No. 20-1776

In the United States Court of Appeals for the Third Circuit

BRUCE E. ELLISON,
Plaintiff-Appellant,

v.

AMERICAN BOARD OF ORTHOPAEDIC SURGERY,
Defendant-Appellee.

ON APPEAL FROM U.S. DISTRICT COURT FOR THE DISTRICT
OF NEW JERSEY, NO. 2-16-cv-8441-KM-JBC
HON. KEVIN MCNULTY, DISTRICT JUDGE

BRIEF FOR *AMICUS CURIAE*
AMERICAN BOARD OF PHYSICIAN SPECIALTIES
IN SUPPORT OF APPELLANT IN SUPPORT OF REVERSAL

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 26.1 of the FEDERAL RULES OF APPELLATE PROCEDURE, *amicus curiae* American Board of Physician Specialties makes the following disclosures:

1) For non-governmental corporate parties please list all parent corporations: None.

2) For non-governmental corporate parties please list all publicly held companies that hold 10% or more of the party's stock: None.

Dated: November 3, 2020

Respectfully submitted,

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IDENTITY, INTEREST, AND AUTHORITY TO FILE

Amicus curiae American Board of Physician Specialties ("ABPS") files this brief pursuant to the accompanying motion for leave to file.[1] Like defendant American Board of Orthopaedic Surgery ("ABOS") and its umbrella the American Board of Medical Specialties ("ABMS"), *amicus* ABPS is in the business of certifying that physicians meet the appropriate professional standards for their area of medical specialization. *Amicus* ABPS has 12 member boards representing 18 distinct medical specialties, and approximately 5,000 participating physicians. By contrast, ABMS has 24 member boards – one of which is defendant ABOS – representing 40 specialties and 87 subspecialties and more than 900,000 participating physicians. Although *amicus* ABPS is thus the David to ABMS's Goliath, ABMS and *amicus* ABPS compete directly with respect to the orthopedic-surgery certification market at issue here. Specifically, like ABMS's member board ABOS, *amicus* ABPS offers certification for orthopedic surgeons.[2]

While *amicus* ABPS competes directly with defendant ABOS in the market at issue before this Court, *amicus* ABPS has a wider range of antitrust disputes with

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[1] Pursuant to FED. R. APP. P. 29(a)(4)(E), the undersigned counsel certifies that: counsel for *amicus* authored this brief in whole; no counsel for a party authored this brief in any respect; and no person or entity – other than *amicus*, its members, and its counsel – contributed monetarily to this brief's preparation or submission.

[2] *See* https://www.abpsus.org/specializations/orthopedic-surgery/ (last visited Nov. 3, 2020).

ABOS's umbrella ABMS. Through this Court's resolution of this antitrust dispute over board-certification issues in the orthopedic-surgeon market, *amicus* ABPS respectfully submits that the Court also can accelerate a long-needed review of the abusive practices of not only defendant ABOS but also ABMS and its other member boards, which damage competition, providers, and consumers in the market for medical care.

For example, ABMS has used its market power to force physicians to engage in a time-consuming and expensive maintenance of certification ("MOC") process. While continuing education can have value to an industry and its customers, "after nearly 30 years of attempting to legitimize the existence of time limited certification, no credible data exist that the ABMS MOC program has led to improved patient outcomes." Paul S. Teirstein, *Boarded to death - Why maintenance of certification is bad for doctors and patients*, 372 NEW ENGLAND JOURNAL OF MEDICINE 106, 106 (2015); John H. Hayes *et al.*, *Association Between Physician Time-Unlimited vs Time-Limited Internal Medicine Board Certification and Ambulatory Patient Care Quality*, 312 JAMA INTERN. MED. 2358, 2358 (2014) ("no differences in outcomes for patients cared for by internists with time-limited or time-unlimited certification for any performance measure"). Under the circumstances, ABPS would like to compete with ABMS and its member boards by offering better and more appropriate certification that meets the profession's and industry's needs. *See* W. G. Fisher & E.

J. Schloss, *Medical specialty certification in the United States—a false idol?*, 47 JOURNAL OF INTERVENTIONAL CARDIAC ELECTROPHYSIOLOGY 37, 41-43 (2016) (describing MOC costs over time). While the ABMS's MOC requirements do not add value for the medical industry or its patients, the industry undoubtedly passes its costs onto patients for little if any value other than the additional profits extracted by a certifying entity with monopoly power.

In addition to ABMS's interlocking membership with the American Hospital Association ("AHA"), *see* Sec. Am. Compl. ¶ 5 (App. 73), ABMS is also closely tied to the Accreditation Council for Graduate Medical Education ("ACGME") as a founding member:

> The members of the ACGME shall be the American Board of Medical Specialties ("ABMS"), American Hospital Association ("AHA"), American Medical Association ("AMA"), Association of American Medical Colleges ("AAMC"), Council of Medical Specialty Societies ("CMSS"), American Osteopathic Association ("AOA") and American Association of Colleges of Osteopathic Medicine ("AACOM").

Accreditation Council for Graduate Medical Education, *Bylaws*, art. IV, § 1 (Sept. 27, 2020).[3] Medical residency is a necessary and well-known step of a physician's education, and there is both a current and a projected (larger) shortage of physicians.

[3] Available at https://www.acgme.org/Portals/0/PDFs/ab_ACGMEbylaws.pdf (last visited Nov. 3, 2020)

Although there are thousands more applicants than residency positions annually, Alicia Gallegos, *Match Day 2019: Residency spots increase, but improvements needed*, INTERNAL MED. NEWS (Mar. 15, 2019),[4] ACGME accredits only residency programs that lead to an ABMS-approved board certification and further requires that only ABMS-certified physicians may direct and instruct these residency programs. While this restriction is bad for the medical field and consumers generally, it feeds the pipeline of new entrants into ABMS's certifications.

In sum, *amicus* ABPS has direct experience in competing with defendant ABOS and its umbrella ABMS. Much of that experience is relevant to the issues that Dr. Ellison asks this Court to decide. For these reasons, ABPS has direct and urgent interests in the issues presented here.

STATEMENT OF THE CASE

Plaintiff Bruce E. Ellison, M.D. appeals the district court's dismissal under FED. R. CIV. P.12(b)(6) of his antitrust claim against defendant ABOS, which denied him an opportunity to complete the final phase of ABOS's board-certification process for certification in orthopedic surgery. *Amicus* ABPS adopts the facts as stated in Dr. Ellison's opening brief and the operative complaint. *See* Opening Br. at 5-15; Appendix at 72-88 (Second Amended Complaint).

[4] https://www.mdedge.com/internalmedicine/article/196478/lifestyle/match-day-2019-residency-spots-increase-improvements (last visited Nov. 3, 2020).

Dr. Ellison needs ABOS certification to obtain admitting privileges at the hospitals in northern New Jersey, where he wishes to move for personal reasons. Sec. Am. Compl. ¶ 11 (App. 74-75). He faces a "catch-22" in the ABOS requirement that he first obtain admitting privileges at a hospital, whereas the New Jersey hospitals require that he obtain ABOS certification before getting admitting privileges. *Id.* ¶ 7 (App. 73-74). This ABOS requirement is new, *id.* ¶ 40 (App. 82), and alternate board-certification providers such as *amicus* ABPS with "equally rigorous certification standards" do not impose that circular requirement. *See Id.* ¶ 8 (App. 74); note 7, *infra*.

ABOS exempts two classes of surgeons or aspiring surgeons from its catch-22 requirement. First, ABOS exempts younger physicians who have recently completed their residency. Sec. Am. Compl. ¶ 7 (App. 74). Second, ABOS exempts "academic [orthopedic] surgeons who have received their graduate medical education outside of the United States or Canada." *See* American Board of Orthopaedic Surgery, Inc., *Rules and Procedures for Residency Education, Part I, and Part II Examinations*, § V.H (academic pathway) (July 7, 2020).[5] Although ABOS's exception for academics is not in the complaint, it is readily available online as part of ABOS's criteria for certification.

[5] Available at https://www.abos.org/wp-content/uploads/2020/07/Part-I-and-II-RP-2020_07_07.pdf (last visited Nov. 3, 2020).

STANDARD OF REVIEW

This Court exercises plenary review of dismissals under FED. R. CIV. P. 12(b)(6), including dismissals of antitrust actions. *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 314 (3d Cir. 2010). With all such dismissals, appellate courts assume the complaint's well-pleaded facts, *Hernandez v. Mesa*, 137 S.Ct. 2003, 2005 (2017), which "must be taken as true and interpreted in the light most favorable to the plaintiffs, and all inferences must be drawn in favor of them." *McTernan v. City of York*, 577 F.3d 521, 526 (3d Cir. 2009). In addition, like the district court, an appellate court may include judicially noticeable facts without converting dismissal into a summary-judgment proceeding. *Zavala v. Wal-Mart Stores Inc.*, 691 F.3d 527, 546 (3d Cir. 2012); *Ieradi v. Mylan Labs., Inc.*, 230 F.3d 594, 598 n.2 (3d Cir. 2000); *cf. Berger v. Hahnemann Univ. Hosp.*, 765 Fed. Appx. 699, 703 n.5 (3d Cir. 2019) ("[i]n addition to the factual allegations in the complaint, we may consider undisputedly authentic documents if the complainant's claims are based upon these documents and matters subject to judicial notice"). With respect to the section of the Sherman Act that Dr. Ellison invokes, the "two essential requirements on an antitrust plaintiff" are "show[ing] that the defendant was a party to a contract, combination … or conspiracy" and "that the conspiracy to which the defendant was a party imposed an unreasonable restraint on trade." *Brokerage Antitrust Litig.*, 618 F.3d at 314 (internal quotations omitted).

SUMMARY OF ARGUMENT

The Sherman Act applies to board-certification entities like ABOS and its umbrella ABMS because their certifications are themselves a form of commerce and those certifications affect the larger commerce in medical services (Section I.A) and because they do not operate as a governmental body that could be exempt from antitrust law (Section I.B). Dr. Ellison did not need to sue any other defendants, such as hospitals or ABMS because he can receive complete relief from ABOS by enjoining its admitting-privilege requirement (Section I.C).

ABOS's admitting-privilege requirement violates the Sherman Act under any standard that this Court would apply. The requirement *per se* violates the Sherman Act by enabling a horizontal restraint against competition in orthopedic surgery in northern New Jersey that restricts competition and artificially limits the supply of surgeons (Section II.A). Because this particular restraint is both new and counterintuitive – *i.e.*, to would-be entrants like Dr. Ellison, the tied product is *unavailable*, as opposed to overpriced – this Court may wish to evaluate it using a quick-look analysis of the rule of reason, which renders the same conclusion as the *per se* analysis (Section II.B). Finally, the "modified *per se* standard" used for certain tying arrangements yields the same result (Section II.C).

Under the circumstances, the district court erred in dismissing the complaint for failure to state a claim. A complaint need only be "short and plain" and need not

plead evidence: it is enough for antitrust plaintiffs to allege a contract, combination, or conspiracy that imposes an unreasonable restraint on trade, which the complaint does (Section III.A). To the extent that parties – understandably – dispute the truth of these claims, the liberal rules for discovery and a trial provide the mechanisms for resolving that dispute (Section III.B).

ARGUMENT

"The heart of our national economic policy long has been faith in the value of competition." *Standard Oil Co. v. FTC*, 340 U.S. 231, 248 (1951). "Federal antitrust law is a central safeguard for the Nation's free market structures." *N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494, 502 (2015). Consumers and the national economy benefit from competition not only on cost but also on other, less tangible factors such as quality, safety, and innovation:

> The assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.

Nat'l Soc'y of Prof'l Eng'rs v. U.S., 435 U.S. 679, 695 (1978). Congress has given injured parties a private right of action because such private actions help ensure competition. 15 U.S.C. § 15. This litigation proceeds against that background.

I. THE SHERMAN ACT APPLIES TO ABOS AND ABMS.

The Sherman Act broadly prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce … is declared to be illegal." 15 U.S.C. § 1. While the Supreme Court has excluded some areas that technically fall within this broad scope, *Flood v. Kuhn*, 407 U.S. 258, 282 (1972), and eschewed a literal reading, *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 688, the Act remains broad in what it covers. *See*, *e.g.*, *U.S. v. Line Material Co.*, 333 U.S. 287, 310 (1948) (distinguishing "between the lawful restraint on trade of the patent monopoly and the illegal restraint prohibited broadly by the Sherman Act"). Assuming *arguendo* that the relevant market is board certification, as distinct from medical services generally, *see* Sec. Am. Compl. ¶ 45 (App. 83), this Court should hold that a physician like Dr. Ellison – or a patient or a hospital – can sue a board-certification entity like ABOS or ABMS.

A. ABOS, ABMS, and hospitals are engaged in commerce.

Whether this Court evaluates the board-certification market for orthopedic surgeons or the larger orthopedic-surgery market itself, Dr. Ellison has sued for commercial activity within the Sherman Act's reach.

First, with respect to the orthopedic-surgery market, the "the market for medical services" falls within the scope of antitrust law. *Arizona v. Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 354 n.29 (1982). It is unexceptional that medical services

would qualify as commerce when the "U.S. spends seventeen percent of its gross domestic product (GDP) on health." David Pratt, *Health Care Reform: Will It Succeed?*, 21 ALBANY L.J. SCI. & TECH. 493, 495 (2011). ABOS's actions affect a significant portion of the market for orthopedic surgery, both in the cost of services and the delay – and other non-financial areas of competition – that result from the limitations that ABOS puts on the ability of orthopedic surgeons to practice their trade in the northern New Jersey area. *See* Sec. Am Compl. ¶¶ 25-28, 43-44, 46-47 (App. 78-80, 82-83). Clearly, ABOS's challenged policy affect medical services.

With respect to the board-certification market, ABOS engages in seven-figure activity in New Jersey alone. Sec. Am Compl. ¶¶ 37-38 (App. 81). In addition to its effect on the larger medical-service market, ABOS's board-certification business is commerce in its own right. Although "antitrust laws … were enacted for the protection of *competition*, not *competitors*," *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977), Dr. Ellison meets that criterion by seeking to void ABOS's requirement for hospital privileges as a barrier to obtaining board certification in ABOS's market. *See Hessein v. Am. Bd. of Anesthesiology Inc.*, 628 F.App'x 116, 120 (3d Cir. 2015); *Daniel v. Am. Bd. of Emergency Med.*, 428 F.3d 408, 438-41 (2d Cir. 2005). Given ABOS's dominant market share in the northern New Jersey area, Sec. Am Compl. ¶¶ 25-28, 43-44, 46-47 (App. 78-80, 82-83), ABOS's challenged policy not only *affects* the board-certification market but also *defines* that market.

B. ABOS, ABMS, and hospitals do not have governmental immunity from Sherman Act liability.

When a government regulates a market, that regulation is not subject to the Sherman Act, even if the act of regulation restrains trade. Specifically, "*Parker v. Brown* interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity." *Dental Exam'rs*, 574 U.S. at 503 (citing *Parker v. Brown*, 317 U.S. 341, 350-51 (1943)). In *Dental Examiners*, however, the Supreme Court explained that "state-action immunity … is not unbounded" *vis-à-vis* "the Nation's commitment to a policy of robust competition." *Id.* at 504. Specifically, the Court narrowed the scope of that immunity "when the State seeks to delegate its regulatory power to active market participants." *Id.* at 505. In such circumstances, the Court imposes a two-part test to ensure that the regulation is indeed state action and not a restraint on trade by market participants.

First, a "state law or regulatory scheme cannot be the basis for antitrust immunity unless … the State has articulated a clear … policy to allow the anti-competitive conduct." *Id.* at 506 (internal quotations omitted). Even if some of the hospitals involved in the restraint of trade are state entities, ABOS cannot point to any New Jersey law allowing the anticompetitive conduct at issue here.

Second, even if state law did allow the anticompetitive conduct, the entity that does the regulating – while perhaps a titular state board – must have "active super-vision" from the state in its operation. *Id.*; *cf. McKeesport Hosp. v. Accreditation*

Council for Graduate Med. Educ., 24 F.3d 519, 524-26 (3d Cir. 1994) (accreditation boards do not commit state action). Similarly, ABOS and ABMS are not even the type of titular state board held to lack immunity in *Dental Examiners*. ABOS and ABMS are purely instances of self-regulation by the medical profession and, as such, are not immune from suit under the Sherman Act.

C. Nothing required Dr. Ellison to sue ABMS or the relevant hospitals to obtain relief from ABOS.

Although the district court may have believed that Dr. Ellison should have joined other parties (*e.g.*, hospitals, AHA, or ABMS), *see* App. at 2-3 (noting entities that are not defendants), the decision to sue only ABOS is not a basis for ruling against Dr. Ellison. A potential defendant is a necessary party only in one of two circumstances, FED. R. CIV. P. 19(a)(1), neither of which applies here. Even absent but *necessary* parties provide no basis to deny relief unless that absent party is also *indispensable*. *Id.* 19(b); *Gen'l Refractories Co. v. First State Ins. Co.*, 500 F.3d 306, 312 (3d Cir. 2007). Because the other potential defendants are not "necessary," this Court need not determine whether they are "indispensable."

First, joinder of an absent defendant is necessary if, "in that person's absence, the court cannot accord complete relief among existing parties." FED. R. CIV. P. 19(a)(1)(A). Compelling ABOS to allow Dr. Ellison to complete the second half of the board-certification examination would solve his problem. While *amicus* ABPS would prefer that the hospitals' requirement for ABMS-affiliated board certification

be challenged and overturned, that need not be Dr. Ellison's fight. For him to prevail in getting his career moving in a new state, he need only complete the ABOS board-certification process, which requires relief only against ABOS. The complaint requests that relief, Sec. Am. Compl. at 16 (App. 87), and it would redress his core injury.[6]

Second, and alternatively, joinder of the absent defendant is necessary if that absent party claims an interest with respect to the litigation's subject matter and resolving the litigation may either (a) "as a practical matter impair or impede the person's ability to protect the interest," or (b) "leave an existing party subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." FED. R. CIV. P. 19(a)(1)(B). The absent potential defendants have no claim with respect to whether defendant ABOS restricts board-certification tests to those with hospital privileges. Indeed, until recently ABOS did not impose

[6] The district court noted that it decided only the question of the lack of an agreement to restrain trade as failure to state a claim under FED. R. CIV. P. 12(b)(6), without addressing ABOS's arguments on venue, personal jurisdiction, and standing (*i.e.*, the allegedly speculative nature of the claim that New Jersey hospitals requiring board certification would deny privileges to someone without board certification). App. 19 & n.5. This raises three issues about constitutional standing. First, there is nothing speculative about hospitals' following their own requirements. Second, it was error for the district court to reach the merits without resolving standing. *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 93-95 (1998). Third, as indicated in the text, a federal court can redress Dr. Ellison's injury by allowing him to obtain ABOS certification without first obtaining hospital privileges.

this catch-22 requirement. *See* Sec. Am Compl. ¶ 40 (App. 82). The mere existence of a decision from this litigation as precedent against an absent party's interests or even potential estoppel are insufficient bases to find an absent party "necessary" here. *Huber v. Taylor*, 532 F.3d 237, 250 (3d Cir. 2008) (courts engaging in Rule 19 analysis should not 'theorize' as to whether an absent party is in privity with a party to an action because such an analysis would be premature"); *cf. Culinary Serv. of Del. Valley, Inc. v. Borough of Yardley*, 385 F.App'x 135, 145 (3d Cir. 2010) ("an unsubstantiated or speculative risk will not satisfy Rule 19(a) criteria – the possibility of exposure to multiple or inconsistent obligations must be real"). There is no basis in Rule 19(a)(1)(B) to find the absent parties "necessary" here.

II. ABOS AND ABMS VIOLATE THE SHERMAN ACT UNDER ANY STANDARD.

Federal courts have parsed the Sherman Act's broad language into two main types of violations: one for restraints that are *per se* violations and another for restraints that cannot survive the "rule of reason." *Nat'l Soc'y of Prof'l Eng'rs*, 435 U.S. at 692. The first category includes a "modified *per se*" standard for tying agreements. *Brokerage Antitrust Litig.*, 618 F.3d at 318 n.15. Similarly, the second includes a "quick look" analysis for "highly suspicious yet sufficiently idiosyncratic [restraints where] judicial experience with them is limited." *Id.* at 317 (internal quotations omitted). Whichever standard this Court uses, ABOS's catch-22 requirement violates the Sherman Act.

A. ABOS and ABMS *per se* violate the Sherman Act.

A restraint on trade is "unreasonable *per se*" if that type of restraint "always or almost always tend[s] to restrict competition and decrease output." *Ohio v. Am. Express Co.*, 138 S.Ct. 2274, 2283-84 (2018) (internal quotations omitted). The paradigm types of *per se* violations are "horizontal" restraints – restraints imposed by agreement between competitors." *Id.* (internal quotations omitted).

The district court found that the "purported tying arrangement makes little sense," App. 18, and the agreement is perhaps unusual. Starting in 2012, ABOS tied its board certification (the tying product) to obtaining privileges at the third-party hospitals (the tied product), Sec. Am. Compl. ¶ 40 (App. 82), but would-be buyers like Dr. Ellison are *excluded altogether* by hospitals that refuse to provide privileges to would-be market entrants like Dr. Ellison.

Because this arrangement – unusual or not – serves no purpose but to enable a horizontal restraint on trade across the northern New Jersey orthopedic-surgery market and other similar markets nationwide, this Court should find a *per se* violation of the Sherman Act. In antitrust theory, certification is less restrictive than – and thus often preferrable to – licensing. Aaron Edlin & Rebecca Haw, *Cartels by Another Name: Should Licensed Occupations Face Antitrust Scrutiny?*, 162 U. PA. L. REV. 1093, 1150 (2014). The key difference is that certification typically does not serve as a barrier to entry or horizontal restraint:

> Certification is similar to licensing in that the state sets educational or testing criteria for professionals; passing these hurdles signals to consumers the individual's minimum quality and competency. But unlike under licensing schemes, uncertified practitioners may still practice as long as they do not claim a "certified" title. Certification thus solves the information asymmetry problem because consumers seeking higher-quality services can pay more for certified practitioners. But *it does so at a lower cost to competition, since certification is not an absolute barrier to entry for low-cost practitioners.*

Id. (emphasis added). But ABOS has weaponized its certification to enable its hospital customers to use that certification as a barrier to entry.

Importantly, neither Dr. Ellison nor *amicus* ABPS oppose the use of board certification for orthopedic surgeons to distinguish themselves. Dr. Ellison seeks board certification, and *amicus* ABPS is in the business of certifying orthopedic surgeons and other medical professionals with "equally rigorous certification standards as those of the ABMS and ABOS." Sec. Am. Compl. ¶ 8 (App. 74). Also important is the fact that the lynchpin to the arrangement here – namely, ABOS's policy against certifying surgeons without hospital privileges – is a recent development that started in 2012. Sec. Am. Compl. ¶ 40 (App. 82). The arrangement is not, therefore, some vestige – whether still justified today or not – of the way that the industry has always done things. It is a recent action, taken for a purpose.

The complaint credibly alleges that the agreement here and the concerted action by ABOS, ABMS, AHA, and the relevant hospitals (1) excludes surgeons like

Dr. Ellison from entering the market, (2) is anticompetitive, and (3) "lack[s] … any legitimate business or other pro-competitive justification." *See* Sec. Am. Compl. ¶¶ 6-7, 40-44, 60 (App. 73-74, 82, 85). The orthopedic-surgery market survived until 2012 without this restriction, and equally rigorous board-certification regimens still survive without the restriction. *Id.* ¶¶ 8, 40 (App. 74, 82).[7] Unfortunately for the sake of competition, ABOS and ABMS have monopoly power in the certification market. *Id.* ¶¶ 3-4, 46-47 (App. 73, 83).

The district court thought that this agreement makes little sense, App. 18, but it makes perfect sense both to market participants like the hospitals and to rivals like *amicus* ABPS. The district judge need not have worried that ABMS and ABOS were shortchanging themselves by walking away from willing buyers and market entrants like Dr. Ellison. Over the same period, ABMS and ABOS dramatically increased the cost of *maintaining* board certification through the MOC process. *See* Fisher & Schloss, *Medical specialty certification*, 47 JOURNAL OF INTERVENTIONAL CARDIAC ELECTROPHYSIOLOGY at 41-43. Net over increased MOC costs from its captive

[7] ABPS has an *analogous* requirement for orthopedic-surgery staff privileges, but the ABPS requirement applies broadly to facilities accredited by the American Osteopathic Association or the Joint Commission on Accreditation of Healthcare Organizations ("JCAHO"). The JCAHO accredits facilities beyond the hospital setting, including ambulatory surgical centers and even office-based surgery settings. As such, requiring staff privileges at a JCAHO-certified facility screens for qualified surgeons without imposing or enabling a horizontal restraint.

market minus lost sales to would-be entrants like Dr. Ellison, ABMS and ABOS are doing just fine, while hospitals and surgeons pass the costs on to consumers without any demonstrable improvement to patient outcomes. *See* Teirstein, *Boarded to death*, 372 NEW ENGLAND JOURNAL OF MEDICINE at 106; John H. Hayes *et al.*, *Board Certification and Ambulatory Patient Care Quality*, 312 JAMA INTERN. MED. at 2358. Viewed as a whole, the ABMS-ABOS business plan makes perfect sense, except that it violates the Sherman Act.

ABOS exempts two types of surgeons – or aspiring surgeons – from its catch-22 requirement that surgeons already have admitting privileges to obtain the board certification that hospitals require before granting those privileges: academics and MDs completing their residencies. Because ABOS is an entity within the ABMS fold, a suspicious person might notice that those two favored groups are represented in ABMS's coalition through medical schools and the ACGME, as are hospitals through the AHA. The people whom ABOS excludes and includes suggests an intentional barrier to entry.

Perhaps most importantly, a requirement for hospital admitting privileges adds little or no medical benefit in many situations, *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2311-14 (2016) (finding a "virtual absence of any health benefit" from admitting privileges), such as when an orthopedic surgeon practices in an ambulatory surgical center (*i.e.*, outside a hospital setting). Sec. Am. Compl. ¶

41 (App. 82). Like Texas in *Hellerstedt*, New Jersey requires that ambulatory surgical centers have a working arrangement with hospitals. *Compare* 25 TEX. ADMIN. CODE §139.56(a) *with* N.J. ADMIN. CODE § 8:43A-3.6(a)(6). As the Supreme Court held in *Hellerstedt*, the lack of medical benefit for an added admission-privilege requirement is even more pronounced when state law already requires that ambulatory surgical centers have that type of "working arrangement." *Hellerstedt*, 136 S.Ct. at 2310. In short, ABOS's requirement for hospital admission privileges serves no medical purpose.

Because the ABOS hospital admitting-privilege requirement serves no purpose, other than to enable horizontal price-fixing by hospitals, this Court should reject it as a *per se* violation of the Sherman Act.

B. ABOS and ABMS violate the Sherman Act under the Rule of Reason.

While *amicus* ABPS maintains that ABOS's new restriction is a *per se* violation of the Sherman Act, *see* Section II.A, *supra*, this Court may find it sufficiently novel to warrant analysis under the rule of reason. Alternatively, the Court may look to the rule of reason because exclusive dealing in the board-certification market with ABOS, while not a *per se* violation because of *potential* consumer benefits,[8] requires courts to weigh the degree of market exclusion and the

[8] *Compare Allied Tube & Conduit Corp. v. Indian Head*, 486 U.S. 492, 501 (1988) ("private standards can have significant procompetitive advantages" if

"likely or actual anticompetitive effects … including … reduced output, increased price, or reduced quality in goods or services." *Eisai, Inc. v. Sanofi Aventis U.S., LLC*, 821 F.3d 394, 403 (3d Cir. 2016). As explained below, the exclusive use of ABOS certification here provides no consumer benefits and reduces competition.

The rule of reason "requires courts to conduct a fact-specific assessment of market power and market structure to assess the restraint's actual effect on competition." *Am. Express*, 138 S.Ct. at 2284 (alterations and interior quotations omitted). When "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," that "quick look" is all that is required. *California Dental Ass'n v. FTC*, 526 U.S. 756, 769-71 (1999). Otherwise, the analysis must run deeper.

Although the district court was wrong to conclude that ABOS's restriction "makes little sense," App. 18, *amicus* ABPS acknowledges that the restriction is both novel and unusual. That novel and unusual nature may counsel for this Court's resolving this matter under the rule of reason, rather than under *per se* standard:

"promulgate[d] … based on the merits of objective expert judgments and through procedures that prevent the standard-setting process from being biased by members with economic interests in stifling product competition") *with Am. Soc'y of Mech. Eng'rs v. Hydrolevel Corp.*, 456 U.S. 556, 571 (1982) ("standard-setting organization … can be rife with opportunities for anticompetitive activity").

> Some restraints of trade are highly suspicious yet sufficiently idiosyncratic that judicial experience with them is limited. *Per se* condemnation is inappropriate, but at the same time, the inherently suspect nature of the restraint obviates the sort of elaborate industry analysis required by the traditional rule-of-reason standard.

Brokerage Antitrust Litig., 618 F.3d at 317 (interior quotations and citations omitted). But if this Court cannot reject ABOS's hospital admitting-privilege requirement as a *per se* violation of the Sherman Act, *amicus* ABPS respectfully submits that this Court can reject it with only a "quick look" as "an abbreviated form of the rule of reason." *Id.* That quick look is enough for a court – or any "observer with even a rudimentary understanding of economics," *id.* (interior quotations omitted) – to reject ABOS's abuse of its market power.

In that quick look, the same arguments that lie against the requirement as a *per se* violation also inform a finding that "the arrangements in question would have an anticompetitive effect on customers and markets." *California Dental*, 526 U.S. at 770. In addition, the Court's quick-look analysis should also consider that the ABOS requirement discriminates on the basis of age, in violation of the Affordable Care Act, PUB. L. NO. 111-148, 124 Stat. 119 (2010). Under this Court's precedents, the rule-of-reason analysis can include that type of discriminatory impact, *U.S. v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 17, 1993), which is another basis to reject the new ABOS restriction.

Specifically, Section 1557 of the Affordable Care Act prohibits discrimination in health programs and activities:

> [A]n individual shall not, on the ground prohibited under title VI of the Civil Rights Act of 1964 …, the Age Discrimination Act of 1975 …, or section 504 of the Rehabilitation Act of 1973 …, be excluded from participation in, be denied the benefits of, or be subjected to discrimination under, any health program or activity, any part of which is receiving Federal financial assistance, including credits, subsidies, or contracts of insurance, or under any program or activity that is administered by an Executive Agency or any entity established under this title[.]

42 U.S.C. § 18116(a). Even if ABMS's federal funding does not put ABOS directly under this restriction, the relevant hospitals certainly fall under it. Section 1557 allows disparate-impact claims to the same extent as the underlying statutory provision that a plaintiff invokes, *Doe v. BlueCross BlueShield of Tenn., Inc.*, 926 F.3d 235, 238-44 (6th Cir. 2019), and the Age Discrimination Act of 1975 allows disparate-impact claims. *Smith v. City of Jackson*, 544 U.S. 228, 240 (2005). By blocking experienced – and thus older – surgeons like Dr. Ellison but allowing new graduates from resident programs, *see* Sec. Am. Compl. ¶ 7 (App. 74), ABOS's restriction disparately impacts surgeons on the basis of age.

With respect to consumer benefit, there is none. Alternate board-certification providers like *amicus* ABPS provide "equally rigorous certification standards as those of the ABMS and ABOS." Sec. Am. Compl. ¶ 8 (App. 74). Thus, subjecting

surgeons to ABOS's hospital admitting-privilege requirement adds nothing. Instead, surgeons are captive to ABOS's meritless and expensive MOC process – which they pass on to patients in the form of increased prices and longer wait times – along with the general increase in price that comes from limiting supply and competition. *See* Sec. Am. Compl. ¶ 43 (App. 82); Fisher & Schloss, *Medical specialty certification*, 47 JOURNAL OF INTERVENTIONAL CARDIAC ELECTROPHYSIOLOGY at 41-43.

C. ABOS and ABMS violate the Sherman Act under the "modified *per se* standard" for Sherman Act liability.

As *amicus* Open Markets Institute ("OMI") explains, the Supreme Court and this Court have identified a modified *per se* standard to apply to tying arrangements. *See* OMI *Amicus* Br. at 14-17. If this Court applies that standard, ABOS and ABMS violate it for the same reasons outlined under the *per se* and rule-of-reason analyses. *See* Sections II.A-II.B. Specifically, ABOS has more than an "appreciable economic power" *vis-à-vis* the tying product (board certification) and affects the entire market in the tied product (hospital admitting privileges and even orthopedic surgery). *See Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451, 462 (1992); Sec. Am. Compl. ¶¶ 3-4, 46-47 (App. 73, 83) (ABOS's market power). By limiting the supply of orthopedic surgeons, ABOS and its hospital customers can conspire to reduce competition. *Id.* ¶ 43 (App. 82). That violates the Sherman Act under the modified *per se* standard.

III. DR. ELLISON IS ENTITLED TO DISCOVERY TO PROVE ABOS'S VIOLATION OF THE SHERMAN ACT.

With the foregoing two sections as background, dismissing the complaint for failure to state a claim was error because the complaint adequately states an antitrust claim; to the extent that Dr. Ellison needs discovery to support his pleadings, that is not surprising, given the incentives for ABOS, ABMS, and the hospitals to hide their collusion.

A. The Complaint states a claim under the Sherman Act.

Although the district court dismissed for failure to state a claim, Dr. Ellison has met the "two essential [pleading] requirements on an antitrust plaintiff" (*i.e.*, that ABOS "was a party to a contract, combination … or conspiracy" and that that "imposed an unreasonable restraint on trade"). *Brokerage Antitrust Litig.*, 618 F.3d at 314 (internal quotations omitted). This Court should reverse the dismissal of the Second Amended Complaint and remand for further proceedings.

A pleading need set out only "a short and plain statement of the claim showing that the pleader is entitled to relief." FED. R. CIV. P. 8(a)(2). Even after *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), a plaintiff need not "plead evidence." *Brokerage Antitrust Litig.*, 618 F.3d at 324 n.25 (internal quotation omitted). While "a plaintiff cannot merely assert that the defendants' actions were concerted without alleging facts plausibly suggesting an agreement," *id.*, the complaint satisfies that standard by alleging not only concerted action, *see* Sec. Am. Compl. ¶¶ 6-7, 40-44,

60 (App. 73-74, 82, 85), but also supporting facts that bolster the existence of that concerted action. *See id.* ¶¶ 6, 18-20, 64 (App. 73, 77-78, 85-86). Because standard-setting or certifying bodies can be held liable for disadvantaging competition, *Am. Soc'y of Mech. Eng'rs*, 456 U.S. at 570-74; *Radiant Burners v. Peoples Gas Light & Coke Co.*, 364 US 656, 658, 660 (1961), Dr. Ellison plausibly states a claim here.

Dr. Ellison has "antitrust standing" – or statutory standing – because he seeks to lower the barriers to entry for *all surgeons*, not merely to enter the protected market with those market barriers intact. *Gregory Mktg. Corp. v. Wakefern Food Corp.*, 787 F.2d 92, 95 n.4 (3d Cir. 1986); *Hessein*, 628 F.App'x at 120 (citing *Daniel*, 428 F.3d at 438-39); *cf. Sanjuan v. Am. Bd. of Psychiatry & Neurology*, 40 F.3d 247, 252 (7th Cir. 1994) ("[p]laintiffs, who want to obtain a credential that will help them charge higher prices, have pleaded themselves out of court on the antitrust claim"). The relief that Dr. Ellison seeks – abolishing the ABOS hospital admitting-privilege requirement, Sec. Am. Compl. at 16 (App. 87) – would benefit competition itself, not merely Dr. Ellison as a competitor.

Most importantly, the ABOS admitting-privilege requirement violates the Sherman Act under all applicable standards. *See* Section II, *supra*. This Court should not allow ABOS and ABMS to escape antitrust review because of the novelty of their restraints on trade or their ability to operate outside public view.

B. Discovery is needed to show the extent of ABOS's violation of the Sherman Act.

ABOS presumably will claim that hospitals act independently to require ABOS certification and that its hospital admitting-privilege requirement serves some purpose other than to limit competition, thereby allowing hospitals to maintain higher fees for orthopedic surgery. As explained in Section III.A, *supra*, however, Dr. Ellison has plausibly alleged the "two essential requirements on an antitrust plaintiff." *Brokerage Antitrust Litig.*, 618 F.3d at 314 (internal quotations omitted). This is precisely the type of dispute that should proceed to discovery. A plaintiff need not "plead evidence," *id.* at 324 n.25 (internal quotation omitted), and likely does not even have evidence for all of its allegations. It is enough for this case to proceed to discovery that Dr. Ellison has stated a plausible claim, backed by supporting facts.

CONCLUSION

The district court's decision should be reversed.

Dated: November 3, 2020

Respectfully submitted,

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COMBINED CERTIFICATE OF COMPLIANCE

The undersigned counsel certifies compliance of the accompanying brief with the following requirements of the FEDERAL RULES OF APPELLATE PROCEDURE and the Local Rules of this Court.

1. Pursuant to Local Rule 28.3(d), counsel for *amicus curiae* is a member of this Court's bar.

2. This brief complies with the type-volume limitation of FED. R. APP. P. 32(a)(7)(B) and 29(c)(5) because:

This brief contains 6,149 words, including footnotes, but excluding the parts of the brief exempted by FED. R. APP. P. 32(a)(7)(B)(iii).

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Dated: November 3, 2020

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CERTIFICATE OF SERVICE

I hereby certify that on November 3, 2020, I electronically filed the foregoing brief – as an exhibit to the accompanying motion for leave to file – with the Clerk of the Court for the United States Court of Appeals for the Third Circuit by 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.

In addition, I hereby certify that on November 3, 2020, I served one paper copy via U.S. Mail, postage prepaid, on the following counsel for the appellee:

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