

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

**SUPPLEMENTAL BRIEF
IN SUPPORT OF APPLICATION FOR STAY**

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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:

We initially submitted on December 7, 2020, an application for a stay in *Louisiana Real Estate Appraisers Board v. Federal Trade Commission*, which this Court docketed on December 9, 2020, after resubmission on December 8, 2020. *See* No. 20A107. We submit this short supplemental brief to provide notice of a subsequent development in the law related to the case.

Our application (at 11-12) describes a three-way disagreement among the courts of appeals on the rule that governs the appealability of an order denying state action antitrust immunity. Our case arises from the Fifth Circuit, which has the rule that government entities can immediately appeal, but private parties cannot. *See Martin v. Mem'l Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996). Our application notes (at 12-13) that the Eleventh Circuit necessarily has the same rule with respect to government entities because that court (alone) permits *all* parties—including even private entities—to take an immediate appeal. *See, e.g., Commuter Transp. Sys., Inc. v. Hillsborough County*, 801 F.2d 1286, 1290 (11th Cir. 1986) (permitting a county aviation authority's appeal from an order denying state action antitrust immunity); *Praxair, Inc. v. Fla. Power & Light Co.*, 64 F.3d 609, 611 (11th Cir. 1995) (same for private entity). Three other courts deny an immediate appeal even to governmental entities. The upshot is that the three-way disagreement can also be described as a 3-to-2 split over whether government entities can take an immediate appeal. Indeed, that was the circuit disagreement and question presented described in the petition

for certiorari this Court granted in *Salt River Project v. Tesla Energy Operations, Inc.*, No. 17-368, before it was dismissed in light of a settlement. 138 S. Ct. 1323 (2018).

With that background, we write to notify the Court that, shortly after we submitted our application for a stay, the Eleventh Circuit decided *sua sponte* to hold rehearing en banc in *SmileDirectClub, LLC v. Battle*, 969 F.3d 1134 (11th Cir. 2020) (No. 19-1227), *vacated*, --- F.3d ----, 2020 WL 7214148 (11th Cir. Dec. 8, 2020).^{*} The panel decision in that case—identified in our application—had granted an immediate appeal to private members of a state government dental board after those members were denied state action antitrust immunity, but it likewise denied those members’ claim of immunity on the merits. Neither party requested rehearing en banc, and so the question of interest to the whole court in that appeal has not been squarely identified. But Judge Jordan had concurred at the panel stage to suggest that, on the question of immediate appealability, the Eleventh Circuit should either adopt the rule that applies in the three circuits that always deny immediate appeals, or the rule in the Fifth Circuit that non-governmental entities cannot take an immediate appeal. *See SmileDirectClub*, 969 F.3d at 1147-48 (Jordan, J., concurring). And the third panel member had dissented on the ground that, in that particular case, the district court had reserved decision on the board members’ immunity pending further factual development, making its order truly interlocutory. *Id.* at 1148-49 (Tjoflat, J., dissenting).

^{*} The Eleventh Circuit’s order is attached to this filing.

It is thus possible, although not certain, that the Eleventh Circuit en banc will reach the issue that divides the courts of appeals and potentially alter the shape of the circuit split. But even if it does, it will not eliminate the disagreement entirely. The question that divided the courts of appeals in *Salt River* will remain a live one no matter what the Eleventh Circuit may hold. Indeed, because the state board itself was dismissed on sovereign immunity grounds in *SmileDirectClub* (which dismissal is not at issue in that appeal), that case concerns *only* the remaining private defendants, and so cannot have any direct impact on a case like this one (or *Salt River*), where the state entity is the defendant. And the latter question of board immunity (which our application presents) is likely to be of far greater significance to the States, and so is a more pressing candidate for this Court's consideration.

Finally, we note that future opportunities to consider the question presented may not present themselves. Because the circuits have made it more and more difficult to bring a direct appeal, fewer and fewer state boards are willing to run the gauntlet to this Court simply to win the prize of an appeal where they may still lose on the merits. Indeed, it is notable that neither party sought en banc review in *SmileDirectClub*, which suggests that there may not be an incentive to seek certiorari in that case (or other, similar cases) after the en banc Eleventh Circuit rules. Meanwhile, as our application notes, the issue itself has only become more pressing for state authorities after this Court's decision expanding state board liability in *North Carolina State Board of Dental Examiners v. FTC*, 574 U.S. 494 (2015). The intersection of that issue with the question of immediate appealability is uniquely

presented in this case. Accordingly, it is particularly important that this Court grant a stay in this case to at least permit the applicant to present a full case for plenary review in its petition for certiorari.

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 16, 2020

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ATTACHMENT

**IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**

No. 19-12227

SMILEDIRECTCLUB, LLC,

Plaintiff-Appellee,

versus

TANJA D. BATTLE,
in her official capacity as Executive Director of the
Georgia Board of Dentistry, et al.,

Defendants-Appellants.

On Appeal from the United States District Court
for the Northern District of Florida

Before WILLIAM PRYOR, Chief Judge, WILSON, MARTIN, JORDAN,
ROSENBAUM, JILL PRYOR, NEWSOM, BRANCH, GRANT, LUCK, LAGOA,
and BRASHER, Circuit Judges.

BY THE COURT:

A judge of this Court having requested a poll on whether this case should be reheard en banc, and a majority of the judges of this Court in active service having voted in favor, the Court sua sponte ORDERS that this case will be reheard en banc. The panel's opinion is VACATED.