No. 20A._____

In the Supreme Court of the United States

LOUISIANA REAL ESTATE APPRAISERS BOARD,

Applicant,
v.
UNITED STATES FEDERAL TRADE COMMISSION,

Respondent.

On Application to Stay Orders
of the United States Court of Appeals for the Fifth Circuit

APPLICATION TO STAY AND FOR EXPEDITED CONSIDERATION

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To the HONORABLE SAMUEL A. ALITO, JR., Associate Justice of the Supreme Court of the United States and Circuit Justice for the Fifth Circuit:

This case squarely presents the question this Court granted certiorari to review—but was unable to decide, because the parties settled—in *Salt River Project Agriculture Improvement & Power District v. Tesla Energy Operations Inc.*, 138 S. Ct. 1323 (Mar. 22, 2018) (dismissed pursuant to S. Ct. Rule 46). The Court is thus likely to grant certiorari. Most important for present purposes, however, is that the Court is unlikely to be able to resolve the merits absent a temporary stay of further proceedings. All the governing factors unambiguously favor granting a stay here: (1) this Court is likely to grant review (as *Salt River* demonstrates); (2) there is a reasonable prospect that a majority of this Court will reverse; and (3) the failure to grant a stay will cause irreparable harm.

The Question Presented relates to the right of a government entity (here, the Louisiana Real Estate Appraisers Board, or "LREAB") to immediately appeal a decision denying it state-action antitrust immunity under the collateral order doctrine. Respondent (the Federal Trade Commission) entered such a decision. The district court then recognized that the FTC's decision was subject to immediate review as a collateral order, and stayed the administrative proceedings. Now that the Fifth Circuit has reversed in the decision below, the FTC's administrative proceedings are poised to recommence. If this Court does not grant a stay, petitioner will thus inevitably lose the right to be free from the burden of such proceedings—which is precisely what LREAB's asserted right to an immediate appeal protects.

Further, those proceedings may conclude entirely before this Court disposes of the merits of the case (likely in early 2022). If so, there would be an appealable final judgment of the Commission, effectively mooting the question whether petitioner had a right to appeal earlier.

For similar reasons, denying a stay would harm the public interest. The Question Presented arises from every denial of state-action antitrust immunity—and the factual context of this case applies to thousands of state boards across the United States whose membership is comprised of professionals who participate in the regulated industries. Thus, this case is an ideal vehicle to bring needed clarity to the many cases in which this issue arises. If the Court declines to grant a stay here, and presumably in each of the cases that follow in the same posture, it will create a significant obstacle to its own ability to ever resolve the Question Presented.

The Court should accordingly stay the mandate of the Fifth Circuit (which otherwise will issue on December 9), and/or stay further proceedings before the FTC, pending the disposition of a petition for a writ of certiorari (and, if certiorari is granted, of the merits as well). To ensure that disposition occurs as expeditiously as practicable, LREAB commits to filing its petition within 60 days of the Fifth Circuit's denial of rehearing, rather than the 150 days this Court's rules permit.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at *La. Real Estate Appraisers Bd. v. FTC*, 976 F.3d 597 (5th Cir. 2020), and is attached as Appendix A. The district court order, available at *La. Real Estate Appraisers Bd. v. FTC*, No. 19-CV-00214-BAJ-

RLB, 2019 WL 3412162 (M.D. La. Jul. 29, 2019), is attached as Appendix B. The Fifth Circuit's denial of LREAB's Motion to Stay is attached as Appendix C.

JURISDICTION

The Fifth Circuit issued its opinion on October 2, 2020, terminating a stay issued by the district court and directing the district court to dismiss LREAB's complaint. LREAB timely filed with the Fifth Circuit a petition for panel rehearing and a petition for consideration en banc. Both petitions were denied on December 1, 2020. On December 3, LREAB filed a motion asking the Fifth Circuit to stay the issuance of its mandate, or alternatively to stay the FTC administrative proceedings, pending certiorari review in this Court. That request was denied December 4.

This Court has jurisdiction to stay or to recall the Fifth Circuit's mandate pending this Court's review on a petition for a writ of certiorari. 28 U.S.C. §2101(f).

STATEMENT OF THE CASE

I. Factual Background

1. LREAB is a state governmental regulatory agency in the Office of the Governor, tasked by the Legislature with enforcing state laws protecting Louisiana's residential mortgage market and ensuring state compliance with federal law governing real estate appraisals. Appendix ("App.") A at 2; La. R.S. 37:3394, 37:3415. Members are appointed by the Governor, confirmed by the Senate, and removable by the Governor for cause. App. A at 2; La. R.S. 37:3394. State law requires that eight of LREAB's ten members must hold a license as a residential or general appraiser, but at all relevant times only a minority of LREAB members performed residential appraisals. La. R.S. 37:3394(B); *see* C.A. ROA.16.

2. In 2010, Congress imposed mandates upon state governments designed to eliminate a root cause of the 2007-2008 housing market collapse and the ensuing financial crisis. Among other things, Congress sought to prohibit lenders from exerting improper pressure on residential real estate appraisers. C.A. ROA.13. Accordingly, the prudential "appraiser independence" provisions of the Dodd-Frank Act,[1] and federal financial agency regulations promulgated thereunder,[2] mandate that: (1) that appraisal management companies ("AMCs," who act as agents of mortgage lenders) must compensate fee appraisers at a rate that is "customary and reasonable" for mortgage appraisals of residential real estate properties within the market area; and (2) state agencies that license and register appraisers and AMCs must implement and enforce this requirement.[3] C.A. ROA.12-13. In 2012, the Louisiana legislature incorporated into its laws these federally-imposed requirements, and empowered LREAB to implement and enforce them. C.A. ROA.13.[4]

LREAB promulgated rules in compliance with Louisiana's Administrative Procedure Act ("LAPA"), and after supervisory review by House and Senate committees, LREAB's rules took effect. La. Admin. Code tit. 46, § 31101 ("Rule

[1] Dodd-Frank Wall Street Reform and Consumer Protection Act ("Dodd-Frank"), Pub. L. 111–203, title XIV, subtitle F, 124 Stat. 1376, 2185 (2010).

[2] 12 C.F.R. § 226.42 ("Valuation Independence").

[3] Dodd-Frank Act § 1472 (adding Truth in Lending Act § 129E, 15 U.S.C. § 1639e(i); § 1473 (adding Financial Institutions Reform, Recovery, and Enforcement Act §§ 1118, 1124, 12 U.S.C. §§ 3347(a), 3353(a). *See* 12 C.F.R. § 34.213(a).

[4] Appraisal Management Company Licensing and Regulation Act ("AMC Act") La. R.S. 37:3415.01-21; La. R.S. 37:3415.15 (2012). Under the AMC Act, in accordance with federal law and regulations, LREAB does not itself set prices, but has authority to review complaints whether the methods used by AMCs to set appraisal prices meet the federal regulatory definitions of "customary and reasonable."

31101"); C.A. ROA.13-14, 114. As required by federal and state law, LREAB investigated colorable complaints of Rule 31101 violations, and enforced the Rule against AMCs that admitted to violating or were found non-compliant with the Rule's presumptive methods of compliance. C.A. ROA.15.

3. In 2017, the FTC issued an administrative complaint alleging that LREAB's regulation of the customary and reasonable fee mandate unreasonably restrained price competition in violation of the Sherman Act and FTC Act. C.A. ROA.8-9. LREAB's Answer denied the allegations and asserted as an affirmative defense that state-action immunity protected LREAB from federal antitrust enforcement. C.A. ROA.16. FTC Complaint Counsel did not dispute that LREAB was a governmental agency, and did not address whether LREAB's actions were authorized by clearly-articulated state law for purposes of *Midcal*'s first requirement.[5] But the FTC and LREAB did dispute (1) whether LREAB was "controlled by active market participants"; and (2) whether state supervision of LREAB, if necessary, was sufficiently "active." C.A. ROA.16.

4. Reacting to the FTC's allegations regarding inadequate state supervision, Louisiana's Governor issued Executive Order 17-16, entitled "*Supervision of the Louisiana Real Estate Appraisers Board Regulation of Appraisal Management Companies*." C.A. ROA.16, 92-93. This order supplemented legislatively-prescribed oversight with executive branch supervision over LREAB's

[5] *Cal. Retail Liquor Dealers Assn. v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (conditioning state-action antitrust immunity on a private entity—there a wine industry price-setting association—showing that (a) state policies clearly articulate the intent to regulate competition, and (2) the state actively supervises the regulatory activity).

promulgation and enforcement of Rule 31101. C.A. ROA.16-17, 92-93. After initial approval from the State Commissioner of Administration, and receipt of public written comments and a public hearing in accordance with the LAPA, LREAB re-promulgated Rule 31101. And after obtaining legislative approval via the LAPA-prescribed supervision from the House and Senate subcommittees, *and* receiving a finding from the Division of Administration (under the Governor's Executive Order) that the proposed rule would promote state policy, LREAB's re-promulgated Rule 31101 took effect. C.A. ROA.17-18, 115.

5. LREAB then moved to dismiss the FTC's administrative complaint based on state-action immunity and mootness. C.A. ROA.19. The same day, FTC Complaint Counsel moved for partial summary decision against LREAB's pre-complaint state-action immunity defenses. C.A. ROA.19. On April 10, 2018, the two FTC Commissioners who had issued the complaint denied LREAB's motion, granted Complaint Counsel's motion, and dismissed both of LREAB's state-action immunity defenses. C.A. ROA.19, 70-90. In so doing, the Commission found that LREAB was "controlled by active market participants" for purposes of *North Carolina Dental*, and that none of the supervision by the House and Senate committees or by the executive agencies was sufficiently "active" to demonstrate that the State had taken on political accountability for LREAB. *Id.*

6. In response to the FTC Order, the Governor issued a second Executive Order further reinforcing state supervision over LREAB; and the Louisiana Senate unanimously passed a concurrent resolution reaffirming that both promulgations of

Rule 31101 were supervised by the legislature and were "the sovereign acts of the State of Louisiana and its legislature." C.A. ROA.19-20, 109-110, 112-116.

II. Procedural History

1. LREAB petitioned for review of the FTC Order in the Fifth Circuit, asserting collateral order jurisdiction under the FTC Act and Fifth Circuit precedent allowing immediate appeal from denials of state-action immunity. C.A. ROA.20; *see Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). That court granted LREAB a stay of the FTC proceedings pending review. C.A. ROA.20, 99. However, the merits panel dismissed the petition for lack of appellate-court jurisdiction, ruling that the FTC Act's authorization for direct appeals from "cease-and-desist" orders did not permit collateral order review of other final Commission orders. *La. Real Estate Appraisers Bd. v. FTC*, 917 F.3d 389 (5th Cir. 2019) ("*LREAB I*"); C.A. ROA.118, 121-122. But that opinion suggested as an alternative that the federal Administrative Procedure Act might permit collateral order review of the FTC's Order in the district court as final agency action. *LREAB I*, 917 F.3d at 394 n.3; C.A. ROA.126; 5 U.S.C. §704.

2. LREAB thus initiated a federal APA suit in district court, and moved to stay further FTC proceedings pending the district court's review of its state-action immunity defenses. Based on the facts summarized above, the district court granted the stay, just as the Fifth Circuit had before. App. B. It found LREAB had made the requisite strong showing of likely success on the merits of its state-action immunity defenses, and further found that "the abrogation of immunity itself, if improvidently done, may cause irreparable harm by forcing the State to engage in activities from

which it might otherwise be protected[.]" *Id.* at 9. The FTC then immediately appealed the stay order to the Fifth Circuit.

3. On October 2, 2020, a new panel of the Fifth Circuit vacated the district court's stay with instructions to dismiss LREAB's complaint for lack of jurisdiction. In accordance with other circuits, the panel (correctly) proceeded on the assumption that this issue was governed by the collateral-order doctrine—which is the same doctrine that governs whether district court denials of state-action immunity defenses can be immediately appealed to a circuit court.[6] The Fifth Circuit concluded, however, that the FTC's decision was not a collateral order, and so was not subject to immediate review as final agency action under the APA.

In so finding, the Fifth Circuit applied a unique rule that no other court of appeals has adopted: that orders denying state-action antitrust immunity to *public* entities are immediately appealable, whereas orders denying that immunity to *private* entities are not. *See Martin* 86 F.3d at 1395-97; *Acoustic Systems, Inc. v. Wenger*, 207 F.3d 287 (5th Cir. 2000). In contrast, three circuits hold that orders denying state action antitrust immunity (whether to public or private entities) are never appealable collateral orders, *see infra* p. 11, and one circuit holds that such orders are always appealable collateral orders (whether the appealing entity is governmental or not,) *see infra* p. 11.

[6] App. A at 5 & n.3 (holding APA's "final agency action" requirement sufficiently similar to the "final judgment" language of §1291), citing *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 288 (5th Cir. 1999); *LREAB I*, 917 F.3d at 392; *see also FTC v. Standard Oil*, 449 U.S. 232 (1980) (applying collateral order doctrine to APA).

The Fifth Circuit was thus compelled to decide whether LREAB should be considered a public or private entity for purposes of its rule—a question that would not be of particular concern for any other court.

In this case, the Fifth Circuit did not question whether the LREAB *is* a governmental entity (and it surely is). But the court nonetheless refused to *treat* it as a public entity based on a strained reading of this Court's recent decision in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015). The FTC had denied LREAB state-action immunity in part by finding that, for purposes of *North Carolina Dental*, LREAB was "controlled by active market participants" and so had to meet *Midcal*'s active-supervision requirement to establish state-action immunity on the merits. *See supra* p. 6. And the Fifth Circuit apparently assumed that this FTC finding of market-participant control was correct (although that merits question was in fact disputed in the very LREAB complaint at issue). App. A at 9-10. The panel then concluded that this assumption was a sufficient reason to treat LREAB as a private actor—rather than a public entity—when it came to jurisdictional rules. App. A at 9-10. In so doing, the Fifth Circuit also reached the conclusion that the FTC's order did not satisfy the ordinary elements of the collateral order test, which asks (1) whether the question presented is conceptually distinct from the merits; (2) whether it has been conclusively resolved; and (3) whether it will be effectively unreviewable on appeal from a final judgment. *See, e.g.*, *Cohen v. Beneficial Indus. Loan Corp.,* 337 U.S. 541, 546-47 (1949); App. A at 10-11.

4. LREAB filed a petition with the panel seeking rehearing, and a petition to the court seeking en banc consideration. On December 1, the court denied both petitions.

5. Two days later, LREAB asked the Fifth Circuit to stay the issuance of the mandate, so that LREAB could file a petition for a writ of certiorari in this Court. LREAB committed to filing that petition within 60 days. LREAB's motion noted that the FTC opposed the requested stay. On December 4, the Fifth Circuit denied LREAB's stay motion.

REASONS FOR GRANTING THE STAY

"To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay." *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010). These standards are readily satisfied in this case.

I. THERE IS A REASONABLE PROBABILITY THAT THIS COURT WILL GRANT CERTIORARI.

It is unusually clear in this case that there is "a reasonable probability" that this Court will grant certiorari to review the Fifth Circuit's decision. That is because this Court has already granted the writ once recently to consider the question "[w]hether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine"—the precise question presented

here.[7] That previous grant was frustrated when the parties settled amidst the pressure of ongoing trial-level proceedings. This case thus presents an appropriate vehicle to decide that still-unresolved question, and granting a stay will ensure that this vehicle is properly preserved for this Court's eventual decision.

1. This Court granted review in *Salt River* because there is a long-standing, well-recognized disagreement among the circuits as to whether and when orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine. The petition in *Salt River* described this split as 3-to-2 on the assumption that the Fifth Circuit would regard an entity like the Salt River Project as "governmental." But as the brief in opposition in *Salt River* explained and this case now makes clear, the split is actually a three-way disagreement in which the Fifth Circuit applies a unique rule, and this three-way split has only become more pronounced since this Court was unable to resolve the disagreement in *Salt River*.

At present, three circuits hold that state-action immunity provides no immunity *from suit*—only immunity from liability—and so hold that denials of state-action immunity never meet the factors governing collateral order review. *SolarCity Corp. v. Salt River Project Ag. Improvement and Power District*, 859 F.3d 720 (9th Cir. 2017), *cert. dismissed sub nom. Salt River, supra* p. 1; *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 contrast, the Eleventh Circuit holds that state-action antitrust immunity is an immunity from suit, and so a denial is immediately

[7] *See Salt River,* Question Presented, at https://www.supremecourt.gov/qp/17-00368qp.pdf.

appealable whether the entity involved is governmental or not. Notably, the Eleventh Circuit had not so held since 1986 when this Court granted certiorari in *Salt River*. But that Court has since rearticulated its position in a case decided just this year involving private persons. *See SmileDirectClub v. Battle,* 969 F. 3d 1134, 1139 (11th Cir. 2020) (permitting immediate appeal by private entities, including individual private-sector members of a state dentistry board). Accordingly, the case for certiorari has only strengthened since this Court's last attempt to review the Question Presented.

Moreover, as this case shows, the Fifth Circuit occupies a middle ground that has become increasingly confused following this Court's decision in *North Carolina Dental*, and that now needs review. Nominally, the Fifth Circuit permits an immediate appeal under the collateral order doctrine if the appealing party is a governmental entity, while denying private parties the same right to an immediate appeal. *Supra* pp. 7-8. But now, the Fifth Circuit has held that the operative question is not whether the entity is governmental in any ordinary sense, but rather whether the entity meets the amorphous standard established in *North Carolina Dental* for when "active market participants" can be said to "constitute 'a controlling number of [the] decisionmakers'" on a state board. *See N.C. Dental*, 574 U.S. at 526 (Alito, J., dissenting) (flagging the "many questions" that *North Carolina Dental*'s new test would raise). At a minimum, this demonstrates a three-way circuit split that is both deeper and fresher than the one this Court granted certiorari to resolve in *Salt River*.

2. Relatedly, there is no doubt that at least the Eleventh Circuit would have reached a different result in this case. If anything, this case is an *easier* candidate for immediate appeal, because it concerns the state agency itself, rather than the board's individual members. Accordingly, it follows *a fortiori* that if the Eleventh Circuit allowed the immediate appeal of a decision denying state-action immunity to a board's individual members as a collateral order, it would surely have reached a different outcome from the Fifth Circuit and allowed an immediate appeal in this case, too.[8]

Moreover, the Fifth and Eleventh circuits' reasoning regarding the collateral-order doctrine's factors are likewise in conflict. For example, the Eleventh Circuit clearly (and correctly) recognizes that claims of state-action immunity implicate issues that are completely separate from the merits of the underlying antitrust suit. *Commuter Transp. Sys., Inc. v. Hillsborough Cty.,* 801 F.2d 1286, 1290 (11th Cir. 1986). In contrast, the Fifth Circuit held here that state-action antitrust immunity cannot be disentangled from the merits, solely on the basis that both questions involve antitrust law. App. A at 11. That reasoning would not only deny immediate

[8] The Fifth Circuit suggested that even a state governmental entity would not be permitted to pursue an immediate appeal in an action brought by the federal government because, by analogy, that entity would not have sovereign immunity in such a suit. *See* App. A at 10. Such a principle would equally conflict with the Eleventh Circuit's rule that the denial of state-action immunity is always immediately appealable *without regard* to whether the defendant is a public or private entity. Indeed, the Eleventh Circuit must necessarily view sovereign immunity as irrelevant as a matter of law to the right to appeal, because private parties never have sovereign immunity and are nonetheless permitted to appeal. And the other circuits must likewise regard principles of sovereign immunity as irrelevant because they never permit any party to immediately appeal on this issue, whether they are the kind of party otherwise entitled to sovereign immunity or not.

appeal to parties such as LREAB; it would potentially preclude immediate appeal by any state or municipality.

3. The proceedings on the petition for certiorari in *Salt River* also demonstrate that this issue is clearly important enough to merit review. State action immunity directly implicates key principles of federalism and state sovereignty, as demonstrated by the *amici* who submitted briefs in support of the opposing sides in the previous case. Twenty-four states, and state and municipal government associations led by the National Governors Association, advocated for a state entity's right to an immediate appeal. In contrast, the United States opposed the right to an appeal, as the FTC does here. Any case that so directly implicates opposing interests from the states and the federal government is a good candidate for this Court's review.

4. Finally, this case is a good vehicle through which to resolve the existing disagreement. Although the case arises from an APA suit regarding an FTC order rather than from an appeal of a district court decision, the Fifth Circuit (like other courts) correctly recognized that the governing collateral order doctrine is identical. *Supra* p. 8, note 6. A party is entitled to directly and immediately appeal a district court order denying state-action immunity only if it is a "collateral order," and a party is entitled to seek immediate review of an administrative order denying that immunity only if it is a "collateral order." So there is no doubt that the question presented here—as in *Salt River*—is "[w]hether orders denying state-action immunity to public entities are immediately appealable *under the collateral-order*

doctrine." *Supra* p. 10, note 8. And unlike entities being sued by private parties that are pursuing damages, LREAB will not face the same ongoing settlement pressures—at least so long as this Court enters a stay and spares LREAB the immediate burden of a full-blown trial.

In short, the disagreement among the courts of appeals regarding the appealability of orders denying state-action immunity remains live, unresolved, and important, and is well presented for resolution here. There is thus a more than reasonable probability that this Court will grant certiorari to resolve this three-way dispute among the circuit courts.

II. THERE IS A FAIR PROSPECT THAT A MAJORITY OF THE COURT WILL VOTE TO REVERSE THE JUDGMENT BELOW.

There also is a fair prospect that this Court will reverse the Fifth Circuit's decision and hold that orders denying state-action immunity from suit are immediately appealable, particularly for government entities like LREAB. Indeed, that conclusion is both favored by the leading antitrust treatise and clearly entailed by the factors governing the collateral order doctrine.

1. As noted above, prior to this case the Fifth and Eleventh Circuits had both long held that denials of state-action immunity from suit may be immediately appealed by governmental entities, while other circuits did not.[9] In this disagreement, the leading antitrust authorities sided with the courts that allowed the appeals—recognizing that, in order to protect government operations from the threat of litigation, state-action immunity must include an immunity from antitrust

[9] *See Martin*, 86 F.3d at 1395; *Commuter Transp.*, 801 F.2d at 1289.

suit and thus a right to immediately appeal a final order denying that immunity to public entities and servants. 1A P. Areeda and H. Hovenkamp, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ("Hovenkamp"), ¶222b & n.36 (2020) (citing "the importance that the *Parker* immunity issue not proceed to trial, especially when government officials are defendants," so that "[state] entities and officials cannot be intimidated from carrying out their regulatory obligations by threats of costly litigation").

This analysis is plainly correct. The state-action immunity doctrine already falls heavy on many state boards and public servants, who are forced to guess at whether their boards will be deemed controlled by market participants under *North Carolina Dental*'s new test, and whether they will then be held to satisfy *Midcal*'s less-than-predictable active-supervision requirement—even where, as here, they assiduously follow their state's supervisory review procedures. *Supra* pp. 4-6. So the least the law should provide to public servants and state regulatory boards is an assurance that they will not be dragged through the expense of trial in cases where a federal court will eventually determine that they were immune all along. At the same time, immediate appealability limits the possibility that activists or strategic business interests will try to gum up the work of state government with the threat of costly federal antitrust suits for their own private purposes.

These policy concerns are clearly implicated in the case of state agencies like LREAB, to which the state legislature has delegated responsibility to regulate the State's own domestic commerce. Indeed, the FTC's allegations in this case have

prevented LREAB "from faithfully executing mandates under the Dodd-Frank Act and Louisiana law." C.A. ROA.92. And any trial on the merits will further disrupt state official functions by requiring testimony from state executive branch employees and legislators, in addition to state employees of LREAB.[10] For these reasons, the district court found that, without collateral-order review and a stay of the FTC proceedings, the State would be irreparably harmed "by distracting state officials and curtailing Louisiana's ability to make and enforce policies that it deems beneficial." App. B at 9. Because the Fifth Circuit's holding contravenes these governing policy concerns, it is likely to be reversed.

2. There is also no merit in the Fifth Circuit's conflation of the question whether a state board should have to satisfy *Midcal*'s active-supervision requirement under *North Carolina Dental*'s rule with the wholly distinct question of whether an entity is public or private for purposes of granting it an immediate appeal. Only the Fifth Circuit even *asks* the latter question, which indicates that it may not be necessary to consider at all, and that it certainly was not decided by anything in *North Carolina Dental*. That case did not purport to hold that state regulatory boards that meet its standard of "control" by "active market participants" *are* private entities; indeed, it expressly stated that, under its approach, the active supervision test could apply to either "*public* or private" entities. 574 U.S. at 496 (emphasis added). *North*

[10] Establishing LREAB's defenses at trial could require testimony from State employees including LREAB's Executive Director and Chief Investigator, and witnesses from the Office of the Governor, the Division of Administration, the Division of Administrative Law, the House and Senate, as well as testimony from a federal magistrate judge.

Carolina Dental thus decided nothing of interest about whether and to what extent a decision on the merits of state-action immunity is subject to immediate appeal by a public entity like LREAB.

3. The Fifth Circuit's decision is also likely to be reversed under a straightforward analysis of the factors that govern the collateral order doctrine. This Court's cases treat an order as collateral if it: (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is "effectively unreviewable" on appeal after trial. *See*, *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978); *Cohen* 337 U.S. at 546-47. The Fifth Circuit found (as the Commission conceded) that its order dismissing LREAB's state-action immunity defenses met the first *Cohen* factor. But it plainly erred in applying the other two.

First, denials of state-action immunity are "effectively unreviewable" on appeal because, by definition, they irremediably harm fundamental state interests. "[T]he decisive consideration 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) (citation omitted). Prior to this case and its erroneous expansion of *North Carolina Dental*'s meaning, the Fifth Circuit itself recognized that a denial of immediate appeal imperils the substantial public interests protected by state-action immunity from suit, including "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*, 86 F.3d at 1395-96; *see also Auraia Student Housing at the Regency, LLC v. Campus Village Apartments LLC*, 703 F.3d 1147, 1151 (10th Cir. 2013) (noting that collateral order appeals of state-action immunity by government entities would "protect[] important dignitary and public interests which would be lost if a suit proceeded to trial"). In any event, immunity is a classic example of a right that cannot be meaningfully restored by a successful appeal from a final judgment.

Second, a denial of state-action immunity is unambiguously distinct from the merits. Whether Louisiana's state-action immunity extends to LREAB turns on *the State's* actions: *i.e.*, whether *the State* clearly articulated a policy of to displace competition with regulation and (if necessary) whether *the State* actively supervises that regulation by LREAB. Conversely, the merits in the FTC's proceedings depend on *LREAB's* regulatory actions, and whether their substance is anticompetitive and violates the antitrust laws. These issues are not just conceptually distinct, they are entirely different questions about entirely different actors.

A denial of state-action immunity to a governmental agency thus belongs to the "narrow class of decisions that do not terminate the litigation," but must "nonetheless be treated as 'final'." *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). Any other approach leaves too much good faith state regulation to the unpredictable outcome of an unreviewable decision on state-action immunity by a single district court or the FTC itself.

4. Finally, it is worth noting how dramatically the non-appealability rule exacerbates the "many questions" posed by *North Carolina Dental*'s new test for when state boards require active supervision. *See N.C. Dental*, 574 U.S. at 516-527 (Alito, J., dissenting). The dissenters in that case noted the vast number of new wrinkles created by the standard of "control by active market participants" that would have to be "worked out by the lower courts and the Federal Trade Commission" going forward, including: "Who is an 'active market participant'? … What is the scope of the market in which a member may not participate while serving on the board? …. And how much participation makes a person 'active' in the market?" *Id.* at 526. If the initial decisions of district courts and the FTC on those questions cannot be immediately appealed, however, they are unlikely to ever be "worked out," because there will be enormous pressure on state boards and public servants to settle under the threat of expensive litigation and potential treble-damage liability before those questions can be definitively answered. Indeed, whatever the merits may be of *North Carolina Dental*'s rule, denying state agencies the right to appeal a denial on the immunity issue until after a full-blown trial will vastly multiply its imposition on the States and their ability to freely decide how best to regulate their own economies. *See id.* (explaining the difficult predictive judgments states will already face under *North Carolina Dental* about when and how they can use expert practitioners to staff regulatory boards and thereby vindicate "the State's interest in sensibly regulating a technical profession in which lay people have little expertise"). And this too

represents a reason why the Fifth Circuit's decision on the collateral-order question is likely to be reversed.

III. LREAB WILL LIKELY INCUR IRREPARABLE HARM IN THE ABSENCE OF A STAY.

The district court granted the stay (appealed from here by the FTC) upon a finding that the loss of state-action immunity from trial pending a decision on the merits would cause LREAB irreparable harm. As that court put it: "the abrogation of immunity itself, if improvidently done, may cause irreparable harm by forcing the State to engage in activities from which it might otherwise be protected[.]" App. B at 9. The opinion in this case did not question this determination, and it remains precisely right. In fact, the Fifth Circuit itself stayed these same FTC proceedings when it first considered the issue in *LREAB I*. *See supra* p. 7. The exact same considerations that animated the district court's and the Fifth Circuit's initial stay orders apply equally to the present motion.

First, allowing trial to proceed before the FTC continues to interfere with the State of Louisiana's ability to enforce state laws regulating commerce and protecting homeowners. Any time a state is prevented "from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 133 S. Ct. 1, 3 (2012) (Roberts, C.J., in chambers) (citing *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). *See Planned Parenthood of Greater Tex. Surgical Health Servs. v. Abbott*, 734 F.3d 406, 419 (5th Cir. 2013) ("the State necessarily suffers the irreparable harm of denying the public interest in the enforcement of its laws.") (citation omitted).

The Louisiana legislature has found that LREAB's regulation of the appraisal industry, including the requirement that AMCs pay appraisers customary and reasonable fees for their appraisals, promotes State policy by securing the integrity of the appraisal industry and, thereby, the residential mortgage and housing markets. C.A. ROA.19-20, 112-116. This "legislative choice is not subject to courtroom fact-finding." *FCC v. Beach Commc'ns*, 508 U.S. 307, 315 (1993) (citation omitted). This concern was the impetus for Governor Edwards's Executive Order 17-16. As he noted, "the possibility of federal antitrust law challenges to state board actions affecting prices … *may prevent the LREAB from faithfully executing mandates under the Dodd-Frank Act and Louisiana law*." C.A. ROA.92 (emphasis added). Thus, both the likelihood of irreparable harm and the public interest in enforcing state laws favor the requested stay.

Second, without a stay, LREAB will inevitably be deprived of its right to state-action immunity from suit—and will have lost any reason to bring before the Court the issues affecting the intersection of state-action immunity and the collateral-order doctrine presented here. If a stay is not granted, the FTC will press ahead in its prosecution of its administrative case against LREAB, and those proceedings will be well underway before this Court even considers LREAB's petition—and complete before the Court could decide the merits of the Question Presented. Preventing this kind of irreparable change in the status quo while a court considers a potentially meritorious objection to a lower court's determination is the archetypical function of

a stay order. *See Ohio Citizens for Responsible Energy, Inc. v. NRC,* 479 U.S. 1312 (1986) (Scalia, J., in chambers).

Third, and finally, a stay is necessary to protect not only LREAB's interests, but the interests of the public and the judiciary as well. As noted, this case presents a good vehicle for addressing a disagreement among the courts of appeals that this Court has already once granted certiorari to resolve. And perhaps the only way to frustrate this Court's ability to resolve that question here is to permit the FTC to press LREAB to trial, while LREAB considers whether to pursue in this Court what at best would be a pyrrhic victory. Accordingly, this Court is unlikely to have any opportunity to review this case and resolve the *Salt River* question in the absence of the requested stay.

Meanwhile, this question is important to thousands of similarly situated state boards across the United States, not just to LREAB. And if a stay is denied to this vehicle in this posture, there is no obvious reason why future stay requests will be decided differently, thereby frustrating future cases in their efforts to reach this Court in the exact same fashion. Indeed, subsequent boards in the same position as LREAB may well conclude that there is no use in running the gauntlet to this Court, since they are likely to be placed in the same procedural Catch-22 when it comes time for them to bring their petitions for certiorari. Denying a stay here will thus harm far more parties than just LREAB, and may well frustrate this Court's ability to resolve the Question Presented in any case for the foreseeable future. That outcome should be avoided, and the stay should be granted.

CONCLUSION

Louisiana Real Estate Appraisers Board respectfully requests that the Court issue the requested stay pending a decision on LREAB's petition for certiorari.

Respectfully submitted,

Dated: December 8, 2020

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APPENDIX A

United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
October 2, 2020
Lyle W. Cayce
Clerk

No. 19-30796

LOUISIANA REAL ESTATE APPRAISERS BOARD,

Plaintiff—Appellee,

versus

UNITED STATES FEDERAL TRADE COMMISSION,

Defendant—Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
3:19-CV-214

Before JONES, ELROD, and HIGGINSON, *Circuit Judges*.

EDITH H. JONES, *Circuit Judge*:

This is an appeal of a district court order staying administrative proceedings that were initiated by appellant the Federal Trade Commission[1] against appellee the Louisiana Real Estate Appraisers Board (the "Board") pursuant to the Federal Trade Commission Act. Because the district court

[1] We refer to the FTC acting in its role as complaint counsel as the "FTC" and the FTC acting in its adjudicatory capacity as the "Commission."

lacked jurisdiction, we vacate its stay order and remand with instructions to dismiss.

I. BACKGROUND

The Board is a state agency tasked with licensing and regulating commercial and residential real estate appraisers and management companies in Louisiana. La. Stat. Ann. §§ 37:3395; 37:3415.21. Each of the Board's ten members is appointed by the Governor and confirmed by the state senate, and members are removable by the Governor for cause. *Id.* § 37:3394. Of the ten members, eight must be "licensed as certified real estate appraisers." *Id.* § 37:3394(B)(1)(c), (b).

In 2010, Congress enacted the Dodd-Frank Wall Street Reform and Consumer Protection Act, which requires lenders to compensate fee appraisers "at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised." 15 U.S.C. § 1639e(i)(1). In response, the Louisiana legislature amended its own law, the Appraisal Management Company Licensing and Regulation Act (the "AMC Act"), to require that appraisal rates be consistent with Section 1639e and its implementing regulations. *See* La. Stat. Ann. § 37:3415:15(A). The legislature also gave the Board the authority to "adopt any rules and regulations in accordance with the [Louisiana] Administrative Procedure Act necessary for the enforcement of [the AMC Act]." *Id.* § 37:3415.21.

Accordingly, the Board adopted Rule 31101, requiring that licensees "compensate fee appraisers at a rate that is customary and reasonable for appraisal services performed in the market area of the property being appraised and as prescribed by La. Stat. Ann. § 34:3415.15(A)." La. Admin. Code tit. 46 § 31101. Unlike the federal regulations, which instruct that appraisal fees are "presumptively" customary and reasonable if they meet certain market conditions, Rule 31101 prescribed its own methods by which

a licensed appraisal management company can establish that a rate is customary and reasonable. *Compare id.*, *with* 12 C.F.R. § 226.42(f)(2), (3).

In 2017, the FTC filed an administrative complaint against the Board, asserting the Board had engaged in "concerted action that unreasonably restrains trade" in violation of the FTC Act's prohibition on unfair methods of competition. The complaint alleged Rule 31101 "unlawfully restrains competition on its face by prohibiting [appraisal management companies] from arriving at an appraisal fee through the operation of the free market." The FTC also alleged that the Board's enforcement of Rule 31101 unlawfully restrained price competition. In response, the Board denied the FTC's allegations and argued that it was entitled to immunity from antitrust liability under the state action doctrine.

Following the FTC's initiation of proceedings against the Board, the Governor of Louisiana issued an executive order purporting to enhance state oversight of the Board. The Board also revised Rule 31101 in accordance with the Governor's executive order. Based on those changes, the Board moved to dismiss the FTC's complaint in the administrative proceedings, arguing that the executive order and revision of Rule 31101 mooted the FTC's claims. The same day, the FTC cross-moved for summary judgment on the Board's state action immunity defense. On April 10, 2018, the Commission denied the Board's motion and granted the FTC's, rejecting the Board's assertion of state action immunity.

The Commission has not issued a final cease and desist order, but the Board has twice challenged the April 10, 2018 order in federal court to claim immunity. First, in late April, the Board petitioned this court directly for review of the Commission's order. In a published opinion, this court dismissed the petition for lack of jurisdiction. *La. Real Estate Appraisers Bd. v. F.T.C.*, 917 F.3d 389, 393 (5th Cir. 2019) (*LREAB I*). Second, and relevant here, the day after this court denied the Board's petition for *en banc* rehearing, the Board sued the FTC in a federal district court, alleging the

Commission's April 10, 2018 order violated the Administrative Procedure Act. The Board also moved to stay the ongoing Commission proceedings. The district court granted the Board's motion and stayed the Commission proceedings pending the resolution of the Board's APA claim. On appeal, the FTC principally contends that the district court lacked jurisdiction.

II. DISCUSSION

We review questions of jurisdiction *de novo*, with the "burden of establishing federal jurisdiction rest[ing] on the party seeking the federal forum." *Gonzalez v. Limon*, 926 F.3d 186, 188 (5th Cir. 2019).

The FTC contends the district court lacked jurisdiction over the Board's lawsuit because the FTC Act vests exclusive jurisdiction to review challenges to Commission proceedings in the courts of appeals. 15 U.S.C. § 45(d) ("Upon the filing of the record with it the jurisdiction of the court of appeals of the Unites States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive."). The Board counters that the district court had jurisdiction pursuant to the APA's default review provision, 5 U.S.C. § 704, regardless of the FTC Act's judicial review scheme. We agree with the FTC that the district court lacked jurisdiction but for a different reason: Even if the FTC Act does not preclude Section 704 review—an issue we need not address—the Board fails to meet Section 704's jurisdictional prerequisites.[2]

Section 704 of the APA permits non-statutory judicial review of certain "final agency action." 5 U.S.C. § 704 ("Agency action made reviewable by statute and final agency action for which there is no other

[2] The Board also argues we lack jurisdiction over the merits of the FTC's appeal, but because the district court lacked jurisdiction, we do not address the merits. *See Arizonians for Official English v. Arizona*, 520 U.S. 43, 73, 117 S. Ct. 1055, 1072 (1997) (recognizing that when a district court "lack[s] jurisdiction, we have jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the [matter]").

adequate remedy in a court are subject to judicial review."). Absent a showing of finality, a district court lacks jurisdiction to review APA challenges to administrative proceedings. *Am. Airlines, Inc. v. Herman*, 176 F.3d 283, 287 (5th Cir. 1999). Here, the Board relies on the collateral order doctrine as an expansion of the finality requirement of Section 704. Because the April 10, 2018 order meets the doctrine's predicates, the Board contends, the order should be treated as final and subject to challenge under the APA. The FTC disagrees with this approach, and so do we.

The collateral order doctrine is a judicially created exception to the "final decision" requirement of 28 U.S.C. § 1291, which governs appellate jurisdiction over appeals of final district court decisions. *See Exxon Chemicals Am. v. Chao*, 298 F.3d 464, 469 (5th Cir. 2002). The doctrine provides that an interlocutory decision is immediately appealable "as a final decision under § 1291 if it (1) conclusively determines the disputed question; (2) resolves an important issue completely separate from the merits of the action; and (3) is effectively unreviewable on appeal from a final judgment." *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 290 (5th Cir. 2000). This court has recognized that "the requirement of 'final agency action' in [Section 704]" is analogous "to the final judgment requirement of 28 U.S.C. § 1291." *Am. Airlines*, 176 F.3d at 288; *see also LREAB I*, 917 F.3d at 392 ("[C]ourts have recognized that the [APA's] 'final agency action' requirement is analogous to § 1291's 'final decision' requirement.").[3] We assume arguendo that equating finality under Sections 1291 and 704 imports the collateral order

[3] Other circuits concur. *See, e.g.*, *Chehazeh v. Attorney Gen.*, 666 F.3d 118, 135 (3d Cir. 2012) ("A provision analogous to Section 704's 'final agency action' requirement is found in 28 U.S.C. § 1291, which permits appellate review only of 'final decisions' of a district court."); *DRG Funding Corp. v. Sec'y of Hous. & Urban Dev.*, 76 F.3d 1212, 1220 (D.C. Cir. 1996) (Ginsburg, J., concurring) ("Our analysis of the finality requirement imposed by the APA is properly informed by our analysis of that requirement in § 1291.").

doctrine into the Section 704 analysis.[4] Nevertheless, the Board fails to show that the Commission's interlocutory denial of state action immunity in this case meets the doctrine's requirements. As to the first prong of the doctrine, there is no dispute that the Commission's rejection of state action immunity was "conclusive." Problems arise concerning the second prong, whether the issue of state action immunity is "completely separate from the merits" of the FTC's antitrust action, and the third prong, whether the decision is "effectively unreviewable on appeal."

The parties square off in differing interpretations of our case law that has applied the collateral order doctrine to denials of claims of state action immunity. To begin our analysis, however, the background of the substantive issues must be briefly recapitulated. "The state action doctrine was first espoused by the Supreme Court in *Parker v. Brown*, 317 U.S. 341, 63 S. Ct. 307 [] (1943) as an immunity for state regulatory programs from antitrust claims." *Acoustic Systems*, 207 F.3d at 292. In *Parker*, the Court considered whether a state statute that authorized state officials to issue regulations restricting certain agricultural competition violated antitrust law. 317 U.S. at 350–51, 63 S. Ct. at 313–14. The Court found "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." *Id.* Accordingly, the Court concluded that state regulatory programs cannot violate the Sherman Act because the "Act makes no mention of the state as such, and gives no hint that it was intended to restrain state action or official action directed by a state."[5] *Id.* at 351.

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[4] Note that this is a significant theoretical stretch, as it (a) means the appeal to the district court of an interlocutory order under the APA, which normally requires "final" agency action, and (b) supersedes the FTC Act's direction of appeals to the courts of appeals.

[5] The state action analysis applies to FTC actions as well as to federal antitrust litigation. *See F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 635, 112 S. Ct. 2169, 2177 (1992) (applying the state action analysis in a case arising only under the FTC Act). We also note

"In subsequent cases, the Court extended the state action doctrine to cover, under certain circumstances, acts by private parties that stem from state power or authority . . . as well as acts by political subdivisions, cities, and counties." *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1397 (5th Cir. 1996) (citing *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 100 S. Ct. 937 (1980); *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 105 S. Ct. 1713 (1985)). But immunity for such actors is not automatic because they are not sovereign.[6] *Id.* Rather, to invoke state action immunity, private parties must meet two requirements set forth in *Midcal*. First, "the challenged restraint must be one clearly articulated and affirmatively expressed as state policy." *Patrick v. Burget*, 486 U.S. 94, 100, 108 S. Ct. 1658, 1663 (1998) (quoting *Midcal*, 445 U.S. at 105, 100 S. Ct. at 943). Second, "the anticompetitive conduct must be actively supervised by the state itself." *Id.* Municipalities and other political subdivisions need only satisfy the first *Midcal* prong; they need not show active supervision. *Town of Hallie*, 471 U.S. at 45–46, 105 S. Ct. at 1720.

Following this framework, this court has twice addressed whether the collateral order doctrine authorizes interlocutory appeals from a district court's denial of state action immunity. In *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391, 1396–97 (5th Cir. 1996), this court held that "the denial of a state or state entity's motion for dismissal or summary judgment on the ground of state action immunity" is immediately appealable. The

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that, although "the state action doctrine is often labeled an immunity, that term is actually a misnomer because the doctrine is but a recognition of the limited reach of the Sherman Act . . . ." *Acoustic Sys.*, 207 F.3d at 292 n.3. Consistent with our prior opinions, however, we continue to refer to the doctrine as one of immunity. *See generally Veritext Corp. v. Bonin*, 901 F.3d 287 (5th Cir 2018).

[6] "For purposes of *Parker*, a nonsovereign actor is one whose conduct does not automatically qualify as that of the sovereign State itself." *N.C. St. Bd. of Dental Examiners v. F.T.C.*, 574 U.S. 494, 505, 135 S. Ct. 1101, 1111 (2015). Pardon the circularity of this direct quotation.

defendant was a municipal hospital, which this court ultimately held immune under the state action doctrine. Drawing an analogy with principles that animate interlocutory appeals of government officials' claims of absolute or qualified immunity, or the Eleventh Amendment, this court reasoned that making a "state or state entity" go to trial to claim immunity renders the defense effectively unreviewable on appeal. *Id.* at 1396–97.

In *Acoustic Systems,* however, we clarified that *Martin*'s extension of the collateral order doctrine was limited "to the denial of a claim of state action immunity 'to the extent that it turns on whether a *municipality* or *subdivision* [of the state] acted pursuant to a clearly articulated and affirmatively expressed state policy.'" *Acoustic Systems, Inc. v. Wenger,* 207 F.3d 287, 291 (5th Cir. 2000) (quoting *Martin*, 86 F.3d at 1397). The defendant in *Acoustic Systems* was a private party whose status did not implicate the concerns underlying other immunity doctrines. Therefore, although the defendant could invoke the state action doctrine as a defense to liability, it could not obtain interlocutory review of the issue to avoid suit. *Id.* at 293–94. Likewise, because a defense to liability is effectively reviewable on direct appeal, the denial of state action immunity to a private party "is not an immediately reviewable collateral order." *Id.*

Neither *Martin* nor *Acoustic Systems* fits this case. In neither of those cases was the collateral order doctrine being invoked as an appendage to APA Section 704, thus neither case involved interlocutory interference with an ongoing federal regulatory proceeding. Further, in each case, applying the Supreme Court's test for state action immunity was relatively straightforward: *Martin* rested on *Town of Hallie,* 471 U.S. at 45-46, 105 S. Ct. at 1720 (holding that municipal entities, though not sovereign, may avail themselves of the immunity if their actions spring from governing state authority); Wenger, the *Acoustic Systems* defendant, could only rely on private party immunity pursuant to *Midcal*'s two-part test.

Here, the jurisdictional issue is more complex, as it concerns both an action by the FTC rather than private litigation, and it involves the Supreme Court's comparatively recent decision in *North Carolina State Board of Dental Examiners v. F.T.C.*, 574 U.S. 494, 135 S. Ct. 1101 (2015).

Taking the Supreme Court case first, apprehension over placing private practitioners in regulatory agencies constituted like this Board animated *Dental Examiner's* application of the *Midcal* test. The Court explained that "[l]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern." *Id.* at 504. Hence, it was necessary to apply *Midcal's* active supervision prong, which "demands 'realistic assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.'" *Id.* at 507 (quoting *Patrick*, 486 U.S. at 101, 108 S. Ct. at 1663).

The Board nevertheless argues that it is entitled to immunity from suit as a state agency, not a "purely private part[y]." But the Court has rejected such a "purely formalistic inquiry." *See Town of Hallie*, 471 U.S. at 39, 105 S. Ct. at 1716. Instead, in *Dental Examiners*, the Court distinguished "specialized boards dominated by active market participants" from "prototypical state agencies" because of the private incentives inherent in their structure. *Id.* at 511. Such "agencies controlled by market participants are more similar to private trade associations vested by States with regulatory authority . . . ." *Id.* Thus, while the Board may rightly defend its entitlement to state action immunity, it invokes the state action doctrine as a private party. *See also S.C. St. Bd. of Dentistry v. F.T.C.*, 455 F.3d 436, 439 (4th Cir. 2006); *SmileDirectClub, LLC v. Battle*, No. 19-12227, 2020 WL 4590098, at *11 (11th Cir. 2020) (Jordan, J., concurring) ("Even if we assume that a state is able to immediately appeal the denial of *Parker* immunity, an interlocutory appeal should not be available to private parties like the members of the

Georgia Board of Dentistry, whose status does not implicate sovereignty concerns.").

As a private party, the policy imperatives behind relieving the Board from suit as well as liability do not apply. *See Acoustic Systems,* 207 F.3d at 292–94. To summarize, the collateral order doctrine must be deployed narrowly and "with skepticism," and state action immunity, in particular, though it may extend to private parties, exists principally to secure the full scope of political activity for *state* actors. *Id. Dental Examiners* has intensified our skepticism of allowing an interlocutory appeal. This court aptly stated, in reference to the state action "immunity" doctrine, that "[t]he price of the shorthand of using similar labels for distinct concepts is the risk of erroneous migrations of principles." *Surgical Care Center of Hammond, LC v. Hospital Serv. Dist.,* 171 F.3d 231, 234 (5th Cir. 1999) (en banc).

Another reason for rejecting the Board's quest for collateral review is that this regulatory case was initiated by the FTC. Even if the Board were a sovereign actor, it is paradigmatic that "[s]tates retain no sovereign immunity as against the Federal Government." *West Virginia v. United States*, 479 U.S. 305, 312 n.4, 107 S. Ct. 702, 707 n.4 (1987); *see also Bd. of Dentistry*, 455 F.3d at 447 (rejecting collateral order appeal of a *Parker* immunity claim in a suit brought *by* the federal government; "because such suits do not offend the dignity of a state, sovereign immunity is no defense to such an action").

In sum, case law does not support jurisdiction based on the collateral order doctrine as applied through Section 704 of the APA. Specifically, the second and third prongs of the doctrine are not satisfied here. *Parker* immunity concerns the boundaries of federal antitrust law set against the principles of federalism and the states' authority over their economies. This court explained, "[w]hile thus a convenient shorthand, '*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act than the judicial creation of a defense to liability for its violation." *Surgical*

Care Center, 171 F.3d at 234. In this case, where the FTC challenges aspects of rate setting by the Board as restraining price competition, and the FTC rejects the sufficiency of overarching governmental supervision, an interlocutory ruling on state action immunity by this court would inevitably affect the question of liability. The issues relevant to immunity in this case pertain to the reach of the Sherman Act, consequently, a judicial decision at this point would not resolve an issue "completely separate from the merits of the action," as required by the second prong of the collateral order doctrine. *Acoustic Systems*, 207 F.3d at 290. Nor, obviously, is the state action immunity issue "effectively unreviewable on appeal from a final judgment." *Id.*;[7] *see N.C. State Bd. of Dental Exam'rs*, 717 F.3d 359, 366 (4th Cir. 2013) (considering the applicability of state action immunity in a petition for review), *aff'd*, 574 U.S. 494 (2015).

For the foregoing reasons, the April 10, 2018 order does not constitute final agency action under Section 704, and the collateral order doctrine does not apply. Consequently, the district court lacked jurisdiction over the Board's lawsuit.

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[7] The Board relies perfunctorily on a finality test articulated in *Bennett v. Spear*, 520 U.S. 154, 117 S. Ct. 1154 (1997). *Bennett* pronounced two conditions that "must be satisfied for an agency action to be 'final'": (1) the action must "mark the consummation of the agency's decision making process," and (2) the action must be that "by which rights or obligations have been determined or from which legal consequences will flow." 520 U.S. at 177–78, 117 S. Ct. at 1168. The Board argues that the April 10, 2018 order is "independently reviewable as a 'final' order under the test articulated in *Bennett*" because the order "reflects a consummation of the decision making process" from which "legal consequences will flow, including [the Board's] legal right to immunity from trial." This is incorrect. Not only is the Board not entitled to immunity from suit, but the Commission's denial of state action immunity will affect the Board adversely only if the Commission ultimately finds the Board liable for antitrust violations. Put differently, the April 10, 2018 order "does not itself adversely affect [the Board] but only affects [its] rights adversely on the contingency of future administrative action." *Am. Airlines*, 176 F.3d at 288 (quoting *Rochester Tel. Corp. v. United States*, 307 U.S. 125, 130, 59 S. Ct. 754, 757 (1939)). The April 10, 2018 order does not constitute final agency action under *Bennett*.

III. CONCLUSION

We **VACATE** the district court's stay order and **REMAND** with instructions to **DISMISS** the Board's lawsuit for lack of jurisdiction.

APPENDIX B

UNITED STATES DISTRICT COURT

MIDDLE DISTRICT OF LOUISIANA

LOUISIANA REAL ESTATE APPRAISERS BOARD	CIVIL ACTION
VERSUS	
UNITED STATES FEDERAL TRADE COMMISSION	NO.:19-CV-00214-BAJ-RLB

RULING AND ORDER

Before the Court is Petitioner's **Motion to Stay Administrative Proceedings (Doc. 9-1 at p. 1)**. Defendants oppose this motion. (Doc. 23-2). Oral argument is not required. For the reasons stated herein, Petitioner's motion is GRANTED.

I. BACKGROUND

This matter arises from allegations that the United States Federal Trade Commission ("FTC" or "Defendant") is unlawfully attempting to force the Louisiana Real Estate Appraisers Board ("Board" or "Petitioner") to undergo federal antitrust enforcement proceedings. (Doc. 1 at ¶ 1). The Board is a state governmental regulatory agency empowered to regulate appraisal management companies which secure appraisals that support residential mortgage transactions. *See* La. Stat. Ann. § 37:3394, *et seq*. (Doc. 9-1 at p. 3). The Board is also empowered to collect "customary and reasonable" fees for the agents of mortgage lenders. (*Id.).*

On or about May 30, 2017, the FTC filed an administrative complaint against the Board, alleging that setting certain "customary and reasonable" fees for mortgage lenders' agents violated certain federal antitrust rules (Doc. 1 at par. 4). In particular, the FTC alleges that the Board is controlled by active market participants, not the state, and that the manner in which fees are set amounts to unlawful price fixing. (Doc. 1 at ¶ 4). In response to the complaint, the Governor's Office issued Executive Order 17-16, which re-promulgated the manner in which fees are fixed.[1] The Board moved for a dismissal of the administrative complaint based on its assertation that the alleged impropriety identified by the FTC had been rectified. (*Id.*). The Board claimed that all branches of Louisiana government accepted a supervisory role and "political accountability" for the alleged anti-competitive practices cited by the FTC, as required under *N.C. S. Bd. of Dental Exam'rs v FTC*, 135 S.Ct. 1101, 1111 (2015), and that it is therefore entitled to be relieved from participation in the administrative proceedings on the basis of the "state-action immunity" defense. (Doc. 1 at ¶ 5). State-action immunity from suit is applicable when a state establishes that anticompetitive conduct is created, overseen, and guided by the state, without the influence or control of parties who have not been conferred regulatory powers by the state. *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 225 (2013). To qualify for state-action

[1] La. Admin. Code tit. 46 § 31101.

immunity, a state must establish that the anticompetitive act is a clearly articulated state policy, and that such activity is actively supervised by the state.[2] (Id.).

On April 10, 2018, the FTC issued an order ("FTC Order") rejecting the Board's state-action immunity defense. (*Id.* at ¶ 6). The Board then filed a lawsuit requesting that the Court set aside the FTC Order on the grounds that it was issued in an arbitrary and capricious manner. (*Id.* at ¶ 9).

Initially, the Board filed a petition for review of the FTC Order before the United States Court of Appeals for the Fifth Circuit, claiming that the FTC Order was an appealable collateral order under the FTC Act.[3] (Doc. 9-1 at p. 14). The Fifth Circuit granted the Board's request to stay administrative proceedings pending appellate review, but ultimately found that the FTC Act did not allow direct appeals from collateral orders. (*Id.*). The Fifth Circuit opined that the "final agency action" language of the Administrative Procedure Act ("APA")[4] may allow a district court to review the FTC Order prior to the final administrative adjudication of the action. *Louisiana Real Estate Appraisers Bd. v. Fed. Trade Comm'n*, 917 F.3d 389, n.3 (5th Cir. 2019). Following the Fifth Circuit ruling, the Board moved for rehearing *en banc*,

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[2] "Maintaining state-action immunity from administrative proceedings requires more than a mere facade of state involvement, for it is necessary . . . to ensure the States accept political accountability for anticompetitive conduct they permit and control." *N. Carolina State Bd. of Dental Examiners v. F.T.C.*, 135 S. Ct. 1101, 1111 (2015).

[3] 15 U.S.C. § 45 provides "Any person, partnership, or corporation required by an order of the [Federal Trade] Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States.

[4] 5 U.S.C. § 551, *et seq.*

and urged the FTC to stay its administrative proceeding pending a resolution of the petition. (Doc 9-1 at p. 14.). The Fifth Circuit denied rehearing, and the FTC denied Petitioner's request to stay the administrative proceedings. (*Id.*). The Board now seeks relief under the APA to stay the FTC administrative proceedings until such time as this Court completes a review of the merits of the FTC Order. (Doc. 1).

II. LEGAL STANDARD

A. Jurisdiction

The Code of Federal Regulations gives the FTC and a court of competent jurisdiction the power to stay an administrative proceeding. 16 C.F.R. § 3.41 (f)(1)(i). Additionally, Section 705 of the APA allows a reviewing court to "issue all necessary and appropriate process to postpone the effective date of an agency action or to preserve status or rights pending conclusion of the review proceedings." 5 U.S.C. § 705.

The Supreme Court of the United States found that the term "court of competent jurisdiction" is any state or federal court already endowed with subject-matter jurisdiction over the suit. "*Lightfoot v. Cendant Mortg. Corp.*, 137 S. Ct. 553, 561 (2017).

B. Administrative Procedure Act

The APA provides:

> [a]gency action[s] made reviewable by statute[,] and final agency action[s] for which there is no other adequate remedy in a court[,] are

> subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review [only] on the review of the final agency action. 5 U.S.C. § 704.

Thus, under normal circumstances, agency actions are only reviewable at such time as the agency action is finalized. (Id.).

C. Appeal from a Collateral Order

The Supreme Court has recognized a narrow exception under the APA for the review of administrative decisions which have not yet been made final but for which justice requires interlocutory review. *See Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949). This narrow exception allows collateral reviews of administrative orders that (1) conclusively determine the disputed question, (2) resolve an important issue separate from the merits of the action, and (3) are effectively unreviewable on appeal from a final judgment. (Id.).

D. Stay Factors

To grant a stay of an administrative proceeding, a court must consider (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits, (2) whether the applicant will be irreparably injured absent a stay, (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding, and (4) where the public interest lies. *Hilton v. Braunskill*, 481 U.S. 770, 776 (1987).

III. DISCUSSION

This Court is a "court of competent jurisdiction" pursuant to the Supreme Court's ruling in *Lightfoot,* and thus, has jurisdiction to consider this matter. Further, federal question jurisdiction under 28 U.S.C. § 1331 is applicable here. Having established that the Court *may* issue a stay of the administrative proceeding, the Court now turns to whether doing so is warranted in this case.

A. The FTC Order is Appealable

When this matter was reviewed by the Fifth Circuit, that Court opined that the test set forth in *Cohen* is applicable to some administrative decisions that dismiss certain affirmative defenses, but do not end the litigation. *Louisiana Real Estate Appraisers Bd. v. Fed. Trade Comm'n*, 917 F.3d 389, 392 (5th Cir. 2019). The Fifth Circuit ultimately concluded that the FTC Act only provided courts of appeals with jurisdiction to review "cease and desist" orders. However, it left open the door for Petitioner to bring a claim in the district court by appealing the FTC Order under the APA (*Id.* at n. 3). The FTC claims that this Court does not have jurisdiction under the APA because the FTC Order was not a "final agency action." (Doc. 22-3 at pp. 5-6).

This Court's jurisdiction under the APA is not limited to "cease and desist" orders; rather, the Act allows challenges to "agency action[s] made reviewable by statute and final agency action[s] for which there is no other adequate remedy [. . .]" 5 U.S.C. § 704. Therefore, should this Court find that the challenged agency action

meets the test set forth in *Cohen*, an interlocutory ruling may be entered in the case. The Court will now consider each of the *Cohen* factors in turn.

1. *Did the FTC Order Conclusively Determine the Disputed Question of Petitioner's Immunity from Administrative Action?*

The FTC Order completely bars Petitioner's state-action immunity defense. (Doc. 9-2 at pp. 25). Although this denial was not dispositive of the entire case, the Fifth Circuit has ruled that there is no requirement that the challenged decision be the final decision in the entire case. Because the FTC Order conclusively answers the question of whether Petitioner is entitled to immunity from the FTC's administrative proceedings, the Court finds that Petitioner has established the first of the *Cohen* requirements.

2. *Did the FTC Order Resolve an Important Issue Separate from the Merits of the Underlying Action?*

The FTC Order only addresses two of Petitioner's many affirmative defenses and does not involve all of the merits of the underlying case. Because the FTC Order is severable from the rest of the case, the Court finds that Petitioner has established the second of the *Cohen* requirements.

3. *Is the Denial of Immunity Unreviewable on Appeal from the Final Judgment?*

In *Mitchell v. Forsyth*, 472 U.S. 511, 512 (1985), the Supreme Court found that the denial of qualified immunity was similar to the denial of absolute immunity, and that both are effectively lost if a case is erroneously allowed to proceed to trial. As noted, the Supreme Court reasoned that because immunity involves the entitlement

to not stand trial *at all* under certain circumstances, should the case erroneously proceed to trial, such privilege would already have been lost and is inherently unrecoverable. (*Id.*). Here, the FTC Order dismissed the Board's immunity defense, similar to the defense presented in *Mitchell*. Accordingly, petitioner has established the third and final *Cohen* factor.

B. The Court Shall Stay the Administrative Proceeding

Having satisfied the jurisdictional prerequisites, the Court must now consider the four "stay factors" set forth in *Hilton*, 481 U.S. at 776. The FTC claims that Petitioner cannot meet any of the *Hilton* factors. (Doc. 22-3 at pp. 11-19). The Court will nonetheless consider each factor in turn.

1. The Likelihood of Success on the Merits

To assess the likelihood of success on the merits of a claim, the Court must consider the standards of the substantive laws applicable to the matter. *Janvey v. Alguire*, 647 F.3d 585, 596 (5th Cir. 2011). The Board asserts that the question of whether a state may maintain state-action immunity is whether the state will accept "political accountability for the anticompetitive conduct they permit and control." *Dental Exam'rs*, 135 S.Ct. at p. 1111. The Board claims that it has made a strong showing that Louisiana's legislative and executive branches have accepted political responsibility for changing the challenged anti-competitive conduct. (Doc. 23-2 at p. 7). The Board points to its own opening brief wherein it asserted that the State of

Louisiana purposefully set uniform fees, and that the conduct identified by the FTC has been rectified through legislative, executive, and judicial oversight. (*Id.*).

Without reaching the merits of this matter, the Court finds that the Board has made an acceptable showing that the State has exercised sufficient oversight over, and accepted responsibility for, the actions identified by the FTC. The first *Hilton* factor has been established.

2. Irreparable Injury Absent a Stay

The Board argues that should a stay not be granted, its immunity from administrative proceedings would be lost, at which point the harm would be impossible to redress post trial. (Doc. 23-2 at p. 6). The Board further argues that disallowing the stay would cause harm to the State by distracting state officials and curtailing Louisiana's ability to make and enforce policies that it deems beneficial and that are responsive to the FTC's claims. (*Id.*).

The Court agrees, and finds that the abrogation of immunity itself, if improvidently done, may cause irreparable harm by forcing the State to engage in activities from which it might otherwise be protected, such as an unlawful enforcement order. The second *Hilton* factor has been met.

3. Substantial Injury to the Public or Other Parties Interested in the Proceedings

The Board contends that no party will be harmed if the Court grants the stay, as it will refrain from enforcing La. Admin. Code tit. 46 § 31101 until the issue of

state-action of immunity is resolved by the Court. (Doc. 23-3 at pp. 8-9). It further claims that granting the stay will benefit Louisiana and its citizens by ensuring that Louisiana laws and regulations are appropriately enforced. (*Id.* at p. 9). The Board further argues that should the Court deny the stay, the principles of federalism that underlie the purpose of state-action sovereignty would be eroded, and would negatively impact Louisiana's ability to regulate its own markets, to the determent of its citizens. (*Id.* at p. 9).

The Court agrees that no substantial injury to the public or other parties would result if this matter is stayed. Also, the Court recognizes that an unnecessary trial would hamper State officials' efforts to conduct the normal daily responsibilities of their offices, to the detriment of the State. The Court further finds that the arguments presented by the Board concerning the public interests in granting the stay are valid. Petitioner has established the third and fourth *Hilton* factors.

IV. CONCLUSION

Accordingly,

IT IS ORDERED that Petitioner's **Motion to Stay Administrative Proceedings (Doc. 9-1 at p. 1)** is **GRANTED**.

IT IS FURTHER ORDERED that all pending activity in the matter captioned *In the Matter of the Louisiana Real Estate Appraisers Board*, Dkt. No. 9374 (F.T.C.) is hereby **STAYED** until further order of this Court.

Baton Rouge, Louisiana, this 29th day of July, 2019.

JUDGE BRIAN A. JACKSON
UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

APPENDIX C

United States Court of Appeals for the Fifth Circuit

No. 19-30796

LOUISIANA REAL ESTATE APPRAISERS BOARD,

Plaintiff—Appellee,

versus

UNITED STATES FEDERAL TRADE COMMISSION,

Defendant—Appellant.

Appeal from the United States District Court
for the Middle District of Louisiana
USDC No. 3:19-CV-214

Before JONES, ELROD, and HIGGINSON, *Circuit Judges*.

PER CURIAM:

IT IS ORDERED that the appellee's opposed motion to stay the issuance of the mandate pending disposition of Louisiana Real Estate Appraisers Board's petition for certiorari is DENIED.

IT IS FURTHER ORDERED that the appellee's opposed alternative, motion to stay the Federal Trade Commission proceeding pending the disposition of a petition for writ of certiorari is DENIED.