IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

CASE NO. 18-60291

LOUISIANA REAL ESTATE APPRAISERS BOARD,

Petitioner

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review from the Federal Trade Commission,
In the Matter of Louisiana Real Estate Appraisers Board,
No. 9374

BRIEF FOR THE STATES OF MISSISSIPPI, IDAHO, IOWA, RHODE ISLAND, AND UTAH AS *AMICI CURIAE* IN SUPPORT OF THE PETITIONER AND IN SUPPORT OF A REVERSAL

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STATES' INTEREST

The States of Mississippi, Idaho, Iowa, Rhode Island, and Utah file this *amicus* brief pursuant to Federal Rule of Appellate Procedure 29(a)(2). States are interested in the outcome of *Louisiana Real Estate Appraisers Board v. Federal Trade Commission* because they want to protect their sovereign actions from unnecessary and costly antitrust litigation. The States rely on state agencies and public entities to implement regulations and economic policy. The U.S. Supreme Court has affirmed repeatedly that sovereign actions are immune from federal antitrust laws because States are a "sovereign" part of our Nation's "dual system of government." *Parker v. Brown*, 317 U.S. 341, 351 (1943). That immunity provides little value to the States if they are forced to contend with the burden and indignity of defending an antitrust suit to final judgment without the opportunity to appeal an order denying immunity.

The Fifth Circuit recognized that interlocutory appeal is necessary to protect state action immunity should a lower court or administrative law judge not recognize it, and the States have an interest in ensuring that this Court's position is maintained for the sake of States within the Fifth Circuit and in hopes that other Circuits and the U.S. Supreme Court will adopt the Fifth Circuit's precedent.

The States have a long productive history of working with the Federal Trade Commission ("FTC").[1] Accordingly, the States recognize and appreciate the FTC's crucial role in antitrust and consumer protection enforcement throughout the United States. The States are not intervening in this matter to address the merits but to protect the States' rights. The states are not addressing whether or not the Louisiana Real Estate Appraisers Board (LREAB) met the active supervision test set by the U.S. Supreme Court in *North Carolina State Board of Dental Examiners v. FTC ("N.C. Dental")* but are earnestly asking this honorable Court to determine such before the Board is improperly dragged through antitrust litigation. *N.C. State Bd. Of Dental Examiners v. F.T.C.*, 135 S.Ct. 1101, 1107 and 1113 (2015). Most importantly, we are beseeching the 5th Circuit to maintain its correct position that state action immunity is immunity from suit, and therefore entitled to an interlocutory appeal, in order to genuinely protect and recognize such. Certainly, a balance of states' rights and duties and that of the federal government are achievable.

[1] www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers

SUMMARY OF THE ARGUMENT

We are asking the 5th Circuit to maintain its position as stated in *Martin* in which they previously granted interlocutory for state action immunity. *Martin v. Memorial Hosp. 8*6 F.3d 1391, 1393 and 1395 (1996). A denial of state action immunity to a state entity is an appealable collateral order. State action immunity automatically has suit immunity, granted to it by the Sherman Act and adopted under the FTC Act in *N.C. Dental*. 135 S.Ct. at 1107. Therefore, a state entity or board, such as the LREAB, is entitled to interlocutory appeal under the collateral order doctrine.

As stated by the U.S. Supreme Court in *N.C. Dental*, this is a right to "immunity;" it is not simply a defense to a cause of action as the FTC represents. *N.C. State Bd. Of Dental Examiners*, 135 S.Ct. at 1110. Commission orders that meet the collateral order test are not exempt from this Court's jurisdiction. Failing to grant an interlocutory appeal would undermine the purpose of state action immunity, ignore state sovereignty, and violate principals of federalism. Furthermore, violating a state's inherent right, to such suit immunity, would be an undue burden and cost prohibitive to the states.

While the States as *amici curiae* do not take a position concerning the merits of this case, the States note that a state actor's legal right to seek an

interlocutory appeal should necessarily stay all lower court or administrative proceedings.[2]

ARGUMENT

I. The Fifth Circuit set a precedent for other Circuits in recognizing the necessity of interlocutory appeal to preserve state action immunity.

As this honorable Court stated over twenty years ago,

> [w]e have jurisdiction of the appeal under the collateral order doctrine because [the] ruling conclusively determines the disputed question, resolves an important issue completely separate from the merits of the action, and is effectively unreviewable on appeal from a final judgment... We conclude that *Parker v. Brown* state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—an entitlement not to stand trial under certain circumstances.

Martin, 86 F.3d at 1393 and 1395 (Citing *Mitchell v. Forsyth*, 472 U.S. 511, 525 (1985) and *Parker v. Brown*, 317 U.S. at 350–351, 63 S.Ct. at 313.)

Unlike liability immunity, "[t]he entitlement [at hand] is an immunity from suit rather than a mere defense to liability; and like an absolute immunity, it is effectively lost if a case is erroneously permitted to go to trial." *Martin,* 86 F.3d at 1396 citing *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815. The "central benefits" of immunity would be lost "absent immediate appeal... An appeal after judgment would come too late to protect that right." *Martin 86* F.3d at 1395-1396. Accordingly, a denial of state action

[2] The States' decision to not express an opinion on the merits is in no way acquiescence to the multiple underlying issues related to state action immunity in the case before the FTC.

immunity to a state entity is an appealable collateral order.[3] *Martin*, 86 F.3d at 1396-97 (5th Cir. 1996). See *Earles v. State Bd. of Certified Pub. Accountants of LA*, 139 F.3d 1033, 1035 (5th Cir. 1998).

II. The question of state action immunity meets the test for an interlocutory appeal under the collateral order doctrine.

To be "final" and qualify under the collateral order doctrine, an order must "1. Conclusively determine the disputed question, 2. Resolve an important issue completely separate from the merits of the action, and 3. Be effectively unreviewable on appeal from a final judgment." *Martin,* 86 F.3d at 1396 (1996); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

A. Issue Separate from The Merits

Here, the issue, which is completely separate from the merits of the underlying antitrust action, is whether a state agency or board has state action immunity. The Sherman Act grants state action immunity to a state agency or board when "the State accepts political accountability for the anticompetitive conduct it permits and controls." The Supreme Court applied state action immunity in antitrust actions under the FTC Act for the

[3] The FTC cites *Surgical Care Center of Hammond LC v. Hospital Service Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc) claiming that it undermined *Martin*. However, *Surgical Care v. Hammond* considered what the test should be for state action immunity before *N.C. Dental* and did not involve the question of the right to an interlocutory appeal. Pl.'s Mot. in Opposition 8 (June 21, 2018). To the contrary, *Surgical Care* in no way implicates *Martin*'s holding that a denial of state-action immunity is immediately appealable as a collateral order. *Commuter Transportation Systems, Inc. v. Hillsborough county Aviation Authority,* 801 F.2d 1286, 1289 (11th Cir. 1986).

same reasons. *N.C. State Bd. Of Dental Examiners*, 135 S.Ct. at 1107.[4] There is a two-part test to determine whether alleged anticompetitive conduct undertaken by a non-sovereign entity, controlled by active market participants, is actually the conduct of the State: 1. Clear articulation, and 2. Active supervision. *N.C. State Bd. Of Dental Examiners,* 135 S. Ct. at 1113. These are distinct questions from whether LREAB committed anticompetitive conduct.

B. Conclusively Determined

The Commission's summary judgment ruling is a final ruling on a question of fact, specifically whether the LREAB met the active supervision requirement for state action immunity and, therefore, qualified for state action immunity from the suit at hand. Commission orders that meet the collateral order test are not exempt from this Court's jurisdiction. As stated by the FTC's Guide to Antitrust Law, "[f]inal decisions issued by the Commission may be appealed to a U.S. Court of Appeals and, ultimately, to the U.S. Supreme Court.[5]

Section 45(c) does not preclude review under the collateral order doctrine. It simply states that the defendant *may* appeal a cease and desist order to the Court of Appeals and does not address or limit appellate review

[4] In the present matter, LREAB states that, like the commission in *Parker*, the Governor and Senate have control over the Board's membership.
[5] www.ftc.gov/tips-advice/competition-guidance/guide-antitrust-laws/enforcers June 29, 2018

of other final orders by the Commission. The collateral order doctrine is a "practical construction" of finality under a federal statute. *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994); 15 U.S.C. § 45(b), (c), (g).

As this honorable Court has previously stated "refusal to grant defendants' motions for summary judgment vindicating their entitlement to state action immunity is appealable under the collateral order doctrine." *Martin,* 86 F.3d at 1394.

The states' fundamental rights should not be deprived solely depending on whether the FTC decided to bring an action under its own procedures or in a district court under 15 U.S.C. § 45(m). *LabMD v. FTC*, ___ F.3d ___, 2018 WL 3056794, at *9 (June 29, 2018).

> The denial of a state or state entity's motion for dismissal or summary judgment on the ground of state action immunity easily meets these requirements: (i) denials of states' and state entities' claims to state action immunity clearly purport to be conclusive determinations that they have no right not to be sued under federal antitrust laws for actions by the state or its officers or agents directed by its legislature; and (ii) a claim of such state action immunity is conceptually distinct from the merits of the plaintiff's claim that he has been damaged by the defendants' alleged violation of the federal antitrust laws. An appellate court reviewing the denial of the state or state entity's claim of immunity need not consider the correctness of the plaintiff's version of the facts, nor even determine whether the plaintiff's allegations actually state a claim. In a case involving alleged anticompetitive acts by

> a state's municipality or subdivision, all it need determine is a question of law: whether the state entity acted pursuant to a clearly articulated and affirmatively expressed state policy… Accordingly, we hold that a… denial of a claim of state action immunity, to the extent that it turns on whether a municipality or subdivision acted pursuant to a clearly articulated and affirmatively expressed state policy, is an appealable "final decision" within the meaning of 28 U.S.C. § 1291 notwithstanding the absence of a final judgment.

Martin, 86 F.3d at 1397.

C. Effectively Unreviewable

The third element is whether denial of a public entity's claim to state action antitrust immunity is "effectively unreviewable" absent interlocutory appeal within the meaning of *Cohen*. Cohen, 337 U.S. at 546. A wrongful denial of that immunity is effectively unreviewable because it subjects states and related entities to the indignity of defending sovereign action through protracted litigation. Delaying appeals or orders denying state action immunity will interfere with their regulatory freedom by distracting officials from their duties and hindering their discretionary actions.

The "consequences" with which the U.S. Supreme Court was concerned included not only liability for money damages, but also "the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526

(quoting *Harlow v. Fizgerald*, 457 U.S. 800, 816 (1982)). Additionally, the Eleventh Circuit explained, "[a]bsent state immunity[,] local officials will avoid decisions involving antitrust laws which would expose such officials to costly litigation and conclusory allegations." *Commuter Transp. Sys. v. Hillsborough County Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir. 1986); *see also We, Inc. v. City of Phila.*, 174 F.3d 322, 329 (3rd Cir. 1999) (noting that the burdens of antitrust litigation might deter public officials from "vigorous execution of their office" (quoting *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987))).

The only way to free states and their delegates from the threat of litigation is to ensure that questions of state action immunity are litigated at the earliest possible stage. Otherwise, there is no guarantee that state and public entities and officials will not be subjected to protracted and costly litigation under federal antitrust law, and the mere risk of such litigation will inhibit states from fully exercising their regulatory discretion, in violation of the federalism principles underlying state action immunity.

Somehow, the FTC contends that "a state's dignitary interests are not even implicated in actions brought by the federal government" simply because the action was brought by the federal government rather than a private plaintiff. Pl.'s Mot. in Opposition 18 (June 21, 2018). To the

contrary, the State of Louisiana's board would still face the cost of trial and the distraction of government officials away from their duties to taxpayers no matter who is the plaintiff, and the states are sovereign states acting through their "state creatures" no matter who is the plaintiff. The FTC cites *U.S. v. Mississippi* for this contention. 380 U.S. 128, 140 (1965). However, *U.S. v. Mississippi* was a voting rights case based on the 15th Amendment, which expressly prohibits abridgment of the right to vote on the basis of race by "any State." *Id.* This is the polar opposite of the holding in *Parker v. Brown* which held that antitrust laws did **not** apply to the actions of a state, and thus articulated the doctrine of state action immunity. 317 U.S. at 351. Later, *N.C. Dental* confirmed that state action immunity applied to state boards whose conduct was challenged by the FTC. 135 S. Ct. at 1110.

III. Infringing on a state's ability to implement its regulations is a violation of federalism.

The Fifth Circuit reiterated the U.S. Supreme Court affirming "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." *Martin,* 86 F.3d at 1395 citing *Parker,* 317 U.S. at 351, 63 S.Ct. at 313. "As an incident of sovereignty, a state may govern directly or through its creatures, clothing

them with the attributes and authority it chooses, including, if it desires, insulation from the Sherman Act." *Surgical Care Ctr of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 171 F.3d 231, 234 (5th Cir. 1999). State action antitrust immunity "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition." *N.C. Carolina St. Bd. Or Dental Exam'rs*, 135 S. Ct. at 1110.

State action undertaken pursuant to the state's sovereign authority is thus immune from the operation of federal antitrust laws. *N. C. Dental,* 135 S.Ct. at 1110. In *Parker*, the U.S. Supreme Court recognized that subjecting state action to antitrust suit would be an affront to the federalism and dual sovereignty embedded in the Constitution. *Id.* citing 317 U.S. at 350–351, 63 S.Ct. 307. The Court refused to hold that Congress had acted to interfere with state sovereignty in that way without an express indication it had intended to do so. *Parker*, 317 U.S. at 350-352. ("Under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority."); *N.C. Carolina St. Bd. Or Dental Exam'rs*, 135 S. Ct. at 1110. The federalism principles that state action immunity is intended to further will be directly undermined if Sherman Act or FTC Act defendants are barred from immediate appeal of state action immunity denials.

IV. State sovereignty is threatened when an interlocutory appeal, concerning the question of state action immunity, is not allowed.

State action immunity originates in the sovereignty retained by the states in both the federal system and the Eleventh Amendment. The Supreme Court has recognized the immediate need for appeal when state sovereignty is threatened. A denial of state action immunity should thus be treated in the same manner as a denial of sovereign immunity: as a threat to the sovereign interests of the states. Permitting immediate appeals of denials of state sovereign immunity but not for denials of state action immunity would be inconsistent with principles of the collateral order doctrine. Both are derived from the reservation of sovereignty embodied in the Constitution.

According to the Supreme Court, protecting states' sovereignty is a "value of a high order" that warrants immediate appeal. *N.C. Dental*, 135 S. Ct. at 1110. One of the "particular value[s] of a high order [that has been successfully] marshaled in support of the interest in avoiding trial" is "respecting a State's dignitary interests." *Will v. Hallock*, 546 U.S. 345, 352 (2006); *see P. R. Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-47 (1993).

In *Puerto Rico Aqueduct*, the Court held that a denial of state sovereign immunity warranted immediate appeal because of "the importance of ensuring that the States' dignitary interests can be fully vindicated." 506 U.S. at 146. "[T]he Constitution's structure, its history, and the authoritative interpretations by this Court make clear [that] the States' immunity from suit is a fundamental aspect of the sovereignty which the States enjoyed before the ratification of the Constitution, and which they retain today." *Alden v. Maine*, 527 U.S. 706, 713 (1999). State action immunity is no different. *N. C. Dental*, 135 S. Ct. at 1109-10. State action immunity preserves "the dignity and essential attributes" of "primary sovereignty." *Cf. Alden*, 527 U.S. at 714.

Delaying an immediate appeal from a denial of state action immunity until after final judgment therefore endangers that sovereignty. It supports the very "conflicts" between state sovereignty and antitrust laws that state action immunity is designed to avoid. *N. C. Dental*, 135 S. Ct. at 1110. As such, allowing immediate appeal in this limited class of cases prevents fundamental harm to a state's sovereign interests while causing no damage to other interests.

V. Deferring appellate review until final judgment exposes states to unnecessary costs and undermines judicial efficiency.

Violating a state's inherent right to state action immunity, and therefore suit immunity, would be an undue burden and cost prohibitive to the states. The Fifth Circuit has recognized the "consequences" of failing to grant interlocutory appeal and that they are "not limited to liability for money damages [but] also included the general costs of subjecting officials to the risks of trial—distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Martin, 8*6 F.3d at 1396 citing *Mitchell*, 472 U.S. at 526, 105 S.Ct. at 2815.

Antitrust litigation is enormously expensive. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007). The complex discovery required in the early stages of antitrust litigation accounts for much of that expense. *Id.* at 558. *Twombly* proposed that, when allegations in a complaint, however true, do not state a claim entitled to relief, the claim should be dealt with "at the point of minimum expenditure of time and money by the parties and the court." 550 U.S. at 558.

The inability to immediately appeal a denial of state action immunity subjects the states to these costs even when the matters at issue are sovereign state actions. Allowing immediate appeal will enhance—not undermine—the judicial efficiency that finality serves to protect. *Harlow*,

457 U.S. at 816, 102 S.Ct. at 2737 (even pretrial matters such as discovery should be avoided, as "[i]nquiries of this kind can be peculiarly disruptive of effective government.")

Most importantly, states have a special duty to their citizens to be cost conscious. There is thus every reason to grapple with the issue of state action immunity before the parties and the court are faced with the exorbitant costs of discovery and trial.

CONCLUSION

For the foregoing reasons, the States beseech this honorable Court to grant the Appellant's petition for interlocutory appeal. Applying the collateral order doctrine to the narrow class of state action immunity rulings, including any Commission order expressing a final opinion on an issue, fits within the "stringent" application of the collateral order doctrine. *Will*, 546 U.S. at 350. Immediate appeal in this limited context will advance judicial efficiency and is the only way to adequately protect the State's potential state action immunity and to avoid the burdens of potentially unwarranted litigation.

Respectfully Submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 11, 2018 an electronic copy of the foregoing was filed with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit using the appellate CM/ECF system, and that service will be accomplished by the appellate CM/ECF system.

THIS the 11th day of July, 2018.

S/Crystal Utley Secoy

CERTIFICATE OF ELECTRONIC COMPLIANCE

Undersigned counsel certifies that this brief has been transmitted to the Clerk of the United States Court of Appeals for the Fifth Circuit via the court's CM/ECF document filing system. Counsel further certifies that the required privacy redactions have been made, Fifth Cir. R. 25.2.13, the electronic submission is an exact copy of the paper document, Fifth Cir. R. 25.2.1, and the document has been scanned with the most recent version of Symantec Endpoint Protection and is free of viruses.

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S/Crystal Utley Secoy

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