—Austin 1996, writ denied)). Thus, review under § 2001.174 also fails as active supervision because the court cannot modify a TMB decision to ensure it accords with state policy. *Dental Exam'rs*, 135 S. Ct. at 1116.

(citing S.B. 419). This argument makes no sense. The 2005 sunset review process could not have provided active supervision of actions that took place from 2010 onward.[12] Indeed, after discussing the issue at length, even Defendants concede that "of course the 2005 sunset review could not have covered rules that had not yet been adopted." MTD at 20.[13]

Second, *future* sunset review does not satisfy the active supervision requirement. *See id.* at 20.[14] Supervision that may occur in the future is, by definition, nothing more than the "mere potential" for supervision, which cannot constitute active supervision. *See Dental Exam'rs*, 135 S. Ct. at 1116 (quoting *Ticor*, 504 U.S. at 638); *Patrick*, 486 U.S. at 101.

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[12] Defendants argue the TMB had a policy against telehealth in 2005. But the Amended Complaint alleges this is not the case: In 2005, the TMB was aware of and did not object to Teladoc's practice model. AC ¶ 8. And, as discussed *infra*, 2005 sunset review did not evaluate every policy of the TMB. Nor did it consider their effects on "market forces" and "competition." MTD at 18 (quoting Tex. Gov't Code § 325.0115(b)). These factors, which are considered only as to the board's existence as a whole, not as to each of its actions, were added to the statute in 2013 and were not part of the 2005 review. *See* 83rd Leg., R.S., Ch. 222 (H.B. 86), Sec. 1 (2013) (codified at Tex. Gov't Code § 325.0115(b)). Finally, Defendants argue they are actively supervised because they are on notice of the *potential* that their rules may be "subject to thorough scrutiny." MTD at 19. This is inconsistent with the law. *See Dental Exam'rs*, 135 S. Ct. at 1116 (quoting *Ticor*, 504 U.S. at 638)); *Patrick*, 486 U.S. at 101 (active supervision "requires that state officials have **and exercise** power" to supervise) (emphasis added).

[13] Not surprisingly, the Sunset Advisory Commission's 2005 report on the TMB and the legislature's subsequent bill continuing the TMB's existence do not discuss the restraint of trade challenged in this litigation. *See* 2005 Tex. Sess. Law Serv. Ch. 269 (West); Sunset Advisory Commission, *Report on Texas State Board of Medical Examiners to the 79th Legislature* (Feb. 2005) ("2005 Sunset Advisory Report").

[14] Defendants' factual contentions regarding their 2017 sunset review evaluation, *see* MTD at 20; *id.* at Ex. 2, ECF No. 64-2, are both irrelevant (they describe only purported communications with the legislature, not review or affirmative decision by the state) and in any event are not properly considered in a motion to dismiss. *See* Fed. R. Civ. P. 12(d); *Scanlan*, 343 F.3d at 536-37 (reversing dismissal because court erroneously considered materials submitted by defendant that "the plaintiffs did not accept . . . as true"). For the same reasons, all of Defendants' factual contentions are irrelevant and outside the scope of a Rule 12(b)(6) motion. *See also id.* at Ex. 3, ECH No. 64-3.

Moreover, it is pure distraction to argue that sunset review provides active supervision. The point of sunset review is to ask approximately once every twelve years whether an agency's function continues to be needed. As the Sunset Advisory Commission explains, "While standard legislative oversight is concerned with agency compliance with legislative policies, Sunset asks a more basic question: Do the agency's functions continue to be needed?" Sunset Advisory Commission, *Sunset in Texas 2013-2015*, 1 (2015).[15] To this end, sunset review follows three steps: (1) a review to "determin[e] whether a public need exists **for the continuation of a state agency**," Tex. Gov't Code § 325.011 (emphasis added); (2) a report by the Commission answering that question, *see id.* §§ 325.007, .010, .012; and (3) a vote by the legislature on whether to "continue the agency . . . for a period not to exceed 12 years," *id.* § 325.015.

Sunset review also is not active supervision because, as Defendants concede, "the Sunset Commission does not itself have the power to veto or modify any rule adopted by the TMB." MTD at 19. Defendants are thus incorrect when they claim that future sunset review "will culminate in the state's ratification, rejection, or alteration of the rules at issue." *Id*. at 20. Just like past sunset reviews, the future review will culminate in the legislature voting on *whether to continue the existence of the TMB*, not whether any particular rule adopted by the TMB should be stricken or modified. *See* Tex. Gov't Code § 325.015; Sunset Advisory Commission, *Department of State Health Services Staff Report with Final Results*, 42 (2015)[16] (**"[T]he luxury**

[15] https://www.sunset.texas.gov/public/uploads/files/reports/Sunset%20in%20Texas.pdf.

[16] https://www.sunset.texas.gov/reviews-and-reports/agencies/department-state-health-services-dshs.

of a detailed analysis of each regulatory program was simply not possible.") (emphasis added).[17]

Ultimately, Defendants' arguments regarding sunset review boil down to the observation that it is always possible that the legislature might adopt a statute to modify or supersede a regulation. *See* MTD at 19 (conceding Commission has no veto power, but arguing there is a possibility of legislative intervention). If that sufficed to provide active supervision, then all boards would always be actively supervised. The legislature *always* has the power to pass a statute overruling a particular board act. Defendants' argument would render the active supervision requirement meaningless and cannot be squared with the many cases holding that no active supervision occurred despite the omnipresent possibility of legislative action.

(b) Legislative Standing Committees Are Not Active Supervision.

Defendants argue that some measure of "[l]egislative oversight is also provided through the statutory requirement that every proposed rule must be submitted 'to the appropriate standing committee [of the House and Senate] for review before the rule is adopted.'" *Id*. at 20 (quoting Tex. Gov't Code § 2001.032(a)) (alterations in original). But the standing committees have no authority to veto or modify proposed rules. The most that the committees can do is "send to a state agency a statement supporting or opposing adoption of a proposed rule." Tex. Gov't Code § 2001.032(c). As the Supreme Court has explained, a requirement of active supervision is "**the power to veto or modify particular decisions** to ensure they accord with state policy." *Dental*

[17] Review that takes place approximately once every twelve years is also not active supervision because of its sporadic and after-the-fact nature, which would leave the public subjected to anticompetitive restraints of trade potentially for years. Indeed, this is precisely the case here, where even the most recent anticompetitive restriction was designed to take effect at the beginning of June 2015, just after the legislature ended its session, not to reconvene until 2017.

Exam'rs, 135 S. Ct. at 1116 (emphasis added). Because the standing committees referenced by Defendants have no such power, they cannot provide active supervision. Indeed, if the committees had veto power, it would violate the Texas Constitution. *See* Op. Tex. Att'y Gen. No. MW--460 (Mar. 23, 1982) ("[I]t is constitutionally impermissible for the legislature to delegate to legislative committee the power to nullify rules proposed or adopted by agencies in the executive branch of government.").

Defendants recognize that notifying the standing committees of a rule change is not active supervision, but nonetheless argue that it provides a "supplement" to other forms of inadequate supervision. MTD at 21. But there is no such thing as "supplementary supervision" under state action doctrine, and Defendants offer no authority for their argument. Defendants also characterize the standing committees as providing a "negative option" for review—that is, a system in which the state has the power to veto a proposed rule but, if it takes no action, the rule goes into effect automatically. *See id* at 20-21. But the notification procedure in § 2001.032 does not create even a negative option because the power to issue "a written statement of support or non-support" is not the power to veto.[18] And, in any event, under well-established law a "negative option" **is not active supervision,** because it does not ensure that the state has made the policy decision to impose the anticompetitive conduct. *See, e.g.*, *Ticor*, 504 U.S. at 638–40.[19]

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[18] Moreover, even though it would be far short of active supervision, there is no evidence that any standing committee even *reviewed* the proposed amendments to Rules 190.8 and 174, much less issued any statement on the proposed rule changes. *See* AC ¶ 125.

[19] *Ticor*'s holding that a "negative option" is insufficient for active supervision is not a narrow holding limited to the "circumstances of [that] case." MTD at 22. In *Dental Examiners*, the Court included *Ticor*'s holding as among the "constant requirements" of active supervision. 135 S. Ct. at 1116-17; *see also Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1042 n.10 (5th Cir. 1998) (citing *Ticor*, 504 U.S. at 629, 638–40). Defendants argue *Ticor* is distinguishable because it involved price fixing. But, in the present case, a group of active

3. Defendants Cannot Evade the Active Supervision Requirement.

After conceding that they must establish that their anticompetitive conduct was actively supervised by the state, *see* MTD at 6, Defendants argue there is "necessarily" a "spectrum" of active supervision and further argue that alleged factual distinctions between this case and *Dental Examiners* are sufficient to ensure the promotion of state policy. *See* MTD at 9-10, 23-30.[20] If Defendants are suggesting they can avoid showing what the Supreme Court has explained are the "constant requirements" of active supervision, they are wrong. The active supervision test is a "rigorous" one. *Patrick*, 486 U.S. at 100. To the extent there is a "spectrum," it necessarily includes the four "constant requirements" even at the low end. Defendants argue supervision depends on the circumstances of the case. MTD at 3, 6-8, 24. But the Supreme Court explained that only when the basic requirements are met will "the adequacy of supervision *otherwise* … depend on all the circumstances of a case." *Dental Exam'rs*, 135 S. Ct. at 1117 (emphasis added). Here, Defendants have not established that the constant requirements are met.

Defendants raise several other unfounded arguments that fail to satisfy their burden to show active supervision. For example, Defendants' claim that telehealth is prohibited in many other states is irrelevant to whether Defendants were actively supervised by Texas. MTD at 28;

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market participants reached an agreement that will prevent a low-priced form of competition. Indeed, the conduct at issue here is arguably worse than that in *Ticor* because Defendants' actions here raise prices of and reduce access to much-needed medical services. AC ¶¶ 129-34.

[20] For example, Defendants argue that "while dentists made up three-fourths of the North Carolina board, physicians account for only a little more than three-fifths of the TMB." *See, e.g.*, MTD at 23 & n. 19. These purported distinctions are not relevant. As Defendants concede, the Court did not review whether the North Carolina Dental Board was actively supervised. *Id*. at 14-16. The board lost the argument that it was actively supervised and chose not to seek review on that issue in the Supreme Court. *See* Pet. for a Writ of Cert., No. 13-534 (Oct. 25, 2013).

MTD Ex. 1, Defs.' "State Prescription Laws" App., ECF No. 64-1. The claim is also grossly misleading. To take just the first few examples:

> **(1) Alabama.** Defendants claim Teladoc's services are unlawful in Alabama, but fail to disclose that the Alabama State Board of Medical Examiners has specifically confirmed that Teladoc's services are lawful in Alabama. *See* Pls. Reply Br. in Supp. of Prelim. Inj., at 10 n.15, ECF No. 35; Public Minutes, Alabama Board of Medical Examiners, at 14-15 (Oct. 15, 2014);
>
> **(2) Alaska.** Defendants claim Alaska law requires an in-person exam before prescriptions may be written, but in fact Alaska law expressly authorizes prescriptions to be written without an in-person exam. *See* Alaska Stat. Ann. § 08.64.364 (West) ("The board may not impose disciplinary sanctions on a physician for prescribing, dispensing, or administering a prescription drug to a person without conducting a physical examination . . . .");
>
> **(3) Arizona.** Defendants cite Ariz. Rev. Stat. Ann. § 32-1401(27)(ss) as prohibiting telehealth without acknowledging that the statute has nine enumerated exceptions, including one permitting on-call services like Teladoc. *See id.* at § 32-1401(27)(ss)(i); and
>
> **(4) California.** Defendants "presum[e]" the state mandates an in-person exam, MTD at 29 n.31, when public records show the opposite. *See, e.g.*, Medical Board of California, *Newsletter*, vol. 129 (Winter 2014) ("The physician-patient relationship may be established via telehealth.").

Teladoc would be happy to address other state and federal laws if doing so would be useful to the Court, but laws outside of Texas have no bearing on whether Texas actively supervised Defendants' anticompetitive actions. For now, we note simply that New Rules 190.8 and 174 are extreme outliers.[21] AC ¶ 100.

[21] Defendants' alleged "parallels" between their rules and Texas Medicaid reimbursement rules are both irrelevant to active supervision and misleading. *See* MTD at 27-28. To the extent Texas has a Medicaid policy that limits reimbursement for telemedicine, that says nothing about whether telehealth should be lawful if a private employer or insurer wishes to offer it. *Cf.*, *e.g.*, Congressional Budget Office, *Answers to Questions for the Record: Senate Committee on the Budget*, at 9 (July 28, 2015) (Medicare reimbursement for telehealth could increase access to health care and therefore potentially increase total spending for the program).

Finally, Defendants argue that a failure to hold that the sources of potential supervision they have identified are sufficient to constitute active state supervision "would result in the substitution of federal judicial oversight of any state licensing board rule or action." MTD at 15-16. That, too, is wrong. Federal judicial oversight exists only when an unsupervised board violates federal law by taking anticompetitive action. Indeed, the North Carolina Dental Board made exactly this "sky is falling" argument, and the Supreme Court firmly rejected it. *See Dental Exam'rs*, 135 S. Ct. at 1117 ("The Sherman Act protects competition while also respecting federalism. It does not authorize the States to abandon markets to the unsupervised control of active market participants, whether trade associations or hybrid agencies.").[22]

B. The TMB Did Not Act Pursuant to a Clearly Articulated State Policy.

Defendants also fail to prove the other requirement for their state action defense, namely that "the State has articulated a clear policy to allow the anticompetitive conduct." *Dental Exam'rs*, 135 S. Ct. at 1112. This "clear articulation requirement is satisfied where the displacement of competition [is] the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature" and "the State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *Id.* (internal quotation marks omitted); *see also DFW Metro*, 988 F.2d at 605 (finding clearly articulated policy where "[t]he legislature f[ound] that public utilities are by definition monopolies in the areas they serve" and "that therefore the normal forces of competition which operate to regulate prices in the free enterprise society do not operate").

[22] As the Court further explained, this inquiry is "essential" when dealing with rules adopted by boards controlled by market participants, because the true motives for an anticompetitive action may be difficult even for the market participants themselves to discern. *Id.* at 1111.

A grant of regulatory **authority** does not clearly articulate a state policy of unreasonably restraining trade, even if the authority ostensibly could be used in an anticompetitive manner. For example, in *Surgical Care Center of Hammond*, the Fifth Circuit rejected the argument that a legislature's decision to authorize a hospital to enter into joint ventures was a clearly articulated policy to permit **anticompetitive** joint ventures. 171 F.3d at 235 ("[I]t is not the foreseeable result of allowing a hospital service district to form joint ventures that it will engage in anticompetitive conduct."). The Fifth Circuit found that the hospital was acting within its authority, yet was not pursuing a clearly articulated state interest. The same is true here, where Defendants' statutory authority to regulate the practice of medicine is not a clearly articulated policy to impose anticompetitive regulations that raise prices and reduce access to care. *See Cmty. Commc'ns Co. v. City of Boulder, Colo.*, 455 U.S. 40, 56 (1982) ("Acceptance of such a proposition—that the general grant of power to enact ordinances necessarily implies state authorization to enact specific anticompetitive ordinances—would wholly eviscerate the concepts of "clear articulation and affirmative expression" that our precedents require."). Defendants barely address the clear articulation requirement that they must establish for their defense, providing only a single paragraph on this issue. *See* MTD at 23-24. Defendants cite only two statutory provisions, one authorizing the TMB to regulate the Texas practice of physicians located outside of Texas (Tex. Occ. Code § 151.056) and the other authorizing the TMB to adopt telemedicine rules (Tex. Occ. Code § 111.004). Neither is a clearly articulated policy to adopt unreasonable restraints of trade.

Section 151.056 clarifies that out-of-state physicians who treat patients in Texas are practicing medicine in Texas. It does not articulate any policy to prevent such practices or subject them to anticompetitive restrictions that raise price and reduce patient access to

healthcare. Nor does it have any bearing on Defendants' anticompetitive restraints placed on Texas-resident physicians. Ultimately, the TMB's authority to adopt "appropriate regulation" does not show the legislature "must have foreseen and implicitly endorsed" an anticompetitive rule that effectively bars telehealth providers like Teladoc from offering services in Texas. *See Dental Exam'rs*, 135 S. Ct. at 1112; AC ¶¶ 138-40.

Likewise, Section 111.004 does not authorize the TMB to regulate telehealth providers out of existence. To the contrary, it only authorizes the TMB to adopt certain rules related to telemedicine. *See* Tex. Occ. Code § 111.004. It certainly does not articulate a policy to adopt anticompetitive rules that raise price for patients and reduce access to "appropriate, quality care." *See id.* Further, the TMB selectively quotes the statute to suggest the law authorizes rules requiring a face-to-face consultation **before** a physician may provide telemedicine. *See* MTD at 23. The statute actually presumes that telemedicine services can be provided by a physician who has never seen the patient. *Id.* § 111.004(5) (authorizing requirement of physical examination "within a certain number of days *following* an initial telemedicine medical service") (emphasis added). In-person follow-up care may be necessary for some patients regardless of whether their initial consultation is in person or remote.

Anticompetitive rules that prevent patients from having access to sophisticated telehealth treatment when it meets the standard of care are not the "inherent, logical, or ordinary result" of having a medical board. *Dental Examn'rs*, 135 S. Ct. at 1112. Physicians have treated patients by telephone since the invention of the technology—this is a mode of medical practice that has long been accepted in traditional on-call arrangements. *See* AC ¶ 138.

II. Teladoc Has Properly Alleged a Dormant Commerce Clause Violation.

The Constitution grants Congress the power to regulate interstate commerce, and this affirmative grant simultaneously "limits the power of the states to regulate commerce," a limitation known as the "dormant Commerce Clause." *Piazza's Seafood World, LLC v. Odom*, 448 F.3d 744, 749 (5th Cir. 2006).[23] Dormant Commerce Clause jurisprudence recognizes two general tests for unlawful regulation: (1) discriminatory laws face strict scrutiny when they are either intentionally discriminatory or have the practical effect of discriminating against out-of-staters, *see C & A Carbone, Inc. v. Town of Clarkston, N.Y.*, 511 U.S. 383, 390-91 (1994); and (2) even rules that are not discriminatory are dormant Commerce Clause violations under the *Pike* balancing test if they impose an undue burden on interstate commerce, *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970). *See also Granholm v. Heald*, 544 U.S. 460, 476 (2005).[24] In the present case, Defendants' motion to dismiss should be denied regardless of which test is applied. The Amended Complaint alleges both that the rules at issue here have the practical effect of discriminating against interstate commerce and that they unduly burden interstate commerce.

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[23] Defendants assert that a dormant Commerce Clause claim is not a cognizable under 42 U.S.C. § 1983. *See* MTD at 42. But the Supreme Court has expressly held that such claims are cognizable. *See Dennis v. Higgins*, 498 U.S. 439, 451 (1991) ("We conclude that the Supreme Court of Nebraska erred in holding that petitioner's Commerce Clause claim could not be brought under 42 U.S.C. § 1983.").

[24] Defendants say the antitrust claim is "contrary" to the Commerce Clause claim because the latter requires Defendants to be "acting as and for the State of Texas." MTD at 31. There is no contradiction. Defendants adopted anticompetitive rules using state authority, but without active state supervision. This misuse of authority is both an antitrust violation and a dormant Commerce Clause violation.

Discriminatory Design and Effect. New Rules 190.8 and 174 discriminate against interstate commerce because they require a physician to have a physical presence in Texas to provide in-person physical exams. *See* AC ¶ 161; *Granholm*, 544 U.S. at 476. A regulation is subject to strict scrutiny even when it does "not in explicit terms seek to regulate interstate commerce," where it nonetheless does so "by its practical effect and design." *C & A Carbone*, 511 U.S. at 394. For example, in *Hunt v. Washington State Apple Advertising Commission*, the Court considered a North Carolina law requiring closed containers of apples shipped or sold into the state to have U.S. Department of Agriculture labeling or no labeling at all. 432 U.S. 333, 337 (1977). The rule was facially neutral. *Id.* at 352. But apple growers in Washington, who had invested in developing a stringent rating system, were prohibited from using it on their labels in North Carolina, stripping them of the competitive benefits of their investment. *Id.* at 351-52. The Court found that this had the "practical effect" of burdening interstate commerce and discriminating. *Id.* at 350-51. The Court invalidated the law because "the challenged statute does remarkably little to further [the] laudable goal" of consumer protection and "nondiscriminatory alternatives . . . [were] readily available." *Id.* at 353-54.

Here, Teladoc has alleged both that the challenged rules are intentionally discriminatory, *see* AC ¶¶ 95, 97, 103, 105, 109, 121-22, and that the rules are discriminatory in effect, *see id.* ¶ 161. In this case, as in *Hunt*, out-of-state competitors have built a competitive advantage by creating a platform for a low-cost, high-quality product to meet local demand. *See id.* ¶¶ 69, 75, 132. Defendants' rules require interstate firms to adopt burdensome, costly practices that eliminate this economic advantage and would operate as a practical ban on competition by out-of-state competitors. *Id*. ¶¶ 100-01, 128, 142.

Defendants argue that their rules are not discriminatory because "a Teladoc physician physically located in San Antonio advising a user in Dallas is no less inconvenienced by the requirement than a Teladoc physician in Oklahoma City." MTD at 33. This line of reasoning—*i.e.*, that burdens on *intra*state commerce excuse burdens on *inter*state commerce—has been rejected repeatedly by the Supreme Court. *See C & A Carbone*, 511 U.S. at 391 ("The ordinance is no less discriminatory because in-state or in-town processors are also covered by the prohibition."); *Dean Milk Co. v. City of Madison, Wis.*, 340 U.S. 349, 354 n.4 (1951) (it was "immaterial that Wisconsin milk from outside the Madison area [was] subjected to the same proscription as that moving in interstate commerce"). Moreover, Defendants' protectionist motives and the discriminatory effects of New Rules 174 and 190.8 are factual issues. *See Colon Health Ctrs. of Am., LLC v. Hazel*, 733 F.3d 535, 544 (4th Cir. 2013) (reversing dismissal of dormant Commerce Clause claim because "determining whether Virginia's certificate-of-need law discriminates in either purpose or effect necessarily requires looking behind the statutory text to the actual operation of the law.").

Undue Burden. Even if Teladoc had not alleged intentional and practical discrimination, and thus the *Pike* test that Defendants prefer is applied, the Amended Complaint still states a Commerce Clause claim. Teladoc has alleged that the burden imposed on interstate commerce by New Rules 174 and 190.8 clearly exceeds any benefits. Teladoc cannot provide telehealth in Texas if it must conduct an in-person physical exam before treating patients, and losing the ability to provide services in Texas will harm Teladoc's business nationwide. AC ¶ 144. On the other side of the ledger, the rules are not necessary to promote patient safety, which is already protected by existing rules and the standard of care. *Id.* ¶ 137. (In fact, if prohibiting phone-based treatment were necessary to promote patient safety, Defendants would not permit phone-

based treatment under cross-coverage arrangements.) Indeed, the new rules are affirmatively **harmful** to public health because they take away access to healthcare for many patients who will not otherwise be able to obtain medical care, and raise the price of healthcare for many others. *See id*. ¶¶ 129-34*; cf. Hazel*, 733 F.3d at 546 (reversing dismissal of dormant Commerce Clause claim because "[t]he *Pike* inquiry, like the discrimination test, is fact-bound").[25] Plaintiffs have properly alleged a Commerce Clause violation. *See, e.g.*, *Bibb*, 359 U.S. at 528-30 (1959); *Kassel*, 450 U.S. at 670 (1981).

III. Claims Regarding New Rule 174 Are Timely.

Defendants argue that "Plaintiffs' Claim Attacking New Rule 174 is Time-Barred" under the equitable doctrine of laches. MTD at 35. Defendants argue that laches effectively imposes a four-year bar, and they assert that New Rule 174 was adopted in October 2010, four years and six months before Teladoc filed suit in April 2015. Defendants' argument fails because it ignores some of the plaintiffs in this case and fundamentally mischaracterizes the antitrust claim.

Time-bar argument fails to account for all plaintiffs. First, there are plaintiffs other than Teladoc, Inc. in this case. Dr. Hood first became licensed to practice medicine in Texas in 2014, and could not have been injured by New Rule 174 until then. *See* Pls.' Appl. for Prelim. Inj. Ex. 5 ¶ 4, ECF No. 10-6. In addition, while long licensed in Texas, Dr. Clark did not

[25] Defendants dispute issues of fact—*i.e.*, whether, "the burden imposed on [interstate] commerce is clearly excessive in relation to the putative local benefits." 397 U.S. at 142. But a state fails the *Pike* test where it fails to provide evidence supporting a regulation's stated justification. *See Bibb v. Navajo Freight Lines, Inc.*, 359 U.S. 520, 528-30 (1959) (striking down safety regulation under balancing standard). "[T]he incantation of a purpose to promote the public health or safety does not insulate a state law from Commerce Clause attack." *Kassel v. Consol. Freightways Corp. of Del.*, 450 U.S. 662, 670 (1981) (striking down regulation where state's safety justification was not supported by record evidence). The Court should not accept Defendants' unproven factual assertion that the challenged rules produce a public benefit, let alone a benefit sufficient to outweigh the burdens imposed on interstate commerce.

become a Teladoc provider until 2013. *See* Pls.' Appl. for Prelim. Inj. Ex. 6 ¶ 7, ECF No. 10-7. Defendants offer no basis to hold that these plaintiffs are barred from challenging an anticompetitive regulation that did not affect them until (at most) two years ago. *See, e.g.*, *Bourns, Inc. v. Raychem Corp.*, 331 F.3d 704, 712 (9th Cir. 2003) (plaintiff did not suffer antitrust injury, and thus antitrust claim did not accrue, until plaintiff was ready to "enter[] the market"); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 339 (1971). If even a single plaintiff has a claim for injunctive relief against New Rule 174, Defendants' argument fails. *See Cargill, Inc. v. Monfort of Colorado, Inc*., 479 U.S. 104, 111 n.6 (1986) ("[T]he fact is that one injunction is as effective as 100, and, concomitantly, that 100 injunctions are no more effective than one.") (quoting *Hawaii v. Standard Oil Co. of Cal.*, 405 U.S. 251, 261 (1972)).

Time-bar argument fails because Defendants mischaracterize the claim. Defendants' argument also fails because it attempts to rewrite the Amended Complaint as alleging distinct antitrust claims against New Rule 174 and New Rule 190.8. In fact, each plaintiff has alleged a *single* count under the Sherman Act based on Defendants' ongoing antitrust conspiracy to block competition from telehealth providers. AC ¶¶ 153-57. Although adoption of New Rule 174 was one step in the conspiracy that occurred more than four years prior to the filing of the Complaint, Defendants' conspiracy has continued to the present through a series of further actions restraining trade. Defendants acknowledge that laches will not bar a claim for injunctive relief when there is a "continuing violation." MTD 36; *Kaiser Aluminum & Chem. Sales, Inc. v. Avondale Shipyards, Inc.*, 677 F.2d 1045, 1051 (5th Cir. 1982) ("[T]he continuing conspiracy or continuing violation exception . . . permits a cause of action to accrue whenever the defendant commits an overt act in furtherance of an antitrust conspiracy.").

As Defendants concede, "a new overt act" will restart the clock on Teladoc's antitrust claim if the act is "(1) new and independent and not merely a reaffirmation of a previous act, and (2) inflicts new and accumulating injury on the plaintiff." MTD 37 (quoting *Oliver v. SD-3C LLC*, 751 F.3d 1081, 1086 (9th Cir. 2014)). Here, Plaintiffs allege several independent, overt acts by Defendants that occurred fewer than four years before the claim was filed, including: sending the June 2011 letter that a Texas state court later declared an invalid attempt to amend Rule 190.8; sending letters in October 2013 and November 2014 to Teladoc's clients stating that Teladoc was in violation of Rule 190.8 (even though Defendants' invalid interpretation of that rule had been stayed);[26] adopting an invalid "emergency" amendment to Rule 190.8 in January 2015; and adopting New Rule 190.8 in April 2015. AC ¶¶ 103-119.

New Rule 174 was not a one-time harm that took place in October 2010, and Defendants' subsequent actions did not merely reaffirm the prior act of adopting New Rule 174, *see* MTD 37. Defendants sought to enforce and expand the restraint of trade, to the detriment of patients and telehealth providers like Teladoc. *See* Order, at 15-18, ECF No. 44 (discussing variety of substantial threatened injuries to Plaintiffs). Defendants' conduct is "not . . . a violation which, if it occurs at all, must occur within some specific and limited time span. . . . Rather, we are dealing with conduct which constitute[s] a continuing violation of the Sherman Act and which inflict[s] continuing and accumulating harm." *Poster Exchange v. Nat'l Screen Serv. Corp.*, 517 F.2d 117, 126 (1975) (quoting *Hanover Shoe*, 392 U.S. at 502 n.15). Defendants' unlawful

[26] Copies of the letters are public record. *See* Defendants' Motion to Reconsider and Vacate Supersedeas Order, *Teladoc, Inc. v. Texas Medical Board, et al.*, No. D-1-GN-11-002115 (Dec. 22, 2014) (attaching letters as Exhs. 4-6).

conduct sustains the barrier to competition and continues to prevent Teladoc and other telehealth providers from offering Texas patients the option of video consultations.

Even if a presumption of laches did apply, it would not bar a claim due to lack of prejudice. Laches also does not bar the claim at issue here because there is no actual prejudice to Defendants from litigating the issue now rather than six months earlier.[27] *See Kaiser*, 677 F.2d at 1057 ("The plaintiff who delays bringing suit must show that his delay is excusable and that there is no prejudice to the defendant."). No evidence has gone stale or been lost as a result the passage of six extra months. As the Fifth Circuit has explained, "[t]he concept of undue prejudice . . . is normally inapplicable when the relief is prospective." *Envtl. Defense Fund v. Marsh*, 651 F.2d 983, 1005 n.32 (5th Cir. 1981); *see also, e.g.*, *Morrow v. Crisler*, 479 F.2d 960, 965 (5th Cir. 1973) (emphasizing "basic fairness inherent in equity").

Moreover, applying laches to bar injunctive relief here would harm the public interest. The public will be the primary beneficiary of an injunction against an anticompetitive barrier to offering consumers the option of affordable, convenient video consultation. Application of laches is not justified on the facts of this case. *Rohm & Haas Co. v. Dawson Chem. Co.*, 557 F. Supp. 739, 819 (S.D. Tex. 1982) (application of doctrine of laches "must be decided upon the facts of each particular case," and "its application is left to the sound discretion of the judge"); *rev'd on other grounds*, 722 F.2d 1556 (Fed. Cir. 1983).

Dormant Commerce Clause challenge to New Rule 174 is also not time-barred. The dormant Commerce Clause challenge to New Rule 174 is also timely. First, as noted above, Dr. Hood was not injured until 2014 when he first sought to practice medicine in Texas as a Teladoc

[27] New Rule 174 went into effect on October 17, 2010. Plaintiffs filed suit April 29, 2015.

provider. *See Price v. City of San Antonio, Tex.*, 431 F.3d 890, 893 (5th Cir. 2005) ("Ordinarily, a cause of action under section 1983 accrues when the plaintiff "knows or has reason to know of the injury which is the basis of the action.'"). Even if his injury occurred earlier, his claim did not accrue until a reasonable person would have been aware of the injury, *Piotrowski v. City of Houston*, 237 F.3d 567, 576 (5th Cir. 2001), which would not be until **at least** he became a Texas-licensed physician. Second, for the reasons noted above, Defendants have engaged in an on-going conspiracy that discriminates against and imposes undue burden on interstate commerce. Defendants' acts in furtherance of the conspiracy have caused repeated harm. All plaintiffs thus have dormant Commerce Clause claims that have accrued within the statute of limitations period. *See Va. Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd sub nom. Wilder v. Va. Hosp. Ass'n*, 496 U.S. 498 (1990) (continuing enforcement of unconstitutional law was "an ongoing constitutional violation" giving rise to continually accruing claims, because "the limitations period cannot protect an allegedly unconstitutional program"). Defendants' ongoing conspiracy to prevent competition from out-of-state physicians, is a continuing violation of the Commerce Clause.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that Defendants' motion to dismiss be denied. Should the Court decide to grant the motion in any part, Plaintiffs respectfully request leave to amend the Complaint.

Dated: September 3, 2015

Respectfully submitted,

By: */s/ Leah Brannon*

JACKSON WALKER L.L.P.
100 Congress Avenue, Suite 1100
Austin, Texas 78701
(512) 236-2000 (Telephone)
(512) 236-2002 (Facsimile)

James Matthew Dow
mdow@jw.com
State Bar No. 06066500

Dudley McCalla
dmccalla@jw.com
State Bar No. 13354000

Joshua A. Romero
State Bar No. 24046754
jromero@jw.com

CLEARY GOTTLIEB STEEN
& HAMILTON LLP
2000 Pennsylvania Avenue, NW
Washington, DC 20006
(202) 974-1500 (Telephone)
(202) 974-1999 (Facsimile)

George S. Cary (*Pro hac vice*)
gcary@cgsh.com
D.C. Bar No. 285411

Leah Brannon (*Pro hac vice*)
lbrannon@cgsh.com
D.C. Bar No. 467359

Drew Navikas (*Pro hac vice*)
dnavikas@cgsh.com
D.C. Bar No. 1015606

ATTORNEYS FOR PLAINTIFFS TELADOC, INC., TELADOC PHYSICIANS, P.A., KYON HOOD, AND EMMETTE A. CLARK

CERTIFICATE OF SERVICE

This is to certify that on this 3rd day of September, 2015, a true and correct copy of the foregoing instrument was electronically filed by the Court's ECF system, and notice has been electronically mailed to Jim Todd and Sean Flammer with the Office of the Texas Attorney General Litigation Division.

/s/ Matt Dow
Matt Dow