No. 18-60291

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

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LOUISIANA REAL ESTATE
APPRAISERS BOARD,
*Petitioner,*

v.

FEDERAL TRADE COMMISSION,
*Respondent.*

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On Petition for Review from the
Federal Trade Commission
No.9374

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# OPPOSITION OF THE FEDERAL TRADE COMMISSION TO THE LOUISIANA REAL ESTATE APPRAISERS BOARD'S MOTION FOR A STAY PENDING APPEAL

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## INTRODUCTION

The Court should deny the Louisiana Real Estate Appraisers Board's motion to stay an ongoing administrative proceeding that will determine whether the Board's price-fixing regime violates the antitrust laws. The Board is unlikely to succeed on the merits. First, the Court lacks jurisdiction. The Federal Trade Commission Act allows judicial review *only* of final cease-and-desist orders, not other types of orders. Moreover, the Federal Trade Commission's order would not be immediately reviewable anyway because it does not deprive the Board of an immunity from suit. The Board claims such an immunity based on the panel decision in *Martin v. Memorial Hospital*, 86 F.3d 1391 (5th Cir. 1996), but it fails to even mention a subsequent, unanimous *en banc* decision of this Court holding explicitly to the contrary. *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (1999) (*en banc*).

The Board provides no good reason to question the FTC's ruling on the state-action doctrine. The Board's members plainly are market participants—8 of 10 are real estate appraisers who are licensed to appraise residential real estate. And while there is a *possibility* of state supervision, that is not sufficient under established law to merit protection. Finally, the Board is not a sovereign entity and cannot assert an injury to state sovereignty. By contrast, a stay would harm the public interest in expeditious enforcement of the antitrust laws.

## BACKGROUND

The FTC issued an administrative complaint charging the Board with unreasonably restraining price competition for real estate appraisal services provided to appraisal management companies (AMCs). The Board is a state agency controlled by licensed real estate appraisers and empowered to regulate aspects of the real estate appraisal industry in Louisiana. As alleged in the Complaint, the Board elected to fix the prices AMCs pay for appraisal services. That action, the Complaint alleges, unreasonably restrains price competition among appraisers, and thereby amounts to an "unfair method of competition" that violates Section 5 of the FTC Act, 15 U.S.C. § 45(a).

The Board believes itself exempt from antitrust scrutiny under the state-action doctrine, which can shield implementations of state policy from federal antitrust liability. *See Parker v. Brown*, 317 U.S. 341 (1943). To qualify for state-action protection, the Board must show that the challenged restraint on competition is one "clearly articulated and affirmatively expressed in state policy" and that the Board's conduct is "actively supervised by the State." *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015) (cleaned up).

The Board moved to dismiss the Complaint as moot. ROA.34-35. It maintained that post-Complaint modifications to the State's regime for supervision of the Board and the Board's re-promulgation of the price-fixing rule qualify all of

the Board's post-Complaint conduct for state-action protection. ROA.57. In addition, the Board argued that it had taken actions sufficient to eliminate any continuing effects of the pre-Complaint conduct. ROA.65-66.

The Commission rejected the Board's argument. It disagreed that the State has and will actively supervise all of the Board's post-Complaint conduct. ROA.1374-1379. The Commission found that the Board's re-promulgation of the price-fixing rule in 2017 was not actively supervised. ROA.1376. The Commission found that with regard to future enforcement of the rule, the limited and deferential oversight contemplated by the State will be insufficient to satisfy active supervision standards. ROA.1378.[1]

At the same time, Complaint Counsel (FTC staff who present the case to the ALJ and the Commissioners) moved for partial summary disposition of the Board's affirmative defenses: that the Complaint failed to 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*. ROA.249. In granting Complaint Counsel's motion, the Commission ruled that the Board is subject to the active supervision requirement, because a majority of its

[1] Because the Commission concluded that the Board failed the active-supervision prong of the state-action doctrine, it did not need to reach whether Louisiana has a clearly articulated policy to displace competition in the market for residential real estate services. ROA.1370 n.13.

members (at least eight of ten) are real estate appraisers who are active market participants. ROA.1365, 1381. It explained that "the Board is controlled by active market participants and is therefore subject to the active supervision requirement." ROA.1382.

The Commission similarly held that the Board failed to show that the State of Louisiana actively supervised its pre-Complaint conduct, ROA.1382, let alone its post-Complaint conduct, ROA.1378, 1382; *see also* ROA.1378. The State had not supervised the initial issuance of the price-fixing rule, its subsequent enforcement, or its reissuance in identical form. ROA.1374-1378, 1382.

The case is scheduled for a trial on the merits starting October 15, 2018. The Board petitioned for review of the Commission's state-action decision and now asks the Court to stay the upcoming trial.

## ARGUMENT

To merit a stay, the Board must show (1) a substantial likelihood of success on the merits; (2) irreparable injury absent a stay; (3) that a stay will not substantially injure other parties; and (4) that a stay would serve the public interest. *Nken v. Holder*, 556 U.S. 418, 434 (2009). The first two prongs are the "most critical," *id.*, but the Board satisfies none of them.

## I. THE BOARD IS UNLIKELY TO SUCCEED ON THE MERITS

The Board's appeal is unlikely to succeed both because the Court lacks jurisdiction to hear it and because the Commission's state-action ruling was correct.

### A. The Court Lacks Jurisdiction For Two Reasons

#### 1. Section 5(c) of the FTC Act Allows Appeal Only of Final Cease-and-Desist Orders

The Board petitions for review under Section 5(c) of the FTC Act, 15 U.S.C. § 45(c), which is the only statute that permits an appeal from FTC action. Congress did not, however, authorize judicial review of interlocutory orders. Rather, Section 5(c) provides for review by a court of appeals only of "an order of the Commission to cease and desist from using any method of competition or act or practice." *Id*. Statutes limiting judicial review to "a particular type of decision" by an agency are "central to the requisite grant of subject-matter jurisdiction." *Weinberger v. Salfi*, 422 U.S. 749, 764 (1975). On that principle, this Court has barred review of pending FTC adjudicatory proceedings because "jurisdiction [under Section 5(c)] arises only from a cease and desist order entered by the Commission." *Texaco, Inc. v. FTC*, 301 F.2d 662, 663 (5th Cir. 1962).

The Board ignores the preclusive jurisdictional effect of Section 5(c), asserting instead that non-final Commission decisions are immediately appealable under the collateral order doctrine. Mot. 10-11. We show below that the decision

does not satisfy the requirements of that doctrine, but even if it did, the collateral order doctrine is only a "practical construction" of the term "final decision" as used in 28 U.S.C. § 1291, which authorizes appeals of district court decisions. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Section 5(c) is not susceptible of the same "practical construction" because it allows review only of "cease and desist" orders and not "final" decisions. Thus, whether or not the collateral order doctrine could apply to state-action rulings issued by district courts, Congress has precluded review of similar decisions issued by the FTC other than final cease and desist orders.

**2. A State-Action Ruling Is Not Immediately Appealable.**

This Court also lacks appellate jurisdiction for the independent reason that the Commission's interlocutory state-action ruling is not an immediately appealable collateral order.

Only a "small class" of non-dispositive collateral rulings can be deemed final and immediately appealable. *Will v. Hallock*, 546 U.S. 345, 349 (2006). To come within that narrow category, an order must (1) "conclusively determine the disputed question;" (2) "resolve an important issue completely separate from the merits of the action;" and (3) "be effectively unreviewable on appeal from a final judgment." *Id*. at 349 (cleaned up). 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" because otherwise the collateral order doctrine would "swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered." *Digital Equip. Corp.*, 511 U.S. at 868 (citation omitted). Thus, "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (quoting *Will*, 546 U.S. at 350).

At the outset, an order determining that a case is not moot cannot fall into the narrow class of immediately appealable orders. The Board cites no case in a similar posture that a court has found subject to collateral appeal. If such orders were automatically appealable, the collateral order doctrine would be expansive, not narrow as the Supreme Court has demanded. As to Complaint Counsel's motion for summary disposition on the Board's state action defense, the decision on review is akin to a ruling on a motion *in limine*. Even if the Court reversed the order on review, that outcome would not even spare the Board from trial. A trial would still be required to resolve disputed issues of fact, and to determine whether the evidence sufficiently establishes a state action defense.

More importantly, the Commission's state-action ruling will be meaningfully reviewable should the Board appeal a final cease-and-desist order. An order 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). The quintessential such interest is a "right not to be tried." *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989). The Supreme Court thus has deemed immediately reviewable orders denying immunities such as qualified immunity and Eleventh Amendment immunity. *Will*, 546 U.S. at 350. But the Court has rejected the idea that an immediate appeal arises whenever a party is denied "an asserted right to avoid the burdens of trial." *Will*, 546 U.S. at 351. "[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at 353 (emphasis added).

The Board argues that the state-action doctrine "protects the right to be free of litigation." Mot. 8, citing *Martin*, 86 F.3d 1391. That is incorrect. The state-action doctrine is a defense to antitrust liability, not a right to be free from suit. To be sure, in *Martin* a panel of the Court analogized state-action doctrine to qualified or Eleventh Amendment immunities and found a denial subject to the collateral order doctrine. *Id.* at 1394-97. But in a subsequent, unanimous *en banc* decision—which the Board inexplicably fails even to mention—this Court recognized that "immunity is an inapt description" of the state-action doctrine; the term "*Parker* immunity" is most accurately understood as "a convenient shorthand" for "locating

the reach of the Sherman Act." *Surgical Care Ctr.*, 171 F.3d at 234. The Court went on to note, contrary to *Martin*, that the state-action doctrine has a "parentage [that] differs from the qualified and absolute immunities of public officials" and from Eleventh Amendment immunity. *Id.*

*Surgical Care Center* thus both fatally undermines the reasoning in *Martin* and defeats the Board's claim that it has a sovereign right not to face trial. *See also S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006) ("*Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.'"); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567 (6th Cir. 1986) ("the [state-action] exemption is not an 'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim"). Because the state-action doctrine confers no "immunity" as that term is used in the collateral order cases, the Board enjoys no automatic right to appeal.

The Board may obtain full and effective review of the Commission's state-action ruling after the Commission issues a final order. Should this Court ultimately conclude that the Board's conduct was protected by the state-action doctrine, it may set aside the Commission's final order and the Board's rights will be fully vindicated. As with any other affirmative defense, review of the Commission's denial of state-action protection "on direct appeal … certainly

affords the necessary protection if the defense is valid." *Huron Valley Hosp.*, 792 F.2d at 567.

### B. The Board is Unlikely to Show it is Protected by the State-Action Doctrine

The Board is unlikely to show a valid state-action defense. "A nonsovereign actor controlled by active market participants"—such as the Board—enjoys *Parker* immunity only if it shows first that the challenged action is "clearly articulated and affirmatively expressed as state policy," and second that the policy is "actively supervised by the State." *N.C. Dental*, 135 S. Ct. at 1110 (cleaned up). The Board is not likely to meet any part of that test.

#### 1. The Board is Unlikely to Show That its Members Are Not Active Market Participants

The Board first contends that it will prevail on appeal by showing that its members are not "active market participants" and that active state supervision is not required. Mot. 12. The claim is meritless.

As the Commission concluded, at all relevant times, a majority of the Board's members have been licensed real estate appraisers actively providing appraisal services in Louisiana. ROA.1381-1382. The Board seeks to obscure this undisputed fact by subdividing the Board's membership into residential and non-residential appraisers and then claiming that "at no time did a majority of the Board members actively participate in the relevant market for *residential* real

estate appraisals." Mot. 12 (emphasis added). But that distinction overlooks the key factor underlying the *N.C. Dental* decision: that "the need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade." 135 S. Ct. at 1114.

Of the Board's ten members, eight must be certified appraisers, including at least four "general appraisers" and two "residential appraisers." La. Rev. Stat. §§37:3394(B)(1)(c), (B)(2). As the Board conceded (ROA.1380), being a "general appraiser" means that the licensee may appraise "all types of real estate regardless of complexity or transaction value," *id.* §37:3392(7), including residential property. In fact, several of the "general appraisers" whose affidavits the Board proffered provide residential service. ROA.1380. Thus, a clear majority of Board members are active market participants because they are licensed to provide residential real estate appraisal services.[2] They have an obvious financial interest in setting appraisal fees higher than a free market would bear.

[2] This question is one of federal law, but Louisiana law defines "active market participant" to mean anyone who is (a) licensed by an occupational licensing board; (b) a provider of any service subject to the regulatory authority of an occupational licensing board; or (c) subject to the jurisdiction of an occupational licensing board. La. Rev. Stat. §37:43(1) (eff. May 30, 2018).

### 2. The Board Is Unlikely to Show Active State Supervision

The Board claims that the Louisiana state government actively supervises its conduct. Mot. 15-19. As the Commission has concluded, however, that is incorrect. *See* ROA.1372-1378, 1382-1383.

First, the Board relies on "negative option" regulatory review by legislative oversight committees and the Governor, and judicial review of enforcement actions. Mot. 17-18. Neither review amounts to active supervision. Louisiana law gives legislative oversight committees the right, but not the duty, to determine whether a Board rule is "acceptable or unacceptable." La. Rev. Stat. §§49:968(D)(1)(b), (3)(d). The failure to exercise that power "shall not affect the validity" of proposed rules. *Id.* §49:968(E)(2).[3] Similarly, the Governor may, but does not have to, suspend or veto any rule within 30 days of its adoption. *Id*. §§ 49:968(D)-(G); 49:970.

These provisions show at best only the "potential for state supervision," which is "not an adequate substitute for a decision by the State." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992). Indeed, the Court in *Ticor* rejected this very

[3] Louisiana law used to provide that Board rules required "affirmative approval" by legislative oversight committees. La. Rev. Stat. §3415.21(B) (2013). But the law contained a loophole that allowed the Board to submit a proposed rule while the legislature is out-of-session, in which case it converted to a negative-option. The price-fixing rule became effective through that loophole, with no review by the legislature. ROA.1382.

type of "negative option" as adequate state supervision. *Id*. The Court held that the State's failure to act does not "signif[y] substantive approval" and thus does not amount to active supervision. *Id.*

Limited judicial review is likewise insufficient to qualify as active supervision. *Patrick v. Burget*, 486 U.S. 94, 103-04 (1988). The Board argues that *Patrick* did not foreclose the possibility that *some* judicial review could be active state supervision, but it utterly fails to distinguish the judicial review of *its* enforcement decisions from the one found inadequate in *Patrick*. Mot. 17-18. A court may review "questions of law" *de novo*, but other matters are reviewed deferentially. La. Rev. Stat.*Id*. §37:3415.20(B)(1) & (2). This is the same limited and highly deferential review held inadequate in *Patrick*. 486 U.S. at 103-04. *See also Ticor*, 504 U.S. at 638 (the mere *availability* of state judicial review "could not fill the void").

Second, the Board argues that any failure of active supervision was remedied by the reissuance of the price-fixing rule, combined with the Governor's 2017 Executive Order (EO), which provided for review of the rule by the State's Commissioner of Administration (COA), and for review of the Board's enforcement proceedings by the State Division of Administrative Law (DAL). ROA.1368-73. The Commission correctly rejected those claims.

The State did not actively supervise the re-promulgation of the rule. ROA.1373-1376. In fact, the Board failed to follow the procedure set out in the EO. For example, it did not submit for COA review the "rulemaking record," as required by Section 2 of the EO [ROA.1373]. The Board did not solicit public comment or conduct a hearing on the rule. The Board claims that it relied on the record of the original rule, but that material was long-since stale. The COA thus had no ability to "exercise[] sufficient judgment and control" to demonstrate that the Rule was the "product of deliberate state intervention." *Ticor*, 504 U.S. at 634-35. Unsurprisingly, the COA's cursory approval letter consisted of three conclusory sentences reciting the standard set in the EO, with no analysis, discussion, or explanation of the COA's reasoning. As the Commission found, "the letter strongly suggests that the [COA] simply rubber-stamped the Board's decision." ROA.1374.[4]

The procedures for DAL review of enforcement proceedings plainly leave unreviewable substantial parts of the Board's conduct. ROA.1376-1378. The review standards and procedures are set out in a memorandum of understanding between the Board and the DAL. ROA.1368-1369. The memorandum expressly

[4] The *post-hoc* opinion of the General Counsel of the Division of Administration was hardly better. It too lacked any substantive analysis of the proposed rule; worse, it disavowed the General Counsel's "power to veto or modify particular decisions" of the Board (ROA.1374). Yet the Supreme Court held that a state active reviewer "must have" such power. *N.C. Dental*, 135 S. Ct. at 1116.

limits DAL review of proposed settlements, dismissals, and informal resolutions to "DAL-approved enforcement actions." MOU § 5(b) [ROA.1376]. As the Board itself acknowledged before the Commission, *see* ROA.1378 (citing Unangst Aff. ¶¶64-65, 76 [ROA.899, 901]), *most* of the Board's fee investigations (under the original price-fixing Rule) did not proceed to formal adjudication. Substantial Board conduct therefore has no state supervision at all.

### 3. The Board is Unlikely to Show A State Policy to Displace Competition

The Board argues that by mandating that AMCs pay "customary and reasonable" residential appraisal fees, "Louisiana has clearly articulated a policy to displace price competition in the market for residential real estate appraisal fees." Mot. 13. Having found no active state supervision, the Commission found no need to address the issue.[5] ROA.1370 n.13. Nevertheless, the Board is unlikely to succeed in showing that clear articulation.

Clear articulation requires a showing that the displacement of competition be "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013). For the Board to satisfy this condition, it must show that the appraisal fee

[5] The Board claims (Mot. 13) that "[n]either Complaint Counsel nor the Commission has ever challenged the existence of clear articulation in this case," but that is only because such a challenge was unnecessary. Neither has conceded the issue.

requirements it promulgated and its enforcement conduct necessarily follow from the Louisiana legislature's command that AMCs be paid "customary and reasonable" appraisal fees. La. Rev. Stat. §37:3415. The Board cannot make that showing.

The Board concedes that the Louisiana legislation merely implements the requirements of the federal Dodd-Frank Act. *See* Mot. 3-4, 14-15. Thus, state law could have directed displacement of competition only if the federal statute and its implementing regulations did so. But those federal authorities do not contemplate that the States would displace the free market as a means for determining the "customary and reasonable" value of residential real estate appraisal services. If anything, they do the opposite.

The Dodd-Frank Act requires the payment of "customary and reasonable fees" for residential real estate appraisal services. 15 U.S.C. § 1639e(i). Implementing regulations issued by the Federal Reserve Board (the Fed) established several non-exclusive ways to ascertain customary and reasonable fees, including two safe-harbor provisions. *See* 12 C.F.R. § 226.42(f)(2) & (3).[6] Rather

[6] The rules create a rebuttable presumption of compliance with the "customary and reasonable" standard if a lender (a) uses recent fees paid for equivalent appraisals, as adjusted based on six enumerated factors that influence fee levels; or (b) uses fee schedules prepared by independent third parties, such as government agencies, academic institutions, and independent private sector surveys, so long as these sources exclude compensation paid directly by AMCs.

than mirroring the federal use of these two methods as safe-harbors, the Board itself—not the legislature—declared them the *exclusive* means of setting customary and reasonable fees in Louisiana. *See* La. Admin. Code tit. 46, pt. LXVII § 31101 (2017) [ROA.523]; ROA.1367. The Board thus did not implement the State's legislated standard (which incorporated the federal standard); instead, it severely restricted how AMCs may comply with the standard. That is not "the inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature." *Phoebe Putney*, 568 U.S. at 229 (2013).

Significantly, the Fed explained the federal "customary and reasonable" standard to mean that "the marketplace should be the primary determiner of the value of appraisal services, and hence the customary and reasonable rate of compensation for fee appraisers." Truth in Lending Interim Final Rule, Supplemental Information, 75 Fed. Reg. 66554, 66569 (Oct. 28, 2010). Thus, the federal mandate for "customary and reasonable fees," which the Board concedes is coterminous with Louisiana's statutory mandate, ROA.805, 889, does not displace competition as a means to set fees but *embraces* the marketplace as "the primary determiner" of these fees. The Board's rule and enforcement conduct, by contrast, restrain that marketplace.

## II. THE BOARD HAS NOT SHOWN IRREPARABLE INJURY

Claiming irreparable harm, the Board tries to wrap itself in the "gauzy cloak"[7] of state sovereignty to assert that it has the same "dignitary interests" as the State of Louisiana itself to be immunized from suit. Mot. 9. But the Board is not the State, and its arguments fail.

The Board first argues that Supreme Court and circuit authority immunizing sovereign states from the burdens of trial apply to the Board, too, and thus render the burden of having to undergo the Commission's proceeding irreparable harm. Mot. at 8-9 (citing *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985); *Martin*, 86 F.3d at 1396-97; *Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013)). But the Board is not a sovereign state; under *N.C. Dental*, it is a non-sovereign actor. 135 S. Ct. at 1111. "State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." *Id.* The Board does not share the dignitary interests possessed by the State of Louisiana.

Even if it did, a state's dignitary interests are not even implicated in actions brought by the federal government. *See United States v. Mississippi*, 380 U.S. 128,

[7] *See California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 106 (1980) ("The national policy in favor of competition cannot be thwarted by casting [a] gauzy cloak of state involvement over what is essentially a private price-fixing arrangement.").

140 (1965) ("nothing in [the Eleventh Amendment] or any other provision of the Constitution prevents … a State's being sued by the United States"). Such 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*, 139 F.3d 899, 1998 WL 127839, at *1 (5th Cir .1998) (Table, Text in Westlaw) (citing *Chrissy F. by Medley v. Mississippi Dep't of Pub. Welfare*, 925 F.2d 844, 849 (5th Cir. 1991)).

The Board next argues that under *Martin*, 86 F.3d at 1396-97, the Board's burden of suit must be deemed irreparable. Mot. 9-10. Not so. As shown above, this Court, sitting *en banc*, concluded after the panel decision in *Martin* that the state-action doctrine does not equate with qualified or absolute immunities protecting public officials from the burden of trial. *Surgical Care Center*, 171 F.3d at 234. Yet the Board does not even mention that controlling case. Because state-action protection does not provide immunity from suit, the Board cannot be irreparably harmed by having to defend itself before the administrative tribunal.

In any event, *Martin* involved sub-divisions of the state itself, not a Board composed of active market participants. *Id.* at 1393, 1397. In refusing to extend immunity from suit beyond public entities, this Court explained 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. v. Wenger Corp.*, 207 F.3d 287, 293 (5th Cir. 2000). The Supreme Court in *N.C. Dental*, however, rejected efforts to treat state regulatory boards like typical public defendants, finding that, unlike municipalities, boards controlled by active market participants have structural incentives to engage in anticompetitive conduct. 135 S. Ct. at 1111-12. Accordingly, the Board is appropriately treated like a private defendant, which enjoys no immunity from trial under the state-action doctrine. *See Acoustic Sys.*, 207 F.3d at 294.

The burdens on the Board of the Commission proceeding are principally the expense and disruption of defending itself. Such burdens are "part of the social burden of living under government." *Petro. Exploration, Inc. v. Pub. Serv. Comm'n*, 304 U.S. 209, 222 (1938) (cleaned up). "Mere litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 244 (1980) (cleaned up).

Finally, the Board maintains that the burdens of the Commission proceeding "while this Court resolves the question of whether the Board can be tried in the first instance is quintessential irreparable harm." Mot. 11-12. In the absence of an immunity from suit, that cannot be correct. Even if it were, that harm would not provide sufficient grounds for a stay. "A stay 'is not a matter of right, even if irreparable injury might otherwise result to the [petitioner].'" *Planned Parenthood*

*of Greater Texas Surgical Health Servs.*, 734 F.3d at 410 (quoting *Nken*, 556 U.S. at 427).

## III. A STAY WOULD HARM THE PUBLIC INTEREST

Continuing to equate itself to the State of Louisiana, the Board suggests that the Commission proceeding prevents the state from effectuating or enforcing its laws, which is contrary to the public interest. Mot. 20 (citing *Maryland v. King*, 133 S. Ct. 1, 3 (2012); *Planned Parenthood of Greater Tex. Surgical Health Servs.*, 734 F.3d at 419). The Board fails to identify any actual impairment, nor could it. The cases cited by the Board involved challenges to state statutes, but the FTC's challenge is to a Board rule that the Board adopted and implemented with deficient state supervision. Every case cited by the Board involved a state as a defendant, represented by state officials. Here, in sharp contrast, the State of Louisiana is not a party and is not representing the Board, which has its own private counsel.

The Board next contends that the public interest would not be harmed by a stay because the Board is not enforcing the challenged Rule. Mot. 20-21. The absence of enforcement is ephemeral and reflects a unilateral decision of the Board. There is no reason why the Board cannot resume enforcement, especially if given breathing room by the grant of a stay. Thus, the public remains threatened by the Board's actions, and a stay would only delay a determination of their lawfulness.

The Board asserts that the Commission and others will also not be harmed by a stay. Mot. 21. The claim ignores the Commission's and the public's interest in expeditious resolution of proceedings. *See* 16 C.F.R. § 3.1; *cf. FTC v. Texaco, Inc.*, 555 F.2d 862, 872 (D.C. Cir. 1977) (*en banc*) (emphasizing "important governmental interest in the expeditious investigation of possible unlawful activity"). The Commission's decision here to delay by a few months the start of the evidentiary hearing in this case is in no way contrary to this interest. *See* Mot. 21. Indeed, by denying the stay, the Court may actually assist the Commission in expeditiously resolving the case because it will permit the Commission to address another of the Board's affirmative defenses. Mot. Ex. 2 at 1-2. Moreover, the Board would likely use the grant of a stay as an excuse to suspend other deadlines aimed at assisting the parties to prepare for the hearing, which could cause even further delay if the Court were to grant the stay and later lift it.

Finally, the Board says that a stay would allow other state appraiser boards to move forward with their own policies without fear of antitrust enforcement. Mot. 21. That argument, however, depends on the Board's position that it is a sovereign entity, like the State of Louisiana, which it is not. Moreover, whether any other state's board is a sovereign entity or is protected by the state-action doctrine depends on the specific facts bearing on the composition of the board and the existence of clear articulation and active supervision. In contrast, by denying

the stay, this Court will allow the Commission to work towards a decision that will provide guidance to those boards about mechanisms for regulation of appraiser fees that are consistent with the antitrust laws.

## CONCLUSION

The Court should deny the Board's motion for a stay.

Respectfully submitted,

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June 21, 2018

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## COMBINED CERTIFICATES

I certify that the foregoing brief complies with Federal Rule of Appellate Procedure 27(d)(2)(A), in that it contains 5,193 words.

I further certify that on the 21st day of June, 2018, an electronic copy of the foregoing opposition was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system and that service will be accomplished via that system.

June 21, 2018

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