

No. 18-60291

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**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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Petition for Review on an Order of the  
Federal Trade Commission

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**BRIEF OF THE FEDERAL TRADE COMMISSION**

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## **STATEMENT REGARDING ORAL ARGUMENT**

The Federal Trade Commission believes that the Court's lack of jurisdiction over this matter is sufficiently clear that argument is not necessary. Should the Court determine that it needs to assess the state-action question, the Commission requests oral argument of the case.

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## **JURISDICTION**

The Federal Trade Commission has subject matter jurisdiction over the adjudicative proceedings in this matter under 15 U.S.C. 45(b). As explained in Argument Section I below, under 15 U.S.C. 45(c), this Court lacks jurisdiction to hear this petition for review of an interlocutory Commission order, and there is no other basis on which to establish the Court's jurisdiction.

## **STATUTES**

See attached appendix.

## **QUESTIONS PRESENTED**

1. Whether this Court lacks jurisdiction over the order on review, which is neither a "cease and desist" order appealable under 15 U.S.C. 45(c) nor an appealable collateral order.
2. Whether the Louisiana Board's price-fixing scheme is beyond the reach of the antitrust laws by virtue of the state-action doctrine, where the state has not clearly articulated a policy to displace competition and does not actively supervise the Board's price-fixing conduct.
3. Whether the Commission correctly denied the Board's motion to dismiss the administrative complaint as moot and granted summary decision rejecting the Board's state-action defenses.

## STATEMENT OF THE CASE

“No antitrust offense is more pernicious than price fixing.” *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 639 (1992). The Louisiana Real Estate Appraisers Board, a state-chartered regulatory agency controlled by licensed, active real estate appraisers, stands charged with fixing minimum prices for real estate appraisal services. In the interlocutory order now before the Court, the Federal Trade Commission ruled that the Board was not beyond the reach of the antitrust laws due to the “state-action doctrine.” As pertinent here, the doctrine would allow a state agency to act anticompetitively only if the state both clearly articulates a policy to displace competition and actively supervises the agency’s anticompetitive conduct, neither of which the State of Louisiana has done. The Commission also determined that the case was not rendered moot by changes to Louisiana’s supervisory regime spurred by the Commission’s Complaint.

### **A. The Board’s Price-Fixing Regime for “Customary and Reasonable” Appraisal Fees**

The Dodd-Frank Wall Street Reform and Consumer Protection Act (Dodd-Frank) requires that lenders and their agents compensate real estate appraisers “at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised.” 15 U.S.C. 1639e(i)(1). Implementing regulations issued by the Federal Reserve Board (the Fed) established several specific, but non-exclusive, ways to ascertain “customary and reasonable” (C&R)

fees, including two rebuttable presumptions of compliance. *See* 12 C.F.R. § 226.42(f)(2) & (3). In particular, appraisal fees are presumptively “customary and reasonable” if they are based on either (a) recent fees paid for equivalent appraisals, as adjusted by various factors, or (b) fee schedules prepared by independent third parties, such as government agencies, academic institutions, or independent private surveys (with certain conditions). *Id.*

The Fed recognized, however, that the free market should principally determine fees. Thus, lenders and their agents are entitled to the presumption of compliance only if they do not “engage in any anticompetitive acts in violation of state or federal law that affect the compensation paid to fee appraisers.” *Id.*

§ 226.42(f)(2)(ii). The Fed explained that “the marketplace should be the primary determiner of the value of appraisal services, and hence the customary and reasonable rates of compensation for fee appraisers.” Truth in Lending Interim Final Rule, Supplementary Information, 75 Fed. Reg. 66554, 66569 (Oct. 28, 2010).

In recent years, lenders have increasingly turned to appraisal management companies (AMCs) to arrange for appraisal services. AMCs act as intermediaries between lenders and appraisers, contracting for services and compensation.

Under Louisiana law, the Board oversees both AMCs and commercial and residential appraisers. Real Estate Appraisers Law, LSA-R.S. 37:3391, *et seq.*;

Appraisal Management Company Licensing and Regulation Act (AMC Act), LSA-R.S. 37:3395.1, *et seq.* In 2012, the Legislature amended the AMC Act to incorporate the Dodd-Frank C&R fee standard. The revised statute requires that AMCs “shall compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the presumptions of compliance under federal law.” LSA-R.S. 37:3415.15(A).<sup>1</sup> Beyond directly incorporating the federal standards, the Legislature did not specify how the “customary and reasonable” standard may be met. The statute gave the Board authority to “adopt any rules and regulations ... necessary for the enforcement of” the AMC Act. LSA-R.S. 37:3415.21.

In 2013, the Board adopted Rule 31101, which (like the statute) directs that AMCs “shall compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised.” La. Admin. Code, title 46, rule 31101. (As described below, the Board re-promulgated the Rule in exactly the same form in 2017.) Unlike Dodd-Frank or the AMC statute, which favor market forces for fee-setting and which establish

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<sup>1</sup> The Legislature later changed the reference to “federal law” to “the requirements of 15 U.S.C. 1639(e) and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222.” 2016 La. Act 259.

presumptions for compliance, the Rule fixes prices at a minimum floor, measured against one of three tests:

1. Evidence for such fees may be established by objective third-party information such as government agency fee schedules, academic studies, and independent private sector surveys. Fee studies shall exclude assignments ordered by appraisal management companies.
2. The board, at its discretion, may establish a customary and reasonable rate of compensation schedule for use by any licensees electing to do so.
3. Licensees electing to compensate fee appraisers on any basis other than an established fee schedule as described in Paragraphs 1 or 2 above shall, at a minimum, review the factors listed in § 31101.B.1-6 on each assignment made, and make appropriate adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable.

*Id.* None of the tests allows an AMC and an appraiser to negotiate a fee through arms-length, market-based negotiations. Indeed, the Board commissioned a survey of recent fees and disciplined AMCs that paid fees lower than the median fees reported in the Survey. ROA.11-12. The Board admits that “Rule 31101 ... will displace competition in the residential appraisal market,” *see* Br.38.

## **B. The Federal Trade Commission’s Challenge to Rule 31101**

### *1. Complaint and Answer*

In 2017, the Commission issued and set for hearing an administrative complaint (Complaint) alleging that (1) Rule 31101 unlawfully restrains competition on its face because it prohibits AMCs from paying market-based appraisal fees, and (2) the Board’s enforcement of the Rule effectively set a fee

floor. ROA.11, 14. In its Answer, the Board asserted several affirmative defenses including invoking the protection of the “state-action” doctrine of antitrust law. ROA.29-30. That doctrine was first articulated in *Parker v. Brown*, 317 U.S. 341 (1943), which held that the Sherman Act does not reach the anticompetitive conduct of a sovereign state. Numerous subsequent decisions have fleshed out the contours of *Parker*, and it is now established that the conduct of a state agency controlled by active market participants in the field that the agency regulates will be shielded only if “the State has articulated a clear and affirmative policy to allow the anticompetitive conduct” and “the State provides active supervision” of that conduct. *North Carolina State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1114 (2015); *Ticor*, 540 U.S. at 631.<sup>2</sup>

The Board’s Ninth Affirmative Defense in its Answer asserted that the Board “is immune from federal antitrust liability under *Parker v. Brown*.” ROA.209. Its Third Affirmative Defense claimed that the Complaint did not state an antitrust claim because it “fails adequately to allege that the Board has a controlling number of active participants in the relevant residential appraisal market.” ROA.209. (emphasis omitted).

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<sup>2</sup> This test two-pronged test was announced in *California Retail Liquor Dealers Ass’n v. Midcal Alum., Inc.*, 445 U.S. 97 (1980).



## 2. *Motion for Partial Summary Decision*

Complaint Counsel (Commission staff who present the case to the ALJ and the Commissioners) asked the Commission to summarily reject the Board's state-action defenses. Complaint Counsel maintained that Louisiana did not actively supervise the price fixing, and thus the state-action doctrine did not protect the Board from antitrust liability.<sup>3</sup> ROA.273-74.

Complaint Counsel first argued that undisputed facts showed that a majority of the Board's members were active real estate appraisers licensed by the Board, which therefore "must satisfy [the] active supervision requirement in order to invoke state-action" protection. ROA.264-68 (quoting *N.C. Dental*, 135 S. Ct. at 1114). The Board responded that under *N.C. Dental*, a majority of the Board must be active participants in *residential* real estate appraisal services, which they were not. ROA.824-25. It also asserted that to determine whether Board members were active market participants, the Commission must undertake a fact-based inquiry into their income streams. ROA.828-31.

Applying the framework for summary judgment under Fed. R. Civ. P. 56(a), the Commission found no dispute that a majority of the Board were licensed real estate appraisers. ROA.1380, 1382. It explained that *N.C. Dental* did not require

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<sup>3</sup> Because the lack of active supervision negated the state-action defense, Complaint Counsel did not address the clear articulation prong. ROA.256 n.1. It did not, however, concede the issue. ROA.256 n.1.

parsing between residential and commercial appraising, since the Board regulated both and thus was composed of active market participants. ROA.1381. It further explained that the Governor's power to appoint and remove Board members did not negate their status as active market participants. ROA.1381-1382.

Complaint Counsel also argued that the Board is not entitled to state-action protection because Louisiana did not actively supervise its conduct. ROA.268-73. The Board claimed in response that the Louisiana House and Senate actively supervised promulgation of the Rule. ROA.815-19. The Board also contended that judicial review of enforcement decisions amounted to active supervision. ROA.819-21.

The Commission rejected both arguments. The legislative and judicial supervision were, at best, merely "potential," but under Supreme Court precedent, potential state supervision is not active supervision. ROA.1382-1383 (citing *Ticor*, 504 U.S. at 638). The Commission thus held that, in the absence of disputed and material facts about state supervision of the conduct alleged in the Complaint, Complaint Counsel had shown as a matter of law that the state did not actively supervise the Board's conduct and its state-action defense should be dismissed. ROA.1383-84.

### 3. *The Board's Motion to Dismiss*

After the Commission issued the Complaint, the Governor of Louisiana issued an executive order (E.O.) requiring the Commissioner of Administration (COA) to review new rules implemented by the Board involving the C&R standard. ROA.62. The Governor also required the Division of Administrative Law (DAL) to approve, modify, or reject certain Board enforcement activities. ROA.62. The Board then re-promulgated the Rule (in identical form to the original) and submitted it to the COA for approval to publish it for comment. It later re-submitted the Rule, along with the rulemaking record, to the COA, the Governor, and the Legislature, none of which objected. ROA.61-63. The Board also rescinded the prior Rule, closed all pending C&R fee investigations, and vacated its only adjudicated fee order. ROA.66-67.

Relying on those new measures, the Board asked the Commission to dismiss the Complaint as moot. ROA.34-72. It asserted that the post-Complaint measures eliminated any prior effects of the old Rule while providing for active supervision of the new Rule and the Board's actions going forward. ROA.67. According to the Board, the Commission could no longer order any meaningful relief to address the conduct alleged in the Complaint. ROA.67. Complaint Counsel argued in opposition that the new measures did not create a facially adequate state-action

regime, and further that the case was not moot anyway because the Commission must still address the prior anticompetitive conduct. ROA.1409-16.

Because the Board's claim of mootness addressed jurisdiction, the Commission considered the issue under the standard of Fed. R. Civ. P. 12(b)(1), under which the Commission may look beyond the Complaint allegations, weigh evidence, and resolve factual disputes. ROA.1371. Nonetheless, the Commission found that there were no disputes about the facts bearing on the new state supervision regime.<sup>4</sup> The undisputed record showed that the amended regime did not amount to active supervision, either of the re-promulgated Rule or its enforcement.

Louisiana did not actively supervise the re-promulgated Rule. A COA letter approving the publication of the new Rule for public comment did not show that the COA had undertaken a substantive analysis of the Rule, especially in the absence of a full rulemaking record. ROA.1373-74. And, a subsequent letter from the COA's general counsel expressly disclaimed any COA power to disapprove the Rule once it had been published for comment. ROA.1374. As for legislative supervision, the Commission found that neither house of the Louisiana Legislature held hearings or voted on the re-promulgated Rule, thus failing to actively

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<sup>4</sup> Because its ruling on active supervision disposed of the state-action question, the Commission did not find it necessary to reach the clear articulation issue. ROA.1370 n.13.

supervise it. ROA.1375. Moreover, under state law, any Board rule could go into effect after legislative inaction. ROA.1375. Again, the Board had shown only the potential for state supervision, not actual supervision. ROA.1375 (citing *Ticor*, 504 U.S. at 638).

The Commission found further that the new standards governing DAL-review of enforcement activities were too deferential to amount to meaningful supervision, especially with respect to review of proposed remedies. ROA.1377. The Commission further found “significant gaps” in potential DAL review because the Board could undertake a range of enforcement activities, such as sending demand letters and resolving alleged violations through informal settlements, without triggering DAL review. ROA.1378.

The Commission thus concluded that Louisiana had not actively supervised re-promulgation of the Rule and that the state supervision regime going forward did not satisfy the state-action doctrine. ROA.1378. The matter therefore was not moot, and the Commission declined to dismiss it. ROA.1378. Since the Board filed its petition, Louisiana and the Board have continued to modify measures for Board supervision, but those measures are not part of the record on appeal and have not been considered by the Commission.

## SUMMARY OF ARGUMENT

1. The Court should dismiss the petition for lack of jurisdiction. The FTC Act grants appellate jurisdiction only from “cease and desist” orders. 15 U.S.C. 45(c). The Board, however, asks the Court to review an interlocutory decision, not a “cease and desist” order. Nor is the order subject to the collateral-order doctrine, which is rooted in the language of 28 U.S.C. 1291 governing review of “final decisions” of district courts. The FTC Act allows review only of “cease and desist” orders, not “final decisions.”

This case does not meet the strict demands of the collateral-order doctrine in any event. State-action rulings are not “effectively unreviewable”; this Court can review the question on appeal from a cease-and-desist order. Nor will the Board lose any rights in the meantime, because the state-action doctrine does not protect a right to avoid trial. This Court, sitting *en banc*, has held that state-action protection defines the reach of the antitrust laws and does not give states “immunity” like the Eleventh Amendment. *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th 1999) (*en banc*). In addition, unlike absolute or other immunities, state-action determinations are intertwined with the merits of the case and are thus inappropriate for appellate consideration at this point. *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), does not control this case both because the *en banc* Court seriously undermined its reasoning in

*Surgical Care Center* and another panel of the Court limited its holding to municipal governments, which the Board is not. *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 291 (5th Cir. 2000).

2. If the Court reaches the merits, it should affirm the Commission's decision. Competition is the cornerstone principle of the American economy, and state boards may override that fundamental precept only in narrow circumstances and after meeting a strict test. In particular, to warrant state-action protection, the Board must satisfy the "*Midcal*" test by showing that the state "clearly articulated" its intent to displace competition, and that the state has "actively supervised" the Board's conduct.

*Midcal* applies to the Board. A "controlling number of [the Board] are active market participants in the occupation the [B]oard regulates." *N.C. Dental*, 135 S. Ct. at 1114. The Supreme Court made clear in *N.C. Dental* that when it comes to such regulatory boards, "market participant" refers not to a board member's specific line of business but to her participation in the occupation regulated by the Board. It therefore is enough that a majority of Board members are licensed real estate appraisers, whether or not they conduct residential appraisals.

The Board fails to satisfy either prong of the *Midcal* test. Louisiana has not "clearly articulated" a state policy to displace competition and did not reasonably foresee that the Board would set a price floor for appraisal fees. To the contrary,

the Legislature directly expressed its intention to adopt the federal standard for “customary and reasonable” fees, which explicitly contemplates reliance on market forces.

Louisiana did not actively supervise the Board’s conduct challenged in the Complaint, and it will not actively supervise that conduct under new procedures adopted after the Complaint issued. To show active supervision, there must be evidence that the supervisor, aware of the sovereign state policy, undertook an informed and substantive assessment of the Board’s conduct, and exercised independent judgment in determining whether the Board’s actions promoted that policy and were the inherent, logical, or ordinary result of the exercise of the authority delegated by the state. At no time has Louisiana met those requirements.

When the Board first issued its price-fixing rule in 2013, the Governor and the Legislature had the power to review the Board’s rules. But they made no meaningful use of that power, simply doing nothing while the rules took effect. Thus, the Board can show at most that it was subject to *potential* state supervision, but it cannot show that the rule was subject to *active* supervision. The Supreme Court has ruled repeatedly that the mere potential for state oversight—such as the “negative option” review on which the Board relies—is not enough to overcome federal antitrust law. Active supervision requires action.



The same goes for the Board's 2017 adoption of an identical rule under a revised regime, after the Commission issued the Complaint. The State added new overseers, such as the Division of Administrative Law and the Commission on Administration, but the record shows that those bodies exercised no independent judgment to determine whether the rule promoted state policy. The new oversight regime simply added more layers of potential supervision, but active supervision calls for quality, not quantity.

Judicial review of Board enforcement of both the former Rule and the new one is inadequate. For one thing, judicial review will amount only to potential supervision because enforcement targets may decide not to seek judicial review. Moreover, the Supreme Court has never found judicial review to satisfy active supervision requirements where a court is acting in an adjudicative capacity. The Division of Administrative Law also does not actively supervise the Board's post-Complaint enforcement activity. DAL has limited authority that does not reach all of the Board's enforcement activity, which itself disproves active supervision. And even to the degree DAL has oversight power, it engages only in deferential review of the Board's proposed remedies.

3. The Commission correctly ruled on both Complaint Counsel's motion to summarily reject the Board's state-action defenses and the Board's motion to dismiss for mootness. The case is not moot. Even if Louisiana's modified

supervision regime were found to be “active,” the Commission could still direct a meaningful remedy for the Board’s pre-Complaint conduct.

The Commission also applied the correct legal standards in deciding the motions. The Board sought dismissal for mootness, an issue appropriately decided under Rule 12(b)(1). Complaint Counsel sought a summary ruling, an issue appropriately decided under Rule 56(a). The Board has shown no genuine and material disputed fact that precluded the Commission’s grant of summary decision.

### **STANDARD OF REVIEW**

The Commission applied standards adopted from the Federal Rules of Civil Procedure. It resolved the Board’s mootness motion under Rule 12(b)(1) and Complaint Counsel’s summary decision motion under Rule 56(a). ROA1371, 1379. When reviewing similar Commission decisions, courts of appeals have applied the same *de novo* standard of review used in appeals from district court decisions involving comparable motions. *See, e.g., Orkin Exterminating Co. v. FTC*, 849 F.2d 1354, 1360 n.6 (11th Cir. 1988); *Ctr. for Biological Diversity v. BP America Prod. Co.*, 704 F.3d 413, 421 (5th Cir. 2013); *Snydergeneral Corp. v. Continental Ins. Co.*, 133 F.3d 373, 375 (5th Cir. 1998).

## ARGUMENT

### I. THE COURT SHOULD DISMISS THE PETITION FOR LACK OF JURISDICTION

#### A. Section 5(c) of the FTC Act Allows Appeal Only of Cease-and-Desist Orders, Not Interlocutory Orders

In the FTC Act, Congress set forth a judicial review scheme that forecloses this Court’s jurisdiction in the absence of a final “cease and desist order.” Specifically, Section 5(c) of the Act, 15 U.S.C. 45(c)—the only statute that permits review of an FTC order by a court of appeals—provides for review of “an order of the Commission to cease and desist from using any method of competition or act or practice.” *Id.* Without such an order here, there is no basis for this Court’s jurisdiction.

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). This Court thus 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) (per curiam). Other courts have ruled likewise. *PepsiCo, Inc. v. FTC*, 472 F.2d 179, 185 (2d Cir. 1972); *LabMD, Inc. v. FTC*, No. 13-15267, 2014 U.S. App. LEXIS 9802, at \*2 (11th Cir., Feb. 18, 2014).

The jurisdictional limits of Section 5(c) cannot be sidestepped by invoking the collateral-order doctrine. That doctrine is not a free-floating route to immediate judicial review, but is rooted in a “practical construction” of the specific statutory term “final decision” in 28 U.S.C. 1291. *See Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Congress made a different and more restrictive choice for review of FTC decisions than it did for those of district courts, limiting review *only* to “cease and desist” orders. That precise term is not susceptible of the same “practical construction” as the term “final decision” in Section 1291. Thus, even if state-action rulings issued by district courts are appealable under the collateral-order doctrine, Congress precluded interlocutory review of similar decisions issued by the FTC. An aggrieved party must await issuance of a final cease-and-desist order.<sup>5</sup>

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<sup>5</sup> In seeking a stay, the Board argued that “[c]ourts apply the collateral order doctrine to [non-final] agency orders under ... the FTC Act.” Reply in Supp. of Mot. for Stay at 4-5, citing *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980), and *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006). It does not raise that claim now, and for good reason. *Standard Oil* did not involve a petition for review under Section 5(c), but a complaint filed in district court under the Administrative Procedure Act, which authorizes judicial review of “final agency action.” *See* 449 U.S. at 235 n.4 & 238. *S.C. State Bd.* misread *Standard Oil* and thus mistakenly “assume[d]” that the collateral-order analysis was pertinent to review under Section 5(c). *See* 455 F.3d at 440 n.5.

## **B. The Commission’s State-Action Ruling Is Not Immediately Appealable Under the Collateral-Order Doctrine**

Even if the collateral-order doctrine could apply here, the order on review does not satisfy its strict demands. Only a “small class” of collateral rulings may be appealed: those that are “too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated.” *Will v. Hallock*, 546 U.S. 345, 349-51 (2006). Otherwise, the 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, an order will fall within the “narrow and selective” class of immediate appeal, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 113 (2009) (quoting *Will*, 546 U.S. at 350), only if it meets all of three requirements. It 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 ruling on review is neither effectively unreviewable nor separate from the merits.

**1. State-action determinations are not effectively unreviewable on appeal from a final judgment**

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). One such interest is a “right not to be tried.” *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989). Thus, district court orders denying absolute Presidential immunity, qualified immunity, and Eleventh Amendment immunity are immediately appealable. *Will*, 546 U.S. at 350. But an immediate appeal does not arise from “an asserted right to avoid the burdens of trial.” *Id.* at 351.

The Board argues that the state-action doctrine is an “immunity” that protects “the State’s sovereign dignitary interests to be free from federal antitrust litigation.” Br.2-3. That is incorrect. The Supreme Court has made clear that the state-action doctrine is a defense to antitrust liability, not a right to be free from suit. The concern behind the doctrine is not that states be spared litigation, but the “burden on the States’ power to regulate” that would result if state economic policy were overridden by Sherman Act liability. *N.C. Dental*, 135 S. Ct. at 1109. *See So. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 56 (1985) (“the Sherman Act did not intend to compromise the States’ ability to regulate their domestic commerce”). That interest can be fully vindicated on appeal from a cease-and-desist order.

The panel decision in *Martin*, 86 F.3d at 1394-96, does not establish otherwise. To be sure, the panel analogized the state-action doctrine to absolute, qualified, or Eleventh Amendment immunities and found a denial of state-action protection subject to the collateral-order doctrine. *Id.* But three years later, the *en banc* Court unanimously recognized that “immunity is an inapt description” of the state-action doctrine. *Surgical Care Ctr.*, 171 F.3d at 234. The state-action doctrine has a “parentage [that] differs from the qualified and absolute immunities of public officials” and from Eleventh Amendment immunity. *Id.*<sup>6</sup> Consistent with the Supreme Court’s repeated description, the *en banc* Court recognized that the term “*Parker* immunity” is most accurately understood as “a convenient shorthand” for “locating the reach of the Sherman Act.” *Id.*<sup>7</sup>

*Surgical Care Center* thus defeats the Board’s claim that *Martin* gives it immunity from facing trial. In the absence of such an immunity, the Board cannot

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<sup>6</sup> The amici states thus wrongly analogize the state-action doctrine to Eleventh Amendment immunity. States Br.12-13. Moreover, the Board has no Eleventh Amendment interests; it is “not considered part of the State for Eleventh Amendment purposes.” *Will v. Michigan Dep’t of State Police*, 491 U.S. 58, 70 (1989) (citation omitted).

<sup>7</sup> The Ninth Circuit has held that “the state-action doctrine is a defense to liability, not immunity from suit.” *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 726 (9th Cir. 2017); accord *S.C. State Bd. of Dentistry*, 455 F.3d at 444; *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567 (6th Cir. 1986).

point to a right that will be “destroyed if its vindication must be postponed until trial is completed.” *Lauro Lines*, 490 U.S. at 498-99.

Brushing aside *Surgical Care Center*, the amici states argue that immediate review is required to protect the State’s “dignitary interests” and to avoid the costs and distraction of litigation.<sup>8</sup> State Br.8-9. That argument is meritless. States are routinely defendants in all manner of litigation, and claims that immediate appeal is necessary to preserve effective government could be made in every case.

In any event, reversing the Commission’s decision to reject the state-action defenses would not spare the Board from trial. The Board moved neither to dismiss the Complaint for failure to state a claim nor for summary decision on state-action. Reversal thus would simply restore those defenses for the Board to raise before the ALJ. Moreover, the Board’s mootness motion pertained only to the post-Complaint supervisory regime, not the pre-Complaint regime. Significantly, the Board does not claim that the Commission’s ruling on mootness is immediately appealable. Br.3 (claiming only pendent appellate jurisdiction on mootness).

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<sup>8</sup> It is of no moment that *Surgical Care Center* did not involve an interlocutory appeal. States Br.5 n.3. The *en banc* Court’s ruling renders *Martin*’s analysis invalid. For the same reason, it likewise renders misplaced state amici’s reliance on *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), which reached the opposite conclusion from *Surgical Care Center*.



## **2. State-action issues are 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 v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat’l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). State-action orders are directly enmeshed in the merits of antitrust claims. The central question presented in such suits is whether the defendant has engaged in conduct that antitrust laws prohibit. That is precisely the question that the state-action doctrine addresses. Conduct that is attributable to a state under the state-action standards does not violate federal antitrust laws. Far from being “completely separate from the merits of the action,” *Will*, 546 U.S. at 349, a state-action determination *is* a merits determination. That is particularly so here, given Louisiana’s continuous adjustment of its supervision while this matter has been pending.

State-action decisions are thus significantly different from those determining immunity from suit. Resolution of Eleventh Amendment immunity, for example, does not also determine the legality of challenged state conduct. *See Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993). And a determination that an official has qualified immunity “does not entail a

determination of the ‘merits’ of the plaintiff’s claim that the defendant’s actions were in fact unlawful.” *Mitchell v. Forsyth*, 472 U.S. 511, 529 n.10 (1985).

It makes no difference that courts can sometimes evaluate a state-action defense without considering the antitrust merits. The separateness determination turns on “the entire category to which a claim belongs,” not the facts of particular cases. *Digital Equip.*, 511 U.S. at 868; *see also Cunningham v. Hamilton Cty.*, 527 U.S. 198, 206 (1999) (eschewing “case-by-case approach to deciding whether an order is sufficiently collateral.”).

### **3. *Martin* does not control this case.**

The Board and the state amici’s argument turns entirely on *Martin*, but even if that decision were still good law, it does not control here. That panel held only that a denial of a state-action defense is an appealable collateral order “to the extent that it turns on whether a *municipality or subdivision* acted pursuant to ... state policy.” *Martin*, 86 F.3d at 1397 (emphasis added); *see Acoustic Sys. Inc.*, 207 F.3d at 291.<sup>9</sup> That expressly limited holding does not apply here. The Board is not a local government entity but a state regulatory board dominated by active market participants, which is akin to a trade association. *See N.C. Dental*, 135 S. Ct. at 1111-12.

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<sup>9</sup> To the extent that *Acoustic Systems* adopted *Martin*’s understanding of the state-action doctrine, it is inconsistent with *Surgical Care Center*.

## II. THE STATE-ACTION DOCTRINE DOES NOT PROTECT THE BOARD FROM ANTITRUST LIABILITY

Competition is “the fundamental principle governing commerce in this country,” *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 & n.16 (1978) (cleaned up), and one not lightly discarded. The Supreme Court has nevertheless recognized a narrow exception to the antitrust laws to accommodate principles of federalism and state sovereignty. The “state-action” doctrine permits states to act anticompetitively, but only when it is clear that the decision to dispense with free-market principles is the state’s own. *Parker*, 317 U.S. at 350-51. “[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws,” the state-action exception “is disfavored.” *FTC v. Phoebe Putney Health, Sys.*, 568 U.S. 216, 226 (2013) (cleaned up).

When anticompetitive conduct is undertaken not by the state itself, but by a state-created body composed of market participants, its actions are protected from antitrust liability only in limited circumstances. “State agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity.” *N.C. Dental*, 135 S. Ct. at 1111. The state-action defense applies only if (1) the state has “clearly articulated and affirmatively expressed” a policy displacing competition, and (2) the implementation of the policy is “actively

supervised by the State.” *Phoebe Putney*, 568 U.S. at 225 (quoting *Midcal*, 445 U.S. at 105).

The Board nevertheless contends that it does not have to satisfy the stringent *Midcal* requirements for three reasons. Br.24-35. None succeeds. And applying the *Midcal* criteria shows both that Louisiana has not “clearly articulated and affirmatively expressed” a state policy to displace competition in the regulation of appraisal fees and that the State has not actively supervised the anticompetitive conduct alleged in the Complaint.

**A. The Board Must Satisfy *Midcal***

**1. *Parker* does not establish that the Board is a sovereign actor**

The Board first contends that the state-action inquiry begins and ends with the 1943 *Parker* decision. The claim is that *Parker* held that “a state agency whose existence is defined by state law, and whose members are appointed and removable by state officials, is a state actor under federal antitrust laws, and not merely an assembly of private market participants.” Br.27. Thus, according to the Board, *Parker* establishes definitively that the Board is not subject to the *Midcal* test. The claim is flatly wrong.

To begin with, the Board fails to identify where in *Parker* this “holding” appears. The Board’s argument rests on the notion that *Parker* resolved the status of state agencies such as itself, but in fact the composition of the state commission

in *Parker* played no role in the Court’s reasoning, which did not address the matter. Nor had the lower courts. See *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 585-86 (1976) (opinion of Stevens, J.). Thus, the Board is wrong that *Parker* “held” that state boards with members appointed and removable by state officials automatically are sovereign entities. “Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided.” *Webster v. Fall*, 266 U.S. 507, 511 (1925).

Moreover, the Board’s reading of *Parker* cannot possibly be correct in light of the ensuing 65 years of Supreme Court decisions. As the Court has observed, the state-action doctrine has undergone “evolution and application” in the years since *Parker*. *Ticor*, 504 U.S. at 633.

Most prominently, in *N.C. Dental*, the Supreme Court rejected an argument nearly identical to the Board’s here that a state dental board’s “members were invested ... with the power of the State and ... cloaked with *Parker* immunity” without regard to the *Midcal* inquiry. 135 S. Ct. at 1110. The Court explained that whereas “[s]tate legislation and decisions of a state supreme court” are “undoubted exercise[s] of state sovereign authority,” *id.* (cleaned up), a non-sovereign actor under *Parker* “is one whose conduct does not automatically qualify as that of the sovereign State itself.” *Id.* at 1111. State agencies controlled by market participants plainly fall into the latter category. *Id.*

**2. Board members’ status as active market participants, not the method of their selection and removal, determines whether *Midcal* applies**

The Board next claims that because its members are appointed by the Governor and may be removed by him, it may not be deemed a non-sovereign actor under *N.C. Dental*. Br.29-30. The case does not support the Board’s theory.

It is true that the members of the state board at issue in *N.C. Dental* were selected by other dentists and not by a state agent. But the Court’s analysis turned not on the method of appointment, but on the board members’ status as active market participants. That status gave the members “an incentive to pursue their own self-interest under the guise of implementing state policies.” *N.C. Dental* at 1113 (quoting *Phoebe Putney*, 568 U.S. at 1011) (cleaned up). Active market participants “possess singularly strong private interests,” and their participation on policy-setting boards “pose[s] the very risk of self-dealing *Midcal*’s supervision requirement was created to address.” *Id.* at 1114. “The lesson is clear,” the Court explained: “*Midcal*’s active supervision test is an essential prerequisite of *Parker* immunity for any nonsovereign entity—public or private—controlled by active market participants.” *Id.* at 1113.

That concern is not diminished by the Board’s contention that appointment by state officers “assure[s] professional qualification and personal integrity; and the threat of removal deters self-interest.” Br.30. *N.C. Dental* anticipated such an

argument and rejected it. The Court explained that “established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern. Dual allegiances are not always apparent to an actor.” *Id.* at 1111. The Court’s “conclusion does not question the good faith of state officers but rather is an assessment of the structural risk of market participants’ confusing their own interests with the State’s policy goals.” *Id.* at 1114.

### **3. A majority of the Board consists of active market participants**

The Board finally attempts to avoid *Midcal* on the ground that a majority of its members are not active market participants. The claim is that under *N.C. Dental* the relevant “market” is residential appraisals, and the Board suggests that only a minority of its ten members actually performs residential appraisals. Br.33. This approach grossly misreads *N.C. Dental* and would result in an unworkable regime.

Nothing in *N.C. Dental* remotely suggests that when the Court used the phrase “active market participants” it meant to require a relevant antitrust market analysis. Rather, the Court focused on the general occupations of a board’s members. Thus, while the specific anticompetitive conduct at issue concerned teeth-whitening services, the Court considered only that the board was made up of dentists, without regard to whether they provided such services. *N.C. Dental*, 135 S. Ct. at 1114, 1116.

The Court stated its concern over “the risk that [a government body] would pursue private interests while regulating any single field.” *Id.* at 1113. The Court contrasted a board regulating a single field with a municipal government, which “exercise[s] a wide range of governmental powers across different economic spheres.” *Id.* at 1112-1113. Single-occupation boards, like the Louisiana Real Estate Appraisers Board, “have none of the features” of broad-ranging municipal bodies. They are more like private trade associations with incentives to pursue their members’ private interests. *Id.* at 1113, 1114.

The Court’s focus on the general occupation of the board’s members rather than the specific service they provided followed from its earlier decision in *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975). There, the Court held that the Virginia State Bar, a state agency, did not have state-action protection for a rule that fixed fees for title search services. *Id.* at 791, 792. The Court did not examine whether the lawyers controlling the State Bar practiced real estate law. For state-action purposes, it was enough that the lawyers were members of the profession they regulated.

The members of the Board in this case thus fall comfortably within the category of “active market participants” as identified in *N.C. Dental*. The Board regulates real estate appraisers. Louisiana law requires that a controlling number (*i.e.*, a majority) of Board members be licensed appraisers, including at least four



licensed general appraisers and two licensed residential appraisers. LSA-R.S. 37:3394(B)(1). And both types of appraisers may perform residential appraisals. LSA-R.S. 37:3392(7), (12); ROA.835. All real estate appraisers have an interest in higher fees for appraisal services, even if they do not specialize in the specific type of appraisals at issue.

The Board's suggested rule (Br.34) that status as an "active market participant" depends on the income streams of individual Board members would be "difficult, if not impossible, to apply as a practical matter." ROA.1381. As the Commission explained, "it would be impossible to know whether a particular action required active supervision without first conducting an analysis of ... the degree to which each Board member derived income" from a given activity. ROA.1381. Determining the need for active supervision would be a constantly moving target, as board members start or stop providing a particular service. Indeed, the Board itself cannot state how many Board members provide residential real estate appraisals. Br.34.

Finally, the Board (Br.35), joined by amicus Federation of State Medical Boards (Br.1-5), claims that defining "active market participant" by occupation rather than specific activity will interfere with a state's choices about how to regulate a profession. The Supreme Court addressed and rejected those very concerns in *N.C. Dental*. "States ... can ensure *Parker* immunity is available to

agencies by adopting clear policies to displace competition; and if agencies controlled by active market participants interpret or enforce those policies, the State may provide active supervision.” 135 S. Ct. at 1115. The Court has repeatedly made clear that it will not weaken the prerequisites for state-action protection in the context of professional regulation. *Id.*; *Patrick v. Burget*, 486 U.S. 94, 105-06 (1988).

**B. Louisiana Has Not Clearly Articulated a Policy to Displace Competition in the Market for Appraisal Services**

Under *Midcal*, the Board cannot enjoy protection under the state-action doctrine unless it shows that its price-fixing regime promotes a “‘clearly articulated and affirmatively expressed’ state policy to displace competition.” *Phoebe Putney*, 568 U.S. at 226 (quoting *Cnty. Commc’ns Co. v. Boulder*, 455 U.S. 40, 52 (1982)). The Board has failed to make that showing.

Although a state legislature need not “‘expressly state in a statute or its legislative history that the legislature intends for the delegated action to have anticompetitive effects,’” *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 43 (1985), those effects must be the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature,” *Phoebe Putney*, 568 U.S. at 229. The “State must have foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals.” *Id.* The evidence in this case shows that

Louisiana did not intend to displace competition in the setting of appraisal fees and did not foresee the anticompetitive effects of the Board's Rule.

As an initial matter, the Board claims that the Commission waived the issue because neither Complaint Counsel nor the Commission addressed it below. Br.36 (citing *U.S. v. Avants*, 278 F.3d 510, 519-20 (5th Cir. 2002)). Complaint Counsel made clear that it was not conceding clear articulation but simply had no need to pursue it, ROA.256 n.1, and the Commission was able to dispose of the entire matter on active supervision alone, as courts routinely do in similar situations. *See, e.g., Patrick*, 486 U.S. at 100.<sup>10</sup> That does not amount to waiver. *Avants*, the Board's sole case, does not show otherwise. That case involved the distinct procedural and substantive rules of criminal law, which have no bearing here. And the Government there failed even to mention the relevant issue, unlike here, where both Complaint Counsel and the Commission specifically addressed why they did not need to reach clear articulation. ROA.256 n.1, 1370 n.13.

On the merits, the Board contends that the AMC Act evidences the Legislature's intent to displace competition. Br.36. Specifically, it claims, the Act adopted federal regulations promulgated under Dodd-Frank that "expressly displace competition in the setting of fees for individual appraisals." Br.37. The

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<sup>10</sup> This Court could also affirm the Commission on either ground.

federal regulations do no such thing, and the State’s intent to adopt the federal regime shows that the Legislature intended to *preserve* competition, not displace it.

The Fed made clear when it enacted the regulations that it did *not* intend to displace competition. It explained 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.” 75 Fed. Reg. at 66569. The regulations underscore the point by disabling reliance on the regulations’ presumptions of compliance if lenders or AMCs engage in anticompetitive acts. 12 C.F.R. § 226.42(f)(2)(ii). The Board’s brief ignores these clear expressions of intent to preserve competition.

The Board’s reading of the regulations does not overcome the Fed’s clearly stated intent. That the rules apply to “residential appraisals that are ‘covered transactions’ within a defined geographic area” (Br.37) signifies only that the regulations concern appraisal services and not other services, such as home inspections. The rules’ reference to a geographic area sensibly indicates that fees should reflect market conditions in a particular location.

The Board is similarly wrong when it asserts that federal regulations displace competition because they “prohibit AMCs from paying appraisal fees that are not ‘customary and reasonable’ in accordance with three prescribed methods.” Br.37. The federal regulations contain no such limitation. They *allow* the use of the

three methods, but do not *require* it. By contrast, the Board's Rule does require that AMCs use one of only three methods, none of which relies on competitive forces.

Nor do federal regulations requiring a licensing program that incorporates federal standards evince an intent to displace competition. Br.37. The existence of the program says nothing about competition, and the Board points to nothing in the specifics of the federal standards suggesting an intent to disregard the market. That is especially so given the Fed's stated intent to preserve competition. State-mandated price fixing is not the inherent, logical or ordinary result of the regulations, which thus cannot be deemed to satisfy the requirement of "clear articulation and affirmative expression." *Boulder*, 455 U.S. at 55.

The Board is likewise mistaken that when the state granted general rulemaking and enforcement power, it foresaw the anticompetitive use of that authority. Br.37. That cannot be the case when the State intended to adopt the market-based federal regime. *See Boulder*, 455 U.S. at 55 (grant of neutral authority to enact ordinances does not contemplate displacement of competition). Otherwise, such authority "would wholly eviscerate the concepts of 'clear articulation and affirmative expression.'" *Id.* at 56; *see also Phoebe Putney*, 568 U.S. at 228, 234.

The authority granted to the Board to effectuate the statutory C&R standard is markedly different from cases finding a delegation to act anticompetitively. In *Hallie*, for example, the state granted a city complete power to determine where to provide sewer service. That unbridled discretion contemplated that the city would decline to serve certain areas. *Hallie*, 471 U.S. at 42. In *City of Columbia v. Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), authority to regulate zoning necessarily carried with it the power to restrict the size and placement of billboards. *Id.* at 373. And in *Earles v. State Board of Certified Public Accountants*, 139 F.3d 1033 (5th Cir. 1998), this Court concluded that a Louisiana law authorizing a state board to determine who may practice accounting reasonably contemplated that the board would use its authority to forbid accountants from engaging in incompatible professions. *Id.* at 1043.<sup>11</sup> Those specific grants of authority do not resemble the neutral delegation here, made in the wake of an expressed legislative intent to preserve fee competition.

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<sup>11</sup> The holding in *Earles* (*id.* at 1041) that an accounting board composed entirely of CPAs avoids active supervision is no longer good law after *N.C. Dental*, 135 S. Ct. at 1114.

**C. Louisiana Does Not Actively Supervise the Promulgation or Enforcement of the Board’s Rule Under Either the Former Regime or the New One**

**1. Louisiana’s multiple layers of review provide only a “gauzy cloak of state involvement” in the Board’s anticompetitive conduct**

The gist of the Board’s case is that active supervision is proven by the number of state officials—the Governor, the Legislature, the courts, the COA, the DAL, and an ever-growing list—authorized to supervise its work. The Board claims that all these layers of oversight provide “political accountability” and thus meet the *Midcal* test “in spades.” Br.19-20, 35, 39, 41-43, 51.

But the Supreme Court meant what it said when it imposed a requirement of *active* supervision. The *Midcal* test turns not on the quantity of overseers, as the Board posits, but on the substance of the review they engage in. One state supervisor would be enough if it satisfied “real compliance” with the demands of *Midcal*. See *Ticor*, 504 U.S. at 636.

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.” *Hallie*, 471 U.S. at 46. The regulator must show that “the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties.”

*Ticor*, 504 U.S. at 634-35. Otherwise, “there is no realistic assurance that a private party’s anticompetitive conduct promotes state policy.” *Patrick*, 486 U.S. at 101.<sup>12</sup> To satisfy the burden, the record must show more than the mere potential for state supervision and demonstrate that the state actually exercises oversight. *N.C. Dental*, 135 S. Ct. at 1116-17.

Accordingly, the key to showing active supervision is evidence that the supervisor, aware of the sovereign state policy, undertook an informed and substantive assessment of the Board’s conduct, and exercised independent judgment in determining whether the Board’s actions promoted that policy and were the inherent, logical, or ordinary result of the exercise of the authority delegated by the state. As we show below, the Board offered no such evidence. Instead, for each supervisor alleged to provide active supervision, the Board describes only the documentation it provided to the supervisor and the decision the supervisor made. Those two data points, however, give no indication that the supervisor analyzed the information and reached an independent determination that the Board’s conduct promoted state policy and that Louisiana foresaw and implicitly endorsed anticompetitive effects of the Rule. Without this evidence of

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<sup>12</sup> And as shown above, the state must clearly and affirmatively articulate a policy to displace competition, and the anticompetitive effects must be the “inherent, logical, or ordinary result of the exercise of authority delegated by the state legislature,” *Phoebe Putney*, 568 U.S. at 226, 229.



meaningful engagement, supervision amounts to nothing more than a “gauzy cloak of state involvement over what is essentially a price-fixing arrangement.” *Midcal*, 445 U.S. at 106.

Unable to satisfy the Supreme Court’s requirements, the Board repeatedly faults the Commission for not deferring to various branches of Louisiana state government. The Board says that the Governor, despite not having acted, should be presumed to have exercised review authority. Br.48. It argues that the inaction of the Legislature “deserved full deference as acts of the State,” especially since the Legislature sits part-time while state boards do business year-round. Br.43. The Board claims (Br.22, 39) that such deference is required under *N.C. Dental*, which noted that the “inquiry regarding active supervision is flexible and context dependent.” 135 S. Ct. at 1116. But the Court’s observation that states may supervise non-sovereign actors in various ways does not mean that they may simply go through the motions of oversight or otherwise avoid the requirement to show “real compliance” with *Midcal*. *See id.* at 1117. And, to the degree “deference” plays a role in state-action doctrine, it is incorporated into the doctrine itself, under which federal antitrust law yields to a state’s sovereign choices. *See Parker*, 317 U.S. at 350-51.

**2. Louisiana did not actively supervise promulgation of either the original or the replacement Rule**

Because Louisiana changed its review procedures after the Complaint issued, the Court must assess active supervision in two separate contexts. First, it must consider whether Louisiana actively supervised the Board's issuance and enforcement of Rule 31101 under the procedures in place before the Complaint issued. The adequacy of pre-Complaint supervision is pertinent to the Commission's decision to reject the Board's affirmative defenses. Second, the Court must consider whether Louisiana actively supervised the re-issuance and will supervise enforcement of the Rule under the procedures the Governor directed *after* the Complaint was issued. Post-Complaint supervision is pertinent to the Commission's decision that the case is not moot. The Commission correctly ruled that neither the pre- nor the post-Complaint procedures were sufficient.

a. Gubernatorial inaction is not active supervision

The Governor of Louisiana had authority to veto the Board's rules, although he did not exercise that power for either the original or re-issued Rules. To the Board, possession of veto power is enough. Br.48. Under the law, it is not.

The Commission correctly rejected the power to veto as merely potential supervision, inadequate under *Ticor*, and the very kind of "negative option" procedure that the Supreme Court there held insufficient. 504 U.S. at 638. As the

Commission explained, nothing in the record indicates that the Governor engaged in a substantive analysis of the rules or even reviewed them. ROA.1376, 1383.

That makes this case just like *Ticor*. There, as here, the state had an opportunity to review rates, which became effective if the state did nothing within a set period. 504 U.S. at 638. The Court held that active supervision required that “the details of the rates” be “established as a product of deliberate state intervention” in which “the State has played a substantial role” and has “undertaken the necessary steps to determine the specifics of the price-fixing.” *Id.* at 634-635, 638. Negative-option review amounted only to “the potential for state regulatory review,” not “active state supervision.” *Id.* at 638. So too here.

While this case involves a regulatory standard rather than a rate schedule, the evidentiary requirement to show active supervision remains the same.<sup>13</sup> The Board needed to submit the proposed Rule and the rulemaking record to the Governor, who needed to examine those materials and independently assess whether the proposal promoted and was the foreseeable result of a state policy to displace competition. The record had to show that the Governor actually exercised

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<sup>13</sup> Contrary to the Board (Br.45 & n.26), *N.C. Dental*'s broad language leaves no doubt that its analysis applies to policies such as the Board's. Indeed, *N.C. Dental* relied on *Ticor* in identifying the “constant requirement” that potential supervision does not suffice, without regard to the particular facts of *Ticor*. 135 S. Ct. at 1116.

his review powers, rather than let the Rule take effect through inaction. The Board admits, however, that none of those things happened. Br.48.

b. Legislative inaction is not active supervision

*Ticor* similarly demonstrates that the Louisiana Legislature did not actively supervise the Board either when it first promulgated or later re-issued Rule 31101. Like the Governor, the Legislature also had a negative-option review process. Its details varied over time, but their effect is the same: Board Rules became effective automatically and were “deemed affirmatively approved” even when the legislature did nothing.

The actual steps taken by the Board and the Legislature varied little between the first promulgation of Rule 31101 in 2013 and its re-promulgation in 2017.<sup>14</sup> Both times, the Board submitted statutorily required documentation to the House and the Senate, ROA.1382, 1375, which was then provided to subcommittees in each chamber. ROA.1382, 1375. In 2013, neither chamber’s subcommittee held a

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<sup>14</sup> The Louisiana Administrative Procedures Act provides that “[f]ailure of a subcommittee to conduct a hearing or to make a determination regarding any [proposed] rule ... shall not affect the validity” of the rule, and if neither the House nor the Senate subcommittee finds the proposed rule unacceptable, the agency may adopt it as proposed. LSA-R.S. 49:968 (E)(2) & (H)(1)). In 2013, LSA-R.S. 3415.21 contained a similar provision.

hearing, ROA.1382,<sup>15</sup> and because the Legislature was not in session, the Rule went into effect without legislative action, *see supra* note 14. In 2017, the process unfolded slightly differently but with the same result. No member of either subcommittee requested a hearing and the re-issued rule then took effect automatically. ROA.243-44, 1375.

That is not “active” supervision on any understanding. Like the gubernatorial negative option, the legislative negative option amounts only to the “potential for state supervision.” ROA.1375, 1382-83.

The Board nevertheless argues (Br.43, 44, 49-50) that the Legislature actively supervised the rule because “[h]aving received the Board’s report and rulemaking record and, having the option to affirm, reject, modify, or remand for additional information or hearing, [the subcommittee] affirmatively determined the rule should proceed.” Br.44 (citing ROA.229, 239, 241, 912-913).

The record shows no evidence of “affirmative determination.” Of the documents cited by the Board to support its claim, the most detailed one stated:

No member of the oversight subcommittee has requested to convene a hearing concerning the proposed Rule 31101. Therefore, in accordance with the Louisiana APA, it is the decision of the oversight subcommittee that no further review of the rule by the oversight

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<sup>15</sup> The Senate subcommittee scheduled a hearing, but the chairman deliberately cancelled it, thereby forfeiting the subcommittee’s opportunity for substantive review. ROA.1382.

subcommittee is necessary, and that the proposed Rule 31101 should become final and effective.

ROA.239. Construing the absence of any request for a hearing as an “affirmative determination” is pure doublespeak. Indeed, the statute establishing legislative review procedures defines a determination as “the favorable vote of a majority of the members of the subcommittee who are present and voting, provided a quorum is present.” LSA-R.S. 49:968(E)(1)(a). The absence of a hearing request does not fit that description.

The letter does state that the subcommittee “focused” on whether the Rule promoted state policy, but nothing shows what that entailed. Nothing indicates that the subcommittees believed that Louisiana had a policy to displace fee competition among appraisers or understood that the Rule itself was anticompetitive. The Legislature likely understood the opposite, since the Fed rules that the Legislature adopted were expressly intended to preserve competition, and the Board told it in both 2013 and 2017 that the rule “will have no effect on competition.” ROA.106, 110, 435.

The Commission observed that the subcommittees had not “engaged in substantive analysis” and explained that “[a]lthough it is clear that the legislative oversight subcommittees could have conducted a substantive review,” they did not ROA.1382-83 (quoting *Ticor*, 504 U.S. at 638). In short, there simply is no evidence that the Legislature “exercised sufficient independent judgment and

control” over the Board’s rule to ensure that it promoted state policy. *Ticor*, 504 U.S. at 634-35.

- c. The Commission of Administration does not provide active supervision of post-Complaint rulemaking

Under the post-Complaint procedures, the Commission of Administration must review proposed Board rules related to AMC fees. ROA.100. The Board claims that the COA review process amounts to active supervision. Br.46-47. It does not. The inadequacy of COA supervision is made plain by the two letters that document its supposed review.

The Board has now abandoned its position that the first letter shows adequate supervision, but the letter (ROA.80) nevertheless demonstrates the inadequacy of the entire COA-review process. The COA purported to review re-issued Rule 31101, which was identical to the former Rule. The letter simply parroted the empty phrase that Board rules would protect the integrity of the appraisal process and then approved the re-issued Rule. ROA.80. Beyond that, the letter contained no analysis or evidence of deliberation. ROA.80. The COA did not even have before it the public comments or the public hearing transcript for the re-

issued Rule. ROA.1373.<sup>16</sup> As the Commission determined, the letter lacked any indication that the COA “‘exercised sufficient judgment and control’ to show that the reissuance of Rule 31101 was ‘a product of deliberate state intervention, not simply [an] agreement among private parties.’” ROA.1373 (quoting *Ticor*, 504 U.S. at 634-35). It looked far more like a rubber stamp. ROA.1374.

The second letter fares no better. In it, the COA’s general counsel expressly disavowed any “formal authority to disapprove proposed rules” after they had been published for comment. ROA.236. The letter starkly illustrates that the COA did not have “the power to veto or modify particular decisions” as required to show active supervision. *N.C. Dental*, 135 S. Ct. at 1116.

The Board tries to dismiss the general counsel’s fatal concession as a “caveat” and claims that the COA “actually conducted the review in accordance with the Executive Order.” Br.46-47 (italics omitted). There’s no proof. The letter demonstrates the COA’s failure to exercise any independent judgment. For example, it notes that the public comments of the Real Estate Valuation Advocacy Association (REVAA) raised concerns that the Rule was more restrictive than the Dodd-Frank standard. ROA.237. In fact, REVAA had determined that the Rule

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<sup>16</sup> The Board apparently provided records from the 2013 rulemaking to the COA, ROA.1509-1622, but says that the Commission overlooked them. Br.41 n.20, 46. Even if the Board is correct, that submission to the COA was not compliant with the E.O.’s requirement to submit the 2017 rulemaking record (ROA.100) and does not rescue the manifest inadequacies of COA supervision.



was downright anticompetitive, ROA.188, but the COA did not even acknowledge that conclusion. The COA would have actively supervised only if it recognized the disruption to competition and affirmatively approved it as promoting state policy. *See Patrick*, 486 U.S. at 101. Its failure to exercise independent judgment on this very issue powerfully evidences the lack of active supervision. *See* ROA.1374.

**3. Louisiana does not actively supervise Board enforcement under either the old regime or the new one**

a. The possibility of judicial review is insufficient

The Board contends that the availability of judicial review of enforcement decisions under both the original rule and the re-issued rule shows active supervision. Wrong. Any such review is partial at best, because review is not mandatory but takes place only at the request of a disciplined party. ROA.1383. As the Commission noted—and the Board does not contest—a party “might decide not to undertake the burden and expense of a court challenge,” thereby leaving the decision unreviewed. ROA.1383.

Moreover, even if parties seek judicial review, the deferential standard renders it insufficiently rigorous to qualify as active supervision. The Board’s governing statute specifies an “arbitrariness” standard, and even then only for “questions of law.” ROA.1383 (citing LSA-R.S. 37:3415.20(B)(2)). The Supreme Court has deemed similarly deferential judicial review insufficient to constitute

active supervision and, in fact, has never found judicial review of private action to be sufficient. *See Patrick*, 486 U.S. at 103-04; *see also* ROA.1383.<sup>17</sup>

- b. Review by the Division of Administrative Law is insufficient because the Division lacks authority over some Board conduct and defers to the Board's remedies

For post-Complaint conduct only, the Board also contends that the Division of Administrative Law will actively supervise Board enforcement activities. Br.51-54. In fact, limitations on DAL review show that it is less an active supervisor than another layer of non-substantive bureaucracy.

Under a contract with the Board, DAL reviews (1) Board decisions to issue an administrative complaint; (2) proposed settlements, dismissal or informal resolution of DAL-approved complaints; and (3) the record of actual Board enforcement proceedings. ROA.99, 225. That regime does not amount to active supervision for two reasons. First, a significant amount of Board activity would never be subject to DAL review because it would not give rise to DAL-approved enforcement actions. ROA.1378. For example, the Board might demand by letter that an AMC bring its fees in line with Board-set fees, and the AMC might comply

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<sup>17</sup> *Bates v. State Bar of Arizona*, 433 U.S. 350, 362 (1977), does not show otherwise. Br.55. That case involved “pointed re-examination” by the judiciary, which had “agency-like responsibilities over the organized bar.” *Patrick*, 486 U.S. at 104. *Malmin v. Idaho State Bar*, 30 F.3d 139 (9th Cir. 1994), is inapposite for the same reason. Br.55 n.34.

without triggering notice to the DAL. Indeed, the Board acknowledged that happened at least once and that most of its investigations do not proceed to formal adjudication. ROA.1378.

The Board does not deny that some of its conduct will not trigger DAL-supervised enforcement actions. It feebly replies that federal regulations require the Board to respond to complaints about AMCs. Br.51-52.<sup>18</sup> It does not explain why a requirement to respond to complaints fills the active-supervision deficit.

Second, the DAL reviews Board enforcement decisions deferentially. ROA.1377 (citing ROA.225 and LSA-R.S. 49:964(G)(5)). Remedies are likely to be a critical issue in many proceedings and can themselves amount to anticompetitive pricing behavior. ROA.1377. The Commission properly concluded—and the Board does not dispute—that deferential review does not satisfy the active supervision requirement. ROA.1377-78. (citing *Ticor*, 504 U.S. at 633; *Patrick*, 486 U.S. at 104). The Board, however, does dispute the degree of deference, contending that review of remedies occurs under a “preponderance of evidence” standard, which is applied to factual findings under LSA-R.S. 49:964(G)(6). Br.53. This is clearly wrong. The DAL contract states that a

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<sup>18</sup> The Board also states that “DAL reviews all [Board] actions following that initial inquiry—to formalize an investigation, issue a complaint, or thereafter settle or adjudicate it,” Br.52, but the DAL contract is clear that these requirements apply only if the DAL approves an enforcement action in the first instance. ROA.225.

“proposed remedy should be reviewed by DAL in accordance with Section 964(G)(5),” ROA.225, which provides that a court may reverse a decision if it is “[a]rbitrary or capricious or characterized by abuse of discretion or clearly unwarranted exercise of discretion.” ROA.1377 n.21. Subsection 5 review is “quite limited.” *Allen v. Louisiana State Bd. of Dentistry*, 543 So. 2d 908, 915 (La. 1989); *see* ROA.1377.<sup>19</sup>

#### **4. Recently enacted changes in Louisiana law do not undermine the Commission’s decision**

As discussed above, the State of Louisiana and the Board have created a moving target by changing supervision measures multiple times since the Commission issued its administrative complaint. The Board claims that the Commission’s dismissal of the state-action defense “improperly foreclosed consideration of” yet more recently adopted legislation that (according to the Board) will amount to active supervision. Br.50. That is wrong. In rejecting the Board’s affirmative state-action defense, the Commission decided only that the pre-Complaint oversight regime was not active supervision. Looking ahead, if the Commission concludes the Board violated the law, the Board remains free to adduce evidence at hearing that new supervisory measures provide active

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<sup>19</sup> Contrary to the Board’s suggestion, Br.53, the 1997 amendment modified only subsection 6, not subsection 5 of Section 964(G). Thus, *EOP New Orleans, LLC v. Louisiana Tax Commission*, 831 So. 2d 1005, 1008 (La. App. 1st Cir. 2002), which addressed only subsection 6, does not support the Board. Br.53.

supervision. The Court therefore need not consider new actions of Louisiana and the Board taken after the petition for review. Indeed, it would be inappropriate for the appellate tribunal to consider brand new developments in the first instance. *See Page v. Gulf Oil Corp.*, 775 F.2d 1311, 1315 (5th Cir. 1985); *Calhoun v. Lyng*, 864 F.2d 34, 35 (5th Cir. 1988).

### **III. THE COMMISSION CORRECTLY REJECTED THE BOARD’S MOTION TO DISMISS AND GRANTED THE MOTION FOR SUMMARY DECISION**

#### **A. The Commission Correctly Denied the Board’s Motion to Dismiss the Complaint as Moot**

The Board claims that the Commission erroneously denied the Board’s motion to dismiss. Br.56-61. The motion presented two questions: (1) whether post-Complaint changes in state law cured the lack of active supervision; and (2) if so, whether those changes mooted the case by leaving no relief to grant. The Commission answered the first question “no” and therefore did not reach the second one. The decision on question one was correct for all the reasons discussed above. But even if this Court disagrees, the case remains live because the Commission may still order meaningful relief.

When the Commission finds a violation of the FTC Act, it is empowered to order the violator to cease and desist from the misconduct and to enjoin future violations. 15 U.S.C. 45(b). A government agency enforcing federal antitrust laws may redress conduct when “the reasonably anticipated consequence[]” is a

“statutorily prohibited injury,” such as harm to competition. 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 303, at 61 (4th ed. 2014). To ensure that the harm does not recur, the FTC Act allows the Commission to seek relief, including penalties, for violations of a cease-and-desist order. 15 U.S.C. 45(l), (m). The Board’s voluntarily abandoning its unlawful conduct and refunding assessed fines do not render the case moot because the Commission may still enter an enforceable order that ensures future compliance with the antitrust laws by an adjudicated violator.

A cease-and-desist order addressing a past defective supervisory regime may nevertheless accommodate the possibility that a future regime could satisfy the active supervision requirement. If the hearing record shows that Louisiana’s current supervision regime is facially adequate, the Commission’s order may include a proviso that expressly permits conduct that satisfies the elements of the state-action doctrine. The Commission has done just that several times. *See In re Tigor Title Ins. Co.*, 112 F.T.C. 344, 466(1989); *In re New England Motor Rate Bureau, Inc.*, No. 9170, 113 F.T.C. 1013, 1014 (Modifying Order, Nov. 6, 1990); *In re Alaska Healthcare Network, Inc.*, 131 F.T.C. 893, 905 (Consent Order, Apr. 25, 2001); and *In re Texas Surgeons, P.A.*, FTC Dkt. No. C-3944, 2000 WL 669997, at \*11 (Consent Order, May 18, 2000).

By contrast, if the Commission had dismissed the case (or if this Court reverses), the state would be free to revert to the prior regime, and the Commission would be powerless unless it undertook a new proceeding (which would then allow the state to change its laws yet again, *ad infinitum*). Indeed, the speed with which Louisiana amended its regime in response to the Complaint suggests the ease of doing the same in reverse. And the terms of DAL supervision are set out in a *contract* that may be readily modified. In similar circumstances, the Supreme Court rejected a mootness claim based on changes in a city ordinance, explaining that “repeal of the objectionable language would not preclude [the city] from reenacting precisely the same provision if the District Court’s judgment were vacated.” *City of Mesquite v. Aladdin’s Castle, Inc.*, 455 U.S. 283, 288-89 (1982).

The Board also asserts that, as a sovereign entity, it should enjoy a presumption of good faith that its unlawful conduct will not recur. Br.60 (citing *Sossamon v. Lone Star State of Tex.*, 560 F.3d 316, 325 (5th Cir. 2009), *aff’d on other grounds*, 563 U.S. 277 (2011)). But as we have shown, the Board is not a sovereign entity. *See supra* Part II.A. Rather, as an agency controlled by market participants, it bears a “heavy burden” to show mootness: “subsequent events” must make it “absolutely clear that the allegedly wrongful behavior could not reasonably be expected to recur.” *Friends of the Earth, Inc. v. Laidlaw Env’tl.*

*Servs., Inc.*, 528 U.S. 167, 189 (2000) (cleaned up). The Board has not met that burden here, whether for the new regime on its face or as applied.

**B. The Commission Applied the Correct Standards to Decide the Motions**

As described at pages 7-11 above, the Commission resolved Complaint Counsel's motion for summary decision under the standards of Rule 56(a) and the Board's motion to dismiss under Rule 12(b)(1). The Board asserts that the Commission should have resolved both motions under Fed. R. Civ. P. 12(b)(6). Br.62-63. The Board appears to believe that regardless of the procedural and pleading posture in which the state-action issue arises, the Commission must always rule under 12(b)(6). The Commission's error, the Board contends, is that by invoking Rule 12(b)(1), the Commission improperly engaged in fact-finding on the mootness claim, and that by relying on Rule 56(a) it foreclosed discovery. Br.62-66.

The Board relies on two cases, *Hoover v. Ronwin*, 466 U.S. 558 (1984), and *Earles*, 139 F.3d 1033. Br.63 n.41. Both cases involved Rule 12(b)(6) motions to dismiss on the ground that an antitrust complaint did not state a cause of action by virtue of the state-action doctrine. *Hoover*, 466 U.S. at 565-66; *Earles*, 139 F.3d at 1034, 1040 n.8. In each, the courts assessed the sufficiency of the allegations in the complaints, unsurprisingly applying the standards of Rule 12(b)(6). *Id.* The cases did not involve claims that subsequent events rendered the complaints moot.



But the application of Rule 12(b)(6) in those cases does not mean that its standard must be used for every state-action question. Here, unlike in *Hoover* and *Earles*, the Board's motion to dismiss did not challenge whether the Complaint stated a cause of action (which would have been appropriate for 12(b)(6) treatment). Rather, the Board focused on *post-Complaint* actions and argued that these actions mooted any relief that the Commission might order. ROA.35. The Board's motion did not address the adequacy of the allegations in the Complaint itself, as a motion under Rule 12(b)(6) would do. The Commission correctly considered the mootness question under Rule 12(b)(1) standards. *See Montez v. Dep't of the Navy*, 392 F.3d 147, 149-50 (5th Cir. 2004) (where plaintiff challenges jurisdiction but not existence of federal cause of action, court may dispose of case on Rule 12(b)(1) grounds).<sup>20</sup>

Similarly, the Commission correctly addressed Complaint Counsel's motion for summary decision under Rule 56(a). ROA.1379. That motion argued that there were no genuine disputes of material fact regarding the Board's eligibility for state-action protection for the conduct alleged in the Complaint and that a fact-

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<sup>20</sup> The Board incorrectly asserts that the parties briefed the Board's motion under Rule 12(b)(6). Br.63. In fact, the Board's motion cited only Rule 12(b) without specifying the subsection. ROA.46. Complaint Counsel opposed the Board's motion on mootness grounds and had no occasion to defend the sufficiency of the Complaint's allegations under Rule 12(b)(6). ROA.1402-03. The Board's reply similarly focused on mootness, not the Complaint's allegation. ROA.1485-1508.

finder would not rule for the Board on its state-action defenses. ROA.261-62. The Board's opposition did not dispute that Rule 56(a) applied, nor did it argue that Complaint Counsel's motion should be heard under Rule 12(b)(6). ROA.810.

Proceeding under Rule 56(a) standards, both Complaint Counsel and the Board submitted voluminous exhibits regarding prior conduct and the pre-Complaint supervisory regime, which the Commission considered in addressing Complaint Counsel's motion. There was no need for fact discovery for "additional evidence of past supervision." Br.64. All such evidence should have been in the possession of the Board (or easily could have been obtained by it from the state) and submitted in opposition to Complaint Counsel's motion.

**C. The Board Fails to Show Genuine Issues of Material Fact Precluding Summary Decision**

Finally, the Board incorrectly contends that genuine disputes of material facts made summary decision on its state-action defense inappropriate. Br.64-66.

First, the Board says that it should have been able to "adduce evidence ... from State legislators supporting their deliberate oversight process." Br.65. The apparent suggestion is that such evidence would have shown the existence of genuine fact disputes about what happened when the Board promulgated the original Rule 31101. Even if it might have, it is too late for the Board try to adduce that evidence now. The Board's obligation to do so arose when it responded to the Complaint Counsel's motion for summary decision. *See Matsushita Elec. Indus.*

*Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586-87 (1986). At that point, the Board could have obtained and submitted pertinent affidavits. Nor did the Board contend that such evidence was then not available. *See* Fed. R. Civ. P. 56(d). The Board's failures provide no ground to conclude that genuine factual disputes exist.

Second, the Board says it should have been permitted to adduce evidence from the COA and DAL about their deliberations. Br.65. Again, the Board seems to suggest that such evidence would have created a genuine fact dispute. But any additional evidence about what the COA and DAL did *after* the Complaint was filed would not have been material to the issues presented by Complaint Counsel's motion seeking summary decision that Louisiana had not engaged in active supervision in existence *before* the COA and DAL received supervisory responsibilities.

Third, the Board asserts that "the Commission gave no deference to legislative subcommittee statements affirming their oversight." Br.66. But questions about the deference owed to the subcommittees' statements are legal questions, not factual ones, and we addressed them at page 39 above.

Lastly, the Board says the Commission improperly "presumed that individuals holding an appraiser license but who performed no residential appraisals were 'active' participants in the residential appraisal market." Br. 66.

The question is a legal issue, not a factual one—and we disposed of it at pages 29-32 above.

### CONCLUSION

The Court should dismiss the petition for lack of jurisdiction or, in the alternative, affirm the Commission's decision.

Respectfully submitted,

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August 6, 2018

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## **STATUTORY APPENDIX**

## STATUTES AND REGULATIONS

### 15 U.S.C. 45(c)

Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used or where such person, partnership, or corporation resides or carries on business, by filing in the court, within sixty days from the date of the service of such order, a written petition praying that the order of the Commission be set aside. A copy of such petition shall be forthwith transmitted by the clerk of the court to the Commission, and thereupon the Commission shall file in the court the record in the proceeding, as provided in section 2112 of Title 28. Upon such filing of the petition the court shall have jurisdiction of the proceeding and of the question determined therein concurrently with the Commission until the filing of the record and shall have power to make and enter a decree affirming, modifying, or setting aside the order of the Commission, and enforcing the same to the extent that such order is affirmed and to issue such writs as are ancillary to its jurisdiction or are necessary in its judgement to prevent injury to the public or to competitors pendente lite. The findings of the Commission as to the facts, if supported by evidence, shall be conclusive. To the extent that the order of the Commission is affirmed, the court shall thereupon issue its own order commanding obedience to the terms of such order of the Commission. If either party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for the failure to adduce such evidence in the proceeding before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts, or make new findings, by reason of the additional evidence so taken, and it shall file such modified or new findings, which, if supported by evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of its original order, with the return of such additional evidence. The judgment and decree of the court shall be final, except that the same shall be subject to review by the Supreme Court upon certiorari, as provided in section 1254 of Title 28.

## **28 U.S.C. 1291**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

## **15 U.S.C. 1639e(i)(1)**

(i) Customary and reasonable fee

(1) In general

Lenders and their agents shall compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised. Evidence for such fees may be established by objective third-party information, such as government agency fee schedules, academic studies, and independent private sector surveys. Fee studies shall exclude assignments ordered by known appraisal management companies.

## **12 C.F.R. § 226.42(f)**

(f) Customary and reasonable compensation—

(1) Requirement to provide customary and reasonable compensation to fee appraisers. In any covered transaction, the creditor and its agents shall compensate a fee appraiser for performing appraisal services at a rate that is customary and reasonable for comparable appraisal services performed in the geographic market of the property being appraised. For purposes of paragraph (f) of this section, “agents” of the creditor do not include any fee appraiser as defined in paragraph (f)(4)(i) of this section.

(2) Presumption of compliance. A creditor and its agents shall be presumed to comply with paragraph (f)(1) if—

(i) The creditor or its agents compensate the fee appraiser in an amount that is reasonably related to recent rates paid for comparable appraisal services performed in the geographic market of the property being appraised. In determining this amount, a creditor or its agents shall review the factors below and make any adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable:

(A) The type of property,

(B) The scope of work,

(C) The time in which the appraisal services are required to be performed,

(D) Fee appraiser qualifications,

(E) Fee appraiser experience and professional record, and

(F) Fee appraiser work quality; and

(ii) The creditor and its agents do not engage in any anticompetitive acts in violation of state or federal law that affect the compensation paid to fee appraisers, including—

(A) Entering into any contracts or engaging in any conspiracies to restrain trade through methods such as price fixing or market allocation, as prohibited under section 1 of the Sherman Antitrust Act, 15 U.S.C. 1, or any other relevant antitrust laws; or

(B) Engaging in any acts of monopolization such as restricting any person from entering the relevant geographic market or causing any person to leave the relevant geographic market, as prohibited under section 2 of the Sherman Antitrust Act, 15 U.S.C. 2, or any other relevant antitrust laws.

(3) Alternative presumption of compliance. A creditor and its agents shall be presumed to comply with paragraph (f)(1) if the creditor or its agents determine the amount of compensation paid to the fee appraiser by relying on information about rates that:



(i) Is based on objective third-party information, including fee schedules, studies, and surveys prepared by independent third parties such as government agencies, academic institutions, and private research firms;

(ii) Is based on recent rates paid to a representative sample of providers of appraisal services in the geographic market of the property being appraised or the fee schedules of those providers; and

(iii) In the case of information based on fee schedules, studies, and surveys, such fee schedules, studies, or surveys, or the information derived therefrom, excludes compensation paid to fee appraisers for appraisals ordered by appraisal management companies, as defined in paragraph (f)(4)(iii) of this section.

(4) Definitions. For purposes of this paragraph (f), the following definitions apply:

(i) Fee appraiser. The term “fee appraiser” means—

(A) A natural person who is a state-licensed or state-certified appraiser and receives a fee for performing an appraisal, but who is not an employee of the person engaging the appraiser; or

(B) An organization that, in the ordinary course of business, employs state-licensed or state-certified appraisers to perform appraisals, receives a fee for performing appraisals, and is not subject to the requirements of section 1124 of the Financial Institutions Reform, Recovery, and Enforcement Act of 1989 (12 U.S.C. 3331 et seq.).

(ii) Appraisal services. The term “appraisal services” means the services required to perform an appraisal, including defining the scope of work, inspecting the property, reviewing necessary and appropriate public and private data sources (for example, multiple listing services, tax assessment records and public land records), developing and rendering an opinion of value, and preparing and submitting the appraisal report.

(iii) Appraisal management company. The term “appraisal management company” means any person authorized to perform one or more of the following actions on behalf of the creditor—

(A) Recruit, select, and retain fee appraisers;

(B) Contract with fee appraisers to perform appraisal services;

(C) Manage the process of having an appraisal performed, including providing administrative services such as receiving appraisal orders and appraisal reports, submitting completed appraisal reports to creditors and underwriters, collecting fees from creditors and underwriters for services provided, and compensating fee appraisers for services performed; or

(D) Review and verify the work of fee appraisers.

**LSA-R.S. 37:3415.15**

A. An appraisal management company shall compensate appraisers at a rate that is customary and reasonable for appraisals being performed in the market area of the property being appraised, consistent with the requirements of 15 U.S.C. 1639(e) and the final federal rules as provided for in the applicable provisions of 12 CFR Parts 34, 225, 226, 323, 1026, and 1222.

B. An appraisal management company shall separately state to the client all of the following:

(1) The fees paid to an appraiser for appraisal services.

(2) The fees charged by the appraisal management company for services associated with the management of the appraisal process, including procurement of the appraiser's services.

C. (1) An appraisal management company shall not prohibit any appraiser who is part of an appraiser panel from recording the fee that the appraiser was paid by the appraisal management company for the performance of the appraisal within the appraisal report that is submitted by the appraiser to the appraisal management company.

(2) An appraisal management company shall not include any fees for appraisal management services performed by the company in the amount the company reports as charges for the actual completion of an appraisal by the appraiser.

**LSA-R.S. 37:3415.21**

The board may adopt any rules and regulations in accordance with the Administrative Procedure Act necessary for the enforcement of this Chapter.

**La. Admin. Code, title 46, rule 31101**

A. Licensees shall compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised and as prescribed by R.S. 37:3415.15(A). For the purposes of this Chapter, market area shall be identified by zip code, parish, or metropolitan area.

1. Evidence for such fees may be established by objective third-party information such as government agency fee schedules, academic studies, and independent private sector surveys. Fee studies shall exclude assignments ordered by appraisal management companies.

2. The board, at its discretion, may establish a customary and reasonable rate of compensation schedule for use by any licensees electing to do so.

3. Licensees electing to compensate fee appraisers on any basis other than an established fee schedule as described in Paragraphs 1 or 2 above shall, at a minimum, review the factors listed in § 31101.B.1-6 on each assignment made, and make appropriate adjustments to recent rates paid in the relevant geographic market necessary to ensure that the amount of compensation is reasonable.

B. A licensee shall maintain written documentation that describes or substantiates all methods, factors, variations, and differences used to determine the customary and reasonable fee for appraisal services conducted in the geographic market of the appraisal assignment. This documentation shall include, at a minimum, the following elements:

1. the type of property for each appraisal performed;
2. the scope of work for each appraisal performed;
3. the time in which the appraisal services are required to be performed;
4. fee appraiser qualifications;

5. fee appraiser experience and professional record; and

6. fee appraiser work quality.

C. Licensees shall maintain records of all methods, factors, variations, and differences used to determine the customary and reasonable rate of compensation paid for each appraisal assignment in the geographic market of the property being appraised, in accordance with § 30501.C.

D. Except in the case of breach of contract or substandard performance of real estate appraisal activity, an appraisal management company shall make payment to an independent contractor appraiser for the completion of an appraisal or appraisal review assignment:

1. within 30 days after the appraiser provides the completed appraisal report to the appraisal management company.

# **CERTIFICATES**

## CERTIFICATE OF SERVICE

I certify that on the 6<sup>th</sup> day of August, 2018, I filed the foregoing Brief of the Federal Trade Commission using the Court's CM/ECF Document Filing System and caused the same to be served on the service list using that system.

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## **CERTIFICATE OF COMPLIANCE**

This document complies with the type-volume limit of Fed. R. App. P. 32(a)(7)(B)(i) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 12,903 words.

This document also complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Word 2016 in 14-point, Times New Roman font.

August 6, 2018

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