No. 20-1018

In the Supreme Court of the United States

LOUISIANA REAL ESTATE APPRAISERS BOARD,

Petitioner

v.

UNITED STATES FEDERAL TRADE COMMISSION

Respondents.

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

BRIEF FOR THE STATES OF MISSISSIPPI, ALABAMA, ARIZONA, ARKANSAS, CONNECTICUT, FLORIDA, GEORGIA, IDAHO, INDIANA, IOWA, KENTUCKY, LOUISIANA, MAINE, MICHIGAN, MINNESOTA, MONTANA, NEW JERSEY, OREGON, SOUTH CAROLINA, TEXAS, UTAH, VIRGINIA, AND WEST VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The *Amici Curiae* are the States of Mississippi, Alabama, Arizona, Arkansas, Connecticut, Florida, Georgia, Idaho, Indiana, Iowa, Kentucky, Louisiana, Maine, Michigan, Minnesota, Montana, New Jersey, Oregon, South Carolina, Texas, Utah, Virginia, and West Virginia, uniquely positioned as the very sovereigns affected by continued discrepancies among the lower-court interpretations of state-action immunity and the collateral-order doctrine.

Amici rely on various state agencies and other public entities, state and local, to implement economic policy. And this Court has recognized that those 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). But that immunity has little value to *Amici* if they must endure the burden and indignity of defending an antitrust suit to final judgment before having the opportunity to appeal from an order denying a claim of immunity.

Amici take no position on the scope of state-action immunity or whether it is applicable on the facts of this particular case. Rather, *Amici*'s interest is limited to preserving and ensuring their sovereign actions from the threat of unnecessary and costly antitrust litigation. *Amici* defend their state entities and officials in antitrust actions, and political subdivisions of *Amici* provide such a defense as well. When

[1] Under Rule 37.4, *Amici* are permitted to file an amicus brief without first obtaining leave. Pursuant to the Rule 37.2(a), Petitioner and Respondent have consented to the filing of this brief and waived the 10-day notice requirement, as confirmed in writing to counsel for *Amici.* No counsel for any party authored this brief, in whole or in part, and no person or entity other than *Amici* contributed monetarily to its preparation or submission.

state-action immunity is wrongly denied, *Amici* have an interest in correcting such a decision—and preserving their immunity—*immediately*.

SUMMARY OF THE ARGUMENT

A denial of state-action immunity to a governmental entity should be subject to interlocutory appeal under the collateral-order doctrine. *See Cohen v. Beneficial Indust. Loan Corp.*, 337 U.S. 541, 546-47 (1949). Any other result threatens the very principles of Federalism embodied in this Court's decision in *Parker*.

I. State-action immunity implicates key constitutional principles of Federalism and state sovereignty. *See City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991) (state action doctrine relies on "principles of federalism and state sovereignty"). And this immunity originates in the sovereignty retained by the States in our federal system.

When an interest as valued as state sovereignty would be imperiled by delaying an appeal, this Court steadfastly has recognized the need for an immediate opportunity to appeal. Because the extension of state-action immunity to governmental entities is rooted in the State's own sovereign immunity, permitting interlocutory appeal is necessary.

In fact, state-action immunity derives from the same principles of sovereignty as the sovereign immunity recognized in the Eleventh Amendment. 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 States. Just as orders denying Eleventh Amendment immunity are immediately appealable under the collateral-

order doctrine, so too should rulings denying *Parker* immunity be immediately appealable under the same doctrine.

II. Denying immediate appeal of a denial of state-action immunity exposes States to unnecessary costs and undermines judicial efficiency. Here, the Fifth Circuit's refusal to apply the collateral-order doctrine devalues the State of Louisiana's sovereign interests and obstructs Louisiana's state actors from an early—and thus timely—determination of immunity.

There is no doubt that antitrust litigation is enormously expensive and consumes significant resources of both litigants and the courts. While state-action immunity is designed to protect States, state officials, and other public entities from these costs, an inability to appeal immediately from a denial of immunity imposes these costs—even in cases in which the actions in question are, in fact, sovereign state actions.

Thus, allowing interlocutory appeals of denials of state-action immunity protects State sovereignty in the same way as the state-action immunity doctrine itself. Indeed, state-action immunity furthers Federalism principles by allowing States the freedom to adopt different models and methods for implementing their desired economic policies. But delaying appeals of orders denying state-action immunity until after final judgment will significantly interfere with that regulatory freedom, both by distracting officials from their duties and chilling their discretionary actions.

All in all, permitting an immediate appeal in this narrow class of cases would avoid these unnecessary costs and preserve States' limited fiscal resources. Doing so also would enhance—not undermine—the judicial efficiency that the general requirement of finality serves to protect.

ARGUMENT

To be "final" 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." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978) (restating *Cohen*, 337 U.S. at 546) (brackets added). This brief focuses on the third element—why a denial of a state entity's or state official's claim to state-action antitrust immunity is "effectively unreviewable" absent interlocutory appeal within the meaning of *Cohen*.

State-action antitrust immunity is derived from state sovereignty and firmly rooted in Federalism principles. It "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition." *N.C. State Bd. of Dental Exam'rs v. F.T.C.*, 574 U.S. 494, 504 (2015) ("*N.C. Dental*"); *see also S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985) ("The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce.").

Like sovereign immunity, and even qualified immunity, the central benefits of state-action immunity are lost absent an immediate appeal. And because state-action immunity and state sovereign immunity derive from the same principles, they should be treated the same under the collateral-order doctrine. Additionally, nationwide uniformity as to the scope of the collateral-order doctrine is especially important here: where a division among the lower courts leaves States with disparate degrees of protection for their sovereignty interests—falling out of step with the "'fundamental principle of equal sovereignty' among the States." *Shelby County v. Holder*, 133 S. Ct. 2612, 2623, 2624 (2013).

I. *Parker* Immunity is Rooted in State Sovereignty and Federalism, and a Denial of that Immunity is Immediately Appealable.

The purpose of state-action immunity is to protect the States' sovereign interests. In *Parker*, this Court recognized that subjecting state action to antitrust suits would be an affront to Federalism and the notion of dual sovereignty embedded in the Constitution. *See Parker*, 317 U.S. at 350-52; *N.C. Dental*, 574 U.S. at 503. *Parker* 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 350-52. That reasoning rightly rests on the premise that state sovereignty is an integral part of the federal structure created by the Constitution. *See id.* at 351 ("[U]nder the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority[.]"); *N.C. Dental*, 574 U.S. at 503 ("[*Parker*] recognized Congress' purpose to respect the federal balance and to 'embody in the Sherman Act the federalism principle that the States possess a significant

measure of sovereignty under our Constitution.'" (quoting *Cmty. Commc'ns Co. v. Boulder*, 455 U.S. 40, 53 (1982))).

Since *Parker*, this Court's decisions only reinforce that state-action immunity is "premised on an understanding that respect for the States' coordinate role in government counsels against reading the federal antitrust laws to restrict the States' sovereign capacity to regulate their economies and provide services to their citizens," *F.T.C. v. Phoebe Putney Health Sys.*, 568 U.S. 216, 236 (2013), and "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition," *N.C. Dental*, 574 U.S. at 504. Affording immunity to States and their delegates "preserves to the States their freedom under our dual system of federalism" to "administer state regulatory policies free of the inhibitions of the federal antitrust laws." *Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion).

Parker also affirmed that state-action immunity is obtainable not only by a State directly, but also through its officers and agents. As this Court explained,

> We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state *or its officers or agents* from activities directed by its legislature. In 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.

Parker, 317 U.S. at 350–351 (emphasis supplied).

While this Court acknowledges that "closer analysis is required when the activity at issue is not directly that of the legislature or supreme court, but is carried

out by others pursuant to state authorization," it also recognizes that it has never departed from the basic reasoning in *Parker* when determining the scope of state-action immunity. *Hoover v. Ronwin*, 466 U.S. 558, 568 (1984).

The two-part analysis ultimately articulated for the conduct of actors who are not *ipso facto* exempt under *Parker* is (1) whether the conduct is the result of a clearly articulated and affirmatively expressed State policy, and (2) the degree to which the State supervises its representative actors. *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.,* 445 U.S. 97, 105-106 (1980) ("*Midcal*").

This analysis is unchanged, regardless of the status or label of the actor as a State agency. Instead, the analysis is necessarily focused on the relationship of the State to the conduct itself—*i.e.*, whether the conduct is informed by a State-articulated policy, and whether the State supervises the conduct—rather than on the specific actor who carries it out. In other words,

> Although *Parker* involved an action against a state official, the Court's reasoning extends to suits against private parties. The *Parker* decision was premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce. If *Parker* immunity were limited to the actions of public officials, this assumed congressional purpose would be frustrated…[a] plaintiff could frustrate any such program merely by filing suit against the regulated private parties, rather than the state officials who implement the plan. We decline to reduce *Parker's* holding to a formalism that would stand for little more than the proposition that Porter Brown sued the wrong parties.

Southern Motor Carriers Rate Conference, Inc. v. U.S., 471 U.S. 48, 56-57 (1985).

The nature of *Parker* immunity thus does not change with the actor. It remains permanently based upon the principles of Federalism and separation of powers as

articulated in *Parker*, utilizing the *Midcal* inquiry to detect the bounds of a State's sovereign action under each factual circumstance.

B. The "decisive consideration" in whether an order should be immediately appealable "is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Will v. Hallock*, 546 U.S. 345, 352-53 (2006)). And "when asking whether an order is 'effectively' unreviewable" absent interlocutory review, "it is not mere avoidance of trial, but avoidance of a trial that would imperil a substantial public interest, that counts." *Will* 546 U.S. at 353.

A denial of state-action immunity is a denial of the sovereignty of state action. In denying state-action immunity, a court necessarily determines that the "actions in question" are not "an exercise of the State's sovereign power." *N.C. Dental*, 574 U.S. at 504. Unquestionably, state sovereignty is a "value of a high order" that would be imperiled by delaying appellate review. *See Will*, 546 U.S. at 352 (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").

And balancing the interest in state sovereignty against ordinary final judgment principles is not a close call. State sovereignty is "weightier than the societal interests advanced by the ordinary operation of final judgment principles." *Digital Equipment Corp. v. Desktop Direct Inc.*, 511 U.S. 863, 878-79 (1994). This Court holds in high esteem the sovereignty and dignity the States retain under our

Constitution, *see, e.g.*, *Bond v. United States*, 564 U.S. 211, 220-22 (2011); *Alden v. Maine*, 527 U.S. 706, 713-14 1999), and a refusal to recognize sovereign action as immune from the operation of the Sherman Act is an affront to that sovereignty.

Like other immunity doctrines, state-action immunity isn't a free pass to evade antitrust liability. But States and their subdivisions are entitled to have a denial of state-action immunity reviewed by a court of appeals promptly, rather than being forced to endure months or years of burdensome and intrusive litigation as a result of an erroneous lower court ruling. Indeed, the "ultimate justification" for allowing an immediate appeal "is the importance of ensuring that the States' dignitary interests can be fully vindicated." *Puerto Rico Aqueduct & Sewer Auth. v. Metcalf & Eddy Inc.*, 506 U.S. 139, 146 (1993).

State-action immunity is not primarily concerned with protecting States and their delegates from liability or from injunctive relief; it is concerned with preserving States' "privilege" to regulate their economies without interference from federal antitrust laws. *Id.* at 146-47 & n.5. Delaying an immediate appeal from a denial of state-action immunity until after final judgment imperils that privilege.

It permits, and exacerbates, the "conflicts" between state sovereignty and the antitrust laws that state-action immunity is designed to avoid. *N.C. Dental*, 574 U.S. at 504. Notably, too, the costs of allowing immediate appeals for this category of orders are minimal. State-action immunity applies only in a narrow subset of antitrust cases involving state-directed actions. *Cf. id.* at 503-06. Providing an opportunity for immediate appeal in this limited class of cases thus prevents

fundamental harm to a State's sovereign interests while causing minimal damage to the traditional rule of finality.

Plus, the need for immediate review of orders denying state-action immunity to state entities is especially strong given the legal uncertainty that exists regarding the precise contours of state-action immunity. *Cf. Jones v. Johnson*, 26 F.3d 727, 727 (7th Cir. 1994) (per curiam) (noting that immediate appeal of immunity issues allows officials to "seek protection from legal uncertainty"). As but one example, in the wake of *N.C. Dental*, the States must predict how lower courts will make the legal determinations whether an entity is a "nonsovereign actor [ ] whose conduct does not automatically qualify as that of the sovereign State" and whether "active market participants" constitute a "controlling number" of its membership. 574 U.S. at 505-06, 510-12; *see id.* at 526 (Alito, J., dissenting) (observing that the test adopted by the majority "raises many questions," the answers to which "are not obvious"). And, as for *N.C. Dental*'s requirement that state occupational licensing boards controlled by "active market participants" be subject to "active supervision" by the State, 574 U.S. at 510, this Court acknowledged that it had "identified only a few constant requirements of active supervision," *id.* at 515.

This uncertainty and the concomitant threat of antitrust liability hinder States from effectively carrying out their regulatory policies and deters "able citizens" from participating in their regulatory efforts. *Hoover*, 466 U.S. at 580 n.34. These problems will only be exacerbated if the state entities and individuals sued as a result of the

State's actions are unable to immediately appeal an order denying them state-action immunity.

Simply put, if Sherman Act defendants are precluded from immediately appealing orders denying state-action immunity to state entities, the very Federalism principles that state-action immunity is intended to further will be directly undermined.

C. State-action immunity and state sovereign immunity derive from the same background principle of state sovereignty and should be treated the same under the collateral-order doctrine. Although the two immunities differ in many respects, those differences do not relate to the "decisive consideration" and "crucial question" of the collateral-order doctrine: whether permitting immediate appeal for these categories of orders is warranted by the potential peril to the important interest they protect. *Mohawk Indus.*, 558 U.S. at 107-08. The interest imperiled is the same.

Both immunity doctrines protect States not only from *actual* liability for sovereign action but also from the interference with that sovereign action created by the *potential* to be haled into court. *See* Phillip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 2.04[B], at 2-51 (4th ed. & 2015 Supp.) ("The *Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial.").

In *Puerto Rico Aqueduct*, the Supreme 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." *Puerto Rico*

Aqueduct, 506 U.S. at 146. Indeed, "[s]tate sovereign immunity, no less than the right to trial by jury in criminal cases, is constitutionally protected." *Coll. Sav. Bank v. Fla. Prepaid Postsecondary Educ. Expense Bd.,* 527 U.S. 666, 682 (1999). And "the value to the States of their Eleventh Amendment immunity…is for the most part lost as litigation proceeds past motion practice." *Puerto Rico Aqueduct*, 506 U.S. at 145.[2]

The Eleventh Amendment is (of course) not the original source of States' immunity from suit. *Alden*, 527 U.S. at 713. Under the Constitution, the States "retain 'a residuary and inviolable sovereignty.'" *Alden*, 527 U.S. at 715 (quoting The Federalist No. 39, at 245). "The limited and enumerated powers granted to the Legislature, Executive, and Judicial Branches of the National Government, moreover, underscore the vital role reserved to the States by the constitutional design[.]" *Id.* at 713; *see Hans v. Louisiana,* 134 U.S. 1, 13 (1890). The Eleventh Amendment therefore does not create the States' immunity; the Eleventh Amendment confirms the rights that States had at the Founding.

State-action immunity is similarly "rooted in a recognition that the States . . . maintain certain attributes of sovereignty" and accords States "the respect owed them

[2] State-action immunity is likewise similar to qualified immunity: Both seek to ensure that state and local officials exercise their discretion in the manner that best promotes the public interest, rather than the manner that minimizes their likelihood of being sued. As this Court has explained in the qualified-immunity context, "the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 819 (1982). That is equally true of state-action immunity, which serves "to avoid needless waste of public time and money" by ensuring that officials do not "avoid decisions involving antitrust laws which would expose [them] to costly litigation and conclusory allegations." *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289 (11th Cir. 1986).

as members of the federation." *Puerto Rico Aqueduct*, 506 U.S. at 146; *see N.C. Dental*, 574 U.S. at 503. State-action immunity preserves "the dignity and essential attributes" that "inher[e]" in sovereign States that retain "primary sovereignty" in some areas and share "concurrent authority" in others. *Alden*, 527 U.S. at 714. Absent an express act of Congress pursuant to its constitutional authority either to abrogate state sovereign immunity or to interfere with States' economic regulation, state sovereigns and their anticompetitive actions are not subject to judicial inquiry; they retain their immunity.

The fact that the Eleventh Amendment is an explicit constitutional provision depriving federal courts of jurisdiction over States does not alter that conclusion. The Eleventh Amendment simply "restore[d] the original constitutional design." *Id.* at 722. *Parker* does the same: restores the constitutional presumption of state sovereignty with respect to matters of state economic regulation after the expansion of federal authority threatened it.

* * *

The "decisive consideration" for the collateral-order doctrine is the *interest* that will be imperiled by deferring appeal, and the "crucial question" is whether the potential harm to that interest outweighs the costs of allowing an immediate appeal. *Mohawk Indus.*, 558 U.S. at 107-08. State-action antitrust immunity under *Parker* meets that test. The interest at issue—the sovereignty retained by the States at the founding—is a "value of a high order" and animates both state sovereign immunity and state-action immunity. Deferring appellate review of the latter until after final

judgment thwarts the rationale for state-action immunity entirely, just as it would for state sovereign immunity.

II. Allowing State Entities to Immediately Appeal Denials of *Parker* Immunity Will Obviate Cost Burdens and Other Intangible Harms.

In this case, not only does the Fifth Circuit's refusal to apply the collateral-order doctrine disregard Louisiana's sovereign interests, it functionally bars Louisiana state actors from an early and conclusive determination of whether they enjoy the very protections state-action immunity is intended to afford. Even more significant, the Fifth Circuit's decision contributes to States' growing concern of inconsistent applications of the collateral-order doctrine among lower courts, which this Court apparently recognized but did not resolve a few years ago in *Salt River Project v. Tesla Energy Operations, Inc.*, No. 17-368 (2017), *cert. dismissed*, 138 S. Ct. 1323 (2018).

A. Neither the United States government nor any State operates through a single, unified entity. Like the federal government, States carry out their sovereign duties through duly enacted laws enforced by various regulatory agencies, departments, divisions, and other entities. In turn, many state laws affect commerce and trade. Thus, all States necessarily run a risk that their regulatory bodies will be accused of enforcing state statutes, rules, or regulations in violation of federal antitrust laws.

When state regulatory bodies are accused of antitrust violations, only an immediate appeal can afford state entities the opportunity to fully-resolve their entitlement to state-action immunity before they incur substantial costs and harms

that the immunity is designed to prevent. The significance of those costs and intangible harms militate in favor of allowing an immediate appeal from the denial a state entity's state-action immunity.

Like qualified immunity, for example, state-action immunity guards against untoward disruption of governmental functions and allows policymakers to exercise their regulatory discretion un-chilled by the threat of litigation. *See Mitchell v. Forsyth*, 472 U.S. 511, 525-26 (1985). Different from a private-party dispute, this substantial public interest is sacrificed when a state entity is required to litigate an antitrust case to a final judgment before an erroneous denial of state-action immunity may be appealed. If the collateral-order doctrine does not afford a state entity the right to immediate appeal, the protection of state-action immunity evaporates, and the threat of litigation will have a chilling effect on state policymakers.

The financial costs and burdens of defending antitrust litigation are also extraordinarily high. To mitigate those costs and burdens, which ultimately are borne by state taxpayers and citizens, States and their political subdivisions have a significant interest in dismissal of antitrust claims at the earliest stage possible whenever dismissal is legally appropriate. "Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government." *Ashcroft v. Iqbal*, 556 U.S. 662, 685 (2009).

Immediate appellate review of a denial of a claim of state-action immunity is also efficient. Antitrust litigation is costly for litigants and the judicial system. Antitrust cases are complex and can easily consume judicial time and resources. Fully resolving state-action immunity on the front-end of litigation focuses on a narrow, outcome-determinative issue and can prevent the waste of judicial resources expended in a trial that, at the end, proves to be unwarranted. Courts therefore have a vested interest in early-stage dismissal of antitrust claims that cannot lead to redress.

An appeal from a final judgment cannot adequately safeguard these important state and judicial interests or adequately protect against financial burdens needlessly imposed by forcing a state entity entitled to state-action immunity to litigate antitrust cases to a final judgment. *See Commuter Transp. Sys.*, 801 F.2d at 1289 ("The purpose of the state action doctrine is to avoid needless waste of public time and money."). Allowing an immediate appeal to avoid an unnecessary trial when a State or state entity is in fact immune will protect significant public interests; obviate, or at least diminish, unnecessary financial expenditure; foster efficiency; and conserve judicial resources.

B. It is widely recognized that antitrust litigation is particularly costly. Indeed, this Court's decision in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007) is predicated in good measure on the fact that antitrust litigation is notoriously expensive. The complex and protracted discovery inherent in the early stages of antitrust litigation accounts for much of that expense. *Id.* at 558. In fact, that is why

Twombly admonished courts not "to forget that proceeding to antitrust discovery can be expensive." *Id.* at 558-59 (citing, *inter alia*, Note, *Modeling the Effect of One-Way Fee Shifting on Discovery Abuse in Private Antitrust Litigation*, 78 N.Y.U. L. REV. 1887, 1898-99 (2003) (discussing the unusually high cost of discovery in antitrust cases); Manual for Complex Litigation, Fourth, § 30, p. 519 (2004) (describing extensive scope of discovery in antitrust cases); and Memorandum from Hon. Paul V. Niemeyer, Chair, Advisory Committee on Civil Rules, to Hon. Anthony J. Scirica, Chair, Committee on Rules of Practice and Procedure (May 11, 1999), 192 F.R.D. 354, 357 (2000) (reporting that discovery accounts for as much as 90 percent of litigation costs when discovery is actively employed)).

Twombly stands for the general proposition that, when allegations in a complaint, however true, fail to state a claim for relief, the claim should be dealt with "at the point of minimum expenditure of time and money by the parties and the court." *Twombly*, 550 U.S. at 558 (quoting 5 C. Wright & A. Miller, Federal Practice and Procedure § 1216, at 233-234 (3d ed. 2004)). The point of minimum expenditure in an antitrust case, in particular, comes before the case proceeds to discovery. *Twombly*, 550 U.S. at 568 (citing *Car Carriers, Inc. v. Ford Motor Co.*, 745 F.2d 1101, 1106 (7th Cir. 1984) ("[T]he costs of modern federal antitrust litigation and the increasing caseload of the federal courts counsel against sending the parties into discovery when there is no reasonable likelihood that the plaintiffs can construct a claim from the events related in the complaint.")).

If a state entity defendant in an antitrust case is entitled to state-action immunity—whether that immunity is deemed immunity from suit or from liability—there is no reasonable likelihood that a plaintiff can raise a claim of entitlement to relief or recovery. There is thus every reason to allow the state-action immunity issue to be appealed before the parties and the court are faced with the costs of discovery and trial—*i.e.*, to deal with the issue "at the point of minimum expenditure of time and money by the parties and the court."

Antitrust litigation is legally and factually complex, inevitably requires massive discovery, cannot be conducted without a battery of expert witnesses, and is of protracted duration. *See*, *e.g.*, *Corr Wireless Commc'ns v. AT&T, Inc.*, 893 F. Supp. 2d 789, 809-10 (N.D. Miss. 2012); *Nepresso USA, Inc. v. Ethical Coffee Co. SA*, 263 F. Supp. 3d 498, 508 (D. Del. 2017) (highlighting "the financial burden of the discovery process in general, but particularly in antitrust cases"). Those concerns counsel in favor of application of the collateral-order doctrine to allow interlocutory appeals of the denial of claims of state-action immunity in antitrust cases.

Applying the collateral-order doctrine to accommodate this discrete class of rulings would be consistent with the requisite "stringent" application of the doctrine and would not pose any risk of "overpower[ing]" the interests of finality in litigation. *Will*, 546 U.S. at 350. Nor would application of the collateral-order doctrine burden the judiciary with "piecemeal, prejudgment appeals" that "undermine[] efficient judicial administration." *Mohawk Indus.*, 558 U.S. at 106. Neither concern is implicated in the context of state-action immunity.

Mohawk dealt with routine, privilege-related disclosure orders, which, like many discovery orders, arise repeatedly during a single case. By contrast, the state-action immunity question is a discrete and conclusive question of law. Allowing an immediate appeal in the very limited context of state-action immunity in antitrust litigation against state entities will not invite piecemeal litigation or cut against finality interests. Rather interlocutory appeal of a denial of state-action immunity to a state entity will advance judicial efficiency and is the only way to adequately provide States and their subdivisions meaningful relief from the costs and burdens of unwarranted litigation.

CONCLUSION

This Court should grant certiorari, and the judgment of the Fifth Circuit should be reversed.

Dated: March 1, 2021

Respectfully submitted,

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