IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TELADOC, INC., *et al.*, Plaintiffs,	§	
v.	§	Civil Action No. 1:15-CV-00343-RP
TEXAS MEDICAL BOARD, *et al.*, Defendants.	§	

DEFENDANTS' REPLY IN SUPPORT OF AMENDED MOTION TO DISMISS

In support of their amended motion (ECF doc. 64) to dismiss the plaintiffs' amended complaint (doc. 55), and in reply to the plaintiffs' supplemental response (doc. 73-1), the defendant members of the Texas Medical Board ("TMB") respectfully submit the following.

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1. The plaintiffs fail to address significant features of the TMB that are relevant to what kind of state supervision is required.

The plaintiffs pointedly ignore the many material differences between the North Carolina dental board and the TMB and the many attributes of the Texas board that are exclusively governmental. Doc. 64 at 9-10, 23-26. The defendants' state agency identity consists of more than "nomenclature alone," and is based on significantly more than merely formal designation by the state, a measure of government power, and procedural requirements. *N. C. State Bd. of Dental Exam'rs v. F.T.C.*, 135 S. Ct. 1101, 1114 (2015) ("*NCSBDE*"). The features that distinguish the TMB from its North Carolina dental counterpart, which the plaintiffs studiously avoid addressing, as a matter of law call for less "active state supervision" of the defendants' rulemaking than was required for the North Carolina dental board.

The contrasts between the functioning of the Texas and North Carolina boards is illuminated in a comment by the FTC commissioner, discussing the *NCSBDE* case:

> Alternatively, the Board could have promulgated a rule defining the practice of dentistry to include teeth whitening. Under North Carolina law, that rule would have been subject to review and approval by the Rules Review Commission, which could very well have constituted sufficient supervision under the state action doctrine. Thus, the Board was subject to antitrust scrutiny because it opted to bypass its statutorily provided powers in favor of coercive measures that were not authorized under state law.[1]

[1] Maureen K. Ohlhausen, *Reflections on the Supreme Court's* North Carolina Dental *Decision and the FTC's Campaign to Rein in State Action Immunity* (address to Heritage Found. March 31, 2015), https://www.ftc.gov/public-statements/2015/03/reflections-supreme-courts-north-carolina-dental-decision-ftcs-campaign

As shown in sections **3-5** below, TMB rules are subject to review that is comparable in legally relevant respects to that of North Carolina's Rules Review Commission.

Following a sentence heavily relied on by the plaintiffs (doc. 73-1 at 7 n. 4), the Supreme Court went on to explain that "the need for supervision turns not on the formal designation given by States to regulators but on the *risk* that active market participants will pursue private interests in restraining trade." *NCSBDE*, 135 S. Ct. at 1114 (emphasis added). The "*structural* risk of market participants' confusing their own interests with the State's policy goals" is posed when the "active market participants . . . possess *singularly strong* private interests." *Id.* (emphasis added).

If the term "flexible and context-dependent," *id.* at 1116, is to have any meaning, a court must examine the *structure* of the defendant agency to determine the degree of *risk* that private interests might prevail over state policy. The Supreme Court reaffirmed its prior decisions holding that agencies which "exercise[] substantial governmental powers" receive more lenient review under the second part of the *Midcal* test. *Id.* at 1112-13 (discussing *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365 (1991), and *Hallie v. Eau Claire,* 471 U.S. 34 (1985)).

Consequently, the holding "that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement," *NCSBDE*, 135 S. Ct. at 1114, is only the beginning of the analysis, not the conclusion. It remains for this court to determine the nature and extent of state supervision required for the TMB rules at issue in this case.

As previously noted, this analysis necessarily contemplates a spectrum ranging from a purely private association pursuing its own interests at one end to a conventional state agency promoting state policy at the other end. Doc. 64 at 24. Between the two extremes are entities described as "hybrid" in *NCSBDE* and circuit decisions applying *Omni* and *Hallie*. *NCSBDE*, 135 S. Ct. at 1109, 1117; *Danner Const. Co. v. Hillsborough Cnty., Fla.*, 608 F.3d 809, 813 (11th Cir. 2010); *Miller v. Hedlund*, 813 F.2d 1344, 1351 (9th Cir. 1987).

In this context, a "hybrid," of course, is a regulatory body with both public and private attributes. "Active state supervision" is most intense for market-participant-majority bodies that "have none of the [governmental] features justifying the [*Omni*/*Hallie*] exception." *NCSBDE*, 135 S. Ct. at 1113. On the other hand, courts applying *Omni* and *Hallie* have held that a hybrid whose public features greatly outweigh its private features, in respects comparable to those that distinguish the TMB from the North Carolina dental board, require much less "active state supervision." *E.g.*, *Fuchs v. Rural Elec. Convenience Co-op. Inc.*, 858 F.2d 1210, 1217 (7th Cir. 1988) (defendant was "a hybrid entity with sufficient non-private attributes that its activities require some lower level of supervision to ensure that it is acting pursuant to state policy" rather than the "state action analysis applicable to a purely private party").

"No simply stated rule draws the line between the two categories." *Bankers Ins. Co. v. Fla. Residential Prop. & Cas. Joint Underwriting Ass'n*, 137 F.3d 1293,

1296 (11th Cir. 1998).[2] Consequently, the analysis "focuse[s] on the government-like attributes of the defendant entity." *Id.* Of great significance for this case:

> Factors favoring political-subdivision treatment include open records, tax exemption, exercise of governmental functions, lack of possibility of private profit, and the composition of the entity's decisionmaking structure. The presence or absence of attributes such as these tells us whether the nexus between the State and the entity is sufficiently strong that there is little real danger that the entity is involved in a *private* anticompetitive arrangement. The more public the entity looks, the less we worry that it represents purely private competitive interests, and the less need there is for active state supervision to ensure that the entity's anticompetitive actions are indeed state actions and not those of an alliance of interests that properly should be competing.

Id. at 1596-97 (emphasis original; footnotes and citations omitted) (relying, *inter alia*, on Phillip E. Areeda & Herbert Hovenkamp, ANTITRUST LAW ("Areeda and Hovenkamp") (cited with approval in *NCSBDE*, 135 S. Ct. at 1111, 1114), and on *Hallie,* 471 U.S. at 45). In according *Parker* immunity to the Oregon state bar, 12 of whose 15 board members were lawyers, the Ninth Circuit explained:

> The records of the Bar, like those of other state agencies and municipalities, are open for public inspection. The Bar's accounts and financial affairs, like those of all state agencies, are subject to periodic audits by the State Auditor. The Board, like the governing body of other state agencies and municipalities, is required to give public notice of its meetings, and such meetings are open to the public. Members of the Board are public officials who must comply with the Code of Ethics enacted by the state legislature to guide the conduct of all public officials. These requirements leave no doubt that the Bar is a public body, akin to a municipality for the purposes of the state action exemption.

[2] Cited with approval in *N. C. State Bd. of Dental Exam'rs v. F.T.C.*, 717 F.3d 359, 369 n. 6 (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015).

Hass v. Ore. State Bar, 883 F.2d 1453, 1460 (9th Cir. 1989) (citations omitted).[3] "When the actor is a state agency subject to requirements such as those set forth above, just as when the actor is a municipality, 'there is little or no danger that it is involved in a *private* arrangement.'" *Id.* (emphasis original) (quoting *Hallie,* 471 U.S. at 47). *See also Earles v. State Bd. of Certified Pub. Accountants of La.*, 139 F.3d 1033, 1035, 1040-44 (5th Cir. 1998) (although the defendant board consisted entirely of CPAs, who were appointed by the governor and confirmed by the senate, "the Board is functionally similar to a municipality" so that "the public nature of the Board's actions means that there is little danger of a cozy arrangement to restrict competition").[4]

In this context, it is worth noting again, as previously shown (doc. 64 at 24) and not refuted by the plaintiffs, that the defendants are not participants in the same relevant corner of the "market" as the plaintiffs.[5] *See Schwartz v. Aultman Health Servs. Ass'n*, 70 F.3d 1273 (6th Cir. 1995) (Table, text in 1995 WL 696715, *2) ("None of the defendants competed with Schwartz for cardiac surgery cases.").

It follows from all of the foregoing that under a "flexible and context-dependent" examination, a type and degree of supervision that is insufficient for one kind of body (*i.e.*, one with more private features than public) can be more than enough for another (with predominantly governmental attributes). Instead of the

[3] Cited with approval in *NCSBDE*, 717 F.3d at 369 n. 6.
[4] Cited with approval in *NCSBDE*, 717 F.3d at 369 n. 6, **and by the plaintiffs** (doc. 73-1 at 21 n. 19).
[5] As shown, the defendants' specialization are matters of public record, subject to judicial notice.

plaintiff's one-size-fits-all approach, "the adequacy of supervision otherwise will depend on all the circumstances of a case." *NCSBDE*, 135 S. Ct. at 1117.

It is against the foregoing important legal backdrop that the defendants now turn to selected arguments in the Supplemental Opposition. For any matters not addressed in this reply, the defendants will rely on the arguments and authorities previously presented.

2. Regardless of how it is labeled, the *Parker* state action defense is an immunity to suit that includes important features of jurisdictional immunity.

The plaintiffs argue that the state action defense is not jurisdictional and is not an immunity at all, but is an affirmative defense for which the defendants bear the burden of proof under the deferential standards of FED. R. CIV. P. 12(b)(6). Doc. 73-1 at 5-6. But closer inspection of the plaintiffs' authorities shows that the state action defense, also sometimes called an "exemption"[6] or "doctrine,"[7] is an immunity *to suit*, with features in common with jurisdictional defenses, and that either standard of review results in exempting the defendants from this claim.

After commenting that, "*Strictly speaking*, . . . *Parker* immunity is an inapt description, for its *parentage* differs from the qualified and absolute immunities of public officials," a decision relied on by the plaintiffs goes on to say in the next sentences: "It does however function in certain important respects much like an immunity. Like other immunities, *Parker* issues can often be resolved at an early

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[6] *E.g.*, *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 291 (5th Cir. 2000); *Earles*, 139 F.3d at 1036, 1040.

[7] *E.g.*, *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 171 F.3d 231, 234 (5th Cir. 1999); *Acoustic Sys.*, 207 F.3d at 288, 290-94; *Destec Energy, Inc. v. S. Cal. Gas Co.*, 5 F. Supp.2d 433, 438-39, 444-45, 448, 454-55, 458 (S.D. Tex. 1997), *aff'd*, 172 F.3d 866 (5th Cir. 1999).

stage of the litigation." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 171 F.3d 231, 234 (5th Cir. 1999) (emphasis added). In *Acoustic Sys.* (doc. 73-1 at 6), the Fifth Circuit compared the "state action doctrine" "to claims by public officials to absolute and qualified immunity and to claims by states to Eleventh Amendment immunity." *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 293 (5th Cir. 2000).

Consequently, the plaintiffs' authorities show no discomfort in referring to the doctrine as, and treating it as, an *immunity*. *Id.* at 292 ("The state action doctrine was first espoused by the Supreme Court in *Parker v. Brown* as an immunity for state regulatory programs from antitrust claims.") (full citation omitted); *Destec Energy, Inc. v. S. Cal. Gas Co.*, 5 F. Supp.2d 433, 444 (S.D. Tex. 1997) ("the 'state action doctrine' . . . confers antitrust immunity for state regulatory programs"), *aff'd*, 172 F.3d 866 (5th Cir. 1999); *Yeager's Fuel, Inc. v. Penn. Power & Light Co.*, 22 F.3d 1260, 1265 (3rd Cir. 1994) ("state action immunity from antitrust liability").

Moreover, the plaintiffs' authorities agree that, as stated in doc. 64 at 6, *Parker* immunity is an immunity *to suit*, not merely a defense to liability. This is the true significance of the remark in *Surgical Care* (doc. 73-1 at 6), that state action immunity is a "strict standard for locating the reach of the Sherman Act [rather] than the judicial creation of a *defense to liability* for its violation." *Surgical Care Ctr.*, 171 F.3d at 234 (emphasis added). *See also Acoustic Sys.*, 207 F.3d at 291-92 (a "state action immunity claim entail[s] a right not to bear the burden of the suit"; "the essence of the claimed right is a right not to stand trial").

> Common to *Nixon, Mitchell,* and *Puerto Rico Aqueduct*[8] were concerns that public defendants would be subjected to the costs and general consequences associated with discovery and trial. . . . The *Parker v. Brown* state action doctrine, like the doctrine of qualified immunity, is "interpreted to create an immunity from suit and not just from judgment—to spare state officials the burdens and uncertainties of the litigation itself as well as the cost of an adverse judgment." "The importance of *Parker*'s status as an immunity is particularly strong when the defendant is a government agency, subdivision, or government official carrying out duties. Such entities and officials cannot be intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they might ultimately win."

Id. at 293-94 (citations and parentheses omitted) (quoting, *inter alia*, Areeda & Hovenkamp).

In addition to immunity from suit, another feature that state action immunity has in common with governmental jurisdictional immunities such as Eleventh Amendment immunity is the immediate appealability of its denial. *Id.* at 293 ("the reasoning that underlies the immediate appealability of an order denying absolute, qualified or Eleventh Amendment immunity indicates that the denial of state action immunity to a state, its officers, or its agents should be similarly appealable").[9] *See also Earles*, 139 F.3d at 1036 ("we have appellate jurisdiction to consider an interlocutory appeal from the denial of a motion to dismiss based upon immunities bestowed by the Eleventh Amendment and the state-action antitrust exemption"). In

[8] *Nixon v. Fitzgerald,* 457 U.S. 731 (1982) (absolute immunity); *Mitchell v. Forsyth,* 472 U.S. 511 (1985) (qualified immunity); and *P. R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.,* 506 U.S. 139 (1993) (Eleventh Amendment immunity).

[9] In *Acoustic Sys.*, a private manufacturing company, with no discernable governmental attributes, was not allowed to take an interlocutory appeal from the denial of its immunity defense. *Id.* at 288-89, 294.

neither *Acoustic Sys.* nor *Earles* was it required that the defendant's entitlement to *Parker* immunity appear on the face of the plaintiff's pleadings.

The plaintiffs' authorities further show that the "burden of proof" is not a significant factor in this analysis, so that it does not matter whether the issue is analyzed under Rule 12(b)(1) or Rule 12(b)(6). "State authorization is generally interpreted by an objective test that looks at the language of the statute; if other evidence is needed, it can be gleaned from legislative histories or state judicial decisions"; the inquiry "ordinarily produces a legal conclusion." *Surgical Care Ctr.*, 171 F.3d at 234 (quoting Areeda & Hovenkamp); *see also Yeager's Fuel*, 22 F.3d at 1265 ("the state action immunity issue is a question of law"); *Destec Energy*, 5 F. Supp.2d at 445 (defendant claiming *Parker* immunity must establish "*as a matter of law*," that the disputed actions "were allowed by a clearly articulated and affirmatively expressed state policy and were the result of active supervision by the state") (emphasis added). Moreover, under Rule 12(b)(6),[10] the court "must consider . . . matters of which a court may take judicial notice." *Funk v. Stryker Corp.*, 631 F.3d 777, 783 (5th Cir. 2011).

3. The state actively supervises the TMB through judicial review under § 2001.038.

"The active supervision prong requires that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove

[10] Note also that the plaintiffs rely on the now obsolete pre-*Twombly* standard for deciding motions under Rule 12(b)(6). Doc. 73-1 at 6 (citing *Clark v. Amoco Prod. Co.*, 794 F.2d 967, 970 (5th Cir. 1986) (relying on *Conley v. Gibson,* 355 U.S. 41 (1957)); *Simon v. Telsco Indus. Emp. Benefit Plan*, 2002 WL 628656, *1 (N.D. Tex. 2002)).

those that fail to accord with state policy." *Yeager's Fuel*, 22 F.3d at 1270 (quoting *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 634 (1992) (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988))). The plaintiffs argue that judicial review of TMB rules under TEX. GOV'T CODE § 2001.038 does not constitute active state supervision because (1) it is merely "potential" rather than "actual," in that Texas courts do not "initiate *sua sponte* review of agency rules," (2) Texas courts cannot review the substance of agency rules to determine whether they promote state policy, and (3) Texas courts are powerless to veto or modify state rules. Doc. 73-1 at 8-16.

If judicial review under section 2001.038 is disqualified because Texas courts cannot "initiate *sua sponte* review of agency rules" (doc. 73-1 at 9), then judicial review is categorically excluded. Courts, of course, decide only cases that are brought to them by parties. But if judicial review can never constitute active state supervision for purposes of *Parker* immunity, that would have been the logical ruling in *Patrick*. On the contrary, as previously discussed (doc. 64 at 11-12), the Supreme Court expressly declined to categorically exclude judicial review but instead explained in detail why Oregon's particular mode of judicial review of hospital privileges termination, if it was available at all, could not satisfy *Midcal*.

The plaintiffs' authorities (doc. 73-1 at 11 & n. 6, 17) likewise continue to leave open the question of whether and when judicial review can constitute active state supervision. *Pinhas v. Summit Health, Ltd.*, 894 F.2d 1024, 1030 (9th Cir. 1989) ("We join the Supreme Court in avoiding the broad question whether state courts, acting in their judicial capacity, ever can adequately supervise private conduct for purposes

of the state action doctrine."), *aff'd on other grounds*, 500 U.S. 322 (1991); *Shah v. Mem'l Hosp.*, 1988 WL 161175, *1 (W.D. Va. 1988) ("The *Patrick* court specifically declined to address the issue of whether review by the state judiciary can ever fulfill the supervision requirement because it found the extent of judicial review in Oregon insufficient."); *Miller v. Ind. Hosp.*, 930 F.2d 334, 337 (3rd Cir. 1991) ("Without deciding 'whether judicial review of private conduct ever can constitute active supervision,' the Court held that any review available in the Oregon courts fell 'far short' of what would be needed to establish active supervision.").

All of the cases cited by the plaintiffs on this point dealt, like *Patrick*, with the denial, suspension, or termination of hospital privileges through peer review. And in each case, the review available suffered from defects comparable to those identified in *Patrick*. *Pinhas*, 894 F.2d at 1029-30 ("This limited form of review is similar to the standards applied by the Oregon courts that the Supreme Court found insufficient to constitute active supervision."); *Shahawy v. Harrison*, 875 F.2d 1529, 1535-36 (11th Cir. 1989) (Florida courts provided less supervision than Oregon courts in *Patrick*); *Islami v. Covenant Med. Ctr., Inc.*, 822 F. Supp. 1361, 1380 (N.D. Iowa 1992) ("This case is very much like *Patrick*."); *Shah*, 1988 WL 161175, *3; *Miller*, 930 F.2d at 337-38. However, as shown previously (doc. 64 at 12-14) and in the discussion that follows, Texas judicial review of state agency rules goes far beyond what was arguably available in the *Patrick* case.

a. Judicial review under § 2001.038 is actual rather than merely potential.

The plaintiffs interpret the term "potential" in *NCSBDE* to mean "reactive" or *post hoc*. Doc. 73-1 at 9-10. But that conclusion does not follow from the relevant decisions using the term. In *NCSBDE*, the Supreme Court relied on *Ticor* for the statement that "the 'mere potential for state supervision is not an adequate substitute for a decision by the State.'"[11] *NCSBDE*, 135 S. Ct. at 1116 (quoting *Ticor*, 504 U.S. at 638). However, as previously discussed (doc. 64 at 21-22), in the facts of *Ticor*, the state gave no indication as to whether it reviewed the proposed rates at all, more than at most, for mathematical accuracy, much less whether it made any kind of judgment about the rates' consistency with state policy. The state reviewing authority thus gave no affirmative indication of approval or disapproval. *Ticor*, 504 U.S. at 637-38. Similarly, as examined above, in the *Patrick* line of cases, although it was argued that judicial review *could* or *might* be available, it was not apparent whether and, if so, to what extent, it was.

Consequently, as the plaintiffs' authority makes clear, a "merely potential" review system under the *Ticor* reasoning is one that "provide[s] only a theoretical mechanism for substantive review," in which a rule is "subject to only minimal scrutiny" (if any at all) by state authorities. *Destec Energy*, 5 F. Supp.2d at 455. By contrast, as shown previously (doc. 64 at 12-14) and in the discussion that follows,

[11] Contrary to the plaintiffs' assertion (doc. 73-1 at 8), the defendants have not ignored this feature of active state supervision. Doc. 64 at 13 ("The state judiciary's authority to realistically assure that state health agencies and professional licensing boards are promoting state policy is not merely potential or hypothetical."). Note that the Thomson-Reuters Westlaw editors' summary of the *NCSBDE* holding lists only the three criteria stated in doc. 64 at 8 (citing *NCSBDE*, 135 S. Ct. at 1116). *See id.* keynote 16.

Texas law and court decisions clearly set out a specific system in which courts analyze the substance of state agency rules and render binding enforceable decisions on whether the rules conform to state policy.

b. Judicial review under § 2001.038 is not limited to procedural error.

Under section 2001.038, Texas courts can and do review the substance of an agency rule, when that is what the plaintiff challenges. The decisions relied on by the plaintiffs here (doc. 73-1 at 12-13) were *all* in cases in which the claimant alleged *only* procedural defects. *McCarty v. Tex. Parks & Wildlife Dep't*, 919 S.W.2d 853, 854 (Tex. App.—Austin 1996, no pet.) ("Appellant claims the Department conducted inadequate hearings"); *Pharmserv, Inc. v. Tex. Health & Human Servs. Comm'n*, 2015 WL 1612006, *8 (Tex. App.—Austin 2015, no pet. his.) ("Pharmserv asserted a challenge under section 2001.038 of the APA to rules 354.1891 and 354.1892 on the ground that the rules denied Pharmserv its due process right to a SOAH hearing."); *Nat'l Ass'n of Indep. Insurers v. Tex. Dep't of Ins.*, 925 S.W.2d 667, 669-70 (Tex. 1996) (alleging failure to comply with § 2001.033 in rule-making process). In three of the decisions relied on by the plaintiffs, the courts did not conduct reviews under § 2001.038 at all, but under statutes providing a more narrow scope of review. *Office of Pub. Util. Counsel v. Pub. Util. Comm'n of Tex.*, 104 S.W.3d 225, 232 (Tex. App.—Austin 2003, no pet.) (TEX. PUB. UTIL. CODE § 39.001(f)); *Gulf Coast Coalition of Cities v. Pub. Util. Comm'n*, 161 S.W.3d 706, 711-12 (Tex. App.—Austin 2005, no pet.) (same); *Tex. Dep't of Human Res. v. Tex. State Employees Union CWA/AFL-CIO*, 696

S.W.2d 164, 169 (Tex. App.—Austin 1985, no writ) (alleging denial of due process under the Texas constitution and violation of former labor statutes).

None of the cases relied on by the plaintiffs holds that a Texas court is powerless under § 2001.038 to hear and decide a facial challenge asserting that the subject matter of an agency rule is outside the agency's statutory authority. Texas decisions holding that under § 2001.038 a court does not judge the "wisdom" of an agency rule or action (doc. 73-1 at 12-13 & n. 7)[12] is not to the contrary. Active state supervision for purposes of *Parker* immunity likewise does not include review of the wisdom of agency decisions or conduct. "The question [for immunity] is not whether the challenged conduct is efficient, well-functioning, or wise." *NCSBDE*, 135 S. Ct. at 1111 (citing *Ticor*, 504 U.S. at 634-35).[13]

In each of the cases cited by the plaintiffs in doc. 73-1 at 14 n. 8, the court, acting under § 2001.038, examined the substance of the rule at issue—*i.e.*, what the rule required or provided, as opposed to the procedures by which it was enacted—in order to determine whether the rule fell within the authority granted to the agency by statute. *See also Tex. Comm'n on Envtl. Quality v. Tex. Farm Bureau*, 460 S.W.3d 264, 270-72 (Tex. App.—Corpus Christi 2015, pet. filed); *Lambright v. Tex. Parks & Wildlife Dep't*, 157 S.W.3d 499, 511-12 (Tex. App.—Austin 2005, no pet.).

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[12] *See also Lambright v. Tex. Parks & Wildlife Dep't*, 157 S.W.3d 499, 510-11 (Tex. App.—Austin 2005, no pet.) ("The rules need not be, in the court's opinion, wise, desirable, or necessary"; instead, the court will only "inquire whether the rules are consistent with the [relevant statute]").

[13] *See also Mun. Utilities Bd. of Albertville v. Ala. Power Co.*, 21 F.3d 384, 387 (11th Cir. 1994) (courts do not "condition immunity from antitrust prosecution on the wisdom of the [state]'s decision") (citing *Hoover v. Ronwin,* 466 U.S. 558, 574 (1984) (state need not act "wisely" to be immune)); *Fuchs*, 858 F.2d at 1214 ("state action immunity is not dependent on the wisdom . . . of state regulation").

c. Judicial review under § 2001.038 may determine whether a rule promotes state policy.

The plaintiffs contend that the determination under § 2001.038 of whether an agency has acted within its statutory authority when it adopted the rule at issue does not include or reach the issue of whether the agency rule promotes state policy. Doc. 73-1 at 14-15. However, in the specific context of section 2001.038 review, that distinction is artificial and illusory.

Under well established Texas law, a Texas state agency has no statutory authority to do anything other than carry out the state policy embodied in the legislation creating the agency. *Tex. Student Hous. Auth. v. Brazos Cnty. Appraisal Dist.*, 460 S.W.3d 137, 143 (Tex. 2015) ("Agencies may only exercise those powers granted by statute, together with those necessarily implied from the statutory authority conferred or duties imposed," so that an agency "thus has no power to [act] beyond its statutory authorization"); *Tex. Ass'n of Psychological Assocs. v. Tex. State Bd. of Exam'rs of Psychologists*, 439 S.W.3d 597, 603 (Tex. App.—Austin 2014, no pet.) ("A state administrative agency has only those powers that the Legislature expressly confers upon it or that are implied to carry out the express functions or duties given or imposed by statute.") (citing *Tex. Workers' Comp. Comm'n v. Patient Advocates of Tex.,* 136 S.W.3d 643, 652 (Tex. 2004)).

> An agency can only adopt rules that are authorized by and consistent with its statutory authority. The determining factor in whether a particular administrative agency has exceeded its rulemaking authority is whether the rules are "in harmony with ***the general objectives of the legislation*** involved." Whether the rules are "in harmony" with the general objectives of the legislation involved is a question of law determined through statutory construction.

Lambright, 157 S.W.3d at 510 (citations omitted, emphasis added). As previously noted (doc. 64 at 13), the presumption of validity of state agency rules (doc. 73-1 at 12) is overcome by showing that a rule is contrary to the statute's "general objectives." *See also Tex. State Bd. of Exam'rs of Marriage & Family Therapists v. Tex. Med. Ass'n*, 458 S.W.3d 552, 555 (Tex. App.—Austin 2015, pet. filed) ("counter to the statute's general objectives"); *Tex. Ass'n of Psychological Assocs.*, 439 S.W.3d at 603 ("counter to the general objectives of the underlying Act"; "counter to the Act's general purpose").

State policy consists of the general objectives and purposes of state statutes. BLACK'S LAW DICTIONARY (7th ed. 1999) at 1178 (first meaning of "policy": "the general principles by which a government is guided in its management of public affairs"). Consequently, a court's decision under section 2001.038 that an agency rule is not in harmony with the general objectives of the agency's enabling statute inescapably constitutes a determination that the rule is not consistent with (does not promote) state policy.

Judicial review under § 2001.038 of the substance of a rule to determine its congruence with state statutory policy is especially evident in a decision this year pertaining to a Texas Medical Board rule. *Physician Assistants Bus. Alliance of Tex., LLC v. Tex. Med. Bd.*, 2015 WL 681010, *1-*4 (Tex. App.—Austin 2015, no pet. his.). In this case, in which, unlike Teladoc (doc. 73-1 at 10 n. 5), the physician assistants' ["PAs"] organization brought a *substantive* challenge under § 2001.038, the court of appeals was called upon to decide whether the contested TMB rule was authorized

by recent legislation that "placed restrictions on the ability of PAs to manage and control business entities they jointly own with physicians."[14] *Id.* at *1-*2. The court examined the substantive requirements imposed by the rule in light of the legislative purpose, to "grandfather" in pre-existing PA business arrangements by exempting them from new restrictions on ownership interests, to reach its conclusion that the rule exceeded the TMB's statutory authority under the legislation. *Id.* at *1-*4

The plaintiffs' authorities are not to the contrary. In a sentence partially quoted by the plaintiffs (doc. 73-1 at 14), the Supreme Court noted that, "Entities *purporting* to act under state authority might diverge from the State's considered definition of the public good." *NCSBDE*, 135 S. Ct. at 1112 (emphasis added). As shown above, Texas courts have the authority to decide whether the agency's action under its *purported* authority diverges from its enabling state policy. In the Indiana dentist case, the FTC found that the defendants' actions "had no basis in any authoritative source of Indiana law and the Federation has not identified any adequate reason for rejecting the Commission's conclusion."[15] *F.T.C. v. Ind. Fed'n of Dentists*, 476 U.S. 447, 465 (1986).

The plaintiffs stress that in their state court litigation under § 2001.038 they brought only "a **procedural** challenge alleging that the TMB attempted to adopt new rules without notice-and-comment rulemaking." Doc. 73-1 at 10 n. 5 (emphasis

[14] The policy underlying the legislation is obviously comparable to legal and ethical restrictions on the control of legal practice by non-lawyers.

[15] Moreover, the Court held that even if the prohibited practice at issue was illegal under state law, that did not justify "collusion among [private] competitors to prevent it." *Id.* Further distinguishing that case from the instant suit, "There is no suggestion of any . . . active supervision here." *Id.*

original). By failing to bring a substantive challenge, they have tacitly conceded that the contested rules are within the TMB's statutory authority. For the reasons shown above, that means they are consistent with state policy.

d. Judicial review under § 2001.038 includes the power to effectively veto or modify a rule.

The plaintiffs argue that "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." Doc. 73-1 at 15. However, if the court declares that a rule is *not* within an agency's statutory authority—authority that is limited by law to carrying out the policy (general objectives and purposes) of the statute creating the agency— a declaration invalidating the rule effectively "vetoes" it.[16]

Moreover, if the agency refuses to comply with the declaratory judgment (an exceedingly rare occurrence),[17] the court can enforce its judgment by injunction. *Tex. Student Hous. Auth. v. Brazos Cnty. Appraisal Dist.*, 460 S.W.3d 137, 143-44 (Tex. 2015) ("courts may [grant] an injunction to prevent [a state agency] from continuing to exceed its limited statutory authority").[18]

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[16] Note that in the state court litigation, following the appellate decision the TMB did not continue to enforce the "C&D" letter "rule" at issue but enacted it as a formal rule.

[17] *See, e.g.*, *Abbott v. G.G.E*, 463 S.W.3d 633, 649 (Tex. App.—Austin 2015, pet. filed) (an "injunction to enforce [a] declaratory judgment is 'unnecessary' where there is no indication that [the] state agency will attempt to contravene the trial court's judgment") (citing *Tex. Educ. Agency v. Leeper,* 893 S.W.2d 432, 446 (Tex. 1994)).

[18] *See also Tex. Dep't of State Health Servs. v. Balquinta*, 429 S.W.3d 726, 748-49 (Tex. App.—Austin 2014, pet. dismissed); *Tex. Dep't of Pub. Safety v. Salazar*, 304 S.W.3d 896, 903-04 (Tex. App.—Austin 2009, no pet.).

e. Judicial review under § 2001.038 is enhanced by § 2001.035.

The plaintiffs argue that TEX. GOV'T CODE § 2001.035 does not "qualify as active supervision" because it "provides for only procedural review." Doc. 73-1 at 15-16. The plaintiffs have missed the point. This statute, in conjunction with §2001.033, enhances the effectiveness of active state judicial supervision by requiring the agency to explain, in its reasoned justification, how the substance of the proposed rule comports with state policy. Doc. 64 at 13 n. 10.

In a case relied on by the plaintiffs (doc. 73-1 at 13), the Texas Supreme Court described the value of sections 2001.033 and -.035 for judicial review of agency rules.

> The Legislature has directed that when an administrative agency adopts a rule, it must at the same time state a reasoned justification for the rule. . . . Thus, section 2001.033 places an affirmative duty on an agency to summarize the evidence it considered, state a justification for its decision based on the evidence before it, and demonstrate that its justification is reasoned. If an order does not substantially comply with these requirements, the rule is invalid. *An agency's order substantially complies with the reasoned justification requirement if it* (1) *accomplishes the legislative objectives underlying the requirement and* (2) *comes fairly within the character and scope of each of the statute's requirements in specific and unambiguous terms*. Provisions like section 2001.033 are designed to compel an administrative agency to articulate its reasoning and, in the process, more thoroughly analyze its rules. Requiring an agency to demonstrate a rational connection between the facts before it and the agency's rules promotes public accountability and ***facilitates judicial review***. It also fosters public participation in the rulemaking process and allows interested parties to better formulate "specific, concrete challenges" to a rule.

Nat'l Ass'n of Indep. Insurers, 925 S.W.2d at 669 (citations omitted, emphasis added).

4. The state actively supervises the TMB through judicial review under sec. 2001.174.

The plaintiffs argue that judicial review under sec. 2001.174 is limited to determining whether any substantial evidence supports the agency's fact findings in a disciplinary action and does not include the ability to modify an agency order. Doc. 73-1 at 16-17. The standards discussed in the Supplemental Response apply only to review under § 2001.174 of agency/SOAH fact findings—for example, if a physician challenges the revocation of his license on the grounds that the TMB erred in finding that he had committed acts that violated the rule in question.

However, erroneous findings are only one of several grounds on which a licensee might challenge a disciplinary action under § 2001.174, with a different legal standard for each kind of challenge. "We may reverse a state administrative agency's decision that prejudices substantial rights of the complaining party if the decision is in violation of a constitutional or statutory provision, *in excess of the agency's authority*, *made through unlawful procedure* or affected by other error of law, *not reasonably supported by substantial evidence*, or arbitrary or capricious ***or*** characterized by an abuse of discretion." *SWEPI LP v. R.R. Comm'n of Tex.*, 314 S.W.3d 253, 259 (Tex. App.—Austin 2010, pet. denied) (emphasis added) (citing TEX. GOV'T CODE § 2001.174(2)(A)-(F)).

Challenges based on legal issues are decided by a different standard than those based on factual issues, to which the substantial evidence inquiry applies. *Heritage on San Gabriel Homeowners Ass'n v. Tex. Comm'n on Envt'l Quality*, 393 S.W.3d 417, 424 (Tex. App.—Austin 2012, pet. denied) ("We review the agency's legal conclusions

for errors of law and its factual findings for support by substantial evidence."); *Cnty. of Reeves v. Tex. Comm'n on Envt'l Quality*, 266 S.W.3d 516, 527 (Tex. App.—Austin 2008, no pet.) ("we review agency fact findings for support by substantial evidence [and] review legal conclusions for errors of law").[19]

A § 2001.174 challenge alleging that the rule under which the licensee was disciplined exceeded the agency's statutory authority raises a question of law. *SWEPI*, 314 S.W.3d at 259 ("the starting point" for determining "the scope of the [agency]'s authority under [its governing statute] is the language of the statute itself"). "Statutory construction presents a question of law that we review de novo." *Employees Ret. Sys. of Tex. v. Garcia*, 454 S.W.3d 121, 133 (Tex. App.—Austin 2014, pet. denied). "Whether [agency] rules are 'in harmony' with the general objectives of the legislation involved is a question of law determined through statutory construction." *Lambright*, 157 S.W.3d at 510.

In this latter kind of review, which is of relevance to active state supervision, the agency does not receive the kind of deference described by the plaintiffs (doc. 73-1 at 16), relying on cases dealing with substantial evidence review of agency fact findings. *Cnty. of Reeves*, 266 S.W.3d at 527 ("we cannot defer to an administrative interpretation that is . . . inconsistent with the . . . underlying statute") (collecting cases); *Tex. Mut. Ins. Co. v. Sonic Sys. Int'l, Inc.*, 214 S.W.3d 469, 476 (Tex. App.—Houston [14th Dist.] 2006, pet. denied) ("A question of statutory interpretation,

[19] This dichotomy parallels the standards for a federal court's review of federal agency administrative decisions. *Halliburton, Inc. v. Admin. Review Bd.*, 771 F.3d 254, 258 (5th Cir. 2014) ("Factual findings are subject to substantial evidence review [while] conclusions of law are reviewed de novo.")

however, is a question of law and the administrative determination of a question of law is not entitled to a presumption of validity," so that, "Neither a district court nor an appellate court is bound by an administrative agency's construction of one of its statutes.").

The plaintiffs assert that "review under § 2001.174 also fails as active supervision because the court cannot modify a TMB decision to ensure it accords with state policy." Doc. 73-1 at 17 n. 11. What a court not only can do but "*shall*" do is "reverse or remand an agency decision for further proceedings if [the decision is] in excess of the agency's statutory authority." *Cnty. of Reeves*, 266 S.W.3d at 527. Although this section does not give the court the ability to vacate the rule,[20] reversal prevents the operation of the rule. An agency's refusal on remand to correct the legal errors identified by the court would subject it to the same penalties and remedies as a failure to abide by a declaratory judgment under § 2001.038.

5. The state actively supervises the TMB through Legislative oversight.

The plaintiffs argue that sunset review in 2005 could not have constituted active state supervision of TMB rules adopted in 2010 and 2015. Doc. 17-18. Once again the plaintiffs have missed the point of, and thereby failed to join issue with, the defendants' showing. What the legislature approved in 2005, by post-sunset reenactment of the Texas Medical Practices Act without changing TEX. OCC. CODE § 164.051(a)(6), was the TMB's interpretation and application of that provision.[21] Doc.

[20] *City of Allen v. Pub. Util. Comm'n of Tex.*, 161 S.W.3d 195, 200 n. 11 (Tex. App.—Austin 2005, no pet.).

[21] It is a matter of public record, which the plaintiffs have not controverted and of which the court must take notice, that since 2000 at the latest, the TMB has regularly disciplined physicians for

64 at 16-17, 20. It is thus the policy of the State of Texas that prescriptions without prior physical examination are prohibited, a policy that the subsequent contested rules promote. (As shown in doc. 64 at 27-30 and discussed below, that is also the policy of the federal government and a majority of states.)

The plaintiffs further assert that "*future* sunset review does not satisfy the active supervision requirement." Doc. 73-1 at 18 (emphasis original). However, as established without contradiction, sunset review of the TMB, including the rules at issue in this suit, *has already begun*.[22] Doc. 64 at 20. For a federal court to invalidate a state agency rule after sunset review has commenced but before sunset legislation has been enacted would be a serious affront to principles of federalism.

The plaintiffs next object that "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.'" Doc. 73-1 at 19 (quoting doc. 64 at 19). However, as previously shown, the Sunset Commission is an arm of the Legislature, which as a matter of law *does* have the power to vacate or alter by legislation any agency's rules or policies. *Compare Yeager's Fuel*, 22 F.3d at 1271[23] (PUC approval based on staff report following more than superficial review constituted active state supervision of rates set by defendant).

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prescribing dangerous drugs without previously conducting a physical examination of the patient. Doc. 64 at 16 (citing doc. 21-13 at 1-28 and docs. 21-20 through 21-24). This incontrovertible fact makes the pleadings cited in doc. 73-1 at 18 n. 12 both immaterial and implausible.

[22] The court may take note that sunset review always begins, indeed *must* begin if it is to be thorough, at least a year before the legislative session for which it is conducted.

[23] Relied on by the plaintiffs in doc. 73-1 at 6.

To attack review by legislative standing committees under TEX. GOV'T CODE § 2001.032, the plaintiffs cite *Ticor* for the proposition that, categorically, "a 'negative option' is not active supervision." Doc. 73-1 at 21 (emphasis omitted) (citing *Ticor*, 504 U.S. at 638-40). But as previously shown, the *Ticor* opinion frames its holding on negative options within "the circumstances of *this case*," "[i]n *this context* . . ." Doc. 64 at 21-22 (quoting *Ticor*, 504 U.S. at 639). Neither *NCSBDE* nor *Earles* (doc. 73-1 at 21 n. 19) purports to modify the *Ticor* holding.

In a further attempt to bring this case within the scope of *Ticor*, the plaintiffs characterize the challenged rules as "price-fixing." Doc. 73-1 at 21-22 n. 19. However, if any act that poses a barrier to "a low-priced form of competition" is "price-fixing," as opposed to dictating a precise amount to be charged, a wide range of antitrust activities would fall within that category. On the contrary, "price-fixing" belongs to a small minority of antitrust violations that are "illegal *per se*," without regard to the rule of reason.[24] Indeed, it would be illogical to declare that "[n]o antitrust offense is more pernicious than price fixing," *Ticor*, 504 U.S. at 639, if most forms of antitrust offense would qualify as such. The plaintiffs offer no authority for their broad definition. *See* BLACK'S LAW DICTIONARY (7th ed. 1999) at 1208 ("price-fixing") ("the artificial *setting or maintenance* of prices at a *certain* level") (emphasis added).

The more important point is that the defendants have not relied on section 2001.032 in isolation. Instead, among "all the circumstances of a case" that the court must examine, *NCSBDE*, 135 S. Ct. at 1117, this provision is one more feature that

[24] *See*, *e.g.*, *Texaco Inc. v. Dagher*, 547 U.S. 1, 5 (2006); *Ariz. v. Maricopa Cnty. Med. Soc'y*, 457 U.S. 332, 342-48 (1982).

reinforces the "reasonable assurance" that the contested rules are based on state policy rather than private interests. Doc. 64 at 20-22.

6. The parallels between the contested rules and state statutes realistically assure the promotion of state policy over private interests.

The plaintiffs attempt to evade the point of section **I-B-4** of the defendants' argument (doc. 64 at 27-30) with the facile assertion that "laws outside of Texas have no bearing on whether Texas actively supervised Defendants' anticompetitive actions." Doc. 73-1 at 23. However, the many close parallels between the content of the rules and that of statutes of Texas, other states, and the federal government provide further reasonable assurance that the rules are an expression of state policy.

A statute is the paragon of an expression of state policy. *NCSBDE*, 135 S. Ct. at 1110 ("State legislation [is] an undoubted exercise of state sovereign authority."). When the product of the defendants' rule-making process matches the product of the "electorally accountable" (*id.* at 1112) legislative process, it is an important indicator that the rule is an expression of state policy.

7. The contested rules promote clearly articulated state policy.

Although when the first part of the *Midcal* test is at issue in a case, it is always examined first, the plaintiffs here have addressed it as their last argument on state action immunity. From the Supreme Court's holding that the "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,"[25] *NCSBDE*, 135 S. Ct. at 1112, the plaintiffs leap to the conclusion that "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." Doc. 73-1 at 24-25. They go on to argue that two particular statutes—of the many that the defendants have discussed throughout this litigation—do not announce "a clearly articulated policy to impose anticompetitive regulations that raise prices and reduce access to care" and do "not articulate a policy to adopt anticompetitive rules that raise price for patients and reduce access to 'appropriate, quality care.'" *Id.* at 25. The plaintiffs misrepresent the relevant requirements for clear articulation.

To clearly articulate a policy that supports an agency rule, it is not necessary that the statute explicitly identify the precise content of the rule. "Since deciding *Midcal,* the Supreme Court has moved away from such a narrow construction of the state policy requirement." *Destec Energy*, 5 F. Supp. 2d at 446. As another of the authorities relied on by the plaintiffs explains, "the deference due states as sovereigns resists any insistence upon a particular formula or expression, so long as it is clear from the nature of the policy articulated that the state contemplates such a displacement of competition." *Surgical Care Ctr.*, 171 F.3d at 234 (cited on this issue in doc. 73-1 at 25). "[C]ourts will not police states to insist that its legislatures use words federally dictated." *Id.* at 236. While the anticompetitive effect must be "foreseeable" as the "inherent, logical, or ordinary result" of the statutory authority,

[25] In that case, "The parties have assumed that the clear articulation requirement is satisfied, and we do the same." *Id.* at 1110.

NCSBDE, 135 S. Ct. at 1112, "the anticompetitive conduct need only be reasonably anticipated, rather than the inevitable, ordinary, or routine outcome of a statute." *Surgical Care Ctr.*, 171 F.3d at 236.

> As long as the State as sovereign clearly intends to displace competition in a *particular field* with a regulatory structure, the first prong of the *Midcal* test is satisfied . . . . Therefore, we hold that if the State's intent to establish an anticompetitive regulatory program is clear, . . . the State's failure to describe the implementation of its policy in detail will not subject the program to the restraints of the federal antitrust laws. . . . Agencies are created because they are able to deal with problems unforeseeable to, or outside the competence of, the legislature. Requiring express authorization for every action that an agency might find necessary to effectuate state policy would diminish, if not destroy, its usefulness. . . .

Destec Energy, 5 F. Supp. 2d at 446-48 (emphasis original) (citing, *inter alia*, Areeda & Hovenkamp). Other authorities relied on by the plaintiffs agree. *Yeager's Fuel*, 22 F.3d at 1266-67, 1270; *Earles*, 139 F.3d at 1042-44. The anticompetitive effect may be the foreseeable result of the "statutory scheme" or the "regulatory structure," rather than the precise words of the statute. *Destec Energy*, 5 F. Supp. 2d at 446, 448, 449.

It is simply not true that the defendants have relied exclusively on the two statutes discussed in the Supplemental Response. The defendants have also called the court's attention to TEX. OCC. CODE § 164.051(a)(6) ("The board may . . . take disciplinary action against a person [who] fails to practice medicine in an acceptable professional manner consistent with public health and welfare"), pursuant to which the board adopted 22 T.A.C. § 190.8(1)(L). Doc. 64 at 16-18, 20. Especially in the

context of the provisions discussed in doc. 21-1 at 3-4,[26] a highly foreseeable consequence of section 164.051(a)(6) is that a competitive medical practice which (in the board's view) lowers prices and/or increases convenience at the expense of patient health or welfare will be prohibited. The statutory language, statutory scheme, and regulatory structure demonstrate a state policy that places a higher priority on public health and welfare than on practitioners' ability to achieve a competitive advantage—*i.e.*, that intends to displace competition with regulation.

8. The plaintiffs have failed to state a sec. 1983 claim for relief under the dormant Commerce Clause.

The plaintiffs have failed to cure the mutual exclusivity of their dormant Commerce Clause and antitrust allegations. As previously noted, liability in antitrust is barred against a state exercising its sovereign authority, whereas an essential element of a dormant Commerce Clause claim is the exercise of state sovereign authority. Doc. 64 at 31-32. The plaintiffs' only response is conclusory and *ad hominem*, asserting that "Defendants adopted anticompetitive rules using state authority, but without active state supervision." Doc. 73-1 at 27 n. 24. However, without state supervision, there was no state action, as required to state a claim under the dormant Commerce Clause. Note "that a government function is not susceptible to standard dormant Commerce Clause scrutiny[,] owing to its likely

[26] The Texas Legislature declared that "as a matter of public policy it is necessary to protect the public interest" by established the Texas Medical Board as "the primary means of licensing, regulating, and disciplining physicians." TEX. OCC. CODE § 151.003. To carry out its responsibilities, the TMB is empowered to "adopt rules . . . as necessary to . . . regulate the practice of medicine in this state" and enforce the Medical Practices Act. *Id.* at § 153.001. State law expressly authorizes the TMB to "adopt rules necessary to . . . ensure that patients using telemedicine medical services receive appropriate, quality care." *Id.* at § 111.004.

motivation by legitimate objectives distinct from the simple economic protectionism the [dormant Commerce] Clause abhors." *Dep't of Revenue of Ky v. Davis*, 553 U.S. 328, 341 (2008).

Of more importance, the plaintiffs cannot show that the challenged rules burden them to any greater extent than in-state physicians.[27] The plaintiffs' selective out-of-context quotations from Supreme Court cases cannot obscure the plain fact that contested rule 22 T.A.C. §190.8(1)(L) applies equally to all physicians, wherever they are located. (It is quite an anomaly when a *Texas* corporation can manufacture an interstate commerce claim simply by contracting with doctors in other states.)

In the principal cases relied on by the plaintiffs, the contested provisions confined transactions to a narrow geographic area that was inherently advantageous to competitors within or near it. *C & A Carbone, Inc. v. Town of Clarkstown*, 511 U.S. 383, 391 (1994) (town ordinance requiring that all solid waste within town be deposited at a single transfer station that charged more than market rate for its services); *Dean Milk Co. v. City of Madison*, 340 U.S. 349, 353-54 (1951) (prohibiting the sale of milk not bottled within five miles of Madison's central square).

As previously discussed, the disputed rules allow for remote "face-to-face" consultations, provided the proper equipment is used and a qualified site presenter is with the patient.[28] Consequently, the required examinations do not impose a limitation on the practice of medicine that is analogous in degree or in kind to those

[27] As previously noted, it is undisputed that most Teladoc physicians serving Texas residents ***are*** in-state physicians.

[28] 22 T.A.C. §§174.2(a)(2), 190.8(1)(L); *see also* doc. 21-1 at 12-13. A physician may also rely on an examination conducted by a referring physician. *Id.*

invalidated in the plaintiff's cited cases. In this connection, the allegation that "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" (doc. 73-1 at 28) is thus false as a matter of law, as is apparent on the face of the rules.

The numerous paragraphs cited from the amended complaint (doc. 73-1 at 28-29) are conclusory, speculative, and/or implausible. *See In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 205 (5th Cir. 2007). These allegations presume, without pleading facts that if proven would show, that Texas physicians categorically have easier geographic access to all Texas patients. Given the sheer size of the state and the closer proximity of many Texas locations to bordering states than to other parts of Texas, that premise is implausible on its face. Consequently, the inferences flowing from the presumption are also invalid.

"The mere fact that state action may have repercussions beyond state lines is of no judicial significance so long as the action is not within that domain which the Constitution forbids." *Osborn v. Ozlin,* 310 U.S. 53, 62, (1940); *see also Healy v. Beer Inst.,* 491 U.S. 324, 345 (1989) (SCALIA, J., concurring) ("innumerable valid state laws affect pricing decisions in other States"). Courts uniformly recognize that, merely because it is sometimes more expensive to do business in a state, in light of that states' duly-enacted regulations, this does not amount to a violation of the dormant Commerce Clause. *E.g., Nat'l Elec. Mfrs. Ass'n v. Sorrell,* 272 F.3d 104, 111 (2nd Cir. 2011) (while "it is axiomatic that the increased cost of complying with a regulation may drive up the sales price," such increased prices do not evidence a dormant

Commerce Clause violation); *Nat'l Paint & Coatings Ass'n v. City of Chicago,* 45 F.3d 1124, 1130–31 (7th Cir. 1995) (noting that "almost every state and local law—indeed, almost every private transaction—affects interstate commerce" and warning, if dormant Commerce Clause applied to "all laws affecting commerce—that is, to all state and local laws addressing a subject that Congress *could* regulate, if it chose—then judicial review of statutory wisdom after the fashion of *Lochner* would be the norm") (emphasis original).[29]

See also, e.g., CTS Corp. v. Dynamics Corp. of Am., 481 U.S. 69, 86 (1987) (state statute regulating takeovers did not discriminate against interstate commerce because it "has the same effects on tender offers whether or not the offeror is a domiciliary or resident" of the state); *Commonwealth Edison Co. v. Mont.,* 453 U.S. 609, 619 (1981) (no discrimination where severance tax on mineral production in the state was imposed without "any distinction between in-state and out-of-state consumers").

9. The plaintiffs' claims attacking "New Rule 174" are time barred.

By the plaintiffs' reasoning, a corporation can perpetually evade both limitations and laches by continuing to recruit new employees or contractors. They argue that Dr. Clark and Dr. Hood are not "barred from challenging an anticompetitive regulation

[29] Commentators have also recognized the danger of overzealous application of the dormant Commerce Clause to attack permissible state regulation. *See, e.g.*, Gillian E. Metzger; *Congress, Article IV, and Interstate Relations,* 120 HARV. L. REV. 1468, 1521 (2007); Mark D. Rosen, *Extraterritoriality and Political Heterogeneity in American Federalism,* 150 U. PA. L. REV. 855, 919–30 (2002); Jack L. Goldsmith & Alan O. Sykes, *The Internet and the Dormant Commerce Clause,* 110 YALE L.J. 785, 795 (2001).

that did not affect them until (at most) two years ago." Doc. 73-1 at 31. But prior lack of standing alone is insufficient to rebut the presumption of laches. Doc. 64 at 35. Here, the plaintiffs have done no more than simply assert that two among them lacked standing to bring this case until recently. They do not cite a single authority even suggesting that this overcomes the presumption of laches, but attempt instead shift their burden to the defendants. Doc. 73-1 at 31.

CONCLUSION

In view of all the foregoing, the defendants respectfully urge that all of the plaintiffs' claims against them be dismissed, that they recover their costs, and that they be awarded any additional relief to which they show themselves entitled.

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