UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

TELADOC, INC., TELADOC PHYSICIANS, P.A., KYON HOOD, and EMMETTE A. CLARK,	§	
Plaintiffs,	§	Civil Action No. 1:15-cv-00343-RP
v.	§	JURY TRIAL DEMANDED
TEXAS MEDICAL BOARD, MICHAEL ARAMBULA, JULIE K. ATTEBURY, MANUEL G. GUAJARDO, JOHN R. GUERRA, J. SCOTT HOLLIDAY, MARGARET C. MCNEESE, ALLAN N. SHULKIN, ROBERT B. SIMONSON, WYNNE M. SNOOTS, PAULETTE B. SOUTHARD, KARL W. SWANN, SURENDA K. VARMA, STANLEY S. WANG, and GEORGE WILLEFORD III, individually and in their capacities as members of the Texas Medical Board,	§	
Defendants.	§	

REPLY BRIEF IN SUPPORT OF PLAINTIFFS' APPLICATION FOR A TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION BEFORE JUNE 3, 2015

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INTRODUCTION

Defendants do not dispute that they are subject to the Sherman Act, 15 U.S.C. § 1, which prohibits joint actions that restrict competition.[1] Defendants do not dispute that they have taken joint action that will prohibit physicians from providing telehealth consultations in Texas.[2] Yet Defendants argue that Plaintiffs cannot prevail on the merits because Defendants were pursuing the "desirable social goal" of protecting public safety. Brief in Opposition ("Opp.") at 7, 15.

As the Federal Trade Commission explained in rejecting a similar patient safety argument by a licensing board, "[c]ourts have rejected social welfare and public safety concerns as cognizable justifications for restraints on competition." *N.C. Bd. of Dental Exam'rs*, 152 F.T.C. 640, 2011 WL 11798463, at *26 (Dec. 2, 2011) ("*N.C. Dental*"). Moreover, Defendants' claim that their ban on telehealth promotes patient welfare is factually unsupported. Plaintiffs have more than shown a prima facie case on the merits. And Defendants do not seriously contest that Plaintiffs face irreparable injury or that an injunction is in the public interest, both of which a state court resolved in Teladoc's favor earlier this year.

ARGUMENT

A. Plaintiffs Have A Substantial Likelihood Of Success On The Merits

To show a substantial likelihood of success, a "plaintiff must present a prima facie case, but need not show that he is certain to win." *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011); *Daniels Health Scis., LLC v. Vascular Health Scis., LLC*, 710 F.3d 579, 582 (5th Cir. 2013) (similar). Plaintiffs easily satisfy this test.

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[1] Defendants concede for this proceeding that they are not immune from the antitrust laws. Opp. at 2.

[2] "**Telehealth**" involves the remote provision of medical services, including without a prior in-person examination. "**Telemedicine**" is defined in Texas as remote medical services provided through a real-time audio-video link (22 T.A.C. § 174.2(10)) after an initial **in-person examination** either **by the physician** (*id.* § 174.7) **or by a qualified "site presenter"** at an established medical site (*id.* §§ 174.6, 174.7). Defendants mix the broad term "telehealth" with the narrow term "telemedicine" in a way that has the potential to create confusion.

1. Plaintiffs' Antitrust Claims Are Likely To Succeed

a) New Rule 190.8 Is Anticompetitive

New Rule 190.8's anticompetitive effects are clear. As Defendants state, "the antitrust laws were enacted to prevent" harm such as "**patients . . . [being] deprived of . . . choice**." Opp. at 4 (emphasis added). Defendants claim patients **choose** telehealth "out of convenience" (as if this is bad) and say they are eliminating this choice to protect Texans. *See id*. at 6, 9. Depriving patients of choice alone shows anticompetitive effects. *NCAA v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107 (1984). Defendants also concede New Rule 190.8 reduces the supply of physician services available to Texans.[3] They argue that "[a]t least half" of Teladoc users have access to other sources of medical care. Opp. at 6. Put another way, up to 50% of Teladoc patients do *not* have access to other care. By banning telehealth, the new rule reduces the supply of care. And Defendants even concede New Rule 190.8 will raise prices, noting it will require Teladoc "to **increase its charges.**" *See* Opp. at 16 (emphasis added); *id.* at 5 (New Rule 190.8 will "impose additional costs and inconveniences"). Reduced supply and increased price are quintessential anticompetitive effects. Defendants have conceded harm to competition.

Defendants suggest the Court should ignore this harm to competition because Teladoc is "the only telemedicine provider" opposed to New Rule 190.8. Opp. at 5.[4] But Teladoc is plainly not the only provider opposed. *See, e.g.*, Navikas Decl. ISO Reply Ex. X (comment opposing New Rule 190.8 by MDLIVE, Inc.); New Benefits, Ltd., ECF No. 20; Texas Nurse Practitioners,

[3] Defendants concede that the relevant market is the "market for [physician] services." Opp. at 4 (quoting *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 30 n.51 (1984).

[4] This is a good example of Defendants' muddying of terms: **Telemedicine** providers, which have established medical facilities with qualified site presenters, are unlikely to be concerned about the New Rule 190.8, which protects them from competition by **telehealth** services, like Teladoc, by mandating physical exams. Telehealth providers are concerned, as Defendants know. Opp. Ex. 11 ("Freshour Aff.") effinancial interest" in providing telehealth to patients). Indeed, Defendants' draft filing with the Secretary of State rejects an extensive record of concern by third parties on the grounds that commenters are just concerned about convenience, choice, cost, and timely access to care. *See id.*

ECF No. 25; Texas Neurodiagnostic Associates, ECF No. 32. The argument is also irrelevant because, as discussed above, Defendants concede New Rule 190.8 will lead to higher prices and other quintessential competitive harms.[5] As summed up by one of Defendants' submissions, "[c]onsidering the basis for Teladoc activity, one cannot help but realize the care they are attempting to deliver decreases the costs for insurance companies and large employers that are self-insured. Teladoc doctors do not have to leave the comfort of their home." Opp. Ex. 5 at 2. This is true: Teladoc makes healthcare more affordable and accessible. New Rule 190.8 hurts competition by eliminating this option.[6]

b) Defendants Cannot Carry Their Burden of Overcoming the Anticompetitive Effects of New Rule 190.8

Where, as here, an "observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets," the restraint is evaluated under the "quick look" test. *E.g.*, *N. Tex. Speciality Physicians v. F.T.C.*, 528 F.3d 346, 360 (5th Cir. 2008). And, as the Fourth Circuit explained in applying a quick look analysis to a similar restriction on competition imposed by a dental licensing board, "[i]t is not difficult to understand that forcing low-cost . . . providers from the market has a tendency to increase a consumer's price" and harm competition. *N.C. State Bd. of Dental Exam'rs v. FTC*, 717 F.3d 359, 374 (4th Cir. 2013), *aff'd*, 135 S. Ct. 1101 (2015).

Defendants say their conduct should be evaluated under the full "rule of reason" rather

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[5] Defendants cite two cases in which harm to competition was found lacking. Opp. at 3-4, 6. In *Abcor Corp. v. AM International, Inc.*, 916 F.2d 924, 931 (4th Cir. 1990), the harm accrued from "aggressive competition," and, in *Petri v. Virginia Board of Medicine*, 2014 WL 6772478, at *3 (E.D. Va. 2014), from a disciplinary action against a single chiropractor. *Id*. Those cases are not relevant here, where the restraint on competition is a rule of general application.

[6] The filing by the Federation of State Medical Boards ("FSMB") misses the mark. Amicus Curiae Br. of FSMB, ECF No. 30. The FSMB argues New Rule 190.8 "does not suppress competition," because it suppresses competition equally by all physicians. *Id*. at 6, 8. The antitrust laws are of course deeply concerned with restraints imposed on all suppliers. *Nat'l Soc'y of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978).

than the quick look test. Opp. at 7-8.[7] Although the quick look analysis is appropriate for the reasons noted by the Fourth Circuit in *N.C. Dental*, Defendants cannot come close to carrying their burden under either framework. Under the quick look, the burden is on the defendant "to show empirical evidence of procompetitive effects" from the restriction. *Speciality Physicians*, 528 F.3d at 362. The rule of reason is similar: Following a showing of anticompetitive effects (which, as noted above, are plainly present here), the defendant bears "a heavy burden of establishing an affirmative defense which competitively justifies this apparent deviation from the operations of a free market." *NCAA*, 468 U.S. at 113.

Defendants cannot satisfy either standard. Indeed, Defendants do not even try.

(1) Defendants Offer No Procompetitive Justification for New Rule 190.8

It is important to note at the outset that a duly enacted state law may restrict competition in the interests of public safety. But New Rule 190.8 is not a state law. It is a rule adopted by a group of active market participants. And states may not abandon to an unsupervised group of market participants the restriction of competition. *N.C. State Bd. of Dental Examr's v. FTC*, 135 S.Ct. 1101, 1114 (2015).

Defendants **do not claim that they have been actively supervised by the State here**. Opp. at 2.[8] Rather, Defendants are a group of private actors and must be reviewed as such. As

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[7] Defendants cite *California Dental Ass'n v. FTC*, 526 U.S. 756 (1999), as justifying use of the full rule of reason. But that case involved an *advertising* rule that had the potential to improve information available to consumers. *Id*. at 775. It did not involve a prohibition on *services* that reduced consumer choice. New Rule 190.8 does not provide information to consumers so they can make better decisions. Defendants' discussions of "consumer information" are off point. Opp. at 10 (suggesting new rule justified by "gains to consumer information"). Moreover, it is not just consumers choosing telehealth: Highly sophisticated hospitals (Memorial Hermann, Beth Israel), Fortune 500 companies (Home Depot, Bank of America) and health plans (Aetna, Highmark) have chosen to offer Teladoc. DePhillips Decl. ¶¶ 11-14.

[8] Amicus FSMB cannot invoke an immunity argument Defendants explicitly chose not to raise. Opp. at 2; *see Squyres v. Heico Cos., L.L.C.*, 782 F.3d 224, 234 n.5 (5th Cir. 2015) (refusing to consider amicus arguments in support of a party who did not raise them). And, in any event, the FSMB is wrong on the

private actors, they must show a procompetitive justification for restricting competition. Here, Defendants cannot argue New Rule 190.8 has procompetitive effects such as reducing price or increasing output. As noted above, Defendants concede the contrary. At times, Defendants claim they have expanded access to **telemedicine** (treatment at an established medical site, accompanied by a site presenter) because the revisions to **Section 174** slightly expand the definition of an "established medical site." Opp. Fact App. at 12. But there is no dispute that **New Rule 190.8**—that is, the rule Plaintiffs seek to enjoin—restricts access to care by banning **telehealth**: remote medical care without a physical exam by a physician or site presenter.[9] Defendants do not (and cannot) claim any competition-based benefit from New Rule 190.8.

(2) Courts Reject "Safety" Justifications

Defendants' real argument is that they are justified in restricting competition in the interests of "improv[ing] the quality of patient care." Opp. at 9. But "[c]ourts have rejected social welfare and public safety concerns as cognizable justifications for restraints on

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law. It mischaracterizes *Patrick v. Burget*, 486 U.S. 94 (1988), which, far from having "strongly indicated that 'state courts, acting in their judicial capacity, can adequately supervise private conduct for purposes of the state action doctrine,'" FSMB Br. 5, in fact noted that "**[t]his Court has not previously considered** whether state courts, acting in their judicial capacity, can adequately supervise private conduct." 486 U.S. at 103 (emphasis added). The FSMB likewise misrepresents *N.C. Dental* by ignoring the requirements the Court identified for active supervision. The Court stated that the "mere potential" for review does not suffice, nor does review that is procedural rather than substantive. *N.C. Dental*, 135 S. Ct. at 1116. Judicial review under the Texas APA fails on both fronts. *Cf. Pinhas v. Summit Health Ltd.*, 894 F.2d 1024, 1030 (9th Cir. 1989) (no active supervision from judicial review for procedure and consistency with public policy). Finally, the FSMB claims this case will affect the ability of licensing boards "across this country" to issue regulations. FSMB Br. at 2. This is flatly wrong. Any board that complies with the well-established law reiterated in *N.C. Dental*, including active supervision, will be immune from antitrust challenge. *N.C. Dental*, 135 S. Ct. at 1117.

[9] Defendants also say they are not restricting access because they long *wanted* to ban telehealth. Freshour Aff. Ex. C at 24 (New Rule 190.8 "increases access to medical care" because it "clarifies" Defendants' prior position). But whether a change expands or restricts access must be judged based on the world (and the law) **as it actually exists**, and the Texas Court of Appeals held that Current Rule 190.8 does not mandate physical exams. Order at 23, *Teladoc, Inc. v. Tex. Med. Bd.*, 453 S.W.3d 606, 620 (Tex. App.—Austin 2014, pet. filed) ("TMB's pronouncements hardly 'track' Rule 190.8 . . . rather, they depart from and effectively change that text"). If New Rule 190.8 takes effect it will clearly restrict access: Tens of thousands of Texans will lose healthcare they are actively using. Gorevic Decl. ¶ 13-14.

competition." *N.C. Dental*, 2011 WL 11798463, at *26; *FTC v. Ind. Fed'n of Dentists*, 476 U.S. 447, 455 (1986); *FTC v. Super. Ct. Trial Lawyers Ass'n*, 493 U.S. 411, 423-24 (1990); *Va. Acad. of Clinical Psychologists v. Blue Shield of Va.*, 624 F.2d 476, 485 (4th Cir. 1980).

Indeed, even the authority cited by Defendants has squarely rejected the "patient care" justification they advance. In *Koefoot*, for example, the court forcefully rejected such a defense, stating, "the Court was astonished when it discovered the real weaknesses in the defendants' authorities" on this issue. *Koefoot v. Am. Coll. of Surgeons*, 652 F. Supp. 882, 900-01 (N.D. Ill. 1986) (Supp. Mem. Op.), *cited* in Opp. at 7 n.19. Defendants' other authorities likewise do not support "patient safety" as a basis for permitting an agreement in restraint of trade.[10]

Defendants also make the confused argument that their rule is "more consistent" with patient care than cartelization.[11] Defendants do not need to have anticompetitive motives for their action to violate the antitrust laws. "[I]t is . . . well settled that good motives will not validate an otherwise anticompetitive practice." *NCAA*, 468 U.S. at 101 n.23; *see also Trial Lawyers*, 493 U.S. at 427; *Kreuzer v. Am. Acad. of Periodontology*, 735 F.2d 1479, 1493 (D.C. Cir. 1984) (consideration of patient care motive defense "necessitates reversal").

(3) Defendants Cannot Establish Patient Safety Justification Here

Even if Defendants' safety defense were considered, Defendants must provide "**empirical evidence**" that their action furthers their stated goal. *Speciality Physicians*, 528 F.3d at 362; *cf. Graphic Prods. Distribs. v. Itek Corp.*, 717 F.2d 1560, 1576-78 (11th Cir. 1983);

[10] For example, *Hines v. Alldredge*, 783 F.3d 197, 199 & n.2, 200 (5th Cir. 2015) (cited in Opp. at 12), involved a constitutional challenge to a state statute, not an antitrust challenge to an unsupervised board's rule. And Defendants' other precedent involves disciplinary actions against individual doctors, not a rule of general application. *Willman v. Heartland Hosp. E.*, 34 F.3d 605, 612 (8th Cir. 1994).

[11] Defendants seem to be confusing cases addressing when to infer an agreement from parallel acts. *See, e.g.*, *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (method of inferring existence of a conspiratorial agreement). Here, there is no dispute Defendants engaged in joint action.

Realcom v. FTC, 635 F.3d 815, 834-35 (6th Cir. 2011). Defendants' patient welfare defense fails to meet this burden for three independent reasons. Defendants: (1) fail to provide evidence that telehealth is harmful; (2) ignore evidence that telehealth expands access to timely, affordable care; and (3) interpret their rules in a way that undermines their defense.

(a) Defendants Fail To Cite Any Evidence Of Harm To Patients

Defendants' basis for claiming that telehealth is harmful is set forth in their filing with the Secretary of State, which was first made available to Plaintiffs in Defendants' opposition. Freshour Aff. Ex. C. The statement identifies the following purported evidence of patient harm:

- A study by Dr. Ateev Mehrotra related to Teladoc and published in Health Affairs in 2014 supposedly found that Teladoc consultations could fragment healthcare and lead to misdiagnosis and higher follow-up costs. *Id.* at 11-12.
- One physician reported an anecdote that a patient was prescribed an unnecessary antibiotic during a telehealth consultation. *Id*. at 7.
- There is at least one pending case against a Teladoc physician and "a number" of historical disciplinary actions for treatment without an in-person exam. *Id*. at 15.

Dr. Mehrotra's 2014 Study. Defendants cite Dr. Mehrotra's 2014 study and assert that it reached several findings supporting the adoption of New Rule 190.8, including that Teladoc's model could lead to misdiagnosis and need for further follow-up care. *See* Freshour Aff. Ex. C at 12. As set forth in the accompanying declaration by the study's author, Dr. Mehrotra, the study in fact "found the opposite of what the Board claims: . . . [L]ess follow-up care appeared to be needed following Teladoc consultations." Mehrotra Decl. ¶ 26.

Anecdote Of Improper Antibiotic Prescription. "Scientific conclusions must be based on empirical evidence," not anecdote. Mehrotra Decl. ¶ 38; *Wells v. SmithKline Beecham Corp*., 601 F.3d 375, 379-80 (5th Cir. 2010) (rejecting anecdotal evidence as unscientific). There is substantial "empirical evidence suggesting widespread improper antibiotic prescribing by

physicians following in-person physical examinations" and "one or more instances of reportedly improper prescriptions written via telehealth is not a basis" to prohibit telehealth any more than it is a basis to prohibit in-person consultations. Mehrotra Decl. ¶¶ 45-47.

"A Number" Of Disciplinary Cases. Defendants say they have one case pending against a Teladoc physician and have taken "a number" of actions against physicians for prescribing without an exam. Freshour Aff. Ex. C. at 15. As to the Teladoc doctor, Defendants assert no finding of wrongdoing. As to the other telehealth physicians, Defendants decline to specify their number, but it is presumably lower than the hundreds of physicians they discipline each year following treatment of patients in-person. This "evidence" provides no basis to ban telehealth. It is also circular: Defendants cite their own disciplining of doctors for prescribing without an exam as evidence why doctors should not be allowed to prescribe without an exam.

Apart from this purported evidence, the other assertions in Defendants' draft filing with the Secretary of State do not appear to relate to telehealth,[12] or discuss theoretical risks. *See* Freshour Aff. Ex. C at 10-11. As the FTC explained in *N.C. Dental*, "[a]lthough several Board members identified a number of theoretical risks . . . none was able to cite to any clinical or empirical evidence validating any of these concerns." 2011 WL 11798463, at *28; *see also* Mehrotra Decl. ¶ 73.[13] This absence of evidence of harm is significant: Teladoc has operated in

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[12] For example, the statement cites a study conducted in conjunction with the University of Alabama that found that sepsis is a leading cause of death *in hospitals* and requires diagnostic testing *in hospitals*. Freshour Aff. Ex. C at 11. This has no bearing on whether telehealth should be prohibited.

[13] The safety evidence rejected as insufficient in *N.C. Dental* is more substantial than what Defendants offer here. In *N.C. Dental*, the board identified four anecdotes of consumer injury from non-dentist teeth whitening including blisters, burns, bleeding gums, and nerve damage. Resp'ts Proposed Findings of Fact, Conclusions of Law, and Order, as Am., The N.C. [State] Bd. of Dental Exam'rs, FTC No. 9343, ¶¶ 165, 183, 508-09, 516, 525 (July 20, 2011), *available at* https://www.ftc.gov/sites/default/files/documents/cases/2011/07/110720resppropfofcoflaw.pdf. Here, Defendants lack even a single anecdote of injury from telehealth. Navikas Decl. Ex. B (Apr. 10 Tr.) at 16:13-17 ("[W]e haven't heard of any harm that was done as a result.").

Texas for more than a decade.[14] And there are many qualified physicians, including those at Memorial Hermann and Beth Israel, who contract with Teladoc for their employees and patients who have come to a different conclusion about telehealth.

(b) *Defendants Ignore Evidence Of Telehealth's Benefits*

Defendants concede that, during the rule-making process, they received numerous public comments explaining how much patients value telehealth. These patients emphasized that, with telehealth, they can obtain prompt and affordable treatment for minor but acute issues, and do not need to: (1) wait until they can get an appointment; (2) leave work to travel to a doctor's office; (3) wait in the doctor's office; (4) expose themselves to sick people in the waiting room; and (5) pay more for the care ultimately received. Freshour Aff. Ex. C at 18. Defendants dismiss those comments, saying "[t]he commenters confuse lack of access to care . . . with consumer convenience." *Id.* But, convenience—the ability to obtain timely, easy, affordable access to care—is of tremendous importance. As Dr. Mehrotra explains, "'convenience' and accessibility of care are important issues." Mehrotra Decl. ¶ 31. It is disturbing that Defendants, while claiming to protect patient welfare, are **overtly dismissive of important aspects of patient welfare**. Freshour Aff. Ex. C at 18 (dismissing as unimportant the fact that patients suffering from acute conditions "did not want to wait" to obtain care). No good decision can be made when the decision makers grasp at straws to find harm while turning a blind eye to benefits. Defendants' refusal to consider important aspects of patient welfare, such as timeliness of access, vitiates their patient welfare defense of New Rule 190.8.

[14] Apart from their written justification, Defendants' other filings in this case yield only three more hypotheticals and three more antibiotic anecdotes. *See* Curran Aff. pp. 3-4 and Malone Aff. ¶ 6 (for three patients *not* treated by telehealth, speculating that they might have been misdiagnosed); Douglass Decl. ¶¶ 4-5 and Yount Aff. ¶¶ 8-9 (three anecdotes of telehealth leading to improper antibiotic prescriptions, with no claim of harm to patients). This does not supply the missing empirical evidence Defendants need.

(c) Defendants' Other Actions, Including Permitting "On-Call" Arrangements, Further Undermine Stated Safety Justification

Finally, Defendants make a number of sweeping assertions about the critical nature of an in-person physical exam to all proper diagnosis and treatment. *See, e.g.*, Freshour Aff. Ex. C at 24 (without an exam, it is "impossible for a practitioner to ensure proper and accurate diagnosis and treatment").[15] But Section 174 currently permits telemedicine "call coverage." That is, after an initial in-person physical exam, a physician can diagnose and treat new and unrelated conditions via video, without a physical exam. 22 T.A.C. §§ 174.2(10); 174.7(e); 174.11. If a physical exam were truly critical to all diagnosis and treatment, this could not take place.

Defendants' position is even more untenable when considering traditional phone-based call coverage, in which, "by prior arrangement, while the patient's regular doctor is temporarily unavailable another doctor can provide advice over the telephone." Opp. Fact App. at 13. Defendants say that, after an initial exam, all subsequent treatment "for up to a year can be done via any method the physician and patient find appropriate." Opp. at 13.[16] And Defendants say this permission for phone-based treatment extends to an "on call" physician. Freshour Aff. Ex. C at 5 (new rules "continue to allow 'call coverage'"); *id*. at 9 (**rejecting** comment asserting that New Rule 190.8 prevents on-call physicians from treating patients over the phone). Thus,

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[15] The FSMB claims "numerous" states apply rules requiring physical exams, FSMB Br. at 8, but it cites just three and is wrong about two of them. A 2014 Alaska law *forbids* disciplinary sanctions for treating patients without a physical exam. Alaska Stat. § 08.64.364. And Alabama has specifically approved of Teladoc's business model, which does not involve physical exams. *See* Gorevic Decl. ISO Reply Ex. L. Perhaps most striking, the FSMB fails to tell the Court that its own model policy **specifically rejects a physical exam requirement**, Navikas Decl. ISO Reply Ex. AA, or correct Defendants' inaccurate statement on this score. Opp. at 12 (incorrectly claiming Rule 190.8's exam requirement is consistent with FSMB policy). Defendants also incorrectly claim consistency with the American Medical Association policy, Navikas Decl. ISO Reply Ex. Z, which says treatment may be "in person or virtual[] through real-time audio and video technology" without any physical exam by a physician or site presenter.

[16] Defendants cite their Fact Appendix, Section 5(b). That section, however, states only that new conditions may be treated "by **telemedicine**" – that is, with video.

Defendants' view is that after one exam, a patient can be treated for up to one year **over the telephone by any physician who has a contractual relationship with the first doctor**, even by a subcontractor who has never "laid hands on" or seen the patient.[17] This guts Defendants' claim that, without an exam, it is "impossible for a practitioner to ensure proper and accurate diagnosis and treatment." Freshour Aff. Ex. C at 24.

Defendants try to justify this glaring disparity by arguing that a physician in a contractual call arrangement is in a better position than a board-certified physician working with Teladoc to treat a patient without a physical exam because the contract between physicians creates "continuity of care" and access to "the" medical record of the patient. *Id*. at 15; Opp. at 11. But allowing treatment without an exam is fatal to Defendants' argument that an exam is necessary to form a diagnosis. Moreover, the continuity and medical records arguments do not hold up. As Dr. Mehrotra explains, lack of continuity of care is a widespread issue. Mehrotra Decl. ¶ 53. And it is not at all clear that this reality leads to worse health outcomes for patients. *Id*. ¶ 34. In addition, if Defendants' true objective was continuity of care, "it would need to prohibit receipt of most of the care received at urgent care clinics, retail clinics, emergency rooms, and other modalities of care where the provider does not have a contractual relationship with a patient's regular physician" – not just ban telehealth. *Id.* ¶ 57. As for the argument that only a patient's regular physician has "the" medical record for the patient, Opp. at 11, this is equally unsound. "Patients today have medical records recorded in multiple different locations" – the record, if any, in the hands of a "regular" physician is not "the" only valid record for the patient. Mehrotra Decl. ¶ 52. Finally, if Defendants' real concern was ensuring more complete medical records,

[17] Dr. Douglass is illustrative. He has a "concierge" practice and also "work[s] occasionally as a subcontractor covering other physicians' practices when they are out of the office and covering the emergency department at the ARISE Hospital." Opp. Ex. 4, Aff. of C. Douglass, ¶ 2.

the logical approach would be to encourage greater sharing of records – not ban telehealth.

Even if Defendants could meet their heavy burden of substantiating their "patient safety" defense with empirical evidence, which they cannot, New Rule 190.8 nonetheless violates the Sherman Act because it is not "reasonably necessary to the accomplishment of the legitimate goals and narrowly tailored to that end." *United States v. Realty Multi-List, Inc.*, 629 F.2d 1351, 1375 (5th Cir. 1980).[18] Current rules already require a physical exam where one is medically necessary to form a diagnosis. 22 T.A.C. § 190.8(1)(L). Mandating medically *unnecessary* exams is not narrowly tailored to any legitimate purpose.

2. Teladoc's Commerce Clause Claims Are Likely To Succeed

Defendants concede that state laws that discriminate against interstate commerce are "per se invalid." Opp. at 14; Br. at 18. But they incorrectly assert that the test for discrimination is simply whether a regulation's text "mention[s]" out-of-state competitors or whether restricting such competitors was the regulation's purpose. *See* Opp. at 14.[19] In *Hunt v. Washington State Apple Advertising Commission*, 432 U.S. 333, 351-52 (1977), for example, the Court held that a state law discriminated against interstate commerce by "raising the costs of doing business" for out of state competitors, "despite the statute's facial neutrality," and noted that it "need not ascribe an economic protection motive to the North Carolina Legislature" to do so. *See also, e.g.*, *C&A Carbone, Inc. v. Town of Clarkstown, N.Y.*, 511 U.S. 383, 393 (1994) (commerce

[18] To the extent Defendants suggest their action does not need to be necessary to a legitimate goal, they are wrong. *See* Opp. at 9 (citing *Hosp. Bldg. Co. v. Trustees of Rex Hosp.*, 691 F.2d 678, 686 (4th Cir. 1982) ("*HBC*"), and claiming *plaintiffs* bear burden of proving new rule is motived only by desire to exclude competition). In *HBC*, the court applied a "special rule of reason" because specific federal healthcare legislation authorized the conduct at issue "*in limited derogation of the normal operation of the antitrust laws*." *Id.* (emphasis added). This is not so here, where no special statutory scheme applies.

[19] Defendants' central authority, *Operation Badlaw, Inc. v. Licking County*, 866 F. Supp. 1059 (S.D. Ohio 1992) (Opp. at 13), illustrates the weakness of their position. *Operation Badlaw* involved an ordinance banning smoking in certain indoor areas. *Id.* at 1067. The plaintiffs could not identify any disadvantage placed on out-of-state competitors. *Operation Badlaw*'s single paragraph of legal analysis does not support the implication that laws relating to health prompt a deferential commerce clause analysis.

clause violated despite nondiscriminatory motives). Here, Defendants do not dispute that New Rule 190.8 would require an out-of-state, Texas-licensed physician to create an in-state presence to conduct physical exams. Opp. at 14-15 (rule mandates an in-Texas "professional medical care provider"). This discriminates against interstate commerce. *C&A Carbone*, 511 U.S. at 392. New Rule 190.8's burdens on commerce greatly outweigh its purported benefits. Br. at 19.

B. Plaintiffs Will Suffer Irreparable Harm If An Injunction Is Not Granted

Defendants do not seriously dispute that Plaintiffs will suffer irreparable injury if New Rule 190.8 takes effect. This is for good reason. The same issue was recently resolved in Teladoc's favor by the state court, which found, following an evidentiary hearing earlier this year, that an identical version of New Rule 190.8 would cause irreparable injury to Teladoc. Navikas Decl. Ex. U ¶ 3. Defendants challenged that conclusion at the time and lost, and cannot reargue this point now given that: (1) irreparability of Teladoc's injury was fully and fairly litigated in the state action; (2) that injury was necessary for the court to issue an injunction; and (3) that litigation involved both Teladoc and the Board. *See Mower v. Boyer*, 811 S.W.2d 560, 562-63 (Tex. 1991); *McCoy v. Hernandez*, 203 F.3d 371, 374 (5th Cir. 2000) (preclusive effect of Texas court judgment assessed by standards of Texas law); *see also Bridal Expo, Inc. v. Van Florestein*, 2009 WL 255862, at *4 (S.D. Tex. 2009) ("[A] decision regarding a preliminary injunction . . . based on the same factual and legal underpinnings, may have a preclusive effect on a subsequent request for a preliminary injunction.").

In practice, Defendants do not really dispute this issue now. They concede that New Rule 190.8 would impose substantial cost on Plaintiffs and force Teladoc to radically alter its business model. *See* Opp. at 16 (suggesting that Teladoc restructure its business toward a higher-cost model of "arrang[ing] in-person or face-to-face consultations" and calculate "how

much it would have to increase its charges" to cover those extra expenses); *id.* at 5 (similar).[20] Defendants also intimate that they are immune from damages, and certainly do not say they have the resources to satisfy a treble damages award.[21]

Defendants' entire argument on injury and the balance of the harms occupies just one page of their brief. Opp. 16. They argue that Plaintiffs have not provided sufficiently "concrete" data as to losses. But injunctive relief is needed precisely *because* Plaintiffs' harms are hard to calculate. *Heil Trailer Int'l Co. v. Kula*, 542 F. App'x 329, 335 (5th Cir. 2013). Plaintiffs are in the midst of a critical (and unpredictable) growth phase, making an injunction appropriate. *See Lakedreams v. Taylor*, 932 F.2d 1103, 1109 (5th Cir. 1991) (harm irreparable due to "lack of a sales history and the difficulty in establishing the extent of damage to [plaintiff's] reputation").

Defendants do not dispute that New Rule 190.8 has *already* begun disrupting Teladoc's business as clients and doctors begin to depart. Gorevic Decl. ¶¶ 18-22, 24; Murphy Decl. ¶¶ 18, 36 n.63; DePhillips Decl. Ex. C. These losses cannot be undone through payment of money after the fact (even if money were clearly available). *Austin Bd. of Realtors v. E-Realty, Inc.*, 2000 WL 34239114, at *5 (W.D. Tex. 2000) (harm irreparable because plaintiff's customers "would likely find a new agent"); *Rogers Grp., Inc. v. City of Fayetteville, Ark.*, 629 F.3d 784, 790 (8th Cir. 2010) (harm irreparable because customers lost "would be unlikely to return"). The same is true of the harm to Teladoc's financing. Murphy Decl. ¶¶ 38-42; Gorevic Decl. ISO Reply ¶¶ 7-10; 20-21.

Teladoc also has no duty to avoid this harm by fundamentally restructuring its business.

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[20] Defendants also do not dispute that New Rule 190.8 will seriously damage Plaintiffs' reputation for quality care. Br. at 21 (citing cases); Murphy Decl. ¶¶ 35-37; Gorevic Decl. ¶ 16.

[21] Defendants assert that the TMB is immune from all relief, Opp. at 2 n.4, and suggest individual defendants might also be immune. Opp. at 2 n.5. *Cf. Atl. Coast Demolition & Recycling, Inc. v. Bd. of Chosen Freeholders of Atl. Cnty.*, 893 F. Supp. 301, 309 n.6 (D.N.J. 1995) (harm irreparable when damages liability for county authorities was unclear).

Stuller, Inc. v. Steak N Shake Enters., Inc., 695 F.3d 676, 680 (7th Cir. 2012) (harm irreparable where mitigation "would be a significant change to [plaintiff's] business model"); *Am. Trucking Ass'ns, Inc. v. City of L.A.*, 559 F.3d 1046, 1058 (9th Cir. 2009) (harm irreparable where plaintiff "will be forced to incur large costs which, if it manages to survive those, will disrupt and change the whole nature of its business"); Navikas Decl. Ex. T at 1-2 (Teladoc will suffer "immediate and irreparable harm" from new rule). Nor is doing so viable. Gorevic Decl ISO Reply ¶¶ 11-22.

C. An Injunction Is In The Public Interest

Texas state courts have reviewed the public interest in the rule at issue here, and have concluded that the public will not suffer from enjoining Defendants' new rule. *See, e.g.*, Navikas Decl. Ex. U ¶ 2; Navikas Decl. ISO Reply Ex. Y (Supersedeas Order, *Teladoc, Inc. v. Tex. Med. Bd.*, No. D-1-GN-11-002115 (353rd Dist. Ct., Travis Cnty., Tex. Mar. 4, 2013)). As one court noted, "Defendants and the public will suffer no harm from suspension of enforcement . . . or at any rate the harm they suffer is outweighed by harm [Teladoc] would suffer." Navikas Decl. ISO Reply Ex Y. No court has ever reached a different conclusion. The public interest would be best served by an injunction that continues to preserve the status quo, so that Teladoc can continue to offer Texans access to much-needed quality medical care. *See Regents of Univ. of Cal. v. Am. Broad. Cos.*, 747 F.2d 511, 521 (9th Cir. 1984) ("[W]ithout the preliminary injunction the options of the consumer have already been prescribed by the defendants.").

CONCLUSION

For the foregoing reasons, and for the reasons stated in their opening brief, Plaintiffs respectfully request that the Court grant their application for a Temporary Restraining Order and Preliminary Injunction (ECF No. 10 *et seq.*).

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Respectfully submitted,

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CERTIFICATE OF SERVICE

This is to certify that on this 20th day of May, 2015, a true and correct copy of the foregoing instrument was electronically filed by the Court's ECF system, and notice has been electronically mailed to Jim Todd with the Office of the Texas Attorney General Administrative Division.

/s/ Leah Brannon
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