No. 06-274

In the Supreme Court of the United States

SOUTH CAROLINA STATE BOARD OF DENTISTRY,
PETITIONER

v.

FEDERAL TRADE COMMISSION

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

BRIEF FOR THE FEDERAL TRADE COMMISSION IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals lacked jurisdiction to entertain a petition for review of an interlocutory order of the Federal Trade Commission denying a motion to dismiss an antitrust proceeding on the basis of the state action doctrine.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution, statutes and regulation:

Statutes and regulation—Continued: Page

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 455 F.3d 436. The opinion and order of the Federal Trade Commission (Pet. App. 21a-64a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 1, 2006. A petition for rehearing was denied on June 27, 2006 (Pet. App. 65a-66a). The petition for a writ of certiorari was filed on August 24, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner South Carolina State Board of Dentistry (Board) is South Carolina's regulatory authority for dentists and dental hygienists. Pet. App. 28a; S.C. Code Ann. § 40-15-10 (2001). In September 2003, the Federal Trade Commission (Commission) issued a complaint alleging that the Board had engaged in anticompetitive conduct in violation of Section 5 of the Federal Trade Commission Act (FTC Act), 15 U.S.C. 45.

In particular, the complaint alleged that the Board, consisting almost entirely of practicing dentists with financial interests in the Board's actions, had enacted a temporary emergency regulation in July 2001 that restricted the availability of preventive oral health care to school-aged children in South Carolina. The regulation prevented competing groups of dental hygienists, even when supervised by dentists, from providing preventive dental care services (such as cleaning teeth, providing fluoride treatments, and applying dental sealants) in school settings unless a dentist had first examined each patient in advance. See Pet. App. 31a-32a (citing 25-7 S.C. Reg. 79, § 39-18(A)). The Board had imposed the regulation, the complaint alleged, even though the South Carolina legislature had expressly eliminated such a preexamination requirement in amendments to the State's Dental Practice Act (DPA) adopted in 2000. *Id.* at 29a-31a (citing 2000 S.C. Act No. 298; S.C. Code Ann. § 40-15-80(C) (1999); *id.* §§ 40-15-80(B) and (C), 40-15-85(B) (2000)). The purpose of the amendments was to make preventive oral health care more available to certain under-served populations, particularly low-income school-aged children and those living in rural areas, who were rarely seen by dentists. *Id.* at 28a-31a.

The complaint further alleged that in March 2003 the Board met to consider the impact of additional proposed revisions to the DPA, then under consideration by the South Carolina legislature. Pet. App. 35a. Those proposals would, *inter alia*, clarify the absence of a preexamination requirement for preventive dental care services in public health settings. *Id.* at 34a & n.11 (citing S.C. Code Ann. § 40-15-102(D) (2003); *id.* § 40-15-110(A)(10)). At that meeting, the Board allegedly insisted that—notwithstanding the 2000 DPA amendments and the proposed 2003 DPA revisions, both of which prohibited the preexamination requirement in certain school settings—such a requirement still applied. *Id.* at 35a. The Commission thereafter issued its complaint to enjoin the Board from reimposing the preexamination requirement in school settings. *Id.* at 25a.

2. Before any post-complaint discovery had taken place, the Board moved to dismiss the Commission's complaint on the grounds that the case was moot and that the Board's conduct was exempt from liability under the antitrust laws pursuant to the state action doctrine. Pet. App. 21a. See *Parker* v. *Brown*, 317 U.S. 341 (1943). After briefing and oral argument on the motion, the Commission issued an opinion and order on July 28, 2004, denying the motion to dismiss on state action grounds, concluding that the Board was not entitled to state action protection because it had not acted pursuant to a clearly articulated state policy to displace competition with regulation. Pet. App. 22a, 38a-59a. More specifically, the Commission held that the Board's actions to reimpose the dental preexamination requirement were directly contrary to the legislature's 2000 DPA amendments, which had expressly eliminated such a requirement. *Id.* at 50a-56a. The Commission stayed

ruling on the Board's mootness motion, pending limited discovery and findings of fact related to that issue by an administrative law judge. *Id.* at 22a-23a, 59a-63a.[1]

On August 10, 2004, the Board filed in the court of appeals a petition for review of the Commission's order denying the Board's motion to dismiss on the basis of the state action doctrine. The Commission moved to dismiss the petition for lack of jurisdiction over the agency's interlocutory order.

The court of appeals dismissed the petition for lack of jurisdiction, without reaching the merits of the Board's challenge. Pet. App. 1a-20a. The court observed that, in the context of appellate review of district court orders pursuant to 28 U.S.C. 1291, parties generally may appeal only from final judgments, but that there is a "small class" of interlocutory orders that may be appealed immediately under the collateral order doctrine. Pet. App. 6a-7a (quoting *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949)). The court noted that the language of 15 U.S.C. 45(c), which provides for court of appeals review of "an order of the Commission to cease and desist from using" an anticompetitive act or practice, is arguably narrower than that of Section 1291, but it assumed for purposes of its decision that the collateral order doctrine does apply to Commission orders. Pet. App. 6a n.5. The court acknowledged that, in the Section 1291 context, the courts of appeals are divided on whether an order declining to dismiss an antitrust action on state action grounds may be appealed immediately as a collateral order. *Id.* at 7a-

[1] The Commission has granted the Board's unopposed motions to stay further administrative proceedings pending final disposition of the petition for judicial review of the Commission's decision regarding the state action doctrine.

8a. Applying the analysis employed in this Court's decision last Term in *Will* v. *Hallock*, 126 S. Ct. 952 (2006), the court of appeals held that the denial of a motion to dismiss an antitrust action on the basis of the state action doctrine articulated in *Parker* is not immediately appealable. Pet. App. 6a-15a.

The court first concluded that analysis of the state action doctrine is not separable from the merits of the action. Pet. App. 8a-12a. It reasoned that when a court considers whether a defendant should be afforded protection from antitrust liability under *Parker*, it often must determine whether the defendant's action was pursuant to a clearly articulated State policy to displace competition. *Id.* at 10a. That inquiry into the nature of the defendant's conduct, the court explained, is "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Id.* 10a-11a (quoting *Huron Valley Hosp., Inc.* v. *City of Pontiac*, 792 F.2d 563, 567 (6th Cir. 1986)). The court acknowledged that "the *Parker* analysis does not always require an inquiry into whether the state acted to displace competition," but recognized that application of the collateral order doctrine turns on the propriety of interlocutory review in the class of cases as a whole. *Id.* at 11a.

The court of appeals further determined that the denial of a motion to dismiss under *Parker* "is not 'effectively unreviewable' after trial." Pet. App. 12a. The court noted that the standard is not satisfied merely by demonstrating the defendant's interest in avoiding trial, but requires a showing that a trial "would imperil a substantial public interest." *Ibid.* (quoting *Will*, 126 S. Ct. at 959). The court held that "[t]he *Parker* doctrine did not arise from any concern about special harms that would result from trial. Instead, *Parker* speaks only

about the proper interpretation of the Sherman Act." *Id.* at 13a. *Parker* did not, the court concluded, "identify or articulate a constitutional or common law 'right not to be tried.'" *Id.* at 13a-14a.

The court of appeals rejected petitioner's argument that a contrary result was compelled by the fact that this Court has, on occasion, referred to the state action doctrine in *Parker* as an "immunity." Pet. App. 15a-16a. Finally, the court rejected petitioner's argument that the state action doctrine should be recognized as an immunity on a par with qualified immunity or sovereign immunity on the ground that in certain circumstances it can further similar interests as those immunities. *Id.* at 16a-20a. The court observed that the collateral order doctrine is applied to an entire class of rulings, and that in many cases involving the *Parker* exemption there is no threat to government officials' initiative or to the State's dignity interest. *Id.* at 17a. The *Parker* doctrine applies to defendants that would not be entitled to assert either qualified or sovereign immunity, and to actions as to which those traditional immunities would be unavailable, such as suits for equitable relief only, or those brought by the United States itself. *Id.* at 18a-19a. Indeed, "the only time that a party must rely on *Parker* to justify immediate appeal is when, like [petitioner in this case], it can not assert a sovereign or qualified immunity defense." *Id.* at 19a-20a.[2]

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[2] In a concurring opinion, Judge Traxler stated that he disagreed with the majority that the state action defense is inseparable from the merits of an antitrust claim, but agreed that the denial of such protection is not "effectively unreviewable" after trial, and that the court therefore lacked jurisdiction over the petition. Pet. App. 20a.

ARGUMENT

The decision of the court of appeals is correct. Moreover, it is the only appellate decision addressing the question presented in the context of a petition for review of an interlocutory order of the Commission, and the only appellate decision to address the issue in light of this Court's most recent pronouncement on the collateral order doctrine. Thus, although the law of one circuit, based on twenty-year-old precedent, appears to be that a district court's denial of a motion to dismiss a private antitrust action on the basis of the state action doctrine is immediately appealable, there is no warrant for this Court to review the court of appeals' holding in this case, in which the court properly applied this Court's most recent decisions regarding the collateral order doctrine to hold that it lacked jurisdiction over a petition for review of an interlocutory Commission order. The petition for a writ of certiorari should therefore be denied.

1. The court of appeals correctly held that, even assuming that the collateral order doctrine applies as a general matter to petitions for review of Commission orders under 15 U.S.C. 45(c), it would not permit interlocutory review of a Commission order denying a motion to dismiss on the basis of the state action doctrine.

a. As a general matter, 28 U.S.C. 1291 has been construed to grant the courts of appeals jurisdiction only to review the final judgment of a district court that effectively ends the litigation. See *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 429-430 (1985) (citation omitted). The requirement of finality serves important interests in judicial economy and efficiency by requiring all claims of district court error to be raised in a single appeal af-

ter a final judgment on the merits. *Will* v. *Hallock*, 126 S. Ct. 952, 957 (2006).

This Court has recognized, however, a "small class" of cases in which immediate appellate review is available under the "collateral order doctrine" articulated in *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949). *Will*, 126 S. Ct. at 957 (quoting *Behrens* v. *Pelletier*, 516 U.S. 299, 305 (1996)). The Court has characterized the doctrine as a "practical construction" of the term "final decision" in Section 1291. *Ibid.* (citing *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994)). Under the collateral order doctrine, appellate courts will review a "'narrow class of decisions that do not terminate the litigation,' but are sufficiently important and collateral to the merits that they should 'nonetheless be treated as "final."'" *Id.* at 956 (citing *Digital Equip.*, 511 U.S. at 867).[3]

Under that doctrine, an interlocutory order is immediately appealable only when three "stringent" conditions are met. *Digital Equip.*, 511 U.S. at 868. The 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

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[3] Unlike Section 1291, which authorizes review of "final decisions," the statute providing for review of Commission orders authorizes review only of "an order of the Commission to cease and desist from using" an anticompetitive act or practice, 15 U.S.C. 45(c). As discussed below, see pp. 19-20, *infra*, the order at issue here is not a cease and desist order, which provides a further reason why the court of appeals lacked jurisdiction and why its judgment in this case does not conflict with those appellate decisions cited by petitioner (Pet. 6-7). As we discuss in the text, the judgment below is also correct even assuming that the collateral order doctrine applies generally to review of Commission orders under Section 45(c).

unreviewable on appeal from a final judgment." *Will*, 126 S. Ct. at 957 (citation and quotation marks omitted).

Last Term, in *Will*, the Court revisited the collateral order doctrine, and stressed its narrow confines. The Court cited four classes of cases that "mark the line" between rulings that are immediately appealable under the collateral order doctrine and those that are not: absolute immunity, see *Nixon* v. *Fitzgerald*, 457 U.S. 731, 742 (1982); qualified official immunity, see *Mitchell* v. *Forsyth*, 472 U.S. 511, 530 (1985); Eleventh Amendment immunity, see *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993); and double jeopardy, see *Abney* v. *United States*, 431 U.S. 651, 660 (1977). See *Will*, 126 S. Ct. at 958. The court rejected any attempt to generalize from those cases a rule permitting immediate appeal whenever the district court denied "an asserted right to avoid the burdens of trial." *Ibid.* "[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" after trial. *Id.* at 959.

For example, this Court has denied immediate review of claims "that the district court lacks personal jurisdiction, that the statute of limitations has run, that the movant has been denied his Sixth Amendment right to a speedy trial, that an action is barred on claim preclusion principles, that no material fact is in dispute and the moving party is entitled to judgment as a matter of law, or merely that the complaint fails to state a claim." *Digital Equip.*, 511 U.S. at 873 (citations omitted); see also *Will*, 126 S. Ct. at 960-961 (denying interlocutory review of defense that suit against a federal employee is precluded under 28 U.S.C. 2676 by the "complete bar" of a prior judgment against the United States); *Digital*

Equip., 511 U.S. at 875-879 (defense that claim was waived in a settlement agreement); *Lauro Lines S.R.L.* v. *Chasser*, 490 U.S. 495 (1989) (order denying dismissal based on contractual forum selection clause). Although such defenses "might loosely be described as conferring a 'right not to stand trial,'" *Digital Equip.*, 511 U.S. at 873, those rights do "not rise to the level of importance needed for recognition under" the collateral order doctrine, *id.* at 878.

Further, the applicability of the collateral order doctrine to interlocutory rulings must be ascertained in light of the entire class of such orders and not based on the peculiarities of individual cases. *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) ("[i]n fashioning a rule of appealability under § 1291, however, we look to categories of cases, not to particular injustices"). Here, as the court of appeals recognized (Pet. App. 11a), that means looking at all potential claims that a suit is barred by the state action doctrine, rather than merely instances when such a defense is raised by a particular type of defendant such as a state officer or board.

b. The court below correctly applied those principles in holding that the Commission's interlocutory ruling on the application of *Parker*'s state action exception to antitrust liability does not satisfy the strict requirements of the collateral order doctrine. The Commission's rejection of the Board's state action defense admittedly satisfied the first *Cohen* requirement because it conclusively determined the disputed issue. The court of appeals properly held, however, that the denial of state action protection did not satisfy the other two requirements of the collateral order rule.

i. This Court's decision in *Parker* simply reflects a determination as to the substantive scope of the anti-

trust laws. In light of principles of federalism, the Court "refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature," *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 38 (1985), in the absence of a clear indication that Congress so intended. The Court did not question Congress's authority to prohibit States from adopting anticompetitive policies, but simply found "nothing in the language of the Sherman Act or its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Parker*, 317 U.S. at 350-351. See *id.* at 352 (the State imposed the challenged restraint "as an act of government which the Sherman Act did not undertake to prohibit").

Nothing in *Parker* suggests that the basis of that decision was either a perceived need to protect the dignitary interest of the State from having its officials called into court to defend against the suit or the need to protect officials from the threat of personal liability that might weaken their zeal in enforcing the law, the kinds of "high order" values that have heretofore been recognized as warranting collateral appeal. See *Will*, 126 S. Ct. at 959. *Parker* itself was not an interlocutory appeal. Rather, it came to this court on appeal from the district court's judgment following a trial on the merits. 317 U.S. at 344-345. The Court's decision established a substantive limitation on the reach of the antitrust laws that can effectively be reviewed after the conclusion of proceedings before the Commission, assuming that the complaint is not dismissed on the ground that the challenged conduct is not likely to recur (as petitioner has urged) and that the Commission upholds the substantive claim of a violation of the FTC Act.

Moreover, as the court below recognized (Pet. App. 17a-19a), *Parker*'s rule applies far beyond the limited class of cases in which there is even a colorable argument that "high order" values akin to the established collateral order immunities are at stake. Because application of the collateral order doctrine must be ascertained in light of "the entire class" of such orders, *id.* at 17a (citing, *inter alia*, *Van Cauwenberghe*, 486 U.S. at 529), the state action doctrine does not qualify.

The immunity doctrines that do satisfy the collateral order rule are limited in nature and scope. For example, to protect government officials from being inhibited in carrying out their functions, they are shielded by immunity from certain claims seeking monetary damages, *Will*, 126 S. Ct. at 959, but their conduct itself may be challenged in an action for prospective injunctive relief, *Seminole Tribe* v. *Florida*, 517 U.S. 44, 71 n.14 (1996). States' dignitary interests are protected by an immunity from suit at the behest of an individual, *Will*, 126 S. Ct. at 959, but such immunity does not bar a suit brought by the United States, *United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965). In contrast, the state action doctrine limits the substantive reach of the antitrust laws even when, as here, none of the interests that justify collateral review is at stake. If it applies, the state action doctrine is a defense against even a claim brought by the United States, as well as a suit by a private plaintiff seeking only injunctive relief, see *Parker*, 317 U.S. at 344 (noting that plaintiffs sought "to enjoin appellants * * * from enforcing" the State's marketing program). See also Pet. App. 18a (noting that *Parker* applies to municipalities, which "may not assert either a qualified or sovereign immunity defense"). Indeed, even a private party may assert the state action doctrine as a defense

against antitrust liability if its actions were taken pursuant to a clear state policy to displace competition and the State closely supervised the private defendant's conduct. *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

For the foregoing reasons, the court of appeals correctly held that, because the state action doctrine applies in many circumstances that present none of the concerns that justify collateral appeal in the context of official or sovereign immunities, and because appealability under *Cohen* applies (if at all) only to the entire *category* of cases to which the disputed order belongs, motions to dismiss on the basis of the *Parker* decision do not qualify for such treatment. Pet. App. 19a. See *id.* at 19a-20a (petitioner's argument must fail because "the only time that a party must rely on *Parker* to justify immediate appeal is when, like [petitioner], it can not assert a sovereign or qualified immunity defense").

ii. The court of appeals also correctly concluded that the denial of *Parker* protection does not fall under the collateral order rule because state action issues are, in many cases, not separable from the merits of the antitrust claims. Pet. App. 8a-12a. The court noted that the issues need only be "intertwined with," and "not identical to," the underlying merits issues, to bar application of *Cohen*. *Id.* at 8a. The court correctly recognized that the state action inquiry—whether the State has a clearly articulated policy to displace competition—will often be "inherently 'enmeshed' with the underlying cause of action," which involves the question whether the defendant engaged in anticompetitive conduct. *Id.* at 9a, 10a; accord, *Huron Valley*, 792 F.2d at 567 (state action determination is "intimately intertwined" with antitrust claims).

Here, for example, the state action inquiry—whether the Board acted pursuant to a clearly articulated state policy to displace competition in the provision of preventive dental care in public health settings—potentially overlaps with the merits of the antitrust claim, which involves the question whether the Board's enactment of its emergency regulation and its later threat to reimpose the dental preexamination requirement constituted anticompetitive conduct in violation of Section 5(a) of the FTC Act, 15 U.S.C. 45(a). Both the merits and the state action issues potentially require an analysis of the nature of economic competition in the context of the provision of dental hygiene services in school settings, together with the regulatory constraints on such activities, including the relevant provisions of the state DPA. The potential overlap in issues here is at least as great as that found by this Court in other contexts. See, *e.g.*, *Van Cauwenburghe*, 486 U.S. at 528 (*forum non conveniens* and merits issues overlap for purposes of a *Cohen* analysis). The lack of separability is an independent reason to deny immediate review under *Cohen*.

2. Contrary to petitioner's characterizations (Pet. 6-7), the court of appeals' decision does not implicate a substantial split among the circuits. Indeed, this case is unique, because it is the only decision addressing the question in the context of a petition for review of an interlocutory decision of the Commission. Moreover, even with respect to private antitrust litigation, the state of the law among the circuits is much less divided, and much less static, than petitioner suggests. There is thus no need for the Court to resolve a circuit conflict on the question presented. Even if there were, moreover, this case, which involves a petition for review under Section 45(c) rather than an appeal from a district court order

under Section 1291, would be an inappropriate vehicle through which to confront that question.

a. Whereas petitioner asserts (Pet. 6-9) that the circuits are deeply divided over the question presented, with one other adopting the same position of the court of appeals here, and four adopting the contrary view, a closer inspection reveals a far narrower division that may yet be reconciled as the courts reevaluate earlier precedent in light of this Court's more recent decisions regarding the collateral order doctrine.

As petitioner notes (Pet. 6-7), and as the court of appeals recognized (Pet. App. 7a-8a), twenty years ago, in 1986, the Sixth and Eleventh Circuits adopted opposing views on the question whether the denial of a motion to dismiss on state action grounds may be immediately appealed under the collateral order rule. See *Commuter Transp. Sys., Inc.* v. *Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1289-1290 (11th Cir. 1986) (holding that such an order is immediately appealable); *Huron Valley*, 792 F.2d at 567 (reaching the opposite result). In the intervening twenty years, the division of authority has been rendered less, rather than more, stark.

Most significantly, during that time this Court has issued two important decisions emphasizing the limited scope of the collateral order doctrine, *Digital Equipment* in 1994, and *Will* just last Term. Those decisions cast significant doubt upon the Eleventh Circuit's analysis in *Commuter Transportation Systems*, which consists of little more than labeling *Parker* as conferring an "*immunity from suit*," 801 F.2d at 1289 (quoting *Mitchell* v. *Forsyth*, 472 U.S. at 512), and accordingly they provide ample basis for the Eleventh Circuit to revisit its prior precedent, cf., *e.g.*, *Kelly* v. *Great Seneca Fin. Corp.*, 447 F.3d 947 (6th Cir.) (overturning, in light of

Will, circuit precedent holding that the denial of witness and advocacy immunity is immediately appealable), cert. denied, No. 06-554 (Dec. 4, 2006).[4]

Likewise, recent decisions of the Fifth Circuit, which petitioner also cites as having adopted a rule contrary to that of the court of appeals here, indicate that that court has been narrowing the scope of collateral review and might well have denied interlocutory review in this case. To be sure, the Fifth Circuit held in *Martin* v. *Memorial Hospital*, 86 F.3d 1391 (1996), that the state action doctrine is analogous to qualified or Eleventh Amendment immunities and therefore subject to the collateral order doctrine. *Id.* at 1394-1397. That holding has subsequently been cast into some doubt, however, and the court has declined to extend it to cases that do not present the types of considerations underlying those immunities.[5] In an en banc decision after *Martin*, the Fifth Circuit recognized that "immunity is an inapt description" for the *Parker* doctrine, and that while "a convenient shorthand, '*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation." *Surgical Care Ctr. of Hammond, L.C.* v. *Hospital Serv. Dist. No. 1*, 171 F.3d 231, 234 (1999).

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[4] The Eleventh Circuit has relied upon its decision in *Commuter Transportation Systems* subsequent to this Court's decision in *Digital Equipment*, see *Praxair, Inc.* v. *Florida Power & Light Co.*, 64 F.3d 609, 611 (1995), cert. denied, 517 U.S. 1190 (1996), but it does not appear that the court of appeals has specifically considered the continued vitality of that decision in light of this Court's rejection of the view that the collateral order doctrine extends to all defenses that might be characterized as providing an immunity from suit.

[5] Although *Martin* was decided after *Digital Equipment*, it did not discuss that decision. See 86 F.3d at 1394-1397.

Although the Fifth Circuit subsequently reiterated *Martin*'s holding in *Acoustic Systems, Inc.* v. *Wenger Corp.*, 207 F.3d 287, 290-291, 293 (2000), it is more telling that that court declined, in light of *Digital Equipment* and *Surgical Care Center*, to extend *Martin*'s rule to suits against private defendants, which in its view did not present the concerns that underlie qualified and Eleventh Amendment immunities, *id.* at 291-294. Thus, contrary to petitioner's assumption, the Fifth Circuit's more recent decisions suggest that it might well reject an immediate appeal in a case, such as this one, involving the refusal to dismiss an antitrust investigation by the Commission in which only injunctive relief is sought, because such a proceeding implicates neither Eleventh Amendment nor qualified immunity concerns. And, in light of those intervening decisions and this Court's discussion in *Will*, the holding in *Martin* itself is subject to being reconsidered.

Petitioner asserts (Pet. 7) that the Third and Seventh Circuits have also endorsed the Eleventh Circuit's rule in *dicta*. See *We, Inc.* v. *City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999); *Segni* v. *Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987). Those decisions do not in any way suggest that those courts would uphold interlocutory review in a case such as this. In each of those cases, the court of appeals simply described the Eleventh Circuit's rationale for applying the collateral order rule to the state action doctrine in the process of distinguishing that decision and holding that a motion to dismiss on the grounds of the *Noerr-Pennington* doctrine and asserted First Amendment immunity is *not* subject to immediate appeal. *We, Inc.*, 174 F.3d at 329; *Segni*, 816 F.2d at 345-346. To the extent that either decision indicates how those courts of ap-

peals would resolve a case like this one, they suggest that those courts would reject petitioner's broad construction of the collateral order doctrine. See *id.* at 346 ("Words like 'immunity' * * * are often used interchangeably with 'privilege,' * * * without meaning to resolve issues of appealability."); *We, Inc.*, 174 F.3d at 329 (adopting *Segni*'s analysis). See also *FTC* v. *Feldman*, 532 F.2d 1092, 1098 (7th Cir. 1976) (challenge to Commission subpoena on *Parker* grounds "could probably not be the proper subject of judicial examination until review of a final order of FTC").

Accordingly, the disagreement among the circuits that petitioner urges this Court to resolve is a stale and relatively narrow one that may well be resolved by the lower courts themselves in light of this Court's more recent decisions regarding the collateral order doctrine. There is no warrant for this Court to grant review.[6]

b. To the extent that the conflict cited by petitioner may persist and ultimately require resolution by this Court, this case would present a poor vehicle through which to address the question. As noted, the cases in which the issue has heretofore been addressed all involved traditional antitrust claims brought by private plaintiffs in federal district court. The present case is not merely the only one in which the Commission is the complaining party (thus eliminating possible Eleventh Amendment concerns), it is also the only case that in-

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[6] The government recently learned of an interlocutory appeal to the First Circuit of a denial of state action protection in a private suit. *Ticket Ctr., Inc.* v. *Banco Popular de P.R.*, No. 06-2338 (filed Sept. 15, 2006). On October 19, 2006, the First Circuit issued an order to show cause why the appeal in that case should not be dismissed for lack of jurisdiction, after which the appellant voluntarily dismissed the appeal. See *ibid.*

volves a petition for review of a Commission order pursuant to 15 U.S.C. 45(c).

That statute does not contain the "final decision" language that has been the textual basis for this Court's "practical construction" of Section 1291. See *Will*, 126 S. Ct. at 957. Rather, Section 45(c) provides for review only of "an order of the Commission to cease and desist from using" an anticompetitive act or practice. 15 U.S.C. 45(c). The courts have held that judicial review under Section 45(c) applies only to "final cease and desist orders." *R.J. Reynolds* v. *FTC*, No. 88-1355 (D.C. Cir. July 1, 1988) (per curiam) (citing *FTC* v. *Standard Oil Co.*, 449 U.S. 232 (1980)).

Even assuming that, under a "practical" construction, the Commission's order denying petitioner's motion to dismiss on the basis of *Parker* could be construed as "final," there is no sense in which that order is one directing petitioner to "cease and desist from using" an anticompetitive act or practice. The Commission has not yet rendered a determination on the question whether petitioner has violated the FTC Act and, if so, whether a cease and desist order should issue. Thus, regardless of whether the collateral order doctrine should be construed as reaching a state action defense in the context of private antitrust suits brought in district court, Congress has not provided for review of the Commission's resolution of that issue before issuance of a final cease and desist order. See *Feldman*, 532 F.2d at 1098 (a *Parker* challenge "could probably not be the proper subject of judicial examination until review of a final order of FTC"). The limited grant of authority to review Commission orders reflects Congress's own determination that interlocutory orders of the Commission do not pres-

ent the kind of "high order" concerns that warrant immediate appellate review in other contexts.

The court of appeals did not address this alternative ground for dismissal, instead assuming for purposes of its decision that the collateral order doctrine does apply to petitions for review under Section 45(c). See Pet. App. 6a n.5.[7] The fact that Congress has authorized only a limited form of appellate review of Commission orders makes this a poor vehicle through which to determine the proper rule regarding the state action doctrine in the more common circumstance of appeals from district court orders.[8]

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[7] The Commission noted in its brief below that the court of appeals lacked jurisdiction "because there has been no final cease and desist order issued by the Commission." C.A. Br. 1 n.1. The court of appeals thus erred in suggesting that the Commission did not raise an argument based on the Commission-specific statutory text. Pet. App. 6a n.5. And, in any event, the issue is jurisdictional and thus not subject to waiver. *Wachovia Bank* v. *Schmidt*, 126 S. Ct. 941, 950 (2006) ("[S]ubject-matter jurisdiction must be considered by the court on its own motion, even if no party raises an objection."). Because the court of appeals dismissed for lack of jurisdiction on other grounds, however, it was not required to address the scope of jurisdiction under the "cease and desist" language of Section 45(c).

[8] The court of appeals suggested (Pet. App. 6a n.5) that this Court's decision in *Standard Oil* "seems to have rejected" the view that the collateral order doctrine does not apply under Section 45(c). That suggestion is incorrect. *Standard Oil* involved a suit filed in *district court* pursuant to 5 U.S.C. 704 and 28 U.S.C. 1331, 1337, 1346, 1361, and 2201, see *Standard Oil*, 449 U.S. at 235 & n.4, and thus Section 1291 was at least arguably apposite. Moreover, the Court did not "apply[] collateral order analysis," Pet. App. 6a n.5, but instead *rejected* Standard Oil's "contention" that the collateral order doctrine applied. See 449 U.S. at 246 ("*Cohen* does not avail Socal"). Although the Court has applied the collateral order doctrine (or suggested that it might be applied) in other cases involving judicial review of agency orders, see *FMC* v. *South Carolina State Ports Auth.*, 535 U.S. 743 (2002)

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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DECEMBER 2006

(upholding collateral challenge on grounds of Eleventh Amendment immunity without discussing the basis of jurisdiction); *Bell* v. *New Jersey*, 461 U.S. 773, 778-779 (1983) (indicating possibility of collateral review of Department of Education orders), *Mathews* v. *Eldridge*, 424 U.S. 319, 327-331 & n.11 (1976) (holding the finality requirement in 42 U.S.C. 405(g) to be waivable), the statutory grants of review authority in those cases involved general terms, such as "final orders" of the Federal Maritime Commission, 28 U.S.C. 2342(3)(B), "any action" of the Secretary of Education pursuant to certain statutes, 20 U.S.C. 1234d(a) (Supp. V 1981), "final action" of the Secretary of Education with respect to certain statutes, 20 U.S.C. 2851(a) (Supp. V 1981), and any "final decision" of the Secretary of Health, Education, and Welfare, 42 U.S.C. 405(g). None of those decisions therefore suggests that the courts can, pursuant to a "practical" construction, simply ignore the textual limitation of Section 45(c), which authorizes review of only "cease and desist orders."