IN THE

United States Court of Appeals

For The

Third Circuit

No. 20-1007

GERARD KENNEY, ALEXA JOSHUA, GLEN DELA CRUZ MANOLO, and KATHERINE MURRAY-LEISURE,

Plaintiffs-Appellants,

v.

AMERICAN BOARD OF INTERNAL MEDICINE,

Defendant-Appellee.

On Appeal from the United States District Court for the Eastern District of Pennsylvania (Case No. 2:18-cv-5260-WB)
(The Honorable Robert F. Kelly and The Honorable Wendy Beetlestone)

BRIEF OF THE AMERICAN SOCIETY OF ASSOCIATION EXECUTIVES, THE INSTITUTE FOR CREDENTIALING EXCELLENCE, AND THE PROFESSIONAL CERTIFICATION COALITION AS *AMICI CURIAE* IN SUPPORT OF APPELLEE

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, counsel for *amici* certify that *amici* do not have any parent corporations, and that no publicly held corporation owns 10% or more of their stock.

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INTEREST OF *AMICI CURIAE*[1]

The American Society of Association Executives ("ASAE") is a nonprofit membership organization of more than 46,000 organization executives and industry partners representing approximately 7,400 organizations—including many certification organizations—and over 20,000 professional society members. ASAE's members lead, manage, work in and collaborate with organizations in more than a dozen disciplines, from executive management to finance to technology. ASAE also issues a professional certification, the Certified Association Executive designation, which over 4,400 professionals have earned. In 2020, ASAE is celebrating 100 years of making the world better, safer, and smarter. The centennial anniversary represents ASAE's role as a leader and supporter of progress and innovation in the organization industry. ASAE has regularly participated as *amicus* in cases implicating antitrust issues and the conduct of organizations. *See*, *e.g.*, *Visa Inc. v. Osborn*, 137 S. Ct. 289 (Mem.) (2016); *Cal. Dental Ass'n v. FTC*, 526 U.S. 756 (1999).

The Institute for Credentialing Excellence ("ICE") is a nonprofit membership organization comprised of approximately 430 credentialing bodies

[1] Pursuant to Federal Rule of Appellate Procedure 29(a)(4)(E), *amici curiae* state that no counsel for any party authored this brief in whole or in part, and that no entity or person aside from *amici curiae*, their members and their counsel made any monetary contribution toward the preparation and submission of this brief.

and 2,500 individuals. ICE provides education, networking, research and other resources for organizations and individuals who work in and serve the credentialing industry. It is a leading developer of standards for certification and certificate programs, and is both a provider of and a clearinghouse for information on certification trends, test development and delivery, assessment-based certificate programs, and other information relevant to the credentialing community. ICE's division of the National Commission for Certifying Agencies accredits certification programs that meet its standards.

The Professional Certification Coalition ("PCC") is an unincorporated nonprofit association formed under District of Columbia law and created in part through the efforts of ASAE and ICE. PCC addresses efforts to enact state legislation that affect the activities or recognition of certifications developed and offered by private, non-governmental certification organizations.

ASAE, ICE and PCC are keenly interested in cases bearing on the application of antitrust laws to private, non-governmental certification organizations. They file this brief to demonstrate the importance of upholding the right of certification organizations, including the American Board of Internal Medicine ("ABIM"), to determine the standards that individuals must meet to earn and maintain certifications.

Amici file this brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). All parties consent to its filing.

SUMMARY OF ARGUMENT

The most fundamental and beneficial role of private, non-governmental certifying organizations is setting professional standards to monitor, evaluate and promote certificants' competencies or, in some fields, quality or excellence. For the general public, certifications serve as helpful, cost-saving indicia of individuals possessing some qualifying level of competence, excellence, or achievement in their fields. For the certified individuals, certifications serve as recognition of their achievements and skills and confer the possibility of greater professional opportunities, among other benefits. Courts have long recognized certifying organizations' standard-setting role and its public utility.

To determine certificants' ongoing competencies or quality, certifying organizations frequently set standards and requirements for not only initial certification but also continuing certification. The requirements of continuing certification programs vary, reflecting the diversity of trades, professions and fields in which certification credentials are earned. In some fields, such as health care, continuing certification requires practitioners to stay current on rapidly evolving and significant changes in medical knowledge. Certification organizations also vary in the time intervals they set for continuing certification, again reflecting that trades, professions and fields change at different speeds, that evolutions within certain fields may be significant—indeed, matters of life or death within the health

care field—and that a one-size-fits-all approach is inappropriate.

Notwithstanding the range of tools that certifying bodies may use as the benchmarks for continued certification, they cannot guarantee any individual's competency or quality through standard setting and testing. Rather, the best that they can do is establish criteria developed by subject matter experts, as well as scientifically valid examinations, that when met by candidates for certification, tend to show greater versus less competency or quality. Courts have acknowledged that these endeavors serve the public interest.

The decision below follows established case law acknowledging this expertise—across trades, professions and fields—and granting certifying bodies significant deference. Even Appellants themselves acknowledge the need for such deference, stating repeatedly in their brief that ABIM should not be prevented from setting its own continuing certification standards. But Appellants' acknowledgement is mere lip service, for they ultimately ask this Court to substitute its own judgments on continuing certification standards for ABIM's. Courts have routinely acknowledged that doing so is not their role. *See, e.g.*, *Lieberman v. Am. Osteopathic Ass'n*, No. 13-15225, 2014 U.S. Dist. LEXIS 153012, at *25-26 (E.D. Mich. Oct. 29, 2014) ("[T]he scope of this Court's review is limited, and does not include the authority to dictate, by judicial fiat, who is or is not qualified for board certification by private actors."), *aff'd*, 620 F. App'x 470

(6th Cir. 2015). This Court should reaffirm as much here.

On appeal, despite acknowledging ABIM's legal prerogatives, Appellants ask this Court to undo the certification requirements ABIM has devised. In doing so, Appellants insist that ABIM's continuing certification program, which is referred to "Maintenance of Certification" ("MOC") and includes an exam component, has no beneficial impact on certified internists or third parties. Appellants' Br. 9, 52. Despite an absence of facts pleaded in support of Appellants' claim, the district court generously credited Appellants' assertions before concluding that they did not change the outcome. J.A. 12-13, 29 (citing Am. Compl. ¶¶ 42-43). But contrary to Appellants' fact-free claim, research reveals that requirements used by ABIM may lead to enhanced physician performance and higher-quality patient care. Research also indicates that medical patients expect physicians to participate in continuing certification programs. In short, this is a prototypical case for deferring to ABIM's certification requirements, including its MOC exam.

According such deference provides a sound basis for dismissing Appellants' complaint, including their tying claim. The decision below properly characterized ABIM's initial certification and MOC as part of a single product: ABIM certification. That characterization is supported by established case law, as well as a recent case with a nearly identical set of facts. Given that Appellants take issue

with just one product—ABIM certification—they fail to state a tying claim under the Sherman Act.

If this Court reverses the decision below, it would disrupt established case law, strip private certifying organizations of control over the standards for issuing their seals of approval, jeopardize the beneficial role of certifying organizations, and grant antitrust plaintiffs a degree of leniency during pleading that *Twombly* and its progeny condemn. These are troubling consequences given the enormous value of certifying organizations, most of which are nonprofit entities that are ill-equipped to handle the financial demands of protracted antitrust litigation. The Court should instead affirm the judgment.

ARGUMENT

I. This Court Should Reaffirm that ABIM and Other Private, Non-Governmental Certifying Organizations Are Entitled to Rely on Their Expertise and Experience to Set Standards and Conduct Testing to Monitor, Evaluate and Promote Certificants' Competencies and Excellence.

At multiple points in its decision, the district court emphasized the right of ABIM to set standards for continued certification and the significant deference that ABIM deserves. J.A. 31 ("Because ABIM offers the certification, it has the right to ensure those standards are met. . . . It would entirely alter the nature of the certification if outside vendors could re-certify internists and potentially disrupt the trust hospitals, patients, and insurance companies place on the ABIM

certification."); J.A. 39 ("[A]s as we have repeatedly discussed above, it is impossible to maintain an ABIM certification through the use of a non-ABIM maintenance program, as ABIM has the right to control who it is certifying and what standards and requirements are necessary."). At multiple points in their brief, Appellants agree that ABIM should be able to set its own certification standards. Appellants' Br. 10 ("[Appellants] do not contend ABIM should be prevented from determining its own standards, or be required to accept any other CPD [continuous professional development] product as a substitute for certifications or MOC."); *id.* at 45 ("And again, [Appellants] do not contend ABIM should be prevented from determining its own standards."); *id.* at 21, 60 (similar); *see also* ABIM Br. 1, 8-9, 18, 26 (discussing Appellants' concessions).

These are critical and appropriate acknowledgements, for standard setting is central to any certifying organization's purpose and its benefit to certificants and the public. Further, the district court's reasoning and Appellants' concessions are well grounded in judicial decisions that have long recognized the need for significant deference in this setting. This Court should reaffirm the principle that certifying organizations deserve substantial deference when their decisions about eligibility and standards come under attack by dissatisfied individuals who seek to undo such decisions through the antitrust law.

A. Certifying bodies provide significant value to certificants and the public, and courts rightly accord deference to those organizations.

Private, non-governmental certifying organizations like ABIM provide significant value to certificants and third parties alike. For certificants, certification offers "prestige, recognition, and possibility of increased earning power." Jerald A. Jacobs, *Association Law Handbook* 443 (6th ed. 2018). More broadly, "certification enables the public (as well as government and private third-party payers for professional services) to distinguish between those that have attained some qualifying level of competency from those that have not." *Id.*

Certification is valuable to consumers in part because it captures many indicia of competence or achievement in a given trade, profession or field. Without it, consumers would need to identify and evaluate each indication on its own. That exercise would increase transaction costs, as well as the likelihood of irrational decision-making. Given those drawbacks, courts have acknowledged that certifications are pro-competitive and reduce costs on multiple fronts. *See, e.g.*, *Int'l Healthcare Mgmt. v. Haw. Coal. for Health*, 332 F.3d 600, 608 (9th Cir. 2003) ("Disseminating information that fosters rational business decisions is pro-competitive."); *McDaniel v. Appraisal Inst.*, 117 F.3d 421, 423 (9th Cir. 1997) ("[A] trusted certification makes it cheaper, in terms of the cost of gathering information . . . . [T]his increased competition and reduced transaction cost will reduce prices.").

Certifying organizations therefore serve a critical role in "helping individuals identify competent people . . . and simultaneously aid the profession or field by encouraging and recognizing individual competency and achievement." *Association Law Handbook* 443. In its decision below, the district court acknowledged the importance of ABIM's continuing certification requirements. *See* J.A. 30 n.2 ("ABIM has an interest in ensuring that all ABIM-certified internists can meet and maintain the same standards and requirements. Otherwise, hospitals, insurance companies, and patients would lose faith in the ABIM certification process.").

Indeed, third parties find certifications to be critical indicia of competence or achievement. This is especially so in medicine, where across disciplines, physicians' essential partners including hospitals and insurers often require current certifications to maintain employment and receive certain benefits. *See Lieberman v. Am. Osteopathic Ass'n*, 620 F. App'x 470, 474 (6th Cir. 2015) ("Clients and insurance companies indeed may *rely* on AOBFP [American Osteopathic Board of Family Physicians] to decline to recertify osteopaths who failed to pass AOBFP's Board Certification process."); *Siva v. Am. Bd. of Radiology*, 418 F. Supp. 3d 264, 269 (N.D. Ill. 2019) ("[H]ospitals often require radiologists to be ABR-certified to obtain consulting and admitting privileges; insurance companies require them to be certified to obtain (higher) reimbursements

and malpractice coverage; and medical corporations and other employers require them to be certified before they will consider them for employment."). Absent certifications, these institutions would lose crucial information sources and face far greater difficulty in identifying competent and high-achieving physicians. *See, e.g.*, *Cnty. of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1159 (9th Cir. 2001) ("It is difficult to see how a hospital, acting independently and relying solely on letters of recommendation and surgical reports, can assure itself that a physician has the surgical competence represented by Board certification or the supervised experience of a 36-month residency program.").

Likewise, courts have long concluded that standard setting and testing are legitimate and useful functions of certifying organizations. *See, e.g.*, *Peel v. Att'y Registration & Disciplinary Comm'n of Ill.*, 496 U.S. 91, 101 (1990) ("A claim of certification is not an unverifiable opinion of the ultimate quality of [an individual's] work or a promise of success, but is simply a fact . . . from which a consumer may or may not draw an inference of the likely quality of an [individual's] work in a given area of practice.") (citation omitted); *Mass. Sch. of Law at Andover, Inc. v. Am. Bar. Ass'n*, 107 F.3d 1026, 1037-38 (3d Cir. 1997) (recognizing the prestige associated with accreditation).[2] Standard setting and

[2] *See also Consol. Metal Prods., Inc. v. Am. Petroleum Inst.*, 846 F.2d 284, 294 (5th Cir. 1988) (upholding trade association's refusal to certify oil well equipment made by plaintiff-manufacturer, and stating: "Even if user reliance gives

testing are the means by which certifying organizations monitor, evaluate and promote the competency or quality of certificants, including *continuing* competency or achievement.

The district court was right to recognize that courts should pay deference to the certification decisions of organizations like ABIM, rather than employing the antitrust law to undo them. *See*, *e.g.*, J.A. 31-32; J.A. 36 ("[T]he Amended Complaint, itself, provides more reasonable and legitimate explanations as to why hospitals and medical service providers require ABIM certification, such as ABIM's long established history of certification and its creation of a national standard to compare internists from different states."); J.A. 39. This Court should reaffirm that the district court was correct to do so. This Court has cast considerable doubt on the propriety of using the antitrust laws to second-guess the justifications of a certifying organization. *Mass. Sch. of Law*, 107 F.3d at 1037 (rejecting antitrust claim where "[t]he conduct of which [plaintiff-law school] complains here is basically the ABA's justification of its accreditation

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[Defendant] significant influence over the market, that influence may enhance, not reduce, competition and consumer welfare."); *Poindexter v. Am. Bd. of Surgery, Inc.*, 911 F. Supp. 1510, 1517-18 (N.D. Ga. 1994) (acknowledging that "Board certified vascular surgeons enjoy significant competitive advantages over non-certified vascular surgeons"); *Sherman Coll. of Straight Chiropractic v. Am. Chiropractic Ass'n, Inc.*, 654 F. Supp. 716, 721 (N.D. Ga. 1986) ("Regulation of curriculum is an activity which is inherently appropriate for an accrediting body."), *aff'd*, 813 F.2d 349 (11th Cir. 1987).

decisions.").[3] Indeed, certification decisions are lightning rods for litigation by dissatisfied plaintiffs. Individuals who fail certification examinations or other requirements face loss of earning power and prestige, and therefore have a substantial incentive to seek to impose standards that benefit *themselves* rather than the trade or profession on the whole and the general public, whereas the certifying organizations have a markedly different and more socially beneficial interest.

Other courts have been more explicit about the importance of granting significant deference to certifying organizations. In *Foundation for Interior Design Education Research v. Savannah College of Art & Design*, 244 F.3d 521 (6th Cir. 2001), the court affirmed the dismissal of, *inter alia*, Sherman Act § 1 claims brought by a college of interior design against an accrediting organization that denied the college accreditation. In doing so, the Sixth Circuit acknowledged that "accreditation serves an important public purpose and can enhance competition." *Id.* at 530. A concurring opinion stressed:

> [T]he courts have accorded the association's determination great deference. Courts give accrediting associations such deference

[3] *See also*, *e.g.*, *Goldfarb v. Va. State Bar*, 421 U.S. 773, 778 n.17 (1975) ("The fact that a restraint operates upon a profession as distinguished from a business is, of course, relevant in determining whether that particular restraint violates the Sherman Act. It would be unrealistic to view the practice of professions as interchangeable with other business activities . . . ."); *Nat'l Soc'y of Prof. Eng'rs v. U.S.*, 435 U.S. 679, 700 (1978) (Blackmun, J., concurring in part and concurring in the judgment) (internal quotation marks and citations omitted) ("[T]here may be ethical rules which have a more than *de minimis* anticompetitive effect, and yet are important in a profession's proper ordering.").

> because of the professional judgment these associations must necessarily employ in making accreditation decisions. . . . Consequently, courts are not free to conduct a *de novo* review or to substitute their judgment for the professional conduct of the educators involved in the accreditation process.

Id. at 533 (Wellford, J., concurring) (citations omitted). Similarly, in dismissing Sherman Act § 1 claims of a general surgeon who sued the American Board of Surgery ("ABS") for refusing to certify him because he did not satisfy ABS's fellowship requirement, the court in *Poindexter* recognized the prudence of deferring to the standards set by certifying organizations:

> Although disappointed competitors sometimes file antitrust actions against associations that refuse accreditation or professional certification, restrictions on access by imposition of educational and training requirements and a degree of self-regulation are definitional aspects of the term "profession." Moreover, in evaluating the antitrust implications of a profession's self-imposed restrictions, the general presumption is that the public interest is served by the promotion of enhanced education and training requirements.

911 F. Supp. at 1519-20 (internal quotation marks and citations omitted); *see also Lieberman v. Am. Osteopathic Ass'n*, No. 13-15225, 2014 U.S. Dist. LEXIS 153012, at *25-26 (E.D. Mich. Oct. 29, 2014) ("[T]he scope of this Court's review is limited, and does not include the authority to dictate, by judicial fiat, who is or is not qualified for board certification by private actors."), *aff'd*, 620 F. App'x 470 (6th Cir. 2015).[4]

[4] This judicial deference is recognized across trades, professions and fields. *See Sherman Coll.*, 654 F. Supp. at 722 ("The matter of what training is relevant and

Against this backdrop, it is understandable that Appellants facially concede that ABIM's decisions deserve deference. *See* Appellants' Br. 10 ("[Appellants] do not contend ABIM should be prevented from determining its own standards, or be required to accept any other CPD product as a substitute for certifications or MOC."); *id.* at 45 ("And again, [Appellants] do not contend ABIM should be prevented from determining its own standards."); *id.* at 21, 60 (similar). But their concession is disingenuous, because Appellants ask this Court to substitute its own judgment by precluding ABIM from "revok[ing] certifications of internists who do not buy MOC." *Id.* at 21. The lifetime certification that Appellants request would override the sound judgments ABIM has made regarding the importance of certificants demonstrating continued entitlement to certification. *See* ABIM Br. 8-9, 18-36.

Ultimately, this is a most straightforward opportunity to accord deference to ABIM's MOC requirements. As shown *infra* § I.B, the path ABIM has chosen is well grounded in the practice of other certifying organizations and reflects the

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appropriate in a given profession is not likely susceptible to intelligent use of facial presumptions. . . . [T]he court will not presume that education in diagnostic procedures lacks any possible relevance to quality chiropractic care."); *Bishara v. Am. Bd. of Orthopaedic Surgery, Inc.*, No. 85 C 3400, 1986 WL 15265, at *1 (N.D. Ill. Dec. 30, 1986) (Sherman Act "Section 1 prohibits only unreasonable restraints on trade, and it is entirely reasonable for a voluntary organization which certifies the qualifications of medical specialists to insist that applicants possess a minimum amount of training before taking the certification examination.") (citation omitted).

special importance of continuing certification requirements, including testing, for those practicing medicine.

B. Appellants second-guess ABIM's certification decisions despite that its certification requirements are within the heartland of those used by other organizations, and that there is a sound scientific basis for requiring testing.

As just noted, despite conceding that ABIM should be able to determine its own standards for certification, Appellants unilaterally seek to impose their own standards. There are exceedingly good reasons for refusing to condone that attempt.

1. Many certification organizations rely on continuing certification, including through examination, to help ensure the continued competency of certificants.

Certification organizations use a variety of tools to help ensure the continued competency or quality of those permitted to hold themselves out as certified. These include requiring continuing education programs, publishing literature, enforcing codes of acceptable conduct, and requiring periodic passage of exams. *Association Law Handbook* 443. Depending on the nature of a certifying body, its certificants, and the field involved, different tools may be more effective than others.

As subject matter experts in their respective fields, certifying organizations are the best positioned to select those tools. *Amicus* ICE recently conducted a study of continuing certification practices and found that more than 90% of responding certifying organizations require some form of continuing education as part of their

programs. *Renewal Programs in Professional Certification and Licensure, 2019 Benchmark Survey Results* (forthcoming Fall 2020) (draft at 13). More significantly for the present case and consistent with ABIM's practices, exams are also common, with 49% of certifying organizations responding that they offer an exam, and 14% of respondents requiring that certificants take and pass their exams. *Id.* at 16-17 (of 157 certifying organizations responding, 77 offer exams, 22 of which are required).

Also consistent with ABIM's choices that Appellants attack here, ICE's study revealed a range of timeframes for which certifications remain valid: while most organizations reported a renewal cycle of three years (31.8%) or five years (34.4%), responses spanned from one year to a lifetime. *Id.* at 12. Such variance is understandable given that some trades, professions or fields of expertise may be largely static whereas others are highly dynamic. As to the latter, the medical professions, for example, experience rapid and dramatic shifts in knowledge following new research, available technologies, pharmacological developments, and guidance on best practices. *See*, *e.g.*, Brian S. Alper, *How Much Does Practice-Guiding Medical Knowledge Change in One Year?*, paper presented at Medicine 2.0: World Congress on Social Media, Mobile Apps, Internet/Web 2.0, Boston, MA (2012) (concluding that more than 20% of core information guiding clinical practice changes within one year based on new evidence or guidelines);

Troyen A. Brennan et al., *The Role of Physician Specialty Board Certification Status in the Quality Movement*, 292 JAMA 1038, 1040 (2004) ("The changing scope of medical information . . . motivated specialty boards to develop recertification programs and to limit the duration of certificates.").

2. Appellants' contention that ABIM's MOC requirements serve no benefit runs counter to medical research.

Promoting continued competency and excellence is important in the health care professions and medical specialties because, in addition to their dynamic nature, studies show that physician performance declines over time. *See*, *e.g.*, Niteesh K. Choudhry et al., *Systematic Review: The Relationship between Clinical Experience and Quality of Health Care*, 142 Annals of Internal Med. 260, 261 (2005) ("Of 62 published studies that measured physician knowledge or quality of care and described time since medical school graduation or age, more than half suggested that physician performance declined over time for all outcomes measured. Only 1 study showed improved performance for all outcomes measured."). An article published in the Journal of the American Medical Association explains that continuing certification requirements were developed in part due to "evidence that knowledge and skills of practicing physicians decay over time." Brennan, 292 JAMA at 1040.

Of course, degraded knowledge and skill in this field is of critical concern because of the subject matter involved—human life. Tragically, medical errors

contribute to a large number of patient injuries and deaths annually. *See* Martin A. Makary & Michael Daniel, *Medical error—the third leading cause of death in the US*, The BMJ (May 3, 2016), https://www.bmj.com/content/353/bmj.i2139 (more than 250,000 deaths per year are due to medical error in the United States); Lucian L. Leape et al., *What Practices Will Most Improve Safety? Evidence-based Medicine Meets Patient Safety*, 288 JAMA 501 (2002) (similar). Thus, it is reasonable and desirable for certifying bodies in health care to impose continuing certification requirements.

The requirements ABIM has set are perfectly understandable—perhaps even optimal—in this light. But, in addition to seeking to run roughshod over ABIM's decisions in this most important context of public health, Appellants urge the Court to do so based on false pretenses. *See* Appellants' Br. 9, 52. They reiterate the bald assertions from their complaint that ABIM's MOC program, which includes an exam component, fails to deliver "'any beneficial impact on physicians, patients or the public.'" J.A. 12 (quoting Am. Compl. ¶ 42). Even if the district court had been right to credit that conclusory claim on the pleadings, *but see*, *e.g.*, *Ashcroft v. Iqbal*, 556 U.S. 662, 680-82 (2009), it is nonsense.

An extensive body of medical research—consistent with research regarding testing in other disciplines—demonstrates the opposite of what Appellants declare: that ABIM's MOC program, including its exam requirement, may enhance

physicians' competence and improve patient care. As authors in a leading medical journal summarized: "Our findings suggest that physician cognitive skills, as measured by [ABIM's] maintenance of certification examination, are associated with higher rates of processes of care for Medicare patients." Eric S. Holmboe et al., *Association Between Maintenance of Certification Examination Scores and Quality of Care for Medicare Beneficiaries*, 168 Archives of Internal Med. 1396 (2008) (care by physicians scoring in the top quartile of their MOC exams was associated with a 17% greater likelihood of guideline-compliant diabetes care, compared to care by physicians scoring in the bottom quartile). Another study found that participation in ABIM's MOC program was associated with more patients getting adequate care and receiving critical medical tests. Bradley Gray et al., *Associations Between American Board of Internal Medicine Maintenance of Certification Status and Performance on a Set of Healthcare Effectiveness Data and Information Set Process Measures*, 169 Annals of Internal Med. 97 (2018). Specifically, that study concluded that ABIM's MOC was associated with 46,000 more diabetic patients per year receiving appropriate care, 108,000 more women per year going for mammography screenings, and 16,000 more coronary artery disease patients per year receiving annual LDL tests. Higher MOC exam scores have also been associated with reduced risks of disciplinary action by state medical boards. Furman S. McDonald et al., *The American Board of Internal Medicine*

Maintenance of Certification Examination and State Medical Board Disciplinary Actions: a Population Cohort Study, 33 J. Gen. Internal Med. 1292 (2018) ("The risk for [state medical board] discipline among physicians who did not pass the [AB]IM MOC examination within the 10 year requirement window was more than double than that of those who did pass the examination . . . .").

More generally, studies have consistently shown that repeated testing is superior to mere study and practice in ensuring individuals' ability to retain information. *See* Andrew C. Butler, *Repeated Testing Produces Superior Transfer of Learning Relative to Repeated Studying*, 36 J. of Experimental Psychology 1118, 1131 (2010) ("[R]epeated testing may also improve people's understanding of the material, enabling them to better perform the execution component of the transfer process (i.e., the ability to apply the knowledge to a new situation)."); Douglas P. Larsen et al., *Repeated testing improves long-term retention relative to repeated study: A randomised controlled trial*, 43 Med. Educ. 1174 (2009) ("Repeated testing with feedback appears to result in significantly greater long-term retention of information taught in a didactic conference than repeated, spaced study. Testing should be considered for its potential impact on learning and not only as an assessment device."); Douglas P. Larsen et al., *Comparative effects of test-enhanced learning and self-explanation on long-term retention*, 47 Med. Educ. 674, 681 (2013) ("Whereas many studies show that testing improves the retention

of information that is retrieved from memory, these new studies suggest that repeated retrieval practice may also improve understanding of that information.").

ABIM's decision to require an exam as part of its MOC requirements is further justified in light of research indicating that continuing education alone can be ineffective for physicians, and that self-assessments may not be optimal. *See* Dave Davis et al., *Impact of Formal Continuing Medical Education: Do Conferences Workshops, Rounds, and Other Traditional Continuing Education Activities Change Physician Behavior or Health Care Outcomes?*, 282 JAMA 867 (1999) ("[D]idactic [continuing medical education] sessions do not appear to be effective in changing physician performance."); Ann W. Evans et al., *Are we really as good as we think we are?*, 84 Annals of The Royal Coll. of Surgeons of Eng. 54, 56 (2002) ("The results of this study found evidence of a surprising and worrying over-rating of their own surgical skills by many trainees and postgraduates in oral and maxillofacial surgery. There can be little doubt that there is a need to evaluate further the accuracy of self-assessment of operative skills.").

C. Consumers expect certified physicians to participate in MOC programs.

Regardless of the tools that organizations use or how frequently they require certificants to satisfy continuing certification standards, there is simply no way to *guarantee* certificants' competency or quality. Too many factors other than subject matter expertise impact the quality of services, and the best that certifying

organizations can do is set standards that promote greater versus less competence or quality, as well as to communicate to the public whether an individual has met those standards.

In the end, however, it is essential to public health that individuals are willing to trust medical providers with their care. Indeed, consumers view doctors' participation in continuing certification programs as significant to the care they seek out as patients. In a 2010 survey conducted by the American Board of Medical Specialties, 95% of participants responded that it was "important" for their doctors to participate in a continuing certification program, and 66% responded that it was "very important." *Facts About the ABMS Consumer Survey: Lifelong Learning and Other Qualities in Choosing a Doctor*, https://www.abms.org/media/1319/abms_2010_consumer_survey_fact_sheet.pdf. Further, 45% of respondents considered participation in continuing certification so critical that they "would look for a new doctor" if their physician did not participate in such a program. *Id.*; *see also* Gary L. Freed et al., *Perspectives and Preferences Among the General Public Regarding Physician Selection and Board Certification*, 156 J. of Pediatrics 841 (2010) ("Parents report a preference for board-certified physicians and expect them to participate in Maintenance of Certification."). Regardless of a continuing certification program's impact on certified individuals' competency or quality, their participation instills

confidence in third parties who rely on their updated knowledge and continuous training.

* * *

For all of these reasons, it is critical that private, nonprofit certifying organizations like ABIM be permitted to rely on their experience and expertise to set standards to monitor, evaluate and promote certificants' competence and excellence. These functions are fundamental to their missions and enormously beneficial to the professionals they credential and to third parties. If certifying organizations cannot be trusted to set reasonable standards and conduct valid testing, query which persons and organizations are better suited. The courts have never claimed such fitness, and it certainly should not fall into the hands of disgruntled plaintiffs. This Court should therefore reaffirm that the district court rightly accorded deference to ABIM's ability to set its own requirements for continuing certification.

Absent such deference, *amici* shudder at the foreseeable consequences. Certifying organizations will lose control over the nature, quality and reputation of their certifications. They will be forced to recertify individuals who, by the organizations' own requirements, have not demonstrated the requisite competency or achievement to maintain their certifications. Third parties that rely on private organizations' certifications would lose trust in their reliability. These are highly undesirable outcomes; courts do not and should not tolerate them. *See Roberts v.*

United States Jaycees, 468 U.S. 609, 623 (1984) ("There can be no clearer example of an intrusion into the internal structure or affairs of an association than a regulation that forces the group to accept members it does not desire."); *Siva*, 418 F. Supp. 3d at 274 ("[I]f ABR ceased to 'control the quality of the product' by allowing competitors to provide certification services, then 'hospitals, insurance companies, and patients would lose faith in the . . . certification process.'") (citation omitted).

II. The District Court Correctly Dismissed Appellants' Tying Claim.

The aforementioned deference that should be granted to certifying organizations provides a compelling basis for dismissing Appellants' complaint entirely, including their tying claim. *See* ABIM Br. 19-23, 27-35. "The first inquiry in any [Sherman Act] § 1 tying case is whether the defendant has sufficient market power over the tying product, *which requires a finding that two separate product markets exist* and a determination precisely what the tying and tied products markets are." *Queen City Pizza, Inc. v. Domino's Pizza, Inc.*, 124 F.3d 430, 443 (3d Cir. 1997) (emphasis added) (internal quotation marks and citation omitted). The decision below correctly characterized ABIM initial certification and MOC as part of a single product market: ABIM certification. As such, there cannot be an illegal tying arrangement. *See Kaufman v. Time Warner,* 836 F.3d 137, 142 (2d Cir. 2016) ("[I]f there is no separate market for the allegedly tied product, there can be no fear

of leveraging a monopoly in one market to harm competition in a second market. The second market simply does not exist.").

A. The district court's decision is consistent with case law involving certification decisions.

After according deference to certifying organizations, *see supra* at 12-15, courts have routinely dismissed Sherman Act claims for refusal to substitute their judgments for those of certifying organizations. *See, e.g.*, *Mass. Sch. of Law*, 107 F.3d 1026; *Found. for Interior Design*, 244 F.3d 521; *Poindexter*, 911 F. Supp. 1510. For example, another court recently dismissed antitrust claims that Appellants' counsel brought against the American Board of Radiology ("ABR"), rejecting plaintiffs' assertions that, as here, tying initial certification to maintenance of certification was unlawful. *Siva*, 418 F. Supp. 3d 264.

In doing so, the court concluded that initial certification and MOC are part of one ABR product: "certification of radiologists as having acquired the requisite standard of knowledge, skill, and understanding essential to the practice of medicine in their particular specialty or subspecialty." *Id.* at 272 (internal quotation marks omitted); *see id.* at 273 (favorably discussing the decision below in *Kenney* and calling the cases "all but identical"). As in the deference-grounded cases noted above, the court recognized that the very decisions a board of medical specialties makes in determining what should be required to maintain certification should be fatal to antitrust claims. *Id.*; *see also Peel*, 496 U.S. at 102 ("[T]he strength of a

certification is measured by the quality of the organization for which it stands."). A certification organization's ability to make such decisions is part and parcel of the deference it should be accorded. Moreover, granting such deference in this context is particularly sensible in light of the ever-changing nature of medical knowledge. *See* Alper, *How Much Does Practice-Guiding Medical Knowledge Change in One Year?* (greater than 20% of core information guiding clinical practice changes within one year based on new evidence or guidelines).

B. That many hospitals, insurers, other medical insurance providers require ABIM certification does not help Appellants.

Despite Appellants' complaints that many hospitals, insurers and related entities require ABIM certification to receive certain benefits, the district court found that those requirements supported dismissal of the tying claim. J.A. 24 ("[T]he 'character of the demand' for the initial certification and the MOC is the same: certification from ABIM. . . . This is made clear by hospitals and other medical service providers requiring ABIM certification, in general."). The district court's perspective is sound given that certifying organizations do not set third-party requirements and cannot dictate the weight that third parties assign certifications. The ruling below also squares with past cases concluding that certifying organizations are not subject to heightened antitrust scrutiny because of third parties' decisions. *See, e.g.*, *DeGregorio v. Am. Bd. of Internal Med.*, No. 92-4924, 1993 WL 719564, at *10 (D.N.J. Oct. 1, 1993) ("[R]egardless of the fact that the defendant

[ABIM] has a towering reputation, in determining the criteria for hospital staffing privileges, third parties are free to completely ignore [ABIM's] stamp of approval, or lack thereof.") (internal quotation marks omitted), *adopted*, 844 F. Supp. 186 (D.N.J. 1994) (dismissing plaintiff's Sherman Act claims); *Patel v. Am. Bd. of Psychiatry and Neurology, Inc.*, No. 89 C 1751, 1989 WL 152816, at *3 (N.D. Ill. Nov. 21, 1989) (no Sherman Act liability where "Plaintiff has failed to allege that defendant has any authority or control over the private hospitals and institutions which allegedly will not hire him to staff positions absent certification by the defendant.").

C. Affirming the decision below will preserve the standards that antitrust plaintiffs must satisfy at the pleading stage.

Separately but crucially, *amici* are concerned that reversal would wrongly allow discovery that is uniquely burdensome for nonprofits. The Supreme Court has instructed courts to be particularly skeptical of opening the door to discovery in the antitrust context: "The costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (internal quotation marks and citation omitted); *see also*, *e.g.*, *Limestone Dev. Corp. v. Vill. of Lemont, Ill.*, 520 F.3d 797, 803 (7th Cir. 2008) (Posner, J.) (an antitrust defendant "should not be put to the expense of big-case discovery on the

basis of a threadbare claim"). These warnings should apply with even greater force in cases filed against private, non-governmental certifying organizations, so many of which are nonprofits that cannot afford protracted antitrust litigation. *Cf. Am. Soc'y of Mech. Eng'rs. v. Hydrolevel Corp.*, 456 U.S. 556, 593 (1982) (Powell, J., dissenting) ("[W]hereas a commercial enterprise may have the resources to bear a treble-damages award, the same cannot be said of most nonprofit organizations.").

This Court should reaffirm the demanding standards that antitrust plaintiffs must satisfy to survive dismissal while declining to "put at risk much of the beneficial private activity of the voluntary associations of our country." *Id.* at 594.

CONCLUSION

This Court should affirm the judgment.

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Respectfully submitted,

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CERTIFICATE OF BAR MEMBERSHIP

In compliance with Third Circuit L.A.R. 28.3(d), I hereby certify that I am a member of the bar of the United States Court of Appeals for the Third Circuit.

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CERTIFICATE OF SERVICE

I hereby certify that on this 13th day of July 2020, I electronically filed the Brief of the American Society of Association Executives, the Institute for Credentialing Excellence, and the Professional Certification Coalition as *Amici Curiae* in Support of Appellee in PDF text format, with the Clerk of the Court for the United States Court of Appeals for the Third Circuit, and using the Court's CM/ECF system, which will send notice of such filing to registered ECF users.

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