No. 20-___

IN THE

Supreme Court of the United States

LOUISIANA REAL ESTATE APPRAISERS BOARD,

Petitioner,

v.

UNITED STATES FEDERAL TRADE COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether and under what conditions orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine.

RELATED PROCEEDINGS

Proceedings directly on review:

Louisiana Real Estate Appraisers Board v. FTC, No. 20A107 (U.S. Dec. 18, 2020)

Louisiana Real Estate Appraisers Board v. FTC, No. 19-30796 (5th Cir. Oct. 2, 2020)

Louisiana Real Estate Appraisers Board v. FTC, No. 19-CV-00214-BAJ-RLB (M.D. La. July 29, 2019)

In the Matter of Louisiana Real Estate Appraisers Board, No. 9374 (FTC Apr. 10, 2018)

Other related proceedings:

Louisiana Real Estate Appraisers Board v. FTC, No. 18-60291 (5th Cir. Feb. 28, 2019)

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PETITION FOR A WRIT OF CERTIORARI

Louisiana Real Estate Appraisers Board (LREAB) respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 976 F.3d 597. The order of the district court (Pet. App. 15a-24a) is available at 2019 WL 3412162. The Fifth Circuit's denial of LREAB's motion to stay is reproduced at Pet. App. 25a.

JURISDICTION

The Fifth Circuit issued its opinion on October 2, 2020, terminating a stay issued by the district court and directing the district court to dismiss LREAB's complaint. LREAB's timely request for rehearing was denied on December 1, 2020 (Pet. App. 26a-27a). The question presented concerns the lower courts' jurisdiction under the collateral-order doctrine. This Court has jurisdiction under 28 U.S.C. §1254.

INTRODUCTION

This Court previously granted certiorari to address the question presented here. *See Salt River Project Agric. Improvement & Power Dist. v. SolarCity Corp.*, 138 S. Ct. 499 (2017). That case settled, however, before this Court could review the Ninth Circuit's holding that government entities are barred from immediately appealing an order denying them state-action antitrust immunity, and must first go through the burdens of discovery and trial instead. *See Salt River Project v. Tesla Energy Operations, Inc.*, 138 S. Ct.

1323 (2018). At that time, two circuits (the Fifth and Eleventh) permitted government entities to immediately appeal, while three (the Ninth, Fourth, and Sixth) did not. *See* Pet. at 2-3, *Salt River*, *supra* (No. 17-368). This disagreement has not been resolved and has only become more complicated since, particularly because of this Court's decision in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494, 502 (2015) (*N.C. Dental*), which holds that *some* kinds of state governmental entities must meet a more stringent test to obtain state-action immunity on the merits than others.

This case presents this Court with another opportunity to avoid the mounting confusion and definitively resolve this conflict in favor of the correct rule—one that protects government entities from the indignities of trial when they are properly immune from suit.

Importantly, it is not clear how many more chances this Court will get to address this issue. Respondent Federal Trade Commission (FTC) will no doubt argue that this split is at least partially resolving itself, because the Eleventh Circuit recently granted *sua sponte* rehearing en banc in a case that at best implicates this question in part, and may not reach it at all. Thus, a disagreement among the circuits still exists and will necessarily survive. And importantly, as more circuits make it harder to put this issue before an appellate court, the odds that this Court will get another chance at review grow smaller. The result is that the circuits could increasingly default into the same mistaken rule prohibiting all immediate appeals that this Court granted certiorari to review in *Salt River*.

This Court should not permit that result. Layering a restrictive jurisdictional limitation on immediate appeals on top of *N.C. Dental*'s limitation on the set of government entities that will obtain immunity on the merits will leave unquestionably public bodies exposed to the threat of federal antitrust suit, without the ability to get a definitive answer on their immunity from a court of appeals until it is too late. *N.C. Dental* itself does not justify this result, nor does anything else.

Since *Parker v. Brown*, 317 U.S. 341 (1943), this Court has consistently recognized that "because 'nothing in the language of the Sherman Act or in its history' suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints 'as an act of government.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 (2013) (quoting *Parker*, 317 U.S. at 350, 352) (alteration omitted). And this Court should not permit the courts of appeals to impose in practice the very restriction on state sovereignty that *Parker* immunity seeks to avoid. The leading antitrust treatise recognizes that immediate appealability is essential to immunize state government entities from the threats of litigation that might prevent them from engaging in the regulation that *Parker* immunity protects, and that position is plainly correct. Indeed, as a strict matter of legal logic, decisions denying state-action immunity to state actors are immediately appealable collateral orders, because they definitively deny to those state actors the very safety from trial that they are seeking. This Court should thus grant certiorari and reverse.

STATEMENT OF THE CASE

A. Legal Background

This case presents a question at the intersection of two distinct legal doctrines: (1) state-action antitrust immunity; and (2) the collateral-order doctrine. The question presented asks whether and when a government entity that is denied immunity under the former can bring an immediate appeal under the latter.

1. The Sherman Act, 15 U.S.C. §1 *et seq.*, "serves to promote robust competition, which in turn empowers the States and provides their citizens with opportunities to pursue their own and the public's welfare." *N.C. Dental*, 574 U.S. at 502. "The States, however, when acting in their respective realm, need not adhere in all contexts to a model of unfettered competition." *Id.* at 503. As this Court has recognized, "in some spheres [States] impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition to achieve public objectives." *Id.* And applying the Sherman Act to such decisions "would impose an impermissible burden on the States' power to regulate." *Id.*

Accordingly, in *Parker*, this Court held that "the antitrust laws … confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity." *N.C. Dental*, 574 U.S. at 503. That immunity, known as "state-action" or "*Parker*" immunity, "recognize[s] Congress' purpose to respect the federal balance" and serves to protect federalism and state sovereignty. *Id.*

Sometimes, the applicability of the state-action immunity doctrine to a particular actor is clear. For example, "[s]tate legislation" is necessarily exempt

from attack under the federal antitrust laws, as "an undoubted exercise of state sovereign authority." 574 U.S. at 504. But because those state laws can (and frequently must) empower state actors and local government entities to carry them out, the immunity must also extend beyond the state legislature to cover a State's agencies, boards, and political subdivisions. Likewise, it must also sometimes extend to private parties that exercise state-vested authority.

This Court's rules governing each kind of actor are different, and so the first step in determining whether immunity applies is deciding what kind of entity we are dealing with: (1) the sovereign state itself; (2) another kind of government actor like a state agency or local government; or (3) a purely private party. And while this Court has not established bright lines among these categories, it is typically easy enough to distinguish between a sub-state actor like a municipality or regulatory board and a truly private entity that state law might empower, like a state retail association or private insurance company.

Once the type of actor is determined, courts decide the *Parker* immunity question by applying "the two-part test set forth in" *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980). *N.C. Dental*, 574 U.S. at 506. *Midcal*'s operative rule stems from the fundamental antitrust immunity of the *State's* legislative commands and actions. And so it holds that, where a private actor is claiming that immunity, "[a] state law or regulatory scheme cannot" provide it "unless, first, the State has articulated a clear … policy to allow the anticompetitive conduct, and second, the State provides active supervision of

[the] anticompetitive conduct." *Id.* (quoting *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992)) (alterations in original). Conversely, this Court's precedents hold that, unlike private actors, sub-state (or "non-sovereign") *government* actors like municipalities must satisfy only the first part of this test. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985).

This Court recently modified that rule in *N.C. Dental*, however, by holding that "a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." 574 U.S. at 511-12. In so doing, *N.C. Dental* did not question these entities' fundamentally governmental character, and indeed acknowledged that this meant some truly governmental entities would be subject to the active-supervision requirement. It thus emphasized that "*Midcal*'s active supervision test is an essential prerequisite of *Parker* immunity for *any* nonsovereign entity—*public or private*—controlled by active market participants." *Id.* at 510 (emphasis added).

As the dissenters observed, this development left many hard questions for public entities that previously believed themselves exempt from the active-supervision requirement. Among those were "What is a 'controlling number'?" "Who is an 'active market participant'?" and "What is the scope of the market in which a member may not participate while serving on the board?" 574 U.S. at 526 (Alito, J., dissenting). And these questions frequently make all the difference because—as this case itself demonstrates (*infra* p.11)—the amount of state involvement that suffices for a dis-

trict court or the FTC to reliably find active supervision is nigh on impossible for the state agency to know in advance, even when it fully complies with all state-imposed supervisory requirements. *See, e.g.*, *Ticor*, 504 U.S. at 639 (finding that a possible state veto did not suffice in a price-fixing case where there was "inaction in fact" by the supervising agency, but affirmatively cautioning that "[o]ur decision should be read in light of the gravity of the antitrust offense, the involvement of private actors throughout, and the clear absence of state supervision" and refusing to "imply that some particular form of state or local regulation is required to achieve ends other than the establishment of uniform prices"); *id.* at 640-41 (Scalia, J., concurring) (agreeing with dissenters that "this standard will be a fertile source of uncertainty").

The upshot is that, both before *N.C. Dental* and particularly after, the immunity of a public entity like a state regulatory board accused of violating the federal antitrust laws will depend on how the initial tribunal applies two separate and somewhat mushy standards: (1) *N.C. Dental*'s standard for which public entities must meet the active-supervision requirement; and (2) the active-supervision requirement itself. Those "context dependent" answers will very often be debatable. 574 U.S. at 515. And if those answers are not appealable, then the word of the first tribunal will also be the last word, at least with respect to the State's interest in avoiding both the inevitable disruption to the enforcement of its laws and policies, and the costs and risks of defending a full-blown federal antitrust suit.

2. The collateral-order doctrine, meanwhile, governs whether such orders are in fact immediately appealable. The ordinary rule is that courts of appeals have jurisdiction only over final district court judgments. *See* 28 U.S.C. §1291. But the collateral-order doctrine treats as "final" certain orders that do not fully resolve the case but do "dispose[] of a matter separable from, and collateral to the merits of the main proceedings," and thus permits their immediate appeal. *Gelboim v. Bank of Am. Corp.*, 574 U.S. 405, 414 n.5 (2015) (quotation marks omitted). "To fall within the exception, an order must at a minimum satisfy three conditions: It must 'conclusively determine the disputed question,' 'resolve an important issue completely separate from the merits of the action,' and 'be effectively unreviewable on appeal from a final judgment.'" *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

While this Court has noted the doctrine's limited scope, it has treated a variety of orders as collateral, including denials of both qualified and absolute immunity for government actors. *See, e.g.*, *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 568 (6th Cir. 1986) (collecting examples). And it is generally accepted that, although it arose in the context of district court appeals, it equally governs when review of "final agency action" is permitted for otherwise nonfinal orders under the Administrative Procedure Act (APA), 5 U.S.C. §701 *et seq.* *See, e.g.*, *FTC v. Standard Oil Co.*, 449 U.S. 232 (1980) (applying collateral-order doctrine to this question); Pet. App. 6a (applying doctrine below); *see also DRG Funding Corp. v. Sec'y of Hous. & Urb. Dev.*, 76 F.3d 1212, 1220 (D.C. Cir. 1996)

(Ginsburg, J., concurring) (calling APA §704 the "counterpart" to §1291 and applying collateral-order doctrine); *Rhode Island v. EPA*, 378 F.3d 19, 24-25 (1st Cir. 2004) (noting that "every circuit to have considered the question" has applied the collateral-order doctrine "to judicial review of administrative decisions").

B. Factual Background

1. Petitioner Louisiana Real Estate Appraisers Board (LREAB) is a state regulatory agency in the Office of the Governor, tasked by the Legislature with enforcing state and federal laws related to Louisiana's residential mortgage market and real estate appraisals. Pet. App. 2a; La. Stat. Ann. §§37:3394, 37:3415.19. The Governor appoints board members for three-year terms and, consistent with federal guidelines, LREAB's members reflect the diverse economic interests affecting the appraisal process. La. Stat. Ann. §37:3394. Members are confirmed by the state Senate, and removable by the Governor for cause. Pet. App. 2a; La. Stat. Ann. §37:3394. State law requires that eight of LREAB's ten members must hold a license as a residential or general appraiser. La. Stat. Ann. §37:3394(B). But at all times relevant here, the majority of LREAB's members performed no residential appraisals. *See* C.A. ROA.12, 16.

2. In 2010, Congress imposed various mandates on state governments designed to eliminate a root cause of the housing market collapse and resulting financial crisis. Among other things, Congress sought to restore housing-market integrity by prohibiting lenders from retaining unqualified appraisers who were willing to appraise at inflated loan values. C.A. ROA.8. The Dodd-Frank Wall Street Reform and Consumer Protection Act and federal agency regulations

therefore protected "appraisal independence" by mandating that: (1) residential mortgage appraisers be paid "customary and reasonable" fees for their market area; and (2) state agencies that license and register appraisers and appraisal management companies (AMCs) implement and enforce this requirement. *See* Pet. App. 2a; C.A. ROA.12-13; 15 U.S.C. §1639e; 12 C.F.R. §226.42 ("Valuation independence"). In 2012, the Louisiana Legislature incorporated these federally imposed requirements into state law, and empowered LREAB to implement and enforce them. Pet. App. 2a; C.A. ROA.13.[1]

LREAB promulgated rules in compliance with Louisiana's Administrative Procedure Act, La. Stat. Ann. §49:950 *et seq.*, and after supervisory review by both House and Senate committees, LREAB's rules took effect. *See* La. Admin. Code tit. 46, §31101 (Rule 31101); C.A. ROA.13-14, 114. As both federal and state law required, LREAB investigated colorable complaints of Rule 31101 violations, C.A. ROA.15, and it was in fact the first state agency to enforce a customary and reasonable fee rule, *Anti-Trust Update: FTC vs LREAB*, Working RE, Winter 2021, at 38, https://issuu.com/workingre/docs/wre_issue55_150ppi. And, predictably, the enforcement of a rule requiring "customary and reasonable" fees affected price competition and limited AMCs' ability to negotiate with individual appraisers.

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[1] Under the applicable provisions, LREAB does not set prices but does have authority to review complaints and determine whether the methods used by AMCs to set appraisal prices meet the federal regulatory definitions of "customary and reasonable." *See* La. Stat. Ann. §§37:3415.15; 37:3415.19.

3. Nevertheless, in 2017, the FTC issued an administrative complaint alleging that LREAB's actions unreasonably restrained price competition. Pet. App. 3a; C.A. ROA.8-9. LREAB answered in part by arguing that it was entitled to *Parker* immunity. Pet. App. 3a; C.A. ROA.16. The FTC's Complaint Counsel did not dispute that LREAB was a governmental entity within the meaning of the cases above, *supra* pp.4-7, and it certainly is. Nor did Complaint Counsel address whether LREAB's actions were authorized by clearly articulated state law for purposes of *Midcal*'s first requirement. Instead, Complaint Counsel averred that LREAB was controlled by active market participants and inadequately supervised by the State for purposes of *Midcal*'s second prong. *See* C.A. ROA.16.

4. Reacting to the FTC's allegation of inadequate state supervision, Louisiana's Governor issued Executive Order 17-16, entitled "*Supervision of the Louisiana Real Estate Appraisers Board Regulation of Appraisal Management Companies*." Pet. App. 3a; C.A. ROA.16, 92-93. This order supplemented the already-present legislative oversight with executive branch supervision over LREAB's promulgation and enforcement of Rule 31101. C.A. ROA.16-17, 92-93. And then, acting under the now unambiguously intended and direct supervision by both the legislative *and* executive branches, LREAB re-promulgated its customary and reasonable fee rule. C.A. ROA.17-18, 115.

5. LREAB then moved to dismiss the FTC's administrative complaint based on state-action immunity and mootness. Pet. App. 3a. That same day, FTC Complaint Counsel moved for a partial summary decision against LREAB's state-action immunity defenses. *Id*. On April 10, 2018, the two FTC Commissioners

who had issued the complaint denied LREAB's motion, granted Complaint Counsel's motion, and dismissed conclusively LREAB's state-action immunity defenses. *Id.* at 3a-4a; C.A. ROA.19, 70-90. In so doing, the Commission found that LREAB was "controlled by active market participants" for *N.C. Dental* purposes, and that none of the supervision by Louisiana's House, Senate, or executive branch was sufficiently "active" to demonstrate that the State had taken on political accountability for LREAB. C.A. ROA.70-90.

6. In response to the FTC Order, the Governor confirmed by Executive Order that the executive branch properly supervised LREAB, and the Louisiana Senate unanimously passed a resolution reaffirming that LREAB's rules were in fact supervised by the Legislature and qualified as "sovereign acts of the State of Louisiana and its legislature." C.A. ROA.19-20, 109-10, 112-16.

C. Procedural History

1. LREAB sought review of the FTC's order dismissing its *Parker* immunity defenses in the Fifth Circuit under the collateral-order doctrine. C.A. ROA.20; *see Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). That court initially granted LREAB a stay pending review. C.A. ROA.20, 99. But the merits panel went on to dismiss the petition for lack of appellate-court jurisdiction, holding that the authorization for appeals from "cease-and-desist" orders under the Federal Trade Commission Act (FTC Act), 15 U.S.C. §41 *et seq.*, did not permit review of other kinds of Commission decisions, even if they were final under the collateral-order doctrine. *La. Real Estate Appraisers Bd. v. FTC*, 917 F.3d 389, 391-92 (5th Cir. 2019) (per curiam) (*LREAB I*). The Fifth Circuit suggested,

however, that even if the FTC Act did not permit review, the collateral-order doctrine might well permit APA review in district court. *LREAB I*, 917 F.3d at 394 n.3; C.A. ROA.126 n.3; 5 U.S.C. §704.

2. Responding to that suggestion, LREAB initiated a federal APA suit in district court, and requested a stay of further FTC proceedings pending that court's decision. The district court granted the stay, finding that LREAB had shown that its state-action immunity defense was likely to succeed. The court further found that "the abrogation of immunity itself, if improvidently done, may cause irreparable harm by forcing the State to engage in activities from which it might otherwise be protected." Pet. App. 23a.

3. The FTC then appealed the stay order to the Fifth Circuit, which again vacated for jurisdictional reasons. This new panel proceeded on the assumption that the APA's "final agency action" requirement was governed by the collateral-order doctrine—the same doctrine that governs attempted appeals from district court orders. *See* Pet. App. 6a & n.3; *supra* pp.8-9. It concluded, however, that the FTC's order denying immunity was not immediately appealable by applying an idiosyncratic rule that no other circuit follows: that *some* public entities can immediately appeal such orders, whereas private entities and public entities subject to the active-supervision requirement under the new *N.C. Dental* test cannot. Pet. App. 7a-12a; *see also Martin*, 86 F.3d at 1395-97; *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000).

To apply this unique test, the Fifth Circuit thus had to decide whether LREAB should be considered a public or private entity for purposes of the circuit's im-

mediate appealability rule. And in making that determination, the court did not question whether LREAB is a governmental entity outside of this particular inquiry. And indeed, it surely is—the court even referred to LREAB (correctly) as a "state agency." Pet. App. 2a.

Nevertheless, the Fifth Circuit refused to *treat* LREAB as a public entity by assuming the very question LREAB sought to appeal—namely, whether *N.C. Dental* requires it to satisfy the active-supervision standard in the first place. Recall that, to deny LREAB state-action immunity on the merits, the FTC first had to find that, under *N.C. Dental*, LREAB was "controlled by active market participants" and so needed to meet *Midcal*'s second element. *See supra* p.6. The Fifth Circuit's decision rested on the assumption that this finding of market-participant control was correct, even though that question was expressly disputed in LREAB's underlying APA action. Pet. App. 10a-12a. And while, prior to this case, the Fifth Circuit's rule had simply distinguished between public entities (who could appeal) and private entities (who could not), the court of appeals decided in this case to mint the new, esoteric rule described above, and treat the outcome of the *N.C. Dental* question *on the merits* of immunity as transforming certain public entities into private ones for purposes of its *appealability* rule.

In so doing, the Fifth Circuit also concluded that the FTC's order did not satisfy two of the collateral-order test's three ordinary elements, Pet. App. 12a-13a—a view the Eleventh Circuit has rejected, *see infra* p.19. And it then suggested in passing that "[a]nother reason for rejecting the Board's quest for

collateral review is that this regulatory case was initiated by the FTC," apparently conflating state-action antitrust immunity with the distinct concept of sovereign immunity, without further explanation. Pet. App. 12a.

4. LREAB sought en banc review, which was denied on December 1, 2020. Pet. App. 26a-27a. Two days later, LREAB asked the Fifth Circuit to stay its mandate so it could petition this Court for a writ of certiorari. On December 4, the court of appeals denied that request. *Id.* at 25a. This Court likewise denied a stay. No. 20A107. This petition follows.

REASONS FOR GRANTING THE WRIT

As noted above, this Court already granted certiorari in *Salt River*, *supra*, to review the Ninth Circuit's holding that government entities are not entitled to immediately appeal an order denying them state action immunity. This case implicates that same question, which continues to divide the circuits. Indeed, at present, there is a three-way disagreement among the Fourth, Sixth, and Ninth Circuits on the one hand, the Eleventh Circuit (supported by dicta from the Third and Seventh Circuits) on the other, and the Fifth Circuit, which occupies an increasingly unstable middle position. This ongoing disagreement on a question this Court has already identified as important enough for certiorari review still merits this Court's attention.

The FTC will no doubt suggest that this Court need no longer act because the Fifth Circuit narrowed the set of government entities entitled to an appeal in this case, while the Eleventh Circuit recently ordered en banc review *sua sponte* in a case that implicates its appealability rule as well. *See SmileDirectClub, LLC*

v. Battle, 981 F.3d 1014 (11th Cir. 2020). In reality, however, a conflict among the circuits certainly exists now and will persist going forward, and the confusion among their varying approaches is only growing.

Perhaps more importantly, if the circuits are coming into alignment on the question presented here, they are manifestly moving in the *wrong* direction. The no-appeals rule this Court agreed to review in *Salt River* places core values of federalism and state sovereignty on even shakier footing than what an ever-narrowing version of *Parker* immunity currently supplies. This Court's decision in *N.C. Dental*, *supra*, exposed a host of established state regulatory boards to novel antitrust attacks that turn on highly uncertain standards. Denying government entities the opportunity to appeal the results of those uncertain inquiries condemns them to bear the disruptions to state regulatory policies and risks of antitrust suits even if they turn out to have been properly immune all along. An order denying such immunity is plainly collateral under this Court's precedents, and—as the leading antitrust treatise explains—any other approach leaves public entities and the business of state government exposed to bullying and holdup, and the costs of litigation and the threat of treble damages. *See infra* p.30.

The predictable result is that more government boards will settle in the face of threats from private plaintiffs or enforcers like the FTC—with the latter having the unique power to delay *any* neutral decisionmaker from reaching the immunity question until after expensive proceedings have concluded. And that means that this Court will have few opportunities to resolve this issue going forward should it reject this petition. The question presented warranted resolution

in *Salt River*, and it warrants resolution now in favor of a rule that protects the sovereignty of the States.

I. The Courts of Appeals Are Divided.

As this Court is already aware from its grant of certiorari in *Salt River*, the circuits are split on the question presented. And while that grant was frustrated when the parties settled, the split endures.

1. The Fourth, Sixth, and Ninth Circuits hold that denials of state-action immunity are never immediately appealable regardless of the relevant entity's status as "public" or "private."

The Sixth Circuit took the first missteps in *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563, 567-68 (6th Cir. 1986), when it "decline[d] to extend the right of immediate appeal" to the issue of state-action antitrust immunity. It reasoned that a denial "of this defense does not satisfy the three requirements necessary for an appeal under the collateral order doctrine." *Id.* at 567. First, the court found that this defense was not "of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense of the original claim." *Id.* The court did not explain how it reached that conclusion or decided the "magnitude" of various immunities. It then continued to find that direct appeal provided sufficient protection of the defense, and that the denial of state-action immunity was not "completely separate from the merits of the original claim." *Id.*

After the circuit split developed, the Fourth Circuit "join[ed] the Sixth Circuit in holding that the denial of *Parker* protection is not an immediately appealable collateral order." *S.C. State Bd. of Dentistry v.*

FTC, 455 F.3d 436, 441 (2006). While it found "no dispute that the denial of *Parker* protection satisfies the first collateral order requirement," *id.*, two judges found that it does not satisfy the second (*i.e.*, that *Parker* immunity is "not separable from the merits of the underlying action," *id.* at 442), and all three concluded that it does not satisfy the third (*i.e.*, that the order was effectively reviewable after final judgment, because *Parker* is more akin to a merits defense than an immunity from the suit itself, *id.* at 446-67). These divisions demonstrate that confusion and disagreement is the norm on this issue, even with respect to courts and jurists that nominally agree on the bottom line.

Finally, the Ninth Circuit sided with the Fourth and Sixth Circuits in *SolarCity Corp. v. Salt River Project Agricultural Improvement & Power District*, 859 F.3d 720 (9th Cir. 2017), the case this Court had agreed to review before it settled. There, the court of appeals—focusing only on the third collateral-order requirement—distinguished state-action antitrust immunity from those immunities that do get immediate appeals, such as sovereign, absolute, qualified, foreign-sovereign, and tribal-sovereign immunity. It reasoned that "those immunities are immunities from suit, which differ from mere immunities from liability," *id.* at 725, and characterized the state-action doctrine as the latter, *id.* at 727. It thus held that the collateral-order doctrine did not apply, because the liability defense would be effectively reviewable after a final judgment. *Id.*

Accordingly, these three courts together hold that no party—including government entities of any kind—

is entitled to immediately appeal the denial of state-action immunity.

2. The Eleventh Circuit, on the other hand, allows immediate appeals from denials of state-action immunity.

It originally staked out this position in *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986). There, it characterized state-action antitrust immunity, like qualified immunity, as an "immunity from suit rather than a mere defense to liability," and thus concluded a "district court's decision (denying immunity) is effectively unreviewable on appeal from a final judgment." *Id.* at 1289 (internal quotation marks and emphasis omitted). Moreover, it found that denying immunity conclusively answers the relevant question because the "right not to stand trial because of state action and statutory immunity has been conclusively determined." *Id.* at 1289-90. And, finally, it found that the immunity decision "resolve[d] an important issue separate from the merits." *Id.* at 1290. Therefore, the court "h[eld] that the denial of a summary judgment based on … immunity from liability and trial constitute[s] an appealable 'collateral order,'" finding all three of the relevant collateral-order factors satisfied. *Id.*

The Eleventh Circuit has reaffirmed this holding numerous times—particularly in cases involving governmental entities. *See, e.g.*, *Diverse Power, Inc. v. City of LaGrange*, 934 F.3d 1270, 1272 n.1 (11th Cir. 2019); *Danner Constr. Co. v. Hillsborough County*, 608 F.3d 809, 812 n.1 (11th Cir. 2010); *TEC Cogeneration Inc. v. Fla. Power & Light Co.*, 76 F.3d 1560, 1564 (11th Cir.), *modified on reh'g*, 86 F.3d 1028 (11th Cir.

1996) (per curiam); *Praxair, Inc. v. Fla. Power & Light Co.*, 64 F.3d 609, 611 (11th Cir. 1995); *Askew v. DCH Reg'l Health Care Auth.*, 995 F.2d 1033, 1036-37 (11th Cir. 1993); *Bolt v. Halifax Hosp. Med. Ctr.*, 980 F.2d 1381, 1389 n.5 (11th Cir. 1993). But it also recently made clear that it continues to believe that even "private parties are entitled to appeal the denial of state-action immunity under the collateral-order doctrine." *SmileDirectClub, LLC v. Battle*, 969 F.3d 1134, 1139 (11th Cir. 2020).[2]

3. The Fifth Circuit has a different and now far more complicated rule. Under its hybrid approach, private entities are denied an immediate appeal, but governmental entities can *sometimes* take one.

Initially, the Fifth Circuit generally agreed with the Eleventh Circuit in *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). In *Martin*, the court held that "state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances.'" *Id.* at 1395 (quoting *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985)). The court accordingly recognized that "[o]ne of the primary justifications of state action immunity is the same as that of Eleventh Amendment immunity"—protecting States' dignitary interests. *Id.* at 1395-96. Those in-

[2] As we explain in greater depth below, *infra* p.24-25, this latest case is being reheard en banc, *see* 981 F.3d 1014 (ordering rehearing *sua sponte*), but because it involves an assertion of immunity by private individuals, that rehearing will not necessarily involve any decision regarding the circuit's longstanding approach to cases involving governmental entities.

clude their ability to enforce their laws with confidence, avoiding the distraction of state officials from their duties, and the risk that qualified professionals will be deterred from government service by the risk that the antitrust laws will be used against them while they try in good faith to serve the public interest. "[T]he reasoning that underlies the immediate appealability of an order denying absolute, qualified or Eleventh Amendment immunity" thus indicated to the court "that the denial of state action immunity should be similarly appealable" because, "in each case, the district court's decision is effectively unreviewable on appeal from a final judgment." *Id.* at 1396; *see also* 1A Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶222b & n.36 (4th and 5th eds. 2020) (Hovenkamp).

In *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000), however, the Fifth Circuit made clear that this conclusion only extended to orders denying immunity to *public* entities because Sherman Act suits against private defendants do not raise the same dignitary, public-interest, and government-burden concerns as do suits against public entities. *Id.* at 293-94. The court therefore found that the denial of state-action immunity to the private party in that case was not an immediately reviewable collateral order. *Id.* at 294.[3]

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[3] The Tenth Circuit has reached the same conclusion in the context of private entities, but there found it "unnecessary to weigh in on the circuit split" regarding public entities. *See Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 703 F.3d 1147, 1151 (10th Cir. 2013).

The Fifth Circuit altered this reasonably clear public/private line by holding below that, even though LREAB is a government entity, it should be treated as a private one for purposes of appealability. It did so by taking *N.C. Dental*'s holding—*i.e.*, that public agencies controlled by active market participants must pass *Midcal*'s active-supervision requirement to establish *Parker* immunity *on the merits*—and applying it to this jurisdictional question. Pet. App. 11a. Accordingly, it held that "while the Board may rightly defend its entitlement to state action immunity, it invokes the state action doctrine as a private party," and therefore "the policy imperatives behind relieving the Board from suit as well as liability do not apply." *Id.* at 11a-12a. The Fifth Circuit did not explain how that could be true of a board that in fact remained a public entity full of duly appointed public servants. But the Fifth Circuit's current rule is nonetheless that state entities that are not controlled by active market participants can still immediately appeal denials of state-action immunity, while public entities that fall within *N.C. Dental*'s standard are lumped in with private parties and cannot. And that is its rule even if the finding that this public entity fails the *N.C. Dental* standard (or that it even applies at all) is exactly what is being appealed in the first place.

4. In addition to this 3-1-1 disagreement, two additional circuits have suggested in dicta that denials of state-action antitrust immunity to public entities are immediately appealable.[4] The Seventh Circuit did

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[4] The Fourth Circuit recognized as much. *S.C. State Bd. of Dentistry*, 455 F.3d at 441 ("Two others have suggested the same [as *Martin* and *Commuter Transp. Sys.*] in dicta.").

so in *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987), which found that the denial of a First Amendment immunity was not immediately appealable under the collateral-order doctrine. In so holding, the court found the Eleventh Circuit's *Commuter Transportation* decision "distinguishable" because that case "was careful to point out that the [state-action] doctrine had been interpreted to create an immunity from suit and not just from judgment—to spare state officials the burdens and uncertainties of the litigation itself as well as the cost of an adverse judgment." *Id.* at 346. And the Third Circuit cited *Segni* for the same proposition. *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999). These courts thus have not squarely held that state-action immunity creates an immediately appealable immunity from suit. But if these circuits were to stick to their characterization of state-action immunity in these decisions, they would almost certainly hold that a state regulatory board like petitioner was entitled to an immediate appeal of any order denying that immunity.

5. Finally, numerous courts and commentators have recognized the existence of this conflict. *See, e.g.*, *SolarCity Corp.*, 859 F.3d at 729 ("We acknowledge that two circuits have reached the opposite conclusion."); *Auraria Student Hous. at the Regency, LLC*, 703 F.3d at 1150 ("The circuits are split on the question whether the denial of *Parker* immunity is effectively unreviewable on appeal from a final judgment."); *S.C. State Bd. of Dentistry*, 455 F.3d at 441 ("The circuits are divided, however, as to whether the denial of *Parker* protection satisfies the final two [collateral-order] requirements."); Hovenkamp ¶228e.

II. This Division Warrants This Court's Review.

Given recent developments, we expect the FTC to argue that this 3-1-1 circuit disagreement no longer warrants review. This argument should be rejected for three reasons.

1. First, while it is true that the Eleventh Circuit recently decided *sua sponte* to rehear the panel decision in *SmileDirectClub*, *see supra* p.15, that decision will not resolve the split. The panel in that case granted immediate appeal to *private* members of a regulatory board after they were denied state-action antitrust immunity, but it then went on to ultimately deny those members' claim of immunity on the merits. 969 F.3d at 1139, 1143. Given those two holdings, the fact that neither party requested en banc review, and the lack of any direction in the Eleventh Circuit's order, the precise question of interest to that court is unclear. Moreover, although a concurring panel member did suggest that the Eleventh Circuit ought to revisit its precedent on the immediate appealability of state-action immunity denials, *id.* at 1147-48 (Jordan, J., concurring), another panel member dissented on the ground that the district court had decided that further factual development was needed to actually resolve the immunity request in that case, meaning the interlocutory order in that case failed the first "conclusively determines" collateral-order factor, *id.* at 1149-55 (Tjoflat, J., dissenting). The upshot is that there are a number of resolutions possible in that rehearing, many of which would not affect the Eleventh Circuit's appealability rule at all.

And perhaps even more importantly, the appellants in *SmileDirectClub* were the *members* of the state board, appearing as (and considered by the court

to be) *private* parties; the state board itself had been dismissed on sovereign immunity grounds. 969 F.3d at 1137. Accordingly, that case does not squarely present any question about *public* entities, which is the premise of the split articulated here. Moreover, there is every reason to doubt that—having permitted direct appeals by government entities in several previous cases—the Eleventh Circuit will swing all the way from one side of this issue (permitting even private parties to appeal) to the other extreme (where *no* parties, even plainly governmental ones like cities, can immediately appeal). This means both that *SmileDirectClub* is unlikely to do anything to truly resolve the split on the question presented and also will not provide a vehicle for review on the far more crucial question of appealability for *public* entities however it is eventually decided.

Finally, even if the Eleventh Circuit's place in the circuit split is disregarded entirely, conflicting approaches to the question presented will persist. *Martin* remains part of the Fifth Circuit's rule, *see* Pet. App. 9a, and still permits some governmental entities an immediate appeal that three circuits would deny. *See supra* pp.20-21. The Fifth Circuit's new approach has its own serious flaws, but they are different from those that drive the three circuits that foreclose the immediate appeal of state-action immunity denials altogether, and that disagreement should be resolved. Meanwhile, those three other courts also disagree internally about *why* such denials do not qualify as collateral orders. *See supra* p.18. It is thus clear that, no matter what, this Court will substantially advance the judicial interest in clear and uniform national rules—

particularly on this kind of jurisdictional issue—by granting review in this case.

2. Second, that the courts may become somewhat more uniform in rejecting appeals of orders denying state-action immunity is in this instance a reason for the Court to grant review now, rather than to pretermit review indefinitely. The more the circuits adopt such a bar on appellate review—and the more broadly they adopt it—the less likely it is that this Court will be presented with future vehicles through which to reach the question it intended to resolve in *Salt River*. That is true because, as the courts of appeals make it harder to bring an immediate appeal on the immunity question, the predictable result will be fewer public entities willing to run the gauntlet all the way to this Court simply to win on this jurisdictional question—at which point they will still have to prove that they are entitled to immunity on the merits to avoid going to trial. Facing down those disruptions, costs, and risks after losing on immunity in the trial court or agency, state entities are much more likely to be browbeaten into settling before they ever have the chance to get a final determination of their right to immunity from these very disruptions, costs, and risks. The Court should thus grant review now and establish a uniform and correct approach to the question presented.

III. The Decision Below Is Wrong.

Accordingly, it is particularly important here that the Sixth, Fourth, and Ninth Circuits' rule is wrong, while the Fifth Circuit has put a particularly incorrect spin on its own idiosyncratic view. The right rule—and the one this Court can and should adopt to decide this case—is that denials of state-action immunity to

public entities are immediately appealable, period. That rule both correctly applies collateral-order doctrine and has been rightly championed by the leading treatise as important to protect the proper functioning of state government. It is clear, easily applied, and avoids a circularity in the Fifth Circuit's new approach. It also protects state sovereignty and avoids allowing *N.C. Dental* to become an even-broader impediment to the freedom of state actors to follow non-competitive state regulatory regimes that this Court could not have intended.

A. Orders Denying State-Action Immunity Meet the Collateral-Order Criteria.

The collateral-order doctrine requires otherwise non-final orders to meet three criteria: (1) they must be "conclusive"; (2) they must "resolve important questions completely separate from the merits"; and (3) they must "render such important questions effectively unreviewable on appeal from final judgment." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Denials of state-action immunity to public entities clearly meet these criteria.

1. First, denials of state-action immunity are undisputedly "conclusive" in the sense of being "fully consummated," and not "tentative, informal or incomplete." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). As even the Fourth Circuit put it before finding these orders non-collateral, "[t]here is no dispute that the denial of *Parker* protection satisfies [this] requirement; a decision that the Board is not entitled to such protection 'conclusively determines' the question of whether the Board is subject to the Federal Trade Commission Act restrictions on anticompetitive conduct." *S.C. State Bd. of Dentistry*, 455 F.3d at 441;

see also Martin, 86 F.3d at 1397. The decision below agrees as well. Pet. App. 7a.

2. Second, denials of state-action immunity plainly "resolve important questions separate from the merits." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995). The question is surely important. As described above, it implicates a State's sovereignty and dignity, just like other immunity doctrines that receive collateral-order treatment like Eleventh Amendment and qualified immunities. *See Martin*, 86 F.3d at 1395-96.

And the *Parker* determination is separate from the merits of the underlying antitrust claim. As the Fifth Circuit itself had previously and persuasively explained:

> [A] claim of such state action immunity is conceptually distinct from the merits of the plaintiff's claim that he has been damaged by the defendants' alleged violation of the federal antitrust laws. An appellate court reviewing the denial of the state or state entity's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim.

Martin, 86 F.3d at 1397. This is plainly right; in fact, these two inquiries do not overlap *at all*. Note that the considerations that govern state-action immunity ask about the relationship between the defendant and the *State* under *state non-antitrust* law, while the considerations that govern the merits of the underlying antitrust claim concern the relationship between the defendant and the *plaintiff* under *federal antitrust* law.

This case is itself a perfect example: Even assuming LREAB must establish the second *Midcal* factor, whether and how Louisiana actively supervises LREAB has absolutely nothing to do with whether LREAB's enforcement conduct unreasonably restrained price competition.

3. Finally, a denial of state-action immunity is not effectively reviewable on appeal from a final judgment because the very process of going to trial and obtaining a judgment irremediably harms the fundamental state interests at issue. "To be 'effectively unreviewable,' an order must protect an interest that would be 'essentially destroyed if its vindication must be postponed until trial is completed.'" *S.C. State Bd. of Dentistry*, 455 F.3d at 443 (quoting *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989)) (emphasis omitted); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009). This is a clear-cut case where the public and constitutional values at stake are lost by the time final judgment rolls around.

Denials of state-action immunity offend state sovereignty and dignity interests. This Court has made that clear over and over again. *See, e.g.*, *N.C. Dental*, 574 U.S. at 503. And those kinds of harms are not repaired by simply rejecting the antitrust judgment years after state actors have been dragged through an antitrust trial that should not have been prosecuted against an immune entity, and state coffers have been emptied to mount the defense. Those costs—both dignitary and pecuniary—will not be recovered. Indeed, before this case, the Fifth Circuit itself recognized that the irremediable harms of forcing the immune entity to go to trial included "distraction of officials from their

governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Martin*, 86 F.3d at 1395-96. The leading treatise agrees that these irremediable harms are precisely the reasons why *Parker* must be treated as an immediately appealable immunity from suit itself. Hovenkamp ¶222b & n.36 (citing "the importance that the *Parker* immunity issue not proceed to trial, especially when government officials are defendants," so that "[state] entities and officials cannot be intimidated from carrying out their regulatory obligations by threats of costly litigation").

And this is where the Fifth Circuit's rule becomes particularly problematic, because the existence and extent of these harms are perfectly orthogonal to the question whether the government entity at issue must satisfy the active-supervision test under *N.C. Dental*. In either case, the threat from antitrust allegation will hinder state agencies from carrying out state policies; and public servants appointed by the Governor and confirmed by the Senate are going to be hailed into depositions, threatened with antitrust suits for their discretionary choices, and so deterred from taking up such public-service roles in the first place. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 641 (1992) (Scalia, J., concurring) (noting that those electing to serve in roles subjected to the active-supervision requirement will often not know whether they in fact received active state supervision until *after* they choose to participate). And the State's effort to deploy its regulatory regime will thus be damaged, even if the threatened suits are never brought, or do not finally prevail after they impose their irremediable costs. That barrier to

effective state governance cannot be torn down after the fact.

The simple reality is that a public entity forced into continued litigation has irremediably lost the benefit of immunity from suit, and subsequent appeal opportunities can never really reinstate it. In this way, *Parker* immunity mirrors the motivating forces behind other immunities from suit that cannot be meaningfully restored on appeal from a final judgment, like qualified, sovereign, and Eleventh Amendment immunity. *See, e.g.*, *Martin*, 86 F.3d at 1395-96; Hovenkamp ¶222b (calling the state-action doctrine an "immunity, not merely a defense that can be offered at trial"). So denials of *Parker* immunity should likewise be immediately appealable.

B. The Fifth Circuit's Rule Is Confused and Should Also Be Rejected.

Even putting the details of collateral-order doctrine aside, the Fifth Circuit's rule is unworkable on its own terms.

1. As noted above, its main error is that it treats the *N.C. Dental* rule subjecting certain public entities to the active-supervision requirement as somehow relevant to whether those entities are actually governmental for other purposes—like their ability to take an immediate appeal. *See supra* p.22. This appears to be a simple category error. It is true that all private parties have to satisfy *Midcal*'s active-supervision requirement, but that does not mean that every entity that has to satisfy *Midcal*'s active-supervision requirement is a private party or should be treated like one for any other purpose. Indeed, the core conclusion of *N.C. Dental* was that there are conditions under which

the active-supervision requirement should apply to "any nonsovereign entity—*public or private*." 574 U.S. at 510 (emphasis added). Accordingly, nothing about that decision would authorize or compel the courts to treat public bodies as private parties to any other end.

The Fifth Circuit's approach is also painfully circular. As explained above, the determination by the district court or agency that a state board like LREAB must meet the active-supervision requirement under *N.C. Dental* requires application of a relatively amorphous standard that raises many close and difficult questions. *See supra* p.6. Accordingly, as here, that determination will quite frequently be the very one the government entity wants to appeal. And yet the Fifth Circuit's appealability rule essentially assumes the correctness of the lower court's determination on this issue, with the result of blocking the government entity from appealing that question in the first place.

2. The Fifth Circuit's approach also seems to have fundamentally confused sovereign immunity with state-action immunity, suggesting in passing that because this case is "an action by the FTC rather than private litigation," that might present another reason why an immediate appeal should not be allowed. Pet. App. 10a. The court seems to have rooted that idea in the rule that sovereign immunity—an entirely different doctrine—does not apply to suits brought against the States by the federal government. *Id.* But this point has no application whatsoever to *Parker* immunity itself—which is based on the principle that federal antitrust law does not reach States and their agents and officers—and has even less to do with the collateral-order status of orders denying that immunity.

Taken seriously, it would mean that the FTC could apply the Sherman Act directly to the sovereign State of Louisiana, or could at least drag the State through an extended proceeding before the Commission, before the State could ever appeal that absurd proposition.

In truth, it is somewhat hard to understand the conclusion that this passing discussion is intended to reach. What it mostly demonstrates, however, is that the Fifth Circuit's rule is now hopelessly confounded and untethered from the straightforward application of collateral-order doctrine that should decide the question presented. Because petitioner asks this Court to adopt a simple rule that public entities ought to be allowed to immediately appeal denials of state-action immunity without qualification, a ruling for petitioner on the question presented would also clarify that this detour by the Fifth Circuit was mistaken.

IV. The Issue Presented Is Important.

It may not need saying given that this Court has already itself flagged this question as important enough to merit certiorari, but as the foregoing suggests, the practical stakes of this issue for both States and state entities like LREAB are enormous. The basic reality is that the disruptions to the proper functioning of government caused by the threat of antitrust suits are substantial, that a rule foreclosing immediate appeal on this issue makes such threats vastly more serious, and that losing an unappealable request for immunity will frequently impose heavy costs that government entities can ill-afford to bear.

What's worse is that the courts of appeals are awarding immediate appeals based on different rules,

such that the level of protection for state sovereign interests varies significantly depending on the circuit in which the State happens to be located. *See supra* pp.17-22. This circuit conflict therefore contravenes "[e]ach State's equal dignity and sovereignty under the Constitution." *Franchise Tax Bd. of Cal. v. Hyatt*, 139 S. Ct. 1485, 1497 (2019).

Moreover, because of this Court's grant in *Salt River*, it has the benefit of amicus briefing from that case to inform its decision here. And a review of those materials shows an issue of deep concern to many parties, bolstering the case for this Court's intervention. Most importantly, twenty-four States—joined by state and municipal government associations led by the National Governors Association—advocated for a state entity's right to immediately appeal.[5] On the other side, the United States, as a frequent prosecutor of antitrust violations, naturally opposed the right to an appeal, just as the FTC does here. *See generally* U.S. Br., *Salt River*, *supra* (No. 17-368). That this issue has drawn opposing positions from the States and the federal government on an issue at the heart of federalism and state sovereignty provides yet another compelling reason to grant review.

V. This Case Is a Suitable Vehicle to Finally Resolve the Question Presented.

While this case arises from an APA suit regarding an FTC order, rather than an appeal from a district court, that distinction makes no difference. The Fifth

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[5] *See generally* Tennessee et al. Amicus Br., *Salt River*, *supra* (No. 17-368); Nat'l Governors Ass'n et al. Br., *Salt River*, *supra* (No. 17-368).

Circuit, like other courts, recognized that the governing collateral-order doctrine is identical, and the case was in fact decided on that assumption. *See supra* p.13. Therefore, the question presented here and in *Salt River*—whether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine—can equally be answered under either scenario.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 19-30796

LOUISIANA REAL ESTATE APPRAISERS BOARD,
Plaintiff—Appellee,

versus

UNITED STATES FEDERAL TRADE COMMISSION,
Defendant—Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
3:19-CV-214

Filed October 2, 2020

Before JONES, ELROD, and HIGGINSON, *Circuit Judges*.
EDITH H. JONES, *Circuit Judge*:

This is an appeal of a district court order staying administrative proceedings that were initiated by appellant the Federal Trade Commission[1] against appellee the Louisiana Real Estate Appraisers Board (the "Board") pursuant to the Federal Trade Commission Act. Because the district court lacked jurisdiction, we

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[1] We refer to the FTC acting in its role as complaint counsel as the "FTC" and the FTC acting in its adjudicatory capacity as the "Commission."

vacate its stay order and remand with instructions to dismiss.

I. BACKGROUND

The Board is a state agency tasked with licensing and regulating commercial and residential real estate appraisers and management companies in Louisiana. La. Stat. Ann. §§ 37:3395; 37:3415.21. Each of the Board's ten members is appointed by the Governor and confirmed by the state senate, and members are removable by the Governor for cause. *Id.* § 37:3394. Of the ten members, eight must be "licensed as certified real estate appraisers." *Id.* § 37:3394(B)(1)(c), (b).

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires lenders to compensate fee appraisers "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised." 15 U.S.C. § 1639e(i)(1). In response, the Louisiana legislature amended its own law, the Appraisal Management Company Licensing and Regulation Act (the "AMC Act"), to require that appraisal rates be consistent with Section 1639e and its implementing regulations. *See* La. Stat. Ann. § 37:3415:15(A). The legislature also gave the Board the authority to "adopt any rules and regulations in accordance with the [Louisiana] Administrative Procedure Act necessary for the enforcement of [the AMC Act]." *Id.* § 37:3415.21.

Accordingly, the Board adopted Rule 31101, requiring that licensees "compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised and as prescribed by La. Stat. Ann.

§ 34:3415.15(A)." La. Admin. Code tit. 46 § 31101. Unlike the federal regulations, which instruct that appraisal fees are "presumptively" customary and reasonable if they meet certain market conditions, Rule 31101 prescribed its own methods by which a licensed appraisal management company can establish that a rate is customary and reasonable. *Compare id.*, *with* 12 C.F.R. § 226.42(f)(2), (3).

In 2017, the FTC filed an administrative complaint against the Board, asserting the Board had engaged in "concerted action that unreasonably restrains trade" in violation of the FTC Act's prohibition on unfair methods of competition. The complaint alleged Rule 31101 "unlawfully restrains competition on its face by prohibiting [appraisal management companies] from arriving at an appraisal fee through the operation of the free market." The FTC also alleged that the Board's enforcement of Rule 31101 unlawfully restrained price competition. In response, the Board denied the FTC's allegations and argued that it was entitled to immunity from antitrust liability under the state action doctrine.

Following the FTC's initiation of proceedings against the Board, the Governor of Louisiana issued an executive order purporting to enhance state oversight of the Board. The Board also revised Rule 31101 in accordance with the Governor's executive order. Based on those changes, the Board moved to dismiss the FTC's complaint in the administrative proceedings, arguing that the executive order and revision of Rule 31101 mooted the FTC's claims. The same day, the FTC cross-moved for summary judgment on the Board's state action immunity defense. On April 10, 2018, the Commission denied the Board's motion and

granted the FTC's, rejecting the Board's assertion of state action immunity.

The Commission has not issued a final cease and desist order, but the Board has twice challenged the April 10, 2018 order in federal court to claim immunity. First, in late April, the Board petitioned this court directly for review of the Commission's order. In a published opinion, this court dismissed the petition for lack of jurisdiction. *La. Real Estate Appraisers Bd. v. F.T.C.*, 917 F.3d 389, 393 (5th Cir. 2019) (*LREAB I*). Second, and relevant here, the day after this court denied the Board's petition for *en banc* rehearing, the Board sued the FTC in a federal district court, alleging the Commission's April 10, 2018 order violated the Administrative Procedure Act. The Board also moved to stay the ongoing Commission proceedings. The district court granted the Board's motion and stayed the Commission proceedings pending the resolution of the Board's APA claim. On appeal, the FTC principally contends that the district court lacked jurisdiction.

II. DISCUSSION

We review questions of jurisdiction *de novo*, with the "burden of establishing federal jurisdiction rest[ing] on the party seeking the federal forum." *Gonzalez v. Limon*, 926 F.3d 186, 188 (5th Cir. 2019).

The FTC contends the district court lacked jurisdiction over the Board's lawsuit because the FTC Act vests exclusive jurisdiction to review challenges to Commission proceedings in the courts of appeals. 15 U.S.C. § 45(d) ("Upon the filing of the record with it the jurisdiction of the court of appeals of the Unites States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."). The Board

counters that the district court had jurisdiction pursuant to the APA's default review provision, 5 U.S.C. § 704, regardless of the FTC Act's judicial review scheme. We agree with the FTC that the district court lacked jurisdiction but for a different reason: Even if the FTC Act does not preclude Section 704 review—an issue we need not address—the Board fails to meet Section 704's jurisdictional prerequisites.[2]

Section 704 of the APA permits non-statutory judicial review of certain "final agency action." 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review."). Absent a showing of finality, a district court lacks jurisdiction to review APA challenges to administrative proceedings. *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999). Here, the Board relies on the collateral order doctrine as an expansion of the finality requirement of Section 704. Because the April 10, 2018 order meets the doctrine's predicates, the Board contends, the order should be treated as final and subject to challenge under the APA. The FTC disagrees with this approach, and so do we.

The collateral order doctrine is a judicially created exception to the "final decision" requirement of 28 U.S.C. § 1291, which governs appellate jurisdiction

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[2] The Board also argues we lack jurisdiction over the merits of the FTC's appeal, but because the district court lacked jurisdiction, we do not address the merits. *See Arizonians for Official English v. Arizona*, 520 U.S. 43, 73, 117 S. Ct. 1055, 1072 (1997) (recognizing that when a district court "lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the [matter]").

over appeals of final district court decisions. *See Exxon Chemicals Am. v. Chao*, 298 F.3d 464, 469 (5th Cir. 2002). The doctrine provides that an interlocutory decision is immediately appealable "as a final decision under § 1291 if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 290 (5th Cir. 2000). This court has recognized that "the requirement of 'final agency action' in [Section 704]" is analogous "to the final judgment requirement of 28 U.S.C. § 1291." *Am. Airlines*, 176 F.3d at 288; *see also LREAB I*, 917 F.3d at 392 ("[C]ourts have recognized that the [APA's] 'final agency action' requirement is analogous to § 1291's 'final decision' requirement.").[3] We assume arguendo that equating finality under Sections 1291 and 704 imports the collateral order doctrine into the Section 704 analysis.[4] Nevertheless, the Board fails to show that the Commission's interlocutory denial of state action immunity in this case

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[3] Other circuits concur. *See, e.g.*, *Chehazeh v. Attorney Gen.*, 666 F.3d 118, 135 (3d Cir. 2012) ("A provision analogous to Section 704's 'final agency action' requirement is found in 28 U.S.C. § 1291, which permits appellate review only of 'final decisions' of a district court."); *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212, 1220 (D.C. Cir. 1996) (Ginsburg, J., concurring) ("Our analysis of the finality requirement imposed by the APA is properly informed by our analysis of that requirement in § 1291.").

[4] Note that this is a significant theoretical stretch, as it (a) means the appeal to the district court of an interlocutory order under the APA, which normally requires "final" agency action, and (b) supersedes the FTC Act's direction of appeals to the courts of appeals.

meets the doctrine's requirements. As to the first prong of the doctrine, there is no dispute that the Commission's rejection of state action immunity was "conclusive." Problems arise concerning the second prong, whether the issue of state action immunity is "completely separate from the merits" of the FTC's antitrust action, and the third prong, whether the decision is "effectively unreviewable on appeal."

The parties square off in differing interpretations of our case law that has applied the collateral order doctrine to denials of claims of state action immunity. To begin our analysis, however, the background of the substantive issues must be briefly recapitulated. "The state action doctrine was first espoused by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 [] (1943) as an immunity for state regulatory programs from antitrust claims." *Acoustic Systems*, 207 F.3d at 292. In *Parker*, the Court considered whether a state statute that authorized state officials to issue regulations restricting certain agricultural competition violated antitrust law. 317 U.S. at 350–51, 63 S. Ct. at 313–14. The Court found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* Accordingly, the Court concluded that state regulatory programs cannot violate the Sherman Act because the "Act makes no mention of the state as such, and gives no hint that it was intended to restrain

state action or official action directed by a state."[5] *Id.* at 351.

"In subsequent cases, the Court extended the state action doctrine to cover, under certain circumstances, acts by private parties that stem from state power or authority . . . as well as acts by political subdivisions, cities, and counties." *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1397 (5th Cir. 1996) (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937 (1980); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713 (1985)). But immunity for such actors is not automatic because they are not sovereign.[6] *Id.* Rather, to invoke state action immunity, private parties must meet two requirements set forth in *Midcal*. First, "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." *Patrick v. Burget*, 486 U.S. 94, 100, 108 S. Ct. 1658, 1663 (1998) (quoting *Midcal*, 445 U.S. at 105, 100 S. Ct. at 943).

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[5] The state action analysis applies to FTC actions as well as to federal antitrust litigation. *See F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 112 S. Ct. 2169, 2177 (1992) (applying the state action analysis in a case arising only under the FTC Act). We also note that, although "the state action doctrine is often labeled an immunity, that term is actually a misnomer because the doctrine is but a recognition of the limited reach of the Sherman Act . . . ." *Acoustic Sys.*, 207 F.3d at 292 n.3. Consistent with our prior opinions, however, we continue to refer to the doctrine as one of immunity. *See generally Veritext Corp. v. Bonin*, 901 F.3d 287 (5th Cir 2018).

[6] "For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself." *N.C. St. Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494, 505, 135 S. Ct. 1101, 1111 (2015). Pardon the circularity of this direct quotation.

Second, "the anticompetitive conduct must be actively supervised by the state itself." *Id.* Municipalities and other political subdivisions need only satisfy the first *Midcal* prong; they need not show active supervision. *Town of Hallie*, 471 U.S. at 45–46, 105 S. Ct. at 1720.

Following this framework, this court has twice addressed whether the collateral order doctrine authorizes interlocutory appeals from a district court's denial of state action immunity. In *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1396–97 (5th Cir. 1996), this court held that "the denial of a state or state entity's motion for dismissal or summary judgment on the ground of state action immunity" is immediately appealable. The defendant was a municipal hospital, which this court ultimately held immune under the state action doctrine. Drawing an analogy with principles that animate interlocutory appeals of government officials' claims of absolute or qualified immunity, or the Eleventh Amendment, this court reasoned that making a "state or state entity" go to trial to claim immunity renders the defense effectively unreviewable on appeal. *Id.* at 1396–97.

In *Acoustic Systems,* however, we clarified that *Martin's* extension of the collateral order doctrine was limited "to the denial of a claim of state action immunity 'to the extent that it turns on whether a *municipality* or *subdivision* [of the state] acted pursuant to a clearly articulated and affirmatively expressed state policy.'" *Acoustic Systems, Inc. v. Wenger,* 207 F.3d 287, 291 (5th Cir. 2000) (quoting *Martin*, 86 F.3d at 1397). The defendant in *Acoustic Systems* was a private party whose status did not implicate the concerns underlying other immunity doctrines. Therefore, although the defendant could invoke the state action

doctrine as a defense to liability, it could not obtain interlocutory review of the issue to avoid suit. *Id.* at 293–94. Likewise, because a defense to liability is effectively reviewable on direct appeal, the denial of state action immunity to a private party "is not an immediately reviewable collateral order." *Id.*

Neither *Martin* nor *Acoustic Systems* fits this case. In neither of those cases was the collateral order doctrine being invoked as an appendage to APA Section 704, thus neither case involved interlocutory interference with an ongoing federal regulatory proceeding. Further, in each case, applying the Supreme Court's test for state action immunity was relatively straightforward: *Martin* rested on *Town of Hallie,* 471 U.S. at 45-46, 105 S. Ct. at 1720 (holding that municipal entities, though not sovereign, may avail themselves of the immunity if their actions spring from governing state authority); Wenger, the *Acoustic Systems* defendant, could only rely on private party immunity pursuant to *Midcal*'s two-part test.

Here, the jurisdictional issue is more complex, as it concerns both an action by the FTC rather than private litigation, and it involves the Supreme Court's comparatively recent decision in *North Carolina State Board of Dental Examiners v. F.T.C.*, 574 U.S. 494, 135 S. Ct. 1101 (2015).

Taking the Supreme Court case first, apprehension over placing private practitioners in regulatory agencies constituted like this Board animated *Dental Examiner*'s application of the *Midcal* test. The Court explained that "[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private

anticompetitive motives in a way difficult even for market participants to discern." *Id.* at 504. Hence, it was necessary to apply *Midcal's* active supervision prong, which "demands 'realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.'" *Id.* at 507 (quoting *Patrick*, 486 U.S. at 101, 108 S. Ct. at 1663).

The Board nevertheless argues that it is entitled to immunity from suit as a state agency, not a "purely private part[y]." But the Court has rejected such a "purely formalistic inquiry." *See Town of Hallie*, 471 U.S. at 39, 105 S. Ct. at 1716. Instead, in *Dental Examiners*, the Court distinguished "specialized boards dominated by active market participants" from "prototypical state agencies" because of the private incentives inherent in their structure. *Id.* at 511. Such "agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority . . . ." *Id.* Thus, while the Board may rightly defend its entitlement to state action immunity, it invokes the state action doctrine as a private party. *See also S.C. St. Bd. of Dentistry v. F.T.C.*, 455 F.3d 436, 439 (4th Cir. 2006); S*mileDirectClub, LLC v. Battle*, No. 19-12227, 2020 WL 4590098, at *11 (11th Cir. 2020) (Jordan, J., concurring) ("Even if we assume that a state is able to immediately appeal the denial of *Parker* immunity, an interlocutory appeal should not be available to private parties like the members of the Georgia Board of Dentistry, whose status does not implicate sovereignty concerns.").

As a private party, the policy imperatives behind relieving the Board from suit as well as liability do not

apply. *See Acoustic Systems,* 207 F.3d at 292–94. To summarize, the collateral order doctrine must be deployed narrowly and "with skepticism," and state action immunity, in particular, though it may extend to private parties, exists principally to secure the full scope of political activity for *state* actors. *Id. Dental Examiners* has intensified our skepticism of allowing an interlocutory appeal. This court aptly stated, in reference to the state action "immunity" doctrine, that "[t]he price of the shorthand of using similar labels for distinct concepts is the risk of erroneous migrations of principles." *Surgical Care Center of Hammond, LC v. Hospital Serv. Dist.,* 171 F.3d 231, 234 (5th Cir. 1999) (en banc).

Another reason for rejecting the Board's quest for collateral review is that this regulatory case was initiated by the FTC. Even if the Board were a sovereign actor, it is paradigmatic that "[s]tates retain no sovereign immunity as against the Federal Government." *West Virginia v. United States*, 479 U.S. 305, 312 n.4, 107 S. Ct. 702, 707 n.4 (1987); *see also Bd. of Dentistry*, 455 F.3d at 447 (rejecting collateral order appeal of a *Parker* immunity claim in a suit brought *by* the federal government; "because such suits do not offend the dignity of a state, sovereign immunity is no defense to such an action").

In sum, case law does not support jurisdiction based on the collateral order doctrine as applied through Section 704 of the APA. Specifically, the second and third prongs of the doctrine are not satisfied here. *Parker* immunity concerns the boundaries of federal antitrust law set against the principles of federalism and the states' authority over their economies. This court explained, "[w]hile thus a convenient

shorthand, '*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation." *Surgical Care Center,* 171 F.3d at 234. In this case, where the FTC challenges aspects of rate setting by the Board as restraining price competition, and the FTC rejects the sufficiency of overarching governmental supervision, an interlocutory ruling on state action immunity by this court would inevitably affect the question of liability. The issues relevant to immunity in this case pertain to the reach of the Sherman Act, consequently, a judicial decision at this point would not resolve an issue "completely separate from the merits of the action," as required by the second prong of the collateral order doctrine. *Acoustic Systems*, 207 F.3d at 290. Nor, obviously, is the state action immunity issue "effectively unreviewable on appeal from a final judgment." *Id.*;[7] *see N.C. State Bd. of*

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[7] The Board relies perfunctorily on a finality test articulated in *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154 (1997). *Bennett* pronounced two conditions that "must be satisfied for an agency action to be 'final'": (1) the action must "mark the consummation of the agency's decision making process," and (2) the action must be that "by which rights or obligations have been determined or from which legal consequences will flow." 520 U.S. at 177–78, 117 S. Ct. at 1168. The Board argues that the April 10, 2018 order is "independently reviewable as a 'final' order under the test articulated in *Bennett*" because the order "reflects a consummation of the decision making process" from which "legal consequences will flow, including [the Board's] legal right to immunity from trial." This is incorrect. Not only is the Board not entitled to immunity from suit, but the Commission's denial of state action immunity will affect the Board adversely only if the Commission ultimately finds the Board liable for antitrust violations. Put differently, the April 10, 2018 order "does not itself adversely affect [the Board]

Dental Exam'rs, 717 F.3d 359, 366 (4th Cir. 2013) (considering the applicability of state action immunity in a petition for review), *aff'd*, 574 U.S. 494 (2015).

For the foregoing reasons, the April 10, 2018 order does not constitute final agency action under Section 704, and the collateral order doctrine does not apply. Consequently, the district court lacked jurisdiction over the Board's lawsuit.

III. CONCLUSION

We **VACATE** the district court's stay order and **REMAND** with instructions to **DISMISS** the Board's lawsuit for lack of jurisdiction.

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but only affects [its] rights adversely on the contingency of future administrative action." *Am. Airlines*, 176 F.3d at 288 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130, 59 S. Ct. 754, 757 (1939)). The April 10, 2018 order does not constitute final agency action under *Bennett*.

APPENDIX B

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

LOUISIANA REAL ESTATE APPRAISERS BOARD

VERSUS

UNITED STATES FEDERAL TRADE COMMISSION

CIVIL ACTION
NO.:19-CV-00214-BAJ-RLB

RULING AND ORDER

Before the Court is Petitioner's **Motion to Stay Administrative Proceedings (Doc. 9-1 at p. 1).** Defendants oppose this motion. (Doc. 23-2). Oral argument is not required. For the reasons stated herein, Petitioner's motion is GRANTED.

I. BACKGROUND

This matter arises from allegations that the United States Federal Trade Commission ("FTC" or "Defendant") is unlawfully attempting to force the Louisiana Real Estate Appraisers Board ("Board" or "Petitioner") to undergo federal antitrust enforcement proceedings. (Doc. 1 at ¶ 1). The Board is a state governmental regulatory agency empowered to regulate appraisal management companies which secure appraisals that support residential mortgage transactions. *See* La. Stat. Ann. § 37:3394, *et seq.* (Doc. 9-1 at p. 3). The Board is also empowered to collect

"customary and reasonable" fees for the agents of mortgage lenders. (*Id.*).

On or about May 30, 2017, the FTC filed an administrative complaint against the Board, alleging that setting certain "customary and reasonable" fees for mortgage lenders' agents violated certain federal antitrust rules (Doc. 1 at par. 4). In particular, the FTC alleges that the Board is controlled by active market participants, not the state, and that the manner in which fees are set amounts to unlawful price fixing. (Doc. 1 at ¶ 4). In response to the complaint, the Governor's Office issued Executive Order 17-16, which repromulgated the manner in which fees are fixed.[1] The Board moved for a dismissal of the administrative complaint based on its assertation that the alleged impropriety identified by the FTC had been rectified. (*Id.*). The Board claimed that all branches of Louisiana government accepted a supervisory role and "political accountability" for the alleged anti-competitive practices cited by the FTC, as required under *N.C. S. Ed. of Dental Exam'rs v FTC,* 135 S.Ct. 1101, 1111 (2015), and that it is therefore entitled to be relieved from participation in the administrative proceedings on the basis of the "state-action immunity" defense. (Doc. 1 at ¶ 5). State-action immunity from suit is applicable when a state establishes that anticompetitive conduct is created, overseen, and guided by the state, without the influence or control of parties who have not been conferred regulatory powers by the state. *F.T.C. v. Phoebe Putney Health Sys., Inc.,* 568 U.S. 216, 225 (2013). To qualify for state-action immunity, a state must establish that the anticompetitive act is a clearly

[1] La. Admin. Code tit. 46 § 31101.

articulated state policy, and that such activity is actively supervised by the state.[2] (Id.).

On April 10, 2018, the FTC issued an order ("FTC Order") rejecting the Board's state-action immunity defense. (*Id.* at ¶ 6). The Board then filed a lawsuit requesting that the Court set aside the FTC Order on the grounds that it was issued in an arbitrary and capricious manner. (*Id.* at ¶ 9).

Initially, the Board filed a petition for review of the FTC Order before the United States Court of Appeals for the Fifth Circuit, claiming that the FTC Order was an appealable collateral order under the FTC Act.[3] (Doc. 9-1 at p. 14). The Fifth Circuit granted the Board's request to stay administrative proceedings pending appellate review, but ultimately found that the FTC Act did not allow direct appeals from collateral orders. (*Id.*). The Fifth Circuit opined that the "final agency action" language of the Administrative Procedure Act ("APA"')[4] may allow a district court to review the FTC Order prior to the final administrative adjudication of the action. *Louisiana Real Estate Appraisers Ed. v. Fed. Trade Comm'n*, 917 F.3d 389, n.3

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[2] "Maintaining state-action immunity from administrative proceedings requires more than a mere facade of state involvement, for it is necessary ... to ensure the States accept political accountability for anticompetitive conduct they permit and control." *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1111 (2015).

[3] 15 U.S.C. § 45 provides "Any person, partnership, or corporation required by an order of the [Federal Trade] Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States.

[4] 5 U.S.C. § 551, *et seq.*

(5th Cir. 2019). Following the Fifth Circuit ruling, the Board moved for rehearing *en banc*, and urged the FTC to stay its administrative proceeding pending a resolution of the petition. (Doc 9-1 at p. 14.). The Fifth Circuit denied rehearing, and the FTC denied Petitioner's request to stay the administrative proceedings. (*Id.*). The Board now seeks relief under the APA to stay the FTC administrative proceedings until such time as this Court completes a review of the merits of the FTC Order. (Doc. 1).

II. LEGAL STANDARD

A. Jurisdiction

The Code of Federal Regulations gives the FTC and a court of competent jurisdiction the power to stay an administrative proceeding. 16 C.F.R. § 3.41(f)(1)(i). Additionally, Section 705 of the APA allows a reviewing court to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

The Supreme Court of the United States found that the term "court of competent jurisdiction" is any state or federal court already endowed with subject-matter jurisdiction over the suit." *Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 561 (2017).

B. Administrative Procedure Act

The APA provides:

> [a]gency action[s] made reviewable by statute[,] and final agency action[s] for which there is no other adequate remedy in a court[,] are subject to judicial review. A preliminary, procedural, or intermediate agency action or

> ruling not directly reviewable is subject to review [only] on the review of the final agency action. 5 U.S.C. § 704.

Thus, under normal circumstances, agency actions are only reviewable at such time as the agency action is finalized. (Id.).

C. Appeal from a Collateral Order

The Supreme Court has recognized a narrow exception under the APA for the review of administrative decisions which have not yet been made final but for which justice requires interlocutory review. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). This narrow exception allows collateral reviews of administrative orders that (1) conclusively determine the disputed question, (2) resolve an important issue separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment. (Id.).

D. Stay Factors

To grant a stay of an administrative proceeding, a court must consider (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. *Hilton v. Braunshill*, 481 U.S. 770, 776 (1987).

III. DISCUSSION

This Court is a "court of competent jurisdiction" pursuant to the Supreme Court's ruling in *Lightfoot*, and thus, has jurisdiction to consider this matter. Further, federal question jurisdiction under 28 U.S.C.

§ 1331 is applicable here. Having established that the Court *may* issue a stay of the administrative proceeding, the Court now turns to whether doing so is warranted in this case.

A. The FTC Order is Appealable

When this matter was reviewed by the Fifth Circuit, that Court opined that the test set forth in *Cohen* is applicable to some administrative decisions that dismiss certain affirmative defenses, but do not end the litigation. *Louisiana Real Estate Appraisers Bd. v. Fed. Trade Comm'n,* 917 F.3d 389, 392 (5th Cir. 2019). The Fifth Circuit ultimately concluded that the FTC Act only provided courts of appeals with jurisdiction to review "cease and desist" orders. However, it left open the door for Petitioner to bring a claim in the district court by appealing the FTC Order under the APA (*Id.* at n. 3). The FTC claims that this Court does not have jurisdiction under the APA because the FTC Order was not a "final agency action." (Doc. 22-3 at pp. 5-6).

This Court's jurisdiction under the APA is not limited to "cease and desist" orders; rather, the Act allows challenges to "agency action[s] made reviewable by statute and final agency action[s] for which there is no other adequate remedy [...]" 5 U.S.C. § 704. Therefore, should this Court find that the challenged agency action meets the test set forth in *Cohen,* an interlocutory ruling may be entered in the case. The Court will now consider each of the *Cohen* factors in turn.

1. Did the FTC Order Conclusively Determine the Disputed Question of Petitioner's Immunity from Administrative Action?

The FTC Order completely bars Petitioner's state-action immunity defense. (Doc. 9-2 at pp. 25). Although this denial was not dispositive of the entire case, the Fifth Circuit has ruled that there is no requirement that the challenged decision be the final decision in the entire case. Because the FTC Order conclusively answers the question of whether Petitioner is entitled to immunity from the FTC's administrative proceedings, the Court finds that Petitioner has established the first of the *Cohen* requirements.

2. Did the FTC Order Resolve an Important Issue Separate from the Merits of the Underlying Action?

The FTC Order only addresses two of Petitioner's many affirmative defenses and does not involve all of the merits of the underlying case. Because the FTC Order is severable from the rest of the case, the Court finds that Petitioner has established the second of the *Cohen* requirements.

3. Is the Denial of Immunity Unreviewable on Appeal from the Final Judgment?

In *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985), the Supreme Court found that the denial of qualified immunity was similar to the denial of absolute immunity, and that both are effectively lost if a case is erroneously allowed to proceed to trial. As noted, the Supreme Court reasoned that because immunity involves the entitlement to not stand trial *at all* under certain circumstances, should the case erroneously

proceed to trial, such privilege would already have been lost and is inherently unrecoverable. (*Id.*). Here, the FTC Order dismissed the Board's immunity defense, similar to the defense presented in *Mitchell.* Accordingly, petitioner has established the third and final *Cohen* factor.

B. The Court Shall Stay the Administrative Proceeding

Having satisfied the jurisdictional prerequisites, the Court must now consider the four "stay factors" set forth in *Hilton,* 481 U.S. at 776. The FTC claims that Petitioner cannot meet any of the *Hilton* factors. (Doc. 22-3 at pp. 11-19). The Court will nonetheless consider each factor in turn.

1. The Likelihood of Success on the Merits

To assess the likelihood of success on the merits of a claim, the Court must consider the standards of the substantive laws applicable to the matter. *Janvey v. Alguire,* 647 F.3d 585, 596 (5th Cir. 2011). The Board asserts that the question of whether a state may maintain state-action immunity is whether the state will accept "political accountability for the anticompetitive conduct they permit and control." *Dental Exam'rs*, 135 S.Ct. at p. 1111. The Board claims that it has made a strong showing that Louisiana's legislative and executive branches have accepted political responsibility for changing the challenged anti-competitive conduct. (Doc. 23-2 at p. 7). The Board points to its own opening brief wherein it asserted that the State of Louisiana purposefully set uniform fees, and that the conduct identified by the FTC has been rectified through legislative, executive, and judicial oversight. (*Id.*).

Without reaching the merits of this matter, the Court finds that the Board has made an acceptable showing that the State has exercised sufficient oversight over, and accepted responsibility for, the actions identified by the FTC. The first *Hilton* factor has been established.

2. Irreparable Injury Absent a Stay

The Board argues that should a stay not be granted, its immunity from administrative proceedings would be lost, at which point the harm would be impossible to redress post trial. (Doc. 23-2 at p. 6). The Board further argues that disallowing the stay would cause harm to the State by distracting state officials and curtailing Louisiana's ability to make and enforce policies that it deems beneficial and that are responsive to the FTC's claims. (*Id.*).

The Court agrees, and finds that the abrogation of immunity itself, if improvidently done, may cause irreparable harm by forcing the State to engage in activities from which it might otherwise be protected, such as an unlawful enforcement order. The second *Hilton* factor has been met.

3. Substantial Injury to the Public or Other Parties Interested in the Proceedings

The Board contends that no party will be harmed if the Court grants the stay, as it will refrain from enforcing La. Admin. Code tit. 46 § 31101 until the issue of state-action of immunity is resolved by the Court. (Doc. 23-3 at pp. 8-9). It further claims that granting the stay will benefit Louisiana and its citizens by ensuring that Louisiana laws and regulations are appropriately enforced. (*Id.* at p. 9). The Board further argues that should the Court deny the stay, the principles of

federalism that underlie the purpose of state-action sovereignty would be eroded, and would negatively impact Louisiana's ability to regulate its own markets, to the determent of its citizens. (*Id.* at p. 9).

The Court agrees that no substantial injury to the public or other parties would result if this matter is stayed. Also, the Court recognizes that an unnecessary trial would hamper State officials' efforts to conduct the normal daily responsibilities of their offices, to the detriment of the State. The Court further finds that the arguments presented by the Board concerning the public interests in granting the stay are valid. Petitioner has established the third and fourth *Hilton* factors.

IV. CONCLUSION

Accordingly,

IT IS ORDERED that Petitioner's **Motion to Stay Administrative Proceedings (Doc. 9-1 at p. 1) is GRANTED.**

IT IS FURTHER ORDERED that all pending activity in the matter captioned *In the Matter of the Louisiana Real Estate Appraisers Board*, Dkt. No. 9374 (F.T.C.) is hereby **STAYED** until further order of this Court.

Baton Rouge, Louisiana, this 29th day of July, 2019.

s/_____
JUDGE BRIAN A. JACKSON
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30796

LOUISIANA REAL ESTATE APPRAISERS BOARD,
Plaintiff—Appellee,

versus

UNITED STATES FEDERAL TRADE COMMISSION,
Defendant—Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:19-CV-214

December 4, 2020

Before JONES, ELROD, and HIGGINSON, *Circuit Judges*.
EDITH H. JONES, *Circuit Judge*:

PER CURIAM:

IT IS ORDERED that the appellee's opposed motion to stay the issuance of the mandate pending disposition of Louisiana Real Estate Appraisers Board's petition for certiorari is DENIED.

IT IS FURTHER ORDERED that the appellee's opposed alternative, motion to stay the Federal Trade Commission proceeding pending the disposition of a petition for writ of certiorari is DENIED.

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 19-30796

LOUISIANA REAL ESTATE APPRAISERS BOARD,
Plaintiff—Appellee,

versus

UNITED STATES FEDERAL TRADE COMMISSION,
Defendant—Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:19-CV-214

December 1, 2020

ON PETITION FOR REHEARING AND
REHEARING EN BANC

(Opinion October 2, 2020, 5 CIR., ____, ____ F.3D ____)

Before JONES, ELROD, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

(X) The Petition for Rehearing is DENIED and no member of this panel nor judge in regular active service on the court having requested that the court be polled on Rehearing En Banc, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) The Petition for Rehearing is DENIED and the court having been polled at the request of one of the members of the court and a majority of the judges who are in regular active service and not disqualified not having voted in favor, (FED. R. APP. P. AND 5TH CIR. R. 35) the Petition for Rehearing En Banc is also DENIED.

( ) A member of the court in active service having requested a poll on the reconsideration of this cause En banc, and a majority of the judges in active service and not disqualified not having voted in favor, Rehearing En Banc is DENIED.

s/_____
Edith H. Jones
United States Circuit Judge