

**TELEMEDICINE: A THERAPEUTIC PRESCRIPTION FOR OUR
HEALTH CARE SYSTEM CONTAMINATED BY OLD ECONOMY
RULES AND REGULATIONS**

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As technology has evolved over the past few decades, the power of the Internet has transformed how consumers purchase goods and services. The medical profession, though, has been slow to adapt to this changing marketplace. Telemedicine has the ability to change the future of medicine by providing quality, cost-effective care. However, the state medical boards impose an array of restrictions on the ability of physicians to practice telemedicine. Regulations that prohibit the expansion of telemedicine must be changed. The United States District Court for the Western District of Texas took a first step in allowing this expansion by granting a preliminary injunction of a Texas law mandating in-person consultation before a physician can practice telemedicine.

I. INTRODUCTION

In *The World Is Flat*, Thomas Friedman states that using the concept of “flatness to describe how more people can plug, play, compete, connect, and collaborate with more equal power than ever before—which is what is happening in the world—really helps people who are trying to understand the essential impact of all the technological changes coming together today.”¹ The proliferation of digital content continues to change our lives in

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¹ THOMAS L. FRIEDMAN, *THE WORLD IS FLAT 3.0: A BRIEF HISTORY OF THE TWENTY-FIRST CENTURY*, at x (2007).

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ways that were unimaginable only thirty years ago.² Barriers that previously existed because of time and distance have evaporated.³ For example, we have moved from a brick and mortar economy to an economy that relies more heavily on e-commerce.⁴ The advent of social media sites such as Facebook, Twitter, and Instagram connects us with others across the globe in ways that past generations would have found unfathomable.⁵ However, Friedman's metaphor of flatness currently has limited application to the world of medicine. Access to care continues to be based on a twentieth century fee-for-service model,⁶ and socioeconomic barriers still limit access to care and quality of care.⁷ Telemedicine

² See generally *Top 30 Innovations Of The Last 30 Years*, FORBES (Feb. 19, 2009), http://www.forbes.com/2009/02/19/innovation-internet-health-entrepreneurs-technology_wharton.html (explaining how inventions such as the Internet have impacted various sectors of life including quality of life and ability to communicate).

³ See generally *id.* (internal quotation marks omitted) (describing the evolution of technology and how it has “change[d] the nature of interaction” bringing the world to a more level playing field).

⁴ See *The Shifting Role of E-Commerce in the U.S. Economy*, CRESTMARK (Aug. 11, 2014), <http://www.crestmark.com/the-shifting-role-of-e-commerce-in-the-u-s-economy/> (explaining an increasing trend in total e-commerce sales and a declining trend in retail storefronts).

⁵ See Vivek Wadhwa, *10 Years After Facebook Launched, Media Is Only Beginning To Shake Up the World*, WASH. POST (Feb. 3, 2014), <https://www.washingtonpost.com/news/innovations/wp/2014/02/03/10-years-after-facebook-social-media-is-only-beginning-to-shake-up-the-world/> (explaining how Facebook has broken societal boundaries and changed the knowledge base of the world).

⁶ Bill Frist, *Telemedicine: A Solution To Address The Problems Of Cost, Access, And Quality*, HEALTHAFFAIRSBLOG (July 23, 2015), <http://healthaffairs.org/blog/2015/07/23/telemedicine-a-solution-to-address-the-problems-of-cost-access-and-quality/> (“As we shift our health system from a fee-for-service model to one centered on value-based care, telemedicine is improving outcomes for chronic care patients.”); see also *Fee For Service*, HEALTHCARE.GOV, <https://www.healthcare.gov/glossary/fee-for-service/> (defining “fee for service” as “[a] method in which doctors and other health care providers are paid for each service performed. Examples of services include tests and office visits”).

⁷ See *Disparities in Health and Health Care: Five Key Questions and Answers*, THE HENRY J. KAISER FAMILY FOUND. (Nov. 30, 2012),

offers an alternative delivery model that has been deemed the future of health care, but the old economy still applies rules and regulations that limit the potential benefits of telemedicine.⁸

This Recent Development argues that regulations requiring physicians to have in-person consultations with patients before treating them through the use of telemedicine should be eliminated so that a broader range of consumers can access these medical services. Part II will discuss the background of telemedicine and a recent federal case limiting telemedicine regulations, *Teladoc, Inc. v. Texas Medical Board*.⁹ Part III will analyze why the federal court was correct in its ruling and why the preliminary injunction should thus be upheld. Finally, Part IV will discuss newly proposed Congressional legislation regarding telemedicine, as well as the benefits of eliminating existing regulation and potential arguments against telemedicine. Part V will briefly conclude.

II. BACKGROUND OF TELEMEDICINE AND THE *TELADOC* RULING

Imagine waking up in the middle of the night with a severe rash and intractable pain. Instead of getting in the car to drive to the nearest hospital, which could be many miles away, one can simply turn on his or her computer and request a consultation with a physician. Within minutes, a physician's face appears on the screen asking questions about possible symptoms and providing a diagnosis. The physician then sends a prescription to a nearby pharmacy. All of this occurs in the span of time that it would have taken to drive to the hospital. Although this interaction seems like an implausible scenario, this is likely in medicine's near future.

<http://kff.org/disparities-policy/issue-brief/disparities-in-health-and-health-care-five-key-questions-and-answers/>.

⁸ See Latoya Thomas & Gary Capistrant, *State Telemedicine Gaps Analysis*, AM. TELEMEDICINE ASS'N 4 (May 2015), <http://www.americantelemed.org/docs/default-source/policy/50-state-telemedicine-gaps-analysis--physician-practice-standards-licensure.pdf>.

⁹ No. 1-15-CV-343 RP, 2015 U.S. Dist. LEXIS 90230 (W.D. Tex. May 29, 2015).

A. *What is Telemedicine?*

Telemedicine provides patients with the ability to “see and speak with a doctor using real-time audio or video technology to obtain a diagnosis and any necessary prescriptions for minor medical needs”¹⁰ Modern medicine is facing a major crisis. While primary care physicians are the first line of defense against the explosive cost of health care in the United States,¹¹ there is a shortage of about 45,000 primary care physicians nationwide, and this deficit is continuing to increase.¹² Further, because of the changing landscape of medicine, modern doctors spend much less time with patients than in past generations.¹³ Medical residents spend most of their time on paperwork and tasks that need not be performed by a doctor, such as drawing blood.¹⁴ In fact, only 20% of doctors’ work time is spent with their patients; this translates to doctors only being able to spend about eight minutes with each patient, on average.¹⁵ The aging population of the United States further exacerbates the current physician shortage.¹⁶ These

¹⁰ *UnitedHealthcare Covers Virtual Care Physician Visits, Expanding Consumers’ Access to Affordable Health Care Options*, UNITEDHEALTHCARE (April 30, 2015), <http://www.uhc.com/news-room/2015-news-release-archive/unitedhealthcare-covers-virtual-care-physician-visits> [hereinafter UNITEDHEALTHCARE].

¹¹ Anders Kelto, *Family Doctors Who Do More, Save More*, NPR (May 11, 2015), <http://www.npr.org/sections/health-shots/2015/05/11/405955775/family-doctors-who-do-more-save-more>.

¹² UNITEDHEALTHCARE, *supra* note 10.

¹³ Pauline W. Chen, *For New Doctors, 8 Minutes Per Patient*, N.Y. TIMES (May 30, 2013 12:01 AM), <http://well.blogs.nytimes.com/2013/05/30/for-new-doctors-8-minutes-per-patient/>.

¹⁴ *Id.*

¹⁵ *Id.* The importance of this number, as discussed later in this Recent Development, is that physicians are unable to spend time talking to the patient and discussing preventive care measures that can enhance one’s future health.

¹⁶ As the “baby boomer” generation ages, necessitating more primary care physicians to treat the effects of older age, the demand for primary care physicians will increase faster than the supply of physicians available to treat these health care needs. *See Projecting the Supply and Demand for Primary Care Practitioners Through 2020*, U.S. DEP’T OF HEALTH AND HUMAN SERVS. (Nov. 2013), <http://bhpr.hrsa.gov/healthworkforce/supplydemand/usworkforce/primarycare/>.

pressures on access to primary care are spurring growth in health care alternatives.¹⁷ One study estimates that more than ten million consumers benefited from a form of telemedicine in 2014 and 27% of consumers would choose a telemedicine visit if given the option.¹⁸ American society, accustomed to efficiency and technology, is quickly accepting the use of telemedicine.¹⁹

An example of an effective use of telemedicine is the treatment of patients with congestive heart failure conducted by Partners Healthcare.²⁰ These patients have monitoring devices in their homes that track their weight, blood pressure, and other measurable metrics.²¹ This data is uploaded and sent to clinicians, and “decision support software” helps to identify patients in need of care.²² Through this telemedicine consultation process, three or four nurses are able to provide care for about 250 patients.²³ This program helped reduce hospital readmissions by 44% over a six-year period.²⁴ The program has also created cost savings for the health care company totaling more than \$10 million over the same period.²⁵ As another example, dermatologists at Kaiser Permanente have increased the total number of patients by fifty percent through the use of “store and forward” telemedicine.²⁶ With the “store and forward” practice, referring physicians can upload images and patient history on a secure server that a consulting dermatologist can access.²⁷ The dermatologist can then review this information to conduct a consultation, send a diagnosis, or make a therapeutic

¹⁷ See UNITEDHEALTHCARE, *supra* note 10.

¹⁸ *Id.*

¹⁹ See, e.g., *id.* (“10 million consumers directly benefited from using telemedicine last year . . .”).

²⁰ Joesph Kvedar, Molly Joel Coye & Wendy Everett, *Connected Health: A Review of Technologies And Strategies To Improve Patient Care With Telemedicine And Telehealth*, 33 HEALTH AFFAIRS 194, 195 (Feb. 2014), <http://content.healthaffairs.org/content/33/2/194.full.pdf+html>.

²¹ *Id.*

²² *Id.*

²³ *Id.* at 195–96.

²⁴ *Id.* at 196.

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

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recommendation, or if appropriate, prescribe medicine instead of having a face-to-face visit with each patient.²⁸

Eighty-nine percent of health executives believe that telemedicine will transform health care within the next decade²⁹ due to the potential to “improve access to care, improve patient satisfaction, and reduce costs to the health care system.”³⁰ The United States telemedicine market is expected to reach \$1.9 billion by 2018, a 50% annual growth increase from the \$240 million revenue in 2013.³¹ At a time when American consumers are looking for lower health care costs and increased quality, telemedicine is health care for the future. Telemedicine is attractive to consumers for many reasons, including privacy, convenience, lack of travel time to consult with a physician, quick access to a physician, and lower prices.³²

Telemedicine has grown exceptionally quickly in recent years, illustrated by the example of Teladoc, a Texas-based telemedicine corporation with about “700 board-certified, state-licensed physicians” and approximately 11 million patients.³³ Teladoc uses “telecommunication technologies to provide health care services outside the traditional models.”³⁴ Teladoc’s providers are available

²⁸ *Id.*

²⁹ Nicole Lewis, *Execs View Telehealth As Game Changer*, INFORMATIONWEEK (May 19, 2010, 3:16 PM), <http://www.informationweek.com/administration-systems/execs-view-telehealth-as-game-changer/d/d-id/1089245?>

³⁰ Hilary Daniel & Lois Snyder Sulmasy, *Policy Recommendations to Guide the Use of Telemedicine in Primary Care Settings: An American College of Physicians Position Paper*, ANN. INTERN. MED. (Sept. 8, 2015), <http://annals.org/article.aspx?articleid=2434625>.

³¹ *Health Care Industry Post*, ERNST & YOUNG (2014), [http://www.ey.com/Publication/vwLUAssets/EY-shaping-your-telehealth-strategy/\\$FILE/EY-shaping-your-telehealth-strategy.pdf](http://www.ey.com/Publication/vwLUAssets/EY-shaping-your-telehealth-strategy/$FILE/EY-shaping-your-telehealth-strategy.pdf).

³² Complaint at 46, *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1:15-cv-343 (W.D. Tex. Apr. 29, 2015) [hereinafter *Teladoc* Complaint].

³³ *Id.* at 17, 90–91. Teladoc states that the rapid growth is due to the high quality and value of their services, and the fact that health care prices have outpaced inflation, leaving patients with a limited number of accessible health care options. *Id.* at 90.

³⁴ *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343 RP, 2015 U.S. Dist. LEXIS 90230, at *4 (W.D. Tex. May 29, 2015).

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all day, every day “for a fraction of the cost of a visit to a physician’s office, urgent care center, or hospital emergency room.”³⁵ Approximately 2.4 million Teladoc patients reside in Texas.³⁶

Most Teladoc clients have access to Teladoc’s services through an employer who has contracted for a per-member subscription fee.³⁷ Each person registers by creating an account and providing information such as “medical history, physician, contact information, and medical records. Members may also upload photographs and medical records . . . for inclusion with their medical history.³⁸ When a Teladoc patient needs a physician consultation, he or she can either go onto Teladoc’s web portal or call a toll-free number to request a physician licensed in the proper state.³⁹ Many of Teladoc’s board-certified physicians are licensed in multiple states.⁴⁰ When a physician accepts a consultation request, he or she gains access to the patient’s “medical history, allergies, medications, records from prior consultations, and any photographs the member has uploaded.”⁴¹ After reviewing the patient’s file, the physician contacts the patient and begins the consultation.⁴² Teladoc physicians can write prescriptions when medically necessary, subject to the same strict medical guidelines imposed on any physician.⁴³ Consultation resolves the medical issues of about 94% of patients, while “[t]he remaining six percent are referred to their physician, dentist, or emergency room.”⁴⁴ Upon completion of the consultation, the physician updates the

³⁵ *Teladoc Complaint*, *supra* note 32, at 2.

³⁶ *Id.* at 46.

³⁷ *Id.* at 43.

³⁸ *Id.* at 44.

³⁹ *Id.* at 45. The physician must be licensed to practice in the state where the patient resides. *Id.*

⁴⁰ *Id.* at 68. Teladoc providers are licensed in numerous states in order to “facilitate their provision of telehealth services to more consumers.” *Id.*

⁴¹ *Id.* at 77.

⁴² *Id.* at 78.

⁴³ *Id.* at 79. “For example, antibiotics are prescribed according to guidelines from the Center for Disease Control (“CDC”), and such prescriptions are for a limited duration.” *Id.*

⁴⁴ *Id.* at 80.

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patient's electronic medical records with treatment notes.⁴⁵ Last year, "Teladoc physicians treated patients for conditions varying from insomnia, food poisoning, sunburn, Lyme disease, joint pain, alcohol abuse, and asthma," and offered a "groundbreaking smoking cessation program"⁴⁶

Between 2013 and 2014, Teladoc had a 163% increase in its number of consultations, reaching nearly 60,000 consultations in Texas alone during 2014.⁴⁷ Nationwide, Teladoc currently has about 1,400 consultations per day, an increase from a total of 298,000 consultations in 2014.⁴⁸ This exponential growth should continue.⁴⁹ As stated in Teladoc's complaint, 71% of employers are expected to offer telemedicine by 2017, an approximately 50% increase from 2014.⁵⁰

It is important to note there are some forms of medical care that cannot be provided remotely, and therefore must be done in person.⁵¹ Urgent and life-threatening conditions, such as chest pain or difficulty breathing, require an in-person physician consultation.⁵² However, telemedicine can be used to discuss symptoms and obtain a diagnosis for minor medical needs such as "allergies, sinus and bladder infections, bronchitis and other conditions."⁵³ Telemedicine's purpose is "to meet the patient's immediate acute care needs."⁵⁴

⁴⁵ *Id.* at 84. This information is available for the patient's next consultation, and the patient is able to access this information so that it is able to be sent to another physician. *Id.*

⁴⁶ *Id.* at 71.

⁴⁷ *Id.* at 90.

⁴⁸ *Id.*

⁴⁹ *Id.* at 92. *See also id.* at 90 (explaining that there are approximately 1,400 consultations per day which would equal about 511,000 consultations during this year).

⁵⁰ *Id.*

⁵¹ Abby Goodnough, *Modern Doctors' House Calls: Skype Chat and Fast Diagnosis*, N.Y. TIMES, July 12, 2015, at A1, <http://www.nytimes.com/2015/07/12/health/modern-doctors-house-calls-skype-chat-and-fast-diagnosis.html>.

⁵² *Id.*

⁵³ UNITEDHEALTHCARE, *supra* note 10.

⁵⁴ Daniel & Sulmasy, *supra* note 30.

However, various challenges still prevent the expansion of telemedicine, including “variations in state and federal laws, limited reimbursement, logistic issues, and concerns about the quality and security of the care provided”⁵⁵ Some state medical boards have adopted “practice standards with higher specifications for telemedicine than in-person care.”⁵⁶ For example, many state boards require an initial in-person examination or the establishment of an in-person physician-patient relationship before engaging in telemedicine, which limits the scope of many telemedicine practices.⁵⁷ Another policy with major implications for the telemedicine industry is the issue of “licensure portability.”⁵⁸ Even though video technology offers new ease and convenience to patients and physicians, health care providers cannot provide telemedicine services to a patient present in a different state⁵⁹ because physicians must be licensed in the states where their patients are physically located.⁶⁰ The United States District Court for the Western District of Texas took an important step in considering the deleterious effects that such a widespread in-person consultation requirement has on access to medical care and market competition in *Teladoc, Inc. v. Texas Medical Board*.⁶¹

B. *Teladoc, Inc. v. Texas Medical Board*

Teladoc, Inc., a telehealth services provider, brought an action against the Texas Medical Board (“TMB”) alleging that regulatory changes enacted by the TMB violate antitrust law and the

⁵⁵ *Id.*

⁵⁶ Thomas & Capistrant, *supra* note 8.

⁵⁷ *See id.* at 6.

⁵⁸ *See id.* at 9 (explaining that, in most states, even doctors living on the border must have a license to practice medicine in neighboring states if they consult patients living in those neighboring states; this excludes D.C., Maryland, New York, and Virginia which allow licensure reciprocity from bordering states).

⁵⁹ *Id.*

⁶⁰ *Id.*

⁶¹ No. 1-15-CV-343 RP, 2015 U.S. Dist. LEXIS 90230 (W.D. Tex. May 29, 2015).

Commerce Clause.⁶² The TMB's original rule prohibited "prescription of any 'dangerous drug or controlled substance' without first establishing 'a proper professional relationship'" which includes the establishment of "'a diagnosis through the use of acceptable medical practices such as patient history, mental status examination, physical examination, and appropriate diagnostic laboratory testing.'"⁶³ However, the new rule adds a prohibition on the "prescription of any dangerous drug or controlled substance without first establishing a *defined physician-patient relationship*."⁶⁴ A defined physician-patient relationship is obtained by a "physical examination that must be performed by either a face-to-face visit or in-person evaluation."⁶⁵

In review of Teladoc's application for a preliminary injunction⁶⁶ against the TMB's new rule, the United States District Court for the Western District of Texas applied a four-part standard of review in granting a preliminary injunction and enjoining enforcement of the regulation.⁶⁷ According to Fifth Circuit precedent, the party seeking the injunction has the burden to prove a prima facie case by showing:

- (1) a substantial likelihood of success on the merits;
- (2) a substantial threat that failure to grant the injunction will result in irreparable injury;
- (3) that the threatened injury out-weighs any damage that the injunction

⁶² *Id.* at *3–4, *9. See *Teladoc* Complaint, *supra* note 32, at 150–59. "Telehealth" is often used synonymously with "telemedicine."

⁶³ *Teladoc*, 2015 U.S. Dist. LEXIS 90230, at *6.

⁶⁴ *Id.* (citing 22 TEX. ADMIN. CODE § 190.8(1)(L) (2015)) (emphasis added).

⁶⁵ 22 TEX. ADMIN. CODE § 190.8(1)(L)(II)(c) (2015).

⁶⁶ A preliminary injunction is "a temporary injunction issued before or during trial to prevent an irreparable injury from occurring before the court has a chance to decide the case." BLACK'S LAW DICTIONARY 904–05 (10th ed. 2009).

⁶⁷ *Teladoc*, 2015 U.S. Dist. LEXIS 90230, at *9. The purpose of a preliminary injunction is to "protect the plaintiff from irreparable injury and to preserve the district court's power to render a meaningful decision after a trial on the merits. *Canal Auth. of Florida v. Callaway*, 489 F.2d 567, 572 (5th Cir. 1974). Generally, the decision to grant a preliminary injunction is such an extraordinary remedy that it is considered an exception instead of a rule. See *Valley v. Rapides Parish Sch. Bd.*, 118 F.3d 1047, 1050 (5th Cir. 1997).

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may cause the opposing party; and (4) that the injunction will not disserve the public interest.⁶⁸

It is also important to note that the TMB did not assert any immunity defenses against Teladoc's argument that the new rule was in violation of antitrust law.⁶⁹

1. *Substantial Likelihood of Success on the Merits*

To prove the likelihood of success in the present case, the plaintiffs argued that they are likely to succeed on both antitrust and Commerce Clause claims.⁷⁰ Because the court found that the plaintiffs were likely to succeed on the antitrust claim, it did not consider the arguments in support of the Commerce Clause claim.⁷¹ To succeed on the antitrust claim, plaintiffs had to prove a violation of the Sherman Act, which establishes that “[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade . . . is declared to be illegal.”⁷² There is a violation if “defendants (1) engaged in a conspiracy (2) that produced some anti-competitive effect (3) in the relevant market.”⁷³ In essence, to seek relief, plaintiffs had to prove an injury to Teladoc and an “antitrust injury.”⁷⁴ Finally, the court noted that it did not matter whether the court used a quick-look analysis or applied a more detailed sliding scale rule of reason to

⁶⁸ *Teladoc*, 2015 U.S. Dist. LEXIS 90230, at *9–10 (citing *Hoover v. Morales*, 146 F.3d 304, 307 (5th Cir. 1998); *Wenner v. Texas Lottery Comm’n*, 123 F.3d 321, 325 (5th Cir. 1997); *Cherokee Pump & Equip. Inc. v. Aurora Pump*, 38 F.3d 246, 249 (5th Cir. 1994)).

⁶⁹ *Teladoc*, 2015 U.S. Dist. LEXIS 90230, at *11. This lack of immunity defenses will be important in considering why the court should issue a permanent injunction in future litigation.

⁷⁰ *Id.* at *10.

⁷¹ *Id.* at *25.

⁷² *Id.* at *11 (quoting 15 U.S.C. § 1 (2012)).

⁷³ *Id.* at *11 (citing *Abraham & Veneklasen Joint Venture v. Am. Quarter Horse Ass’n*, 776 F.3d 321, 327 (5th Cir. 2015)).

⁷⁴ *See id.* at *12 (citing *Doctor’s Hosp., Inc. v. Se. Med. Alliance*, 123 F.3d 301, 307 (5th Cir. 1997)) (explaining that to prove an antitrust injury, the plaintiff must show that the action caused injury to competition).

assess whether an injury to competition has occurred, as the plaintiffs are likely to succeed under either analysis.⁷⁵

Here, plaintiffs demonstrated the first component of an anti-competitive effect of the regulation because their evidence and data prove that the new rule would cause “increased prices, reduced choice, reduced innovation, and a reduced overall supply of physician services.”⁷⁶ Plaintiffs provided evidence to support these statements, such as the low \$40 cost⁷⁷ of a consultation, reduced travel and waiting time, increased opportunities for physicians to provide health care, and benefits to the market.⁷⁸ The second part of this analysis involves “balancing the anti-competitive effect of the challenged regulation with the pro-competitive justification offered in support.”⁷⁹ Regarding this issue, the TMB argued that the new rule would improve the quality of medical care.⁸⁰ However, the court instead concluded that plaintiffs’ evidence proves that the anti-competitive effect outweighs the pro-competitive justification.⁸¹ For example, the court cites to the evidence that telemedicine consultations reduce medical costs and follow-up care.⁸²

⁷⁵ *Id.* at *12–13. One spectrum of the analysis has practices that are anti-competitive per se, while the other side of the scale uses the “rule of reason.” N. Tex. Specialty Physicians v. FTC, 528 F.3d 346, 360–62 (5th Cir. 2008). The rule of reason “requires the factfinder to decide whether under all the circumstances of the case the restrictive practice imposes an unreasonable restraint on competition.” *Id.* at 360 (quoting *Arizona v. Maricopa Cnty. Med. Soc.*, 457 U.S. 332, 343 (1982)). In the middle of the spectrum is the quick-look analysis, which is when the “likelihood of anticompetitive effects can be easily ascertained.” *Id.* at 362 (quoting *Cal. Dental Ass’n*, 526 U.S. 756, 770–71 (1999)).

⁷⁶ *Teladoc*, 2015 U.S. Dist. LEXIS 90230, at *13.

⁷⁷ This \$40 cost of a telemedicine consultation is low as compared to the average \$145 cost of a visit to a physician’s office and the average \$1957 cost of an emergency room visit. *Id.* at *14.

⁷⁸ *Id.* at *14–15. Benefits to the market include decreases in costs for insurance companies and large employers that are self-insured in addition to increased access for patients who do not have other providers. *Id.* at *15.

⁷⁹ *Id.* at *16.

⁸⁰ *Id.* at *23.

⁸¹ *Id.* at *24–25.

⁸² *Id.* at *22–23.

2. *Substantial Threat of Irreparable Injury*

The court agreed that Teladoc proved a substantial threat of irreparable injury if the rule were allowed to stand.⁸³ First, plaintiffs showed that “they would no longer be able to engage in providing medical care under the Teladoc model,” which allows residents of one state to provide medical care to residents of another state in which that physician is medically licensed without an initial in-person consultation.⁸⁴ Teladoc argued that the inability to do business in Texas would ruin its business model, which is recognized as an irreparable injury in at least two circuits.⁸⁵ Teladoc estimates that approximately one-fourth of its business would be lost if the TMB regulations were upheld.⁸⁶ In addition, plaintiffs proved a different form of an irreparable injury by showing that monetary damages would be difficult to calculate since the industry is at an early and vulnerable point of growth.⁸⁷ Finally, the Court found that an irreparable injury would occur because the plaintiffs were unlikely to recover from the defendants the tens of millions of treble monetary anti-trust damages to which they would legally be entitled.⁸⁸

⁸³ *Id.* at *25.

⁸⁴ *Id.* at *25–26.

⁸⁵ *Id.* at *27; *see* *Stuller, Inc. v. Steak N Shake Enters., Inc.*, 695 F.3d 676, 680 (7th Cir. 2012) (“Here the record contains sufficient evidence to find, as a threshold matter, that Stuller would suffer irreparable harm if it was forced to implement Steak N Shake’s pricing policy. Specifically, Stuller has presented evidence that the policy would be a significant change to its business model and that it would negatively affect its revenue, possibly even to a considerable extent.”); *Ross-Simons of Warwick, Inc., v. Baccarat, Inc.*, 102 F.3d 12, 19 (1st Cir. 1996) (explaining that without defendant’s product, plaintiff’s business model would suffer irreparable harm from lost sales, lost reputation, and alienation of future registrants).

⁸⁶ *Teladoc*, 2015 U.S. Dist. LEXIS 90230, at *30.

⁸⁷ *Id.*

⁸⁸ *Id.* at *27–31.

3. *Threatened Injury Outweighs Any Damage that the Injunction May Cause the Opposing Party and the Injunction Will Not Disserve the Public Interest*

The court considered the final two prongs together—that the threatened injury outweighs any damage that the injunction may cause the opposing party, and that the injunction would not disserve the public interest.⁸⁹ Plaintiffs presented sufficient evidence of their financial and non-monetary damages, as well as their inability to receive monetary damages from the defendants, to meet this burden.⁹⁰ For example, based on the evidence explained above, the court found that the plaintiffs met this test by demonstrating the “likely . . . destruction of Teladoc’s business model and ability to do business in Texas, in addition to other non-monetary harms.”⁹¹ The court also found plaintiffs’ evidence convincing which “cast[] into doubt their ability to receive monetary damages” even if there were sufficient damages to compensate for the injuries.⁹² In reference to the TMB’s argument that it was acting in the interest of public safety and health, the court found this argument to be poorly founded and held that the new regulations would actually result in higher prices and reduced access to medical care.⁹³ Thus, the new rule was, in fact, the threat to public safety and health.⁹⁴

Based on the analysis above, the Texas District Court ruled in favor of Teladoc for a preliminary injunction of the TMB’s new rule. The next section will explain why this ruling was correct and why it should be upheld in future litigation or in other cases involving telemedicine.

⁸⁹ *Id.* at *32–33. The court considered the final two prongs of the preliminary injunction inquiry together because both “require weighing of the respective interests of the parties and the public.” *Id.* at *32.

⁹⁰ *Id.* at *33.

⁹¹ *Id.* For an explanation of these harms see *supra* Part II.B.

⁹² *Id.*

⁹³ *Id.*

⁹⁴ *Id.*

III. WHY THE PRELIMINARY INJUNCTION SHOULD BE UPHELD

Because the *Teladoc* court issued a preliminary injunction, it is important to consider why future litigation should culminate in a permanent injunction. Although this was a big win for telemedicine, the temporary relief for Teladoc must become permanent in order to create widespread change in the road-blocking regulations that currently inhibit the further development of telemedicine. This section will provide an analysis of why the preliminary injunction should be upheld in future litigation.

A. State Action Immunity Defense

Whether the TMB's actions are lawful depends, in part, on whether TMB can assert a state action immunity defense. In defining state action immunity, the U.S. Supreme Court in *Parker v. Brown*⁹⁵ held that the "antitrust laws . . . confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity."⁹⁶ The *Teladoc* court points out the significance of the TMB's decision not to assert a state action immunity defense.⁹⁷ The judge even alluded to the fact that the failure to assert this defense was unusual.⁹⁸ The court stated:

Significantly, in this case, the TMB declined to assert any immunity defenses, including *Parker* immunity, solely as to Plaintiffs' application for a preliminary injunction. The normal deference afforded to a state under antitrust law is, therefore, not an issue in reviewing Plaintiff's application for a preliminary injunction. The Court's opinion is properly read through that narrow, and *unusual*, lens.⁹⁹

The U.S. Supreme Court recently considered a case on state action immunity in *North Carolina State Board of Dental*

⁹⁵ 317 U.S. 341 (1942).

⁹⁶ N.C. State Bd. of Dental Exam'rs v. Fed. Trade Comm'n, 574 U.S. __ (Feb. 25, 2015) (slip op., at 5) (citing *Parker v. Brown*, 317 U.S. 341, 350–51 (1942)). Because of the basis of state action immunity in *Parker v. Brown*, it is often referred to as "*Parker* immunity."

⁹⁷ See *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343 RP, 2015 U.S. Dist. LEXIS 90230, at *11 (W.D. Tex. May 29, 2015) (emphasis added).

⁹⁸ See *id.* at *10–11 (explaining the antitrust laws in this case using words such as "atypical," "significantly," and "unusual" to explain the uncommon ruling in this case).

⁹⁹ *Id.* at *11 (emphasis added).

*Examiners v. Federal Trade Commission*¹⁰⁰, which can be used to illustrate why the state action immunity defense would fail in future Teladoc litigation. The North Carolina State Board of Dental Examiners (“NCSBDE”) is the agency that regulates the practice of dentistry in North Carolina.¹⁰¹ Per the Dental Practice Act (“DPA”), six of the eight members of the NCSBDE must be licensed dentists who actively practice dentistry.¹⁰² In 2003, non-dentists in North Carolina began whitening teeth at lower prices than licensed dentists.¹⁰³ The NCSBDE investigated these practices and issued “cease-and-desist letters” to non-dentist teeth whitening providers directing that these providers stop offering dental services.¹⁰⁴ As a result, the non-dentist providers in North Carolina stopped offering these services.¹⁰⁵ The Federal Trade Commission (“FTC”) filed a complaint arguing that the Board’s action in excluding non-dentists from teeth whitening services is a violation of the Sherman Act, which creates an “anticompetitive and unfair method of competition.”¹⁰⁶ The NCSBDE moved to dismiss based on state action immunity.¹⁰⁷ An Administrative Law Judge denied the motion, and the FTC sustained this ruling on appeal.¹⁰⁸ The Fourth Circuit affirmed the FTC, and the NCSBDE appealed the decision to the Supreme Court.¹⁰⁹

NCSBDE’s *Parker* immunity argument failed because a non-sovereign actor controlled by active market participants¹¹⁰ only

¹⁰⁰ *North Carolina State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 574 U.S. ____ (Feb. 25, 2015) (No. 13-534).

¹⁰¹ *Id.*, slip op., at 1.

¹⁰² *Id.*, slip op. at 2.

¹⁰³ *Id.*, slip op. at 2–3.

¹⁰⁴ *Id.*, slip op. at 3.

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*, slip op. at 4. “The question is whether the board’s actions are protected from Sherman Act regulation under the doctrine of state-action antitrust immunity, as defined and applied in this Court’s decisions beginning with *Parker v. Brown*, 317 U.S. 341 (1943).” *Id.*, slip op. at 1.

¹⁰⁷ *Id.* This is the defense that the TMB did not use for the preliminary injunction, and therefore is likely to use at trial.

¹⁰⁸ *Id.*

¹⁰⁹ *Id.*

¹¹⁰ *See id.*, slip op. at 2.

enjoys state action immunity if it satisfies two requirements from the U.S. Supreme Court case *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*:¹¹¹ (1) “the challenged restraint . . . be one clearly articulated and affirmatively expressed as state policy,” and (2) “the policy . . . be actively supervised by the State.”¹¹² The U.S. Supreme Court in *N.C. State Bd. of Dental Examiners* applied these two requirements to determine “whether an anticompetitive policy is indeed the policy of a State.”¹¹³ These two requirements can also be applied to the *Teladoc* case to show that the state action immunity defense would fail in future litigation.

The U.S. Supreme Court stated in *N.C. State Bd. of Dental Examiners*, “[s]tate agencies controlled by active market participants, who possess singularly strong private interests, pose the very risk of self-dealing *Midcal*’s supervision requirement was created to address.”¹¹⁴ Although North Carolina has control over the practice of dentistry through the NCSBDE, the DPA, which prohibits unauthorized practice of dentistry, does not specify whether teeth whitening is considered “the practice of dentistry.”¹¹⁵ Active market participants on the NCSBDE acted to stop the non-dentists’ services by imposing criminal liability, and did so without active supervision by the State.¹¹⁶ Thus, “North Carolina officials may well have been unaware that the Board had decided teeth whitening constitutes ‘the practice of dentistry’ and sought to prohibit those who competed against dentists from participating in the teeth whitening market.”¹¹⁷ In sum, there is no evidence that the State initiated or concurred with the NCSBDE’s actions against

¹¹¹ 445 U.S. 97, 105 (1980).

¹¹² *North Carolina State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, No. 13-534, slip op., at 6–7 (internal quotation marks omitted) (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)) (citing *FTC v. Phoebe Putney Health System, Inc.*, 133 S. Ct. 1003, 1010 (2013)).

¹¹³ *Id.*, slip op. at 9.

¹¹⁴ *Id.*, slip op. at 13. The “supervision requirement” is the second prong of the state action immunity test.

¹¹⁵ *Id.*, slip op. at 17.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

non-dentist's teeth whitening services.¹¹⁸ The Court notes that there does not need to be day-to-day involvement in the agency's operations, but rather a "realistic assurance" that the anticompetitive conduct is not the result of the individual interests of the agency.¹¹⁹

In the pending *Teladoc* trial, the court should take a similar position as the Supreme Court did with the NCSBDE. The TMB is an analogous agency to the NCSBDE.¹²⁰ Twelve of the nineteen members of the TMB are practicing physicians in the State.¹²¹ *Teladoc* alleged that the TMB is not actively supervised by the State of Texas or the Legislature¹²² because "[n]o agency has the authority to veto or modify a rule promulgated by the TMB" and that the State did not actively supervise the adoption of the new in-person consultation rule.¹²³ Similar to the dentists in North Carolina, the practicing physicians on the TMB stand to gain financially by creating barriers to telemedicine, and they are making these decisions that affect their own market without the active supervision of the State.¹²⁴

The *N.C. State Bd. of Dental Examiners* holding could have an impact on the pending *Teladoc* trial. State action immunity is a possible defense for the TMB, but as put forth herein, this argument should fail. NCSBDE and *Teladoc* are similar because of the makeup of their respective governing boards. Like in *N.C.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*, slip op. at 17–18. "Realistic Assurance" is the Court's standard that they use to determine if the anticompetitive conduct is a result of the agency's personal interest. *Id.*

¹²⁰ See *Teladoc* Complaint, *supra* note 32, at 9–13.

¹²¹ Lisa Schencker, *Supreme Court decision could play into Texas telemedicine fight*, MODERN HEALTHCARE (May 8, 2015), <http://www.modernhealthcare.com/article/20150508/NEWS/150509908>.

¹²² *Teladoc* Complaint, *supra* note 32, at 9.

¹²³ Schencker, *supra* note 121.

¹²⁴ See *id.* (citing Law Professor Robert Fellmeth, who opines that no state medical board would clear the bar). *But see id.* (explaining that the board has "continuous oversight and review by the governor and Legislature"). Here, these decisions affect the TMB's market because the new rule would have affected who is able to practice telemedicine in the State of Texas based on access to patients. *Id.*

State Bd. of Dental Examiners, the *Teladoc* court should also hold that the TMB was not actively supervised by the State and, therefore, that the *Parker* immunity argument should fail. However, the Court in *N.C. State Bd. of Dental Examiners* explains that “States . . . can ensure *Parker* immunity is available to agencies by adopting clear policies to displace competition; and, if agencies controlled by active market participants interpret or enforce these policies, the States may provide active supervision.”¹²⁵ Therefore, although the argument should fail in court based on the present situation, there are actions that the State of Texas can take in the future to ensure that the TMB would succeed on a state action immunity claim.

One potential counterargument that the state action immunity argument should fail is based on the nature of the activities being regulated. In NCSBDE, the issue was dentists trying to keep non-dentists from engaging in dental activities. On the other hand, in *Teladoc*, the treatments are within the scope of the practice of medicine but the focus is on an issue between in-state versus out-of-state physicians. However, the key to the *N.C. State Bd. Of Dental Examiners* decision was that the regulators were unsupervised active market participants acting to benefit themselves.¹²⁶ The *N.C. State Bd. of Dental Examiners* Court itself says, “[i]f a State wants to rely on active market participants as regulators, it must provide active supervision if state-action immunity under *Parker* is to be invoked.”¹²⁷ Therefore, this counterargument would be unlikely to change the outcome of *Teladoc* because instead of focusing on who is being regulated, the *N.C. State Bd. of Dental Examiners* Court focuses on who the regulators are, and the anticompetitive actions of their regulations.¹²⁸

¹²⁵ *North Carolina State Bd. of Dental Exam’rs v. Fed. Trade Comm’n*, 574 U.S. ____ (Feb. 25, 2015) (No. 13-534) (slip op., at 16).

¹²⁶ *Id.*, slip op. at 18.

¹²⁷ *Id.*

¹²⁸ *See id.* (“[T]he state supervisor may not itself be an active market participant.”).

B. *Alternative Commerce Clause Ruling*

The *Teladoc* court did not consider the plaintiffs' Commerce Clause argument because it found that they were likely to prevail on the antitrust claim.¹²⁹ However, if the plaintiffs' antitrust argument fails in further litigation, they would be likely to prevail under the Commerce Clause.¹³⁰ The United States Constitution grants Congress the power to "regulate Commerce . . . among the several States."¹³¹ Congress can regulate "channels of interstate commerce," "instrumentalities of interstate commerce," and "activities having a substantial relation to interstate commerce."¹³²

The Supreme Court has recognized that the Commerce Clause has a necessary corollary, the Dormant Commerce Clause, which is the idea that "[i]f Congress has the power to regulate commerce among the states, then the states lack the power to impede this interstate commerce with their own regulations."¹³³ This idea traces to the case of *Gibbons v. Ogden*¹³⁴ in 1824, where the Supreme Court stated, "[i]f there was any one object riding over every other in the adoption of the [C]onstitution, it was to keep the commercial intercourse among the States free from all invidious and partial restraints."¹³⁵ The U.S. Supreme Court has continued to uphold this "negative" aspect of the Commerce Clause which prohibits "economic protectionism," meaning that a state cannot create regulations that benefit in-state economic interests by placing burdens on out-of-state economic interests.¹³⁶

The U.S. Supreme Court has used a "two-tiered approach to analyzing state economic regulations under the Commerce

¹²⁹ *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343 RP, 2015 U.S. Dist. LEXIS 90230, at *25 (W.D. Tex. May 29, 2015).

¹³⁰ *Id.* at *9.

¹³¹ U.S. CONST. art. I, § 8, cl. 3.

¹³² *United States v. Lopez*, 514 U.S. 549, 558–59 (1995).

¹³³ *Dickerson v. Bailey*, 336 F.3d 388, 395 (5th Cir. 2003).

¹³⁴ 22 U.S. 1 (1824).

¹³⁵ *Id.* at 231.

¹³⁶ *Dickerson*, 336 F.3d at 395 (citing *Wyoming v. Oklahoma*, 502 U.S. 437, 454 (1992)) (quoting *New Energy Co. of Indiana v. Limbach*, 486 U.S. 269 (1988)).

Clause.”¹³⁷ This two-tiered approach classifies “state statutes into one of two categories: A state statute may (1) facially discriminate against out-of-state economic interests, or (2) regulate evenhandedly and thereby evince only an indirect burden on interstate commerce.”¹³⁸ The U.S. Supreme Court has held that the first category, considered facially discriminatory statutes, is “virtually *per se* invalid.”¹³⁹ The U.S. Supreme Court has stated, “[w]hen a statute directly regulates or discriminates against interstate commerce or when its effect is to favor in-state economic interests over out-of-state interests, we have generally struck down the statute without further inquiry.”¹⁴⁰ The second category involves “evenhanded statutes that impose only incidental burdens on interstate commerce” and the Supreme Court has applied a balancing test. The balancing test states:

Where the statute regulates even-handedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits. If a legitimate local purpose is found, then the question becomes one of degree. And the extent of the burden that will be tolerated will of course depend on the nature of the local interest involved, and on whether it could be promoted as well with a lesser impact on interstate activities.¹⁴¹

To succeed with a Commerce Clause argument, Teladoc must first assert that telemedicine is within at least one of the categories of interstate commerce, which should be easy to do. First, physicians who practice telemedicine “transmit and receive medical information across state lines”¹⁴² and because “providing medical services is a form of commerce, the physicians act as

¹³⁷ *Id.* at 396 (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 578–79 (1986)).

¹³⁸ *Id.* at 396.

¹³⁹ *Id.* (internal quotation marks omitted) (citing *Fulton Corp. v. Faulkner*, 516 U.S. 325, 331 (1996)) (quoting *Oregon Waste Systems, Inc. v. Dep’t of Env’tl. Quality of Ore.*, 511 U.S. 93, 99 (1994)).

¹⁴⁰ *Id.* (quoting *Brown-Forman Distillers Corp. v. N.Y. State Liquor Auth.*, 476 U.S. 573, 579 (1986)).

¹⁴¹ *Id.* at 396.

¹⁴² Sarah E. Born, *Telemedicine in Massachusetts: A Better Way to Regulation*, 42 NEW ENG. L. REV. 195, 211 (2007).

instrumentalities of interstate commerce.”¹⁴³ Second, because the practice of telemedicine through Teladoc often occurs across state lines,¹⁴⁴ it is an activity that has a substantial relation to interstate commerce. It is not uncommon for Congress to consider certain areas of health care to be part of interstate commerce, as there are federal statutes that provide national standards for certain areas of health care, “such as the regulation of medical devices.”¹⁴⁵ For example, the Safe Medical Devices Act¹⁴⁶ regulates an aspect of health care through the imposition of a requirement that any injury or death caused by a medical device be reported to the Secretary of Health and Human Services of injury or death from a medical device.¹⁴⁷

Although health care regulation is generally left to the police powers of the states,¹⁴⁸ telemedicine presents a unique situation. As opposed to other forms of health care, a medical provider who practices telemedicine can live in a different state than where he or she has a license.¹⁴⁹ Therefore, as is the case with the physicians associated with Teladoc, many providers who practice telemedicine have interstate patients.¹⁵⁰ In its complaint, Teladoc argued that the new Texas law discriminates against their physicians who are licensed in Texas, but live in a different state.¹⁵¹ It is discriminatory because if the physician has to have an in-person consultation before practicing telemedicine, he or she

¹⁴³ *Id.*

¹⁴⁴ *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343 RP, 2015 U.S. Dist. LEXIS 90230, at *25 (W.D. Tex. May 29, 2015) (explaining that some physicians that practice in Texas are physically located in a different state).

¹⁴⁵ Born, *supra* note 142.

¹⁴⁶ Safe Medical Devices Act of 1990, Pub. L. No. 101-629, 104 Stat. 4511 (1990).

¹⁴⁷ *Id.*

¹⁴⁸ See Patricia J. Zettler, *Toward Coherent Federal Oversight of Medicine*, 52 SAN DIEGO L. REV. 427, 430, 446 (2015) (explaining “that states regulate medical practice” pursuant to their “police power to protect health, safety, . . . welfare of citizens,” and licensing requirements, while “the federal government regulates medical products”).

¹⁴⁹ *Teladoc*, 2015 U.S. Dist. LEXIS 90230, at *25.

¹⁵⁰ *Id.*

¹⁵¹ *Id.* See also *Teladoc Complaint*, *supra* note 32, at 159.

would be required to travel hundreds or thousands of miles in order to establish a preliminary physician-patient relationship. For example, Teladoc cites one physician in its provider network who is a Virginia resident, yet is licensed to practice medicine in twelve states, including Texas.¹⁵² This physician provides telemedicine consultations in Texas while he resides across the country in Virginia.¹⁵³ If the injunction is not upheld, the Virginia located physician would have to travel to Texas to treat a patient located in Texas.

The TMB argues that Teladoc “cannot establish more than ‘an indirect burden on interstate commerce’ which does not violate the Commerce Clause.”¹⁵⁴ However, here there is clear discrimination against out-of-state physicians who practice telemedicine.¹⁵⁵ Physicians who hold a license in a different state are often unable to have an in-person consultation without the time-consuming and costly burden of traveling across state lines.¹⁵⁶ As Teladoc proved through its evidence of higher prices and reduced access to care without telemedicine, it is in the public interest to allow a physician-patient relationship to develop through telemedicine.¹⁵⁷ Thus, even if this is not a “facially discriminatory” law, as in the first category,¹⁵⁸ the burden on interstate commerce is excessive.¹⁵⁹ The benefits of establishing a physician-patient relationship through telemedicine far outweigh those of any rule that mandates an initial in-person consultation prior to creation of this relationship.

¹⁵² *Teladoc* Complaint, *supra* note 32, at 19.

¹⁵³ *Id.*

¹⁵⁴ *Teladoc*, 2015 U.S. Dist. LEXIS 90230, at *25 (quoting *Dickerson v. Bailey*, 336 F.3d 388, 396 (5th Cir. 2003)).

¹⁵⁵ *Id.* at *25–26.

¹⁵⁶ *See id.* (explaining that “a Virginia resident, testifies he would be unable to provide care to Texas residents were New Rule 190.8 to go into effect”).

¹⁵⁷ *See id.* at *13, *33–34 (explaining the effects of “increased prices, reduced choice, reduced access, reduced innovation, and a reduced overall supply of physician services”).

¹⁵⁸ *Dickerson v. Bailey*, 336 F.3d 388, 396 (5th Cir. 2003) (citation omitted).

¹⁵⁹ *See Teladoc*, 2015 U.S. Dist. LEXIS 90230, at *25–26.

C. *Standard of Care*

A typical justification for the in-person consultation rule is to ensure patients' safety and quality of care when it comes to prescribing high-risk prescriptions.¹⁶⁰ However, regardless of whether physicians are examining a patient through video, by phone, or in-person, they are held to the applicable standard of care.¹⁶¹ Because of the liability that physicians face through malpractice suits, it is reasonable to assume that physicians will regulate themselves.¹⁶² Established tort principles are sufficient to cause physicians to exercise the appropriate standard of care and require in-person consultations with some patients or in certain circumstances.¹⁶³ Therefore, because of the self-regulation based on the standard of care, it is unlikely that the number of telemedicine malpractice claims will be significantly greater than that of traditional medicine.

The case *Canion v. United States*¹⁶⁴ demonstrates the state law that governs the standard of care for negligence in Texas medical malpractice claims.¹⁶⁵ In Texas, to recover in a medical malpractice action, plaintiff must prove by a preponderance of the evidence: “(1) a duty by the physician to act according to an applicable standard of care; (2) a breach of that standard of care; (3) actual

¹⁶⁰ See *id.* at *17–18 (citing examples where a better diagnosis or better quality of care was provided through an in-person consultation rather than through telemedicine).

¹⁶¹ See *id.* at *16 (citing 22 TEX. ADMIN. CODE § 190.8(1)(A)) (“As an [sic] threshold matter, the Court notes all physicians licensed by Texas, including Teladoc physicians, are bound to the same standard of care and ethical rules.”).

¹⁶² See Emily R. Carrier et al., *Physicians' Fear of Malpractice Lawsuits Are Not Assuaged By Tort Reforms*, 29 HEALTH AFFAIRS 1585, 1585 (2010), <http://content.healthaffairs.org/content/29/9/1585.full> (explaining that “physicians consistently report that they often engage in defensive practices and that they feel intense pressure to do so out of fear of becoming the subject of a malpractice lawsuit”).

¹⁶³ See *id.*

¹⁶⁴ No. EP-03-CA-0347-FM, 2005 U.S. Dist. LEXIS 12329, at *15 (W.D. Tex. June 21, 2005).

¹⁶⁵ *Id.* This would be the standard of care for cases where the patient is from Texas and the physician is licensed in Texas. Different jurisdictions have different standards of care.

injury to the Plaintiff; and (4) proximate causation.”¹⁶⁶ In addition, through expert testimony, a medical malpractice plaintiff must establish the standard of care required of the physician deemed to be negligent.¹⁶⁷ In Texas, the standard of care for a physician is “a duty of ordinary care ‘to render care to a patient with the degree of ordinary prudence and skill exercised by physicians of similar training and experience in the same or similar community under the same or similar circumstances.’”¹⁶⁸

The standards discussed in *Canion* transition directly into telemedicine. Doctors should practice conservative medicine to prevent malpractice lawsuits and protect their medical licenses.¹⁶⁹ One of the central goals of the Hippocratic Oath is that physicians are to do no harm.¹⁷⁰ Therefore, established tort liability principles, including the breadth of case law around the standard of care, should be sufficient to cause physicians to regulate themselves.¹⁷¹ If harm results from a telemedicine consultation, the patient has adequate recourse available under longstanding malpractice tort law.

IV. POLICY IMPLICATIONS OF REDUCING REGULATIONS

The benefits of telemedicine are even greater than those that Teladoc asserts in its complaint.¹⁷² Telemedicine has the capability to positively impact millions of people across the nation. Although the *Teladoc* ruling only affects telemedicine practices in Texas, this section will analyze possible policy reforms that could expand access to telemedicine nationwide. In addition, it will explain the positive outcomes that these policy reforms will create through the

¹⁶⁶ *Id.* at *16.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at *16–17 (quoting *Hollis v. United States*, 323 F.3d 330, 336 (5th Cir. 2003)).

¹⁶⁹ *Carrier*, *supra* note 162, at 1585.

¹⁷⁰ *Hippocratic Oath, Modern Version*, JOHNS HOPKINS UNIV., <http://guides.library.jhu.edu/c.php?g=202502&p=1335759> (last visited Sept. 26, 2015).

¹⁷¹ *Id.*

¹⁷² *See Teladoc Complaint*, *supra* note 32.

expansion of telemedicine, and address the arguments against telemedicine.

A. *Expansion of Telemedicine*

Some states are expanding the use of telemedicine by implementing changes in regulations even without court challenges.¹⁷³ For example, the North Carolina Medical Board drastically changed the guidelines for telemedicine practice just this year.¹⁷⁴ The updated guidelines specify that physicians are not required to complete an in-person evaluation before prescribing medicine as long as they conduct a thorough exam using technology¹⁷⁵ and verify the identity of the patient.¹⁷⁶ Technology is sufficient for a virtual preliminary examination if it can “accurately diagnose and treat the patient in conformity with the applicable standard of care” or if the “licensed health care professional is able to provide various physical findings that the licensee needs to complete an adequate assessment.”¹⁷⁷ The North Carolina Medical Board noted the growing demand for “quicker, easier and cheaper access to health care” and the possibility that telemedicine could transform health care as reasons for the change.¹⁷⁸

Beyond these regulations, some members of Congress have also taken action to expand the use of telemedicine nationally.¹⁷⁹

¹⁷³ See Thomas & Capistrant, *supra* note 8, at 4.

¹⁷⁴ Kathryn Brown, *NC’s Growing Medical Trend? Telemedicine*, WRAL.COM, <http://www.wral.com/nc-s-growing-medical-trend-telemedicine/14286138/> (last updated July 13, 2015).

¹⁷⁵ *Id.*

¹⁷⁶ NORTH CAROLINA MED. BD., POSITION STATEMENTS: TELEMEDICINE (2014), available at <http://www.ncmedboard.org/resources-information/professional-resources/laws-rules-position-statements/position-statements/telemedicine> [hereinafter NC MED. BD.]. See also Daniel & Sulmasy, *supra* note 30 (explaining their position statement that “[a] telemedicine encounter itself can establish a patient-physician relationship through real-time audiovisual technology”).

¹⁷⁷ NC MED. BD., *supra* note 176.

¹⁷⁸ Brown, *supra* note 174.

¹⁷⁹ *New Telehealth Bills Introduced to Congress*, AM. TELEMEDICINE ASS’N, <http://www.americantelemed.org/news-landing/2015/06/17/new-telehealth-bills-introduced-to-congress#.VfeMMXj4tFK> (last visited Sept. 14, 2015) [hereinafter *Telehealth Bills*].

Telemedicine: A Prescription For Our Health Care System

Senators Mark Warner¹⁸⁰ and Johnny Isakson¹⁸¹ introduced “a telehealth bill that would require Medicare coverage for round-the-clock emergency support for telemedicine and telephone visits when a beneficiary’s medical record and care plan are available.”¹⁸² Representative Scott Peters¹⁸³ introduced a bill in the House that would “modify current legislation in order to expand the use of telemedicine in the TRICARE veterans’ program.”¹⁸⁴ With bills in Congress that could expand the use and coverage of telemedicine, states need to follow the lead of the Texas District Court in loosening regulations and allowing these possible expansions.¹⁸⁵

Telemedicine expansions have also occurred in the realm of health insurance coverage. “[Twenty-nine] states and the District of Columbia require that private insurers cover telehealth the same as they cover in-person services.”¹⁸⁶ Just this year, UnitedHealthcare, the largest insurer in the United States,¹⁸⁷ announced that it is “expanding coverage options for virtual physician visits, giving people . . . online access to a physician via mobile phone, tablet or computer 24 hours a day.”¹⁸⁸ In addition to currently covered self-funded employer health plans, coverage will expand to UnitedHealthcare employer-sponsored and individual plan participants.¹⁸⁹ With private insurers continuing to expand access to telemedicine, Congress and the state legislatures need to

¹⁸⁰U.S. Senator for Virginia, Democratic Party. <http://www.warner.senate.gov/public/>.

¹⁸¹U.S. Senator for Georgia, Republican Party. <http://www.isakson.senate.gov/public/>.

¹⁸² *Telehealth Bills*, *supra* note 179; see S. 1549, 114th Cong. § 1 (2015).

¹⁸³ U.S. Representative of California’s 52nd District, Democratic Party. <https://scottpeters.house.gov>.

¹⁸⁴ *Telehealth Bills*, *supra* note 179; see H.R. 2725, 114th Cong. § 1 (2015).

¹⁸⁵ See Telehealth Modernization Act of 2015, H.R. 691, 114th Cong. (1st Sess. 2015).

¹⁸⁶ *Telemedicine Frequently Asked Questions*, AM. TELEMEDICINE ASS’N, <http://www.americantelemed.org/about-telemedicine/faqs#.VibfRnj4tFI> (last visited Oct. 20, 2015).

¹⁸⁷ Jennifer Jolly, *Housecalls in Smartphone Era*, N.Y. TIMES, May 5, 2015, at D6.

¹⁸⁸ UNITEDHEALTHCARE, *supra* note 10.

¹⁸⁹ *Id.*

take further action to ensure that patients are able to utilize these services without the burden of excessively strict regulations.

B. *Benefits of Policy Changes*

Telemedicine has the potential to reduce nationwide health care costs, break down economic and geographical barriers, and improve the quality of care.¹⁹⁰ First, telemedicine can generate up to \$6 billion per year in health care savings for employers in the United States, if employees, when appropriate, substitute telemedicine for in-person visits.¹⁹¹ These cost savings are the result of “better management of chronic diseases, shared health professional staffing, reduced travel times, and fewer or shorter hospital stays.”¹⁹²

Second, telemedicine has the potential to break down economic barriers to health care. Thus far, most health care legislation has focused on access to insurance, but it has not fully addressed the problem of how to access quality, cost-effective care with this insurance.¹⁹³ In considering the economic barriers to health care, it is noteworthy that the average cost of a physician consultation through the use of telemedicine is \$49, as compared to a \$145 in-person physician appointment or a \$1,957 emergency room visit.¹⁹⁴ Because of the greatly reduced cost per visit, telemedicine has the potential to provide greater access to quality health care without the cost of traveling a long distance to obtain the expertise of a particular physician or medical center.

¹⁹⁰ *What is Telemedicine?*, AM. TELEMEDICINE ASS’N, <http://www.americantelemed.org/about-telemedicine/what-is-telemedicine#.VgaU9Xj4tFI> (last visited Sept. 26, 2014).

¹⁹¹ Joanne Sammer, *Employers Eye Potential Savings Through Telemedicine*, SOC’Y FOR HUMAN RES. MGMT. (Nov. 11, 2014), <http://www.shrm.org/hrdisciplines/benefits/articles/pages/telemedicine.aspx>.

¹⁹² *What is Telemedicine?*, *supra* note 190.

¹⁹³ Bill Frist, *Telemedicine: A Solution To Address The Problems Of Cost, Access, And Quality*, HEALTHAFFAIRSBLOG (July 23, 2015), <http://healthaffairs.org/blog/2015/07/23/telemedicine-a-solution-to-address-the-problems-of-cost-access-and-quality/>.

¹⁹⁴ *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343 RP, 2015 U.S. Dist. LEXIS 90230, at *14 (W.D. Tex. May 29, 2015).

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Third, telemedicine reduces geographical barriers to health care. About 20% of Americans live in rural areas where they do not have access to primary care or specialist services, or must travel hundreds of miles to reach a health care provider.¹⁹⁵ Even more importantly, patients who could not have otherwise received health care are now able to improve their health by receiving primary care, preventive care, or other forms of treatment through telemedicine.¹⁹⁶ For example, the University of Virginia Center for Telehealth has served over 45,000 patients throughout rural areas, saving patients over 16 million miles of travel.¹⁹⁷

Without these regulatory obstacles, telemedicine could help more Americans gain access to preventive care. Currently, many patients do not utilize preventive services.¹⁹⁸ “Increasing the use of just 5 preventive care services would save more than 100,000 lives each year in the United States.”¹⁹⁹ While certain preventive measures require in-person screening and tests, others could easily be implemented through telemedicine.²⁰⁰ Some examples of easily implementable screening include recommending that an individual take aspirin to prevent heart disease, screening for various skin cancers, and providing professional assistance or medication for smoking cessation.²⁰¹ In addition, preventive care throughout one’s life can improve long-term health and decrease the amount of

¹⁹⁵ *The Promise of Telehealth For Hospitals, Health Systems and Their Communities*, AM. HOSP. ASS’N, at 4 (Jan. 2015), www.aha.org/research/reports/tw/15jan-tw-telehealth.pdf [hereinafter *Promise of Telehealth*].

¹⁹⁶ *See generally id.*

¹⁹⁷ *UVA Center for Telehealth*, UNIV. OF VA HEALTH SYS., <http://uvahealth.com/services/telemedicine-telehealth-services/about> (last visited Sept. 14, 2015).

¹⁹⁸ *Preventive Care: National Profile on Use, Disparities, and Health Benefits*, P’SHIP FOR PREVENTION, at 6 (Aug. 7, 2007), <https://www.prevent.org/data/files/initiatives/ncpppreventivecarereport.pdf>.

¹⁹⁹ *Id.*

²⁰⁰ *See generally id.* (explaining the impacts of services such as advice for daily aspirin use and smoking cessation programs that could be implemented through telemedicine with the patient in a remote location).

²⁰¹ *Id.*

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money spent on chronic conditions.²⁰² Whereas physicians often do not have the time²⁰³ for lengthy discussions and education during short in-person visits,²⁰⁴ telemedicine provides physicians with the means to dedicate time to preventive services and chronic condition or disease management.²⁰⁵ For example, if a patient is at risk for diabetes, he or she can use telemedicine as a form of low-cost education and management to prevent suffering from diabetes.²⁰⁶ The social and economic implications of this are huge;²⁰⁷ it currently costs about \$6,032 per year to treat a patient with a chronic illness—five times greater than a patient without a chronic condition.²⁰⁸

Finally, research shows that patients' quality of care can be increased through the use of telemedicine.²⁰⁹ For example, through ICU telemedicine programs that connect patients in remote hospitals with expert physicians and specialists in other places, patients had better survival rates and reduced lengths of hospital stay.²¹⁰ The Veterans Health Administration's post-cardiac arrest program experienced a 51% reduction in hospital readmissions for heart failure and a 44% reduction in hospital readmission for other illnesses through the use of telemedicine.²¹¹ Since physicians can

²⁰² See *National Prevention Strategy*, U.S. DEP'T OF HEALTH AND HUMAN SERVS., at 51 (June 2011), <http://www.surgeongeneral.gov/priorities/prevention/strategy/report.pdf>.

²⁰³ See *Teladoc Complaint*, *supra* note 32, at 75 (explaining that Teladoc's physicians can be 25% more efficient and productive than physicians in offices and that this efficiency allows more time to treat patients).

²⁰⁴ Chen, *supra* note 13 (explaining that physicians only have eight minutes in consultation with a patient).

²⁰⁵ Karen Rheuben, *How Is Telemedicine Preventive Medicine?* SHARECARE, <https://www.sharecare.com/video/healthmakers/karen-rheuban/how-is-telemedicine-preventive-medicine>.

²⁰⁶ *Id.*

²⁰⁷ *The Growing Crisis of Chronic Disease in the United States*, P'SHIP TO FIGHT CHRONIC DISEASE, http://www.fightchronicdisease.org/sites/fightchronicdisease.org/files/docs/GrowingCrisisofChronicDiseaseintheUSfactsheet_81009.pdf (last visited Sept. 26, 2015).

²⁰⁸ *Id.*

²⁰⁹ *What is Telemedicine?*, *supra* note 190.

²¹⁰ *Promise of Telehealth*, *supra* note 195, at 5.

²¹¹ *Id.*

continually check on patients' symptoms and patients can quickly contact their doctors with questions through telemedicine, physicians are able to constantly provide patient advice or consultations to prevent expensive hospital readmissions or visits.

C. *Arguments Against Telemedicine*

Although cases like *Teladoc* can encourage an expansion of telemedicine and a decrease of burdensome regulations, some patients are concerned about the possible negative effects. One concern is that physicians who conduct a virtual visit as opposed to an in-person evaluation may miss important underlying symptoms or illnesses or that there may be a misdiagnosis.²¹² One in twenty adult patients are misdiagnosed annually within the care of traditional medicine and this is partly attributed to the lack of time doctors spend with patients.²¹³ Therefore, the answer to this problem is to use time with physicians more efficiently.²¹⁴ Telemedicine could actually help the problem of misdiagnosis or missed diagnosis because “instead of always treating the most immediate symptoms, due to a lack of time and available information, your doctor will now have the tools needed to see beyond the obvious, to help pinpoint the underlying cause(s) of your discomfort, all while reducing diagnostic errors and lowering operating costs.”²¹⁵ Telemedicine is designed to complement “non-emergency primary care”, not to be a substitute for all forms of non-emergency medical care.²¹⁶ Therefore, the goal of telemedicine is not to eliminate in-person primary medical care and this is not likely to be the result.²¹⁷ While an in-person exam is often necessary in many situations, there are minor urgent conditions,

²¹² Joydeep Bhattacharyya, *Going Beyond the Symptoms: The Case for Telemedicine* (Oct. 21, 2015 1:59 PM), http://www.huffingtonpost.com/joydeep-bhattacharyya/going-beyond-the-symptoms_b_8315294.html.

²¹³ *Id.*

²¹⁴ *Id.*

²¹⁵ *Id.*

²¹⁶ *Aetna Partners with Teladoc to Provide Telehealth Services to Members in Alaska*, TELADOC (May 9, 2012), <http://www.teladoc.com/news/2012/05/09/aetna-partners-with-teladoc-to-provide-telehealth-services-to-members-in-alaska/>.

²¹⁷ *See id.*

follow-up, and post-op check-ins that can be successfully completed without a physical exam and without a higher risk of liability.²¹⁸

A second prominent challenge to, and concern of, telemedicine is that it exacerbates unequal access to health care because of differences in availability and affordability of phone and Internet service across the United States. However, this concern should diminish as more and more Americans gain Internet access. According to the Pew Research Center, 84% of American adults use the Internet²¹⁹ and this number is expected to increase. Regarding community differences, 78% of rural residents use the Internet.²²⁰ The biggest gap is related to age, as only 58% of senior citizens use the Internet.²²¹ However, these percentages should increase over time thereby decreasing any gaps in access to telemedicine.

V. CONCLUSION

Because of telemedicine's potential to decrease health care costs and improve access to and quality of care, the preliminary injunction issued by the Western District of Texas against the TMB's new rule should prevail in future litigation.²²² Telemedicine is the future of health care and has the ability to transform society in a number of positive ways. Therefore, state medical boards and courts should apply the ruling in *Teladoc* to strike down any laws or regulations that require introductory in-person physician consultation as a condition precedent to all telemedicine consultations.

Not only is the TMB's rule a violation of the Sherman Antitrust Act, but the injunction is likely to be upheld in future

²¹⁸ Glen McCracken, *9 Myths of Telemedicine*, EVISIT (Aug. 5, 2015), <http://evisit.com/9-myths-of-telemedicine/>.

²¹⁹ Andrew Perrin and Maeve Duggan, *Americans' Internet Access: 2000-2015*, PEW RESEARCH CENTER (June 26, 2015), <http://www.pewinternet.org/2015/06/26/americans-internet-access-2000-2015/>.

²²⁰ *Id.*

²²¹ *Id.*

²²² *Teladoc, Inc. v. Tex. Med. Bd.*, No. 1-15-CV-343 RP, 2015 U.S. Dist. LEXIS 90230, at *14-15 (W.D. Tex. May 29, 2015).

litigation, even if the TMB argues a state action immunity defense. If the court were to decide that the TMB has state action immunity, the injunction should still be upheld as a violation of the Commerce Clause. Although telemedicine is considered a form of the practice of medicine, which is usually regulated through the states' police powers, it presents a unique situation because the practice of telemedicine can simultaneously occur in more than one state. Finally, medical boards that are considering regulations to control the actions of doctors in the practice of telemedicine should consider whether prevailing tort law and malpractice principles are sufficient to have a self-regulating effect on health care providers.

While there are other regulations that narrow the use of telemedicine, *Teladoc* took a very important step in modernizing the medical profession. As one telemedicine expert stated:

But the perfect cannot be the enemy of the good – and by continuing to practice medicine as usual, we are making it so There is no scenario for sustaining or improving health care in America without telemedicine. State and federal governments, as well as the medical establishment, should embrace the technology.²²³

It is long overdue that Thomas Friedman's simple notion of flatness²²⁴ apply to medicine in the same way that it applies to most other forms of business. One can hardly read a daily newspaper without finding at least one article about the health care crisis that the United States faces as a nation. Telemedicine provides the medical profession with the ability to revolutionize the way that medicine is currently delivered and to transform the ability of the average patient to receive cost-effective primary care.

²²³ Richard Boxer, *When a Doctor Is Always a Phone Call Away*, WALL ST. J. (Aug. 2, 2015 5:30 PM), <http://www.wsj.com/articles/when-a-doctor-is-always-a-phone-call-away-1438551044>.

²²⁴ FRIEDMAN, *supra* note 1.