No. 20-1018

In the Supreme Court of the United States

LOUISIANA REAL ESTATE APPRAISERS BOARD,
PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether an interlocutory agency order rejecting an assertion of the state-action defense, in administrative antitrust proceedings initiated by the Federal Trade Commission against a regulatory board controlled by active market participants, constitutes "final agency action" reviewable in district court under the Administrative Procedure Act, 5 U.S.C. 704.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-14a) is reported at 976 F.3d 597. The order of the district court (Pet. App. 15a-24a) is not published in the Federal Supplement but is available at 2019 WL 3412162.

JURISDICTION

The judgment of the court of appeals was entered on October 2, 2020. A petition for rehearing was denied on December 1, 2020 (Pet. App. 26a-27a). The petition for a writ of certiorari was filed on January 22, 2021. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. a. The Federal Trade Commission Act (FTC Act), 15 U.S.C. 41 *et seq.*, prohibits "[u]nfair methods of competition in or affecting commerce," 15 U.S.C. 45(a)(1),

"including those restraints of trade which also [are] outlawed by the Sherman Act," *FTC* v. *Cement Inst.*, 333 U.S. 683, 691-692 (1948). When the Federal Trade Commission (FTC or Commission) has "reason to believe that any [covered] person, partnership, or corporation has been or is using any unfair method of competition," it may bring an administrative complaint. 15 U.S.C. 45(b). If administrative proceedings establish that the covered entity is engaged in unfair methods of competition, the Commission "shall issue" an order requiring the covered entity "to cease and desist" from the challenged conduct. *Ibid.*

Under the FTC Act, a party subject to a cease-and-desist order "may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of [unfair] competition * * * was used or where such person, partnership, or corporation resides or carries on business." 15 U.S.C. 45(c). The FTC Act states that "the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive." 15 U.S.C. 45(d).

b. In a series of cases beginning with *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has held 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) (citations omitted); see *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992). The Court has described this "state action doctrine" as an "implied exemption 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," *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 574 U.S. 494, 504 (2015) (citation omitted).

To qualify as state action beyond the reach of the federal antitrust laws, a defendant's conduct must be "an exercise of the State's sovereign power." *Dental Exam'rs*, 574 U.S. at 504. "State legislation and 'decisions of a state supreme court, acting legislatively rather than judicially,' will satisfy this standard, * * * because they are an undoubted exercise of state sovereign authority." *Ibid.* (brackets and citation omitted). But when "a State delegates control over a market to a nonsovereign actor"—such as a substate public entity (like a municipality) or a private entity—the conduct of the nonsovereign actor "does not automatically qualify as that of the sovereign State itself." *Id.* at 505. Rather, in order to qualify as state action beyond the reach of the antitrust laws, such conduct 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).

The Court has recognized certain "instances in which an actor can be excused from *Midcal*'s active supervision requirement." *Dental Exam'rs*, 574 U.S. at 508. Although the state-action doctrine does not apply "directly" to municipalities and other political subdivisions, which "are not themselves sovereign," *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013), such local governmental entities are "excused from *Midcal*'s active supervision requirement" because they "are electorally accountable and lack the kind of private incentives characteristic of active participants in the market," *Dental Exam'rs*, 574 U.S. at 508. The

"active supervision test" remains an "essential prerequisite," however, for "any nonsovereign entity—public or private—controlled by active market participants." *Id.* at 510. "[T]he need for supervision turns not on the formal designation given by States to regulators but on the risk that active market participants will pursue private interests in restraining trade." *Ibid.*

2. Petitioner, the Louisiana Real Estate Appraisers Board, regulates the real-estate appraisal industry in Louisiana. La. Stat. Ann. § 37:3395 (2018). Petitioner consists of ten members appointed by the Governor of Louisiana. *Id.* § 37:3394(B)(1). All ten members must be "drawn from real estate-related businesses," C.A. ROA 72, and eight must be licensed as certified real-estate appraisers, La. Stat. Ann. § 37:3394(B)(1)(b)-(c) (2018).

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, Pub. L. No. 111-203, 124 Stat. 1376, which requires "[l]enders and their agents" to compensate real-estate appraisers "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised." 15 U.S.C. 1639e(i)(1). The Louisiana Legislature incorporated that requirement into a state statute that governs appraisal management companies, which "act as agents for lenders in arranging for real estate appraisals." C.A. ROA 72; see La. Stat. Ann. § 37:3415.15(A) (2018). The Legislature authorized petitioner to adopt rules necessary to enforce the state statute. La. Stat. Ann. § 37:3415.21(A) (2018).

In 2013, petitioner promulgated Rule 31101. C.A. ROA 73. Under Rule 31101, when an appraisal management company seeks to establish that the rates at which

it compensates appraisers are "customary and reasonable," it must either (1) use "objective third-party information such as government agency fee schedules, academic studies, and independent private sector surveys"; (2) follow a schedule of rates published by petitioner; or (3) rely on recently charged rates, as adjusted by six specified factors. La. Admin. Code tit. 46, § 31101(A) (2019). Under Louisiana law, the Governor or the Legislature could have disapproved Rule 31101 before it became effective, but neither did so. C.A. ROA 73; see La. Stat. Ann. §§ 49:968, 49:970 (2019).

3. a. In 2017, the Commission issued an administrative complaint alleging that petitioner had violated the FTC Act's prohibition against "unfair methods of competition." FTC Admin. Compl. ¶ 55, https://go.usa.gov/xVMrw. The complaint alleged that Rule 31101 "unlawfully restrains competition on its face by prohibiting [appraisal management companies] from arriving at an appraisal fee through the operation of the free market." *Id.* ¶ 30. It also alleged that, in enforcing the rule, petitioner had "unlawfully restrained price competition" by "effectively requir[ing] payment of appraisal fees at least as high as median fees listed in fee surveys that [petitioner] itself has commissioned." *Id.* ¶ 32. The complaint sought an order requiring petitioner "to cease and desist from enforcing Rule 31101." *Id.* at 10. Correctly anticipating that petitioner would raise a state-action defense, the complaint alleged that petitioner was "controlled at all relevant times by active market participants," *id.* ¶ 6, and that "[i]ndependent state officials have not supervised [petitioner's] discretionary actions," *id.* ¶ 7.

After the FTC initiated proceedings against petitioner, the Governor of Louisiana issued an executive

order directing petitioner to submit to the Louisiana Commissioner of Administration "for approval, rejection, or modification" any "proposed regulation" related to appraisal management companies' "compliance with the customary and reasonable fee requirement." C.A. ROA 93. The order also directed petitioner to submit to the Louisiana Division of Administrative Law "for approval, rejection, or modification" any proposed "settlement with," or "filing of an administrative complaint against," an appraisal management company "regarding compliance with the customary and reasonable fee requirement[]." *Id.* at 92. After the Governor issued that executive order, petitioner repealed Rule 31101 and submitted a substantively identical replacement rule to the Commissioner of Administration, who approved it. *Id.* at 74. The replacement rule then went into effect. *Ibid.*

After dismissing enforcement actions based on the original rule, petitioner moved to dismiss the FTC's complaint as moot. C.A. ROA 75-76. The FTC's complaint counsel (the agency staff responsible for prosecuting the FTC's complaint in the administrative proceeding) moved for partial summary decision—the administrative equivalent of partial summary judgment—on petitioner's state-action defense. *Id.* at 71.

b. The Commission issued an order granting the motion for partial summary decision and denying petitioner's motion to dismiss. C.A. ROA 70-90. The FTC determined that, because petitioner "is controlled by active market participants," petitioner needed to satisfy the active-supervision requirement in order for the state-action doctrine to apply. *Id.* at 88. The Commission concluded that the original issuance of Rule 31101 had not been actively supervised, *id.* at 88-89, and that

petitioner had "not shown that the reissuance and enforcement of Rule 31101 have been and will be actively supervised," *id.* at 77. In particular, the agency determined that the Commissioner of Administration had "simply rubber-stamped" the reissuance of Rule 31101, *id.* at 80, and that the Division of Administrative Law's review of petitioner's enforcement of the reissued rule would be too "deferential" and "limited" to qualify as active supervision, *id.* at 83-84.

c. Petitioner filed a petition for review of the FTC's order in the court of appeals, which dismissed the petition for lack of jurisdiction. 917 F.3d 389. The court explained that Congress had "expressly limited [the court's] jurisdiction to review of cease-and-desist orders," *id.* at 393, and that "the Commission's order denying [petitioner's] motion to dismiss and granting the FTC's motion for partial summary decision is not a cease-and-desist order," *id.* at 391.

4. a. Following the court of appeals' decision, petitioner brought suit against the FTC in district court, asserting that the Commission's order was unlawful and should be set aside under the Administrative Procedure Act (APA), 5 U.S.C. 706(2). C.A. ROA 10. Petitioner argued that, under the "collateral order" doctrine, *id.* at 21, the Commission's order constituted "final agency action" reviewable under the APA, 5 U.S.C. 704. Petitioner moved for a stay of administrative proceedings pending the court's resolution of petitioner's APA suit. D. Ct. Doc. 9-1, at 3 (Apr. 17, 2019).

b. The district court granted petitioner's motion for a stay. Pet. App. 15a-24a. The court held that the Commission's order was "final agency action" under Section 704, and that the court therefore had jurisdiction over the matter. *Id.* at 20a-22a. The court then considered the

various "stay factors," *id.* at 22a (citation omitted), and concluded that a stay was warranted, see *id.* at 22a-24a.

c. The court of appeals vacated the stay and remanded to the district court with instructions to dismiss petitioner's APA suit. Pet. App. 1a-14a. The FTC argued, *inter alia*, that "the district court lacked jurisdiction over [petitioner's] lawsuit because the FTC Act vests exclusive jurisdiction to review challenges to Commission proceedings in the courts of appeals." *Id.* at 4a. The court of appeals found it unnecessary to address that argument because it "agree[d] with the FTC that the district court lacked jurisdiction * * * for a different reason: Even if the FTC Act does not preclude Section 704 review," petitioner "fails to meet Section 704's jurisdictional prerequisites." *Id.* at 5a.

In reaching that conclusion, the court of appeals observed that it had previously recognized that "'the requirement of "final agency action" in Section 704' is analogous 'to the final judgment requirement of 28 U.S.C. § 1291.'" Pet. App. 6a (brackets and citation omitted). The court explained that, under the "collateral order doctrine," "an interlocutory decision is immediately appealable 'as a final decision under § 1291 if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment.'" *Id.* at 5a-6a (citation omitted).

While observing that construing Section 704 to incorporate the collateral-order doctrine entails "a significant theoretical stretch," the court of appeals "assume[d] arguendo that equating finality under Sections 1291 and 704 imports the collateral order doctrine into the Section 704 analysis." Pet. App. 6a & n.4. The court noted that in two prior cases, it had "addressed whether the

collateral order doctrine authorizes interlocutory appeals from a district court's denial of state action immunity." *Id.* at 9a. The court explained that in one of those cases—*Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996)—it had drawn "an analogy with principles that animate interlocutory appeals of government officials' claims of absolute or qualified immunity, or the Eleventh Amendment," and had held that a "municipal hospital" could immediately appeal "'the denial of a * * * motion for dismissal or summary judgment on the ground of state action immunity.'" Pet. App. 9a (citation omitted). The court further explained that in the other case—*Acoustic Systems, Inc.* v. *Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000)—it had held that a "private party whose status did not implicate the concerns underlying other immunity doctrines" "could not obtain interlocutory review of the issue to avoid suit." Pet. App. 9a-10a.

The court of appeals concluded that neither *Martin* nor *Acoustic Systems* "support[ed] jurisdiction" in this case "based on the collateral order doctrine as applied through Section 704 of the APA." Pet. App. 12a. The court noted that in *Dental Examiners*, this Court had "distinguished 'specialized boards dominated by active market participants' from 'prototypical state agencies' because of the private incentives inherent in their structure." *Id.* at 11a (citation omitted). The court of appeals determined that, in light of that distinction, petitioner—a board "'controlled by market participants'"—should be considered a "private party" for purposes of the state-action doctrine and that, as in *Acoustic Systems*, the "policy imperatives" supporting a right of immediate appeal therefore did "not apply." *Id.* at 11a-12a (citation omitted). The court also emphasized that, unlike

Martin and *Acoustic Systems*, this case "was initiated by the FTC" rather than by a private litigant. *Id.* at 12a. The court viewed that as "[a]nother reason for rejecting [petitioner's] quest for collateral review," since "'states retain no sovereign immunity as against the Federal Government.'" *Ibid.* (brackets and citation omitted).

Having determined that the "case law does not support jurisdiction," the court of appeals examined the second and third prongs of the collateral-order doctrine and found that neither prong was satisfied here. Pet. App. 12a. The court explained that "a judicial decision at this point would not resolve an issue 'completely separate from the merits of the action,' as required by the second prong," because "[t]he issues relevant to immunity in this case pertain to the reach of the Sherman Act." *Id.* at 13a (citation omitted); see *id.* at 8a n.5 (noting that, "although 'the state action doctrine is often labeled an immunity, that term is actually a misnomer because the doctrine is but a recognition of the limited reach of the Sherman Act'") (citation omitted). The court further explained that the third prong was not satisfied because the "state action" issue would not be "'effectively unreviewable on appeal from a final judgment.'" *Id.* at 13a (citation omitted). The court therefore concluded that "the collateral order doctrine does not apply" and that "the district court lacked jurisdiction over [petitioner's] lawsuit." *Id.* at 14a.

d. The court of appeals denied rehearing en banc and declined to stay administrative proceedings pending the disposition of a petition for a writ of certiorari. Pet. App. 25a-27a. Justice Alito likewise declined to grant such a stay.

ARGUMENT

Petitioner challenges the court of appeals' conclusion that the FTC's order rejecting petitioner's state-action defense does not constitute "final agency action" under the APA, 5 U.S.C. 704. The court of appeals reached that conclusion by (1) assuming arguendo that the APA term "final agency action" should be construed by reference to the collateral-order doctrine that governs appeals from interlocutory district-court orders under 28 U.S.C. 1291, and (2) determining that the collateral-order doctrine would not authorize an immediate appeal if petitioner's state-action defense had been rejected by a district court rather than by the FTC. Petitioner urges this Court to grant review to resolve a circuit conflict concerning the application of the collateral-order doctrine to antitrust suits in which district courts deny motions to dismiss premised on asserted state-action defenses.

The court of appeals' decision is correct, both in its resolution of the Section 1291 collateral-order question and in its ultimate conclusion that the challenged FTC order is not "final agency action" under the APA. The en banc Eleventh Circuit's decision in a case currently pending before it may eliminate any circuit conflict on the collateral-order issue in this case. In any event, this case would be an unsuitable vehicle for this Court to clarify the rules governing Section 1291 appeals, since petitioner has not sought to pursue a collateral-order appeal from an adverse district-court ruling, but instead sued the Commission in federal district court. No court of appeals has held that an FTC (or other agency) order rejecting a state-action defense in contemplation of further agency enforcement proceedings is a reviewable "final agency action." And even if this Court concluded that the FTC order here is "final agency action"

under usual APA standards, petitioner's suit still could not go forward because the FTC Act limits review to Commission cease-and-desist orders and channels review to the courts of appeals. The petition for a writ of certiorari should be denied.

1. The court of appeals correctly held that the Commission's order rejecting petitioner's state-action defense does not constitute "final agency action" under the APA. Pet. App. 4a-14a.

a. The APA governs judicial review of administrative-agency action and authorizes "judicial review" of "final agency action for which there is no other adequate remedy in a court." 5 U.S.C. 704. Appellate review of district-court decisions is governed primarily by 28 U.S.C. 1291, which vests courts of appeals with jurisdiction to review "final decisions of the district courts," *ibid.* In construing that provision, this Court has held that an order that does "not end the litigation" may nevertheless be "deemed 'final'" if it satisfies the requirements of the "collateral order doctrine." *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted). Under that doctrine, an order that does not terminate the litigation may be immediately appealed if it (1) "conclusively determine[s] the disputed question," (2) "resolve[s] an important issue completely separate from the merits of the action," and (3) is "effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (citations omitted).

The court of appeals in this case "assume[d] arguendo that equating finality under Sections 1291 and 704 imports the collateral order doctrine into the Section 704 analysis." Pet. App. 6a. The court held that, even on that assumption, the district court lacked juris-

diction to review the Commission's order in this case because "the second and third prongs of the [collateral-order] doctrine are not satisfied here." *Id.* at 12a. That holding was correct.

i. As the court of appeals correctly held, "a judicial decision at this point would not resolve an issue 'completely separate from the merits of the action,' as required by the second prong of the collateral order doctrine." Pet. App. 13a. The state-action doctrine reflects this Court's interpretation of the substantive "reach" of the federal antitrust laws, *ibid.* (citation omitted), and "to ask what conduct [a statute] reaches is to ask what conduct [it] prohibits, which is a merits question," *Morrison* v. *National Austl. Bank Ltd.*, 561 U.S. 247, 254 (2010). Thus, far from being "completely separate from the merits of the action," *Will*, 546 U.S. at 349 (citations omitted), a state-action ruling *is* a merits determination.

This Court's decisions confirm that understanding. The Court has consistently framed the state-action inquiry in terms of whether antitrust law "prohibit[s]" the defendant's conduct. *Parker* v. *Brown*, 317 U.S. 341, 352 (1943); see, *e.g.*, *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991) ("prohibit"); *Patrick* v. *Burget*, 486 U.S. 94, 99 (1988) ("prohibits"); *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 antitrust laws," *Southern Motor Carriers*, 471 U.S. at 55 n.18, with "'state action'" lying "outside the reach of the antitrust laws," *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (citations omitted); see *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791-792 (1975) (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" federal antitrust law. *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").

The state-action doctrine is thus significantly different from other doctrines that the Court has referred to as "immunities," which may be wholly separate from the merits. 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 holding 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* v. *Forsyth*, 472 U.S. 511, 529 n.10 (1985). In those contexts, a defendant can be immune from suit even though its conduct was illegal.

By contrast, when a party's conduct is found to be state action, antitrust law "does not apply" at all. *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 343 (1987). For that reason, the state-action doctrine does not afford a genuine

"immunity" from antitrust suits, although courts have sometimes used that shorthand to refer to it. Rather, the doctrine provides a defense on the merits, negating the existence of an antitrust violation. See *Richardson* v. *McKnight*, 521 U.S. 399, 403 (1997) (explaining that "a legal defense may well involve 'the essence of the wrong,' while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly") (citation omitted); 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 suits brought by the federal government 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 federal authorities. See, *e.g.*, *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 574 U.S. 494, 501 (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. That fact logically implies that the state-action doctrine is not an immunity *at all*, and that district-court decisions rejecting antitrust defendants' asserted state-action defenses therefore are not immediately appealable under the collateral-order doctrine, even in suits brought by private parties. But it would

be especially anomalous to treat the state-action doctrine as an immunity in an enforcement proceeding brought by the federal government.

ii. The court of appeals also correctly held that the third prong of the collateral-order doctrine is not satisfied here because a state-action defense is not "effectively unreviewable on appeal from a final judgment." Pet. App. 13a (citation omitted). The "decisive consideration" in applying the third prong "is whether delaying review * * * '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). And no interest protected by the state-action doctrine is "imperil[ed]," *ibid.* (citation omitted), by deferring review until the completion of judicial or administrative proceedings.

To be sure, if a collateral-order appeal is unavailable in this setting, the party alleged to have violated the federal antitrust laws may be subjected to litigation burdens that might have been avoided if the state-action question were subject to immediate appellate review. But this Court has never described the state-action doctrine as protecting a party's interest in avoiding the expense or burdens of litigation. 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."). That interest is fully protected by review after the conclusion of judicial or administrative proceedings. See *Swint* v. *Chambers County Comm'n*, 514 U.S. 35, 43 (1995) ("An erroneous ruling on liability may be reviewed effectively on appeal

from final judgment."); see also, *e.g.*, *Dental Exam'rs*, 574 U.S. at 502, 516 (reviewing final order of the FTC and affirming rejection of state-action defense). If a district court determines that the doctrine does not apply, and the party alleged to have violated the federal antitrust laws is later held liable, that party can raise the state-action issue on appeal and will be entitled to reversal of the adverse merits judgment if the appellate court resolves the issue in its favor. A party's claim that the state-action doctrine renders its conduct lawful therefore can be fully vindicated on appeal from final judgment.

b. For two additional reasons, permitting immediate review of the Commission's order in this case would be particularly unwarranted. Pet. App. 10a-12a.

i. Even assuming that the immediate appealability of certain orders rejecting a state-action defense could be justified by "concerns that public defendants would" otherwise "be subjected to the costs and general consequences associated with discovery and trial," *Acoustic Sys., Inc.* v. *Wenger Corp.*, 207 F.3d 287, 293 (5th Cir. 2000), those concerns are absent where, as here, petitioner "invokes the state action doctrine as a private party," Pet. App. 11a. Petitioner is a "specialized board[] dominated by active market participants." *Ibid.* (citation omitted). Its structure thus presents the "risk" that petitioner "will pursue private interests in restraining trade," *Dental Exam'rs*, 574 U.S. at 510, and "the policy imperatives behind relieving [petitioner] from suit as well as liability do not apply," Pet. App. 11a-12a.

ii. Even assuming that the immediate appealability of certain orders rejecting a state-action defense could be justified by concerns about "the indignity of subjecting a state to the coercive process of judicial tribunals

at the instance of private parties," *Acoustic Sys.*, 207 F.3d at 293, those concerns are likewise absent where, as here, antitrust proceedings were commenced by the FTC rather than by a private party, Pet. App. 10a. As noted above (see p. 15, *supra*), "states retain no sovereign immunity as against the Federal Government." Pet. App. 12a (quoting *West Virginia*, 479 U.S. at 312 n.4) (brackets omitted). The "dignitary interests" that warrant treating denials of Eleventh Amendment immunity as immediately appealable, *Puerto Rico Aqueduct*, 506 U.S. at 146, therefore are not implicated here.

2. Petitioner does not identify any decision in which a court of appeals has found an interlocutory FTC (or other agency) order to be subject to APA review in circumstances like these. Rather, petitioner alleges a circuit conflict on the distinct question whether a district court's rejection of a state-action defense to an antitrust suit is immediately appealable as of right under Section 1291, even if the district-court litigation remains ongoing. Petitioner contends in particular (Pet. 19) that the Eleventh Circuit "allows immediate appeals from denials of state-action immunity." But each of the Eleventh Circuit decisions petitioner cites (Pet. 19-20) involved an attempted appeal under Section 1291 of a district court's interlocutory order rejecting a state-action defense in a suit brought by a private party. None involved the immediate appealability of an interlocutory order rejecting a state-action defense in proceedings initiated by the federal government.

In addition, the Eleventh Circuit recently granted rehearing en banc to reconsider its prior decisions regarding the application of the collateral-order doctrine to a district-court order rejecting an antitrust defendant's state-action defense. See *SmileDirectClub, LLC*

v. *Battle*, 969 F.3d 1134, reh'g en banc granted, 981 F.3d 1014 (2020). Relying on those prior decisions, a panel of the Eleventh Circuit in *SmileDirectClub*—a suit brought against members of the Georgia Board of Dentistry in their official capacities for allegedly violating the Sherman Act—held that the members of the board, which is controlled by active market participants, could appeal the district court's rejection of their state-action defense under the collateral-order doctrine. *Id.* at 1139-1140; see *SmileDirectClub, LLC* v. *Georgia Bd. of Dentistry*, No. 18-cv-2328, 2019 WL 3557892, at *3-*4 (N.D. Ga. May 8, 2019), aff'd, 969 F.3d 1134 (11th Cir.), reh'g en banc granted, 981 F.3d 1014 (11th Cir. 2020). In a concurring opinion, Judge Jordan urged the en banc court to revisit its precedents. *SmileDirectClub*, 969 F.3d at 1147-1148. Judge Jordan explained that the state-action doctrine "arose from an interpretation of the Sherman Act's scope, not from a constitutional (or commonlaw) right to avoid trial, and not out of concern about special harms that might result from litigation." *Id.* at 1147. Judge Jordan therefore expressed the view that the "denial of state-action immunity * * * is not 'effectively unreviewable' on appeal" and that, at a minimum, "an interlocutory appeal should not be available to private parties like the members of the Georgia Board of Dentistry, whose status does not implicate sovereignty concerns." *Ibid.*

Consistent with Judge Jordan's suggestion, the Eleventh Circuit sua sponte granted rehearing en banc and ordered the parties to file briefs addressing the following issue:

> Are district court orders denying [state-action] immunity entitled to interlocutory review under the collateral order doctrine, as this court held in *Diverse*

> *Power, Inc. v. City of LaGrange, Georgia*, 934 F.3d 1270 (11th Cir. 2019), *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), and *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986)?

19-12227 C.A. Mem. 1 (Dec. 14, 2020); see *SmileDirectClub, LLC* v. *Battle*, 981 F.3d 1014 (2020).

Given the Eleventh Circuit's briefing order, petitioner is wrong to contend (Pet. 24) that "the precise question of interest to that court is unclear." The Eleventh Circuit's order asked the parties in *SmileDirectClub* to address whether the en banc court should overrule the same decisions "involving governmental entities" that petitioner alleges (Pet. 19-20) are in conflict with the decision below. Thus, contrary to petitioner's contention (Pet. 20 n.2), the en banc proceedings in *SmileDirectClub* may well result in a "decision regarding the circuit's longstanding approach to cases involving governmental entities." And even if the en banc court addresses only the particular circumstances of the case before it, and holds only that "an interlocutory appeal should not be available to private parties like the members of the Georgia Board of Dentistry, whose status does not implicate sovereignty concerns," *SmileDirectClub*, 969 F.3d at 1147 (Jordan, J., concurring), its decision will still eliminate any conflict between the Fifth and Eleventh Circuits. Indeed, the court below—which cited Judge Jordan's concurrence in holding that the FTC's rejection of petitioner's state-action defense is not "final agency action" reviewable under the APA—viewed its decision as consistent with Judge Jordan's views on the state-action doctrine. See Pet. App. 11a

(citing *SmileDirectClub*, 969 F.3d at 1147 (Jordan, J., concurring)).

3. Even if the collateral-order issue otherwise warranted the Court's review, this case would be an unsuitable vehicle for the Court to decide whether or under what circumstances immediate appellate review is available when an antitrust defendant asserts a state-action defense to an antitrust suit and the district court rejects that defense. That is so for two reasons.

i. This case does not involve a collateral-order appeal from an adverse district-court ruling, but instead involves an APA suit against the Commission in federal district court. Petitioner thus is wrong to contend (Pet. 15) that this case presents the "same question" as did *Salt River Project* v. *Tesla Energy Operations, Inc.*, 138 S. Ct. 1323 (2018), in which this Court dismissed the writ of certiorari upon stipulation of the parties. In *Salt River*, an antitrust defendant in district-court litigation moved to dismiss the suit based on the state-action doctrine, and then sought to appeal the court's order denying that motion. See *SolarCity Corp.* v. *Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 723 (9th Cir.), cert. granted, 138 S. Ct. 499 (2017), and cert. dismissed, 138 S. Ct. 1323 (2018). The case thus squarely presented the question whether the collateral-order doctrine authorized such an appeal under Section 1291. This case, in contrast, presents the question whether an FTC order that rejects a state-action defense is subject to immediate judicial review under the APA. Pet. App. 11a.

The court below discussed the collateral-order doctrine only because it "assume[d] arguendo" that the APA's "'final agency action'" requirement incorporates the collateral-order principles that this Court has applied in construing Section 1291. Pet. App. 6a (citation

omitted). But this Court has never addressed whether the APA's reference to the finality of agency action "imports the collateral order doctrine into the Section 704 analysis," *ibid.*, and the Fifth Circuit recognized that this assumption entails "a significant theoretical stretch," *id.* at 6a n.4. Although petitioner suggests (Pet. 8) that the Court equated the two finality requirements in *FTC* v. *Standard Oil Co. of California*, 449 U.S. 232 (1980), the Court in that case had no occasion to resolve the issue, because the order in question there did not satisfy the requirements of the collateral-order doctrine in any event, *id.* at 246.

To use this case as a vehicle for clarifying the rules that govern Section 1291 appeals from district-court rulings, it would not be sufficient for this Court to conclude that Sections 704 and 1291 impose *analogous* finality requirements, so that precedents interpreting one of those statutes can provide useful guidance in construing the other. Rather, the Court would need to hold that the two finality requirements are coextensive in all particulars. It is far from clear that this is so. The need to resolve that antecedent question would at least complicate, and potentially frustrate, any effort to use this case to clarify the rules governing actual collateral-order appeals.

ii. Even if the Court granted review and held that the challenged FTC order is "final agency action" under the APA, its decision would not be outcome-determinative in this case. The district court would still lack jurisdiction over petitioner's suit because the FTC Act designates review in the court of appeals as the "exclusive" mechanism for challenging Commission orders in enforcement actions like this one. 15 U.S.C. 45(d). And as the Fifth Circuit correctly held in dismissing petitioner's earlier

petition for review, judicial review under the FTC Act is available only for Commission cease-and-desist orders issued at the conclusion of administrative enforcement proceedings. See p. 7, *supra*; 15 U.S.C. 45(c). The FTC Act's specialized review provisions thus supersede the APA's default rules, both with respect to the category of agency orders that are reviewable and with respect to the court in which review may be sought.

Although the court below did not reach the issue, see Pet. App. 5a, Congress's intent to preclude district-court jurisdiction is "fairly discernible" in the FTC Act, *Thunder Basin Coal Co.* v. *Reich*, 510 U.S. 200, 207 (1994) (citation omitted). Indeed, this Court has cited the FTC Act as an example of a statute whose "existing procedures for review of agency action" "Congress did not intend the general grant of review in the APA to duplicate." *Bowen* v. *Massachusetts*, 487 U.S. 879, 903 (1988). And petitioner's state-action defense is the sort of claim that "Congress intended to be reviewed within th[e] statutory structure." *Thunder Basin*, 510 U.S. at 212. Channeling that claim to a petition for review would not "foreclose all meaningful judicial review"; the claim is not "wholly collateral to" the FTC Act's "review provisions"; and resolution of the state-action issue does not lie "outside the agency's expertise." *Id.* at 212-213 (citation and internal quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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