No. 23-285

In the

Supreme Court of the United States

AMORY INVESTMENTS LLC, ET AL.,
Petitioners,

v.

TYSON FOODS INCORPORATED, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Is an interlocutory order denying a challenge to a judgment-sharing agreement among antitrust defendants immediately appealable under the collateral order doctrine given that (i) the effects of judgment-sharing agreements are not akin to any of the recognized rights to which the collateral order doctrine has been applied and (ii) Petitioners can appeal the order after a final judgment?

RULE 29.6 STATEMENT

Case Farms

Respondents Case Foods, Inc. and Case Farms LLC do not have any parent corporations, and no publicly held company owns 10% or more of their stock.

Respondent Case Farms Processing, Inc.'s parent corporation is Respondent Case Foods, Inc. No publicly held company owns 10% or more of Case Farms Processing, Inc.'s stock.

Claxton

Respondent Norman W. Fries, Inc. d/b/a Claxton Poultry Farms does not have any parent corporations, and no publicly held company owns 10% or more of its stock.

Foster Farms

Respondents Foster Poultry Farms LLC and Foster Farms, LLC's parent corporation is Foster Group Acquisition. Foster Group Acquisition LLC is 100% owned by Foster Group Parent LLC. Foster Group Parent LLC is 100% owned by ACR Foster Intermediate Group LLC. ACR Foster Intermediate Group LLC is 99.96% owned by ACR Group Foster Holdings LLC. ACR Group Foster Holdings LLC is owned 32.93% by ACR III Foster Holdings LLC and 65.86% by ACR IV Foster Holdings LLC. No publicly held company owns 10% or more of the stock of Foster Poultry Farms or Foster Farms, LLC.

Harrison Poultry

Respondent Harrison Poultry, Inc. does not have any parent corporations, and no publicly held company owns 10% or more of its stock.

House of Raeford Farms

Respondent House of Raeford Farms, Inc. does not have any parent corporations, and no publicly held company owns 10% or more of its stock.

Koch

Respondent Koch Foods Incorporated does not have any parent corporations, and no publicly held company owns 10% or more of its stock.

Respondent Koch Meat Co., Inc.'s parent corporation is Respondent Koch Foods Incorporated. No publicly held company owns 10% or more of Koch Meat Co., Inc.'s stock.

Respondents JCG Foods of Alabama, LLC and JCG Foods of Georgia, LLC's parent corporation is JCG Foods LLC. JCG Foods LLC's parent corporation is Koch Foods Incorporated. No publicly held company owns 10% or more of the stock of JCG Foods of Alabama, LLC or JCG Foods of Georgia, LLC.

Mar-Jac

Respondent Mar-Jac Holdings, Inc. does not have any parent corporations, and no publicly held company owns 10% or more of its stock.

Respondent Mar-Jac Poultry, LLC does not have any parent corporations, and no publicly held company owns 10% or more of its stock.

Respondent Mar-Jac AL/MS, Inc. does not have any parent corporation, and no publicly held company owns 10% or more of its stock.

Respondent Mar-Jac Poultry, Inc.'s parent corporation is Respondent Mar-Jac Holdings, Inc. No publicly held company owns 10% or more of Mar-Jac Poultry Inc.'s stock.

Respondents Mar-Jac Poultry AL, LLC and Mar-Jac Poultry MS, LLC's parent corporation is Respondent Mar-Jac Poultry, LLC. No publicly held company owns 10% or more of the stock of Mar-Jac Poultry AL, LLC or Mar-Jac Poultry MS, LLC.

Mountaire

Respondents Mountaire Farms Inc., Mountaire Farms, LLC, and Mountaire Farms of Delaware, Inc.'s parent corporation is Mountaire Corporation. No publicly held company owns 10% or more of the stock of Mountaire Farms, Inc., Mountaire Farms, LLC, or Mountaire Farms of Delaware, Inc.

Perdue

Respondent Perdue Farms, Inc. does not have any parent corporations, and no publicly held company owns 10% or more of its stock.

Respondent Perdue Foods LLC's parent corporation is Respondent Perdue Farms, Inc. No publicly held company owns 10% or more of Perdue Foods LLC's stock.

Pilgrim's Pride

Respondent Pilgrim's Pride Corporation's majority owner is JBS Wisconsin Properties, LLC, which is an indirect wholly-owned subsidiary of ultimate parent JBS S.A. JBS S.A. owns 10% or more of Pilgrim's Pride Corporation's stock.

Sanderson Farms

Respondent Sanderson Farms, LLC (f/k/a Sanderson Farms, Inc.)'s parent corporation is Sycamore Buyer LLC. Sycamore Buyer LLC is 100% owned by Walnut Sycamore Intermediate Holdings LLC. Walnut Sycamore Intermediate Holdings LLC is 100% owned by Walnut Sycamore NewCo LLC. Walnut Sycamore NewCo LLC is 36% owned by Walnut Sycamore HoldCo1 LLC and 64% owned by Walnut Sycamore Holdings LLC. Walnut Sycamore HoldCo1 LLC is 100% owned by Walnut Sycamore Holdings LLC. Walnut Sycamore Holdings LLC is 50% owned by Wayne Farms Holdings LLC and 50% owned by CMSC Poultry LLC. Wayne Farms Holdings LLC is 76% owned by Continental Grain Company and 24% owned by BBSB Investments, LLC. CMSC Poultry, LLC is 100% owned by Cargill Incorporated. No publicly held company owns 10% or more of Sanderson Farms, LLC's stock.

Respondents Sanderson Farms Foods, LLC (f/k/a Sanderson Farms, Inc. (Foods Division)), Sanderson Farms Production, LLC (f/k/a Sanderson Farms, Inc. (Production Division)), and Sanderson Farms Processing, LLC (f/k/a Sanderson Farms, Inc. (Processing Division))'s parent corporation is Sanderson Farms, LLC. No publicly held company

owns 10% or more of the stock of Sanderson Farms Foods, LLC, Sanderson Farms Production, LLC, or Sanderson Farms Processing, LLC.

Simmons

Respondents Simmons Foods, Inc. and Simmons Prepared Foods, Inc. do not have any parent corporations, and no publicly held company owns 10% or more of their stock.

Tyson Foods

Respondents Tyson Breeders, Inc., Tyson Chickens, Inc., and Tyson Poultry, Inc. are wholly-owned subsidiaries of Respondent Tyson Foods, Inc.

Respondent Tyson Foods, Inc. is a publicly-held corporation and does not have any parent corporations. No publicly-held corporation owns 10% or more of Tyson Foods, Inc.'s stock.

Wayne Farms

Respondent Wayne Farms LLC's parent corporation is Walnut Sycamore Intermediate Holdings, LLC. Walnut Sycamore Intermediate Holdings LLC is 100% owned by Walnut Sycamore NewCo LLC. Walnut Sycamore NewCo LLC is 36% owned by Walnut Sycamore HoldCo1 LLC and 64% owned by Walnut Sycamore Holdings LLC. Walnut Sycamore HoldCo1 LLC is 100% owned by Walnut Sycamore Holdings LLC. Walnut Sycamore Holdings LLC is 50% owned by Wayne Farms Holdings LLC and 50% owned by CMSC Poultry LLC. Wayne Farms Holdings LLC is 76% owned by Continental Grain Company and 24% owned by BBSB Investments, LLC. CMSC Poultry, LLC is 100% owned by Cargill

Incorporated. No publicly held company owns 10% or more of Wayne Farms LLC's stock.

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BRIEF IN OPPOSITION

Respondents respectfully submit that the Petition for a writ of certiorari should be denied.

INTRODUCTION

Petitioners ask this Court to grant certiorari and expand the reach of the collateral order doctrine in a manner that is both unprecedented and unwarranted. The Seventh Circuit recognized the narrow scope of the doctrine and properly declined to review an interlocutory order upholding the validity of a private judgment-sharing agreement among Respondents (the "JSA"). In addition to being legally correct, the decision concerning the appellate jurisdiction of the court below is not remotely worthy of certiorari: Petitioners do not dispute that the court below applied the correct legal standard; there is no split of authority on the jurisdictional question presented; the question rarely arises; and Petitioners concede that the question may become moot later in the case if Petitioners lose on the merits, which is precisely what happened to other Plaintiffs last month in the first phased trial in this case. There is simply no compelling reason for this Court to intervene and accept Petitioners' invitation to expand the scope of the collateral order doctrine.

As the Seventh Circuit held, the district court's order is not the rare type of order that satisfies the requirements of the collateral order doctrine. First, the collateral order doctrine is reserved for protection of only the most significant constitutional rights, such as the right to sovereign immunity or the protection against double jeopardy. The district court's order

does not implicate any issues of such substantial public importance. Although Petitioners contend that the JSA eliminates their right to pursue joint and several liability, the JSA does nothing of the sort, as the district court cogently explained. *See* Petition Appendix ("Pet. App.") 10a–11a. And Petitioners' self-proclaimed right to negotiate settlements without the constraints of a judgment-sharing agreement among defendants—agreements that have been deemed lawful by every court to consider their enforceability in the context of antitrust litigation, *see* Pet. App. 9a (collecting cases)—is not the type of "right" the collateral order doctrine is intended to protect.

Second, the district court's order is not "completely separate from the merits of the action." *Will v. Hallock*, 546 U.S. 345, 349 (2006) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144 (1993)). Without a judgment in Petitioners' favor, the JSA is not triggered and, therefore, it cannot possibly have any impact on Petitioners' ability to recover damages under a theory of joint and several liability.

Third, Petitioners' ability to challenge the JSA will not be irretrievably lost if they must wait until after a final judgment to appeal the district court's order. Petitioners speculate that the lawsuit will be settled prior to an appeal, thereby rendering the JSA issue moot. But the possibility that a plaintiff will voluntarily settle and abandon the right to appeal does not make an order unreviewable after final judgment.

The petition for certiorari should be denied.

STATEMENT OF THE CASE

A. Petitioners' Claims in the District Court

Petitioners are certain direct action plaintiffs in this consolidated antitrust litigation, which has been pending since 2016 in the United States District Court for the Northern District of Illinois. Plaintiffs (including Petitioners) allege that Defendants (including Respondents) conspired to restrict the supply of broiler chicken in the United States between 2008 and 2019 in violation of § 1 of the Sherman Act, 15 U.S.C § 1. They also allege that Defendants conspired to manipulate an index and rig bids for contracts related to the sale of broiler chicken.

In fall 2021, after extensive fact discovery, the district court divided the case into two tracks. Petitioners opted out of the first track (which did not include the bid-rigging allegations) and are in the second track of the case. The first track proceeded through summary judgment and a trial for a subset of the Track 1 Plaintiffs, which resulted in a complete defense verdict based on the jury's finding that there was no conspiracy. Two additional "Track 1" trials are scheduled to follow. Given the procedural structure of the case, motions to dismiss Petitioners' Track 2 complaint are still pending.

B. The Judgment-Sharing Agreement

Respondents are fourteen Defendants (the "JSA Defendants") who entered into the JSA. Each JSA signatory agreed to pay a proportionate share of any adverse judgment in this case based on the overcharges alleged against them and/or their market share. Pet. App. 7a–8a. The JSA provides that any

settling signatory can choose to be relieved of its contractual judgment-sharing obligations by entering into a qualified settlement agreement. *Id.* A qualified settlement agreement is one that: (a) provides that the settling Plaintiff(s) agree to reduce any future judgment against the non-settling signatories by the percentage of liability that the settling Defendant agreed to shoulder under the JSA; and (b) designates the other JSA signatories as third-party beneficiaries. *See id.* To effectuate the sharing and claim-reduction provisions, the JSA Defendants agreed to provide each other with a copy of any settlement agreement within seven days of its execution. *Id.*

As the district court explained, the JSA does not alter any rights or remedies available to the Plaintiffs. *Id.* at 10a–11a. Specifically, it does not prevent any Plaintiff from going to trial and seeking joint and several liability against each Defendant for treble damages. *Id.* To do so, the Plaintiffs would simply need to forego entering into a JSA qualified settlement. *Id.* The JSA also provides that any "party may settle a plaintiff claim, in whole or in part, at any time for monetary or non-monetary consideration or injunctive or other relief." *Id.* at 10a (quoting the JSA). While the JSA provides an avenue for the parties to negotiate a settlement in which Plaintiffs agree to reduce any future judgment by the settling Defendant's share under the JSA, the JSA leaves that decision entirely within the settling parties' control. *Id.* at 10a–11a. As the district court observed, the only thing that can limit the remedies available to Plaintiffs is their own knowing and voluntary agreement to relinquish some of those remedies as part of a negotiated settlement. *Id.* at 11a.

C. Petitioners' Motion to Preclude Enforcement of the JSA

On October 28, 2021, Petitioners moved to preclude enforcement of the JSA. *Id.* at 7a–8a. Petitioners argued that the JSA's provision for qualified settlement agreements violates federal and Illinois law because it supposedly "disables" joint and several liability, interferes with the goal of deterring antitrust violations, encourages the under-enforcement of antitrust penalties, and makes settling more difficult. *Id.* at 10a–13a. Petitioners also argued that the JSA Defendants' inclusion of the claim-reduction provisions in the JSA was, in and of itself, a Sherman Act § 1 violation because it was an agreement tantamount to a group boycott that unreasonably restrained trade or commerce. *Id.* at 12a. Petitioners further contended that the JSA's provision requiring the sharing of executed settlement agreements among the JSA Defendants unfairly discourages settlements in violation of the federal antitrust regime and the federal policy of encouraging settlement of antitrust cases. *Id.* at 13a.

D. The District Court's Order Upholding the JSA

On May 4, 2022, the district court denied Petitioners' motion. The court first recognized that the use of JSAs is "widespread" and "generally appropriate." *Id.* at 9a (quotation omitted). It further observed that "almost all of the district courts to have addressed language similar to that of [the sharing and claim-reduction provisions] at issue here have found its use to be lawful." *Id.* (citing cases).

The district court found that the JSA expressly allows for individual settlements on any terms—with or without the sharing and claim-reduction provisions—and was thus enforceable. *Id.* at 10a. The court rejected Petitioners' argument that the JSA violated federal and Illinois law by jeopardizing joint and several liability:

> The JSA simply provides incentives for defendants to reach an agreement with a plaintiff to give up some of the remedies it has if it had gone to trial, such as joint and several liability and treble damages. That's an unremarkable proposition. Parties on both sides of settlement agreements give up something and that is simply the nature of settlement agreements. If a plaintiff wants joint and several liability and treble damages on the table, that will always remain a possibility through the avenue of trial.

Id. at 10a–11a.

Further, the court noted that Congress has known about JSAs for decades "and could have passed a law to prohibit them if Congress believed such agreements served to undermine some statutory or regulatory scheme Congress thought needed to be protected." *Id.* at 11a.

Contrary to Petitioners' contention that the JSA itself violates the Sherman Act, the district court found that the agreement "is not a group boycott" and "does not discourage settlements." *Id.* at 12a. The court explained: "The JSA may make it more difficult

for a plaintiff to settle on more advantageous terms. But that is a product of the parties balancing the risks and costs of continuing to proceed with this litigation." *Id.*

Finally, the district court upheld the JSA's provision requiring the sharing of settlement agreements because "Plaintiffs are free to decide whether to insist on confidentiality of any settlement agreement. The JSA does not materially impair that right." *Id.* at 13a.

E. The Seventh Circuit's Order Dismissing Petitioners' Appeal for Lack of Jurisdiction

On June 3, 2022, Petitioners appealed from the district court's order. Three days later, the United States Court of Appeals for the Seventh Circuit ordered Petitioners to file a memorandum explaining why the appeal should not be dismissed for lack of appellate jurisdiction. Pet. App. 6a.

In response, Petitioners filed a "Docketing Statement" arguing that the Seventh Circuit had jurisdiction under the collateral order doctrine. *Id.* at 4a. The Seventh Circuit then ordered Petitioners to explain more fully why the collateral order doctrine applied in light of this Court's admonition that "we have meant what we have said; although the court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership." *Id.* (quoting *Hallock*, 546 U.S. at 350). On June 21, 2022, Petitioners filed a Jurisdictional Memorandum reiterating the arguments they made in their

Docketing Statement. Respondents filed a response at the Court's request on June 30, 2022.

On June 23, 2023, a Panel of the Seventh Circuit (Easterbrook, Wood, and Brennan, JJ.) unanimously dismissed the appeal. The court held:

> Arguments to extend collateral-order review beyond the few, well established categories of orders usually fail. *Herx v. Diocese of Forty Wayne-South Bend, Ind.*, 772 F.3d 1085, 1088-90 (7th Cir. 2014). Like so many other litigants who have tried to expand the small class of collaterally appealable orders, and mindful of the Supreme Court's admonition against expansion of the doctrine's selective membership, *see Will v. Hallock*, 546 U.S. 345, 350 (2006), the interests that appellants raise do not meet the doctrine's high bar.

Pet. App. 2a.

On September 20, 2023, Petitioners filed a petition for a writ of certiorari to review the Seventh Circuit's jurisdictional order.

REASONS FOR DENYING THE PETITION

I. The Petition Merely Seeks Review of an Application of a Correctly Stated Rule of Law.

The Petition does not contend that the Seventh Circuit applied the wrong legal standard when considering whether the district court's order satisfied the collateral order doctrine. Instead, Petitioners argue that the court below *misapplied* the legal standard when ruling that it lacked appellate jurisdiction. Pet. 9–23. That is reason alone to deny the Petition. "A petition for a writ of certiorari is rarely granted when the asserted error consists of . . . the misapplication of a properly stated rule of law." Sup. Ct. R. 10.

The Seventh Circuit's opinion entailed a straightforward application of this Court's precedents. The court cited one of this Court's cases setting forth the requirements for immediate appealability under the collateral order doctrine; recognized that this Court has admonished the lower courts of the doctrine's "selective membership"; and held that "the interests that appellants raise do not meet the doctrine's high bar." Pet. App. 2a.

There is no greater interest at stake in this Petition than the Seventh Circuit's application of the collateral order doctrine to the facts of this case. Indeed, not only did the Seventh Circuit apply the correct legal standard, but, as explained below, it applied that standard correctly. *See* Point IV, *infra*. The Petition is therefore not remotely worthy of this Court's consideration.

II. There Is No Split Among the Lower Courts.

Petitioners concede that there is no split among the Circuits concerning whether an order upholding a judgment-sharing agreement satisfies the collateral order doctrine. Pet. 24–25. The Petition does not cite a single decision disagreeing with the Seventh Circuit's holding that such an order is not immediately appealable as a collateral order, and Respondents are aware of none. There is thus no need for this Court to intervene to ensure uniformity in the law because the Circuits are not divided on the Question Presented.

Moreover, there is no split of authority concerning the district court's underlying decision that the JSA is enforceable. Although the question does not arise frequently, every court to consider whether to enforce judgment-sharing provisions like the ones at issue here has held them to be entirely lawful in the context of antitrust litigation. *See* Pet. App. 9a (collecting cases).

Petitioners argue that this Court has "repeatedly granted certiorari to consider important antitrust questions without waiting for conflicts among courts of appeals to emerge." Pet. 24–25. But the cases they cite—only one of which was decided in the last 45 years—are distinguishable because they were properly appealed after a final judgment was issued or, in one case, after an interlocutory order was certified for appeal by the district court. *See Nat'l Collegiate Athletic Ass'n v. Alston*, 141 S. Ct. 2141 (2021) (appeal from final post-trial judgment enjoining certain restraints on student-athlete compensation); *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322 (1955)

(appeal of an order granting a motion to dismiss to decide whether an action was barred by *res judicata*); *Nat'l Broiler Mktg. Ass'n v. United States*, 436 U.S. 816 (1978) (appeal of an order granting a motion to dismiss to decide whether a producer of broiler chicken qualified as a farmer under the Capper-Volstead Act); *Pfizer, Inc. v. Gov't of India*, 434 U.S. 308 (1978) (order certified for appeal by the district court to decide a novel question of whether a foreign sovereign could sue in United States courts for treble damages under antitrust laws).

This case is also unlike those cited by Petitioners because the question presented here is not an important question of *antitrust law*; instead, it concerns the scope of the collateral order doctrine. And the question decided by the district court concerning the enforceability of the JSA can be resolved, if necessary, in a post-judgment appeal. There is thus no reason for the Court to grant certiorari to consider expanding the purposefully narrow collateral order doctrine and excuse Petitioners from the final judgment requirement.[1]

III. The Decision Below Does Not Conflict with this Court's Precedent.

The Petition asserts that the Seventh Circuit's decision "conflicts" with this Court's precedent. Pet. 3,

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[1] For the same reason, this Court should reject Petitioners' unsupported speculation that if this Court does not intervene before a final judgment, the floodgates will open to this issue arising in "every antitrust case across the country . . . , dramatically tilting the settlement playing field in Section 1 cases in favor of defendants." Pet. 24. Even if other antitrust defendants might enter similar agreements between now and a

13–14. But it fails to identify any decision in which this Court held that an order sustaining a judgment-sharing agreement was immediately appealable under the collateral order doctrine. That is because no such decision exists. There is simply no conflict between the Seventh Circuit's jurisdictional ruling and this Court's prior decisions.

In an effort to manufacture a conflict, Petitioners cite decisions by this Court stating that there is a public interest in enforcing the antitrust laws. Pet. 12–13 (citing cases). But the Seventh Circuit did not hold otherwise. It merely held that the district court's order rejecting Petitioners' challenge to the JSA did not satisfy the high bar of the collateral order doctrine. Pet. App. 2a. The Seventh Circuit recognizes that the enforcement of antitrust laws is important as a general matter. *See, e.g.*, *Kochert v. Greater Lafayette Health Servs., Inc.*, 463 F.3d 710, 715 (7th Cir. 2006). Nevertheless, the order sustaining the JSA is not immediately appealable because it is not final and does not satisfy the elements of the collateral order doctrine. *See* Point IV, *infra*.

IV. The Seventh Circuit's Decision Was Correct.

Certiorari should be denied for the additional reason that the decision below was correct. This Court has "repeatedly stressed" that the collateral order doctrine is a "narrow" exception that "should stay that

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final judgment in this case—which there is no evidence will be the case—it would be irrelevant to the question of whether the district court's order is immediately appealable under the collateral order doctrine.

way and 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." *Digital Equip. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994) (internal citation and quotation omitted). As the Seventh Circuit correctly held, the district court's order is not one of the rare species that comes "within the narrow ambit of collateral orders" that this Court has deemed immediately appealable. *Id.* at 865.

"The requirements for collateral order appeal have been distilled down to three conditions: that an order '[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.'" *Hallock*, 546 U.S. at 349 (quoting *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 144). These requirements are "stringent." *Id.* at 349–50 (quoting *Digital Equip.*, 511 U.S. at 868). To meet them, an order must be "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

To decide these questions, this Court does not "engage in an 'individualized jurisdictional inquiry.'" *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473 (1978)). Instead, the Court focuses on "the entire category to which a claim belongs." *Digital Equip.*, 511 U.S. at 868. "As long as the class of claims, taken as a whole, can be adequately vindicated by other means, 'the chance that the litigation at hand

might be speeded, or a particular injustice averted,' does not provide a basis for jurisdiction . . . ." *Mohawk*, 558 U.S. at 107 (quoting *Digital Equip.*, 511 U.S. at 868). The collateral order doctrine, as this Court has put it, is a "blunt, categorical instrument." *Digital Equip.*, 511 U.S. at 883.

Petitioners do not (and cannot) argue that orders rejecting challenges to judgment-sharing agreements are a recognized category of immediately appealable collateral orders. Instead, they argue that the class of collateral orders should be expanded to include orders like the one issued by the district court. The Court should decline Petitioners' invitation to extend the collateral order doctrine beyond its narrow bounds because the district court's order fails the second and third prongs of the collateral order test. Specifically, the order did not resolve an important issue separate from the merits, and it is not effectively unreviewable on appeal from a final judgment.[2] The Seventh Circuit was, therefore, correct in holding that the district court's order does not "meet the doctrine's high bar." Pet. App. 2a.[3]

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[2] Whether the order meets the first requirement—that it conclusively determine the disputed issue—is immaterial because all three conditions must be met. *Hallock*, 546 U.S. at 349.

[3] Although Petitioners argue that the Seventh Circuit found only that the interests at issue were not sufficiently "important" to satisfy the collateral order doctrine (Pet. 11–23), the Seventh Circuit's reference to the doctrine's "high bar" was not limited to the "importance" of the interests at stake. Pet. App. 2a.

A. The District Court's Order Did Not Resolve an Important Question Completely Separate from the Merits of the Underlying Action.

1. The Interests Implicated by the District Court's Decision Are Not Sufficiently "Important" for Collateral Order Purposes.

"[T]he decisive consideration" in a collateral-order analysis 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*, 558 U.S. at 107 (quoting *Hallock*, 546 U.S. at 352–53). The "crucial question" in making that determination "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." *Id.* at 108. The result, then, is that litigants must almost always "wait until after final judgment to vindicate valuable rights, including rights central to our adversarial system." *Id.* at 108–09.

The district court's order does not implicate any substantial public interest that justifies a departure from the final judgment rule. "Prior cases mark the line between rulings within the class" of immediately appealable orders "and those outside." *Hallock*, 546 U.S. at 350. "On the immediately appealable side are orders rejecting absolute immunity, and qualified immunity[,] . . . a decision denying [a State's] claim to Eleventh Amendment immunity, and . . . an adverse

ruling [against a criminal defendant] on a defense of double jeopardy."[4] *Hallock*, 546 U.S. at 350 (internal citations omitted). Those rights are sufficiently important to warrant immediate appealability because they concern "honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." *Id.* at 352–53. None of the variations of Petitioners' purported rights discussed in the Petition is comparable.

On the other hand, this Court has *declined* to expand the collateral order doctrine to orders implicating rights far more fundamental than any of the purported rights the Petitioners claim here. *See, e.g.*, *id.* at 355 (rejecting as insufficiently substantial the government's right to appeal an order refusing to apply the judgment bar of the Federal Tort Claims Act); *Mohawk*, 558 U.S. 100 (holding that the right to attorney-client privilege is not sufficiently important to justify immediate appealability of orders requiring the disclosure of potentially privileged materials); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424 (1985) (holding that an order disqualifying counsel in a civil case, thus implicating a litigant's right to counsel of her choice, is not immediately appealable); *Flanagan v. United States*, 465 U.S. 259 (1984) (reaching the

[4] This Court also recently recognized that orders "requiring a State to take a convicted felon outside the prison's walls" are appealable collateral orders because they "create[] public safety risks and burdens on the State that cannot be remedied after final judgment." *Shoop v. Twyford*, 596 U.S. 811, 817 n.1 (2022).

same result in a criminal case notwithstanding the Sixth Amendment rights at stake).

Here, Petitioners will not lose any important rights if they must wait to appeal the district court's order in the normal course. Petitioners contend that the district court's decision impinges on their "important" right to pursue joint and several liability. Pet. 14–22. But, as the district court explained, that is simply not true: "[N]othing in the JSA destroys Plaintiffs' entitlement to the full remedies under the law for a trial verdict in their favor." Pet. App. 10a. Petitioners are free to pursue joint and several liability notwithstanding the JSA; the JSA merely "provides incentives for defendants to reach an agreement with a plaintiff to give up some of the remedies it has if it had gone to trial, such as joint and several liability and treble damages. That's an unremarkable proposition." *Id.*

Petitioners also take issue with two features of the JSA that they claim "are antithetical to the federal antitrust regime" because they supposedly "distort" the "playing field" for settlement negotiations: (1) the sharing and claim-reduction provisions; and (2) the JSA's provision requiring a settling JSA Defendant to provide the other JSA Defendants with a copy of any settlement agreement. Pet. 18–23. But as the district court found, the JSA does not impair Petitioners' ability to settle or "discourage settlements[,]" as evidenced by the fact that there have been many settlements in this case already. Pet. App. at 12a. Petitioners' arguments distill down to their belief that permitting JSAs in antitrust matters is bad policy, but

that is not sufficient to obtain the extraordinary relief of a collateral appeal.

In any event, this Court has rejected the argument that "the public policy favoring voluntary resolution of disputes" is sufficiently important for purposes of the collateral order doctrine. *Digital Equip.*, 511 U.S. at 881. In *Digital Equipment*, the parties had executed a settlement agreement that was later vacated by the district court, and this Court held that the order vacating the settlement was not immediately appealable. *Id.* at 865 (holding that "an order denying effect to a settlement agreement does not come within the narrow ambit of collateral orders."). If the right to preserve and enforce an executed settlement agreement is not sufficiently important for immediate appealability, then Petitioners' purported right to their desired "playing field" for settlement is not either.

2. The District Court's Order Is Not Completely Separate from the Merits of the Action.

The district court's ruling concerning the enforceability of the JSA is also not completely separate from the merits of Petitioners' underlying case. To be sure, the question of whether the JSA is enforceable is different from the question of whether Defendants in this case engaged in the alleged antitrust conspiracy. But the enforceability of the JSA is only relevant if, at some point in the future, Petitioners obtain a judgment in their favor that could conceivably be shared among the JSA Defendants under the terms of the JSA. Put differently, without a judgment in their favor, the JSA cannot possibly

have any impact on Petitioners' ability to obtain damages on a joint and several basis because they do not yet have any award. In that sense, then, the issue that the district court's order addresses—while different from the merits—is only relevant if this case ends with a specific outcome (a monetary judgment in Petitioners' favor against one or more JSA Defendants).

The district court's order, therefore, is enmeshed with the merits of this case in a way that truly separable collateral orders are not. Where, for example, a district court denies a civil defendant's claim of immunity, *see, e.g.*, *Nixon v. Fitzgerald*, 457 U.S. 731 (1982), or a criminal defendant's challenge to a prosecution on double jeopardy grounds, *Abney v. United States*, 431 U.S. 651 (1977), those questions do not depend on any particular outcome of the merits case. But where, on the other hand, the challenged order "involve[s] an assessment of the likely course of trial[,]" it is not adequately separable from the merits for purposes of the collateral order doctrine. *Richardson-Merrell*, 472 U.S. at 439–40. While the district court's order here does not involve a substantive assessment of the merits, its relevance and import depends on a specific and uncertain outcome on the merits. This Court, therefore, should not grant certiorari to expand the collateral order doctrine for an issue that would be more appropriately appealed (if it remains relevant) at the same time as the merits. *See Digital Equip.*, 511 U.S. at 868 (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") (internal citation omitted).

B. Petitioners Can Effectively Challenge the District Court's Order After a Final Judgment.

The district court's order is not immediately appealable for the additional reason that Petitioners will not lose their claim of error if they must wait to appeal until after final judgment. If Petitioners obtain a judgment against one or more JSA Defendants, and the JSA somehow interferes with their ability to recover damages jointly and severally from the JSA Defendant(s) against whom the judgment is obtained, Petitioners can appeal the district court's order at that time. No right will have been lost. If Petitioners lose at trial—as other Plaintiffs did last month in the first trial in this case—there would be no need for the Seventh Circuit to review the district court's order because there would be no judgment that could be shared under the JSA. Either way, there is no harm to Petitioners from waiting until final judgment to bring their appeal.

Petitioners argue that the possibility they will lose at trial makes the district court's order effectively unreviewable later in the case because the Seventh Circuit may deem the issue moot if the verdict is upheld. Pet. 11. But that argument confuses appellate review with appellate success. The fact that a jury may find that Petitioners (like the first group of Plaintiffs to go to trial) are not entitled to any relief is a reason to *deny*, not grant, certiorari. *See, e.g.*, *Mount Soledad Mem'l Ass'n v. Trunk*, 567 U.S. 944 (2012) (Alito, J., statement respecting the denial of petitions for writs of certiorari) (recognizing that where a petition comes to this Court "in an interlocutory

posture" and it "remains unclear" how any remedy imposed after final judgment will affect the petitioner, it is proper "to deny the petition[] for certiorari" as "not yet ripe for review by this Court") (quoting *Locomotive Firemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*)).

Petitioners also claim that the order cannot be effectively appealed because some Plaintiffs may settle, under terms that accord with the JSA, prior to a final judgment. Pet. 11. That voluntary choice on the part of certain Plaintiffs, however, does not render the order effectively unreviewable for purposes of the collateral order doctrine. Any Plaintiff who settles does so with the knowledge that it is abandoning its ability to appeal the order as part of the settlement. The only right implicated in this scenario is the Plaintiffs' right to decide whether to accept the terms of a settlement.

Ultimately, neither the JSA nor the district court's order interferes with any of Petitioners' rights—including their right to a post-judgment appeal. The district court's order, therefore, is not "effectively unreviewable" for purposes of the collateral order doctrine.

CONCLUSION

For the foregoing reasons, Respondents respectfully request that this Court deny the Petition for a writ of certiorari.

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