No. 19-30796

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

LOUISIANA REAL ESTATE APPRAISERS BOARD,

Plaintiff-Appellee,

v.

UNITED STATES FEDERAL TRADE COMMISSION,

Defendant-Appellant.

On Appeal from the United States District Court
for the Middle District of Louisiana

REPLY BRIEF FOR APPELLANT

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INTRODUCTION

The Federal Trade Commission Act (FTC Act) provides an exclusive framework for judicial review of cease-and-desist orders entered in enforcement proceedings under the Act. If the Louisiana Real Estate Appraisers Board were ultimately found liable for violating the FTC Act, that framework would allow it to challenge the Commission's rejection of its state-action defense. The Board therefore cannot challenge the state-action determination under the Administrative Procedure Act (APA). APA review is also unavailable because the determination is not final agency action. Nor can it be treated as final under the collateral order doctrine, because it does not implicate the interests that have been held to warrant immediate review of a public entity's state-action defense against a private party's antitrust suit. The Board's responses ignore governing authority.

First, even as the Board defends the district court's review of an interlocutory agency ruling, it insists that this Court lacks jurisdiction to review the district court's order halting the administrative process. The Board characterizes the order as merely holding the Commission's state-action determination in abeyance. That would not defeat appellate jurisdiction even if it were true, however, because stays of agency action are equivalent to preliminary injunctions. At any rate, the district court's order does more than stay the challenged ruling; it forbids the Commission to take *any* action in the pending proceedings. It thus provides, in preliminary form, exactly the relief the Board ultimately seeks. The order is indistinguishable from a preliminary injunction.

Second, the Board claims that, because the FTC Act limits review to cease-and-desist orders, the APA must allow for review of interlocutory orders in FTC Act proceedings. But this Court has rejected APA challenges to ongoing FTC proceedings, and the Supreme Court has held more generally that comprehensive judicial-review schemes foreclose APA review. The Board misconstrues those precedents.

Third, the Board's final-agency-action argument relies on *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). But *Martin*, which involved a private party's antitrust action against a public entity, does not control a challenge to proceedings by a federal agency. Much less does it apply to proceedings against an entity, like the Board, that is treated as private for state-action purposes because it is controlled by market actors.

Finally, the stay order would be improper even if the district court had jurisdiction. In addition to repeating the district court's erroneous understanding of the active-supervision requirement, the Board relies on developments that postdate the challenged ruling. But APA review is limited to the record at the time of the challenged action, and at any rate the new developments do not help the Board's cause. The Board also cannot show that the denial of a stay would cause irreparable harm, and it cannot rehabilitate the district court's failure to consider the public interest in timely antitrust enforcement.

ARGUMENT

I. THIS APPEAL IS JURISDICTIONALLY PROPER

The Board argues that this Court lacks jurisdiction on the theory that the stay was an exercise of the district court's authority under the APA to "postpone the effective date of an agency action or … preserve status or rights pending conclusion of the review proceedings," 5 U.S.C. § 705. That does not fairly describe the district court's order. The court did not merely hold the Commission's state-action ruling in abeyance pending review of that ruling; it entirely halted the Commission's proceedings, ordering "that all pending activity in the matter … is hereby STAYED." ROA.310. It preliminarily granted the very relief the Board ultimately seeks. The Board fails to explain how the order meaningfully differs from a preliminary injunction—*i.e.*, how it would differ in effect had the court used the word "ENJOINED" rather than "STAYED." The order is thus appealable under 28 U.S.C. § 1292(a)(1).

Even if the order were a § 705 stay, it would still be appealable. The Board cites no case holding that § 705 stays are unappealable, for good reason: An order staying even a discrete agency action pending judicial review is equivalent to a preliminary injunction. Courts routinely note that the standard for a § 705 stay "is the same as the standard for issuance of a preliminary injunction." *Monumental Task Comm., Inc. v. Foxx*, 157 F. Supp. 3d 573, 586 (E.D. La. 2016), *aff'd sub nom. Monumental Task Comm., Inc. v. Chao*, 678 F. App'x 250 (5th Cir. 2017); *see, e.g.*, *Cronin v. USDA*, 919 F.2d 439, 446 (7th Cir. 1990); *Texas v. United States*, 95 F. Supp. 3d 965, 973 (N.D. Tex. 2015).

The Board did so in seeking a stay. ROA.144-145 ("Interpreting [§ 705], courts generally apply the traditional preliminary injunction factors."). And because they are tantamount to preliminary injunctions, § 705 stays are appealable just as preliminary injunctions are. *See Wyoming v. U.S. Dep't of Interior*, 2018 WL 2727031, at *1 (10th Cir. June 4, 2018) ("The district court's 'stay' effectively enjoins enforcement of the Rule.").

Stays of an agency's ongoing proceedings, as opposed to stays of final agency action, are no exception to that rule. As our opening brief explains (at 4), a district court order "'halt[ing] proceedings in another court'"—as opposed to "'halt[ing] proceedings on its own docket'"—is "'an injunction within the meaning of section 1292(a)(1).'" *Hamilton v. Robertson*, 854 F.2d 740, 741 (5th Cir. 1988) (emphasis omitted); *see also Mar-Len of La., Inc. v. Parsons-Gilbane*, 773 F.2d 633, 635 n.1 (5th Cir. 1985) (district court's exercise of "equity powers to halt action of its litigants outside of its own proceedings" is "the classic form of an injunction"). The Board responds (at 24) that the stay order here pertains to "the very administrative action under review," rather than "affect[ing] a separate proceeding." That misses the point: Proceedings before an agency are not "'proceedings on [the district court's] own docket,'" *Hamilton*, 854 F.2d at 741 (emphasis omitted); they are proceedings before a distinct tribunal. *Cf. Mar-Len*, 773 F.2d at 635 n.1 ("Arbitration is not a mere extension of a court's proceedings but involves a separate tribunal."). Because the stay order halts proceedings before the Commission, not before the district court itself, it is an injunction.

The Board relies heavily on *Nken v. Holder*, 556 U.S. 418 (2009), for the proposition that stays and injunctions are distinct. But *Nken* did not address the scope of § 1292(a)(1); nor did it involve a § 705 stay. It addressed whether a stay of a removal order pending judicial review is an injunction against "the removal of any alien" within the meaning of a provision, 8 U.S.C. § 1252(f)(2), that limits such injunctions. That holding turned on the text, structure, and context of the statute at issue, *see* 556 U.S. at 428-433, none of which matters here. In any event, the district court's order is an injunction even under *Nken*'s framework, because (as noted above) it does not merely "suspend[] … the order or judgment in question"; rather, "it directs the conduct of a party, and does so with the backing of [the court's] full coercive powers." *Nken*, 556 U.S. at 428-429.

Other cases cited by the Board are equally unavailing. In *United States v. Garner*, 749 F.2d 281 (5th Cir. 1985), this Court held that a district court's order was "not 'injunctive in nature,'" and thus "not appealable under § 1292(a)(1)," because it merely "establish[ed] a prerequisite for [an agency's] proceeding" with an action and was not enforceable by "the imposition of contempt sanctions." *Id.* at 286-287. The order here, by contrast, does not allow the Commission to proceed by satisfying a "prerequisite"; it bars the Commission from proceeding, on pain of contempt. ROA.310. The order likewise constitutes an injunction under the Third Circuit's holding that, "to be an 'injunction' for purposes of section 1292(a)(1), [an] order must grant part of the relief requested by the claimant and must be immediately enforceable by contempt."

Hershey Foods Corp. v. Hershey Creamery Co., 945 F.2d 1272, 1277 (3d Cir. 1991). Unlike the order in *Hershey Foods*, which was "ancillary to" the (unappealable) denial of a motion to transfer, *id.* at 1278, the order here gives the Board a preliminary form of the very relief it is seeking: an end to the Commission's proceedings.

Finally, the Board is wrong to suggest (at 21-22) that the stay order was necessary to "preserve the district court's ability to perform judicial review." A court cannot issue a stay to protect jurisdiction it does not possess, and the district court lacks jurisdiction. *See infra* pp. 6-13. Moreover, there is no doubt that the Commission's state-action determination will be subject to judicial review—by this Court—if the Commission ultimately enters a cease-and-desist order. That will protect any viable state-action defense the Board might have. Opening Br. 22-23, 34.

II. THE FTC ACT DISPLACES APA REVIEW

The Board next argues that APA review is available notwithstanding the FTC Act's provision for "exclusive" review of cease-and-desist orders in the courts of appeals. The Board's central theory is that, because the FTC Act limits review to cease-and-desist orders, other Commission orders in FTC Act proceedings must be reviewable under the APA. That gets the law backwards. By limiting review of FTC Act adjudications to cease-and-desist orders, the Act did not authorize APA review of interlocutory orders; it foreclosed such review.

A. As our opening brief explains (at 18-20), this Court has repeatedly held that district courts lack jurisdiction to review Commission proceedings. It first did so

in *Frito-Lay, Inc. v. FTC*, 380 F.2d 8 (5th Cir. 1967) (per curiam), holding that the district court lacked jurisdiction because "[a]ll constitutional, jurisdictional, substantive, and procedural issues arising in Commission proceedings may be considered" through a petition for review of a cease-and-desist order. *Id.* at 10. The Court reiterated that holding in *Coca-Cola Co. v. FTC*, 475 F.2d 299 (5th Cir. 1973), explaining that the FTC Act "contemplates judicial review only of 'an order of the Commission to cease and desist,' 15 U.S.C. § 45(c), and then only 'in the court of appeals of the United States.'" *Id.* at 302. And the Court rejected another district-court challenge to FTC proceedings in *American General Insurance Co. v. FTC*, 496 F.2d 197 (5th Cir. 1974).

The Board misconstrues those decisions (at 29-30). For example, the Board notes *Coca-Cola*'s statement that the FTC Act judicial-review procedure is "'fully consonant with the [APA].'" Br. 29 (quoting 475 F.2d at 302). It reads that statement to mean district courts may review Commission orders that are not reviewable under the FTC Act. The Court's actual point, however, was that the FTC Act provides the type of "adequate remedy" that displaces APA review, 5 U.S.C. § 704—not that APA review can supplement review under the FTC Act. That is clear from the Court's statement, in the same paragraph, that the FTC Act "means what it says" in providing for "the jurisdiction of the court of appeals … [to] be exclusive," 475 F.2d at 302. That statement accords with the Supreme Court's observation in *Bowen v. Massachusetts*, 487 U.S. 879 (1988), that the FTC Act's review framework is the type of "existing procedure[] for review of agency action" that "Congress did not intend the … APA

to duplicate." *Id.* at 903. The Board similarly misreads this Court's statement in *JTB Tools & Oilfield Services, LLC v. United States*, 831 F.3d 597, 599 (5th Cir. 2016), that the Occupational Safety and Health Administration's judicial-review provision is "'read in conjunction with the APA.'" What the Court meant was that its exclusive jurisdiction encompassed the types of review provided in other contexts by the APA—not, as the Board suggests (at 30 n.19), that the APA afforded an additional basis for review.

The Board further errs in asserting that, in *Frito-Lay*, the Court "observed that 'all … issues arising in Commission proceedings may be considered' under the combination of [the FTC Act] and the [APA]." Br. 30 (quoting 380 F.2d at 10). The Court said no such thing. What it said was that "[a]ll … issues arising in Commission proceedings may be considered in a[n] … appeal" under 15 U.S.C. § 21(c)—the Clayton Act's analogue to § 45(c)—which, like the FTC Act, provides for "exclusive" review of cease-and-desist orders "in the court of appeals of the United States." 15 U.S.C. § 21(c), (d). The Court followed that statement by *citing* the APA, 5 U.S.C. § 1009 (1964), presumably for the proposition that the Clayton Act procedure constituted an "adequate" means of judicial review, *id.* § 1009(c)—the same point the Court was making in *Coca-Cola*, as discussed above. But the Court said nothing to suggest APA review would be necessary in "combination" (Board Br. 30) with Clayton Act review. To the contrary, it explained in the same paragraph that "[o]nly in extraordinary cases will parties be allowed to deviate from" the Clayton Act procedures "and seek injunctive relief from the district court." 380 F.2d at 10.

Finally, the Board incorrectly suggests (at 29-30) that *Coca-Cola*, *Frito-Lay*, and *American General Insurance* turned on the absence of final agency action within the meaning of the APA. None of those decisions suggested a district court could review an interlocutory Commission order if it satisfied the APA's definition of final agency action, let alone if it did so by analogy to the collateral order doctrine. All emphasized that "[t]he extraordinary remedy of judicial intervention in agency proceedings still in progress is unavailable unless necessary to vindicate an unambiguous statutory or constitutional right." *American Gen. Ins.*, 496 F.2d at 200; *see Coca-Cola*, 475 F.2d at 304 (same); *Frito-Lay*, 380 F.2d at 10 ("Only in extraordinary cases will parties be allowed to … seek injunctive relief from the district court[.]").[1]

B. This Court's precedents are consistent with the Supreme Court's broader framework for determining when a statutory judicial-review scheme impliedly precludes APA review. The Board's discussion of that framework underscores why its position lacks merit.

As our opening brief explains (at 20-22), analysis under the Supreme Court's framework begins by "ask[ing] whether it is 'fairly discernible' from the 'text, structure, and purpose' of the statutory scheme that Congress intended to preclude district court jurisdiction." *Bank of Louisiana v. FDIC*, 919 F.3d 916, 923 (5th Cir. 2019). If so, courts ask "whether the 'claims at issue are of the type Congress intended to be

[1] As noted in our opening brief (at 20 n.2), litigants in such "extraordinary" circumstances would properly seek relief in the court of appeals, not the district court.

reviewed within th[e] statutory structure.'" *Id.* (some quotation marks omitted). They conduct that analysis using factors set forth in *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994). *See Bank of Louisiana*, 919 F.3d at 923.

The Board does not dispute that, to the extent Congress intended for the FTC Act "to preclude district court jurisdiction," an order rejecting a state-action defense is "'of the type Congress intended to be reviewed within th[e] statutory structure,'" *Bank of Louisiana*, 919 F.3d at 922-923 (some quotation marks omitted). Instead, the Board argues (at 31-32) that the FTC Act's review scheme is not "comprehensive" and thus that Congress did not intend it to preclude APA review. To make that argument, the Board must distinguish other statutory review schemes. Its asserted distinctions are specious.

First, the Board claims (at 31-32 & n.20) that the FTC Act's scheme is not "comprehensive" because it "grants direct review *only* of cease-and-desist orders," whereas other statutes provide for review of all "final" orders. That argument reflects the apparent misconception that cease-and-desist orders are just one type of final order that the Commission may issue in adjudicating enforcement proceedings under the FTC Act. In reality, cease-and-desist orders are the *only* type of final order the Commission may issue in such proceedings. *See* Opening Br. 5; 15 U.S.C. § 45(b) ("If … the Commission shall be of the opinion that [a] method of competition or [an] act or practice … is prohibited by this subchapter, it shall … cause to be served on [a] person, partnership, or corporation an order requiring such person, partnership, or

corporation to cease and desist from using such method of competition or such act or practice.").[2] Thus, the FTC Act's provision for judicial review of cease-and-desist orders is no less comprehensive than provisions for review of "final" orders.

Second, the Board argues (at 31) that the FTC Act gives the court of appeals exclusive jurisdiction only "[u]pon the filing of the record with it," 15 U.S.C. § 45(d). The Board suggests it was misleading for the FTC to omit the "filing of the record" language in describing the review scheme (Opening Br. 5). But that language has nothing to do with apportioning jurisdiction between the district court and the court of appeals; it simply identifies the time when the Commission loses jurisdiction to modify its own cease-and-desist orders. *See* 15 U.S.C. § 45(b) (Commission may modify orders "until the record … has been filed" in a petition for review); *id.* § 45(c) (after a petition for review has been filed, the court of appeals and the Commission "shall have … concurrent[]" jurisdiction "until the filing of the record"). The "filing of the record" language does not diminish the comprehensiveness or exclusivity of the FTC Act's judicial-review procedure.

Otherwise, the Board offers no basis for distinguishing the FTC Act's judicial-review process from that of the Mine Act, which the Supreme Court addressed in *Thunder Basin* and held to preclude district-court jurisdiction. *See* Opening Br. 21-25.

[2] To the extent that certain interlocutory orders in FTC Act proceedings might be treated as if final under the collateral order doctrine, the same is true of orders by other agencies whose judicial-review procedures provide for review of "final" orders.

The Board urges (at 26-27) that "the FTC 'bears the heavy burden of overcoming the strong presumption that Congress did not mean to prohibit all judicial review of [its] decision.'" But the point of *Thunder Basin* and similar cases is not that an agency's ruling is immune from judicial review but that it is subject to review only at the appropriate time and by the appropriate court—here, on petition for review of a cease-and-desist order in the court of appeals. As the Court emphasized in *Thunder Basin,* "[b]ecause court of appeals review is available, this case does not implicate the strong presumption that Congress did not mean to prohibit all judicial review." 510 U.S. at 207 n.8 (quotation marks omitted).

The Board notes (at 28-29) that in *FTC v. Standard Oil Co. of California*, 449 U.S. 232 (1980), the Supreme Court held that an APA challenge to a Commission proceeding failed because the Commission's issuance of a complaint was not final agency action. The Board mistakenly infers (at 28) that if APA review were unavailable, "the Supreme Court would not have applied the APA." But the Supreme Court had no occasion to apply the analysis it adopted 14 years later in *Thunder Basin*, as the Commission did not urge the Court to resolve the case on the ground that APA review was precluded. *See* Pet'r Br., *FTC v. Standard Oil Co. of Cal.*, No. 79-900, 1980 WL 339286 (U.S. June 6, 1980). Nor does it help the Board's argument that the order in *Standard Oil* was held not to constitute final agency action. This Court likewise could hold that

the Commission's state-action determination was not final agency action without addressing whether APA review would otherwise be available.[3]

The question presented here was not presented in *Louisiana Real Estate Appraisers Bd. v. FTC*, 917 F.3d 389 (5th Cir. 2019). The Board notes (at 29) this Court's statement in the prior appeal that "the APA can reasonably be interpreted as permitting courts to undertake collateral review of agency decisions that are conclusive, but do not end the agency proceeding," *id.* at 392. But that statement simply addressed whether the collateral order doctrine applies to the APA's final-agency-action requirement, and the Court made it while explaining why collateral order review was unavailable. The Court did not hold that this suit could be brought under the APA, whether under the collateral order doctrine or otherwise. Nor did it have occasion to address whether the FTC Act's judicial-review procedure impliedly precluded APA review—an issue neither briefed nor argued in the prior appeal.

In short, challenges to an adjudication proceeding under the FTC Act must be pursued through a petition for review of a cease-and-desist order, not an APA action.

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[3] Two cases that the Board cites in a footnote (at 29 n.18) are equally inapposite. In *LabMD, Inc. v. FTC*, 776 F.3d 1275 (11th Cir. 2015), the Eleventh Circuit held not only that the plaintiff's APA claim failed for lack of final agency action but also that the plaintiff's other claims could be pursued only through the FTC Act's judicial-review procedure. *Id.* at 1278-1279. *Soundboard Association v. FTC*, 888 F.3d 1261 (D.C. Cir. 2018), *cert. denied*, 139 S. Ct. 1544 (2019), did not involve a challenge to an FTC Act enforcement proceeding. It concerned an unsuccessful attempt to invoke the APA to challenge an opinion letter issued in connection with the Commission's authority under a different statute. *See id.* at 1263-1264.

III. THE FTC'S INTERLOCUTORY ORDER IS NOT FINAL AGENCY ACTION

Even if the FTC Act did not foreclose APA review, the Board's action would fail because the Commission's state-action determination was not final agency action.

A. The Board briefly suggests (at 42-43) that the Commission's order satisfies the requirements for finality under *Bennett v. Spear*, 520 U.S. 154 (1997). It does not. "[T]wo conditions must be satisfied for agency action to be 'final'" under *Bennett*, *id.* at 177, and neither is satisfied here.

"First, the action must mark the 'consummation' of the agency's decisionmaking process—it must not be of a merely tentative or interlocutory nature." *Bennett*, 520 U.S. at 177-178 (citation omitted). An agency's denial of a motion to dismiss is "as interlocutory, as far from final, as the run-of-the-mill district-court denial of a motion to dismiss." *Automated Merch. Sys., Inc. v. Lee*, 782 F.3d 1376, 1380 (Fed. Cir. 2015). The Board is wrong to suggest (at 42) that the Commission has foreclosed all consideration of the state-action doctrine in further proceedings and thus has concluded its decisionmaking on that issue. The Board is free to argue in future proceedings that, to the extent its past conduct violated the FTC Act, any additional changes to the Louisiana supervision regime (postdating the order challenged here) are sufficient to provide active supervision of its conduct going forward. The Board is also free to argue that any cease-and-desist order based on past violations should expressly permit future conduct shown to satisfy the elements of the state-action doctrine.

Second, an action is not final under *Bennett* unless it is "one by which rights or obligations have been determined, or from which legal consequences will flow." 520 U.S. at 178 (quotation marks omitted). No such consequences follow from the Commission's interlocutory ruling. An agency's decision "to impose" on a respondent to an administrative complaint "the burden of responding to the charges made against it … is different in kind and legal effect from the burdens attending … final agency action." *Standard Oil*, 449 U.S. at 242.

B. The Board principally relies, as the district court did, on the theory that the Commission's state-action determination should be treated as final by analogy to the collateral order doctrine. The Board bases that argument on *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). It offers no other response to the opening brief's arguments (at 32-34) that orders rejecting a state-action defense fail to satisfy the collateral order doctrine's separateness and effective-unreviewability requirements. As our opening brief explains, *Martin*—which involved antitrust proceedings by a private party against a public entity—does not control a case involving proceedings by a federal agency against an entity that is treated as private for purposes of the state-action doctrine.

1. *Martin*'s analysis rested on the premise that "[o]ne of the primary justifications of state action immunity is the same as that of Eleventh Amendment immunity—'to prevent the indignity of subjecting a State to the coercive process of judicial tribunals *at the instance of private parties*' and to 'ensur[e] that the States' dignitary inter-

ests can be fully vindicated.'" 86 F.3d at 1395-1396 (emphasis added; citation omitted). Whether or not that premise was correct in *Martin*, it does not extend to antitrust proceedings brought by a federal agency. As our opening brief explains (at 27-28), suits by the federal government against a state do not infringe the state's dignity as private-party suits do. *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993).

The Board responds (at 43-45) that defendants are entitled to assert a state-action defense—unlike an Eleventh Amendment defense—in suits brought by a federal agency. But the Board confuses a defense to liability with an immunity from suit. In determining "whether interlocutory review is appropriate" under the collateral order doctrine, the "critical question … is whether the essence of the claimed right is a right not to stand trial." *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 292 (5th Cir. 2000) (quotation marks omitted). The fact that the state-action doctrine protects states from the imposition of liability for their economic policy choices—even in suits by a federal agency—does not mean the doctrine affords an immunity from suit. For the reasons discussed in our opening brief (at 29-30, 32-34), it does not.[4]

[4] The Board further asserts (at 44-45) that, whereas the state-action doctrine protects states against the federal government, the Eleventh Amendment "exists to prevent direct conflicts between states." That is incorrect. The Eleventh Amendment constrains "[t]he Judicial power of the United States" to entertain suits against the states, U.S. Const. amend. XI, not the states' power in relation to each other. The Supreme Court only recently recognized states' immunity from suit in other states'

Continued on next page.

2. *Martin* is also inapplicable because, as this Court explained in *Acoustic Systems*, its reasoning rested on "concerns that public defendants would be subjected to the costs and general consequences associated with discovery and trial." 207 F.3d at 293. Those concerns "are not raised by a suit against a private party." *Id.* at 294. And, as our opening brief explains (at 28-29), the Supreme Court's decision in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015), requires that the Board be treated as a private entity for purposes of the state-action doctrine.

The Board responds (at 40) that it is formally "a state regulatory agency." But the same was true of the North Carolina Board of Dental Examiners—a body created by the North Carolina Legislature as "'the agency of the State for the regulation of the practice of dentistry,'" *Dental Examiners*, 574 U.S. at 499—yet the Supreme Court did not view that fact as dispositive, *id.* at 510-512. As the Court explained in holding that the North Carolina board was subject to the active-supervision requirement, what matters is not "the formal designation given by States to regulators" but "the risk that active market participants will pursue private interests in restraining trade." *Id.* at 510. That risk is as present here as in *Dental Examiners*.[5]

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courts, and it did so on the basis of "the constitutional design," *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1496 (2019), not the Eleventh Amendment.

[5] For the same reason, it is irrelevant that the Board's members are appointed or removable by the governor. Gubernatorial appointment or removal does not alter "the structural risk of market participants' confusing their own interests with the State's policy goals," *Dental Examiners*, 574 U.S. at 510, and the method of selection or removal played no role in the Supreme Court's reasoning in *Dental Examiners*.

The Board's other responses are equally unpersuasive. First, the Board argues—quoting *Acoustic Systems*' description of *Martin*—that *Martin* allows immediate appeals not just by "'a state'" or "'its officers'" but also by "'its agents.'" Br. 39-40 (quoting 207 F.3d at 293; emphasis omitted). But the Court did not mean that any entity claiming to act on a state's behalf for state-action purposes can immediately appeal the rejection of its state-action defense. The reference to "agents" was limited to "public defendant[s]." 207 F.3d at 293. Indeed, the Court held that private parties *cannot* immediately appeal the rejection of a state-action defense. *Id.* at 293-294.

Second, the Board contends (at 40-41) that the Louisiana governor and legislature "have intervened to invoke the State's authority" on the Board's behalf. But even if those actions constituted active supervision (which they do not, *see infra* pp. 21-24), they would not transform the Board into a public entity. Under *Acoustic Systems*, a private party cannot immediately appeal the rejection of its state-action defense even if it has a strong argument that state officials have supervised its conduct.

Third, the Board argues (at 41-42) that it can invoke the collateral order doctrine because further FTC proceedings might require state officials and legislators to testify. But the Board cites no precedent permitting immediate appeals on the ground

that subsequent proceedings might involve testimony by government officials, and that argument would radically expand the collateral order doctrine.[6]

In sum, *Martin* does not govern the applicability of the collateral order doctrine to antitrust proceedings brought by a federal agency against an entity treated as private for state-action purposes. The authorities discussed in our opening brief (at 32-34) make clear that orders rejecting a state-action defense in this context do not satisfy the collateral order doctrine's separateness and effective-unreviewability requirements.

3. Even if it were otherwise debatable whether *Martin* should be extended to this type of case, *Martin*'s inconsistency with the subsequent en banc decision in *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999), weighs against extending it.

As our opening brief explains (at 29-30), *Martin*'s reasoning cannot be squared with the Court's observation in *Surgical Care Center* that the state-action doctrine "is more accurately a strict standard for locating the reach of [federal antitrust law] than the judicial creation of a defense to liability for its violation," 171 F.3d at 234. Nor is

[6] The Federation of State Medical Boards offers an equally unpersuasive argument (at 10-14) that the Commission's order should be immediately reviewable because the prospect of litigation might otherwise chill individuals' willingness to serve on regulatory boards. If fear of litigation were sufficient to override the finality rule in this context, it would equally do so in many other contexts. The Federation's real complaint is not with the prospect of litigation but with the prospect of liability for board members, but that complaint is properly directed to the Louisiana legislature, which could indemnify board members or provide active supervision. *See Dental Examiners*, 574 U.S. at 512-513. In any event, the Commission could not seek fines or restitution from individual board members through a proceeding like this one.

it consistent with the Court's recognition in *Acoustic Systems* that, although "the state action doctrine is often labeled an immunity, that term is actually a misnomer because the doctrine is but a recognition of the limited reach of the Sherman Act," 207 F.3d at 292 n.3.

The Board responds by claiming that *Surgical Care Center* recognized "not *just* … the right of state actors to be immune from trial," but also the "broader principle that '[t]he Sherman Act does not reach states.'" Br. 37 (emphasis added). But that again misstates the law: *Surgical Care Center* and *Acoustic Systems* rejected the notion that the state-action doctrine confers a right "to be immune from trial."

Contrary to the Board's argument (at 38), *Acoustic Systems* did not "ma[k]e clear … that *Martin* remains controlling." The Court did not need to address *Martin*'s viability in *Acoustic Systems*, because the question was not whether to apply *Martin* but whether to extend it. The same is true here: As in *Acoustic Systems*, the Court should not extend *Martin* to a context different from the one that animated its reasoning.

IV. THE STAY WOULD BE IMPROPER EVEN ASSUMING THAT THE DISTRICT COURT HAD JURISDICTION

Finally, the district court's stay order would be improper even if the court had jurisdiction. The Board has shown neither a likelihood of success on the merits nor irreparable harm from the denial of a stay.

A. The Board notes (at 46-47) that this Court stayed the Commission's proceedings during the prior appeal. Motions panel decisions are not "binding prece-

dent," however. *Northshore Dev., Inc. v. Lee*, 835 F.2d 580, 583 (5th Cir. 1988); *see also, e.g.*, *Trevino v. Davis*, 861 F.3d 545, 548 n.1 (5th Cir. 2017), *cert. denied*, 138 S. Ct. 1793 (2018); *Firefighters' Ret. Sys. v. Citco Grp. Ltd.*, 796 F.3d 520, 524 n.2 (5th Cir. 2015). And to the extent the motions panel's one-line order (ROA.99) could otherwise be read to express a view on the Board's likelihood of success, the merits panel's subsequent decision made clear that the Court lacked jurisdiction to opine on that issue.

The question here is whether the district court's stay order reflected a correct understanding of the law, because "making 'an error of law constitutes an abuse of discretion.'" *BP Expl. & Prod., Inc. v. Claimant ID 100281817*, 919 F.3d 284, 287 (5th Cir. 2019). As discussed below, the order was legally erroneous. The non-binding, one-line stay order in the prior appeal does not affect the analysis.

B. The first of the district court's errors is that the Board failed to show a likelihood of establishing the active-supervision element of a state-action defense. The district court's cursory analysis cannot justify the stay it entered.

As our opening brief explains (at 36), the district court was wrong to think the Board could establish active supervision by "showing that the State has exercised sufficient oversight over, and accepted responsibility for, [its] actions," ROA.308. "The mere presence of some state involvement or monitoring does not suffice." *Patrick v. Burget*, 486 U.S. 94, 101 (1988). State officials must not only "have" but actually "exer-

cise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy." *Id.*[7]

The Board urges (at 51) that "[a]ctive supervision exists" when the state "has the power to approve, veto, or modify particular decisions to ensure that they accord with state policy." But again, the key question is not whether the state *could* exert authority. It is "whether the State has played a substantial role in determining the specifics of the economic policy," and "[t]he mere potential for state supervision is not an adequate substitute for a decision by the State." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 638 (1992).

The Board identifies no forms of control that satisfy the Supreme Court's actual standard for active supervision. As our opening brief explains (at 36-37), the legislature's and governor's opportunities to disapprove Rule 31101 show at most a "mere potential for state supervision," *Ticor*, 504 U.S. at 638, not actual control. Nor did the approval of Rule 31101 by the state Commissioner of Administration—in a three-sentence letter containing "no analysis, discussion, or explanation," ROA.80—show actual control. And review of the Board's actions by the state Division of Administrative Law would not constitute actual control, because it would be limited to whether a proposed remedy was "'[a]rbitrary or capricious or characterized by abuse

[7] Contrary to the Federation's suggestion (at 2), the Commission is not asking this Court to "adopt a test of 'adequate state supervision'"—only to apply Supreme Court precedent. It is amicus that asks the Court to change the law. *See, e.g.*, Br. 16-17 (proposing a multifactor test never adopted by any court).

of discretion or clearly unwarranted exercise of discretion,'" ROA.83 (quoting La. Rev. Stat. § 49:964(G)(5)). The Supreme Court has held that similarly "limited" judicial review of agency proceedings does not constitute active supervision, *Patrick*, 486 U.S. at 104-105, and the same is true here.[8]

Aside from reiterating the review power of the Division of Administrative Law, the Board mainly relies (at 52) on measures postdating the Commission's April 2018 order: a May 2018 resolution of the Louisiana Senate, which purports to "affirm[] that the promulgation and repromulgation of [Rule 31101] were the sovereign acts of the state of Louisiana and its legislature," ROA.113-116; and an August 2018 executive order, ROA.109-110. But APA review is based on "'the administrative record already in existence'" when the agency acted, "'not some new record made initially in the reviewing court.'" *Budhathoki v. Nielsen*, 898 F.3d 504, 517 (5th Cir. 2018). As noted above (at 14), the Board remains free to offer evidence of new developments as proceedings continue before the Commission.[9]

At any rate, those developments do not advance the Board's active-supervision arguments. The Senate resolution was never passed by the state house of representa-

[8] The Federation also relies (at 19) on the governor's power to remove Board members, but the removal power is only for cause, La. Rev. Stat. § 37:3394(D)—and even if it were at-will, it would at most create a "potential for state supervision," *Ticor*, 504 U.S. at 638.

[9] Louisiana's new Occupational Licensing Review Commission—which the Board mentions in its statement of facts (at 14 & n.15) but not in its argument—is irrelevant for the same reason.

tives, ROA.112, so it is not state law. *See* La. Const. art. III, § 15(G) (bicameralism requirement). And the new executive order, which pronounces that "a designee of the Commissioner of Administration reviewed and approved" the repromulgated Rule 31101 "in accordance with" the prior executive order, ROA.109, cannot render the approval more substantive or meaningful than it actually was (*see supra* p. 22).

C. The Board also cannot show that the denial of a stay would cause it to suffer irreparable injury. The Board's contrary argument (at 53-55) rests on the premise that the state-action doctrine confers an immunity from suit rather than a mere defense to liability. But as discussed in our opening brief (at 29-30, 32-34), that is wrong. *Surgical Care Center* and *Acoustic Systems* establish that the doctrine affords only a defense to liability, and *Martin* does not compel a different result in this context. In any event, even if the state-action doctrine afforded an immunity from suit, the Board has not satisfied the doctrine's requirements.

D. Finally, the district court erred in balancing the equities by failing to consider the public interest in the timely enforcement of antitrust law. The Board responds (at 56) that a stay of the Commission's proceedings does not harm the public interest because the Board will "refrain from enforcing Rule 31101 until the dispute" over its state-action defense "is resolved." But if the Board ultimately fails in challenging the Commission's state-action determination—as it should—then the Board's meritless challenge will have succeeded in delaying the Commission's proceedings by many months, if not years. That unquestionably harms the public interest.

CONCLUSION

The district court's stay order should be reversed.

Respectfully submitted,

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January 10, 2020

CERTIFICATE OF SERVICE

I hereby certify that on January 10, 2020, I electronically filed the foregoing brief with the U.S. Court of Appeals for the Fifth Circuit using the appellate CM/ECF system. Participants in the case are registered CM/ECF users, and service will be accomplished by the appellate CM/ECF system.

/s/ Daniel Winik
Daniel Winik

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This brief complies with the type-volume limit of Federal Rule of Appellate Procedure 32(a)(7)(B)(ii) because it contains 6,498 words. This brief also complies with the typeface and type-style requirements of Federal Rule of Appellate Procedure 32(a)(5)-(6) because it was prepared using Microsoft Word 2016 in Garamond 14-point font, a proportionally spaced typeface.

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No. 19-30796 LA Real Estate Appraiser Board v. FTC
USDC No. 3:19-CV-214

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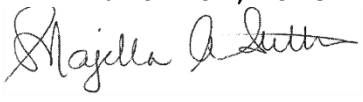

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