No. 19-12227

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SMILEDIRECTCLUB, LLC,
Plaintiff-Appellee,

v.

TANJA D. BATTLE; THOMAS P. GODFREY; GREGORY G. GOGGANS; RICHARD BENNETT; REBECCA B. BYNUM; TRACY GAY; STEVE HOLCOMB; LOGAN NALLEY JR.; ANTWAN L. TREADWAY; H. BERT YEARGAN; and WENDY JOHNSON,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
(JUDGE WILLIAM M. RAY, II)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLEE

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SmileDirectClub, LLC v. Battle, et al., No. 19-12227

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
C-1 of 5

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SmileDirectClub, LLC v. Battle, et al., No. 19-12227
C-2 of 5

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SmileDirectClub, LLC v. Battle, et al., No. 19-12227
C-3 of 5

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SmileDirectClub, LLC v. Battle, et al., No. 19-12227
C-5 of 5

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TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT ii

TABLE OF CONTENTS vii

TABLE OF AUTHORITIES viii

STATEMENT OF INTEREST 1

STATEMENT OF ISSUES PRESENTED 2

STATEMENT 3

SUMMARY OF ARGUMENT 12

ARGUMENT 15

I. The State-Action Defense to Antitrust Liability is Limited and Disfavored 15

II. The *Midcal* Requirement of Active Supervision Applies to This Case 19

A. Whether the Governor is a “Sovereign Actor” for Purposes of the State-Action Defense is Not At Issue Here 20

B. The Board’s Challenged Rule Cannot Be Attributed to the Governor By Reason of His Supervision 24

III. The Board Members Have Not Demonstrated, At the Motion to Dismiss Stage, That the State Actively Supervised the Board’s Challenged Conduct. 28

CONCLUSION 34

CERTIFICATE OF COMPLIANCE

CERTIFICATE OF SERVICE

TABLE OF AUTHORITIES

Cases

Bates v. State Bar of Arizona,
433 U.S. 350 (1977) 22

California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.,
445 U.S. 97 (1980) 8, 17

City of Lafayette v. Lousiana Power & Light Co.,
435 U.S. 389 (1978) 15

Community Communications Co. v. City of Boulder,
455 U.S. 40 (1982) 10

Commuter Transporation Systems, Inc. v. Hillsborough County Aviation Authority,
801 F.2d 1286 (11th Cir. 1986) 11

Cost Management Services, Inc. v. Washington Natural Gas Co.,
99 F.3d 937 (9th Cir. 1996) 29, 30

Diverse Power, Inc. v. City of LaGrange,
No. 18-11014 (11th Cir. Aug. 20, 2019) 11

Edinboro College Park Apartments v. Edinboro University Foundation,
850 F.3d 567 (3d Cir. 2017) 17, 23, 27

FTC v. Indiana Federation of Dentists,
476 U.S. 447 (1986) 11

**FTC v. Phoebe Putney Health System*,
568 U.S. 216 (2013) .... passim

**FTC v. Ticor Title Insurance Co.*,
504 U.S. 621 (1992) 2, 17, 31, 33

Goldfarb v. Virginia State Bar,
421 U.S. 773 (1975) 20, 23

Hoover v. Ronwin,
466 U.S. 558 (1984) 22, 23, 25, 26

Huron Valley Hospital, Inc. v. City of Pontiac,
792 F.2d 563 (6th Cir. 1986) 12

In re Realcomp II Ltd.,
2007 WL 693619 (FTC Oct. 30, 2009)...3

**North Carolina Board of Dental Examiners v. FTC*,
135 S. Ct. 1101 (2015) .... passim

Parker v. Brown,
317 U.S. 341 (1943) 1, 15, 16

Patrick v. Burget,
486 U.S. 94 (1988) .... passim

Realcomp II, Ltd. v. FTC,
635 F.3d 815 (6th Cir. 2011) 3

South Carolina State Board of Dentistry v. FTC,
455 F.3d 436 (4th Cir. 2006) 11, 12

Shames v. California Travel & Tourism Commission,
626 F.3d 1079 (9th Cir. 2010) 17

SolarCity Corp. v. Salt River Project Agricultural Improvement & Power District,
859 F.3d 720 (9th Cir. 2017) 11, 12

Teladoc, Inc. v. Texas Medical Board,
2015 WL 8773509 (W.D. Tex. Dec. 14, 2015) 4

Town of Hallie v. City of Eau Claire,
471 U.S. 34 (1985) 29

Trigen Oklahoma City Energy Corp. v. Oklahoma Gas & Electric Co.,
244 F.3d 1220 (10th Cir. 2001) 29

United States v. Aluminum Co. of America,
377 U.S. 271 (1964) 3

Will v. Hallock,
546 U.S. 345 (2006) 11

Yeager's Fuel v. Pennsylvania Power & Light Co.,
22 F.3d 1260 (3d Cir. 1994) 17, 18

Statutes

15 U.S.C. § 1 7

2015 Ga. HB 952, 2016 Ga. Laws 485 21

O.C.G.A. § 43-1C-1 .... 6, 21

O.C.G.A. § 43-11-9 24

O.C.G.A. § 43-1C-3(a) 7

State Agency Rules

Ga. Comp. R. & Regs. r. 150-9-.01(2) 6

Ga. Comp. R. & Regs. r. 150-9.02(aa) 6, 7, 9

Rules

Fed. R. App. P. 29(a) 2

Other Authorities

U.S. Dept. of Justice & Federal Trade Commission, Antitrust
Guidelines for the Licensing of Intellectual Property (2017) 3

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.

[1] FTC staff also has issued guidance regarding 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 693619, 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. Complaint ¶¶ 24-26. 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.* ¶¶ 26-27. Then, a dentist or orthodontist, who is licensed to practice in Georgia 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.* ¶¶ 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 the 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 SmileDirect to serve Georgia consumers across state lines. *Id*. ¶¶ 34-39, 43. Specifically, an amended rule requires that certain non-dentist personnel 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 dental assistant." Ga. Comp. R. & Regs. r. 150-9-.01(2).

4. Georgia's scheme for review of state agency actions (including rulemakings) is, in pertinent part, O.C.G.A. § 43-1C-1 et seq., the "Georgia Professional Regulation Reform Act" (2016). The statute gives the Governor "the authority and duty to actively supervise 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 Subparagraph (aa)." *Id*. ¶ 45.

6. 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 an Order filed May 8, 2019, the court denied the motion with respect to the antitrust claim against the Board members individually in their official capacities. With respect to the state-action defense, the court ruled that the Board members must satisfy the clear articulation and active supervision requirements, as set forth in *Dental Examiners*. Order at 12. The court then ruled that dismissal on the basis of the state-action defense would be "premature at this stage." *Id*. at 13.

The court noted that the Board members submitted a "Certification of Active Supervision," signed by the Governor, stating

that he approves the amendment to Board rule 150-9-.02. The Certification states:

> Pursuant to the Georgia Professional Regulation Reform Act, O.C.G.A. § 43-1C-1, *et seq*., the Governor is vested with the duty to "actively supervise the professional licensing boards of this state." In accordance with the Georgia Professional Regulation Reform Act, the Georgia Board of Dentistry (hereinafter "Board") seeks to amend Ga. Comp. R. & Regs. r. 150-9-.02. As stated by the Board, the purpose of the amendment is to expand the list of services dental assistants may perform.
>
> Georgia law grants the Board authority to promulgate rules and regulations related to dental assistant services. See O.C.G.A. § 43-11-9. As such, the amendment adopted by the Board is within its authority as granted by clearly articulated state policy. Therefore, I hereby approve the amendment to Ga. Comp. R. & Regs. r. 150-9-.02 for the purposes of active supervision review required by O.C.G.A. § 43-1C-3.

Doc. 29-2.

SmileDirect, however, alleged that the Board impeded active supervision by the Governor. Complaint ¶ 45. The Board did not fully advise the Governor of the reasons for its actions and the objections thereto; the Board's official minutes do not fully summarize the objections to the Board's action expressed during Board meetings; the Board did not inform the Governor of the consumer impact of the amendment; and the Board did not "reveal the conflicts of interest" of

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 Cir. 2006) (2005 WL 3775767).[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. 41-42) 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 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 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.

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 challenged 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 Active Supervision states, the Governor's sole role was to serve as the "supervisor" of certain Board conduct. This case therefore does not present the question whether or when a governor plays a role equivalent (for 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 actively or adequately supervise the Board," Complaint ¶ 45, because the Board impeded active supervision in specific ways—factual allegations that are accepted as true on a motion to dismiss. The district court properly recognized that a factual inquiry is needed to resolve the question whether the Board provided the information required to permit the Governor to actively supervise the Board's actions. Second, the Certification of Active Supervision,

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 supervision" that the Supreme Court has identified. *Dental Examiners*, 135 S. Ct. at 1116. Under those requirements, the supervisor should review the actual substance and effect of the Board rule to ensure that it is "in accord with state policy" to displace competition. *Id*. at 1111 (quoting *Patrick v. Burget*, 486 U.S. 94, 101 (1988)). The Certification, however, establishes only that the Governor, relying on the rule's *stated* purpose, determined that the Board acted within its authority, which does not satisfy the requirements of active supervision. *See id*. at 1116.

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*, 133 S. Ct.

at 1010, 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 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) (concluding that respondents had not succeeded in showing 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.

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 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, 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 directly analogous precedent and the *Midcal* requirements that come with it, the Board members wrongly assert (1) that the Governor's supervisory 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 purposes. Under Georgia's statutory

framework, the Governor's role here was only to supervise. The alleged injury from promulgation and ultimate enforcement of the Board rule thus cannot be attributed to him, regardless of whether a governor might be deemed the state acting as sovereign in other circumstances.

A. Whether the Governor is a "Sovereign Actor" for Purposes of the State-Action Defense is Not At Issue Here.

The state-action defense protects the right of states to choose to displace competition with a program of state regulation, but only when that choice is made by "the State acting as sovereign." *Goldfarb v. Virginia State Bar*, 421 U.S. 773, 790 (1975). Under current law, the Supreme Court has recognized the legislature when enacting legislation and the state supreme court when acting legislatively rather than judicially, as "sovereign" for purposes of the state-action defense. *Dental Examiners*, 135 S. Ct. at 1110. The Board members do not disagree (Br. 24-25), but ask the Court to rule that the Governor also is sovereign for purposes of state-action (Br. 24-30). The Court, however, need not and should not rule that a governor can act as a sovereign to displace competition because the question simply is not presented by this case: Here, state law makes clear that the Governor's role

regarding the challenged restraint is solely supervisory. The challenged Board rule is not an act of the Governor as sovereign decisionmaker ordering a market restraint.[3]

The Georgia Professional Regulation Reform Act, O.C.G.A. § 43-1C-1, et seq., gives the Governor authority to "actively supervise" professional licensing boards and to "review" board rules to "ensure that their actions are consistent with clearly articulated state policy," *id*. subpart (a). It was enacted in an attempt to comply with *Dental Examiners*, not to assign regulatory authority to the Governor. *See* 2015 Ga. HB 952, 2016 Ga. Laws 485, Section 1 (citing *Dental Examiners* as the impetus for the bill).[4] The Certification of Active Supervision submitted by the Board emphasizes that the Governor acted only as the supervisor of the Board, using language that mirrors the Court's holding in *Dental Examiners*. In addition, the Certification is not framed as a restraint of competition by the Governor. It says only

[3] Because the question of a governor's sovereignty is not presented, we take no position on it at this time.

[4] The same title of the Georgia Code that assigns supervisory authority to the Governor does so for more than 40 separate occupational boards, including the Board of Dentistry.

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" because that court had delegated only limited responsibilities to the committee, the committee followed the

court's rules, and the court made the 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 Supreme Court's delegation to the state bar in *Bates* or the bar admissions committee in *Hoover*. SmileDirect's alleged antitrust injury stems from the Board's and its members' own conduct in adopting the amended rule—and not from any act of the Governor. *Cf. Goldfarb*, 421 U.S. at 790 ("it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of" defendants); *Edinboro College Park Apartments*, 850 F.3d at 573 ("plaintiffs' alleged antitrust injury stems entirely from the conduct of the University"). The Governor did not take any action that even purported to restrain competition: he merely approved the Board's rule, in his role as supervisor, as "within its [the Board's] authority." Doc. 29-2.

As shown above, not all acts of a legislature or state supreme court are treated as those of the state acting as sovereign. In the same way, not all acts of a governor should be treated as sovereign decisions.

It may be that in some circumstances the governor may act as a sovereign in an antitrust sense, for example, in the command of the National Guard in the wake of a natural disaster. In this case, however, the Georgia legislature delegated to the Governor limited supervisory powers over active market participants; it did not create a new "sovereign" power for the Governor to regulate the occupation of dentistry. The Certification of Active 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 applies when a legislature passes legislation or a state supreme court acts in a legislative role. The question is thus whether the active supervision test is satisfied.

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 Supreme Court also directed and mandated the activities of the bar admissions committee. "The Supreme Court Rules specified the subjects to be tested, and the general qualifications required of applicants for the Bar. … After giving and grading the examination, the Committee's authority was limited to making recommendations to the Supreme Court. The court itself made the final decision to grant or deny admission to practice." 466 U.S. at 572-73.

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

issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization." 466 U.S. at 568 (citing cases involving state boards, private parties, and municipalities). In those situations, "[i]f the replacing of entirely free competition with some form of regulation or restraint was not authorized or approved by the State then the rationale of *Parker* is inapposite." *Id*. As a result, cases involving anticompetitive conduct by entities other than the legislature or the state supreme court acting legislatively require the clear articulation test, and active supervision is also "relevant to the inquiry." *Id*. at 569.

Hoover's caution that *ipso facto* protection is not appropriate "when the activity at issue is not directly that of the legislature or supreme court, but is carried out by others pursuant to state authorization" precisely describes this case. The activity at issue (the challenged Board rule) is not directly that of the Governor but is carried out by others (the Board and its members) pursuant to state authorization.

There is no meaningful distinction between the Board here and the dental board in *Dental Examiners*: the sole fact that compelled the

Supreme Court's decision was control of the board by active market participants (dentists), which SmileDirect alleges here. The Board members' attempt to distinguish the Board factually from the North Carolina Board (Br. 35 n.8) is unavailing. "[T]he need for supervision" does not turn on how board members are appointed or removed, but on "the risk that active market participants will pursue private interests in restraining trade." *Dental Examiners*, 135 S. Ct. at 1114. *See also id*. at 1117 ("If a State wants to rely on active market participants as regulators, it must provide active supervision"); *Edinboro College Park Apartments*, 850 F.3d at 579 (*Dental Examiners* imposed full *Midcal* scrutiny "[b]ecause" the North Carolina board was "controlled by active market participants").

If the Board members' position that gubernatorial supervision alone is enough to make the Board's conduct *ipso facto* sovereign were the law, *Dental Examiners* would be largely meaningless. Yet, the Court there never suggested that if the North Carolina Board had been supervised by a sovereign actor, the acts of that board would have been attributed to the supervisor. Instead, the Court explained that if the North Carolina board had been properly supervised, the board would

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

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

The question of whether the state supervisor actually reviewed the substance of the challenged conduct is a factual one. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 (1985) (the "requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy"); *Cost Mgmt. Servs., Inc. v. Wash. Nat'l Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996) ("[T]he question of whether a state has 'actively supervised' a state regulatory policy is a factual one which is inappropriately resolved in the context of a motion to dismiss.").[5] SmileDirect's Complaint, whose factual allegations must be accepted as true on a motion to dismiss, alleges that the required substantive review did not occur because the Board failed to provide the Governor with information regarding the substance of the rule and its

[5] The Board members assert (Br. 51-52) that active supervision is a legal question, but the case they cite, *Trigen Okla. City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220, 1225 (10th Cir. 2001), refers only to "state action immunity" generally, not the active supervision test specifically, and does not cite any authority for this specific proposition.

impact on consumers. Complaint ¶ 45. SmileDirect alleges that the Board "impeded" the Governor's review of the Board's rule by withholding important information from the Governor, including a complete account of the reasons for and the objections to the Board's conduct. *Id.*; Order at 12-13. SmileDirect further alleges that the Board failed to explain the consumer impact of the Board's conduct, information that may be critical to a supervisor's assessment of competitive impact. Order at 12-13. Supervision in the absence of complete information can render the review substantively insufficient. *See Cost Mgmt. Servs.*, 99 F.3d at 943 (plaintiff's allegation that key information was deliberately withheld from the supervisor made active supervision a disputed issue of fact).

The Certification of Active Supervision submitted by the Board, assuming that the district court could consider it on a motion to dismiss, does not resolve the factual question of whether active supervision occurred.[6] A purpose of the active supervision inquiry is to determine "whether the State has exercised sufficient independent

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[6] We do not question the Governor's motives in issuing the Certification, which are not at issue here.

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 judgment 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 doctrine"). The Supreme Court has explained that "state-law authority to act is insufficient … the substate governmental entity must also show that it has been delegated authority to act or regulate 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.

See 135 S. Ct. at 1116 ("Whether or not 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 implements an articulated state policy to displace competition instead of serving private competitive interests. Although the Governor has a statutory "duty" to review Board rules, as the Board members note (Br. 48), actually carrying out that duty is a different matter. The Certification of Active Supervision, by finding only that the Board's rule was "related to" dental assistant services, does not establish that the Governor conducted a substantive review to ensure that the rule and the Board's enforcement 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 wrong 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 supervisor's review of the particular

conduct under challenge." Br. 52 (citation and internal quotations omitted). That contention is flatly inconsistent with *Dental Examiners* and other Supreme Court precedent. The Court has made clear that substantive review actually must take place in the case at hand, finding that "there is no evidence here of any decision by the State to initiate or concur with the Board's actions" and explaining that the "mere potential for state supervision is not an adequate substitute for a decision by the State." 135 S. Ct. at 1115-16. Similarly, in *Ticor* the Court held that a "negative option," by which regulatory rates became effective if not rejected within a set time, was not active supervision; there must be an actual "decision by the State." 504 U.S. at 638. *See also Patrick*, 486 U.S. at 101 (active supervision demands "that state officials have *and exercise* power to review particular anticompetitive acts") (emphasis added). The Board members' recitation of Georgia's statutory review procedures (Br. 47-51) therefore is insufficient to show what review actually took place.

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 of the Board's challenged regulation.

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 6,476 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 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 States of America and Federal Trade Commission as Amici Curiae Supporting Plaintiff-Appellee 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.

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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