No. 20-1018

In the Supreme Court of the United States

LOUSIANA REAL ESTATE APPRAISERS BOARD,
Petitioner,

v.

UNITED STATES FEDERAL TRADE COMMISSION,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF OF *AMICUS CURIAE* THE FEDERATION OF STATE MEDICAL BOARDS IN SUPPORT OF PETITIONER

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March 1, 2021

MOTION FOR LEAVE TO FILE BRIEF OF *AMICUS CURIAE* THE FEDERATION OF STATE MEDICAL BOARDS

The Federation of State Medical Boards ("FSMB") is a non-profit organization whose members are the seventy-one state and territorial medical licensing and disciplinary boards of the United States. Since 1912, the mission of FSMB has been to support State Medical Boards in protecting the public and improving the quality, safety, and integrity of health care by promoting high standards for physician licensure and practice. FSMB's purposes include supporting the ability of State Boards of Medicine to act in what they believe to be in the best interests of patients and the advancement of public health.

Throughout its history, FSMB has supported laws, regulations, and policies that enable State Boards of Medicine to efficiently carry out their responsibility to regulate the practice of medicine in the public interest, prioritizing public safety first and foremost. FSMB has assisted states in including policies that expand access to care through license reciprocity and has effectuated federal healthcare priorities through state-level implementation on issues of concern, such as mitigating the opioid epidemic and addressing physician wellness and burnout.

However, FSMB is concerned that, ever since this Court's decision in *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494 (2015) ("*North Carolina Dental*")—which held that actions by state regulatory boards are fully subject to the federal antitrust laws unless those actions are undertaken pursuant to

affirmatively expressed state policy and subject to active state supervision—good-faith efforts to regulate the practice of medicine in the public interest by State Boards of Medicine will expose those Boards and their members to time-consuming and expensive antitrust lawsuits. The results of this exposure are (1) to cause State Boards of Medicine to shrink from making regulatory decisions that have competitive consequences and (2) to discourage knowledgeable and conscientious physicians from serving on those Boards.

This problem is compounded if, as the court below has held, the issue of state-action immunity can be decided only after a full-blown antitrust case and without an interlocutory appeal of rejection of the state-action defense—with all the uncertainty and expense that antitrust cases inevitably entail. FSMB is in a unique position to explain these issues to the Court from the perspective of State Boards of Medicine. FSMB therefore seeks leave to file an *amicus* brief urging this Court to grant the petition for certiorari and to hold that the state-action defense of a state regulatory board should be decided at the outset of the case and should be subject to immediate review if a motion to dismiss on immunity grounds is denied.

FSMB has obtained the written consent of all parties to file its proposed *amicus* brief. However, FSMB did not provide notice within 10 days of filing this brief under Supreme Court Rule 37.2(a) and therefore files this motion under Rule 37.2(b) seeking permission to file the attached brief in support of petitioner.

Respectfully submitted,

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INTEREST OF *AMICUS CURIAE* [1]

The Federation of State Medical Boards ("FSMB") is a non-profit organization whose members are the seventy-one state and territorial medical licensing and disciplinary boards of the United States. Since 1912, the mission of FSMB has been to support State Medical Boards in protecting the public and improving the quality, safety, and integrity of health care by promoting high standards for physician licensure and practice. FSMB's purposes include supporting the ability of State Boards of Medicine to act in what they believe to be in the best interests of patients and the advancement of public health.

Throughout its history, FSMB has supported laws, regulations, and policies that enable State Boards of Medicine to efficiently carry out their responsibility to regulate the practice of medicine in the public interest, prioritizing public safety first and foremost. FSMB has assisted states in including policies that expand access to care through license reciprocity and has effectuated federal healthcare priorities through state-level implementation on issues of concern, such as mitigating the opioid epidemic and

[1] Pursuant to Supreme Court Rule 37.2, *amicus* states that all parties have provided written consent to filing this brief. However, FSMB did not provide notice within 10 days of filing this brief under Rule 37.2(a) and therefore has filed a motion under Rule 37.2(b) seeking permission to file this brief. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person or entity other than *amicus*, its members, or its counsel made such a monetary contribution.

addressing physician wellness and burnout.

However, FSMB is concerned that, ever since this Court's decision in *North Carolina State Bd. of Dental Examiners v. FTC*, 574 U.S. 494 (2015) ("*North Carolina Dental*")—which held that actions by state regulatory boards are fully subject to the federal antitrust laws unless those actions are undertaken pursuant to affirmatively expressed state policy and subject to active state supervision—good-faith efforts to regulate the practice of medicine in the public interest by State Boards of Medicine will expose those Boards and their members to time-consuming and expensive antitrust lawsuits. The results of this exposure are (1) to cause State Boards of Medicine to shrink from making regulatory decisions that have competitive consequences and (2) to discourage knowledgeable and conscientious physicians from serving on those Boards.

This problem is compounded if, as the court below has held, the issue of state-action immunity can be decided only after a full-blown antitrust case and without an interlocutory appeal of rejection of the state-action defense—with all the uncertainty and expense that antitrust cases inevitably entail. FSMB therefore urges this Court to grant the petition for certiorari and to hold that the state-action defense of a state regulatory board should be decided at the outset of the case and should be subject to immediate review if a motion to dismiss on immunity grounds is denied.

At a minimum, a decision by this Court on the timing of judicial consideration of the state-action defense by state regulatory boards will provide State Boards of Medicine and other state boards with much needed

clarity on how to proceed if their actions are challenged under the federal antitrust laws. A decision by this Court will ultimately impact the manner in which State Boards of Medicine regulate in the interests of patients and the public health. Such a decision will have a significant effect on the ability of these Boards to issue rules on such issues as the prescribing of opioids and other habit-forming drugs, integration of technology into the delivery of health care, and evolving methods of healthcare delivery such as telemedicine and other methods of delivery of medical care in which the patient may not be seen in person by a physician.

SUMMARY OF ARGUMENT

The question of whether the state supervision of the actions of a state regulatory board is sufficiently active to confer antitrust immunity under the state-action doctrine should be definitively decided at the outset of a case—not after discovery and a trial. This timing is particularly important given that whether state supervision of a regulatory board is sufficiently active to justify immunity is "flexible and context dependent." *North Carolina Dental*, 574 U.S. at 515. A rule that a decision on state action immunity must await a final judgment after plenary antitrust proceedings serves only to cause State Boards of Medicine to shrink from making difficult decisions that have competitive consequences and for physicians to decline to serve on such Boards—lest they be exposed to time-consuming, highly expensive, and extremely burdensome litigation. This Court should therefore grant the petition and reverse the decision of the Court of Appeals.

ARGUMENT

This case presents a question of importance for the Court to consider. Whether the oversight of the activities of a state regulatory board is sufficient to meet the requirements of the state-action doctrine, thereby shielding the board from antitrust liability, should be decided at the outset of a case—not after discovery and a trial. As long as uncertainty persists on these issues, State Medical Boards, as well as the analogs in all regulated professions, will be subject to significant difficulties when issuing rules designed to protect the public interest or may shrink from regulating in what they regard to be in the best interests of patients—all for no reason other than to avoid the substantial costs and uncertainties of plenary antitrust litigation.

I. Prompt Resolution Of A State Action Immunity Defense By State Boards of Medicine Is Essential To Enable Those Boards To Efficiently Regulate The Practice of Medicine In the Public Interest.

Although this case arises in the context of actions by a state real estate appraisal board, resolution of this case will have enormous consequences for the ability of State Boards of Medicine to regulate the conduct of physicians in the public interest. State medical boards have been called upon, for example, to implement rules that implement federal law, especially for such matters as the prescribing of controlled substances and monitoring of opioid abuse. *See, e.g.*, John S. McCain Opioid Addiction Prevention Act, H.R. 1614, S. 724, 116th Congress (2019) (proposing limits on opioid prescriptions for acute pain); Prescription

Drug Monitoring Act of 2019, H.R. 3974, S. 516, 116th Congress (proposing reporting requirements for state prescription-drug monitoring programs); *see also* 21 U.S.C. § 831(h)(2) (requiring the Attorney General to promulgate regulations allowing a "special registration" for practitioners of telemedicine to prescribe controlled substances without an in-person exam).

Denial of the petition for certiorari will mean that such Boards will be exposed to enormously expensive, full-blown antitrust litigation whenever they issue a regulation that is said by a plaintiff to suppress competition. And, of course, the very nature of regulation is to impact competition. Thus, denial of the petition will discourage State Boards from taking actions that will expose them to this sort of litigation and will also discourage qualified physicians from serving on these Boards for fear of being named as defendants in such litigation—even if the action is a good-faith effort to implement federal law or policy.

This Court has long recognized that the state's protection of "the health of its citizens . . . *is at the core* of its police power." *Sporhase v. Neb. ex rel. Douglas*, 458 U.S. 941, 956 (1982) (emphasis added). The related need to regulate professionals that practice medicine has for more than a century been recognized as an appropriate exercise of the power of the state. *Dent v. West Virginia*, 129 U.S. 114 (1889). This Court expressed similar approval of the state's power to regulate other similarly situated health professionals in *Semler v. Or. State Bd. of Dental Exam'rs*, 294 U.S. 608, 611 (1935) ("That the State may regulate the practice of dentistry, prescribing the qualifications that are reasonably necessary, and to that end may

require licenses and establish supervision by an administrative board, is not open to dispute."). Preventing State Boards of Medicine from obtaining early dismissal of antitrust cases where there has been active state supervision of their conduct will undermine these important state interests.

State-action immunity should be conclusively litigated as early as possible—and should not be resolved after plenary proceedings. Moreover, if a motion to dismiss based on state-action immunity is denied, that denial should be immediately appealable. Otherwise, State Boards of Medicine and other state regulatory boards will be forced to carry out their responsibilities in the shadow of protracted and costly antitrust litigation that will interfere with the ability of states to effectively implement regulatory policies. *See* Fundamentals of Antitrust Law § 2.04[8], at 2-52 (emphasizing "[t]he importance of *Parker*'s status as an immunity" because of the possibility that public entities and officials could be "intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they might ultimately win"). The prospect of expensive antitrust litigation does more than inhibit and delay the issuance of rules designed to serve the public interest. It also dissuades qualified practitioners—people thoroughly informed and experienced in their professions—to regulate within their areas of expertise. *See S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 64 (1985).

The threat of litigation is particularly problematic in cases against state regulatory boards because such boards face the additional "heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper

execution of the work of the Government." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009). The threat of such suits in the antitrust context is amplified since plaintiffs in antitrust matters are quick to bring "wild and wooly lawsuits" that the state would be forced to defend. Richard Posner, Antitrust Law: An Economic Perspective 228 (1975).

Since *North Carolina Dental*, several cases have been filed against State Medical Boards that have caused these Boards and their States to incur significant costs. *See, e.g., Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343 RP (W.D. filed Apr. 29, 2015) (antitrust challenge by a telemedicine provider to the Texas Medical Board's in-person patient exam rule); *Allibone v. Tex. Med. Bd.*, No. 1:17-cv-00064-SS (W.D. Tex. filed Jan. 30, 2017) (challenging disciplinary proceedings against a physician practicing "complementary and alternative medicine"); *Axcess Med. Clinic, Inc. v. Miss. St. Bd. of Med. Licensure*, No. 3:15-cv-00307-WHB-JCG (S.D. Miss. filed Apr. 24, 2015) (challenging rule restricting non-physician ownership of "pain management clinics"); *DeJong v. Idaho State Bd. of Med.*, No. 1:17-cv-00469-BLW (D. Idaho filed Nov. 15, 2017) (challenging discipline of out-of-state telemedicine providers). Despite the clear lack of standing for lack of market impact, an antitrust challenge to discipline of an individual practitioner has necessitated review by the United States Court of Appeals. *Petrie v. Va. Board of Med.*, 648 Fed.Appx. 352 (4th Cir. 2016).

Numerous cases have also been brought against regulatory boards of other professions, most notably against state dental boards. *See, e.g.*, *Sulitzer v. Tippins*, No. CV 19-8902-GW-MAAX (C.D. Cal. filed Oct.

16, 2019), *appeal filed*, No. 20-55735 (9th Cir.); *Leeds v. Bd. of Dental Exam'rs*, No. 2:18-cv-01679-RDP (N.D. Ala. filed Oct. 12, 2018), *appeal filed*, Nos. 19-11502 & 19-11863 (11th Cir.); *SmileDirectClub, LLC v. Battle*, No. 1:18-cv-02328-SDG (N.D. Ga. filed May 21, 2018), *aff'd* 969 F.3d 1134 (11th Cir.), *vacated and rehearing en banc ordered*, 981 F.3d 1014 (11th Cir. 2020).

The personal and economic burden on the state to defend against such private actions, even if the state is confident that no antitrust violation occurred and that it actively supervised the defendant board, is alarmingly high. In antitrust cases, discovery alone accounts for as much as 90 percent of litigation costs.[2] The impact of such costs on a defendant's decision-making has been recognized by this Court. *See Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007) (discussing the risk that prohibitively expensive antitrust discovery "will push cost-conscious defendants to settle even anemic cases before reaching those proceedings"). Prompt resolution of state-action defenses would substantially reduce these costs and burdens—particularly if this Court were to give clear guidance on what sort of state supervision would satisfy the active state-supervision prong of the state-action doctrine. It would thus encourage state regulatory boards to address important issues without the threat of being subject to enormously expensive antitrust litigation.

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[2] Memorandum from Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000).

As it is, a state medical board may have to modify its budget to pay for the costs of protracted litigation, to the detriment of its other activities, such as investigation and discipline of licensees. The majority of state medical boards are self-funded, some entirely from licensure fees. *See* U.S. Medical Regulatory Trends and Actions Report, Federation of State Medical Boards, *available at* www.fsmb.org/ siteassets/advocacy/publications/us-medical-regulatory-trends-actions.pdf (Board Budget Authority and Reserve Fund Information). The inability of a State Medical Board to quickly dispose of litigation through an immediate motion to dismiss on state-action grounds, and interlocutory appellate review of an adverse decision, may leave the Board no choice other than to retreat from the challenged action to conserve funds for equally important aspects of medical regulation—or to pass these costs through to their licensees.

Protracted litigation to answer the question of immunity carries with it more than just a financial cost. The continued exposure to treble damages liability creates a social cost, and the inability to quickly resolve the immunity defense will deter well-meaning and civic-minded professionals from serving on Medical Boards. Potential personal antitrust liability has already caused some to reconsider service on similarly situated regulatory boards. *See, e.g.,* Minutes of Florida Board of Podiatric Medicine (Feb. 3, 2017), *available at* www.floridaspodiatricmedicine.gov/meetings/minutes/2017/02-february/020317-minutes.pdf (two members of Florida Board of Podiatric Medicine resign citing antitrust liability concerns).

This Court has recognized that, for the regulatory functions of the state to work, there is "the need to

protect officials who are required to exercise their discretion and the related public interest in encouraging the vigorous exercise of official authority." *Butz v. Economou*, 438 U.S. 478, 506 (1978). Resolution of the state-action immunity defense and prompt appellate review are steps towards protecting these public servants. Decisions on these issues at the outset of this sort of antitrust litigation would mitigate the costs of plenary antitrust litigation that distract from governmental duties, inhibit discretionary action, or which deter "able people from public service." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985).

II. Interlocutory Review Would Also Enable Courts To Promptly Indicate What Sort of State Supervision Is Necessary To Confer State Action Immunity.

The need for the ability to appeal decisions on state action immunity is particularly necessitated by the unresolved and murky issue of active supervision after the decision in *North Carolina Dental*.

Underlying the principle of state-action immunity is an understanding that the sovereign actions of a state, or its subdivisions if certain conditions are met, are intended to be exempt from antitrust scrutiny. As this Court explained in *Parker v. Brown*, 317 U.S. 341 (1943), the antitrust statutes give "no hint that [they were] intended to restrain state action or official action directed by a state," and this Court has refused to attribute to Congress an "unexpressed purpose to nullify a state's control over its officers and agents." *Id.* at 351. "The rationale of *Parker* was that . . . the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the

States in their governmental capacities as sovereign regulators." *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374 (1991). Invoking the state-action doctrine thus "preserves to the States their freedom . . . to administer state regulatory policies free of the inhibitions of the federal antitrust laws." *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion).

Since *North Carolina Dental*, state regulatory boards seeking immunity under antitrust law must show that the allegedly anticompetitive conduct was actively supervised by the State. Whether a state board was actively supervised is an inquiry that is "flexible and context dependent." 574 U.S. at 515. In effect, a finding that activities of a state medical board were pursuant to a clearly articulated policy, and subsequently actively supervised by the state, "conclusively determine[s] the disputed question" of whether the activity violates federal competition law since the there is every reason to conclude that that action is the action of the State itself. *Will v. Hallock,* 546 U.S. 345, 349 (2006). In the absence of more specific guidance from this Court on what specific acts of supervision will satisfy this standard, immediate appellate review will enable the Courts of Appeal to give prompt guidance on what states must do to confer immunity on their regulatory agencies.

Guidance issued by the Federal Trade Commission attempted to address inherent questions left by *North Carolina Dental,* but this guidance is inconsistent with the Court's admonition that the active supervision inquiry be "flexible and context-dependent." Fed. Trade Comm'n, FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by

Market Participants (Oct. 14, 2015). In effect, the FTC guidance has become the de facto standard to which states will be held despite this inconsistency. In good faith, states have attempted to comply with their review of actions of their regulatory boards in an attempt to immunize those actions from antitrust challenge. *See* S.B. 1502, 2015 Conn. Leg., June Sp. Sess., Pub. Act 15-5 (eff. July 1, 2015); Del. Gov. Jack Markell Exec. Order 60 (April 20, 2016); Mass. Gov. Charles D. Baker Executive Order 567 (March 28, 2016). However, states will lack confirmation that these efforts suffice for the purposes of immunity until the day such changes are part of the state response to an antitrust challenge brought against one of their agencies. Moreover, as in this case, the question of whether the members of a state regulatory board are "active market participants"—even if they are appointed as public members—remains unanswered. Under the FTC guidance, the definition of market participant is so unbounded that it is plausible that any recipient of the services of a licensed professional could be considered a participant in the market. *See North Carolina Dental*, 574 U.S. at 525 (Alito, J., dissenting) (highlighting the difficulty in defining market, market participant, and controlling number of participants). Confirmation of immunity should come at the outset of a case, not at the end.

Without prompt appellate rulings on the issue of active supervision, the ability of State Medical Boards and other state regulatory boards to regulate in the totality of the public interest, not just its interest in competition, is at the mercy of private plaintiffs and government antitrust enforcement agencies. States simply cannot know what they must do to immunize actions by their regulators. While it is appropriate for

federal competition policy to be considered by state regulators, states regulatory agencies should not be subjected to massive antitrust litigation without the opportunity to have the immunity issue resolved before a final decision in the case. And states should be given guidance as soon as possible as to the nature of supervision that will entitle their agencies to immunity from the antitrust laws.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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