UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LOUISIANA REAL ESTATE APPRAISERS BOARD **CIVIL ACTION**

VERSUS **19-214-BAJ-RLB**

FEDERAL TRADE COMMISSION

MOTION TO DISMISS OF FEDERAL TRADE COMMISSION

Defendant Federal Trade Commission hereby moves this Court to dismiss the above captioned case pursuant to Fed. R. Civ. P. 12(b)(1). The FTC is contemporaneously filing its memorandum in support of this motion.

UNITED STATES OF AMERICA, by

BRANDON J. FREMIN
UNITED STATES ATTORNEY

/s/ John J. Gaupp
John J. Gaupp, LBN 14976
Assistant United States Attorney
777 Florida Street, Suite 208
Baton Rouge, Louisiana 70801
Telephone: (225) 389-0443
Fax: (225) 389-0685
E-mail: john.gaupp@usdoj.gov

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the *Motion to Dismiss of the Federal Trade Commission* and supporting memorandum were filed electronically with the Clerk of Court using the CM/ECF system. Notice of these filings will be sent to all known counsel of record via operation of the Court's electronic filing system.

Baton Rouge, Louisiana, this 7th day of June, 2019.

/s/ John J. Gaupp
John J. Gaupp, LBN 14976
Assistant United States Attorney

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LOUISIANA REAL ESTATE APPRAISERS BOARD	**CIVIL ACTION**
VERSUS	**19-214-BAJ-RLB**
FEDERAL TRADE COMMISSION	

MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF THE FEDERAL TRADE COMMISSION'S MOTION TO DISMISS

The Federal Trade Commission respectfully submits this memorandum of points and authorities in support of its motion to dismiss the Complaint of the Louisiana Real Estate Appraisers Board. The Complaint asks this Court (i) to reverse an FTC administrative decision finding that the Board failed to show that the "state-action" doctrine of antitrust law protects the Board's anticompetitive conduct from antitrust liability and (ii) to issue a declaratory judgment that the Board does enjoy such protection. This Court does not have subject matter jurisdiction to hear the Complaint.[1]

Jurisdiction fails for two separate reasons. First, Congress has vested the courts of appeals with exclusive jurisdiction over FTC administrative proceedings, thereby cutting off jurisdiction in district court. Second, even if the Court could take up this matter in the first place, the Administrative Procedure Act authorizes review only of "final" agency decisions and expressly excludes review of "intermediate" decisions like the one challenged here. The finality requirement

[1] After filing the Complaint, the Board filed a motion to stay the FTC administrative proceeding, which is also pending before this Court. *See* ECF 9, ECF 12, ECF 22, ECF 23.

prevents the Board from short-circuiting procedures mandated by Congress, disrupting the orderly conduct of administrative proceedings, and turning the enforcement agency into a defendant. Nor can the Board satisfy the finality requirement by relying on the collateral order doctrine, which permits immediate review of interlocutory rulings under extremely limited circumstances which do not exist here. Most particularly, because the Board is not immune from having to litigate its case before the FTC by virtue of the state-action doctrine, its state-action defense can be effectively reviewed at the conclusion of the Commission's proceeding. The state-action doctrine can provide a substantive defense to antitrust liability, but as explained by the Fifth Circuit, it is not an immunity from suit or a right not to be tried akin to the Eleventh Amendment or qualified immunity.

BACKGROUND

The FTC issued an administrative complaint charging the Board with violating antitrust law by unreasonably restraining price competition—*i.e.*, price fixing—in the market for real estate appraisal services. The Board is a state-chartered agency controlled by licensed real estate appraisers and empowered to regulate real estate appraisers in Louisiana. As alleged in the FTC's administrative complaint, the Board adopted and enforced a rule, Rule 31101, that sets a floor on the price for certain appraisal services. The matter is first tried before an administrative law judge and is then appealable to the full Commission, 16 C.F.R. §§ 0.14, 3.51, 3.52, 3.54, which consists of five Commissioners, 15 U.S.C. § 41. Should the Commission ultimately find at the conclusion of the proceeding that the Board's practices amount to an antitrust violation, it will issue a "cease-and-desist" order under 15 U.S.C. § 45(b).

The Board claims it is exempt from antitrust scrutiny under the "state-action" doctrine of antitrust law, Compl. ¶¶ 39, 78, 89,[2] which in limited circumstances can shield state-sanctioned anticompetitive conduct from federal antitrust liability. *See Parker v. Brown*, 317 U.S. 341 (1943). The doctrine applies only if the Board shows that its price-fixing rule satisfies both prongs of the "*Midcal* test": (a) that the Board's actions were taken pursuant to a "clearly articulated and affirmatively expressed … state policy," and (b) that the Board's application of the anticompetitive state policy is "actively supervised by the State." *Cal. Retail Liquor Dealers Ass'n. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980); *accord N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015).

After the FTC administrative complaint was issued, the State modified its regime for supervising the Board, Compl. ¶¶ 40-41, and the Board re-promulgated Rule 31101, Compl. ¶¶ 43, 50. The Board then moved to dismiss the complaint as moot on the ground that the changes placed *all* of the Board's post-complaint conduct within the state-action doctrine. Compl. ¶ 54; ECF 9-2, Ex. 1 at 7.[3] The Board also claimed that it had eliminated any continuing effects of its pre-complaint conduct. ECF 9-2, Ex. 1 at 7.

In the decision that now serves as the basis for the Board's complaint in this Court, the Commission determined that the case was still live. It found that the new regime does not invariably provide active state supervision of the Board under the *Midcal* test. Compl. ¶ 56; ECF 9-2, Ex. 1 at 11-15. In particular, it held that the State did not actively supervise the Board's re-

[2] The Complaint is ECF 1.

[3] Exhibit 1 to the Board's motion for a stay contains the Commission's interlocutory decision. The Board filed a redacted version of the decision, but the unredacted version is also a public document and was part of the public record in the Court of Appeals.

promulgation of the price-fixing rule in 2017 and that the State's oversight of Board enforcement of the rule going forward had not been shown to satisfy the test for active supervision. ECF 9-2, Ex. 1 at 15.[4]

Complaint counsel, the FTC staff who present the case to the ALJ and the Commissioners, had simultaneously asked the Commission to reject the Board's two state-action defenses: that the administrative complaint did not allege that "the Board has a controlling number of active participants in the relevant residential market" and that "the [Board] is immune from federal antitrust liability" under *Parker*. Compl. ¶¶ 39, 55; ECF 9-2, Ex. 1 at 15-16. The Commission ruled that a majority of the Board members are real estate appraisers who are active market participants and that the Board is therefore subject to the active supervision requirement. ECF 9-2, Ex. 1 at 19. The Commission also ruled that the Board had not shown active State supervision over its adoption and enforcement of Rule 31101. *Id.* at 15, 19.

The Board petitioned for review of the Commission's interlocutory decision in the Court of Appeals, which dismissed the petition for lack of jurisdiction. Compl. ¶ 62, 65; *La. Real Estate Appraisers Bd. v. FTC*, 917 F.3d 389 (5th Cir. 2019) (*LREAB*). The court ruled that the FTC Act does not provide for judicial review of interlocutory Commission decisions. *Id*. at 391. Sections 5(c) and (d) of the Act vest exclusive review of an FTC proceeding in the court of appeals, but allow review only of "an order of the Commission to cease and desist from using any method of competition or act or practice," 15 U.S.C. §§ 45(c), (d), which as described above is the final order issued by the agency at the end of the proceeding. Interlocutory rulings can be reviewed along with the final cease-and-desist order. *See Frito-Lay, Inc. v. FTC*, 380 F.2d 8, 10 (5th Cir. 1967).

[4] Because the Board failed the active-supervision test, the Commission did not address the other *Midcal* prong, which asks whether Louisiana has clearly articulated a policy to displace competition in the market for residential real estate appraisals. *Id*. at 7 n.13.

The hearing before an FTC administrative law judge is scheduled to start in September 2019. Having failed to derail the proceeding in the Court of Appeals, the Board now takes a second bite at the apple in this Court. For the reasons set forth below, the Court should dismiss the Board's Complaint for lack of subject matter jurisdiction.

ARGUMENT

Federal courts have "limited jurisdiction" that must be "conferred by statute." *Texas v. Travis Cty., Tex.*, 910 F.3d 809, 811 (5th Cir. 2018). Under Fed. R. Civ. P. 12(b)(1), a party may "challenge the subject matter jurisdiction of a district court to hear a case." *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001). The court may rule based on "(1) the complaint alone; (2) the complaint supplemented by undisputed facts evidenced in the record; or (3) the complaint supplemented by undisputed facts plus the court's resolution of disputed facts." *Id.* The plaintiff—here, the Board—"bears the burden of proof that jurisdiction does in fact exist." *Id.* The Board cannot meet its burden for two independent reasons.

I. Congress Vested Exclusive Jurisdiction Over FTC Administrative Proceedings In The Courts Of Appeals.

The Commission issued the administrative complaint and set it for hearing under Section 5(b) of the FTC Act, which authorizes the Commission to issue a cease-and-desist order if it finds a violation of the Act. 15 U.S.C. § 45(b). Section 5(c) of the Act allows a person subject to a cease-and-desist order to "obtain a review of such order in the court of appeals of the United States." 15 U.S.C. § 45(c). Section 5(d) provides that "the jurisdiction of the court of appeals … *shall be exclusive*." *Id.* § 45(d) (emphasis added). By specifying the precise means of judicial review, Congress "contemplate[d] judicial review only of 'an order of the Commission to cease and desist,' and then only 'in the court of appeals of the United States.'" *Coca-Cola Co. v. FTC*, 475 F.2d 299, 302 (5th Cir. 1973) (quoting 15 U.S.C. § 45(c)).

By vesting exclusive jurisdiction over FTC proceedings in the court of appeals, Congress cut off subject matter jurisdiction in district courts. Where "Congress has created a specific mode of judicial review of administrative orders, declaratory relief [in district court] is not available." *Bywater Neighborhood Ass'n v. Tricarico*, 879 F.2d 165, 169 (5th Cir. 1989) (citing *Telecomm'ns Research & Action Ctr. v. FCC*, 750 F.2d 70, 77 (D.C. Cir. 1984)); *JTB Tools & Oilfield Servs., LLC v. United States*, 831 F.3d 597, 600-01 (5th Cir. 2016) (same). Applying that principle in *Ligon v. LaHood*, 614 F.3d 150, 154 (5th Cir. 2010), the Fifth Circuit held that judicial review procedures similar to the ones found in the FTC Act divested the district court of jurisdiction over challenges to Federal Aviation Administration orders. "Specific grants of jurisdiction to courts of appeals," the Court determined, "override general grants of jurisdiction to the district courts." *Id.* The Supreme Court has similarly held that a statute vesting direct review in the court of appeals "demonstrates that Congress intended to preclude challenges" in district court prior to the completion of agency proceedings. *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200, 208 (1994); *accord Whitney Nat. Bank v. Bank of New Orleans & Trust Co.*, 379 U.S. 411, 420 (1965) (where Congress provides for review in the courts of appeals, those procedures are exclusive); *Myers v. Bethlehem Shipbuilding Corp.*, 303 U.S. 41, 48 (1938) (same).

The divestiture of district court jurisdiction by the FTC Act's judicial review provision overrides the general grant of jurisdiction to district courts in the Administrative Procedure Act. That statute allows judicial review of "final agency action for which no other adequate remedy in any court," 5 U.S.C. § 704, but "Congress did not intend the general grant of review in the APA to duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988). Indeed, *Bowen* specifically identified the FTC Act's judicial review provision as an example of that principle. It explained that "[a]t the time the APA was enacted, a number of

statutes creating administrative agencies defined the specific procedures to be followed in reviewing a particular agency's action; for example, Federal Trade Commission … orders were directly reviewable in the regional court of appeals." *Id.*

Indeed, well before *Bowen*, the Fifth Circuit arrived at the same conclusion, holding that the FTC Act's exclusive review scheme disallows end-run complaints in district court and "is fully consonant with the Administrative Procedure Act." *Coca-Cola*, 475 F.2d at 302. Where Congress "has provided an adequate procedure for judicial review of administrative actions, that procedure must be followed. Only in extraordinary cases will parties be allowed to deviate from this statutory course and seek injunctive relief from the district court, short circuiting the administrative procedures." *Frito-Lay, Inc.*, 380 F.2d at 10. "[T]here can be little doubt … that the mandatory [exclusive review] provision of the Federal Trade Commission Act … means what it says." *Coca-Cola*, 475 F.2d at 302.

The Court of Appeals did not reach a different determination when it observed that the "APA can reasonably be interpreted as permitting courts to undertake collateral review of agency decisions that are conclusive, but do not end the agency proceeding." *LREAB*, 917 F.3d at 392. That may be true as a general matter, but not where a statute contains "specific procedures to be followed in reviewing a particular agency's action." *Bowen*, 487 U.S. at 803. Otherwise, collateral review would swallow Congress's decision to limit review to particular courts. The proper rule was applied in *North Carolina State Board of Dental Examiners v. FTC*, 768 F. Supp. 2d 818, 822 (E.D.N.C. 2011), nearly identical to this case, where a state board sought to block an FTC administrative proceeding on state-action grounds under the APA. The court dismissed the case for lack of jurisdiction, finding it "well-settled" that a district court "lacks jurisdiction to enjoin ongoing administrative enforcement proceedings such as the one at issue here." *Id.*

Similarly, the Fifth Circuit did not override decades of established precedent when it stated in a passing footnote that "if the Board were to appeal the Commission's decision under the APA, that action would have to originate in the district court." *LREAB*, 917 F.3d at 394 n.3. The Court was merely contrasting the direct court of appeals review provided for by the FTC Act with APA review and noting that the Board had not sought review under the APA. The footnote does not determine (or even address) whether a district court would have jurisdiction over an APA claim challenging the Commission's decision; that issue was not raised by the parties and was not necessary to the Court's disposition of the case.

A regime in which final orders are reviewable only in the court of appeals, but interlocutory orders in the very same proceeding can be adjudicated by district courts would be as unworkable as it is illogical. "All constitutional, jurisdictional, substantive, and procedural issues arising in Commission proceedings may be considered" by an appellate court on review of an FTC cease-and-desist order. *Frito-Lay*, 380 F.2d at 10; *see also Thunder Basin*, 510 U.S. at 215 ("petitioner's statutory and constitutional claims here can be meaningfully addressed in the court of appeals" on review of a final determination). Beyond upending Congress's intent to allow the courts of appeals to consider such claims, review of interim agency decisions in district courts would disserve judicial economy and risk "duplicative and potentially conflicting review," including "the delay and expense incidental thereto." *Telecommunications Research and Action Center*, 750 F.2d at 78.

II. The APA Does Not Provide Jurisdiction.

A. The Board Challenges A Non-Final Action.

Even if the Commission's decision could be challenged under the APA's general grant of jurisdiction, that statute applies only to "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. § 704. The statute expressly excludes from review "preliminary" and

"intermediate" actions, because such interlocutory orders are "subject to review on the review of the final agency action." *Id.* In the absence of "final agency action," a court lacks subject matter jurisdiction over an agency order. *Veldhoen v. U.S. Coast Guard*, 35 F.3d 222, 225 (5th Cir. 1994). Thus, "a plaintiff must exhaust all available administrative remedies before coming to a federal court for relief." *Am. Gen. Ins. v. FTC*, 496 F.2d 197, 199 (5th Cir. 1974). "[N]o one is entitled to judicial relief for a supposed or threatened injury until the prescribed administrative remedy has been exhausted." *Myers*, 303 U.S. at 51.

"[T]wo conditions must be satisfied for agency action to be 'final': First, the action must mark the 'consummation' of the agency's decision making process[ ]—it must not be of a merely tentative or interlocutory nature. And second, the action must be one by which 'rights or obligations have been determined,' or from which 'legal consequences will flow.'" *Bennett v. Spear*, 520 U.S. 154, 177-78 (1997) (citations omitted); *see Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287-88 (5th Cir. 1999). "[A]gency action that is merely 'preliminary, procedural, or intermediate' is subject to judicial review at the termination of the proceeding in which the interlocutory ruling is made." *Id*. (citation omitted). An action that is not "the consummation of the agency's decision-making process" and does not "definitively resolv[e] the merits of [the administrative] case" is not final because the challenger "may ultimately prevail in front of the [agency], mooting any current challenge." *Exxon Chems. Am. v. Chao*, 298 F.3d 464, 467 (5th Cir. 2002).

The APA's requirement that agency action be final serves to ensure the efficiency of the administrative process. The rule "'is predicated upon the perception that litigants as a group are best served by a system which prohibits piecemeal … consideration of rulings that may fade into insignificance' by the time proceedings conclude." *CSX Transp., Inc. v. Surface Transp. Bd.*, 774

F.3d 25, 31 (D.C. Cir. 2014) (quoting *Aluminum Co. of Am. v. United States*, 790 F.2d 938, 942 (D.C. Cir. 1986)). Because the Board "may well emerge victorious from the [FTC adjudicative process], leaving nothing for them to appeal," *CSX Transp.*, 774 F.3d at 30, the possibility that "completion of an agency's processes may obviate the need for judicial review … is a good sign that an intermediate agency decision is not final." *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212, 1215 (D.C. Cir. 1996). Until final resolution, judicial review of agency action in district court under the APA "should not be a means of turning prosecutor into defendant before adjudication concludes." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 243 (1980).

The decision challenged here is not a final order. It is an interlocutory order that rejected the Board's state-action defenses, one of several defenses on which the Board relies. The FTC has not yet addressed the Board's other defenses, determined whether any conduct by the Board violates the antitrust laws, or held that the Board should be subject to a cease-and-desist order. Before that happens, an administrative law judge must first consider the matter and then the full Commission may review the ALJ determination. Far from the consummation of the process, the order challenged by the Board represents only its beginning stage. This Court therefore does not have jurisdiction to review the decision (even if a district court could review an FTC decision of this nature (*see* Section I, *supra*)).[5]

The Board cannot escape the controlling requirement of finality by claiming (Compl. ¶ 69; ECF 12-2 at 11) that the decision it challenges is the FTC's "final" word on whether the Board is exempt from antitrust law. As the cases cited above demonstrate, the finality requirement applies

[5] In the absence of jurisdiction under the APA, the Declaratory Judgment Act cannot independently supply jurisdiction. In that statute, "Congress enlarged the range of remedies available in the federal courts but did not extend their jurisdiction." *Skelly Oil Co. v. Phillips Petroleum Co.*, 339 U.S. 667, 671 (1950). The Act "does not confer subject matter jurisdiction on a federal court where none otherwise exists." *Lawson v. Callahan*, 111 F.3d 403, 405 (5th Cir. 1997).

to the finality of the entire proceeding, not to one specific issue raised in its course. *See Herman*, 176 F.3d at 289, 292. The decision challenged by the Board is a quintessential interlocutory order, "subject to judicial review at the termination of the proceeding in which the interlocutory ruling is made." *Id.* at 288. The Supreme Court rejected an essentially identical argument in *Standard Oil*, ruling that the FTC's assertedly "final" determination to issue an administrative complaint was not subject to review under the APA. 449 U.S. at 243-44. "It is firmly established that agency action is not final merely because it has the effect of requiring a party to participate in an agency proceeding." *Alcoa*, 790 F.2d at 941.

B. The FTC's Decision May Not Be Deemed "Final" Under the Collateral Order Doctrine.

The lack of finality under the APA is not excused under the "collateral order" doctrine, *see* Compl. ¶ 70, which allows a narrow class of interlocutory orders to be deemed "final" for purposes of review. *Will v. Hallock*, 546 U.S. 345, 349 (2006). To come within that doctrine, an order must (1) "'be effectively unreviewable on appeal from a final judgment;'" (2) "'resolve an important issue completely separate from the merits of the action;'" and (3) "'conclusively determine the disputed question.'" *Id*. at 349 (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). An order that "fails to satisfy any one of these requirements" is not immediately appealable. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988). The conditions are "stringent" lest the exception "swallow the general rule that a party is entitled to a single appeal" on a final judgment. *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (citation omitted). The Board's Complaint fails all three parts of the collateral order test.

i. Review at the end of the proceeding will be meaningful. The Commission's state-action ruling will be meaningfully reviewable upon appeal of a final cease-and-desist order. An issue is "effectively unreviewable" only when it protects an interest that would be "essentially

destroyed if its vindication must be postponed until trial is completed," *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-99 (1989), such as a "right not to be tried," *id* at 499 (citing *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989)). The Fifth Circuit has held that a state-action question is "effectively reviewable after trial." *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287, 293-94 (5th Cir. 2000).

The Board claims that post-proceeding review will not be meaningful because the state-action doctrine gives it a right not be tried, akin to Eleventh Amendment or qualified immunity. The Board cites *Martin v. Memorial Hospital*, 86 F.3d 1391, 1394-96 (5th Cir. 1996), for the propositions that it possesses sovereign dignitary interests to be free from federal antitrust litigation and trial, and that it must be allowed to carry out the effective operation of state government free from disruption. Compl. ¶¶ 8, 62, 71.

The Board's reliance on *Martin* is misplaced. Without explanation, the Board ignores a subsequent decision by the Fifth Circuit, sitting en banc, substantially revising *Martin*'s description of state-action doctrine. In *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc), the court held that "immunity is an inapt description" of the state-action doctrine. The term "*Parker* immunity," the court instead determined, is not really an immunity at all, but is most accurately understood as a "convenient shorthand" for "locating the reach of the Sherman Act."[6] *Id.* The doctrine is not rooted in concerns

[6] The en banc Court's conclusion aligns with those of the majority of other circuits. *See SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 726 (9th Cir. 2017); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.3d 563, 567 (6th Cir. 1986); *but see Commuter Trans. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986).

about exempting states from legal proceedings, as traditional immunity doctrines are, but has a "parentage [that] differs from the qualified and absolute immunities of public officials" and from the Eleventh Amendment. *Id.* It functions, in other words, only as a substantive defense to an antitrust claim.

After *Surgical Care Center*, *Martin* does not stand for the broad proposition, relied on by the Board, that any entity that may qualify for state-action protection is ipso facto immunized from any antitrust proceedings against it. The Fifth Circuit later ratified that limitation on *Martin* in *Acoustic Systems*, 207 F.3d at 293-94, holding that an interlocutory order denying a state-action defense could not be appealed immediately because it was "effectively reviewable after trial." The state-action doctrine, the court explained, "provides only a defense against liability," *id.* at 294, not immunity from suit.

Moreover, to the degree *Martin* remains good law, it involved a governmental entity very different from the Board. The Supreme Court has explained that an "electorally accountable municipality with general regulatory powers and no private price-fixing agenda" is treated differently under antitrust law from a "specialized board[] dominated by active market participants." *N.C. Dental*, 135 S. Ct. at 1114. Municipalities "exercise[] a wide range of governmental powers across different economic spheres," *Id.* at 1112-1113, and lack structural incentives to engage in anticompetitive conduct, *id.* at 1111-12. By contrast, state regulatory boards controlled by "active market participants in the occupation the board regulates" are like private trade associations with incentives to pursue their members' private interests. *Id*. at 1113, 1114.[7] Thus, to the degree *Martin* suggested that state-action protection is equivalent to qualified

[7] *N.C. Dental* thus overturned the Fifth Circuit's ruling in *Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033, 1041 (5th Cir. 1998), that state boards composed entirely of active market participants function similarly to municipalities and thus are exempt from *Midcal*'s active supervision requirement.

or Eleventh Amendment immunity, that is no longer the case for essentially private entities like the Board. Unsurprisingly, the Fifth Circuit has refused to extend immunity from suit beyond municipal entities, explaining that *Martin* was based on "concerns that public defendants would be subjected to the costs and general consequences associated with discovery and trial." *Acoustic Sys., Inc.*, 207 F.3d at 293.

Indeed, the Board does not share the State's sovereign interests, as the Board alleges. Compl. ¶ 71. The Supreme Court has rejected that idea, holding instead that "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." *N.C. Dental*, 135 S. Ct. at 1111. Indeed, the Court has identified only two state acts that automatically qualify as sovereign: state legislation and decisions of state supreme courts acting in a legislative capacity. *Id.* at 1110. The Board's rule and its enforcement of the rule possesses neither attribute and thus does not share the sovereign interests of the State of Louisiana itself.

Moreover, even if the Board could assert the state's own sovereign, dignitary interests as an abstract matter, those interests cannot be asserted against the federal government. "[N]othing in [the Eleventh Amendment] or any other provision of the Constitution prevents … a State's being sued by the United States." *United States v. Mississippi*, 380 U.S. 128, 140 (1965). Dignitary interests likewise are not at issue in actions (like this one) seeking purely injunctive relief; "[t]he doctrine of qualified immunity shields government officials from money damages, not suits for injunctive or declaratory relief." *Davis v. Lensing*, 1998 WL 127839, at *1 (5th Cir. 1998) (citing *Chrissy F. by Medley v. Mississippi Dep't of Pub. Welfare*, 925 F.2d 844, 849 (5th Cir. 1991)).

Thus, even if the antitrust laws do not apply to the Board's conduct, the Board has no immunity from suit and therefore no interest that cannot be fully vindicated at the termination of the FTC administrative proceeding.

The Board also suggests (Compl. ¶ 8) that the Commission proceeding prevents the state from effectuating or enforcing its laws. The Board fails to allege any actual impairment, nor could it. The FTC's administrative complaint challenges no state law, and the FTC has not forbidden the Board from taking any action while the proceeding is pending (and it has no power of its own to do so).

ii. State action is entwined with the merits. The Board's attempt to obtain immediate review also fails because the question of state-action is intertwined with the antitrust merits. An issue is not completely separate from the merits when it "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand*, 437 U.S. at 469 (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). A determination that the state-action doctrine protects the Board's conduct is a determination that the Board has not violated the antitrust laws. *See 324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987). By definition, that is a merits determination. For example, even though at this point the Commission has not needed to decide whether the Board can satisfy the clear-articulation prong of *Midcal*, a ruling by this Court that the Board satisfies the state-action doctrine would require it to consider whether the Board's conduct was anticompetitive and whether the "anticompetitive effects" of Rule 31101 were the "inherent, logical, or ordinary result" of Louisiana's grant of authority to the Board. *FTC v. Phoebe Putney Health Sys.*, 568 U.S. 216, 229 (2013). "That inquiry is inherently enmeshed with the underlying cause of action, which requires a determination of whether a defendant has used 'unfair methods of competition in or affecting commerce.'" *S.C.*

State Bd. of Dentistry v. FTC, 455 F.3d 436, 442-43 (4th Cir. 2006) (quoting FTC Act, 15 U.S.C. § 45(a)(2)). And even if certain questions, such as active supervision, can be determined using summary procedures, that fact does not make the issue immediately appealable. The collateral order doctrine "look[s] to categories of cases, not to particular injustices." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988).

iii. The FTC has not conclusively determined the state-action issues. For similar reasons, the Commission's order cannot be deemed final because the Commission decision did not "conclusively determine" all of the Board's state-action issues. At this point, the Commission has decided only that the Board's pre-complaint conduct was not actively supervised and that certain post-complaint measures do not, on their face, provide active supervision. At hearing, the Board will be able to (1) argue that the more recent changes to the Louisiana supervision regime are sufficient to assure active state supervision of the Board's anticompetitive conduct going forward; (2) argue that that conduct is pursuant to a clearly articulated policy to displace competition; and (3) ask, *if the Commission ultimately concludes that the Board violated the FTC Act*, that the remedy expressly permit conduct that satisfies the elements of the state-action doctrine. *See e.g.*, *In re Ticor Title Ins. Co.*, 112 F.T.C. 344, 466 (1989), *aff'd on other grounds*, *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992); *In re New England Motor Rate Bureau, Inc.*, 113 F.T.C. 1013, 1014 (1990).

CONCLUSION

For the foregoing reasons, this Court should dismiss the Board's Complaint.

UNITED STATES OF AMERICA, by

BRANDON J. FREMIN
UNITED STATES ATTORNEY

/s/ John J. Gaupp
John J. Gaupp, LBN 14976
Assistant United States Attorney
777 Florida Street, Suite 208
Baton Rouge, Louisiana 70801
Telephone: (225) 389-0443
Fax: (225) 389-0685
E-mail: john.gaupp@usdoj.gov

OF COUNSEL:
Alden F. Abbott
General Counsel

Joel Marcus
Deputy General Counsel

Mark S. Hegedus
Attorney

Office of the General Counsel
Federal Trade Commission
600 Pennsylvania Avenue NW
Washington, DC 20580