No. 17-368

In the Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER

v.

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

NOEL J. FRANCISCO
Solicitor General
Counsel of Record
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANDREW C. FINCH
Principal Deputy Assistant Attorney General
FREDERICK LIU
Assistant to the Solicitor General
KRISTEN C. LIMARZI
ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

DAVID C. SHONKA
Acting General Counsel
Federal Trade Commission
Washington, D.C. 20580

QUESTION PRESENTED

Whether a public entity has the right to an immediate appeal under the collateral-order doctrine from a district court's determination that the entity's conduct is not state action beyond the reach of the Sherman Act, 15 U.S.C. 1 *et seq*.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases:

Cases—Continued: Page

Cases—Continued: Page

Constitution and statutes: Page

Miscellaneous:

In the Supreme Court of the United States

No. 17-368

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, PETITIONER

v.

TESLA ENERGY OPERATIONS, INC., FKA SOLARCITY CORPORATION

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE SUPPORTING RESPONDENT

INTEREST OF THE UNITED STATES

This case presents the question whether the collateral-order doctrine permits immediate appeal of a district court's determination that the conduct of a public entity is not state action beyond the reach of the Sherman Act, 15 U.S.C. 1 *et seq*. The Department of Justice and the Federal Trade Commission have primary responsibility for enforcing the federal antitrust laws and a strong interest in their correct application. As the Nation's most frequent litigator in federal court, the United States also has a strong interest in the correct application of the collateral-order doctrine. The United States, through the Department of Justice, filed an amicus brief supporting respondent in the court of appeals.

STATEMENT

1. "Federal antitrust law is a central safeguard for the Nation's free market structures." *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1109 (2015). "The Sherman Act was designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pac. Ry. Co.* v. *United States*, 356 U.S. 1, 4 (1958). Section 1 of the Sherman Act prohibits "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States." 15 U.S.C. 1. Section 2 makes it unlawful to "monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States." 15 U.S.C. 2.

In *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court considered whether "the Sherman Act prohibits" a State from engaging in anticompetitive activity. *Id.* at 352. The Court began from the premise that an intent to restrain the acts of States as "sovereign[s]" should not be "lightly * * * attributed to Congress." *Id.* at 351. The Court found that neither the text nor the history of the Sherman Act suggested such an intent. *Id.* at 350-351. The Court held that "the Sherman Act did not undertake to prohibit," *id.* at 352, an agricultural marketing program adopted pursuant to a California state statute, *id.* at 346.

Since *Parker*, this Court has often reaffirmed that "'state action'" lies "outside the reach of the antitrust laws." *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (citation omitted). It has described this "state action doctrine" as an "implied ex-

emption to the antitrust laws," *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 55 n.18 (1985), which is "disfavored, much as are repeals by implication," *Dental Exam'rs*, 135 S. Ct. at 1110 (citations omitted). The Court has explained that 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." *Southern Motor Carriers*, 471 U.S. at 56.

Subsequent decisions of this Court have clarified the scope of the state-action doctrine. Because the doctrine rests on the assumption that Congress did not intend to restrain *state* action, it applies only when "the actions in question are an exercise of the State's sovereign power." *Dental Exam'rs*, 135 S. Ct. at 1110. That requirement is satisfied when the actions in question are those of a state legislature or state supreme court, "acting legislatively rather than judicially." *Ibid.* (citation omitted).[1]

To implement their policies, States often rely on nonsovereign actors, including substate public entities (like municipalities) and private businesses or individuals. See *Dental Exam'rs*, 135 S. Ct. at 1110-1111 (observing that a State may "delegate[] control over a market to a non-sovereign actor," *i.e.*, "one whose conduct does not automatically qualify as that of the sovereign State itself"). Those policies could be frustrated if the federal antitrust laws were construed to forbid the conduct of those who carry out the State's will. See *Southern Mo-*

---

[1] The Court has reserved the question "whether the Governor of a State stands in the same position * * * for purposes of the state-action doctrine." *Hoover* v. *Ronwin*, 466 U.S. 558, 568 n.17 (1984).

tor Carriers, 471 U.S. at 56-57. The state-action doctrine thus treats the federal antitrust laws as inapplicable to nonsovereign actors when their conduct is "truly the product of state regulation." *Patrick* v. *Burget*, 486 U.S. 94, 100 (1988). To satisfy that standard, the conduct of a nonsovereign actor generally must (1) be taken pursuant to a "clearly articulated and affirmatively expressed * * * state policy" to displace competition and (2) be "actively supervised by the State itself." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (citation and internal quotation marks omitted).

Both parts of the *Midcal* test are "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy." *FTC* v. *Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992). The first requirement—clear articulation—ensures that the State has "foreseen and implicitly endorsed the anticompetitive effects as consistent with its policy goals." *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013). But even when that requirement is satisfied, a state policy may "be defined at so high a level of generality as to leave open critical questions about how and to what extent the market should be regulated." *Dental Exam'rs*, 135 S. Ct. at 1112. "Entities purporting to act under state authority" therefore may "diverge from the State's considered definition of the public good" even when they act within the scope of their delegated powers. *Ibid.* The second requirement—active supervision—seeks to bridge that gap "between a state policy and its implementation" by demanding that "'state officials have and exercise power to review particular anticompetitive acts * * * and disapprove those that fail to

accord with state policy.'" *Ibid.* (quoting *Patrick*, 486 U.S. at 101).

The Court has recognized "instances in which an actor can be excused from *Midcal*'s active supervision requirement." *Dental Exam'rs*, 135 S. Ct. at 1112. Although the state-action doctrine does not apply "directly" to municipalities and other political subdivisions, which "are not themselves sovereign," *Phoebe Putney*, 568 U.S. at 225, such local governmental entities "are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies," *id.* at 226 (citation omitted). The "active supervision test" remains an "essential prerequisite," however, for "any nonsovereign entity—public or private—controlled by active market participants." *Dental Exam'rs*, 135 S. Ct. at 1113.[2]

2. Petitioner Salt River Project Agricultural Improvement and Power District was formed as a "special public water district[]" under Arizona law in 1937. *Ball* v. *James*, 451 U.S. 355, 358 (1981); see *id.* at 359. Petitioner delivers water to landowners throughout central Arizona and subsidizes those operations by selling power as an electric utility. *Id.* at 357; J.A. 12. Petitioner is "the only supplier of traditional electrical power" in the Phoenix metropolitan area, Pet. App. 3a,

---

[2] That rule reflects this Court's recognition that, when "a State empowers a group of active market participants to decide who can participate in its market," there is a "structural risk" that they will pursue "their own interests" instead of "the State's policy goals." *Dental Exam'rs*, 135 S. Ct. at 1114. Active supervision of such entities by state officials is necessary to ensure that the entity's anticompetitive conduct "result[s] from procedures that suffice to make it the State's own." *Id.* at 1111.

where it has nearly a million customers, Pet. Br. 6; J.A. 12.

Respondent SolarCity Corporation (recently renamed Tesla Energy Operations, Inc.) sells and leases rooftop solar-energy systems to homes and businesses. J.A. 8. Those systems allow respondent's customers to generate their own electricity, reducing the amount they need to purchase from utilities. *Ibid.* Respondent has thousands of customers in the Phoenix metropolitan area. J.A. 12.

In 2015, petitioner promulgated new rate plans for self-generating customers—customers who purchase some of their electricity from petitioner but who also rely on self-generation methods, like solar-energy systems. J.A. 10, 30-32. The new plans imposed greater fees on self-generating customers. J.A. 33. Respondent has alleged that the electric-utility bills for a "typical" home with a solar-energy system could increase by about $600 per year, or 65%. J.A. 32. After petitioner announced the new rate plans, J.A. 28, the number of applications respondent received for solar-energy systems in petitioner's service area allegedly fell from about 500 applications per month to 19, J.A. 35, 39-40.

3. Respondent sued petitioner in federal district court, alleging violations of Sections 1 and 2 of the Sherman Act. J.A. 7, 49-52.[3] Respondent alleged that petitioner's new rate plans imposed a "penalty" on self-generation so "significant" that consumers would have

---

[3] Respondent also brought claims under Section 3 of the Clayton Act, 15 U.S.C. 14; under state antitrust law; and under state tort law. J.A. 52-59. The district court dismissed the Clayton Act claim, Pet. App. 57a-58a, but allowed all but one of the state-law claims to proceed, *id.* at 56a-57a, 60a-64a. The court's rulings on those claims and on petitioner's accompanying defenses are not at issue here.

"no choice but to buy all their electricity from [petitioner]," thereby "exclud[ing] competition and unlawfully maintain[ing] [petitioner's] monopoly over the retail sale of electricity" in petitioner's service area. J.A. 8, 10-11. Alleging the loss of "substantial" profits "as a result of [petitioner's] anticompetitive conduct," J.A. 39, respondent sought treble damages and injunctive relief, J.A. 59.

Petitioner moved to dismiss the complaint. D. Ct. Doc. 53 (June 23, 2015). Petitioner argued that respondent had failed to adequately plead antitrust injury, a relevant product market, an illegal agreement, and anticompetitive conduct, *id.* at 18-28, and that the Local Government Antitrust Act of 1984 (LGAA), 15 U.S.C. 34 *et seq.*, precluded any award of antitrust damages, D. Ct. Doc. 53, at 6-7. Petitioner also contended that the state-action doctrine warranted dismissal. *Id.* at 9-16. It argued that Arizona had a "clearly articulated" policy to displace competition in the retail sale of electricity and that, as a local governmental entity, it was not required to show that its conduct was "actively supervised" by the State. *Id.* at 10 & n.14.

The district court granted petitioner's motion in part. Pet. App. 37a-69a. The court declined to find the state-action doctrine applicable, explaining that whether "Arizona has articulated a clear policy permitting anticompetitive conduct" and whether it "has 'actively supervised' a state regulatory policy" are "factual" questions that are "inappropriately resolved in the context of a motion to dismiss." *Id.* at 67a (citation omitted). The court viewed respondent's allegations that "Arizona has a policy permitting competition in the relevant market," and that petitioner "operates without supervision," as "all that is necessary at this stage." *Ibid.*

The district court determined, however, that as "a political subdivision of the state," petitioner was shielded by the LGAA from respondent's claims for antitrust damages. Pet. App. 64a-65a. The court also dismissed respondent's Section 1 claim for failure to adequately plead an unreasonable restraint on trade. *Id.* at 56a-60a & n.4. The court allowed respondent's Section 2 claims to proceed, finding that the complaint had "plausibly allege[d] anticompetitive conduct by an alleged monopolist." *Id.* at 62a.

Petitioner filed a notice of appeal, arguing that the district court's ruling on the state-action doctrine was "an immediately appealable collateral order" under 28 U.S.C. 1291. D. Ct. Doc. 81, at 1 (Nov. 20, 2015); see D. Ct. Doc. 82, at 1 (Nov. 20, 2015). On the same day, petitioner filed a motion asking the court to certify its order for interlocutory appeal under 28 U.S.C. 1292(b). D. Ct. Doc. 82, at 1.

The district court denied the motion for certification. Pet. App. 21a-35a. The court determined that, in ruling on petitioner's motion to dismiss, it had erred in treating application of the clear-articulation requirement as a question of fact. *Id.* at 25a. It concluded that application of that requirement is instead a "controlling question of law," satisfying one of the conditions for certification under Section 1292(b). *Id.* at 24a.

The district court explained, however, that "had [it] reached the issue as a matter of law, it would have concluded that Arizona does not have a clearly articulated policy to displace competition in the retail electricity market." Pet. App. 27a. Concluding that petitioner had "failed to demonstrate a substantial ground for difference of opinion" on the issue, *id.* at 24a-25a, the court declined to certify it for a Section 1292(b) appeal, *id.* at

27a. The court noted, however, that petitioner "is free to raise [the state-action doctrine] at summary judgment." *Id.* at 33a n.7.

4. The court of appeals dismissed petitioner's appeal for lack of jurisdiction. Pet. App. 1a-17a.

The court of appeals observed that it has "jurisdiction over appeals from 'final decisions' of district courts," and that a "'final decision' is typically one 'by which a district court disassociates itself from a case.'" Pet. App. 4a (citations omitted). The court explained, however, that "a piece of the case may become effectively 'final' under the collateral-order doctrine, even though the case as a whole has not ended." *Id.* at 5a. Emphasizing that the collateral-order doctrine "must remain a narrow exception," the court explained that three requirements must be satisfied for an otherwise nonfinal order to be immediately appealable: (1) the order must be "conclusive"; (2) "the order must address a question that is 'separate from the merits' of the underlying case"; and (3) "the separate question must raise 'some particular value of a high order' and evade effective review if not considered immediately." *Ibid.* (citations omitted).

The court of appeals held that the district court's state-action ruling was not immediately appealable because it did not satisfy the third requirement. Pet. App. 7a-11a & n.4. The court acknowledged that "interlocutory denials of certain particularly important immunities from suit" may be immediately appealed. *Id.* at 7a. It found that principle inapplicable here, however, because "the state-action doctrine is a defense to liability, not immunity from suit." *Id.* at 8a.

The court of appeals explained that this Court in *Parker* had "recognize[d] a limit on liability under the

Sherman Act rather than a safeguard of state sovereign immunity." Pet. App. 9a. The court of appeals also observed that, "[u]nlike immunity from suit, immunity from liability can be protected by a post-judgment appeal." *Id.* at 8a. Based on its conclusion that "an interlocutory appeal is not necessary to guarantee meaningful appellate review of an order denying state-action immunity," *id.* at 11a n.4, the court dismissed petitioner's appeal without addressing the two other requirements of the collateral-order doctrine, see *id.* at 11a & n.4.

SUMMARY OF ARGUMENT

A public entity has no right under the collateral-order doctrine to appeal a district court's interlocutory determination that the entity's conduct is not state action beyond the reach of the Sherman Act.

A. Under 28 U.S.C. 1291, the courts of appeals have jurisdiction over "final decisions" of the district courts, except where direct review in this Court is available. Although a "final decision[]" typically is one that ends the litigation, the Court has construed that term in Section 1291 to encompass a narrow class of collateral orders that do not have that effect. To be immediately appealable 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." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (citations omitted; brackets in original). The Court has emphasized that those requirements should be applied stringently, lest the collateral-order doctrine "swallow the general rule that a party is entitled to a single appeal" after final judgment. *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (citation omitted).

B. An order determining that the conduct of a public entity is not state action beyond the reach of the Sherman Act does not satisfy the second or third requirement of the collateral-order doctrine. Far from resolving an issue completely separate from the merits, a determination whether the defendant's conduct is attributable to the State is itself a merits ruling. When a defendant's conduct qualifies as state action, the Sherman Act does not "prohibit" it. *Parker* v. *Brown*, 317 U.S. 341, 352 (1943). Because the state-action doctrine reflects the Court's understanding of the Sherman Act's substantive reach, a state-action determination goes directly to the merits of the Sherman Act claim.

In arguing that a state-action determination is separate from the merits, petitioner assumes (Br. 19) that the "merits" of a Sherman Act claim consist only of whether the defendant has engaged in "anticompetitive conduct," *i.e.*, conduct that would violate the Sherman Act if the State had not authorized it. That assumption is unfounded. But even under that truncated view of the "merits" of a Sherman Act claim, petitioner would not be entitled to an immediate appeal of the district court's state-action ruling, since the determination whether a defendant's conduct is attributable to the State is intertwined with the determination whether the defendant's conduct is anticompetitive.

C. A state-action determination is not effectively unreviewable on appeal from a final judgment. In order to protect "the States' power to regulate," the state-action doctrine treats the Sherman Act as inapplicable to conduct that is attributable to the State itself. *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1109 (2015). Where it applies, the state-action doctrine ensures that conduct satisfying the doctrine's

requirements will not be treated as a Sherman Act violation. Defenses to liability, as distinguished from immunities from suit, are fully vindicable on appeal from final judgment. Delaying review thus would not "imperil a substantial public interest" protected by the state-action doctrine. *Mohawk Indus.*, 558 U.S. at 107 (citation omitted).

Petitioner contends (Br. 31-39) that, at least when the defendant is a public entity, the state-action doctrine protects the same interests as Eleventh Amendment immunity and qualified immunity. But the doctrine does not reflect any special concern for public entities as such. And while petitioner is a public entity, it is not a sovereign and is not entitled to Eleventh Amendment immunity. The purpose of the state-action doctrine is not to respect a sovereign's dignity (as in the case of the Eleventh Amendment) or to preserve initiative (as in the case of qualified immunity), but to protect the State's regulatory prerogatives. That interest is not imperiled by the absence of immediate review.

ARGUMENT

AN ORDER DETERMINING THAT THE CONDUCT OF A PUBLIC ENTITY IS NOT STATE ACTION BEYOND THE REACH OF THE SHERMAN ACT DOES NOT QUALIFY FOR IMMEDIATE APPEAL UNDER THE COLLATERAL-ORDER DOCTRINE

An order determining that a public entity's conduct is not state action for purposes of the federal antitrust laws does not satisfy two of the requirements of the collateral-order doctrine. It does not resolve an issue completely separate from the merits, and it is not effectively unreviewable on appeal from a final judgment.

The court of appeals correctly held that it lacked jurisdiction over petitioner's appeal in this case.[4]

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

"Finality as a condition of review is an historic characteristic of federal appellate procedure," dating to the first Judiciary Act, ch. 20, §§ 21-22, 25, 1 Stat. 83-87 (1789). *Cobbledick* v. *United States*, 309 U.S. 323, 324 (1940). Today, that requirement is codified in 28 U.S.C. 1291, which provides: "The courts of appeals * * * shall have jurisdiction of appeals from all final decisions of the district courts of the United States, * * * except where a direct review may be had in the Supreme Court." *Ibid.* "A 'final decision' generally is one which ends the litigation on the merits and leaves nothing for the court to do but execute the judgment." *Catlin* v. *United States*, 324 U.S. 229, 233 (1945). It is "typically" the decision "'by which a district court disassociates itself from a case.'" *Mohawk Indus., Inc.* v. *Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Swint* v. *Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995)).

This Court, however, has "long given" Section 1291 a "practical rather than a technical construction." *Cohen* v. *Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). The Court has held that "the statute entitles a party to appeal * * * from a narrow class of decisions that do not terminate the litigation, but must, in the interest of achieving a healthy legal system, nonetheless be treated as 'final.'" *Digital Equip. Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (citation and internal

---

[4] The United States takes no position on whether the first requirement of the collateral-order doctrine is satisfied here.

quotation marks omitted). That "small class" encompasses decisions that "finally determine claims of right separable from, and collateral to, rights asserted in the action." *Cohen*, 337 U.S. at 546.

The Court has applied a three-part test to determine whether a "category" of orders is immediately appealable under the collateral-order doctrine. *Mohawk Indus.*, 558 U.S. at 107 (citation omitted); see *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) ("In fashioning a rule of appealability under § 1291, * * * we look to categories of cases, not to particular injustices."). To be immediately appealable, an order that does not terminate the litigation must "[1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will* v. *Hallock*, 546 U.S. 345, 349 (2006) (citations omitted; brackets in original). The "party seeking appeal must show that all three requirements are satisfied." *Stringfellow* v. *Concerned Neighbors in Action*, 480 U.S. 370, 375 (1987).

The Court has treated those requirements as "'stringent,'" to ensure that the collateral-order doctrine does not "overpower the substantial finality interests § 1291 is meant to further." *Will*, 546 U.S. at 349-350 (citation omitted). The general rule that only final judgments are appealable "promotes efficient judicial administration" by "avoid[ing] the delay that inherently accompanies" piecemeal appellate review. *Richardson-Merrell Inc.* v. *Koller*, 472 U.S. 424, 430, 434 (1985). It "reduces the ability of litigants to harass opponents and to clog the courts through a succession of costly and time-consuming appeals," *Flanagan* v. *United States*, 465 U.S. 259, 264 (1984), and avoids "burden[ing] appellate courts"

with "immediate consideration of issues that may become moot or irrelevant by the end of trial," *Stringfellow*, 480 U.S. at 380. It also "helps preserve the respect due trial judges by minimizing appellate-court interference with the numerous decisions they must make in the prejudgment stages of litigation." *Flanagan*, 465 U.S. at 263-264. For these reasons, the Court has stressed that the collateral-order doctrine "must 'never be allowed to swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered.'" *Mohawk Indus.*, 558 U.S. at 106 (quoting *Digital Equip.*, 511 U.S. at 868).

In restricting the collateral-order doctrine to a narrow class of decisions, the Court has also noted the existence of "potential avenues of review apart from collateral order appeal." *Mohawk Indus.*, 558 U.S. at 110. Under 28 U.S.C. 1292(b), "a party may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal" when certain requirements are met. *Mohawk Indus.*, 558 U.S. at 110. Alternatively, a "party may petition the court of appeals for a writ of mandamus" in "extraordinary circumstances." *Id.* at 111. And Congress through legislation—or this Court through rulemaking—can "expand the list of orders appealable on an interlocutory basis." *Swint*, 514 U.S. at 48; see *Cunningham* v. *Hamilton Cnty.*, 527 U.S. 198, 210 (1999) ("Congress may amend the Judicial Code to provide explicitly for immediate review of [nonfinal] orders."); see also 28 U.S.C. 1292(e), 2072(c) (authorizing this Court to prescribe rules designating certain orders as immediately appealable). Congress thus has "designate[d] rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when

prejudgment orders should be immediately appealable." *Mohawk Indus.*, 558 U.S. at 113 (citation omitted). Accordingly, the Court has "not mentioned applying the collateral order doctrine recently without emphasizing its modest scope." *Will*, 546 U.S. at 350.

B. Whether A Defendant's Conduct Is State Action Beyond The Reach Of The Sherman Act Is Not An Issue Completely Separate From The Merits Of A Sherman Act Claim

1. As its name suggests, the collateral-order doctrine applies only to orders that are "collateral to" the "rights asserted in the action." *Cohen*, 337 U.S. at 546. To fall within that category, an order must "resolve an important issue completely separate from the merits of the action." *Will*, 546 U.S. at 349 (citations omitted). That requirement is "a distillation of the principle that there should not be piecemeal review of 'steps towards final judgment in which they will merge.'" *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 12 n.13 (1983) (quoting *Cohen*, 337 U.S. at 546).

An order determining that an antitrust defendant's conduct is not state action does not satisfy that requirement. In a suit brought under the Sherman Act, the question on the merits is whether the defendant has engaged in conduct that the Sherman Act prohibits. Cf. *Mitchell* v. *Forsyth*, 472 U.S. 511, 529 n.10 (1985) (distinguishing question of qualified immunity from "the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful"); *Abney* v. *United States*, 431 U.S. 651, 659 (1977) (explaining that a criminal defendant's double-jeopardy claim "is collateral to, and separable from," the determination "whether or not the accused is guilty of the offense charged"). That is precisely the question that the state-action doctrine addresses. See *Parker* v.

Brown, 317 U.S. 341, 352 (1943). The Court in *Parker* "assume[d]" that "Congress could, in the exercise of its commerce power, prohibit a state from maintaining a [price] stabilization program" like the one at issue in that case. *Id.* at 350. As a matter of statutory interpretation, however, the Court held that "the Sherman Act did not undertake to prohibit" such "an act of government." *Id.* at 352.

The state-action doctrine thus reflects the Court's understanding of the Sherman Act's substantive reach. Conduct that is attributable to a State under this Court's state-action precedents does not violate the Sherman Act. Far from being "completely separate from the merits of the action," *Will*, 546 U.S. at 349 (citations omitted), a state-action determination therefore *is* a merits determination.

The Court's decisions since *Parker* confirm that understanding. The Court has consistently framed the state-action inquiry in terms of whether the Sherman Act "prohibits" the defendant's conduct. *Patrick* v. *Burget*, 486 U.S. 94, 99 (1988); see, *e.g.*, *City of Columbia* v. *Omni Outdoor Adver., Inc.*, 499 U.S. 365, 374 (1991) ("prohibit"); *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 55 (1985) ("prohibit"); *Community Commc'ns Co.* v. *City of Boulder*, 455 U.S. 40, 48 (1982) ("prohibited"). The Court has described the state-action doctrine as an "implied exemption" to the Sherman Act, *Southern Motor Carriers*, 471 U.S. at 55 n.18, with "state action" lying "outside the reach of" the statute, *New Motor Vehicle Bd.* v. *Orrin W. Fox Co.*, 439 U.S. 96, 109 (1978) (citation omitted); see *Goldfarb* v. *Virginia State Bar*, 421 U.S. 773, 791-792 (1975) (concluding that, because the state-action doctrine did not apply, the defendant's conduct

was not "beyond the reach of the Sherman Act"). And the Court has equated a determination that the state-action doctrine applies with a determination that the defendant's conduct "did not violate the Sherman Act." *Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 589 (1976) (plurality opinion); see *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 104 (1980) ("not violate"); *Goldfarb*, 421 U.S. at 788 ("not a violation").

Although the Court has also referred to the state-action doctrine as an "immunity," *e.g.*, *Midcal*, 445 U.S. at 105, its use of that word should not be read to suggest that the doctrine is separate from the merits of a Sherman Act claim. In describing the doctrine, the Court has used the words "immunity" and "exemption" interchangeably, often in the same opinion. *E.g.*, *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 36 (1985) ("state action exemption"); *id.* at 39 ("*Parker* immunity"); *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion) ("*Parker* 'exemption'" and "*Parker* immunity"). And the word "exemption" is simply "shorthand" for "*Parker*'s holding that the Sherman Act was not intended by Congress to prohibit the anticompetitive restraints imposed by California in that case." *Lafayette*, 435 U.S. at 393 n.8.

The state-action doctrine is thus significantly different from other doctrines the Court has referred to as "immunities." A determination that a State has Eleventh Amendment immunity from a particular private suit, for example, does not resolve the question whether the challenged state conduct violated the applicable law. See *Puerto Rico Aqueduct & Sewer Auth.* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 145 (1993) (explaining that the "resolution" of whether a State is entitled to Eleventh

Amendment immunity "generally will have no bearing on the merits of the underlying action"). And while a determination that an official has qualified immunity from a particular damages claim entails a determination that there was no violation of "clearly established" law, it "does not entail a determination of the 'merits' of the plaintiff's claim that the defendant's actions were in fact unlawful." *Mitchell*, 472 U.S. at 529 n.10. In those contexts, a defendant can be immune from suit even though its conduct was unlawful. By contrast, when an antitrust defendant's conduct is found to be state action, the Sherman Act "does not apply" at all. *324 Liquor Corp.* v. *Duffy*, 479 U.S. 335, 343 (1987); see 15A Charles Alan Wright et al., *Federal Practice and Procedure* § 3914.10, at 694 (2d ed. 1992) (concluding that the state-action doctrine does not establish an immunity from suit because "there is little to distinguish [it] from many other defenses to antitrust or other claims").

The Court's application of the state-action doctrine to federal-government suits confirms that understanding. This Court has long recognized that "States have no sovereign immunity as against the Federal Government." *West Virginia* v. *United States*, 479 U.S. 305, 311 (1987). But the Court has repeatedly applied the state-action doctrine in proceedings commenced by the federal government. See, *e.g.*, *North Carolina State Bd. of Dental Exam'rs* v. *FTC*, 135 S. Ct. 1101, 1108-1109 (2015); *FTC* v. *Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 222 (2013); *Southern Motor Carriers*, 471 U.S. at 52-53. That approach reflects the Court's recognition that the state-action doctrine is a limit on the substantive coverage of the federal antitrust laws, not an immunity from suit.

Permitting immediate review of each state-action determination therefore would risk multiple appeals on the merits in a single case. There could even be multiple pretrial appeals if, for instance, a district court determined that the clear-articulation requirement was not satisfied, was reversed, and then determined on remand that the active-supervision requirement was not satisfied, prompting a second collateral-order appeal. See *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 474 (1978) (noting the "potential for multiple appeals" when a district court is reversed on one ground and then relies on a different ground on remand to reach the same result). And because a state-action determination is but a "step toward final disposition of the merits," *Cohen*, 337 U.S. at 546, permitting appellate review of each such determination would risk "burden[ing] appellate courts" with "immediate consideration of issues that may become moot or irrelevant by the end of trial," *Stringfellow*, 480 U.S. at 380; see *Johnson* v. *Jones*, 515 U.S. 304, 309 (1995) (explaining that exceptions to the final-judgment rule risk "additional, and unnecessary, appellate court work" by permitting "appeals that, had the trial simply proceeded, would have turned out to be unnecessary").

2. Petitioner maintains (Br. 18-27) that a state-action determination is separate from the merits of a Sherman Act claim. Petitioner's analysis assumes (Br. 19) that the "merits" of a Sherman Act claim consist only of issues bearing on whether the defendant engaged in "anticompetitive conduct"—that is, "what conduct actually occurred, whether that conduct had an anticompetitive effect and, if so, whether there was a legitimate business justification for the conduct." Petitioner thus assumes that, in a case like this one, the only "merits"

question is whether the defendant's conduct *would* violate the Sherman Act *if* that conduct were not attributable to the State.

Petitioner makes no effort to defend that assumption, and there is no sound basis for it. Petitioner contends that, "as in the qualified-immunity context, a court adjudicating a claim of state-action immunity assumes that the complaint states a valid claim." Pet. Br. 3 (citation omitted). As explained above, however, a judicial determination that the state-action doctrine applies in a particular case means that the Sherman Act does not prohibit the defendant's conduct. See pp. 16-18, *supra*. A finding that the challenged conduct is attributable to the State therefore necessarily means that the plaintiff has no "valid claim" under the federal antitrust laws.

In any event, even under petitioner's cramped view of the "merits" of a Sherman Act claim, a state-action determination would not be completely separate from the "merits." Application of the clear-articulation requirement, for example, often involves consideration of whether "anticompetitive effects" were the "inherent, logical, or ordinary result" of a state grant of authority to a nonsovereign actor. *Phoebe Putney*, 568 U.S. at 229. Because a State typically does not "catalog all of the anticipated effects" of such an authorization, *ibid.* (citation omitted), a court must construe the authorization "against the backdrop of federal antitrust law," *id.* at 231, in order to determine whether conduct taken pursuant to a particular state regulatory scheme would be "'necessarily'" or "inherently anticompetitive," *id.* at 230 (citation omitted).

That determination "involve[s] considerations enmeshed in" whether the defendant's own conduct was

anticompetitive, *Van Cauwenberghe*, 486 U.S. at 528, requiring elucidation of the relevant principles of federal antitrust law and the application of those principles to the type of conduct in question. Although an "extensive" inquiry into such issues might not always be necessary for purposes of the state-action doctrine, *id.* at 529, the inquiry is still "conceptually" linked to the rest of the case, *Johnson*, 515 U.S. at 314 (citation omitted). Thus, even under petitioner's conception of the "merits" of a suit like this one, the second requirement of the collateral-order doctrine is not satisfied.

C. An Order Determining That The Conduct Of A Public Entity Is Not State Action Is Not Effectively Unreviewable On Appeal From A Final Judgment

1. For an order to qualify for immediate appeal under the collateral-order doctrine, it must also "be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (citations omitted). To satisfy that requirement, an appellant must show that "review after trial would come too late to vindicate [an] important purpose" of the right asserted. *Johnson*, 515 U.S. at 312; see *Lauro Lines* v. *Chasser*, 490 U.S. 495, 499 (1989) ("insist[ing] that the right asserted be one that is essentially destroyed if its vindication must be postponed until trial is completed"). The inquiry also entails "a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." *Will*, 546 U.S. at 351-352 (citation omitted). The "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.*, 558 U.S. at 107 (quoting *Will*, 546 U.S. at 352-353).

No interest protected by the state-action doctrine is "irretrievably lost" by deferring appeal until after final judgment. *Richardson-Merrell*, 472 U.S. at 431. The state-action doctrine preserves the States' "ability to regulate their domestic commerce." *Southern Motor Carriers*, 471 U.S. at 56. It accomplishes that purpose by placing conduct attributable to the State beyond the reach of the Sherman Act, thereby ensuring that federal antitrust law does not prevent the achievement of the State's regulatory objectives. See pp. 16-18, *supra*. That interest "is fully vindicable on appeal from final judgment." *Digital Equip.*, 511 U.S. at 882; see *Swint*, 514 U.S. at 43 ("An erroneous ruling on liability may be reviewed effectively on appeal from final judgment."). If a district court determines that the defendant's conduct is not state action, and if the defendant is later held liable for a Sherman Act violation, the defendant can raise the state-action issue on appeal from final judgment and will be entitled to vacatur of that judgment if the court of appeals resolves the issue in the defendant's favor.

To be sure, if it is "eventually decided" that the district court erred in finding the state-action doctrine to be inapplicable, "petitioner will have been put to [the] unnecessary trouble and expense" of litigating to final judgment, and therefore will not receive the full practical benefit of a pretrial appellate decision ordering dismissal of the antitrust claims on the pleadings. *Lauro Lines*, 490 U.S. at 499. "It is always true, however, that 'there is value . . . in triumphing before trial, rather than after it.'" *Ibid.* (citation omitted). The possibility of avoiding a lengthy and burdensome trial may sometimes be a sound basis for a district court to decide as a matter of discretion to *certify* an issue for interlocutory

appeal. See 28 U.S.C. 1292(b) (specifying, as a precondition for certification, that "an immediate appeal" would "materially advance the ultimate termination of the litigation"). But if the prospect of such burdens by itself were sufficient to render a merits issue "effectively unreviewable on appeal from a final judgment," *Will*, 546 U.S. at 349 (citations omitted), the collateral-order doctrine would "swallow the rule" that the denial of a motion to dismiss (or motion for summary judgment) is not appealable as of right, *Richardson-Merrell*, 472 U.S. at 436 (citation omitted).

For the third requirement of the collateral-order doctrine to be satisfied, it therefore is not enough that "a ruling may be erroneous and may impose additional litigation expense." *Richardson-Merrell*, 472 U.S. at 436. The defendant must show that "a trial * * * would imperil a substantial public interest," *Will*, 546 U.S. at 353, as by establishing that it has an "immunity from suit," *Swint*, 514 U.S. at 43, or a "right not to be tried," *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989) (citation omitted). If the defendant is unable to "marshal[]" "some particular value of a high order" "in support of the interest in avoiding trial," *Will*, 546 U.S. at 352, and instead asserts a "mere defense to liability," its claim can be fully vindicated on appeal from a final judgment, *Swint*, 514 U.S. at 43 (citation omitted).

That distinction between immunities from suit and defenses to liability runs throughout this Court's decisions on the collateral-order doctrine. See *Midland Asphalt*, 489 U.S. at 801 ("There is a 'crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges.'") (citation omitted). In each case where the Court has recognized an immunity from suit, "'the essence' of the claimed right"

has been "a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524 (citation omitted); see *Osborn* v. *Haley*, 549 U.S. 225, 238-239 (2007) (Westfall Act, 28 U.S.C. 2679); *Puerto Rico Aqueduct*, 506 U.S. at 146 (Eleventh Amendment immunity); *Mitchell*, 472 U.S. at 525-527 (qualified immunity); *Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982) (absolute immunity); *Helstoski* v. *Meanor*, 442 U.S. 500, 508 (1979) (Speech or Debate Clause); *Abney*, 431 U.S. at 661 (Double Jeopardy Clause). Thus, "it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later." *Will*, 546 U.S. at 353 (citation omitted).

This Court has never described the state-action doctrine as protecting an antitrust defendant's interest in avoiding trial. Rather, the doctrine "protects the States' acts of governing." *Omni Outdoor Adver.*, 499 U.S. at 383; see *Southern Motor Carriers*, 471 U.S. at 56 ("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."). The concern behind the doctrine is not the burden that litigation may impose on entities (like petitioner) that do not partake of the States' sovereign immunity from private suits, but the "burden on the States' power to regulate" that would result if such entities were exposed to Sherman Act liability for implementing state regulatory preferences. *Dental Exam'rs*, 135 S. Ct. at 1109. A defendant's claim that the state-action doctrine renders its conduct lawful therefore is fully vindicable on appeal from final judgment.

2. Petitioner agreed below that, for purposes of the collateral-order doctrine, the "key question" was whether

the state-action doctrine confers an immunity from suit or a defense to liability. Pet. C.A. Br. 42-43. In this Court, however, petitioner describes (Br. 41) that distinction as "analytically unhelpful," and argues (Br. 30) that the analysis should turn instead on "the importance of the interests at stake."

That argument reflects a misunderstanding of the third prerequisite to immediate appeal under the collateral-order doctrine. In determining whether a particular interlocutory order is effectively unreviewable after trial, "[t]he crucial question * * * is not whether an interest is important in the abstract; it is whether deferring review until final judgment so imperils the interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk Indus.*, 558 U.S. at 108. This Court "routinely require[s] litigants to wait until after final judgment to vindicate valuable rights," including constitutional ones. *Id.* at 108-109; see, *e.g.*, *Flanagan*, 465 U.S. at 260, 262-263 (requiring criminal defendants to wait until after final judgment to vindicate their asserted Sixth Amendment rights). For example, the principle that vertical restraints are less likely to be anticompetitive than horizontal ones is undoubtedly an important tenet of antitrust law; but a defendant's contention that the district court misapplied that principle in denying a motion to dismiss would provide no basis for immediate appeal under the collateral-order doctrine.

Contrary to petitioner's contention (Br. 29-30), this Court's "recent collateral-order cases" do not depart from that approach. Petitioner relies on language using the words "important" and "importance" in describing the criteria for collateral-order review. See *Will*, 546 U.S.

at 355 (concluding that the "judgment bar" of the Federal Tort Claims Act (FTCA), 28 U.S.C. 2676, "has no claim to greater importance than the typical defense of claim preclusion"); *Digital Equip.*, 511 U.S. at 879 (concluding that the inclusion of "a provision in a private contract * * * is barely a prima facie indication that the right secured is 'important'"); *Lauro Lines*, 490 U.S. at 503 (Scalia, J., concurring) (concluding that a right to be sued only in the place specified by a contractual forum-selection clause "is not sufficiently important to overcome the policies militating against interlocutory appeals"). In each of those cases, however, the right at issue was understood to protect an interest in avoiding trial. See *Will*, 546 U.S. at 353 (a right to avoid "further litigation" under the "judgment bar"); *Digital Equip.*, 511 U.S. at 878 (an "immunity from trial" in a settlement agreement); *Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring) (a contractual "right not to be sued elsewhere than in Naples"). Those decisions make clear that, *even if* the pertinent right is a right to avoid litigation, the collateral-order doctrine's third requirement may not be satisfied if the right is insufficiently important. They do not suggest that the importance of a right by itself can make the challenged order effectively unreviewable on appeal.

3. Petitioner argues (Br. 28, 31-39) that, when the defendant is a public entity, the state-action doctrine protects the same interests as Eleventh Amendment immunity and qualified immunity. Petitioner contends (Br. 25 n.7) that, whatever rule might apply to private defendants, public entities should be entitled to immediate review of adverse state-action rulings before final judgment. That argument lacks merit.

a. Petitioner's contention rests on the premise (Br. 34) that public entities are owed special solicitude under the state-action doctrine. The state-action doctrine, however, is not concerned with particular defendants. See *Southern Motor Carriers*, 471 U.S. at 58-59 ("The success of an antitrust action should depend upon the nature of the activity challenged, rather than on the identity of the defendant."). Rather, the doctrine protects "the States' ability to regulate their domestic commerce." *Id.* at 56; see *Dental Exam'rs*, 135 S. Ct. at 1109 (explaining that the state-action doctrine prevents federal antitrust law from "impos[ing] an impermissible burden on the States' power to regulate"). It applies to nonsovereign actors—whether public or private—only insofar as their actions represent "an exercise of the State's sovereign power." *Dental Exam'rs*, 135 S. Ct. at 1110. That aspect of the doctrine reflects the Court's recognition that, if such actors could be subjected to federal antitrust liability for carrying out the State's policies, those policies would be rendered largely ineffectual. See *Southern Motor Carriers*, 471 U.S. at 56-57 (explaining that the state-action doctrine prevents an antitrust plaintiff from "frustrat[ing]" a state regulatory program "by filing suit against the regulated private parties"). The state-action doctrine thus applies to public and private entities alike, not for their own sake, but to preserve the *State's* regulatory prerogatives.

To be sure, the Court's state-action decisions have distinguished between private entities and certain public ones by holding that the former, but not the latter, are subject to the active-supervision requirement. See *Dental Exam'rs*, 135 S. Ct. at 1112-1113. That aspect of the doctrine, however, simply reflects the decreased risk that certain public entities, such as municipalities

and other local governmental units, might "pursue their own self-interest under the guise of implementing state policies." *Phoebe Putney*, 568 U.S. at 226. It is thus consistent with the understanding that the state-action doctrine exists to protect state regulatory prerogatives, rather than to serve the interests of the nonsovereign public and private entities that carry out the State's will. It does not reflect any greater concern for public entities as such, let alone for the burdens they might face in litigation.

b. Petitioner is also wrong in analogizing (Br. 32-35) the state-action doctrine to Eleventh Amendment immunity. See pp. 18-19, *supra*. Relying on *Puerto Rico Aqueduct*, petitioner asserts that the state-action doctrine protects the same "dignitary interests" that led this Court to treat denials of Eleventh Amendment immunity as immediately appealable. Pet. Br. 35 (quoting *Puerto Rico Aqueduct*, 506 U.S. at 146).

In *Puerto Rico Aqueduct*, however, the Court did not suggest that "dignitary interests" were at risk whenever a public entity was sued. If that were so, a public entity would arguably have a right of immediate appeal in any case in which it had lost a motion to dismiss or motion for summary judgment. Rather, the Court concluded that it was "[t]he very object and purpose of the 11th Amendment * * * to prevent the indignity of" a particular type of suit: a suit "subjecting *a State* to the coercive process of judicial tribunals at the instance of private parties." *Puerto Rico Aqueduct*, 506 U.S. at 146 (emphasis added; citation omitted).

Such dignitary interests are not implicated in the mine run of suits against public entities under the federal antitrust laws. See *Mohawk Indus.*, 558 U.S. at 107 (focusing on "the class of claims, taken as a whole").

Most significantly, they are not implicated in suits (including this one) against municipalities or similar governmental entities that, while public in character, "are not considered part of the State for Eleventh Amendment purposes." *Will* v. *Michigan Dep't of State Police*, 491 U.S. 58, 70 (1989) (citation omitted). Such dignitary interests likewise are not at issue in suits brought by the federal government, from which "States have no sovereign immunity." *West Virginia*, 479 U.S. at 311; see p. 19, *supra*.

The state-action doctrine thus extends to numerous antitrust suits that raise no Eleventh Amendment concern. To be sure, the state-action doctrine reflects solicitude for state prerogatives, by "embody[ing] * * * the federalism principle that the States possess a significant measure of sovereignty under our Constitution." *Dental Exam'rs*, 135 S. Ct. at 1110 (citation omitted). But the sovereignty-related interest that the doctrine aims to protect is "the States' power to regulate," *id.* at 1109, not "their privilege not to be sued," *Puerto Rico Aqueduct*, 506 U.S. at 147 n.5. Unlike Eleventh Amendment immunity from suit, a State's interest in enforcement of its regulatory program can be fully vindicated on appeal from a final judgment.

The principle that federal statutes should be construed to avoid unwarranted interference with traditional state prerogatives, moreover, is not limited to the antitrust laws. See, *e.g.*, *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991) (absent clear evidence of congressional intent, federal law should not be interpreted in a way that "would upset the usual constitutional balance of federal and state powers"). Defendants in federal lawsuits often invoke that principle in arguing that the statutes they are alleged to have violated do not encompass

their conduct. Nothing in this Court's decisions suggests that, when a defendant moves to dismiss on that basis, the denial of its motion is immediately appealable under the collateral-order doctrine.

c. Petitioner's analogy (Br. 35-39) between the state-action doctrine and qualified immunity is likewise mistaken. Indeed, the Court rejected a similar argument in *Will*. That case involved the judgment bar of the FTCA, which provides that a judgment in an FTCA suit brought against the United States "shall constitute a complete bar" to certain related actions brought against individual federal employees. 28 U.S.C. 2676. When the district court held that the judgment bar did not preclude particular *Bivens* claims brought against various federal customs agents, the agents sought immediate appeal of the court's ruling under the collateral-order doctrine. *Will*, 546 U.S. at 348-349; see *Bivens* v. *Six Unknown Named Agents of Fed. Bureau of Narcotics*, 403 U.S. 388 (1971).

In concluding that the district court's ruling was not immediately appealable, this Court acknowledged the argument that "if the *Bivens* action goes to trial the efficiency of Government will be compromised and the officials burdened and distracted, as in the qualified immunity case." *Will*, 546 U.S. at 353. In rejecting that argument, the Court explained:

> [I]f simply abbreviating litigation troublesome to Government employees were important enough for *Cohen* treatment, collateral order appeal would be a matter of right whenever the Government lost a motion to dismiss under the Tort Claims Act, or a federal officer lost one on a *Bivens* action, or a state official was in that position in a case under 42 U.S.C. § 1983, or *Ex parte Young*.

Id. at 353-354. The Court declined to adopt an approach under which Section 1291 "would fade out whenever the Government or an official lost an early round that could have ended the fight." *Id.* at 354. The fact that a public entity is the defendant thus is not, by itself, a sufficient ground for holding that the denial of a motion to dismiss would be effectively unreviewable on appeal from a final judgment.

Petitioner argues (Br. 37) that immediate review of state-action rulings would help save public entities from the "distraction and disruption" of further litigation. But the desire to prevent such litigation burdens is not the rationale for the state-action doctrine. Rather, the doctrine serves a different purpose, unrelated to shielding public but nonsovereign entities from the burdens of litigation. See pp. 23, 25, *supra*.

Any concerns about the ability of public entities to bear the monetary costs of antitrust litigation, moreover, may be addressed in other ways. Indeed, Congress has specifically addressed such concerns in the LGAA, which precludes recovery of antitrust damages in suits against local governments and their employees. 15 U.S.C. 35; see 15 U.S.C. 36 (similarly prohibiting the recovery of antitrust damages on "any claim against a person based on any official action directed by a local government"); Pet. App. 64a-65a (district court holds that the LGAA shields petitioner from antitrust damages in this case). But Congress has not conferred on such entities either an express immunity from suit or any special right to obtain interlocutory review of adverse state-action holdings, as it has in a different context. Cf. 15 U.S.C. 37(b) (providing that persons "involved in the planning, issuance, or payment of charitable gift annuities or charitable remainder trusts shall

have immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial"). Thus, while the state-action doctrine undoubtedly constitutes an important limit on the coverage of federal antitrust law, a public-entity defendant's claim that the district court misapplied the doctrine can be effectively vindicated on appeal from a final judgment.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

NOEL J. FRANCISCO
Solicitor General
MAKAN DELRAHIM
Assistant Attorney General
MALCOLM L. STEWART
Deputy Solicitor General
ANDREW C. FINCH
Principal Deputy Assistant Attorney General
FREDERICK LIU
Assistant to the Solicitor General
KRISTEN C. LIMARZI
ROBERT B. NICHOLSON
STEVEN J. MINTZ
Attorneys

DAVID C. SHONKA
Acting General Counsel
Federal Trade Commission

FEBRUARY 2018

APPENDIX

1. 15 U.S.C. 1 provides:

Trusts, etc., in restraint of trade illegal; penalty

Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal. Every person who shall make any contract or engage in any combination or conspiracy hereby declared to be illegal shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

2. 15 U.S.C. 2 provides:

Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court.

3. 28 U.S.C. 1291 provides:

Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292(c) and (d) and 1295 of this title.