No. 19-12227

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

SMILEDIRECTCLUB, LLC,
Plaintiff-Appellee,

v.

TANJA D. BATTLE; THOMAS P. GODFREY; GREGORY G. GOGGANS; RICHARD BENNETT; REBECCA B. BYNUM; TRACY GAY; STEVE HOLCOMB; LOGAN NALLEY JR.; ANTWAN L. TREADWAY; H. BERT YEARGAN; and WENDY JOHNSON,
Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
(JUDGE WILLIAM M. RAY, II)

EN BANC BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLEE

JAMES REILLY DOLAN
Acting General Counsel

JOEL MARCUS
Deputy General Counsel

MARK S. HEGEDUS
Attorney
Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

RICHARD A. POWERS
Deputy Assistant Attorney General

KATHLEEN S. O'NEILL
Senior Director of Investigations and Litigation

DANIEL E. HAAR
ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Washington, D.C. 20530-0001
(202) 353-0256

SmileDirectClub, LLC v. Battle, et al., No. 19-12227

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT
C-1 of 3

Pursuant to Eleventh Circuit Rules 26.1-1, 28-1, and 29-2, the undersigned certifies that the Certificates of Interested Persons filed by Defendants-Appellants and Amici Curiae States of Tennessee, et al., on January 4, 2021, are complete with the following omissions:

Abbott, Alden F., former General Counsel, Federal Trade Commission

Chopra, Rohit, Commissioner, Federal Trade Commission

Delrahim, Makan, former Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Dolan, James Reilly, Acting General Counsel, Federal Trade Commission

Haar, Daniel E., Attorney, Appellate Section, Antitrust Division, U.S. Department of Justice

Hegedus, Mark S., Attorney, Federal Trade Commission

Marcus, Joel, Deputy General Counsel, Federal Trade Commission

SmileDirectClub, LLC v. Battle, et al., No. 19-12227
C-2 of 3

Mintz, Steven J., Attorney, Appellate Section, Antitrust Division, U.S. Department of Justice

Murray, Michael F., former Acting Principal Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Nicholson, Robert B., Attorney, Appellate Section, Antitrust Division, U.S. Department of Justice

O'Neill, Kathleen S., Senior Director of Investigations and Litigation, Antitrust Division, U.S. Department of Justice

Owings, Taylor M., former Acting Chief of Staff, Antitrust Division, U.S. Department of Justice

Phillips, Noah Joshua, Commissioner, Federal Trade Commission

SmileDirectClub, LLC v. Battle, et al., No. 19-12227
C-3 of 3

Powers, Richard A., Deputy Assistant Attorney General, Antitrust Division, U.S. Department of Justice

Simons, Joseph J., Commissioner, Federal Trade Commission

Slaughter, Rebecca Kelly, Acting Chair, Federal Trade Commission

Wilson, Christine S., Commissioner, Federal Trade Commission

/s/ Steven J. Mintz

Steven J. Mintz
Attorney

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

STATEMENT OF INTEREST

The United States and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and have a strong interest in the proper application of the state-action defense articulated in *Parker v. Brown*, 317 U.S. 341 (1943). Thus, we filed a brief amici curiae with the panel supporting Plaintiff-Appellee SmileDirectClub. As frequent litigators in federal court, the United States and the FTC also have a strong interest in the correct application of the collateral-order doctrine. We now urge the Court to hold that an interlocutory order denying the state-action defense is not appealable under the collateral-order doctrine. If the Court finds jurisdiction, however, we urge the Court to hold that Defendants-Appellants have not shown entitlement to the state-action defense, and thereby to affirm the district court's Order.

ISSUES PRESENTED

1. Whether a district court's interlocutory ruling that a defendant's alleged conduct is not state action beyond the reach of the Sherman Act, 15 U.S.C. §§ 1-7, is within the narrow class of immediately-appealable collateral orders.

2. Whether, if this Court has jurisdiction, the active-market-participant members who control the Georgia Board of Dentistry have shown entitlement to the state-action defense at the motion-to-dismiss stage despite the lack of active supervision.

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*, 574 U.S. 494, 502 (2015). The Sherman Act is "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).

In *Parker v. Brown*, 317 U.S. 341 (1943), the Supreme 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 Act suggested that intent. *Id.* at 350-351. Thus, it concluded that "the Sherman Act did not undertake to prohibit," *id.* at 352, an agricultural marketing

program adopted pursuant to a California state statute.

Since *Parker*, 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). Such exemptions are "disfavored, much as are repeals by implication," *Dental Exam'rs*, 574 U.S. at 504 (citations omitted). Their expansion would detract from "the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *Id*. Courts therefore interpret the state-action doctrine "narrowly." *Shames v. Cal. Travel & Tourism Comm'n*, 626 F.3d 1079, 1084 (9th Cir. 2010); *see also Yeager's Fuel v. Pa. Power & Light Co.*, 22 F.3d 1260, 1265 (3d Cir. 1994).

Subsequent decisions have clarified that 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*, 574 U.S. at 504. That requirement is satisfied when the challenged actions are those of a state legislature or state supreme court, "acting legislatively rather than judicially." *Id*. (citation omitted).

To implement their policies, however, States often rely on non-sovereign actors, including sub-state public entities, private businesses, or individuals. For non-sovereign actors to invoke state-action protection, their 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), although some non-sovereign public actors (*e.g.*, municipalities) are "excused" from *Midcal*'s second element, *see Dental Exam'rs*, 574 U.S. at 507-08.

Dental Exam'rs confirmed that both *Midcal* requirements apply to state regulatory boards "controlled by active market participants" in the regulated occupation. 574 U.S. at 510. Such boards are treated like "private trade associations vested by States with regulatory authority," *id*. at 511, because 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." *Id*. at 510-11. Accordingly, such boards bear

the burden of satisfying both *Midcal* requirements. *See id*. at 511-12; *see also Patrick v. Burget*, 486 U.S. 94, 101 (1988).

2. SmileDirectClub says it provides an innovative teledentistry system for straightening teeth that both reduces costs for consumers and expands access to treatment for under-served populations. That system depends on Georgia-licensed dentists who treat patients remotely, *i.e.*, not from a traditional dental office, and potentially from out-of-state. SmileDirectClub alleges that the eleven-member Georgia Board of Dentistry—which regulates the practice of dentistry in Georgia—consists of nine dentists, one dental hygienist, and one layperson, and that the dentists and hygienist are active market participants in dentistry. Complaint ¶¶ 4-15, 17. SmileDirectClub further alleges that, beginning in late 2017, the Board amended its rules to restrict competition from teledentistry services and make it "virtually impossible" for SmileDirectClub to serve Georgia consumers across state lines. *Id*. ¶¶ 34-39, 43.

3. SmileDirectClub sued, alleging that the Board's amended rules violate (among other things) Section 1 of the Sherman Act. Complaint ¶¶ 89-99. The Board moved to dismiss, contending that the

state-action defense bars that claim because the rules were approved by the Governor. On May 8, 2019, the district court denied the motion with respect to the antitrust claim against the Board members individually in their official capacities.

4. The Board members appealed. A divided panel held that it had jurisdiction under binding Circuit precedent applying the collateral-order doctrine and affirmed the district court because the Board members did not satisfy the "active supervision" prong of the defense. 969 F.3d 1134 (11th Cir. 2020). Judge Jordan, concurring, expressed his view that the Circuit precedent allowing the collateral-order appeal "is mistaken and should be re-examined[.]" *Id*. at 1147. Judge Tjoflat, dissenting, contended that the Court lacked jurisdiction because the district court's Order did not conclusively determine a disputed question, a requirement of the collateral-order doctrine. *Id*. at 1148-50. On December 8, 2020, the Court sua sponte granted en banc review.

SUMMARY OF ARGUMENT

1. The most commonly held position among the courts of appeals to have addressed the issue of appellate jurisdiction is that

interlocutory orders denying state-action protection never may be appealed under the collateral-order doctrine. *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720 (9th Cir. 2017), *cert. dismissed*, 138 S. Ct. 1323 (2018); *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). In *La. Real Estate Appraisers Bd. v. United States FTC*, 976 F.3d 597, 604 (5th Cir. 2020), *petition for cert. filed*, the Fifth Circuit recently considered the collateral-order doctrine by analogy and found that a state board controlled by market participants should, under *Dental Exam'rs*, be treated like a private defendant and therefore not permitted collateral review. *See also Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC,* 703 F.3d 1147, 1151 (10th Cir. 2013) (denying immediate appealability for private parties and not deciding the issue for public parties).

Only this Circuit allows collateral-order appeals to private defendants, and even the Fifth Circuit would not permit an immediate appeal to an entity like the Georgia Board. This Court's precedents on the issue—chiefly *Commuter Transportation Systems, Inc. v.*

Hillsborough County Aviation Authority, 801 F.2d 1286, 1289–90 (11th Cir. 1986), followed by *Diverse Power, Inc. v. City of LaGrange*, 934 F.3d 1270, 1272 n.1 (11th Cir. 2019)—rest on the erroneous premise that the state-action doctrine is a "form of immunity from suit, not merely from liability." *Diverse Power*, 934 F.3d at 1272 n.1. To the contrary, the doctrine arose in *Parker* from an interpretation of the Sherman Act's scope, not from a constitutional (or common-law) right to avoid trial, and not out of concern about special harms that might result from litigation. *Parker* held only that the Sherman Act *does not* reach state action, not that Congress *cannot* do so. The Supreme Court has confirmed this understanding by consistently describing the state-action doctrine as an interpretation of the reach of the Sherman Act, which means that it functions as a defense to liability, and not as an immunity from suit.

The Supreme Court has emphasized that the collateral-order doctrine should be applied stringently, lest it "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). Interlocutory denials of state-action protection never satisfy

two of the doctrine's three requirements.

First, such denials are not "completely separate from the merits of the action" because a determination whether the defendant's conduct is attributable to the State is itself a merits ruling. Because the state-action doctrine reflects the Supreme Court's interpretation of the Sherman Act's substantive reach, when a defendant's conduct qualifies as state action, the Sherman Act simply does not "prohibit" it. *Parker,* 317 U.S. at 352.

Second, a state-action determination is not effectively unreviewable on appeal from a final judgment. In order to protect "the States' power to regulate," *Dental Exam'rs,* 574 U.S. at 503, the state-action doctrine treats the Sherman Act as inapplicable to conduct that is attributable to the State itself, *i.e.*, there is no 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).

2. The district court ruled correctly that the Board members' asserted state-action defense does not entitle them to dismissal at this

stage. *Dental Exam'rs* "holds … that a state board on which a controlling number of decisionmakers are active market participants in the occupation the board regulates must satisfy *Midcal*'s active supervision requirement in order to invoke state-action antitrust immunity." 574 U.S. at 511-12. SmileDirectClub alleges that this case involves such a board.

The active-supervision requirement applies to this case. The automatic protection afforded anticompetitive action by the State acting as sovereign does not apply. The Georgia Legislature, not the Governor, exercises the State's sovereign authority over the practice of dentistry. Whether and when a governor plays a role equivalent (for state-action purposes) to a state legislature or a state supreme court acting legislatively is not at issue here. The Georgia statute, its legislative history, and the Certification of Active Supervision issued by the Governor show that his role in Board rulemaking is to serve as the "supervisor."

Dental Exam'rs thus cannot be avoided on the ground that gubernatorial approval of Board rules transformed them into acts of, or attributable to, the Governor for state-action purposes. Unlike the state

supreme court in *Hoover v. Ronwin*, 466 U.S. 558 (1984), the Governor did not create the Board, does not direct the Board's activities, and does not define the Board's authority.

The district court also rightly determined that the Board members did not show, at the motion-to-dismiss stage, that the Governor actively supervised their conduct. The Certification of Active Supervision, on its face, does not establish that the Governor reviewed the substance of the Board rule to ensure that it accords with state policy to displace competition. *Dental Exam'rs,* 574 U.S. at 507. The Certification establishes only that the Governor, relying on the rule's stated purpose, determined that the Board acted within its authority; this does not satisfy the requirements of active supervision. *See id*. at 514. The district court properly recognized that a factual inquiry is needed to resolve the question of whether the requirements of active supervision were satisfied.

ARGUMENT

I. An Interlocutory Denial Of The State-Action Defense Does Not Qualify For Immediate Appeal Under The Collateral-Order Doctrine.

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

The Supreme Court applies 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) ("we look to categories of cases, not to particular injustices."). 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). "[A]ll three requirements [must be] satisfied." *Stringfellow v. Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987).

These requirements are "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). "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 Indus.*, 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 has stressed that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk Indus.*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). 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." *Id*. (quoting *Swint v. Chambers County Commission*, 514 U.S. 35, 48 (1995).

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. In a Sherman Act suit, the question on the merits is whether the defendant has engaged in conduct that the Act prohibits. That is precisely the question that the state-action doctrine addresses. The Supreme 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 there. 317 U.S. 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 Supreme Court's interpretation of the Sherman Act's substantive reach. *See Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc). Conduct that is properly attributable to a State 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.

Since *Parker*, the Supreme Court consistently has framed the state-action inquiry in terms of whether the Sherman Act "prohibits" the defendant's conduct. *Patrick*, 486 U.S. at 99; *see*, *e.g.*, *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 374 (1991) ("prohibit"); *Southern Motor Carriers,* 471 U.S. at 55 ("prohibit"); *Cmty. 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. Va. State Bar*, 421 U.S. 773, 791-792 (1975) (because state action did not occur, defendant's conduct was not "beyond the reach of the Sherman Act"). The Court also 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 Midcal,* 445 U.S. at 104 ("not violate"); *Goldfarb*, 421 U.S. at 788 ("not a violation").

Although the Court sometimes has 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, sometimes 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. La. Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion) ("*Parker* 'exemption'" and "*Parker* immunity"). The Court, moreover, has explained that 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.

Thus, rather than an immunity, state action is an affirmative defense to an alleged antitrust violation. And unlike other immunities, which a defendant may invoke to escape liability regardless of the underlying unlawful conduct, the state-action defense is available only in response to an alleged antitrust violation.

By contrast, the "resolution" of whether a State is entitled to Eleventh Amendment immunity, for example, "generally will have no bearing on the merits of the underlying action." *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993). Similarly, although 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 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 unlawful. The state-action defense, by contrast, is a limit on the substantive coverage of federal antitrust laws. *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 343 (1987); *see also* 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.10, at 694 (2d ed. 1992) (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").

2. In *Commuter Transportation*, the Court did not explain its rationale for declaring that the state-action doctrine provides an

"*immunity from suit* rather than a mere defense to liability." 801 F.2d at 1289. After *Commuter Transportation*, however, the Supreme Court, recognizing that many ordinary defenses can be described loosely as a right to avoid trial, instructed lower courts to "view claims of a right not to be tried with skepticism, if not a jaundiced eye," *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994) (internal quotation marks omitted). Simply characterizing state action as an immunity from suit, as in *Commuter Transportation* and *Diverse Power*, does not reflect current Supreme Court jurisprudence.

Commuter Transportation uncritically analogized the state-action doctrine to qualified immunity, 801 F.2d at 1289, but that analogy is mistaken because the state-action doctrine is qualitatively different from other "immunities." In *Surgical Care Center of Hammond, L.C.*, 171 F.3d at 234, the en banc Fifth Circuit acknowledged that the state-action doctrine has a "parentage [that] differs from the qualified and absolute immunities of public officials" and from Eleventh Amendment immunity.

The Supreme Court's application of the state-action doctrine to federal-government suits further confirms that state action is different

from traditional "immunities." "States have no sovereign immunity as against the Federal Government." *W. Va. v. United States*, 479 U.S. 305, 311 (1987). If the state-action doctrine were akin to sovereign immunity, it would not apply against the federal government either. The Court repeatedly has applied the state-action doctrine, however, in proceedings brought by the federal government. *See*, *e.g.*, *Dental Exam'rs*, 574 U.S. at 500-02; *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 222 (2013); *Southern Motor Carriers*, 471 U.S. at 52-53.

C. An Order Determining That A Defendant's Conduct Is Not State Action Also Is Not Effectively Unreviewable On Appeal From A Final Judgment.

1. To satisfy the third requirement of the collateral-order doctrine, an appellant must show that "review after trial would come too late to vindicate [an] important purpose" of the right asserted. *Johnson v. Jones*, 515 U.S. 304, 312 (1995). No interest protected by the state-action defense is "irretrievably lost" by deferring appeal until after final judgment. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985). The defense preserves the States' ability "to regulate their domestic commerce." *Southern Motor Carriers*, 471 U.S. at 56. That interest "is fully vindicable on appeal from final judgment." *Dig.*

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 no state action, the defendant will not receive the full practical benefit of a pretrial appellate decision ordering dismissal of the antitrust claims on the pleadings. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989). "It is always true, however, that 'there is value … in triumphing before trial, rather than after it.'" *Id.* (citation omitted). The possibility of avoiding a burdensome trial sometimes may 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). If the prospect of such burdens by itself were sufficient to render a merits issue effectively unreviewable on appeal from a final judgment,

however, 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).

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 amici States complain at length about the cost of antitrust litigation (Br. 23-26), but cost "has never sufficed," *Dig. Equip.*, 511 U.S. at 872.[1] Instead, 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.

The Court's collateral-order decisions consistently distinguish immunities from suit from defenses to liability. *See Midland Asphalt Corp. v. United States*, 489 U.S. 794, 801 (1989) ("There is a 'crucial distinction between a right not to be tried and a right whose remedy

[1] Indeed, in *Dental Exam'rs*, the Court suggested that States could bear those costs if regulatory board members were sued for antitrust violations. 574 U.S. at 513. The Court gave no indication that bearing such costs would offend state dignitary interests.

requires the dismissal of charges'") (citation omitted); *Swint*, 514 U.S. at 43. Contrary to the Board members' (Br. 36 n.12) and amici States' (Br. 8-9) suggestions, even in the Court's more recent decisions 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"); *Dig. Equip.*, 511 U.S. at 878 (an "immunity from trial" in a settlement agreement).

By contrast, "importance" of the interest is not alone sufficient; the Court "routinely require[s] litigants to wait until after final judgment to vindicate valuable rights," including constitutional ones. *Mohawk Indus.*, 558 U.S. at 108-09; *e.g.*, *Flanagan v. United States*, 465 U.S. 259 (1984) (Sixth Amendment rights). The Court's decisions thus 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 asserted importance of a right by itself can make the challenged order effectively unreviewable on appeal. [2]

[2] The amici States' citations (Br. 16) to *Seminole Tribe v. Florida*, 517 U.S. 44, 52 (1996) and *Allen v. Cooper*, 140 S. Ct. 994, 1000 (2020), are unavailing. Those cases did not involve the state-action doctrine,

The Board members (Br. 29-32) and amici States (Br. 5-18) make sweeping assertions of State sovereignty and dignitary interests—so broad that the "effectively unreviewable" requirement would be satisfied in almost any litigation involving a State—but they do not cite any case in which the Supreme Court ever articulated the state-action defense as based on those interests. That is because the sovereignty-related interest that the doctrine aims to protect is "the States' power to regulate," *Dental Exam'rs*, 574 U.S. at 503 (citation omitted), not "their privilege not to be sued," *P.R. Aqueduct*, 506 U.S. at 147 n.5. With respect to federalism, the Supreme Court in *Parker* took account of that interest by using it to inform the Court's construction of the Sherman Act. The Court has never, however, held that federalism in the abstract justifies collateral-order review or described the state-action doctrine as protecting federalism in general, as opposed to "the States' ability to regulate their domestic commerce," *Southern Motor Carriers*, 471 U.S.

---

but rather interlocutory appeals under settled law based on Eleventh Amendment immunity. The Court did not construe the scope of a federal statute as in *Parker*; the statutory meaning was "unmistakably clear" in *Seminole Tribe* and undisputed in *Allen*. Instead, the Court decided that Congress lacked the constitutional power to enact the statutes.

at 56.

2. This Court's analogy of the state-action defense to qualified immunity for the "effectively unreviewable" requirement, *see Commuter Transportation*, 801 F.2d at 1289, is unsound. Indeed, the Supreme Court rejected a similar argument in *Will*, where the district court held that the judgment bar of the Federal Tort Claims Act, 28 U.S.C. § 2676, did not preclude particular *Bivens* claims brought against federal customs agents. The agents sought immediate collateral-order appeal of that ruling. The Supreme Court, in concluding that the district court's ruling was not immediately appealable, 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. But the Court rejected that argument, explaining:

> [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 353-54.

The rationale for qualified immunity, to save public officials from "costly litigation and conclusory allegations," *Commuter Transportation*, 801 F.2d at 1289, is not the rationale for the state-action defense, which protects the States' ability to *regulate*. Thus, while the state-action defense constitutes an important limit on the coverage of federal antitrust law, even a public entity's claim that the district court misapplied it can be effectively vindicated on appeal from a final judgment.[3]

II. The Board Members Have Not Satisfied The *Midcal* Requirement Of Active Supervision At The Motion-To-Dismiss Stage.

A. Whether The Governor Is A "Sovereign Actor" For Purposes Of The State-Action Defense Is Not At Issue Here.

The state-action defense protects a State's discretion to displace competition with state regulation, but only when that choice is made by

[3] The Board members suggest (Br. 31-33) that they be treated as public officials because Georgia law treats the Board as a state instrumentality. State law, however, does not determine the contours of the federal-law state-action or collateral-order doctrines. *Dental Exam'rs* explains that such boards are treated as private actors for state-action purposes, 574 U.S. at 511, and *LA. Real Estate Appraisers Bd.* held that such boards therefore should be treated as private defendants for collateral-order purposes. 976 F.3d at 604.

"the State acting as sovereign." *Goldfarb*, 421 U.S. at 790. The Supreme Court has recognized the legislature, when enacting legislation, and the state supreme court, when acting legislatively rather than judicially, as "sovereign" for state-action purposes. *Dental Exam'rs*, 574 U.S at 504. The Board members do not disagree, but ask this Court to rule that the Governor also is sovereign for state-action purposes (Br. 40).

This Court, however, need not answer that question because it is not presented by this case. Georgia law makes clear that the Governor's role regarding the challenged restraint is solely supervisory. The amended Board rule is not an act of the Governor as sovereign decisionmaker ordering a market restraint.[4]

The Georgia Professional Regulation Reform Act, O.C.G.A. § 43-1C-1, et seq., is an act of the Georgia Legislature that gives the Governor authority to "actively supervise" the Board and more than forty occupational licensing boards, and to "review" board rules to "ensure that their actions are consistent with clearly articulated state

[4] Because the question of a governor's sovereignty is not presented, we take no position on it at this time.

policy," *id*. subpart (a). The Legislature enacted it in an attempt to comply with the active-supervision requirement of *Dental Exam'rs*, not to assign regulatory authority to the Governor. *See* 2015 Ga. HB 952, 2016 Ga. Laws 485, Section 1 (citing *Dental Exam'rs* as the impetus for the bill). Indeed, the Governor's Certification of Active Supervision (Doc. 29-2) states that he acted only as the supervisor of the Board, using language that mirrors the Court's holding in *Dental Exam'rs*.

In the limited circumstances when the Supreme Court has found an *ipso facto* exemption, a legislature or state supreme court was the source of the challenged market restraint. Thus, in *Parker* the Court "considered the antitrust implications of the California Agriculture Prorate Act" and held that "when a state legislature adopts legislation, its actions constitute those of the State." *Hoover v. Ronwin*, 466 U.S. 558, 558, 567 (1984) (describing *Parker*). In *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), the state bar carried out the "affirmative command of the Arizona Supreme Court" and "act[ed] as the agent of the court under its continuous supervision." 433 U.S. at 360, 361. In *Hoover*, where the plaintiff challenged the activities of a bar admissions committee, the Court held that "conduct that [plaintiff] challenges was

in reality that of the Arizona Supreme Court" because that court had created the committee, prescribed its rules, and delegated only limited responsibilities to it, while the court made the final decision to grant or deny admission to practice. 466 U.S. at 561, 572-73.

Here, by contrast, SmileDirectClub has not challenged any statute, as did the plaintiffs in *Parker*, and the Governor has not delegated authority to the Board or directed it to act, unlike the Arizona Supreme Court's delegation to the state bar in *Bates* or its direction to the bar admissions committee in *Hoover*. SmileDirectClub's alleged antitrust injury stems solely from the Board's and its members' own conduct in adopting the amended rule, pursuant to authority delegated by the *Legislature*. *Cf. Goldfarb*, 421 U.S. at 790 ("it cannot fairly be said that the State of Virginia through its Supreme Court Rules required the anticompetitive activities of" defendants).

Indeed, the Certification of Active Supervision itself recites that "Georgia law grants *the Board* authority" to regulate dental assistant services, not the Governor. Doc. 29-2 (citing O.C.G.A. § 43-11-9) (emphasis added). The Governor did not take any action that even purported to restrain competition: he merely approved the Board's rule,

in his role as supervisor, as "within its [the Board's] authority." *Id*. When a governor is authorized to act only as a supervisor, in compliance with *Dental Exam'rs*, there is no basis to find the type of *ipso facto* protection that applies when a legislature passes legislation or a state supreme court acts in a legislative role.

B. The Board's Challenged Rule Cannot Be Attributed To The Governor By Reason Of His Supervision.

Lacking a restraint on competition by the Governor himself, the Board members, invoking *Hoover*, seek to analogize themselves to the bar admissions committee and the Governor to the Arizona Supreme Court (Br. 44-45). The Board members ignore, however, the fact that the Arizona Supreme Court also established the bar admission committee, defined its purpose, and mandated its activities. *Hoover*, 466 U.S. at 576. Specifically, the Supreme Court Rules identified test subjects and general qualifications for the Bar, but limited the committee's authority to giving and grading the examination and making recommendations to the Supreme Court. *Id.* at 572-73. "The court itself made the final decision to grant or deny admission to practice." *Id.* at 573. In short, the committee was the Arizona Supreme Court's agent. *Id.* at 572 (quoting *Bates*, 433 U.S. at 361).

By contrast, the Board is not the Governor's agent. The Governor did not establish the Board. He does not define or authorize its activities and does not direct adoption or enforcement of Board rules. Instead, the Governor only reviews and approves or vetoes the Board's rules, along with forty other occupational licensing boards, under a statute passed to comply with, not evade, *Dental Exam'rs*. That supervisory role does not make Board's rule an action of the State acting as sovereign.

The Board is wholly unlike the bar committees in *Bates* and *Hoover*. Accordingly, as the panel said (slip op. 17), the Board is "precisely like" the North Carolina board in *Dental Exam'rs*. The Board members must therefore show that the Governor actively supervised the challenged rule.

C. The Board Members Have Not Demonstrated That The State Actively Supervised The Board's Challenged Conduct.

The Board members' principal arguments on active supervision are that the requirements vary from case-to-case (Br. 65-67), that it is enough if state law provides for a mechanism of supervision, regardless of what the supervisor actually does (Br. 60-62), and that the

Certification of Active Supervision showed active supervision (Br. 62). They are wrong on all three counts.[5]

First, rather than authorizing variable requirements, *Dental Exam'rs* identifies "*constant* requirements of active supervision," including that the state supervisor must "review the substance of the anticompetitive decision, not merely the procedures followed to produce it." 574 U.S. at 515 (emphasis added). Contrary to the Board members' view (Br. 65), this review cannot be "modest."[6] Rather, review of the "substance" means review of the "merits" to determine whether the action at issue actually implements a clearly articulated state policy to displace competition, instead of serving private competitive interests. *See Patrick*, 486 U.S. at 101, 105.

---

[5] The Board members also argue that they satisfied the clear articulation requirement (Br. 53-59). This Court need not reach that issue, because the absence of active supervision alone suffices to affirm the district court. *See Patrick*, 486 U.S. at 100.

[6] For its view, the Board members principally rely on *New England Motor Rate Bureau, Inc. v. FTC*, 908 F.2d 1064 (1st Cir. 1990), but the Supreme Court specifically rejected the First Circuit's approach in *FTC v. Ticor Title Ins. Co.,* 504 U.S. 621, 637-38 (1992).

Second, active supervision cannot be *assumed* based on the existence of statutory review mechanisms. "The mere potential for state supervision is not an adequate substitute for a decision by the State." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992). Contrary to the Board members' view (Br. 64), the question of whether the state supervisor actually reviewed the substance of the challenged conduct is a factual one.[7] *See Town of Hallie*, 471 U.S. at 46 (the "requirement of active state supervision serves essentially an evidentiary function: it is one way of ensuring that the actor is engaging in the challenged conduct pursuant to state policy"); *Cost Mgmt. Servs., Inc. v. Wash. Nat'l Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996) (active supervision is a factual question). As the panel correctly concluded, while the Governor had the authority and duty to supervise issuance of the Board's rule, the question of whether he actually engaged in the requisite substantive review is one of fact, not law. Slip op. 7 n.4.

[7] The Board members cite *Trigen Okla. City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220, 1225 (10th Cir. 2001), but that case refers only to "state action immunity" generally, not the active-supervision test specifically, and does not cite any authority for this specific proposition.

Third, the Board members fail to show that the Governor, in fact, provided active supervision here. As the panel explained, the Certification of Active Supervision, cited by SmileDirectClub (Complaint ¶ 45) and submitted by the Board (Dkt. 29-2), does not resolve that factual question. Slip op. 17-18. Active supervision requires that the supervisor "exercise[] sufficient independent judgment and control" such that the challenged conduct "ha[s] been established as a product of deliberate state intervention." *Ticor*, 504 U.S. at 634. The Certification, however, appears to disclaim such independent judgment by the Governor: It recounts the "purpose" of the amendment "*[a]s stated by the Board*." Doc. 29-2 (emphasis added). Indeed, the Complaint alleges that substantive review could not occur because the Board failed to provide the Governor with relevant information concerning the rule. Complaint ¶ 45; Order at 12-13. Supervision without sufficient information can render the review substantively inadequate. *See Cost Mgmt. Servs.*, 99 F.3d at 943.

In any event, the Certification's only stated rationale for approval is that the Board's amended rule is "within [the Board's] authority" because it is "related to" dental assistant services. Doc. 29-2; slip. op.

17. Merely determining that the Board acted within its authority, however, is not active supervision. *See Dental Exam'rs*, 574 U.S. at 514 ("Whether or not the Board exceeded its powers under North Carolina law," there was no evidence of state control of the board's action); *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").

Thus, as the panel correctly concluded, the Governor "examined only the procedural question of whether the amended rule was within the Board of Dentistry's statutory power" and "did not comment—even in passing—on the merits or substance of the rule change." Slip op. 17. At best, that amounted to potential, not active, supervision. *Id.* (citing *Dental Exam'rs*, 574 U.S. at 515; *Patrick*, 486 U.S. at 101).

CONCLUSION

The Court should dismiss the appeal for lack of jurisdiction. Alternatively, it should affirm the district court's Order.

Respectfully submitted.

/s/ Steven J. Mintz

RICHARD A. POWERS
Deputy Assistant Attorney General

JAMES REILLY DOLAN
Acting General Counsel

KATHLEEN S. O'NEILL
Senior Director of Investigations and Litigation

DANIEL E. HAAR
ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys

JOEL MARCUS
Deputy General Counsel

MARK S. HEGEDUS
Attorney

U.S. Department of Justice
Antitrust Division
950 Pennsylvania Avenue, N.W.
Room 3224
Washington, D.C. 20530-0001
Phone: (202) 353-0256
Fax: (202) 514-0536
Email: Steven.Mintz@usdoj.gov

Federal Trade Commission
600 Pennsylvania Ave., NW
Washington, D.C. 20580

Dated: January 25, 2021

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rules 32(a)(7)(B) and 29(a)(5) of the Federal Rules of Appellate Procedure because it contains 6,485 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.

January 25, 2021 /s/ Steven J. Mintz
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on January 25, 2021, I electronically filed the foregoing En Banc Brief of the United States of America and Federal Trade Commission as Amici Curiae Supporting Plaintiff-Appellee with the Clerk of the Court of the United States Court of Appeals for the Eleventh Circuit using the CM/ECF system. I also sent seven copies to the Clerk of the Court by FedEx next 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.

/s/ Steven J. Mintz
Attorney