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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., *Leeds v. Jackson*, No. 19-11502 (11th Cir., filed Sept. 11, 2019); *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 Georgia actively supervised the challenged regulation of the Georgia Board of Dentistry.

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 regarding the application of the defense to state regulatory boards controlled by market participants.

that disruption brings the benefits of competition and innovation to consumers.

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. ¶¶ 26-29. The dentist then prescribes the aligners, which are sent directly to the patient. Id. ¶ 21. The patient therefore need never visit a traditional dental office for teeth alignment treatment. Id. ¶¶ 20-21.

SmileDirect claims to reduce the cost of expensive aligner treatment and to increase access to treatment for unreached segments of the population. Complaint ¶¶ 21-23, 32. SmileDirect opened its first SmileShop in Georgia in July 2017. Id. ¶ 33. SmileDirect further alleges that incumbent dentists and orthodontists who practice in traditional dental offices have used their influence with industry-controlled state licensing boards to enact regulatory restraints on competition from SmileDirect, for the purpose of "restricting the number of competitors and causing prices in the Relevant Market to rise, maintain, or stabilize above competitive levels." Id. ¶ 97.

3. The Georgia Board of Dentistry (hereafter "Board") is a state agency that regulates the practice of dentistry in Georgia. Complaint

¶¶ 4, 17. SmileDirect alleges that the eleven-member Board consists of nine dentists, one dental hygienist, and one non-dentist/non-hygienist, with the dentists and th e hygienist being active market participants in the profession that the Board regulates. Id . ¶¶ 4-15. SmileDirect further alleges that, beginning in late 2017, the Board amended its rules so as to restrict competition from teledentistry services and make it "virtually impossible" for Smile Direct to serve Georgia consumers across state lines. Id . ¶¶ 34-39, 43. Specifically, an amended rule requires that certain non-dentist pe rsonnel may take "digital scans for fabrication [of] orthodontic appliances and models" only when acting under the "direct supervision" of a licensed dentist. Ga. Comp. R. & Regs. r. 150-9.02(aa). Other rules define "direct supervision" as requiring that a dentist be physically present "in the dental office or treatment facility while the procedures are being performed by the

professional licensing boards of this state to ensure that their actions are consistent with clearly articulated state policy[.]" Id. § 43-1C-3(a). As to rulemakings, the Governor shall "[r]eview and, in writing, approve or veto" two kinds of licensing board rules: (1) any rule that is "required to be filed in the office of the Secretary of State," and (2) any rule that is "challenged via an appeal to the Governor" or submitted by a licensing board for review by the Governor. Id. subsections (a)(1) and (2). As to other actions, the Governor shall "[r]eview and, in writing, approve, remand, modify, or reverse any action" by a licensing board that is challenged via an appeal to the Governor or submitted by a board for review by the Governor. Id. subsection (a)(3).

5. SmileDirect alleges that the amended subparagraph (aa) of Board Rule 150-9.02 will subject it to the threat of both Board action seeking to enjoin SmileDirect from conducting business in Georgia and enforcement action by the state seeking criminal penalties. Complaint ¶¶ 34-39. SmileDirect filed suit, alleging that the amended rule violates (among other things) Section 1 of the Sherman Act, 15 U.S.C. § 1. Complaint ¶¶ 89-99. SmileDirect alleges that the State of Georgia

"did not actively or adequately supervise the Board with regard to its action in passing

the Board members "who will benefit monetarily, now or in the future, by restraining trade[.]" Order at 12-13; Complaint ¶ 45. Given these allegations, the court found that "the Complaint reveals a well-pleaded factual dispute that is not resolved by the Certification of Active Supervision," and discovery is necessary to determine "whether the Certification of Active Supervision was merely 'rubberstamped' as a matter of course." Order at 13. The court noted, however, that the Board members could re-assert the state-action defense on summary judgment. Id.

7. 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).

8. On June 10, 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. The Board members must satisfy all three requirements of the collateral-order doctrine. See Will v. Hallock, 546 U.S. 345, 349 (2006). 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) (2016 WL 3208041); Brief of the FTC in S.C. State Bd. of

Dentistry v. FTC , 455 F.3d 436 (4th Ci r. 2006) (2005 WL 3775767). [2] A majority of the circuits to have a ddressed 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 recogn ize that for this Court to join it would require an en banc decision.

SUMMARY OF ARGUMENT

The state-action defense is dis favored, narrowly construed, and the party asserting the defense (here, the Board members) bears the burden of showing that the requiremen ts 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. 41-42) highlighting the district court's unanswered factu al questions demonstrat e one of the reasons why the state-action defense should not be considered an immunity from suit that is appealable under th e 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 su bstantive review and made a decision to approve the agen cy rule, because the "mere potential for state supervision is not an adequa te substitute for a decision by the State." Id . at 1115-16.

state actively supervised the Board regulation 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 nu mber of decisionmakers are active market participants in the occupati on 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 ma rket participants—dentists and a dental hygienist—in the occupati on that the Board regulates.

Contrary to the Board members' contentions, the ipso facto standard for anticompetitive action by a state sovereign entity does not apply here. First, SmileDirect does not allege that the Governor alone took the action challeng ed as anticompetitive. The Governor does not direct the Board's activities or set the bounds of the Board's authority. Instead, as the Certification of Acti ve Supervision states, the Governor's sole role was to serve as the "supervi sor" of certain Board conduct. This case therefore does not present the question whet her or when a governor plays a role equivalent (fo r state-action purposes) to a state

legislature or a state supreme court acting legislatively. Second, Dental Examiners cannot be avoided on the ground that gubernatorial review of the Board's allegedly anticompetitive conduct transforms that conduct into an act of the Governor, or an act attributable to the Governor. Far from obviating the active supervision requirement, the text of the Certification, the statutory language, and the legislative history all reflect a system created precisely to comply with Dental Examiners' requirement of active supervision. The question is whether the Board members can show that this requirement has been satisfied.

The district court also rightly determined that the Board members did not show, at the motion to dismiss stage, that the involvement of the Governor amounted to active supervision. First, SmileDirect alleges that the Governor "did not ac

even assuming it could be considered on a motion to dismiss, does not establish, on its face, whether the Governor engaged in the "constant requirements of active supervis

In Dental Examiners

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

The district court correctly held that this case is governed by Dental Examiners , and the Board members therefore must satisfy the active supervision requirement. Order at 12. Dental Examiners squarely "holds … that a state boar d on which a controlling number of decisionmakers are active market pa rticipants in the occupation the board regulates must satisfy Midcal's active supervision requirement in order to invoke state-action antitr ust immunity," 135 S. Ct. at 1114, a holding that the Board members do not dispute (Br. 34-35). SmileDirect alleges that the Board is controlled by active market participants in the occupation of dentistry. Complaint ¶¶ 4-15.

In an attempt to evade this di rectly analogous precedent and the Midcal requirements that come with it, the Board members wrongly assert (1) that the Governor's supervis ory role here is that of the state acting as a "sovereign actor" in a state-action sense (Br. 23-30), and (2) that the challenged rule can be "attributed" to the Governor (Br. 30-34), making it ipso facto an act of the sovereign. Both assertions are incorrect. This Court need not decide whether or when a governor acts as the sovereign for state-action pu rposes. Under Georgia's statutory

that the Board sought to "expand the list of services dental assistants may perform."

When the Supreme Court has found that a legislature or state supreme court was acting in a sovereign capacity, the challenged market restraints were adopted by or mandated by the sovereign. Thus, in Parker the Court "considered the antitrust implications of the California Agriculture Prorate Act" and held that "when a state legislature adopts legislation, its actions constitute those of the State." Hoover v. Ronwin , 466 U.S. 558, 568 (1984). In Bates v. State Bar of Arizona, 433 U.S. 350 (1977), where the Court held that "a decision of a state supreme court, acting legislatively rather than judicially, is exempt from Sherman Act liability as state action," Hoover, 466 U.S. at 568, the state bar carried out the "affirmative command of the Arizona Supreme Court" and "act[ed] as the agent of the court under its continuous supervision." Bates, 433 U.S. at 360, 361. In Hoover, where the plaintiff challenged the activities of a bar admissions committee, the Court held that "conduct that [plaintiff] challenges was in reality that of the Arizona Supreme Court" becaus

court's rules, and the court made th e final decision to grant or deny admission to practice. 466 U.S. at 561, 572-73.

Here, by contrast, SmileDirect does not challenge any statute, as in Parker , and the Governor has not delegated authority to the Board or directed it, unlike the Arizona Suprem

It may be that in some circumsta nces the governor may act as a sovereign in an antitrust sense, fo r example, in the command of the National Guard in the wake of a natural disaster. In this case, however, the Georgia legislature de legated to the Governor limited supervisory powers over active mark et participants; it did not create a new "sovereign" power for the Governor to regulate the occupation of dentistry. The Certification of Acti ve Supervision itself recites that "Georgia law grants the Board authority" to regulate dental assistant services, not the Governor. Doc. 29-2 (citing O.C.G.A. § 43-11-9) (emphasis added). When a governor is authorized to act only as a supervisor, in compliance with Dental Examiners , there is no basis to find the type of ipso facto protection that appl ies when a legislature passes legislation or a state supreme court acts in a legislative role. The question is thus whether the active superv ision test is satisfie d.

B. The Board's Challenged Rule Cannot Be Attributed to the Governor By Reason of His Supervision.

In the absence of a restraint on competition by the Governor himself, the Board members seek to analogize the Board to the bar admissions committee in Hoover by pointing to the supervision and "ultimate authority" of the Arizona Supreme Court (Br. 32). The Board

members ignore, however, that the Arizona Supr eme Court also directed and mandated the activities of the bar admissions committee. "The Supreme Court Rules specified th e subjects to be tested, and the general qualifications required of applicants for the Bar. … After giving and grading the examination, the Co mmittee's authority was limited to making recommendations to the Supreme Court. The court itself made the final decision to gran t or deny admission to practice." 466 U.S. at 572-73.

By contrast, the Board here di d not administer any policy or directive of the Governor and did not merely follow rules promulgated by the Governor. Nor does the Gove rnor here retain final decision-making authority over how the Boar d rule is applied to individual cases—i.e., the conduct of non-dentist personnel in photographing a patient's mouth or the conduct of de ntists who serve Georgia consumers via teledentistry—as the Arizona Supreme Court had final authority over examination standards and in dividual bar admissions. Thus, Hoover simply is not controlling.

Hoover itself explained that "[c]loser analysis [i.e., more exacting scrutiny than ipso facto protection] is required when the activity at

have been entitled to state-action protection because it would have satisfied Midcal's active supervision requirement. 135 S. Ct. at 1116. The Court thus identified "constant requirements of active supervision" that could have met the active supervision test. Id. There would have been no need to spell out proper methods of supervision if board rules simply could be attributed to the supervisor and declared ipso facto protected.

III. The Board Members Have Not Demonstrated, At the Motion to Dismiss Stage, That the State Actively Supervised the Board's Challenged Conduct.

Dental Examiners identifies 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

judgment and control" such that the Board's conduct "has been established as a product of deliberate state intervention." Ticor Title Ins. Co., 504 U.S. at 634. The text of the Certification, however, appears to disclaim independent judg ment by the Governor; it recounts the "purpose" of the amendment " [a]s stated by the Board ." Doc. 29-2 (emphasis added).

Moreover, the Certification's stated rationale for approval is that the Board's amended rule is "within its authority" because it is "related to" dental assistant services. Merely determining that the Board regulated an occupation within its authority, however, is not active supervision. See Patrick , 486 U.S. at 105 ("constricted review does not convert the action of a private party … into the action of the State for purposes of the state-action do ctrine"). The Supreme Court has explained that "state-law authority to act is insufficient … the substate governmental entity must also sh ow that it has been delegated authority to act or regula te anticompetitively." Phoebe Putney , 568 U.S. at 228.

In any event, Dental Examiners makes clear that whether the Board exceeded its authority is not the relevant supervisory question.

See135 S. Ct. at 1116 ("Whether or no t the Board exceeded its powers under North Carolina law," there was no evidence of state control of the board's action). The relevant question is whether a proper state supervisor reviewed the challenged Board rule to determine whether the rule actually implem ents an articulated state policy to displace competition instead of serving privat e competitive interests. Although the Governor has a statutory "duty" to review Board rules, as the Board members note (Br. 48), actually carr ying out that duty is a different matter. The Certification of Active Su pervision, by finding only that the Board's rule was "related to" dental assistant services, does not establish that the Governor conducte d a substantive review to ensure that the rule and the Board's enforceme nt of it are in "accord with state policy" to displace competition. Id . at 1111 (quoting Patrick , 486 U.S. at 101). The Board members therefore have not at this stage of the litigation met their burden to prove the state-action defense applies to their conduct.

Finally, the Board members are wr ong to argue that the active supervision test "looks to the State's review mechanisms set out in state law … not to the details of a state su pervisor's review of the particular

CERTIFICATE OF COMPLIANCE

1. This brief complies with the ty pe-volume limitations of Rules 32(a)(7)(B) and 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 6,476 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the ty peface requirements of Rule 32(a)(5) of the Federal Rules of Appella te Procedure and the type style requirements of Rule 32(a)(6) because th is brief has been prepared in a proportionally spaced typeface usin g Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

September 25, 2019

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CERTIFICATE OF SERVICE

I hereby certify that on September 25, 2019, I electronically filed the foregoing Brief of the United St ates of America and Federal Trade Commission as Amici Curiae Suppo rting Plaintiff-Appellee with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit using th e CM/ECF system. I also sent 7 copies to the Clerk of the Court by FedEx next day delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

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