BEFORE THE JUDICIAL QUALIFICATIONS COMMISSION
STATE OF FLORIDA

INQUIRY CONCERNING A JUDGE **SC19-1193**
THE HONORABLE VEGINA T. HAWKINS
JQC No. 2019-351
_____/

ERWIN ROSENBERG'S MOTION FOR REVIEW BY THE FULL HEARING PANEL OF ERWIN ROSENBERG'S MOTION FOR LEAVE TO FILE AMICUS BRIEF IN SUPPORT OF RESPONDENT

On Januaey 21, 2020 the Honorable Kevin Emas, FJQC Hearing Panel Chair, denied my motion for leave to file an amicus brief in support of Respondent. JQC Rule 7(b) says "The Chair's disposition of motions shall be subject to review by the full Hearing Panel."

"An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, when the amicus has an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case), or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide." Ryan v. Commodity Futures Trading Com'n, 125 F. 3d 1062, 1063 (7th Cir. 1997):

Apparently Respondent's representation has not included the essential defense that this disciplinary prosecution is prohibited by federal antitrust law as expressed in State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101 (2015). The main holding is as follows:

> A nonsovereign actor controlled by active market participants — such as the Board — enjoys *Parker* immunity only if it satisfies two requirements: "first that `the challenged restraint ... be one clearly articulated and affirmatively expressed

> as state policy,' and second that `the policy... be actively supervised by the State.'" *FTC v. Phoebe Putney Health System, Inc*., 568 U.S. ___, ___, 133 S.Ct. 1003, 1010, 185 L.Ed.2d 43 (2013) (quoting *California Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc*., 445 U.S. 97, 105, 100 S.Ct. 937, 63 L.Ed.2d 233 (1980)).
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> State Bd. of Dental Examiners v. FTC, 135 S. Ct. at 1110.

As to "the challenged restraint ... be one clearly articulated and affirmatively expressed as state policy", it holds that if and only if a statute or a Supreme Court Rule required the challenged anticompetitive action such as a suspension (which is a group boycott, See Klor's, Inc. v. Broadway-Hale Stores, Inc., 359 US 207, 212-213 (1959)) could an order ordering an anti-competitive action be immune from federal antitrust liability. See State Bd. of Dental Examiners v. FTC, 135 S. Ct. 1101, 1110 (2015):

> An entity may not invoke *Parker* immunity unless the actions in question are an exercise of the State's sovereign power. See *Columbia v. Omni Outdoor Advertising, Inc*., 499 U.S. 365, 374, 111 S.Ct. 1344, 113 L.Ed.2d 382 (1991). **State legislation and "decision[s] of a state supreme court, acting legislatively rather than judicially," will satisfy this standard**, and "*ipso facto* are exempt from the operation of the antitrust laws" because they are an undoubted exercise of state sovereign authority. *Hoover, supra*, at 567-568, 104 S.Ct. 1989.

(emphasis added).

See Bates v. State Bar of Ariz., 433 US 350, 359-360 (1977):

> In *Goldfarb* we held that § 1 of the Sherman Act was violated by the publication of a minimum-fee schedule by a county bar association and by its enforcement by the State Bar. The schedule and its enforcement mechanism operated to create a rigid price floor for services and thus constituted a classic example of price fixing. Both bar associations argued that their activity was shielded by the state-action exemption. This Court concluded that the action was not protected, emphasizing that "we need not inquire further into the state-action question because it cannot fairly be said that the State of Virginia **through its Supreme Court Rules required the anticompetitive activities** of either respondent." 421 U. S., at 790. In the instant case, by contrast, the challenged restraint is **the affirmative command of the Arizona Supreme Court under its Rules 27 (a) and 29 (a)**

and its Disciplinary Rule 2-101 (B).

Id. at 359-360 (emphases added).

Article V, section 12(c)(1) of the Florida Constitution says:

> (c) SUPREME COURT.—The supreme court shall receive recommendations from the judicial qualifications commission's hearing panel.
> (1) The supreme court **may accept**, reject, or modify in whole or in part the findings, conclusions, and recommendations of the commission and it **may order** that the justice or judge be subjected to appropriate discipline, **or be removed from office** with termination of compensation for willful or persistent failure to perform judicial duties or for other conduct unbecoming a member of the judiciary demonstrating a present unfitness to hold office, **or be involuntarily retired** for any permanent disability that seriously interferes with the performance of judicial duties. Malafides, scienter or moral turpitude on the part of a justice or judge shall not be required for removal from office of a justice or judge whose conduct demonstrates a present unfitness to hold office. After the filing of a formal proceeding and upon request of the investigative panel, the supreme court **may suspend the justice or judge from office**, with or without compensation, pending final determination of the inquiry.

(emphases added).

Article V, section 12(c)(1) of the Florida Constitution does not require or command the suspension of a judge.

As to active supervision prong of the Midcal requirements the argument was presented in the motion for leave to file an amicus brief.

Furthermore, as shown in the motion for leave to file amicu brief, I have an interest in some other case that may be affected by the decision in the present case (though not enough affected to entitle the amicus to intervene and become a party in the present case).

Wherefore I move for review by the full hearing panel of my motion for leave to file

amicus brief in support of Respondent.

CERTIFICATE OF SERVICE

I hereby certify that on January 21, 2020 I served via Portal Filing a copy hereof on all persons registered to receive filings in this case.

Respectfully,

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