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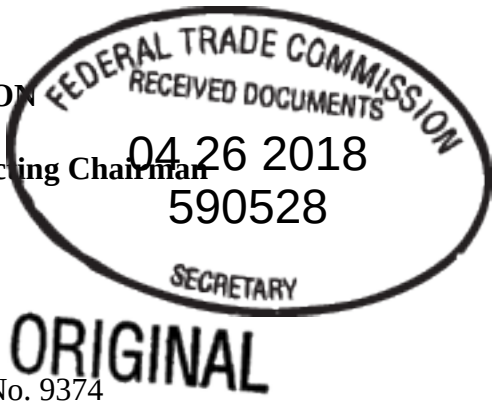


**UNITED STATES OF AMERICA**
**BEFORE THE FEDERAL TRADE COMMISSION**

**COMMISSIONERS:** **Maureen K. Ohlhausen, Acting Chairman**
**Terrell McSweeny**

ORIGINAL

**In the Matter of**

Louisiana Real Estate Appraisers Board,
Respondent

Docket No. 9374

**COMPLAINT COUNSEL'S OPPOSITION TO RESPONDENT'S MOTION TO STAY PROCEEDINGS PENDING APPELLATE REVIEW**

Respondent's Motion seeks a stay that would prevent the parties from completing a limited amount of expert discovery and other pre-trial tasks, while Respondent seeks immediate review of the Commission's April 10, 2018 Opinion and Order ("Order"). The Order granted partial summary decision in Complaint Counsel's favor on Respondent's third and ninth affirmative defenses, and denied Respondent's motion to dismiss the Complaint as "moot." Order at 15, 20-21. Respondent's Motion should be denied because the Commission's Order is not subject to interlocutory appellate review under the collateral order doctrine. Further, this case is far advanced, and a stay would simply delay a limited amount of final pretrial procedures without any good cause.

## ARGUMENT

### A. The Commission's Order is Not an Immediately Appealable Collateral Order

The collateral order doctrine is a narrow and disfavored doctrine under which Courts of Appeal can take jurisdiction to immediately review a "small class" of collateral orders that "finally determine claims of right separable from, and collateral to, rights asserted in the

action."[1] The Commission's Order does not fit within the narrow parameters of the collateral order doctrine. First, Respondent never filed, and therefore the Commission never decided, a motion that "finally determine[d]" whether all of Respondent's challenged conduct is exempt from antitrust scrutiny due to the state action exemption. In fact, and contrary to Respondent's arguments (Motion at 2), Respondent never moved to dismiss the Complaint or obtain summary decision based on the state action doctrine. Instead Respondent "moved to dismiss the Complaint as moot," arguing that Respondent's conduct after certain 2017 administrative changes was exempt from antitrust scrutiny under the state action doctrine. Order at 2, 6-14.[2] Even if the Commission had accepted this argument, it would not have "finally determine[d]" the Complaint's allegations regarding Respondent's conduct *before* the 2017 administrative actions.[3]

Nor is the Commission's grant of partial summary judgment to Complaint Counsel with respect to Respondent's third and ninth affirmative defenses an appealable case-dispositive

[1] Brief for the United States as Amicus Curiae, *Salt-River Project v. SolarCity Corp.*, No. 17-368 (Feb. 2018) (attached as Ex. 1) at 14 (quoting *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949)) (hereinafter, "*Salt-River Project* Amicus").

[2] *See* Order at 8 ("We conclude that the Board has not shown that the reissuance and enforcement of Rule 31101 have been and will be actively supervised, and, thus, the Board has not met its burden to demonstrate mootness."). Respondent provides neither precedent nor reasoned argument suggesting that a decision rejecting a mootness defense is an appealable collateral order, and Complaint Counsel is aware of none.

[3] Respondent's Motion to Dismiss argued that the "replacement rule," promulgated in 2017 conferred an exemption from antitrust liability because it satisfied the "active supervision" requirement. *See, e.g.*, Mem. of Points and Authorities In Support of Motion of Respondent Louisiana Real Estate Appraisers Board to Dismiss the Complaint (Nov. 27, 2017) at 20 ("These levels of . . . review of Replacement Rule 31101 more than satisfy the requirements for active supervision under *Midcal* and *N.C. Dental*, and demonstrate that the review of Replacement Rule 31101 met the test for active supervision."); *id.* at 14 (the "promulgation and implementation of ***replacement*** Rule 31101 are immune from antitrust liability under the state action doctrine."). Respondent did not argue that the pre-2017 regulatory regime (the "Prior Rule") was exempt from antitrust liability. Instead it argued that the case is moot because "the Board has repealed Prior Rule 31101, terminated or vacated any pending enforcement actions conducted under Prior Rule 31101, and eliminated all potential future effects from the Prior Rule." *Id.* at 22.

determination.[4] Respondent never filed a motion that would have precluded trial based on these defenses. The Commission decided the issue on Complaint Counsel's motion for partial summary decision on these two affirmative defenses. Thus, even if the Court of Appeals were to reverse the Commission's Order, trial would still proceed, with Complaint Counsel and Respondent submitting evidence on the issues. For these reasons, Respondent errs when it suggests that the Order constitutes "a denial of [*Parker v. Brown*] immunity [that] is appealable under the collateral order doctrine." Motion at 3.

Moreover, even if Respondent correctly construed the Order as a final determination of the state action question, immediate appeal under the collateral order doctrine would be inappropriate because the Commission has repeatedly made it clear that "an order determining that the conduct of a public entity is not state action beyond the reach of the Sherman Act does not qualify for immediate appeal under the collateral order doctrine."[5] Most Circuits have endorsed the Commission's position. Notably, in *S.C. State Bd. of Dentistry v. F.T.C.*, 455 F.3d 436 (4th Cir. 2006) the Court of Appeals held that the Commission's order rejecting a dental board's state action defense may not be appealed immediately, reasoning: "Although it is undoubtedly less convenient for a party—in this case the Board—to have to wait until after trial to press its legal arguments, no protection afforded by [*Parker v. Brown*] will be lost in the

[4] *See* Order at 4 ("As relevant to these Motions, the Third Affirmative Defense states, "The Complaint fails adequately to allege that the Board has a controlling number of active participants in the relevant residential appraisal market" (emphasis omitted), and the Ninth Affirmative Defense states that the Board "is immune from federal antitrust liability under *Parker v. Brown*, 317 U.S. 341 (1943)."").

[5] Ex. 1 (*Salt-River Project* Amicus) at 12. *See also* Brief for the United States and the Federal Trade Commission as Amici Curiae, *Teladoc, Inc. v. Texas Med. Bd.*, No. 16-50017 (5th Cir.) (Sept. 9, 2016) at 13 (attached as Ex. 2) (hereinafter, "*Teladoc* Amici"); Brief for the United States and the Federal Trade Commission as Amici Curiae, *Aurora Student Housing at the Regency, LLC, v. Campus Village Apartments*, No. 11-1569 (10th Cir.) (April 13, 2012) at 4 ("The collateral order doctrine . . . is narrow and does not apply to an order denying a motion to dismiss an antitrust claim under the 'state action' doctrine of *Parker v. Brown*, 317 U.S. 341 (1943).").

delay." 455 F.3d at 445. Respondent suggests a contrary rule applies in the Fifth Circuit, Motion at 3, citing *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). But the Commission rejected this suggestion in its *Teladoc* Amici brief, noting that *Martin* is wrongly decided, undermined by subsequent authority, and inapplicable to appeals taken by state regulatory boards. *See* Ex. 2 at 18-19 ("*Martin* should not be followed . . . because the analogy it drew between the state action doctrine and absolute, qualified, and Eleventh Amendment immunities is incorrect."); *id.* at 21 ("Nor should *Martin*'s application of the collateral order doctrine be extended to appeals taken by state regulatory boards . . . .").

**B. Respondent Has Not Demonstrated Good Cause to Stay the Proceedings**

Part 3 litigation can be stayed pending appellate review only for "good cause." *See* Rule 3.41(f); *In re Phoebe Putney Health System*, Dkt. No. D-9348, 152 F.T.C. 1035, 1035 (July 15, 2011). Respondent cannot show good cause here, as it identifies no cognizable interest threatened by the absence of a stay. Respondent suggests that a stay would "protect Louisiana's sovereign interests," Motion at 1, but this is not a cognizable justification. As discussed above, the Commission's consistent position on the scope of immediately appealable collateral orders pre-supposes that no State's "sovereign interest" provides an exemption from the *process* of antitrust litigation brought by the agencies charged with enforcing the federal antitrust laws. While the state action doctrine, under certain conditions, exempts state action from antitrust *liability*, the purpose of the doctrine is to "protect state regulatory prerogatives," not to protect a State's "dignitary interests" in immunity from suit.[6] Thus, "[u]nlike qualified or sovereign immunity, the state action doctrine does not create a right to avoid trial."[7] Respondent's incorrect

[6] Ex. 1 (*Salt-River Project* Amicus) at 29.

[7] Ex. 2 (*Teladoc* Amici) at 5; *id.* at 14 (quoting *S.C. St. Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006) ("[*Parker v. Brown*, 317 U.S. 341 (1943)] construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.' *Parker* therefore

assertion that Louisiana's sovereign prerogatives require a stay of litigation during Respondent's appeal of a supposedly collateral order has been roundly rejected by the Commission and by Courts of Appeal, and does not constitute "good cause" to stay the Part 3 proceedings.

Apart from "sovereignty" considerations, the only interest Respondent identifies is its desire to avoid ordinary litigation expenses. This is insufficient to overcome the Commission's strong interest in completing these proceedings expeditiously, as the Commission already held when it denied Respondent's third and fourth requests for a stay on January 12, 2018, and February 16, 2018, respectively. The Commission rejected Respondent's requests for a stay, holding "[g]enerally, routine discovery costs do not outweigh the competing public interest in the efficient and expeditious resolution of litigated matters," and moreover "[i]n this instance, our concern for expedition is heightened by the fact that, as previously requested by Respondent, the presiding Administrative Law Judge and the Commission have already stayed this proceeding and delayed commencement of the evidentiary hearing by four months."[8]

Respondent's current request to stay the proceedings (its fifth)[9] should be denied for the same reason. Indeed, the potential for litigation expenses is an even more insubstantial concern at this stage of the litigation than it was when the Commission denied Respondent's motions in January and February. At this juncture, fact discovery and Respondent's expert reports have been

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recognizes a 'defense' qualitatively different from the immunities described in [*Will v. Hallock*, 546 U.S. 345 (2006)], which focus on the harms attendant to litigation itself.")).

[8] *See* Commission Order Denying Respondent's Expedited Motion to Stay Part 3 Administrative Proceedings and Move the Evidentiary Hearing Date ("Order Denying Stay") at 2 (Jan. 12, 2018); Commission Order Denying Respondent's Renewed Expedited Motion to Stay Part 3 Administrative Proceedings and Move the Evidentiary Hearing Date (Feb. 16, 2018) at 2 ("For the same reasons stated in our January 12 order, Respondent's renewed motion is denied.").

[9] *See* Respondent's Renewed Expedited Motion to Stay Part 3 Proceedings and Move the Evidentiary Hearing Date (Jan. 31, 2018); Respondent's Expedited Motion for a Stay (Jan. 11, 2018); Respondent's Motion for Stay (July 18, 2017); Joint Motion for Stay (Oct. 16, 2017) (joint motion at Respondent's request).

completed.[10] The only tasks that remain are expert depositions, Respondent's provision of its witness and exhibit lists, and the exchange of evidentiary objections and proposed pre-trial stipulations.[11]

### C. Granting Respondent's Request Would Cause Needless Delay

The parties will complete expert discovery and the exchange of pretrial disclosures and stipulations no later than May 24, 2018. A stay that prevents the parties from completing these tasks until after the resolution of Respondent's appeal of the Order would cause needless delay, contrary to the Commission's strong interest in resolving proceedings expeditiously.[12] Respondent ignores the potential for delay, apparently based on the erroneous assumption that Respondent's appeal of the Order could obviate the need for a trial. As discussed above, this assumption is not correct.

Moreover, Respondent's suggestion that the Part 3 proceeding will necessarily be stayed because the Court of Appeals will obtain "exclusive jurisdiction" is wrong. *See* Mot. at 1. Respondent cites 15 U.S.C. §45(c) and §45(d), which are the statutory avenues for appeal of final cease and desist orders. These provisions, by their terms, do not confer on the Court of Appeals "exclusive jurisdiction" over this interlocutory appeal, or any appeal that does not implicate a cease and desist order. *See* 15 U.S.C. §§45(c), (d).

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[10] Complaint Counsel's Rebuttal Expert Report will be served on April 30, 2018.

[11] Of course, the case would also no doubt involve limited briefing, such as pretrial briefs, motions *in limine*, and motions for *in camera* treatment. *See* Ex. 3 (Second Revised Scheduling Order).

[12] Rule 3.1 ("[T]he Commission's policy is to conduct [adjudicative] proceedings expeditiously."); Rule 3.41(b) ("Hearings shall proceed with all reasonable expedition ...."); Rules of Practice Amendments, 61 Fed. Reg. 50,640 (FTC Sept. 26, 1996) ("[A]djudicative proceedings shall be conducted expeditiously and . . . litigants shall make every effort to avoid delay at each stage of a proceeding.").

While the "collateral order doctrine" provides Courts of Appeal with jurisdiction to hear immediate appeals of a narrow class of orders that finally resolve certain claims, the doctrine does not import into such an appeal the elements of the statute governing appeals from final cease and desist orders. Rather, such an interlocutory appeal would be governed by Fed. R. App. Proc. 18, which does not provide for an automatic stay of the Part 3 proceeding. Instead the Rule requires Respondent to file a motion seeking a stay, and provide, *inter alia*, "the reasons for granting the relief requested and the facts relied on." Fed. R. App. Proc. 18(a)(2)(B)(i). As the trial date is set for October 15, 2018, Respondent (should it choose to do so) has sufficient time to move the Court of Appeals for a stay under Fed. R. App. Proc. 18. Moreover the Court of Appeals has a sufficient period to resolve the motion without risking a last-minute postponement of trial that could inconvenience witnesses and require the parties to needlessly re-do final trial preparations.

### D. If the Commission Determines a Stay is Warranted, It Should Make the Stay Effective May 18, 2018

Respondent also fails to acknowledge the risk that a stay could prejudice one party by interrupting the orderly process for pre-trial disclosures. In the event the Commission determines that a stay is warranted, the Commission should avoid making the stay effective on a date that would risk prejudicing one of the parties due to asymmetrical discovery or disclosures. The current Scheduling Order includes two salient deadlines in the coming weeks: on May 4 Respondent provides its final proposed witness and exhibit lists (Complaint Counsel provided its lists on April 20); and on May 17 the parties (a) complete expert depositions and exchange expert related exhibits, and (b) exchange and serve objections to final proposed witness lists and exhibit lists. *See* Ex. 3. Given these deadlines, any stay that takes effect prior to May 18 would risk prejudicing one of the parties. In particular, a stay that takes effect on or before May 4 would deny Complaint Counsel the benefit of Respondent's exhibit list and witness lists, which would

be asymmetric because Complaint Counsel provided its lists on April 20, per the Scheduling Order. And a stay that takes effect on or before May 17 would create a risk that one party's expert(s) would be deposed, but the other party's expert(s) would not be deposed for many months. The Commission can avoid the risk of prejudice by ensuring that any stay it deems warranted takes effect on May 18, 2018.[13]

## CONCLUSION

For the foregoing reasons, Respondent's request for a stay should be denied.

Dated: April 26, 2018

Respectfully submitted,

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[13] No risk of prejudice to third parties will result from a stay effective May 18, 2018. Third parties will receive notice of any confidential information the parties intend to use at the hearing on or before May 4. Under the current Scheduling Order, third parties' deadline for filing motions for in camera treatment falls on May 21. In the event the Commission determines a stay is warranted, any necessary alteration to this deadline and all other pretrial deadlines can be left to the sound discretion of the Administrative Law Judge.

# EXHIBIT 1

No. 17-368

# In the Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER

*v.*

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION

*ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT*

**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT**

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## QUESTION PRESENTED

Whether a public entity has the right to an immediate appeal under the collateral-order doctrine from a district court's determination that the entity's conduct is not state action beyond the reach of the Sherman Act, 15 U.S.C. 1 *et seq*.

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SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER

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**BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT**

## INTEREST OF THE UNITED STATES

This case presents the question whether the collateral-order doctrine permits immediate appeal of a district court's determination that the conduct of a public entity is not state action beyond the reach of the Sherman Act, 15 U.S.C. 1 *et seq*. The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and a strong interest in their correct application. As the Nation's most frequent litigator in federal court, the United States also has a strong interest in the correct application of the collateral-order doctrine. The United States, through the Department of Justice, filed an amicus brief supporting respondent in the court of appeals.

## STATEMENT

1. "Federal antitrust law is a central safeguard for the Nation's free market structures." *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1109 (2015). "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. 1. Section 2 makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. 2.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court considered whether "the Sherman Act prohibits" a State from engaging in anticompetitive activity. *Id.* at 352. The Court began from the premise that an intent to restrain the acts of States as "sovereign[s]" should not be "lightly * * * attributed to Congress." *Id.* at 351. The Court found that neither the text nor the history of the Sherman Act suggested such an intent. *Id.* at 350-351. The Court held that "the Sherman Act did not undertake to prohibit," *id.* at 352, an agricultural marketing program adopted pursuant to a California state statute, *id.* at 346.

Since *Parker*, this Court has often reaffirmed that "'state action'" lies "outside the reach of the antitrust laws." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (citation omitted). It has described this "state action doctrine" as an "implied ex-

emption to the antitrust laws," *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 55 n.18 (1985), which is "disfavored, much as are repeals by implication," *Dental Exam'rs*, 135 S. Ct. at 1110 (citations omitted). The Court has explained that the "*Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *Southern Motor Carriers*, 471 U.S. at 56.

Subsequent decisions of this Court have clarified the scope of the state-action doctrine. Because the doctrine rests on the assumption that Congress did not intend to restrain *state* action, it applies only when "the actions in question are an exercise of the State's sovereign power." *Dental Exam'rs*, 135 S. Ct. at 1110. That requirement is satisfied when the actions in question are those of a state legislature or state supreme court, "acting legislatively rather than judicially." *Ibid.* (citation omitted).[1]

To implement their policies, States often rely on nonsovereign actors, including substate public entities (like municipalities) and private businesses or individuals. See *Dental Exam'rs*, 135 S. Ct. at 1110-1111 (observing that a State may "delegate[] control over a market to a non-sovereign actor," *i.e.*, "one whose conduct does not automatically qualify as that of the sovereign State itself"). Those policies could be frustrated if the federal antitrust laws were construed to forbid the conduct of those who carry out the State's will. See *Southern Mo-*

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[1] The Court has reserved the question "whether the Governor of a State stands in the same position * * * for purposes of the state-action doctrine." *Hoover* v. *Ronwin*, 466 U.S. 558, 568 n.17 (1984).

*tor Carriers*, 471 U.S. at 56-57. The state-action doctrine thus treats the federal antitrust laws as inapplicable to nonsovereign actors when their conduct is "truly the product of state regulation." *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988). To satisfy that standard, the conduct of a nonsovereign actor generally must (1) be taken pursuant to a "clearly articulated and affirmatively expressed * * * state policy" to displace competition and (2) be "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation and internal quotation marks omitted).

Both parts of the *Midcal* test are "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). The first requirement—clear articulation—ensures that the State has "foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013). But even when that requirement is satisfied, a state policy may "be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." *Dental Exam'rs*, 135 S. Ct. at 1112. "Entities purporting to act under state authority" therefore may "diverge from the State's considered definition of the public good" even when they act within the scope of their delegated powers. *Ibid.* The second requirement—active supervision—seeks to bridge that gap "between a state policy and its implementation" by demanding that "'state officials have and exercise power to review particular anticompetitive acts * * * and disapprove those that fail to

accord with state policy.'" *Ibid.* (quoting *Patrick*, 486 U.S. at 101).

The Court has recognized "instances in which an actor can be excused from *Midcal*'s active supervision requirement." *Dental Exam'rs*, 135 S. Ct. at 1112. Although the state-action doctrine does not apply "directly" to municipalities and other political subdivisions, which "are not themselves sovereign," *Phoebe Putney*, 568 U.S. at 225, such local governmental entities "are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies," *id.* at 226 (citation omitted). The "active supervision test" remains an "essential prerequisite," however, for "any nonsovereign entity—public or private—controlled by active market participants." *Dental Exam'rs*, 135 S. Ct. at 1113.[2]

2. Petitioner Salt River Project Agricultural Improvement and Power District was formed as a "special public water district[]" under Arizona law in 1937. *Ball* v. *James*, 451 U.S. 355, 358 (1981); see *id.* at 359. Petitioner delivers water to landowners throughout central Arizona and subsidizes those operations by selling power as an electric utility. *Id.* at 357; J.A. 12. Petitioner is "the only supplier of traditional electrical power" in the Phoenix metropolitan area, Pet. App. 3a,

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[2] That rule reflects this Court's recognition that, when "a State empowers a group of active market participants to decide who can participate in its market," there is a "structural risk" that they will pursue "their own interests" instead of "the State's policy goals." *Dental Exam'rs*, 135 S. Ct. at 1114. Active supervision of such entities by state officials is necessary to ensure that the entity's anticompetitive conduct "result[s] from procedures that suffice to make it the State's own." *Id.* at 1111.

where it has nearly a million customers, Pet. Br. 6; J.A. 12.

Respondent SolarCity Corporation (recently renamed Tesla Energy Operations, Inc.) sells and leases rooftop solar-energy systems to homes and businesses. J.A. 8. Those systems allow respondent's customers to generate their own electricity, reducing the amount they need to purchase from utilities. *Ibid.* Respondent has thousands of customers in the Phoenix metropolitan area. J.A. 12.

In 2015, petitioner promulgated new rate plans for self-generating customers—customers who purchase some of their electricity from petitioner but who also rely on self-generation methods, like solar-energy systems. J.A. 10, 30-32. The new plans imposed greater fees on self-generating customers. J.A. 33. Respondent has alleged that the electric-utility bills for a "typical" home with a solar-energy system could increase by about $600 per year, or 65%. J.A. 32. After petitioner announced the new rate plans, J.A. 28, the number of applications respondent received for solar-energy systems in petitioner's service area allegedly fell from about 500 applications per month to 19, J.A. 35, 39-40.

3. Respondent sued petitioner in federal district court, alleging violations of Sections 1 and 2 of the Sherman Act. J.A. 7, 49-52.[3] Respondent alleged that petitioner's new rate plans imposed a "penalty" on self-generation so "significant" that consumers would have

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[3] Respondent also brought claims under Section 3 of the Clayton Act, 15 U.S.C. 14; under state antitrust law; and under state tort law. J.A. 52-59. The district court dismissed the Clayton Act claim, Pet. App. 57a-58a, but allowed all but one of the state-law claims to proceed, *id.* at 56a-57a, 60a-64a. The court's rulings on those claims and on petitioner's accompanying defenses are not at issue here.

"no choice but to buy all their electricity from [petitioner]," thereby "exclud[ing] competition and unlawfully maintain[ing] [petitioner's] monopoly over the retail sale of electricity" in petitioner's service area. J.A. 8, 10-11. Alleging the loss of "substantial" profits "as a result of [petitioner's] anticompetitive conduct," J.A. 39, respondent sought treble damages and injunctive relief, J.A. 59.

Petitioner moved to dismiss the complaint. D. Ct. Doc. 53 (June 23, 2015). Petitioner argued that respondent had failed to adequately plead antitrust injury, a relevant product market, an illegal agreement, and anticompetitive conduct, *id.* at 18-28, and that the Local Government Antitrust Act of 1984 (LGAA), 15 U.S.C. 34 *et seq.*, precluded any award of antitrust damages, D. Ct. Doc. 53, at 6-7. Petitioner also contended that the state-action doctrine warranted dismissal. *Id.* at 9-16. It argued that Arizona had a "clearly articulated" policy to displace competition in the retail sale of electricity and that, as a local governmental entity, it was not required to show that its conduct was "actively supervised" by the State. *Id.* at 10 & n.14.

The district court granted petitioner's motion in part. Pet. App. 37a-69a. The court declined to find the state-action doctrine applicable, explaining that whether "Arizona has articulated a clear policy permitting anticompetitive conduct" and whether it "has 'actively supervised' a state regulatory policy" are "factual" questions that are "inappropriately resolved in the context of a motion to dismiss." *Id.* at 67a (citation omitted). The court viewed respondent's allegations that "Arizona has a policy permitting competition in the relevant market," and that petitioner "operates without supervision," as "all that is necessary at this stage." *Ibid.*

The district court determined, however, that as "a political subdivision of the state," petitioner was shielded by the LGAA from respondent's claims for antitrust damages. Pet. App. 64a-65a. The court also dismissed respondent's Section 1 claim for failure to adequately plead an unreasonable restraint on trade. *Id.* at 56a-60a & n.4. The court allowed respondent's Section 2 claims to proceed, finding that the complaint had "plausibly allege[d] anticompetitive conduct by an alleged monopolist." *Id.* at 62a.

Petitioner filed a notice of appeal, arguing that the district court's ruling on the state-action doctrine was "an immediately appealable collateral order" under 28 U.S.C. 1291. D. Ct. Doc. 81, at 1 (Nov. 20, 2015); see D. Ct. Doc. 82, at 1 (Nov. 20, 2015). On the same day, petitioner filed a motion asking the court to certify its order for interlocutory appeal under 28 U.S.C. 1292(b). D. Ct. Doc. 82, at 1.

The district court denied the motion for certification. Pet. App. 21a-35a. The court determined that, in ruling on petitioner's motion to dismiss, it had erred in treating application of the clear-articulation requirement as a question of fact. *Id.* at 25a. It concluded that application of that requirement is instead a "controlling question of law," satisfying one of the conditions for certification under Section 1292(b). *Id.* at 24a.

The district court explained, however, that "had [it] reached the issue as a matter of law, it would have concluded that Arizona does not have a clearly articulated policy to displace competition in the retail electricity market." Pet. App. 27a. Concluding that petitioner had "failed to demonstrate a substantial ground for difference of opinion" on the issue, *id.* at 24a-25a, the court declined to certify it for a Section 1292(b) appeal, *id.* at

27a. The court noted, however, that petitioner "is free to raise [the state-action doctrine] at summary judgment." *Id.* at 33a n.7.

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-17a.

The court of appeals observed that it has "jurisdiction over appeals from 'final decisions' of district courts," and that a "'final decision' is typically one 'by which a district court disassociates itself from a case.'" Pet. App. 4a (citations omitted). The court explained, however, that "a piece of the case may become effectively 'final' under the collateral-order doctrine, even though the case as a whole has not ended." *Id.* at 5a. Emphasizing that the collateral-order doctrine "must remain a narrow exception," the court explained that three requirements must be satisfied for an otherwise nonfinal order to be immediately appealable: (1) the order must be "conclusive"; (2) "the order must address a question that is 'separate from the merits' of the underlying case"; and (3) "the separate question must raise 'some particular value of a high order' and evade effective review if not considered immediately." *Ibid.* (citations omitted).

The court of appeals held that the district court's state-action ruling was not immediately appealable because it did not satisfy the third requirement. Pet. App. 7a-11a & n.4. The court acknowledged that "interlocutory denials of certain particularly important immunities from suit" may be immediately appealed. *Id.* at 7a. It found that principle inapplicable here, however, because "the state-action doctrine is a defense to liability, not immunity from suit." *Id.* at 8a.

The court of appeals explained that this Court in *Parker* had "recognize[d] a limit on liability under the

Sherman Act rather than a safeguard of state sovereign immunity." Pet. App. 9a. The court of appeals also observed that, "[u]nlike immunity from suit, immunity from liability can be protected by a post-judgment appeal." *Id.* at 8a. Based on its conclusion that "an interlocutory appeal is not necessary to guarantee meaningful appellate review of an order denying state-action immunity," *id.* at 11a n.4, the court dismissed petitioner's appeal without addressing the two other requirements of the collateral-order doctrine, see *id.* at 11a & n.4.

## SUMMARY OF ARGUMENT

A public entity has no right under the collateral-order doctrine to appeal a district court's interlocutory determination that the entity's conduct is not state action beyond the reach of the Sherman Act.

A. Under 28 U.S.C. 1291, the courts of appeals have jurisdiction over "final decisions" of the district courts, except where direct review in this Court is available. Although a "final decision[]" typically is one that ends the litigation, the Court has construed that term in Section 1291 to encompass a narrow class of collateral orders that do not have that effect. To be immediately appealable under the collateral-order doctrine, an order must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (citations omitted; brackets in original). The Court has emphasized that those requirements should be applied stringently, lest the collateral-order doctrine "swallow the general rule that a party is entitled to a single appeal" after final judgment. *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted).

B. An order determining that the conduct of a public entity is not state action beyond the reach of the Sherman Act does not satisfy the second or third requirement of the collateral-order doctrine. Far from resolving an issue completely separate from the merits, a determination whether the defendant's conduct is attributable to the State is itself a merits ruling. When a defendant's conduct qualifies as state action, the Sherman Act does not "prohibit" it. *Parker* v. *Brown*, 317 U.S. 341, 352 (1943). Because the state-action doctrine reflects the Court's understanding of the Sherman Act's substantive reach, a state-action determination goes directly to the merits of the Sherman Act claim.

In arguing that a state-action determination is separate from the merits, petitioner assumes (Br. 19) that the "merits" of a Sherman Act claim consist only of whether the defendant has engaged in "anticompetitive conduct," *i.e.*, conduct that would violate the Sherman Act if the State had not authorized it. That assumption is unfounded. But even under that truncated view of the "merits" of a Sherman Act claim, petitioner would not be entitled to an immediate appeal of the district court's state-action ruling, since the determination whether a defendant's conduct is attributable to the State is intertwined with the determination whether the defendant's conduct is anticompetitive.

C. A state-action determination is not effectively unreviewable on appeal from a final judgment. In order to protect "the States' power to regulate," the state-action doctrine treats the Sherman Act as inapplicable to conduct that is attributable to the State itself. *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1109 (2015). Where it applies, the state-action doctrine ensures that conduct satisfying the doctrine's

requirements will not be treated as a Sherman Act violation. Defenses to liability, as distinguished from immunities from suit, are fully vindicable on appeal from final judgment. Delaying review thus would not "imperil a substantial public interest" protected by the state-action doctrine. *Mohawk Indus.*, 558 U.S. at 107 (citation omitted).

Petitioner contends (Br. 31-39) that, at least when the defendant is a public entity, the state-action doctrine protects the same interests as Eleventh Amendment immunity and qualified immunity. But the doctrine does not reflect any special concern for public entities as such. And while petitioner is a public entity, it is not a sovereign and is not entitled to Eleventh Amendment immunity. The purpose of the state-action doctrine is not to respect a sovereign's dignity (as in the case of the Eleventh Amendment) or to preserve initiative (as in the case of qualified immunity), but to protect the State's regulatory prerogatives. That interest is not imperiled by the absence of immediate review.

## ARGUMENT

### AN ORDER DETERMINING THAT THE CONDUCT OF A PUBLIC ENTITY IS NOT STATE ACTION BEYOND THE REACH OF THE SHERMAN ACT DOES NOT QUALIFY FOR IMMEDIATE APPEAL UNDER THE COLLATERAL-ORDER DOCTRINE

An order determining that a public entity's conduct is not state action for purposes of the federal antitrust laws does not satisfy two of the requirements of the collateral-order doctrine. It does not resolve an issue completely separate from the merits, and it is not effectively unreviewable on appeal from a final judgment.

The court of appeals correctly held that it lacked jurisdiction over petitioner's appeal in this case.[4]

### A. The Collateral-Order Doctrine Is Limited To A Narrow Class Of Orders

"Finality as a condition of review is an historic characteristic of federal appellate procedure," dating to the first Judiciary Act, ch. 20, §§ 21-22, 25, 1 Stat. 83-87 (1789). *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). Today, that requirement is codified in 28 U.S.C. 1291, which provides: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court." *Ibid.* "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). It is "typically" the decision "'by which a district court disassociates itself from a case.'" *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)).

This Court, however, has "long given" Section 1291 a "practical rather than a technical construction." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The Court has held that "the statute entitles a party to appeal * * * from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as 'final.'" *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citation and internal

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[4] The United States takes no position on whether the first requirement of the collateral-order doctrine is satisfied here.

quotation marks omitted). That "small class" encompasses decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action." *Cohen*, 337 U.S. at 546.

The Court has applied a three-part test to determine whether a "category" of orders is immediately appealable under the collateral-order doctrine. *Mohawk Indus.*, 558 U.S. at 107 (citation omitted); see *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) ("In fashioning a rule of appealability under § 1291, * * * we look to categories of cases, not to particular injustices."). To be immediately appealable, an order that does not terminate the litigation must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (citations omitted; brackets in original). The "party seeking appeal must show that all three requirements are satisfied." *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987).

The Court has treated those requirements as "'stringent,'" to ensure that the collateral-order doctrine does not "overpower the substantial finality interests § 1291 is meant to further." *Will*, 546 U.S. at 349-350 (citation omitted). The general rule that only final judgments are appealable "promotes efficient judicial administration" by "avoid[ing] the delay that inherently accompanies" piecemeal appellate review. *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 430, 434 (1985). It "reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals," *Flanagan* v. *United States*, 465 U.S. 259, 264 (1984), and avoids "burden[ing] appellate courts"

with "immediate consideration of issues that may become moot or irrelevant by the end of trial," *Stringfellow*, 480 U.S. at 380. It also "helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation." *Flanagan*, 465 U.S. at 263-264. For these reasons, the Court has stressed that the collateral-order doctrine "must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'" *Mohawk Indus.*, 558 U.S. at 106 (quoting *Digital Equip.*, 511 U.S. at 868).

In restricting the collateral-order doctrine to a narrow class of decisions, the Court has also noted the existence of "potential avenues of review apart from collateral order appeal." *Mohawk Indus.*, 558 U.S. at 110. Under 28 U.S.C. 1292(b), "a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal" when certain requirements are met. *Mohawk Indus.*, 558 U.S. at 110. Alternatively, a "party may petition the court of appeals for a writ of mandamus" in "extraordinary circumstances." *Id.* at 111. And Congress through legislation—or this Court through rulemaking—can "expand the list of orders appealable on an interlocutory basis." *Swint*, 514 U.S. at 48; see *Cunningham* v. *Hamilton Cnty.*, 527 U.S. 198, 210 (1999) ("Congress may amend the Judicial Code to provide explicitly for immediate review of [nonfinal] orders."); see also 28 U.S.C. 1292(e), 2072(c) (authorizing this Court to prescribe rules designating certain orders as immediately appealable). Congress thus has "designate[d] rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when

prejudgment orders should be immediately appealable." *Mohawk Indus.*, 558 U.S. at 113 (citation omitted). Accordingly, the Court has "not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will*, 546 U.S. at 350.

**B. Whether A Defendant's Conduct Is State Action Beyond The Reach Of The Sherman Act Is Not An Issue Completely Separate From The Merits Of A Sherman Act Claim**

1. As its name suggests, the collateral-order doctrine applies only to orders that are "collateral to" the "rights asserted in the action." *Cohen*, 337 U.S. at 546. To fall within that category, an order must "resolve an important issue completely separate from the merits of the action." *Will*, 546 U.S. at 349 (citations omitted). That requirement is "a distillation of the principle that there should not be piecemeal review of 'steps towards final judgment in which they will merge.'" *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 12 n.13 (1983) (quoting *Cohen*, 337 U.S. at 546).

An order determining that an antitrust defendant's conduct is not state action does not satisfy that requirement. In a suit brought under the Sherman Act, the question on the merits is whether the defendant has engaged in conduct that the Sherman Act prohibits. Cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 529 n.10 (1985) (distinguishing question of qualified immunity from "the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful"); *Abney* v. *United States*, 431 U.S. 651, 659 (1977) (explaining that a criminal defendant's double-jeopardy claim "is collateral to, and separable from," the determination "whether or not the accused is guilty of the offense charged"). That is precisely the question that the state-action doctrine addresses. See *Parker* v.

*Brown*, 317 U.S. 341, 352 (1943). The Court in *Parker* "assume[d]" that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a [price] stabilization program" like the one at issue in that case. *Id.* at 350. As a matter of statutory interpretation, however, the Court held that "the Sherman Act did not undertake to prohibit" such "an act of government." *Id.* at 352.

The state-action doctrine thus reflects the Court's understanding of the Sherman Act's substantive reach. Conduct that is attributable to a State under this Court's state-action precedents does not violate the Sherman Act. Far from being "completely separate from the merits of the action," *Will*, 546 U.S. at 349 (citations omitted), a state-action determination therefore *is* a merits determination.

The Court's decisions since *Parker* confirm that understanding. The Court has consistently framed the state-action inquiry in terms of whether the Sherman Act "prohibits" the defendant's conduct. *Patrick* v. *Burget*, 486 U.S. 94, 99 (1988); see, *e.g.*, *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991) ("prohibit"); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 55 (1985) ("prohibit"); *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 48 (1982) ("prohibited"). The Court has described the state-action doctrine as an "implied exemption" to the Sherman Act, *Southern Motor Carriers*, 471 U.S. at 55 n.18, with "state action" lying "outside the reach of" the statute, *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (citation omitted); see *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791-792 (1975) (concluding that, because the state-action doctrine did not apply, the defendant's conduct

was not "beyond the reach of the Sherman Act"). And the Court has equated a determination that the state-action doctrine applies with a determination that the defendant's conduct "did not violate the Sherman Act." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 589 (1976) (plurality opinion); see *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980) ("not violate"); *Goldfarb*, 421 U.S. at 788 ("not a violation").

Although the Court has also referred to the state-action doctrine as an "immunity," *e.g.*, *Midcal*, 445 U.S. at 105, its use of that word should not be read to suggest that the doctrine is separate from the merits of a Sherman Act claim. In describing the doctrine, the Court has used the words "immunity" and "exemption" interchangeably, often in the same opinion. *E.g.*, *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 36 (1985) ("state action exemption"); *id.* at 39 ("*Parker* immunity"); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion) ("*Parker* 'exemption'" and "*Parker* immunity"). And the word "exemption" is simply "shorthand" for "*Parker*'s holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case." *Lafayette*, 435 U.S. at 393 n.8.

The state-action doctrine is thus significantly different from other doctrines the Court has referred to as "immunities." A determination that a State has Eleventh Amendment immunity from a particular private suit, for example, does not resolve the question whether the challenged state conduct violated the applicable law. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (explaining that the "resolution" of whether a State is entitled to Eleventh

Amendment immunity "generally will have no bearing on the merits of the underlying action"). And while a determination that an official has qualified immunity from a particular damages claim entails a determination that there was no violation of "clearly established" law, it "does not entail a determination of the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful." *Mitchell*, 472 U.S. at 529 n.10. In those contexts, a defendant can be immune from suit even though its conduct was unlawful. By contrast, when an antitrust defendant's conduct is found to be state action, the Sherman Act "does not apply" at all. *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 343 (1987); see 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.10, at 694 (2d ed. 1992) (concluding that the state-action doctrine does not establish an immunity from suit because "there is little to distinguish [it] from many other defenses to antitrust or other claims").

The Court's application of the state-action doctrine to federal-government suits confirms that understanding. This Court has long recognized that "States have no sovereign immunity as against the Federal Government." *West Virginia* v. *United States*, 479 U.S. 305, 311 (1987). But the Court has repeatedly applied the state-action doctrine in proceedings commenced by the federal government. See, *e.g.*, *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1108-1109 (2015); *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 222 (2013); *Southern Motor Carriers*, 471 U.S. at 52-53. That approach reflects the Court's recognition that the state-action doctrine is a limit on the substantive coverage of the federal antitrust laws, not an immunity from suit.

Permitting immediate review of each state-action determination therefore would risk multiple appeals on the merits in a single case. There could even be multiple pretrial appeals if, for instance, a district court determined that the clear-articulation requirement was not satisfied, was reversed, and then determined on remand that the active-supervision requirement was not satisfied, prompting a second collateral-order appeal. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 474 (1978) (noting the "potential for multiple appeals" when a district court is reversed on one ground and then relies on a different ground on remand to reach the same result). And because a state-action determination is but a "step toward final disposition of the merits," *Cohen*, 337 U.S. at 546, permitting appellate review of each such determination would risk "burden[ing] appellate courts" with "immediate consideration of issues that may become moot or irrelevant by the end of trial," *Stringfellow*, 480 U.S. at 380; see *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995) (explaining that exceptions to the final-judgment rule risk "additional, and unnecessary, appellate court work" by permitting "appeals that, had the trial simply proceeded, would have turned out to be unnecessary").

2. Petitioner maintains (Br. 18-27) that a state-action determination is separate from the merits of a Sherman Act claim. Petitioner's analysis assumes (Br. 19) that the "merits" of a Sherman Act claim consist only of issues bearing on whether the defendant engaged in "anticompetitive conduct"—that is, "what conduct actually occurred, whether that conduct had an anticompetitive effect and, if so, whether there was a legitimate business justification for the conduct." Petitioner thus assumes that, in a case like this one, the only "merits"

question is whether the defendant's conduct *would* violate the Sherman Act *if* that conduct were not attributable to the State.

Petitioner makes no effort to defend that assumption, and there is no sound basis for it. Petitioner contends that, "as in the qualified-immunity context, a court adjudicating a claim of state-action immunity assumes that the complaint states a valid claim." Pet. Br. 3 (citation omitted). As explained above, however, a judicial determination that the state-action doctrine applies in a particular case means that the Sherman Act does not prohibit the defendant's conduct. See pp. 16-18, *supra*. A finding that the challenged conduct is attributable to the State therefore necessarily means that the plaintiff has no "valid claim" under the federal antitrust laws.

In any event, even under petitioner's cramped view of the "merits" of a Sherman Act claim, a state-action determination would not be completely separate from the "merits." Application of the clear-articulation requirement, for example, often involves consideration of whether "anticompetitive effects" were the "inherent, logical, or ordinary result" of a state grant of authority to a nonsovereign actor. *Phoebe Putney*, 568 U.S. at 229. Because a State typically does not "catalog all of the anticipated effects" of such an authorization, *ibid.* (citation omitted), a court must construe the authorization "against the backdrop of federal antitrust law," *id.* at 231, in order to determine whether conduct taken pursuant to a particular state regulatory scheme would be "'necessarily'" or "inherently anticompetitive," *id.* at 230 (citation omitted).

That determination "involve[s] considerations enmeshed in" whether the defendant's own conduct was

anticompetitive, *Van Cauwenberghe*, 486 U.S. at 528, requiring elucidation of the relevant principles of federal antitrust law and the application of those principles to the type of conduct in question. Although an "extensive" inquiry into such issues might not always be necessary for purposes of the state-action doctrine, *id.* at 529, the inquiry is still "conceptually" linked to the rest of the case, *Johnson*, 515 U.S. at 314 (citation omitted). Thus, even under petitioner's conception of the "merits" of a suit like this one, the second requirement of the collateral-order doctrine is not satisfied.

**C. An Order Determining That The Conduct Of A Public Entity Is Not State Action Is Not Effectively Unreviewable On Appeal From A Final Judgment**

1. For an order to qualify for immediate appeal under the collateral-order doctrine, it must also "be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (citations omitted). To satisfy that requirement, an appellant must show that "review after trial would come too late to vindicate [an] important purpose" of the right asserted. *Johnson*, 515 U.S. at 312; see *Lauro Lines* v. *Chasser*, 490 U.S. 495, 499 (1989) ("insist[ing] that the right asserted be one that is essentially destroyed if its vindication must be postponed until trial is completed"). The inquiry also entails "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Will*, 546 U.S. at 351-352 (citation omitted). The "decisive consideration is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus.*, 558 U.S. at 107 (quoting *Will*, 546 U.S. at 352-353).

No interest protected by the state-action doctrine is "irretrievably lost" by deferring appeal until after final judgment. *Richardson-Merrell*, 472 U.S. at 431. The state-action doctrine preserves the States' "ability to regulate their domestic commerce." *Southern Motor Carriers*, 471 U.S. at 56. It accomplishes that purpose by placing conduct attributable to the State beyond the reach of the Sherman Act, thereby ensuring that federal antitrust law does not prevent the achievement of the State's regulatory objectives. See pp. 16-18, *supra*. That interest "is fully vindicable on appeal from final judgment." *Digital Equip.*, 511 U.S. at 882; see *Swint*, 514 U.S. at 43 ("An erroneous ruling on liability may be reviewed effectively on appeal from final judgment."). If a district court determines that the defendant's conduct is not state action, and if the defendant is later held liable for a Sherman Act violation, the defendant can raise the state-action issue on appeal from final judgment and will be entitled to vacatur of that judgment if the court of appeals resolves the issue in the defendant's favor.

To be sure, if it is "eventually decided" that the district court erred in finding the state-action doctrine to be inapplicable, "petitioner will have been put to [the] unnecessary trouble and expense" of litigating to final judgment, and therefore will not receive the full practical benefit of a pretrial appellate decision ordering dismissal of the antitrust claims on the pleadings. *Lauro Lines*, 490 U.S. at 499. "It is always true, however, that 'there is value . . . in triumphing before trial, rather than after it.'" *Ibid.* (citation omitted). The possibility of avoiding a lengthy and burdensome trial may sometimes be a sound basis for a district court to decide as a matter of discretion to *certify* an issue for interlocutory

appeal. See 28 U.S.C. 1292(b) (specifying, as a precondition for certification, that "an immediate appeal" would "materially advance the ultimate termination of the litigation"). But if the prospect of such burdens by itself were sufficient to render a merits issue "effectively unreviewable on appeal from a final judgment," *Will*, 546 U.S. at 349 (citations omitted), the collateral-order doctrine would "swallow the rule" that the denial of a motion to dismiss (or motion for summary judgment) is not appealable as of right, *Richardson-Merrell*, 472 U.S. at 436 (citation omitted).

For the third requirement of the collateral-order doctrine to be satisfied, it therefore is not enough that "a ruling may be erroneous and may impose additional litigation expense." *Richardson-Merrell*, 472 U.S. at 436. The defendant must show that "a trial * * * would imperil a substantial public interest," *Will*, 546 U.S. at 353, as by establishing that it has an "immunity from suit," *Swint*, 514 U.S. at 43, or a "right not to be tried," *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989) (citation omitted). If the defendant is unable to "marshal[]" "some particular value of a high order" "in support of the interest in avoiding trial," *Will*, 546 U.S. at 352, and instead asserts a "mere defense to liability," its claim can be fully vindicated on appeal from a final judgment, *Swint*, 514 U.S. at 43 (citation omitted).

That distinction between immunities from suit and defenses to liability runs throughout this Court's decisions on the collateral-order doctrine. See *Midland Asphalt*, 489 U.S. at 801 ("There is a 'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'") (citation omitted). In each case where the Court has recognized an immunity from suit, "'the essence' of the claimed right"

has been "a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524 (citation omitted); see *Osborn* v. *Haley*, 549 U.S. 225, 238-239 (2007) (Westfall Act, 28 U.S.C. 2679); *Puerto Rico Aqueduct*, 506 U.S. at 146 (Eleventh Amendment immunity); *Mitchell*, 472 U.S. at 525-527 (qualified immunity); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982) (absolute immunity); *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979) (Speech or Debate Clause); *Abney*, 431 U.S. at 661 (Double Jeopardy Clause). Thus, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Will*, 546 U.S. at 353 (citation omitted).

This Court has never described the state-action doctrine as protecting an antitrust defendant's interest in avoiding trial. Rather, the doctrine "protects the States' acts of governing." *Omni Outdoor Adver.*, 499 U.S. at 383; see *Southern Motor Carriers*, 471 U.S. at 56 ("The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce."). The concern behind the doctrine is not the burden that litigation may impose on entities (like petitioner) that do not partake of the States' sovereign immunity from private suits, but the "burden on the States' power to regulate" that would result if such entities were exposed to Sherman Act liability for implementing state regulatory preferences. *Dental Exam'rs*, 135 S. Ct. at 1109. A defendant's claim that the state-action doctrine renders its conduct lawful therefore is fully vindicable on appeal from final judgment.

2. Petitioner agreed below that, for purposes of the collateral-order doctrine, the "key question" was whether

the state-action doctrine confers an immunity from suit or a defense to liability. Pet. C.A. Br. 42-43. In this Court, however, petitioner describes (Br. 41) that distinction as "analytically unhelpful," and argues (Br. 30) that the analysis should turn instead on "the importance of the interests at stake."

That argument reflects a misunderstanding of the third prerequisite to immediate appeal under the collateral-order doctrine. In determining whether a particular interlocutory order is effectively unreviewable after trial, "[t]he crucial question * * * is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk Indus.*, 558 U.S. at 108. This Court "routinely require[s] litigants to wait until after final judgment to vindicate valuable rights," including constitutional ones. *Id.* at 108-109; see, *e.g.*, *Flanagan*, 465 U.S. at 260, 262-263 (requiring criminal defendants to wait until after final judgment to vindicate their asserted Sixth Amendment rights). For example, the principle that vertical restraints are less likely to be anticompetitive than horizontal ones is undoubtedly an important tenet of antitrust law; but a defendant's contention that the district court misapplied that principle in denying a motion to dismiss would provide no basis for immediate appeal under the collateral-order doctrine.

Contrary to petitioner's contention (Br. 29-30), this Court's "recent collateral-order cases" do not depart from that approach. Petitioner relies on language using the words "important" and "importance" in describing the criteria for collateral-order review. See *Will*, 546 U.S.

at 355 (concluding that the "judgment bar" of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2676, "has no claim to greater importance than the typical defense of claim preclusion"); *Digital Equip.*, 511 U.S. at 879 (concluding that the inclusion of "a provision in a private contract * * * is barely a prima facie indication that the right secured is 'important'"); *Lauro Lines*, 490 U.S. at 503 (Scalia, J., concurring) (concluding that a right to be sued only in the place specified by a contractual forum-selection clause "is not sufficiently important to overcome the policies militating against interlocutory appeals"). In each of those cases, however, the right at issue was understood to protect an interest in avoiding trial. See *Will*, 546 U.S. at 353 (a right to avoid "further litigation" under the "judgment bar"); *Digital Equip.*, 511 U.S. at 878 (an "immunity from trial" in a settlement agreement); *Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring) (a contractual "right not to be sued elsewhere than in Naples"). Those decisions make clear that, *even if* the pertinent right is a right to avoid litigation, the collateral-order doctrine's third requirement may not be satisfied if the right is insufficiently important. They do not suggest that the importance of a right by itself can make the challenged order effectively unreviewable on appeal.

3. Petitioner argues (Br. 28, 31-39) that, when the defendant is a public entity, the state-action doctrine protects the same interests as Eleventh Amendment immunity and qualified immunity. Petitioner contends (Br. 25 n.7) that, whatever rule might apply to private defendants, public entities should be entitled to immediate review of adverse state-action rulings before final judgment. That argument lacks merit.

a. Petitioner's contention rests on the premise (Br. 34) that public entities are owed special solicitude under the state-action doctrine. The state-action doctrine, however, is not concerned with particular defendants. See *Southern Motor Carriers*, 471 U.S. at 58-59 ("The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant."). Rather, the doctrine protects "the States' ability to regulate their domestic commerce." *Id.* at 56; see *Dental Exam'rs*, 135 S. Ct. at 1109 (explaining that the state-action doctrine prevents federal antitrust law from "impos[ing] an impermissible burden on the States' power to regulate"). It applies to nonsovereign actors—whether public or private—only insofar as their actions represent "an exercise of the State's sovereign power." *Dental Exam'rs*, 135 S. Ct. at 1110. That aspect of the doctrine reflects the Court's recognition that, if such actors could be subjected to federal antitrust liability for carrying out the State's policies, those policies would be rendered largely ineffectual. See *Southern Motor Carriers*, 471 U.S. at 56-57 (explaining that the state-action doctrine prevents an antitrust plaintiff from "frustrat[ing]" a state regulatory program "by filing suit against the regulated private parties"). The state-action doctrine thus applies to public and private entities alike, not for their own sake, but to preserve the *State's* regulatory prerogatives.

To be sure, the Court's state-action decisions have distinguished between private entities and certain public ones by holding that the former, but not the latter, are subject to the active-supervision requirement. See *Dental Exam'rs*, 135 S. Ct. at 1112-1113. That aspect of the doctrine, however, simply reflects the decreased risk that certain public entities, such as municipalities

and other local governmental units, might "pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 568 U.S. at 226. It is thus consistent with the understanding that the state-action doctrine exists to protect state regulatory prerogatives, rather than to serve the interests of the nonsovereign public and private entities that carry out the State's will. It does not reflect any greater concern for public entities as such, let alone for the burdens they might face in litigation.

b. Petitioner is also wrong in analogizing (Br. 32-35) the state-action doctrine to Eleventh Amendment immunity. See pp. 18-19, *supra*. Relying on *Puerto Rico Aqueduct*, petitioner asserts that the state-action doctrine protects the same "dignitary interests" that led this Court to treat denials of Eleventh Amendment immunity as immediately appealable. Pet. Br. 35 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146).

In *Puerto Rico Aqueduct*, however, the Court did not suggest that "dignitary interests" were at risk whenever a public entity was sued. If that were so, a public entity would arguably have a right of immediate appeal in any case in which it had lost a motion to dismiss or motion for summary judgment. Rather, the Court concluded that it was "[t]he very object and purpose of the 11th Amendment * * * to prevent the indignity of" a particular type of suit: a suit "subjecting *a State* to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct*, 506 U.S. at 146 (emphasis added; citation omitted).

Such dignitary interests are not implicated in the mine run of suits against public entities under the federal antitrust laws. See *Mohawk Indus.*, 558 U.S. at 107 (focusing on "the class of claims, taken as a whole").

Most significantly, they are not implicated in suits (including this one) against municipalities or similar governmental entities that, while public in character, "are not considered part of the State for Eleventh Amendment purposes." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989) (citation omitted). Such dignitary interests likewise are not at issue in suits brought by the federal government, from which "States have no sovereign immunity." *West Virginia*, 479 U.S. at 311; see p. 19, *supra*.

The state-action doctrine thus extends to numerous antitrust suits that raise no Eleventh Amendment concern. To be sure, the state-action doctrine reflects solicitude for state prerogatives, by "embody[ing] * * * the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Dental Exam'rs*, 135 S. Ct. at 1110 (citation omitted). But the sovereignty-related interest that the doctrine aims to protect is "the States' power to regulate," *id.* at 1109, not "their privilege not to be sued," *Puerto Rico Aqueduct*, 506 U.S. at 147 n.5. Unlike Eleventh Amendment immunity from suit, a State's interest in enforcement of its regulatory program can be fully vindicated on appeal from a final judgment.

The principle that federal statutes should be construed to avoid unwarranted interference with traditional state prerogatives, moreover, is not limited to the antitrust laws. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (absent clear evidence of congressional intent, federal law should not be interpreted in a way that "would upset the usual constitutional balance of federal and state powers"). Defendants in federal lawsuits often invoke that principle in arguing that the statutes they are alleged to have violated do not encompass

their conduct. Nothing in this Court's decisions suggests that, when a defendant moves to dismiss on that basis, the denial of its motion is immediately appealable under the collateral-order doctrine.

c. Petitioner's analogy (Br. 35-39) between the state-action doctrine and qualified immunity is likewise mistaken. Indeed, the Court rejected a similar argument in *Will*. That case involved the judgment bar of the FTCA, which provides that a judgment in an FTCA suit brought against the United States "shall constitute a complete bar" to certain related actions brought against individual federal employees. 28 U.S.C. 2676. When the district court held that the judgment bar did not preclude particular *Bivens* claims brought against various federal customs agents, the agents sought immediate appeal of the court's ruling under the collateral-order doctrine. *Will*, 546 U.S. at 348-349; see *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

In concluding that the district court's ruling was not immediately appealable, this Court acknowledged the argument that "if the *Bivens* action goes to trial the efficiency of Government will be compromised and the officials burdened and distracted, as in the qualified immunity case." *Will*, 546 U.S. at 353. In rejecting that argument, the Court explained:

> [I]f simply abbreviating litigation troublesome to Government employees were important enough for *Cohen* treatment, collateral order appeal would be a matter of right whenever the Government lost a motion to dismiss under the Tort Claims Act, or a federal officer lost one on a *Bivens* action, or a state official was in that position in a case under 42 U.S.C. § 1983, or *Ex parte Young*.

*Id.* at 353-354. The Court declined to adopt an approach under which Section 1291 "would fade out whenever the Government or an official lost an early round that could have ended the fight." *Id.* at 354. The fact that a public entity is the defendant thus is not, by itself, a sufficient ground for holding that the denial of a motion to dismiss would be effectively unreviewable on appeal from a final judgment.

Petitioner argues (Br. 37) that immediate review of state-action rulings would help save public entities from the "distraction and disruption" of further litigation. But the desire to prevent such litigation burdens is not the rationale for the state-action doctrine. Rather, the doctrine serves a different purpose, unrelated to shielding public but nonsovereign entities from the burdens of litigation. See pp. 23, 25, *supra*.

Any concerns about the ability of public entities to bear the monetary costs of antitrust litigation, moreover, may be addressed in other ways. Indeed, Congress has specifically addressed such concerns in the LGAA, which precludes recovery of antitrust damages in suits against local governments and their employees. 15 U.S.C. 35; see 15 U.S.C. 36 (similarly prohibiting the recovery of antitrust damages on "any claim against a person based on any official action directed by a local government"); Pet. App. 64a-65a (district court holds that the LGAA shields petitioner from antitrust damages in this case). But Congress has not conferred on such entities either an express immunity from suit or any special right to obtain interlocutory review of adverse state-action holdings, as it has in a different context. Cf. 15 U.S.C. 37(b) (providing that persons "involved in the planning, issuance, or payment of charitable gift annuities or charitable remainder trusts shall

have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial"). Thus, while the state-action doctrine undoubtedly constitutes an important limit on the coverage of federal antitrust law, a public-entity defendant's claim that the district court misapplied the doctrine can be effectively vindicated on appeal from a final judgment.

## CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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FEBRUARY 2018

## APPENDIX

1. 15 U.S.C. 1 provides:

**Trusts, etc., in restraint of trade illegal; penalty**

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

2. 15 U.S.C. 2 provides:

**Monopolizing trade a felony; penalty**

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

3. 28 U.S.C. 1291 provides:

**Final decisions of district courts**

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.

# EXHIBIT 2

No. 16-50017

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

TELADOC, INCORPORATED; TELADOC PHYSICIANS, PROFESSIONAL ASSOCIATION; KYON HOOD; EMMETTE A. CLARK,
*Plaintiffs-Appellees*,

v.

TEXAS MEDICAL BOARD; MICHAEL ARAMBULA, M.D., Pharm. D., in his official capacity; MANUEL G. GUAJARDO, M.D., in his official capacity; JOHN R. GUERRA, D.O., M.B.A., in his official capacity; J. SCOTT HOLLIDAY, D.O., M.B.A., in his official capacity; MARGARET MCNEESE, M.D., in her official capacity; ALLAN N. SHULKIN, M.D., in his official capacity; ROBERT B. SIMONSON, D.O., in his official capacity; WYNNE M. SNOOTS, M.D., in his official capacity; KARL SWANN, M.D., in his official capacity; SURENDRA K. VARMA, M.D., in her official capacity; STANLEY WANG, M.D., J.D., MPH, in his official capacity; GEORGE WILLEFORD, III, M.D., in his official capacity; JULIE K. ATTEBURY, M.B.A., in her official capacity; PAULETTE BARKER SOUTHARD, in her official capacity,
*Defendants-Appellants*.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
(JUDGE ROBERT L. PITMAN)

# BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PLAINTIFFS-APPELLEES

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## MISCELLANEOUS

## STATEMENT OF INTEREST

The United States and the Federal Trade Commission both enforce the federal antitrust laws and have a strong interest in whether interlocutory orders refusing to dismiss an antitrust claim under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), are immediately appealable under the collateral order doctrine. Courts have dismissed immediate appeals from such orders in prior enforcement actions for lack of appellate jurisdiction. *See* Order, *United States v. Blue Cross Blue Shield of Mich.*, No. 11-1984 (6th Cir. Feb. 23, 2012), *reh'g en banc denied* (Mar. 28, 2012); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006).

The government also has a strong interest in the proper application of the state action doctrine. That doctrine protects the deliberate policy choices of sovereign states to displace competition with regulation or monopoly public service. Overly broad application of the state action doctrine, however, sacrifices the important benefits that

antitrust laws provide consumers and undermines the national policy favoring robust competition. [1]

We file this brief under Federal Rule of Appellate Procedure 29(a) and urge the Court to dismiss the appeal for lack of jurisdiction. If the Court finds jurisdiction, we urge the Court to reject application of the state action doctrine to this case because the "active supervision" requirement of the doctrine is not satisfied.[2]

## STATEMENT OF ISSUES PRESENTED

Whether an order denying a motion to dismiss an antitrust claim under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), is immediately appealable as a collateral order.

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[1] FTC staff is investigating the underlying actions that are the subject of this appeal and also issued guidance regarding the application of the state action doctrine to state regulatory boards controlled by market participants. *See FTC Staff Guidance on Active Supervision of State Regulatory Boards Controlled by Market Participants* (Oct. 14, 2015), available at https://www.ftc.gov/system/files/attachments/competition-policy-guidance/active_supervision_of_state_boards.pdf.

[2] The district court had no need to, and did not, reach the doctrine's "clear articulation" requirement. We take no position on whether Defendants-Appellants met their burden to satisfy that requirement or on the merits of Plaintiffs'-Appellees' claims.

Whether the active supervision requirement of the state action doctrine is satisfied.

## STATEMENT

Plaintiff-Appellee Teladoc describes itself as providing "telehealth services," using telecommunication to provide medical care "for a fraction of the cost of a visit to a physician's office, urgent care center, or hospital emergency room." Amended Complaint ¶ 2. Teladoc's physicians (who are licensed by Texas but may be physically located outside of Texas), dispense medical advice and may prescribe medications to a person in Texas based on information provided by that person, the person's medical records, and a telephone consultation.

Defendant-Appellant Texas Medical Board (we refer to the Board and its members collectively here as "TMB") is a state agency that regulates the practice of medicine in Texas. Teladoc alleges that the TMB, which has 19 members, is "made up of a majority of active market participants in the profession the TMB regulates." Amended Complaint ¶¶ 9, 22. Teladoc further alleges that, beginning in 2010, the TMB revised and adopted several new rules under the Texas Administrative Code that significantly restrict competition from telehealth services.

Those actions culminated in the TMB's adoption of a rule on April 10, 2015, that requires a face-to-face contact between an individual and a physician before the physician can issue a prescription, regardless of whether face-to-face contact or a physical examination is medically necessary. Teladoc alleges that, "[o]f the 14 board members who voted in favor of the new rule, 12 are active physicians." *Id.* ¶ 12.

Teladoc alleges that two TMB rules, the 2015 rule and one adopted in 2010 that restricts video consultations, violate Section 1 of the Sherman Act, 15 U.S.C. § 1, by "dramatically restricting telehealth services in Texas" and raising prices. Amended Complaint ¶¶ 155-56. Teladoc requested a preliminary injunction barring the 2015 rule's enforcement, which the court granted. The TMB then moved to dismiss Teladoc's claims, contending that the state action doctrine bars the antitrust claim. That doctrine provides that federal antitrust law does not reach anticompetitive conduct that is (1) in furtherance of a clearly articulated state policy to displace competition, and (2) actively supervised by the state. In an Order filed December 14, 2015, the court denied the motion, ruling that the state action doctrine did not apply because the requirement of "active supervision" was not met.

On January 8, 2016, the TMB appealed, contending that the denial of its motion is immediately appealable as a final judgment under the collateral order doctrine.

## SUMMARY OF ARGUMENT

This Court lacks jurisdiction over this appeal. There is no final judgment resolving the underlying litigation, and an order denying a motion to dismiss an antitrust claim under the state action doctrine is not immediately appealable under the collateral order doctrine.

The collateral order doctrine applies only to a "small class" of rulings that satisfy "stringent" conditions. *Will v. Hallock*, 546 U.S. 345, 349 (2006). Interlocutory orders rejecting state action arguments do not fall into this small class. State action is a defense to antitrust liability predicated on the absence of any indication in the text or history of the Sherman Act that Congress sought to condemn state-imposed restraints of trade. Unlike qualified or sovereign immunity, the state action doctrine does not create a right to avoid trial. The state action doctrine thus does not satisfy the requirement that an order rejecting its application be "effectively unreviewable" on appeal from a

final judgment. Orders denying a state action defense also do not qualify for review under the collateral order doctrine because state action issues are not completely separate from the merits of the underlying antitrust action. The Fourth and Sixth Circuits have squarely held that denials of motions to dismiss predicated on the state action doctrine are not immediately appealable. *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986).

Although this Circuit has held that the collateral order doctrine applies to some state action orders, *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), that case is wrongly decided. *Martin* also is out of step with the Supreme Court's recent collateral order jurisprudence and was undermined by this Court's *en banc* discussion of *Parker* in *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1*, 171 F.3d 231 (5th Cir. 1999). It therefore should not be followed.

In any event, *Martin* does not control here. It held only that an interlocutory denial of a state action defense falls within the collateral order doctrine "to the extent that it turns on whether a municipality or

subdivision acted pursuant to a clearly articulated and affirmatively expressed state policy." 86 F.3d at 1397. That expressly limited holding does not apply to this case, which involves a different type of defendant—a state regulatory board dominated by active market participants—and a different element of the state action test—the "active supervision" requirement. The Supreme Court's decision in *North Carolina State Board of Dental Examiners v. FTC*, 135 S. Ct. 1101 (2015), makes clear that such regulatory boards are not equivalent to municipalities for state action purposes. Indeed, to extend *Martin* to state regulatory boards would be inconsistent with *Dental Examiners*.

If this Court does find that it has jurisdiction, however, it should hold that the state action doctrine does not shield the TMB's rules from federal antitrust scrutiny because the TMB did not carry its burden to show active supervision. There is no evidence that any disinterested state official reviewed the TMB rules at issue to determine whether they promote state regulatory policy rather than TMB doctors' private interests in excluding telehealth—and its lower prices—from the Texas market. The legislative and judicial review mechanisms cited by the TMB do not satisfy the "constant requirements of active supervision"

that the Supreme Court has identified. *Dental Examiners*, 135 S. Ct. at 1116.

## ARGUMENT

### I. The Court Lacks Jurisdiction Because the District Court's Order Is Not Collaterally Appealable.

The collateral order doctrine is narrow and does not apply to an order denying a motion to dismiss an antitrust claim under the state action doctrine.[3] *Martin* was wrong to reason otherwise, but it does not control here and should not be extended to state regulatory boards controlled by active market participants.

#### A. The Collateral Order Doctrine Is Narrow.

The Supreme Court has identified a "small class" of collateral rulings that, although not disposing of the litigation, are appropriately deemed final and immediately appealable because they are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is

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[3] The TMB has the burden of establishing this Court's jurisdiction. *See* Fed. R. App. P. 28(a)(4); *Thibodeaux v. Vamos Oil & Gas Co.*, 487 F.3d 288, 293 (5th Cir. 2007).

adjudicated." *Will v. Hallock*, 546 U.S. 345, 349-51 (2006); *see Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009).

The "requirements for collateral order appeal have been distilled down to three conditions: that an order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349. An order that "fails to satisfy any one of these requirements . . . is not appealable under the collateral order exception to [28 U.S.C.] § 1291." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *see S.C. State Bd.*, 455 F.3d at 441.

The three conditions are "stringent" (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)), because otherwise "the [collateral order] doctrine will overpower the substantial finality interests [28 U.S.C.] § 1291 is meant to further," *Will*, 546 U.S. at 349-50, and "swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered," *Digital Equip.*, 511 U.S. at 868 (citation omitted). "Permitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration'

and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk*, 558 U.S. at 106 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

For these reasons, the Supreme Court repeatedly emphasized that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). "In case after case in year after year, the Supreme Court has issued increasingly emphatic instructions that the class of cases capable of satisfying this stringent test should be understood as small, modest, and narrow." *United States v. Wampler*, 624 F.3d 1330, 1334 (10th Cir. 2010) (internal quotation marks omitted). The Court's "admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 558 U.S. at 113 (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 48 (1995)); *see also id.* at 113-14 (discussing relevant amendments to

the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, and Congress's enactment of 28 U.S.C. § 1292(e)).

Moreover, the collateral order doctrine's applicability to interlocutory rulings must be ascertained in light of the entire class of such orders and not based on the features of individual cases. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988). For this reason, courts are "cautious in applying the collateral order doctrine, because once one order is identified as collateral, *all* orders of that type must be considered collaterally." *United States v. Guerrero*, 693 F.3d 990, 997 (9th Cir. 2012) (internal quotation omitted).

### B. An Order Denying a Motion to Dismiss an Antitrust Claim Under the State Action Doctrine Is Not Collateral.

#### 1. State action determinations are not effectively unreviewable on appeal from a final judgment.

An order is "effectively unreviewable" when it protects an interest that would be "essentially destroyed if its vindication must be postponed until trial is completed." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-99 (1989). The quintessential such interest is a "right not to be tried," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800

(1989). But the Supreme Court has rejected arguments that a right to collateral appeal arises whenever a district court denies "an asserted right to avoid the burdens of trial." *Will*, 546 U.S. at 351. "[I]t is not mere avoidance of a trial, but *avoidance of a trial that would imperil a substantial public interest*, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Id.* at 353 (emphasis added).

As the Court explained in *Will*, "[p]rior cases mark the line between rulings within the class [of appealable collateral orders] and those outside." 546 U.S. at 350. "On the immediately appealable side" are orders denying: (1) absolute Presidential immunity; (2) qualified immunity; (3) Eleventh Amendment sovereign immunity; and (4) double jeopardy. *Id.* "In each case," the Court noted, "some particular [public] value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." *Id.* at 352-53.

An order denying a motion to dismiss an antitrust claim under the state action doctrine is materially different from these types of appealable collateral orders, because the state action doctrine is a defense to antitrust liability, not a right to be free from suit. *See Huron Valley Hosp.*, 792 F.2d at 567. In *Surgical Care Center*, this Court acknowledged *en banc* that the state action doctrine is an interpretation of the "reach of the Sherman Act" and has a "parentage [that] differs from the qualified and absolute immunities of public officials" and from Eleventh Amendment immunity. 171 F.3d at 234.

The Supreme Court based the *Parker* doctrine not on concerns about facing trial, but instead on the assumption that Congress did not intend the Sherman Act to include "an unexpressed purpose to nullify a state's control over its officers and agents." 317 U.S. at 351. *Accord S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985) (*Parker* was "premised on the assumption that Congress . . . did not intend to compromise the States' ability to regulate their domestic commerce."). The Supreme Court interprets the reach of the Sherman Act consistent with that assumption. Thus, the state action doctrine is not an "immunity" from suit but a "recognition of the limited reach of

the Sherman Act." *Acoustic Sys. Inc. v. Wenger Corp.*, 207 F.3d 287, 292 n.3 (5th Cir. 2000).

Despite this origin of the state action doctrine, this Court and others have continued to refer loosely to "*Parker* immunity" as a "convenient shorthand," while recognizing that "immunity" is "an inapt description" of the doctrine. *Surgical Care Ctr.*, 171 F.3d at 234. That shorthand labeling does not make state action rulings equivalent to the narrow classes of "immunity" cases that present the concerns that justify collateral appeal. As the Fourth Circuit observed: "*Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.' *Parker* therefore recognizes a 'defense' qualitatively different from the immunities described in *Will*, which focus on the harms attendant to litigation itself." *S.C. State Bd.*, 455 F.3d at 444. *See also Huron Valley Hosp.*, 792 F.2d at 567 ("the [state action] exemption is not an 'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim").

Claims that effective government will be disrupted by subjecting governmental defendants to the burdens of discovery do not warrant

expansion of the collateral order doctrine. That effect may occur in many cases, antitrust or non-antitrust, in which a state or federal government entity is a defendant. If an order were rendered "effectively unreviewable" merely because its denial led to litigation burdens for the government, the final judgment rule would be drastically reduced in scope. Thus, the Supreme Court explained in *Mohawk* "[t]hat a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . has never sufficed" to justify collateral order appeals. 558 U.S. at 107 (internal citations omitted; ellipsis in original).

If a district court erroneously rejects a state action defense in denying a motion to dismiss, and the defendant later is found liable, that judgment can be reversed on appeal. Again, that post-judgment appeal may afford only an "imperfect" remedy in some cases does not justify making all such orders immediately appealable as of right. *Mohawk*, 558 U.S. at 112. Moreover, a defendant who believes her state action defense was rejected because of a legal error "may ask the

district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)." *Id.* at 110-11.[4]

**2. State action issues are not completely separate from the antitrust merits.**

An issue is not completely separate from the merits when it "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). As explained in section B(1) above, state action issues overlap with the merits of an antitrust claim because the state action doctrine delineates, in part, the reach of the Sherman Act—that is, whether the challenged conduct falls within the statutory prohibition. If the state action requirements are met, then the conduct falls outside that prohibition, which is a paradigmatic merits determination. *Cf. Morrison v. Nat'l Australia Bank Ltd.*, 561

[4] The TMB recently did just that, asking the district court to certify for interlocutory appeal the portion of the December 14, 2015 order denying its motion to dismiss the antitrust claim under the state action doctrine. Defs.' Mot. to Certify Order for Appeal, No. 1:15-CV-00343-RP, Doc. No. 90 (July 6, 2016). On August 15, 2016, the court denied the motion.

U.S. 247, 253-254 (2010) (holding that the question of a securities statute's reach "is a merits question").

In any event, the state action determination requires a factual analysis of the nature of economic competition in the specific market at issue, together with the regulatory constraints on that competition, and thus, it overlaps with the merits question of whether the conduct is an unreasonable restraint of trade. "The analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct" typically is "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Huron Valley Hosp.*, 792 F.2d at 567; *S.C. State Bd.*, 455 F.3d at 442-43 & n.7 (the state action inquiry is "inherently 'enmeshed' with the underlying [antitrust] cause of action"). "[T]ime and again the Supreme Court has refused to find an order to be 'collateral' when entertaining an immediate appeal might require it to consider issues intertwined with—though not identical to—the ultimate merits inquiry." *S.C. State Bd.*, 455 F.3d at 441-42.

Moreover, it is immaterial whether a court sometimes can evaluate a state action defense without considering facts and circumstances relevant to the antitrust merits. The separateness determination must evaluate "the entire category to which a claim belongs," not the facts of particular cases, *Digital Equip.*, 511 U.S. at 868. The Court held in *Van Cauwenberghe,* 486 U.S. at 529, that *forum non conveniens* determinations were not collaterally appealable, although some do not "require significant inquiry into the [underlying] facts and legal issues," because "[i]n fashioning a rule of appealability . . . we [must] look to categories of cases, not to particular injustices" and there was substantial overlap "in the main."

### C. This Court Should Disregard its *Martin* Decision.

In *Martin*, this Court reasoned that the state action doctrine serves the same purposes as Eleventh Amendment immunity and the absolute and qualified immunity afforded to public officials. 86 F.3d at 1395-96. Thus, orders denying state action protection to a municipality or state subdivision should be appealable as collateral orders in the same way that orders denying those immunities are treated as final judgments. *Martin* should not be followed, however, because the analogy it drew

between the state action doctrine and absolute, qualified, and Eleventh Amendment immunities is incorrect. In a subsequent decision, *Surgical Care Center,* this Court explained, *en banc* and unanimously, that "immunity" is an "inapt" description of the state action doctrine; the term "*Parker* immunity" is most accurately understood as "a convenient shorthand" for "locating the reach of the Sherman Act." 171 F.3d at 234. This Court went on to note, contrary to *Martin*, that *Parker* protection for state officials does not follow the Eleventh Amendment. *See id.*

Contrary to the supposition in *Martin*, the state action doctrine serves purposes entirely distinct from those underlying qualified, absolute, and Eleventh Amendment immunities afforded to public officials. The protections of the state action doctrine apply to conduct by private parties as well as governmental defendants. As the Fourth Circuit explained, the state action defense may be asserted in antitrust suits against municipalities, suits that seek purely equitable relief, and suits brought by the federal government. But such suits do not offend a state's dignity, and thus qualified or sovereign immunity is not available. *S.C. State Bd.*, 455 F.3d at 446-47. As explained above, the state action doctrine is not concerned with the dignity interests of the

states or the impact of damage suits on the functioning of government. Rather, its purpose is to permit states to engage in economic regulation and shield anticompetitive conduct when states enact deliberate policies to do so.

*Martin* thus failed to heed the Supreme Court's admonition to courts of appeals just two years earlier to "view claims of 'a right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equip.*, 511 U.S. at 873.

*Martin* also was decided several years before *Will* and *Mohawk* emphasized that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). *Martin* does not acknowledge the narrowness of the collateral order doctrine in any way, and it creates an entirely new class of collaterally appealable orders not recognized by the Supreme Court. *See Huron Valley Hosp.*, 792 F.2d at 568 ("We . . . decline to extend the right of immediate appeal any farther than the Supreme Court already has extended the right."). *Martin* therefore is out of step with the Supreme Court's collateral order jurisprudence.

### D. In Any Event, *Martin* Does Not Control This Case.

*Martin* states as its holding that the denial of the state action exemption is immediately appealable "to the extent that it turns on whether a municipality or subdivision acted pursuant to a clearly articulated and affirmatively expressed state policy." 86 F.3d at 1397. That holding is readily distinguishable from this case. As this Court expressly recognized, *Martin*'s application of the collateral order doctrine is limited to situations in which appeal is taken by a "**municipality** or **subdivision**," as opposed to a private party. *Acoustic Sys.*, 207 F.3d at 291 (bold in original). The TMB is not a municipality, political subdivision, or other organ of local government. The Supreme Court in *Dental Examiners* treated state boards composed of market participants as "similar to private trade associations vested by States with regulatory authority[.]" 135 S. Ct. at 1114; *see also id.* at 1121 (Alito, J., dissenting) ("The Court thus treats these state agencies like private entities.").[5]

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[5] Because the Supreme Court treats state regulatory boards like private entities, this Court's holding in *Acoustic Systems,* that private defendants may not take collateral order appeals of denials of state action protection, 207 F.3d at 288, confirms the lack of appellate

Nor should *Martin*'s application of the collateral order doctrine be extended to appeals taken by state regulatory boards like the TMB. This Court explained that *Martin* was based on "concerns that public defendants would be subjected to the costs and general consequences associated with discovery and trial." *Acoustic Sys.,* 207 F.3d at 293. The policy basis of *Martin* was to shield public defendants from the burden of the judicial process.

But the Supreme Court in *Dental Examiners* rejected efforts to treat state regulatory boards like typical public defendants. Although municipalities "lack the kind of private incentives characteristic of active participants in the market," 135 S. Ct. at 1112, boards controlled by active market participants have structural incentives to engage in anticompetitive conduct. *See id.* at 1111. Therefore, a board controlled by active market participants seeking state action protection bears the additional burden of showing that its conduct was actively supervised by the state. *See id.* at 1114 (board controlled by active market

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jurisdiction here. To the extent that *Acoustic Systems* follows *Martin*'s analysis of the state action doctrine, however, *Acoustic Systems* is inconsistent with— and fails even to mention—the Court's *en banc* discussion of *Parker* in *Surgical Care Center.*

participants "must satisfy [the] active supervision requirement"); *id.* at 1122 (Alito, J., dissenting) (majority opinion puts the burden on a state board to "demonstrate that the State actively supervises its actions"). State regulatory boards like the TMB therefore cannot escape the judicial process.

## II. The Active Supervision Requirement of the State Action Doctrine Is Not Satisfied Here.

State action protection from the antitrust laws "is disfavored, much as are repeals by implication." *Dental Examiners*, 135 S. Ct. at 1110. For state regulatory boards like the TMB, "active supervision" is required because licensing boards present the "structural risk of market participants' confusing their own interests with the State's policy goals." *Id.* at 1114, 1106. Here, Teladoc alleges that the private economic interests of some doctors, rather than state policy, unreasonably threaten to impede the innovative and cost-effective provision of medical care in Texas.

### A. The TMB Is Controlled by Active Market Participants.

The district court was correct to apply the active supervision requirement when Teladoc alleged as a fact (that must be taken as true on a motion to dismiss) that a majority of the TMB's members are

active market participants. The Court in *Dental Examiners* explained that a critical feature of state regulatory boards, for purposes of the state action doctrine, is whether the board is controlled by active market participants, because this feature triggers a requirement that the board's actions be supervised by a disinterested state actor.

The district court properly disregarded the TMB's effort to distinguish *Dental Examiners* on the ground that the governor of Texas may appoint or remove the TMB's members (TMB Br. 38-39). The Court in *Dental Examiners* gave no weight to how the North Carolina dental board members were selected. The fact of overriding importance was that the board members were active market participants. The TMB nowhere explains how the manner of selection or removal negates the private economic interests that practicing doctors have while serving as Board members.

The purpose of the active supervision requirement is to ensure that an anticompetitive decision promotes state policy, not private interests. The Supreme Court did not suggest that, to be deemed an active market participant, an individual must have a personal financial interest in the specific subject matter at issue. Rather, the Court

described active market participants as those who have a "private interest" in the "occupation the board regulates." *Dental Examiners*, 135 S. Ct. at 1114. And actively practicing physicians, regardless of specialty, may have incentives to protect traditional office-based medical practices from the competitive threat posed by doctors offering tele-medicine services.

The district court recognized that the majority of TMB members are active participants in the "occupation" of medicine, and it therefore properly disregarded the TMB's argument that because the board members may be specialists they do not compete with Teladoc's physicians (TMB Br. 40).[6] The TMB regulates "the practice of medicine in Texas," 22 Tex. Admin. Code § 161.1; *see* § 174.1 (authorizing TMB to adopt rules "relating to the practice of medicine"), not just specialty

[6] The TMB misleadingly quotes from *Dental Examiners* that the breadth of a regulator's mandate "reduce[es] the risk that it would pursue private interests while regulating any single field" (Br. 40). The Court used that language to describe a *municipal government* that regulates "across different economic spheres," 135 S. Ct. at 1113, whereas all fields subject to the TMB's rules are medical.

practices. The TMB members are properly deemed "active market participants," which triggers the requirement of active supervision.[7]

### B. The TMB Has Not Demonstrated that the State Actively Supervised its Challenged Rules.

The district court correctly concluded that the TMB did not show that its 2010 and 2015 rules met the requirements of active supervision. Once it is determined that active supervision is necessary, as is the case here, the defendant must, at minimum, satisfy four "constant requirements" designed to ensure that the challenged actions of the state agency accord with state policy. *Dental Examiners*, 135 S. Ct. at 1116-17.

The TMB errs in suggesting (TMB Br. 35-36) that these requirements can be ignored in favor of a context-specific risk assessment. *Dental Examiners* explained that "limits" on the state

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[7] *Rivera-Nazario v. Corporacion del Fondo del Seguro del Estado*, 2015 WL 9484490, *8 (D.P.R. Dec. 29, 2015), cited at TMB Br. 40, does not say that because regulatory board doctors could be specialists there is "less risk" of self-dealing than in *Dental Examiners*. The court there held that *Dental Examiners* did not apply because (i) the defendant workers' compensation Board of Directors was not controlled by active market participants, and (ii) although a majority of the Board's Industrial Medical Council were physicians, the Council was an advisory body and could not act without the Board's approval.

action doctrine "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." 135 S. Ct. at 1111. Whatever indicia of good faith might exist in a particular circumstance cannot alter the inherent "structural risk" that the Court identified and relied upon. *Id.* at 1114. The "flexibility" urged by the TMB cannot displace the specific factors that the Court identified in *Dental Examiners* and the precedents the Court followed. Those requirements are the foundation of the active supervision test, which is why the Court described them as "constant." Only if the "constant requirements" are satisfied will "the adequacy of supervision *otherwise* . . . depend on all the circumstances of a case." *Id.* at 1117 (emphasis added).

The first "constant requirement" of active supervision is review of the substance of the anticompetitive decision, not merely the procedures by which it was adopted. *Dental Examiners*, 135 S. Ct. at 1116 (supervisor must "review the substance" of the decision); *Patrick v. Burget,* 486 U.S. 94, 102 (1988) (Health Division's "statutory authority over peer review relates only to a hospital's procedures; that authority

does not encompass the actual decisions made by hospital peer-review committees").

The TMB contends that state court judicial review meets this requirement. The Supreme Court has not determined whether judicial review can provide the requisite active state supervision. It is clear, however, that traditional forms of judicial review of administrative actions, such as limited inquiries into whether an agency acted within its delegated discretion, followed proper procedures, or had some factual basis for its actions, are insufficient. *See Patrick* 486 U.S. at 105 ("constricted review does not convert the action of a private party . . . into the action of the State for purposes of the state-action doctrine"); *Shahawy v. Harrison*, 875 F.2d 1529, 1535-36 (11th Cir. 1989) (judicial review "for procedural error and insufficient evidence" was not active supervision).[8]

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[8] The TMB's out-of-context quotation from the FTC's brief in *Dental Examiners* does not advance the TMB's argument (Br. 36). The FTC did not say there that the dental board's action beyond its authority under state law was the reason the board's conduct was subject to antitrust scrutiny, nor did the FTC argue that judicial review would have been sufficient. Moreover, the Court's opinion makes clear that whether the dental board exceeded its authority is not the relevant supervisory question. 135 S. Ct. at 1116 ("Whether or not the Board

Applying this principle, the district court correctly rejected the TMB's reliance on Administrative Procedure Act-type review. The TMB cites cases supposedly showing that Texas courts engage in substantive review of agency rules (Br. 10-11, 45-47), but as the district court found (Order at 13), that review is limited to determining whether the decision exceeded the agency's statutory authority.[9] A Texas reviewing court "presume[s] that an agency rule is valid, and the party challenging the rule has the burden of demonstrating its invalidity." *Harlingen Family Dentistry, P.C. v. Tex. Health & Human Servs. Comm'n*, 452 S.W.3d 479, 481 (Tex. App. – Austin 2014, pet. dism'd). The courts do not evaluate whether agency rules are "wise, desirable, or

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exceeded its powers under North Carolina law" there was no evidence of state control of the board's actions).

[9] *Lambright v. Tex. Parks and Wildlife Dep't.*, 157 S.W.3d 499, 510 (Tex. App. – Austin 2005, no pet.) (issue is whether agency "exceeded its authority"); *Tex. Orthopedic Ass'n v. Tex. State Bd. of Podiatric Med. Exam'rs*, 254 S.W.3d 714, 722 (Tex. App. – Austin 2008, pet. denied) ("the Board exceeded its authority by promulgating the Rule"); *Tex. Bd. of Chiropractic Exam'rs v. Tex. Med. Ass'n*, 375 S.W.3d 464, 474 (Tex. App. – Austin 2012, pet. denied) (issues for decision "turn principally on whether the rules in question were within TBCE's statutory authority to adopt").

necessary." *Lambright*, 157 S.W.3d at 510-11. That is a constricted form of review, not a fully independent, substantive assessment. And simply having the statutory authority to act is not sufficient: the Court has explained that authority to act and authority to act anticompetitively are different issues. *See City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 372 (1991); *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1012 (2013).[10]

The second "constant requirement" is that "the supervisor must have the power to veto or modify particular decisions to ensure they accord with state policy." *Dental Examiners*, 135 S. Ct. at 1116. That is, the supervisor must possess authority to make an independent judgment to approve or disapprove the board's decision and need not defer to the board. *See also Pinhas v. Summit Health*, 894 F.2d 1024, 1030 (9th Cir. 1989) (judicial review was not active supervision where

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[10] The TMB also cites *Texas Medical Ass'n v. Texas Workers Compensation Comm'n*, 137 S.W.3d 342 (Tex. App. – Austin 2004, no pet.), which refers loosely to "substantive" challenges to a Commission rule. But the court's actual holdings on these challenges were (i) that the Commission did not unlawfully delegate its responsibility to a federal agency, and (ii) that the Commission's fee guidelines did not lack a legitimate factual or legal basis. The court did not evaluate the wisdom or policy of the Commission's decisions and did not substitute its judgment for that of the Commission.

"reviewing court may not reject the judgment of the governing board even if it disagrees with the board's decision") (citation omitted). The district court therefore properly rejected the TMB arguments based on judicial review limited to whether the decision exceeded the agency's statutory authority, or judicial review that defers to the agency. For example, Texas law provides that in judicial review of agency decisions under the substantial evidence rule (or when the law does not define the scope of judicial review), the court may not make an independent judgment "on the weight of the evidence on questions committed to agency discretion." Tex. Code Ann. § 2001.174.

The supervisor's exercise of independent judgment must be focused on the board's specific decision. *Dental Examiners*, 135 S. Ct. at 1116 (supervisor reviews "particular decisions to ensure they accord with state policy"). Here, the district court correctly recognized that a legislative review of whether the entire regulatory agency should continue to exist, as in the case of the Texas "sunset" statute cited by the TMB (Br. 43, 51), is not focused on the specific TMB decision at issue and therefore is insufficient. The same conclusion applies to the "sunshine" and ethics statutes cited by the TMB (Br. 42): None

provides review of the Board's specific anticompetitive rules at issue in this case, or offers a determination of whether the Board's rules accord with a clearly articulated state policy to displace competition.

The third "constant requirement" is that the active supervision must actually occur, not be merely possible. *Dental Examiners*, 135 S. Ct. at 1115-16 ("there is no evidence here of any decision by the State to initiate or concur with the Board's actions" and "mere potential for state supervision is not an adequate substitute for a decision by the State").

The TMB argues it is sufficient that judicial review is *available* by right. But if no one has both standing to sue and the willingness to undertake the burden of a state court challenge to a Board rule, the rule takes effect without the state making any supervisory "decision" whatsoever. That limited "mere potential" for review is insufficient. *Cf. FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 638 (1992) ("negative option," by which rates became effective if not rejected within a set time, was not active state supervision; there must be an actual "decision by the State"). Judicial review that is contingent on a plaintiff filing a lawsuit shifts the burden of initiating supervision away from the court. No challenge ever may be brought if the benefits of a successful lawsuit will

be shared by many but the costs must be borne by a party capable of seeking judicial review. Judicial review that is contingent provides no certainty that the state ever will make a reviewing "decision," and therefore is not "active supervision."[11]

Similarly, the district court properly rejected the TMB's reliance on Tex. Code Ann. § 2001.032, providing that proposed agency rules are referred to standing committees of the legislature, which "may" provide a statement (not binding on the TMB) to the agency "supporting or opposing adoption of a proposed rule." The statute does not mention, much less require, that any committee determine whether an agency rule promotes a state policy to displace competition rather than serves the private interests of market incumbents, which is the standard

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[11] Amicus curiae American Antitrust Institute's theory, that pre-implementation judicial review might suffice if available by right, does not bear scrutiny. First, under that theory, whether there is "active supervision" would depend on the identity of the antitrust plaintiff. *See* AAI Br. 18 n.14 (explaining that prospective judicial review would be "insufficient" in antitrust cases brought by the federal antitrust agencies or by consumers). Nothing in *Dental Examiners*, the Court's state action jurisprudence generally, or the federalism policies that underlie the doctrine supports making state action protection turn on the identity of the plaintiff who challenges a board rule. Second, like the TMB's position, judicial review that may be available but offers no certainty of a state decision is insufficient.

enunciated by *Dental Examiners.* In addition, Teladoc alleges as a fact that "[n]o statement was issued by a standing committee regarding New Rule 174 or New Rule 190.8." Amended Complaint ¶ 125.

The fourth "constant requirement" is that the state supervisor must not be an active market participant. *Dental Examiners*, 135 S. Ct. at 1117. The TMB gave the district court no evidence (nor does its brief on appeal offer any) that any disinterested state official ever substantively reviewed the Board rules challenged here to determine whether the rules promote a clearly articulated state policy to displace competition rather than the private interests of active market participants.[12]

Finally, the TMB contends (Br. 52-54) that the district court's judgment intrudes on state sovereignty. But *Dental Examiners* explains that "respect for federalism" is the very purpose of requiring adherence to the two-pronged test for state action. *See* 135 S. Ct. at

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[12] The TMB (Br. 48) quotes *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir. 1996), but that court later deleted all of the quoted language. *See* 86 F.3d 1028. As modified, that decision says only that the Florida Public Service Commission *actually did* supervise FPL through rulemaking and contested agency proceedings. *See* 86 F.3d at 1029.

1110. The active supervision requirement "is an essential prerequisite" (*id.* at 1113) precisely because it promotes federalism values, by "ensur[ing] that the States accept political accountability for anticompetitive conduct they permit and control." *Id.* at 1111. The district court's judgment thus protects, rather than violates, state sovereignty.

The TMB further implies that the district court's judgment would inhibit Texas from staffing its licensing boards with active market participants. But *Dental Examiners* also rejected that argument. *See* 135 S. Ct. at 1115. Active supervision "need not entail day-to-day involvement in an agency's operations or micromanagement of its every decision." *Id.* at 1116. But *Dental Examiners* does require the TMB to show that its anticompetitive decisions are actively supervised. As the court correctly concluded, the TMB failed to do so.

## CONCLUSION

The Court should dismiss this appeal for lack of appellate jurisdiction. If the Court finds jurisdiction, it should affirm the district court's order with respect to the state action doctrine.

Respectfully submitted.

September 9, 2016 /s/ Steven J. Mintz

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## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,950 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

September 9, 2016 /s/ Steven J. Mintz
*Attorney*

## CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that on September 9, 2016, I electronically filed the foregoing Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Plaintiffs-Appellees with the Clerk of the Court of the United States Court of Appeals for the Fifth Circuit by using the CM/ECF System. I also sent 7 copies to the Clerk of the Court by FedEx 2-Day Delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

September 9, 2016

/s/ Steven J. Mintz
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# *United States Court of Appeals*

**FIFTH CIRCUIT**
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No. 16-50017 Teladoc, Incorporated, et al v. Texas Medical Board, et al
USDC No. 1:15-CV-343

Dear Mr. Mintz,

The following pertains to your brief electronically filed on 9/9/16.

We filed your brief. However, you must make the following corrections within the next 14 days.

You need to correct or add:

Caption on the brief does not agree with the caption of the case in compliance with FED R. APP. P. 32(a)(2)(C). (See attachment)

You must electronically file a "Form for Appearance of Counsel" within 14 days from this date. You must name each party you represent, see FED R. APP. P. 12(b) and 5TH CIR. R. 12 & 46.3. The form is available from the Fifth Circuit's website, www.ca5.uscourts.gov. If you fail to electronically file the form, the brief will be stricken and returned unfiled.

Once you have prepared your sufficient brief, you must select from the Briefs category the event, Proposed Sufficient Brief, via the electronic filing system. Please do not send paper copies of the brief until requested to do so by the clerk's office. The brief is not sufficient until final review by the clerk's office. If the brief is in compliance, paper copies will be requested and you will receive a notice of docket activity advising you that the sufficient brief filing has been accepted and no further corrections are necessary.

Sincerely,

LYLE W. CAYCE, Clerk

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Mr. Sean Patrick Flammer
Mr. Sean Daniel Jordan
Mr. Andrew Kline
Mr. Drew Anthony Navikas
Mr. Joshua Abraham Romero
Mr. Donald P. Wilcox

Case No. 16-50017

TELADOC, INCORPORATED; TELADOC PHYSICIANS, PROFESSIONAL ASSOCIATION; KYON HOOD; EMMETTE A. CLARK,

Plaintiffs - Appellees

v.

TEXAS MEDICAL BOARD; MICHAEL ARAMBULA, M.D., Pharm. D., in his official capacity; MANUEL G. GUAJARDO, M.D., in his official capacity; JOHN R. GUERRA, D.O., M.B.A., in his official capacity; J. SCOTT HOLLIDAY, D.O., M.B.A., in his official capacity; MARGARET MCNEESE, M.D., in her official capacity; ALLAN N. SHULKIN, M.D., in his official capacity; ROBERT B. SIMONSON, D.O., in his official capacity; WYNNE M. SNOOTS, M.D.,, in his official capacity; KARL SWANN, M.D., in his official capacity; SURENDRA K. VARMA, M.D., in her official capacity; STANLEY WANG, M.D., J.D., MPH, in his official capacity; GEORGE WILLEFORD, III, M.D., in his official capacity; JULIE K. ATTEBURY, M.B.A., in her official capacity; PAULETTE BARKER SOUTHARD, in her official capacity,

Defendants - Appellants

# *United States Court of Appeals*

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September 13, 2016

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No. 16-50017 Teladoc, Incorporated, et al v. Texas Medical Board, et al
USDC No. 1:15-CV-343

Dear Mr. Mintz,

We have reviewed your electronically filed proposed sufficient amicus brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

Sincerely,

LYLE W. CAYCE, Clerk

Melissa Mattingly

By: _____
Melissa V. Mattingly, Deputy Clerk
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# EXHIBIT 3

PUBLIC

**UNITED STATES OF AMERICA**
**FEDERAL TRADE COMMISSION**
**OFFICE OF ADMINISTRATIVE LAW JUDGES**

| | | |
|---|---|---|
| In the Matter of | ) | |
| | ) | |
| Louisiana Real Estate Appraisers Board, | ) | DOCKET NO. 9374 |
| | ) | |
| Respondent. | ) | |

## SECOND REVISED SCHEDULING ORDER

In accordance with the January 19, 2018 Commission Order and due to the partial shutdown of the federal government, the remaining dates in the November 14, 2017 Scheduling Order are hereby revised as follows:

| | | |
|---|---|---|
| February 16, 2018 | - | Complaint Counsel provides expert witness list. |
| March 2, 2018 | - | Deadline for issuing requests for admissions, except for requests for admissions for purposes of authenticity and admissibility of exhibits. |
| March 5, 2018 | - | Respondent's Counsel provides expert witness list. |
| March 16, 2018 | - | Close of discovery, other than discovery permitted under Rule 3.24(a)(4), depositions of experts, and discovery for purposes of authenticity and admissibility of exhibits. |
| April 2, 2018 | - | Deadline for Complaint Counsel to provide expert witness reports (to be provided by 4 p.m EDT). |
| April 16, 2018 | - | Deadline for Respondent's Counsel to provide expert witness reports (to be provided by 4 p.m. ET). Respondent's expert report shall include (without limitation) rebuttal, if any, to Complaint Counsel's expert witness report(s). |
| April 20, 2018 | - | Complaint Counsel provides to Respondent's Counsel its final proposed witness and exhibit lists, including |

depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Complaint Counsel's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Complaint Counsel serves courtesy copies on ALJ of its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

April 30, 2018 - Complaint Counsel to identify rebuttal expert(s) and provide rebuttal expert report(s). Any such reports are to be limited to rebuttal of matters set forth in Respondent's expert reports. If material outside the scope of fair rebuttal is presented, Respondent will have the right to seek appropriate relief (such as striking Complaint Counsel's rebuttal expert reports or seeking leave to submit surrebuttal expert reports on behalf of Respondent).

May 4, 2018 - Respondent's Counsel provides to Complaint Counsel its final proposed witness and exhibit lists, including depositions, copies of all exhibits (except for demonstrative, illustrative or summary exhibits and expert related exhibits), Respondent's basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness.

Respondent's Counsel serves courtesy copies on ALJ its final proposed witness and exhibit lists, its basis of admissibility for each proposed exhibit, and a brief summary of the testimony of each witness, including its expert witnesses.

May 4, 2018 - Parties that intend to offer confidential materials of an opposing party or non-party as evidence at the hearing must provide notice to the opposing party or non-party, pursuant to 16 C.F.R. § 3.45(b).[1] *See* Additional Provision 7.

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[1] Appendix A to Commission Rule 3.31, the Standard Protective Order, states that if a party or third party wishes *in camera* treatment for a document or transcript that a party intends to introduce into evidence, that party or third party shall file an appropriate motion with the Administrative Law Judge within 5 days after it receives notice of a party's intent to introduce such material. Commission Rule 3.45(b) states that parties who seek to use material obtained from a third party subject to confidentiality restrictions must demonstrate that the third party has been given at least 10 days' notice of the proposed use of such material. To resolve this apparent conflict, the Scheduling Order requires that the parties provide 10 days' notice to the opposing

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| May 17, 2018 | - | Deadline for depositions of experts (including rebuttal experts) and exchange of expert related exhibits. |
| May 17, 2018 | - | Exchange and serve courtesy copy on ALJ objections to final proposed witness lists and exhibit lists. The Parties are directed to review the Commission's Rules on admissibility of evidence before filing objections to exhibits. |
| May 18, 2018 | - | Deadline for filing motions *in limine* to preclude admission of evidence. *See* Additional Provision 9. |
| May 21, 2018 | - | Deadline for filing motions for *in camera* treatment of proposed trial exhibits. |
| May 22, 2018 | - | Complaint Counsel files pretrial brief supported by legal authority. |
| May 23, 2018 | - | Deadline for filing responses to motions *in limine* to preclude admission of evidence. |
| May 24, 2018 | - | Exchange proposed stipulations of law, facts, and authenticity. |
| May 29, 2018 | - | Deadline for filing responses to motions for *in camera* treatment of proposed trial exhibits. |
| June 5, 2018 | - | Respondent's Counsel files pretrial brief supported by legal authority. |
| June 7, 2018 | - | Final prehearing conference to begin at 1:00 p.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.<br><br>The parties shall meet and confer prior to the prehearing conference regarding trial logistics and proposed stipulations of law, facts, and authenticity of exhibits. To the extent the parties have agreed to stipulate to any issues of law, facts, and/or authenticity of exhibits, the parties shall prepare a list of such stipulations and submit a copy of the stipulations to the ALJ one business day prior to the conference. At the conference, the parties' list of |

party or third parties to allow for the filing of motions for *in camera* treatment.

stipulations shall be marked as "JX1" and signed by each party, and the list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required. Any subsequent stipulations may be offered as agreed by the parties.

Counsel may present any objections to the final proposed witness lists and exhibits. Trial exhibits will be admitted or excluded to the extent practicable. To the extent the parties agree to the admission of each other's exhibits, the parties shall prepare a list identifying each exhibit to which admissibility is agreed, marked as "JX2" and signed by each party, which list shall be offered into evidence as a joint exhibit. No signature by the ALJ is required.

June 11, 2018 - Commencement of Hearing to begin at 10:00 a.m. in FTC Courtroom, Room 532, Federal Trade Commission Building, 600 Pennsylvania Avenue, NW, Washington, DC 20580.

All other provisions of the November 14, 2017 Scheduling Order remain in effect.

ORDERED:

D. Michael Chappell
Chief Administrative Law Judge

Date: January 24, 2018

## CERTIFICATE OF SERVICE

I hereby certify that on April 26, 2018, I filed the foregoing document electronically using the FTC's E-Filing System and served the following via email:

Donald S. Clark
Secretary
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-113
Washington, DC 20580
ElectronicFilings@ftc.gov

The Honorable D. Michael Chappell
Administrative Law Judge
Federal Trade Commission
600 Pennsylvania Ave., NW, Rm. H-110
Washington, DC 20580

I also certify that I delivered via electronic mail a copy of the foregoing document to:

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*Counsel for Respondent Louisiana Real Estate Appraisers Board*

Dated: April 26, 2018

By: /s/ Daniel J. Matheson
Daniel J. Matheson, Attorney

## CERTIFICATE FOR ELECTRONIC FILING

I certify that the electronic copy sent to the Secretary of the Commission is a true and correct copy of the paper original and that I possess a paper original of the signed document that is available for review by the parties and the adjudicator.

Date: April 26, 2018

By: /s/ Daniel J. Matheson
Daniel J. Matheson, Attorney