No. 19-11502

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

D. BLAINE LEEDS and SMILEDIRECTCLUB, LLC,
Plaintiffs-Appellees,

v.

ADOLPHUS M. JACKSON; T. GERALD WALKER; DOUGLAS BECKHAM; STEPHEN R. STRICKLIN; MARK R. MCILWAIN; KEVIN M. SIMS; and SHERRY S. CAMPBELL,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ALABAMA
(JUDGE R. DAVID PROCTOR)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLEES

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CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
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Pursuant to Eleventh Circuit Rules 26.1-1 and 28.1, the undersigned certifies that the following persons and entities are known to him to have an interest in the outcome of this case or have participated as attorneys or judges in the adjudication of this case:

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STATEMENT OF INTEREST

The United States and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and have a strong interest in the proper application of the state-action defense articulated in *Parker v. Brown*, 317 U.S. 341 (1943). That defense protects the deliberate policy choices of sovereign states to displace competition with regulation or monopoly public service. Overly broad application of the state-action defense, however, sacrifices the important benefits that antitrust laws provide consumers and undermines the fundamental national policy favoring robust competition. The federal antitrust agencies have filed amicus curiae briefs in appropriate cases to prevent such overly broad applications. *E.g.*, *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018); *Teladoc, Inc. v. Tex. Med. Bd.*, No. 16-50017 (5th Cir., filed Sept. 9, 2016). In addition, the Supreme Court has clarified the scope and application of the state-action defense in cases brought by the FTC. *See N.C. Bd. of Dental Examiners v. FTC*, 135 S.

Ct. 1101 (2015); *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216 (2013); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992).[1]

We file this brief under Federal Rule of Appellate Procedure 29(a) and urge the Court, if it addresses the "active supervision" component of the state-action defense, to affirm the district court's holding that the Defendants-Appellants (hereafter the "Board members") did not meet their burden at this stage of the proceeding to show that the State of Alabama actively supervised the challenged regulations and enforcement actions of the Board of Dental Examiners of Alabama.

STATEMENT OF ISSUES PRESENTED

Whether the district court correctly determined that the active supervision requirement of the state-action defense applies in this case and that the Board members failed to meet their burden to satisfy that requirement at the motion to dismiss stage.

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[1] FTC staff also has issued guidance on the application of the defense to state regulatory boards controlled by market participants. *See FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* (Oct. 13, 2015), available at https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

STATEMENT

1. Vigorous competition is a crucial factor in fueling innovation. *See*, *e.g.*, *United States v. Aluminum Co. of Am.*, 377 U.S. 271, 281 (1964). Likewise, technological innovations and new business models often have enormous pro-competitive benefits. This reinforcing cycle of competition and innovation allows consumers to reap the rewards of new and exciting products and services, lower prices, and easier access. *See, e.g.*, U.S. Dept. of Justice & Federal Trade Comm'n, Antitrust Guidelines for the Licensing of Intellectual Property § 1.0 (2017); *see also In re Realcomp II Ltd.*, 2007 WL 6936319, at *6 (FTC Oct. 30, 2009) ("Because technological and organizational dynamism are powerful stimulants for economic progress, an especially important application of antitrust law is to see that incumbent service providers do not use improper means to suppress innovation-driven competition that benefits consumers."), *aff'd*, *Realcomp II Ltd. v. FTC*, 635 F.3d 815 (6th Cir. 2011).

Competition, technological innovation, and new models of health care delivery, such as telemedicine, may be disruptive to the traditional business models of doctors and dentists. Almost invariably, however,

that disruption brings the benefits of competition and innovation to consumers. *See Dental Examiners*, 135 S. Ct. at 1108 (non-dentists who offered teeth-whitening services "charged lower prices for their services than the dentists did"); *Teladoc, Inc. v. Tex. Med. Bd.*, 2015 WL 8773509 (W.D. Tex. Dec. 14, 2015) (new competitor offered telehealth services by out-of-state doctors for a fraction of the cost of visiting a traditional medical office).

2. Plaintiff-Appellee SmileDirectClub ("SmileDirect") claims to have created an innovative teledentistry system for providing clear aligner treatment for cases of mild to moderate malocclusion of the teeth. One of SmileDirect's services is SmileShops, which are physical locations in several states at which an employee, using a wand-like, non-radiation-emitting device called an iTero, can take rapid photographs of a consumer's mouth. Amended Complaint ¶¶ 7, 28-30. The photographs are stored digitally and sent to the SmileDirect lab, which uses them to create a 3-dimensional model of the consumer's mouth. *Id.* ¶ 32. Then, a dentist (like Plaintiff-Appellee Dr. Leeds) or orthodontist, who is licensed to practice in the state but is located off-site (and may be located out-of-state), evaluates the model and

photographs and collects additional medical information from the consumer. If the dentist deems the consumer appropriate for SmileDirect's clear aligners, and if the consumer elects to move forward, the dentist creates a treatment plan that is shared with the new patient through SmileDirect's website portal. *Id*. ¶¶ 25, 32-33. The dentist or orthodontist then prescribes the aligners, which are sent directly to the patient. *Id*. Introduction, ¶ 35. The patient therefore need never visit a traditional dental office for teeth alignment treatment. *Id*. ¶¶ 23, 25.

SmileDirect claims to reduce the cost of expensive aligner treatment and to increase access to treatment for unreached segments of the population. Amended Complaint ¶¶ 25-27, 37. SmileDirect alleges that its recent rapid growth has triggered an organized campaign of attacks by incumbent dentists and orthodontists who practice in traditional dental offices. *Id*. ¶¶ 19, 58, 79. SmileDirect further alleges that incumbent dentists and orthodontists have used their influence with industry-controlled state licensing boards to enact regulatory restraints on competition from SmileDirect, for the purpose of "protect[ing] the business interests of traditional dental and orthodontic practices." *Id*. ¶ 79.

3. The Board of Dental Examiners of Alabama (hereafter "Board") is a state agency that regulates the practice of dentistry in Alabama. Amended Complaint ¶ 8. SmileDirect alleges that the seven-member Board consists of six dentists and one dental hygienist, all of whom are active market participants in the profession that the Board regulates. *Id*. ¶¶ 8-15, 133, 147. SmileDirect further alleges that, beginning in 2017, the Board revised or adopted new rules aimed at SmileDirect that restrict competition from teledentistry services and make it "virtually impossible" for SmileDirect to serve Alabama consumers across state lines. *Id*. ¶¶ 51-53, 68, 71-72. Those rules allow dental assistants and dental hygienists to take "digital images" of a patient's mouth only when acting under the "direct supervision" of a licensed dentist. The rules define "direct supervision" as requiring that a dentist be "physically present in the dental facility and available during performance of the procedure, examines the patient during the procedure and takes full professional responsibility for the completed procedure." Ala. Admin. Code rr. 270-X-3.10, 270-X-3.06.

4. Alabama's scheme for review of state agency rules, in pertinent part, is Ala. Code § 41-22-22.1. The statute provides in

pertinent part that the Legislative Services Agency, Legal Division ("LSA") (renamed by amendment effective September 1, 2019) must review each rule certified to it by a state board that regulates a profession "to determine whether the rule may significantly lessen competition and, if so, whether the rule was made pursuant to a clearly articulated state policy to displace competition." *Id*. subpart (a). If the LSA finds no significant effect on competition, review apparently ends, and the rule takes effect. If the LSA determines that a rule may significantly affect competition, "it shall determine whether the rule was made pursuant to a clearly articulated state policy to displace competition, and shall certify those determinations" to a committee of the legislature. *Id*. subpart (b). The committee will collect materials relevant to the adoption of the rule and call a meeting to "review the substance of the rule, determine whether the rule may significantly lessen competition, and if so, whether it was made pursuant to a clearly articulated state policy to displace competition." *Id*. The committee "shall approve, disapprove, disapprove with a suggested amendment, or allow the agency to withdraw the rule for revision." *Id*. Similar review applies to a state board's "previously adopted rule" and to "each

proposed action" submitted to the LSA by a state board. *Id*. subparts (c), (d), (e).

5. On September 20, 2018, the Board sent a cease-and-desist letter to SmileDirect, contending that non-dentist personnel at SmileDirect's Birmingham, Alabama SmileShop were engaged in the unauthorized practice of dentistry. Amended Complaint ¶ 59. After meeting with SmileDirect, the Board directed SmileDirect immediately to stop taking digital images without a supervising dentist present. *Id*. ¶ 62. The Board's cease-and-desist letter and subsequent communications were based on provisions of the Alabama Dental Practice Act, Ala. Code § 34-9-1 et seq., and the Board's rules. The Act defines what constitutes the practice of dentistry in Alabama, including using a "digital imaging machine for the purpose of making dental roentgenograms, radiographs, or digital images," *id*. § 34-9-6, but exempts the "use of . . . digital images . . . under the supervision of a licensed dentist or physician," *id*. § 34-9-7(a). The Act does not define the terms "digital imaging machine" or "supervision."

6. SmileDirect and Dr. Leeds filed suit, alleging that the Board rules and enforcement actions violate (among other things) Section 1 of

the Sherman Act, 15 U.S.C. § 1. Amended Complaint ¶¶ 123-50. Plaintiffs alleged that neither the Board's challenged rules nor its enforcement actions against SmileDirect were adequately supervised by the state. *Id*. ¶¶ 56, 60.

7. The Board moved to dismiss SmileDirect's claims on several grounds. With respect to the antitrust claim, the Board contended that the state-action defense bars that claim. That defense provides that federal antitrust law does not reach the anticompetitive conduct of active market participants that is (1) in furtherance of a clearly articulated state policy to displace competition, and (2) actively supervised by the state. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980). In a Memorandum Opinion filed April 2, 2019, the court denied the motion with respect to the antitrust claim alleged against the Board members individually in their official capacities. With respect to the state-action defense, the court ruled that dismissal on the basis of that defense would be "premature." The court reasoned that the Board members could be entitled to state-action protection in two ways:

First, if the Alabama Dental Practice Act itself "specifies that using an iTero without a dentist on site constitutes the unauthorized practice of dentistry," then that legislative restraint on competition is entitled to *ipso facto* protection. Mem. Op. 27-28. The court found that dismissal on this ground would be premature because, without discovery, the court "cannot determine whether the iTero is a 'digital imaging machine' (as that term is used in § 34-9-6) unless it has more information about the iTero." *Id*. at 30. The court also ruled that the Board members would "have to show that the term 'supervision' in Alabama Code § 34-9-7(a) requires a dentist's physical presence where the digital imaging is performed." *Id*. at 30 n.8.

Second, the court considered that even if the Alabama Dental Practice Act does not expressly authorize the Board's challenged conduct, the Board members still may be entitled to state-action protection "if the state actively supervised their decision to interpret and enforce the Act as prohibiting the use of an iTero without a dentist physically present." Mem. Op. 31. On this issue, the court considered itself bound on a motion to dismiss to accept SmileDirect's factual allegation that any state review was "perfunctory, ministerial, and non-

substantive," *i.e.*, that "no state supervisor in fact reviewed the substance of the Board's anticompetitive policy." *Id*. at 32.

In support of its argument on active supervision, the Board submitted a "Memo to File" showing that the LSA reviewed the challenged Board rules in 2018 and found that the rules would not affect competition. The Memo states in pertinent part:

> Rule 270-X-3-.10, Duties of Allied Dental Personnel, lists the procedures that may be performed by dental hygienists, dental assistants, and dental laboratory technicians. The amendment adds to the list of procedures the making of digital images. . . . [The Rule] do[es] not significantly lessen competition. [It] do[es] not affect competition at all.

Doc. 33-1 at 15-16.

The court, assuming that it could consider the Board's extrinsic documents on a motion to dismiss, found those documents insufficient to show active supervision by the state. The "memo to file spends a mere four sentences discussing the Board's challenged regulation," and those sentences "do not establish that the state reviewed and approved the substance of the Board's anticompetitive policy in this case." Mem. Op. 33. "In fact, because the LSA found the regulation would 'not affect competition at all,' the regulation apparently never reached the stage of Alabama's statutory review process at which its substance would have

been reviewed." *Id*. The court noted, however, that the Board members could re-assert the state-action defense on summary judgment. *Id*. at 19.

8. The court did not reach the "clear articulation" requirement of the state-action defense. We note, however, that the Board's general regulatory authority to implement a broad public interest standard, such as health and safety, does not mean that the legislature has clearly articulated a policy to displace a particular form of competition such as teledentistry. *See Phoebe Putney*, 568 U.S. at 228 ("the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively"); *Community Communications Co. v. City of Boulder*, 455 U.S. 40, 54-55 (1982) (general grant of home rule authority to municipality did not articulate any policy to displace competition in cable television). Merely because anticompetitive conduct purports to protect health and safety does not immunize it from antitrust challenge, *see FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 462-63 (1986).

9. On April 16, 2019, the Board members took this interlocutory appeal of the district court's ruling on the state-action

defense, based on the collateral-order doctrine. SmileDirect moved to dismiss this appeal for lack of jurisdiction, arguing that the district court's ruling was merely tentative, and therefore did not "conclusively determine the disputed question" of the state-action defense, which is the first of the three requirements of the collateral-order doctrine. *Will v. Hallock*, 546 U.S. 345, 349 (2006). On June 11, 2019, this Court ordered that SmileDirect's motion to dismiss be "carried with the case" for decision by the merits panel.

10. As SmileDirect's brief sets forth (at 24), the Board members must satisfy all three requirements of the collateral-order doctrine. Although our brief addresses the state-action merits, we note our view that this Court's decisions on the reviewability requirement of the collateral-order doctrine, *see Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986); *Diverse Power, Inc. v. City of LaGrange,* No. 18-11014, slip op. at 5 n.1 (11th Cir. Aug. 20, 2019), rely on the faulty premise that the state-action defense is an immunity from suit. *See* Brief of the United States as Amicus Curiae in *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720 (9th Cir. 2017) (No. 17-368);

Brief of the FTC in *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006) (No. 04-2006).[2] A majority of the circuits to have addressed this issue hold that orders denying state-action protection may not be appealed under the collateral-order doctrine. *SolarCity Corp.*; *S.C. State Bd. of Dentistry*; *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986). We agree with this majority but recognize that for this Court to join it would require an en banc decision.

SUMMARY OF ARGUMENT

The state-action defense is disfavored, narrowly construed, and the party asserting the defense (here, the Board members) bears the burden of showing that the requirements of the defense are satisfied. Applying these principles, the district court ruled correctly that the Board members have not shown at this stage of the proceeding that the

[2] SmileDirect's arguments (Br. 25-27, 29-30) highlighting the district court's unanswered factual questions demonstrate one of the reasons why the state-action defense should not be considered an immunity from suit that is appealable under the collateral-order doctrine. Factual development may be necessary to determine if the state supervisor is an "active market participant," *see Dental Examiners*, 135 S. Ct. at 1117, or whether the supervisor actually engaged in substantive review and made a decision to approve the agency rule, because the "mere potential for state supervision is not an adequate substitute for a decision by the State." *Id.* at 1115-16.

state actively supervised the Board regulations or the enforcement actions challenged by SmileDirect.

The court first ruled correctly that the active supervision requirement applies to this case. *Dental Examiners* "holds … 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 in order to invoke state-action antitrust immunity." 135 S. Ct. at 1114. SmileDirect alleges that the Board is controlled by active market participants—dentists and a dental hygienist—in the occupation that the Board regulates. The Board members' attempts to avoid *Dental Examiners*' straightforward holding are unavailing.

Next, the court rightly determined that the Board members did not show active supervision at the motion to dismiss stage. They did not present evidence that any state official(s) equipped with authority to provide active supervision reviewed the Board rules at issue, or the Board's enforcement actions, to determine whether they promote state regulatory policy rather than dentists' private interests in excluding teledentistry—and its lower prices—from the Alabama market. The

minimal review by the LSA, which went no further than declaring (without apparent basis) that the rules would have no significant anticompetitive effect, does not satisfy the "constant requirements of active supervision" that the Supreme Court has identified. *See Dental Examiners*, 135 S. Ct. at 1116. The LSA did not review the substance of the rules, and the LSA did not have the power to veto or modify the rules. Nor did the LSA review the Board's action in enforcing the rules.

ARGUMENT

I. The State-Action Defense to Antitrust Liability is Limited and Disfavored.

Competition is "the fundamental principle governing commerce in this country." *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 398 (1978). The Supreme Court, however, has recognized a limited defense to antitrust liability to accommodate principles of federalism and state sovereignty. In *Parker v. Brown*, 317 U.S. 341 (1943), the Court held that "because 'nothing in the language of the Sherman Act . . . or in its history' suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints 'as an

act of government.'" *Phoebe Putney*, 568 U.S. at 224 (quoting *Parker*, 317 U.S. at 350, 352). The state-action defense therefore does not apply "unless the actions in question are an exercise of the State's sovereign power." *Dental Examiners*, 135 S. Ct. at 1110. The Court has recognized that a state exercises sovereign power when the anticompetitive act in question is itself "[s]tate legislation" or when it is the "decision[] of a state supreme court, acting legislatively rather than judicially." *Id*. (internal quotation marks and citation omitted). Under these limited circumstances, the clear articulation and active supervision requirements do not apply, and state legislatures and supreme courts are entitled to what is sometimes called *ipso facto* state-action protection. *Id*.

The Court repeatedly has emphasized, however, that the state-action defense "is disfavored, much as are repeals by implication." *Dental Examiners,* 135 S. Ct. at 1110 (quoting *Phoebe Putney*, 568 U.S. at 225, and *Ticor Title Ins. Co.*, 504 U.S. at 636). This is because it detracts from "the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *Id.* Courts therefore interpret the state-action defense "narrowly."

Shames v. Cal. Travel & Tourism Comm'n, 626 F.3d 1079, 1084 (9th Cir. 2010); *see also Yeager's Fuel v. Pa. Power & Light Co.*, 22 F.3d 1260, 1265 (3d Cir. 1994).

To ensure that the defense is appropriately limited, the Supreme Court has imposed requirements on sub-state entities and private parties that seek to invoke it. In *Midcal*, the Court held that non-sovereign actors can invoke the state-action defense only when they can show (1) that the alleged anticompetitive conduct was taken pursuant to a "clearly articulated and affirmatively expressed . . . state policy" to displace competition, and (2) that the conduct was "actively supervised by the State itself." 445 U.S. at 105. This is "[t]he most searching level of scrutiny," and the test is "rigorous." *Edinboro College Park Apartments v. Edinboro University Foundation*, 850 F.3d 567, 573 (3d Cir. 2017).

In *Dental Examiners* the Supreme Court held that both of the *Midcal* requirements also apply to any non-sovereign state entity "controlled by active market participants" in the occupation that the entity regulates. 135 S. Ct. at 1110, 1114. State agencies controlled by active market participants are treated like "private trade associations

vested by States with regulatory authority." *Id*. This holding reflects the recognition that, when "a State empowers a group of active market participants to decide who can participate in its market," there is a "structural risk" that they will pursue "their own interests" instead of "the State's policy goals." *Id*.

Accordingly, state boards that are controlled by active market participants bear the burden of satisfying both of the *Midcal* requirements. *See Dental Examiners,* 135 S. Ct. at 1114 (board controlled by active market participants "must satisfy [the] active supervision requirement"); *see also Patrick v. Burget*, 486 U.S. 94, 101 (1988) (respondents failed to show active supervision); *Yeager's Fuel*, 22 F.3d at 1266 ("Cases since *Parker*, however, clarify that state action immunity is an affirmative defense as to which [defendant] bears the burden of proof.").

II. The *Midcal* Requirement of Active Supervision Applies to This Case.

A. The Board is Not a Sovereign for Purposes of the State-Action Defense.

The district court correctly concluded that it should analyze the Board's actions according to the test for active market participants, not

as if the Board were a sovereign actor. It reasoned that "[t]he powers, duties, and composition of Alabama's Dental Board are nearly identical to those of the North Carolina Dental Board the Supreme Court considered in *N.C. Dental*." Mem. Op. 24-25. "The similarities between the two Boards compel the conclusion that the Alabama Board is also a 'nonsovereign actor controlled by active market participants' . . . and that the principles set forth in *N.C. Dental* therefore apply to it." *Id*. at 25 (quoting *Dental Examiners*, 135 S. Ct. at 1110). The court further determined that the Supreme Court's earlier state-action cases, considering the acts of sovereigns, are inapposite because the Board is not one of the two types of actors that the Court has recognized as sovereign for these purposes. That is, the Board is not like the legislature when enacting legislation, nor is it like the state supreme court when acting legislatively rather than judicially. *Id*. at 26 (citing *Hoover v. Ronwin*, 466 U.S. 558, 567-68 (1984)).

The district court was right to reject the test that applies to acts of a sovereign. *Dental Examiners* squarely "holds … 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 in order to invoke state-action antitrust immunity." 135 S. Ct. at 1114. SmileDirect alleges that the Board is controlled by active market participants in the occupation of dentistry. Amended Complaint ¶¶ 8-15, 133, 147.

The Board members incorrectly analogize to *Hoover* in arguing that the challenged regulation is an "act of the sovereign" because it "was passed by the state of Alabama under its review procedures" (Br. 16-17). A state legislature, however, cannot impute its sovereign authority to an independent regulatory act through review procedures.

State-board regulations are not statutes and do not become treated as such merely because the Board's regulations were enacted according to state-law procedures. "State *legislation*" is an "undoubted exercise of state sovereign authority," *Dental Examiners*, 135 S. Ct. at 1110 (emphasis added). Even *Hoover* makes clear that "when a state legislature adopts *legislation*, its actions constitute those of the State … and *ipso facto* are exempt from the operation of the antitrust laws." 466 U.S. at 567-68 (emphasis added). The Supreme Court, however, has never described a state licensing board regulation as legislation or a sovereign act.

Although in *Hoover* the Supreme Court imputed the actions of an agent to the sovereign, the Board is not like the agent that acted pursuant to the sovereign's instructions in that case. The plaintiff in *Hoover* challenged the bar committee's standards as an unlawful restraint of trade. The Supreme Court, however, concluded that the committee did not act independently but merely administered the bar examination and admission process for the Arizona Supreme Court, which retained final decision-making authority over examination standards and bar admissions. The Court thus held that "the conduct that [the plaintiff] challenges was in reality that of the Arizona Supreme Court." 466 U.S. at 573.

The Board's conduct, by contrast, is not "in reality" that of the legislature. The Board allegedly did not merely administer laws enacted by the legislature, but exercised independent authority to promulgate occupational rules. (Some rules allegedly go beyond the express terms of the Alabama Dental Practice Act.) In addition, the legislature did not necessarily retain final decision-making authority over the Board's rules: as the district court found, the rules were allowed to take effect when the LSA found no significant anti-

competitive effect, without any review by the legislature itself. Mem. Op. 34.

In any event, *Hoover* did not address the special context of allegedly anticompetitive decisions by licensing boards that are controlled by active market participants. The Court's more recent decision in *Dental Examiners*, which does expressly address this context, rather than *Hoover*, sets the rule for this case.[3]

B. The Board's Characterization as an "Arm of the State" is Irrelevant to the State-Action Defense.

The Board members are also incorrect to argue that, for the purpose of analyzing the Board's actions, "the relevant actor is the state of Alabama." Br. 14. Their only support for that argument is that the

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[3] *Crockett v. NEA-Alaska*, 367 F. Supp. 3d 996 (D. Alaska 2019), cited by the Board members (Br. 17), did not involve the relevant facts of this case and *Dental Examiners*—a rule enacted by a specialized state licensing board controlled by active market participants. The court in *Crockett* first noted that state-action protection would bar the plaintiff's antitrust claim against a state *statute*. *See id.* at 1010 ("Plaintiff consequently cannot challenge PERA [the Public Employment Relations Act] itself."). Contrary to the Board members' contention that the challenged collective bargaining agreements were treated as sovereign acts, the court next applied *Midcal*'s clear articulation requirement. *See id.* (agreement is "clearly articulated and affirmatively expressed as state policy"). Moreover, the court concluded that the defendant school district was a local government not subject to *Midcal*'s active supervision requirement. *Id.* at 1011.

Board is an "arm of the state," but that characterization is legally irrelevant to the state-action defense because it stems from *state* law, as the Board members acknowledge. *See* Br. 15-16 ("arm of the state" derives from *Wilkinson v. Bd. of Dental Exam'rs of Ala.*, 102 So. 3d 368 (Ala. 2012)). The board in *Dental Examiners* likewise contended that it was an arm of the state and not subject to active supervision, yet the Supreme Court specifically rejected that claim. *Dental Examiners*, 135 S. Ct. at 1113-14. The state-action doctrine is an interpretation of a federal statute, the Sherman Act. "[F]ederal law determines which bodies require further supervision in order to gain *Parker* immunity." 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 227a, at 225 (4th ed. 2013). Although Alabama may classify the Board as an "arm of the state" for relevant state-law purposes, that designation does not govern the federal antitrust inquiry.

Thus, whether the *Midcal* requirements apply to the Board does not "turn[] . . on the formal designation given by States to regulators." *Dental Examiners*, 135 S. Ct. at 1114. *Dental Examiners* makes clear that federal antitrust policy supersedes state law when a state delegates its regulatory power to self-interested market participants.

See id. at 1111 ("under *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants"); *accord Phoebe Putney*, 568 U.S. at 236 ("federalism and state sovereignty are poorly served by a rule of construction that would allow 'essential national policies' embodied in the antitrust laws to be displaced by state delegations of authority 'intended to achieve more limited ends.'") (quoting *Ticor*, 504 U.S. at 636).[4]

The Board's "arm of the state" argument is a mistaken attempt to import Eleventh Amendment sovereign immunity principles into the state-action defense. The "doctrines are not coextensive. Even if the University were an arm of the state [for Eleventh Amendment purposes], the University is not 'sovereign' for purposes of *Parker*." *Edinboro College Park Apartments*, 850 F.3d at 575. *See also S.C. State*

[4] For this reason, *Rosenberg v. State of Florida*, 2015 WL 13653967 (S.D. Fla. Oct. 14, 2015), does not help the Board members (*see* Br. 14-15). That decision's description of the Florida Bar as an "arm of the state" by virtue of Florida Supreme Court rules (*i.e.*, state law) does not overcome *Dental Examiners*' directive that whether the *Midcal* requirements apply does not "turn[] … on the formal designation given by States to regulators." 135 S. Ct. at 1114.

Bd. of Dentistry, 455 F.3d at 446-47 (distinguishing *Parker* defense from Eleventh Amendment immunity). Thus, the district court correctly reasoned that because the doctrines are governed by different tests, the Board simultaneously can be an "arm of the state" under the Eleventh Amendment and a non-sovereign actor for state-action purposes. Mem. Op. 25-27.

III. The Board Members Have Not Demonstrated That the State Actively Supervised the Board's Challenged Rules and Enforcement Actions.

A. The Alabama Scheme of Legislative Review, As Applied in This Case, Is Not Active Supervision.

Dental Examiners identified as a "constant requirement[] of active supervision" that the state supervisor must "review the substance of the anticompetitive decision, not merely the procedures followed to produce it." 135 S. Ct. at 1116. Review of the "substance" means review to determine whether the action at issue actually implements a clearly articulated state policy to displace competition, instead of serving private competitive interests. *See Patrick*, 486 U.S. at 101 (referring to "review … to determine whether such decisions comport with state regulatory policy and to correct abuses"); *id*. at 105 (review of the

"merits" of a decision determines "whether it accorded with state regulatory policy").

Based on the Amended Complaint and the materials before the district court, that essential review did not occur. As the district court concluded, when the LSA (inexplicably) determined that the challenged regulations would have no significant anticompetitive effect,[5] review ended and the regulations took effect without any further action by the legislature. Mem. Op. 33-34. The LSA purported to review the regulations only for their potential anticompetitive effects, not for whether they comported with state policy or served the private interests of Board members. Doc. 33-1 at 15-16.

Indeed, it appears the LSA *could not have* conducted a substantive review in this case because the Alabama scheme of review provides that *only if* the LSA "determines that a rule . . . may significantly lessen

[5] The LSA's finding is inexplicable because the likely effect on competition is plain from the fact that the Board's rule sought to exclude new, innovative providers of teledentistry services for which there is significant consumer demand. *See* Amended Complaint ¶¶ 19, 143. Dr. Leeds alleges repeatedly, in allegations that must be taken as true on a motion to dismiss, that enforcement of the Board's challenged rules will prevent him from treating patients in Alabama through teledentistry. *E.g.*, *id*. ¶¶ 2-3, 71-72, 83-84, 124, 129.

competition" will it then "determine whether the rule was made pursuant to a clearly articulated state policy to displace competition." Ala. Code § 41-22.22.1(b); *see also* subsections (d) and (e) (same). If the LSA instead initially finds no significant effect on competition, as it did here, then it does *not* review for conformity with state policy. Mem. Op. 34. The district court therefore correctly determined that "the regulation apparently never reached the stage of Alabama's statutory review process at which its substance would have been reviewed." *Id.* at 33.

Contrary to the Board members' contention, the assertion that "the State put in place adequate measures to actively supervise the Board" (Br. 27) does not show active supervision if those procedures do not result in an actual substantive review of the Board's rules. *Dental Examiners* makes clear that merely having review procedures in place is insufficient: the "mere potential for state supervision is not an adequate substitute for a decision by the State." 135 S. Ct. at 1115-16;

see also Patrick, 486 U.S. at 101 (state officials must "have *and exercise* power to review particular anticompetitive acts") (emphasis added).[6]

Nor is the Board correct to argue that "principles of federalism" require a court to defer to a state's assertion that its supervisory procedures suffice as active supervision, even when no substantive review actually occurred. Br. 28. "Deference" plays a role in the state-action defense only in that federal antitrust law yields to a state's sovereign choices about how to regulate its economy, but only if the state shows "real compliance" with *Midcal*. *See Ticor*, 504 U.S. at 636; *Parker*, 317 U.S. at 350-51.

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[6] For this reason, *Prime Healthcare Services-Monroe, LLC v. Indiana University Health Bloomington, Inc.*, 2016 WL 6818956 (S.D. Ind. Sept. 30, 2016), *see* Br. 24-25, is not analogous. With respect to active supervision, that case held only that the plaintiff failed to avail itself of a state-law forum. The court did not find that the state supervisor, the EMS Commission, would have conducted a sufficient review of the exclusive contracts and other alleged exclusionary conduct if the plaintiff had so availed itself. *See id*. at *8. The Board members also cite *Allibone v. Texas Medical Board*, 2017 WL 4768224 (W.D. Tex. Oct. 20, 2017), Br. 27. That decision, to the extent it can be read to hold that merely having review procedures in place suffices to show active supervision, is inconsistent with *Dental Examiners*, *Ticor* (*see* 504 U.S. at 638), and *Patrick* (*see* 486 U.S. at 101), because there was no indication that actual substantive review of the alleged anticompetitive decision occurred.

Finally, the Board members are mistaken that Ala. Code § 34-9-43.2 immunizes the Board from antitrust liability. Br. 26. Even if that statute may be relevant to the "clear articulation" requirement of the state-action defense (which the district court did not address), because a state may through legislation indicate its policy to displace competition with regulation, the statute is not relevant to the question of active supervision. As explained above, whether active supervision is required, and whether it was satisfied in a particular case, are issues of federal law and subject to requirements articulated by the Supreme Court. If a state legislature simply could give its blessing to anticompetitive conduct without meeting those rigorous requirements, it would be akin to the state "giv[ing] immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful." *Parker*, 317 U.S. at 351.

B. Under the Circumstances of This Case, the Alabama Legislative Services Agency Did Not and Could Not Provide Active Supervision.

The district court assumed, without deciding, that the LSA "qualifies as a 'state supervisor' under *N.C. Dental*." Mem. Op. 33. The court correctly treated the LSA as performing the role of supervisor in

this case insofar as no other state entity even purported to review the Board's regulations or its cease-and-desist letter. The legislature itself conducted no substantive review at all. Given the LSA's lack of power to conduct a substantive review or to approve or reject a Board regulation or action, however, the LSA did not and could not provide the required active supervision under *Dental Examiners*.

Dental Examiners requires that the state supervisor must not only review the substance of the regulation, but also must "have the power to veto or modify particular decisions to ensure they accord with state policy." 135 S. Ct. at 1116. That is, the supervisor must possess authority to make an independent judgment to approve or disapprove the board's decision. *See Ticor*, 504 U.S. at 634-35; *see also Pinhas v. Summit Health*, 894 F.2d 1024, 1030 (9th Cir. 1989) (no active supervision where reviewing "court may not substitute a judgment for that of the governing board even if it disagrees with the board's decision") (citation omitted).

Under the Alabama scheme of review, however, the LSA does not have that power. The statute gives a committee of the legislature, not the LSA, the power to "approve, disapprove, disapprove with a

suggested amendment, or allow the agency to withdraw the rule for revision," Ala. Code § 41-22-22.1(b). The same is true for actions of the Board taken to enforce the rule. *Id*. subpart (e). In both cases, that authority is triggered only if the LSA first determines that a rule or action may significantly lessen competition, that the rule or action was made or taken pursuant to a clearly articulated state policy to displace competition, and the LSA certifies those determinations to the committee, *id*. subparts (b), (e), none of which happened here.

The statute manifestly does not give the LSA itself any power to veto or modify any rule or Board action; instead, the LSA may only "determine whether the rule [or action] may significantly lessen competition and, if so, whether the rule [or action] was made pursuant to a clearly articulated state policy to displace competition." Ala. Code § 41-22-22.1(a), (d), (e). If the LSA answers those questions in the affirmative, it simply "certif[ies] those determinations to the [legislative] committee." *Id*. subsection (b); subsections (c), (e) (same). The "mere presence of some state involvement or monitoring," however, "does not suffice." *Patrick*, 486 U.S. at 101. Rather, active supervision "requires that state officials have and exercise power to review

particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id*. In sum, the legislature did not supervise the challenged Board rules or cease-and-desist letter, and the only entity to review the rules could not provide active supervision.

CONCLUSION

If the Court addresses the active supervision component of the Board members' state-action defense, the Court should affirm the district court's holding that the Board members did not meet their burden to show active state supervision.

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rules 32(a)(7)(B) and 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 6,453 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

September 11, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 11, 2019, I electronically filed the foregoing Brief of the United States of America and Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellees with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I also sent 7 copies to the Clerk of the Court by FedEx next day delivery.

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