No. 20-1018

IN THE

Supreme Court of the United States

LOUISIANA REAL ESTATE APPRAISERS BOARD,

Petitioner,

v.

UNITED STATES FEDERAL TRADE COMMISSION,

Respondent.

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

REPLY BRIEF FOR THE PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

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This Court decided once before that the question presented warrants review. *See Salt River Project Agric. Improvement & Power Dist. v. SolarCity Corp.*, 138 S. Ct. 499 (2017). And this petition cleanly presents another bite at that apple, allowing this Court to resolve a lingering division among the lower courts. The FTC's main opposition to certiorari is to dispute the merits of allowing state entities to immediately appeal denials of state-action immunity. But that just demonstrates how certworthy this case is, especially given that twenty-three States have now urged this Court to grant certiorari and adopt the exact opposite position from the one the federal government wants because "[a]ny other result threatens the very principles of Federalism embodied in this Court's decision in *Parker* [*v. Brown*, 317 U.S. 341 (1943)]." States Br. 2. In short, this petition concededly presents an important federalism question this Court has identified as certworthy and that is sharply disputed between the States and federal antitrust authorities. That is the precise kind of question this Court exists to resolve.

The FTC's main non-merits argument against certiorari is that the circuits *might* be converging towards the view that denials of state-action immunity are never appealable. *See* Opp. 18-21. But that again is a better reason to grant review than to deny it. In *Salt River*, this Court undertook to review exactly that unsound position from the Ninth Circuit. And having lost the ability to review that rule, it now confronts a situation where, if the courts of appeals are heading towards that incorrect result, it becomes less likely

that vehicles presenting this question will reach this Court again. *See infra* p.7.

As this case demonstrates, the government's preferred rule leaves the FTC free to force parties that are likely immune under *Parker* into settlements when they cannot afford the disruption or cost of a trial.[1] A district court defendant gets at least one neutral decisionmaker; but in FTC cases like this one, the only one who will conclude before trial that a state board like petitioner is not an immune state actor is the Commission that decided to sue it in the first place. Meanwhile, having seen the result here, few if any state boards will bother bringing a petition all the way to this Court seeking an immediate appeal, when victory in that multi-year fight still means they might lose. So if this Court is going to hear this important question on which it has already granted certiorari once and half the States in the Union are now urging review, it should do so now.

I. Certiorari Is Warranted to Correct the Decision Below.

The FTC's opposition begins with the merits, arguing that the Fifth Circuit was right to conclude that state-action immunity is neither "completely separate from the merits of the action," nor "effectively unreviewable on appeal from a final judgment," for purposes of the collateral-order doctrine. *Richardson-Merrell Inc. v. Koller*, 472 U.S. 424, 431 (1985) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)). These arguments are incorrect as we explain

[1] Despite the pendency of this petition for certiorari, the FTC plans to commence the hearing from which LREAB claims immunity on April 20, 2021.

below. But, more importantly, we now know for certain that *at least* twenty-three States squarely disagree with the federal government on this important question of federalism that has also divided many courts and judges, demonstrating that this question (still) merits this Court's review without regard to who is right.

1. Contrary to the FTC's assertion, denials of state-action immunity "resolve important questions separate from the merits." *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995). The FTC argues that because state-action "immunity" derives from the boundaries of the federal antitrust laws themselves, a determination that a State or its entity is "immune" is actually a merits determination. Opp. 13-16. That argument misunderstands the question the collateral-order doctrine is asking.

The key point is that answering the antecedent question whether a state entity is immune from suit does not entail knowing or deciding anything about the underlying dispute over whether a defendant's actions violated federal antitrust law. Pet. 28-29. Indeed, in almost every conceivable case (including this one), *none* of the facts elucidated at trial on the latter question would have any bearing on the former. So this question should be easily resolved in petitioner's favor.

The government's sole response is to suggest that the operative question concerns the technical (or semantic) classification of state-action immunity as either an "immunity" or a "merits issue," rather than the practical ability of the courts to segregate the issue from the underlying merits. But this Court already rejected that view in the seminal case, explaining that

this inquiry is "practical rather than … technical." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949). That is why, for example, this Court treats class certification as "enmeshed in the factual and legal issues comprising the plaintiff's cause of action" for collateral-order purposes, *Coopers & Lybrand*, 437 U.S. at 469 (citation omitted), even though class certification is obviously not a "merits question" of any kind. And even if this Court had not already adopted this analytic approach, *Cohen*'s teaching would be right because the FTC's alternative theory is manifestly question begging: A court cannot usefully decide whether a question is separate from the merits just by asking whether we should call it a "merits question."

It is thus beside the point to argue about what name *Parker* immunity should be given. But if it did matter, we would note that—while the FTC turns cartwheels to avoid labeling *Parker*'s holding an "immunity," Opp. 2—this Court called it an "immunity" *forty times* in its recent *North Carolina Dental* decision. *See generally N.C. State Bd. of Dental Exam'rs v. FTC*, 574 U.S. 494 (2015).

2. For similar reasons, the FTC is wrong to say that the denial of state-action immunity is effectively reviewable after final judgment. It grounds this argument in the proposition that the purpose of state-action immunity is not "avoiding the expense or burdens of litigation," but rather "'protect[ing] the States' acts of governing.'" Opp. 16 (quoting *City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 383 (1991)). It then baldly concludes that the interest in governing "is fully protected by review after the conclusion of judicial or administrative proceedings." *Id.* But how can that be true unless we assume (as the FTC does) that

it is right about whether the defendant is a state entity in the first place? Faced with overwhelming litigation costs, government boards will just stop governing (as LREAB has done here), no matter how confident they are that their state-action immunity defense will someday prevail before a neutral decisionmaker. Or, more likely, they will settle and make the Commission's preferred policy the public policy of their State—in which case no neutral decisionmaker will *ever* see this question. Either result involves a federal incursion on the authority of state government officials over their state policies, imperiling the *precise* interest in unfettered local governance that the Court identifies as the purpose of *Parker* immunity.

3. The FTC also endorses two other reasons the Fifth Circuit gave for denying an appeal here. These are easily rejected.

a. First, the Government wrongly argues that concerns about disrupting state governance "are absent where, as here, petitioner 'invokes the state action doctrine as a private party.'" Opp. 17 (citing Pet. App. 11a). This argument manifestly assumes its own conclusion. LREAB is invoking the sovereign interests of the State as a state agency. The FTC's contrary conclusion is, of course, the very issue on which LREAB is seeking a collateral appeal here. An appealability rule that assumes the lower decisionmaker is correct is not an appealability rule at all because it necessarily denies an appeal in every case. The FTC could conclude that the entire state apparatus of the Commonwealth of Virginia is controlled by active market participants and, under this view, that error will have to get sorted

out on final review, because the courts must (conveniently) assume for now that Virginia is "invok[ing] the state action doctrine as a private party."

b. Second, whether "antitrust proceedings were commenced by the FTC rather than a private party," is irrelevant. Opp. 17-18. The contrary proposition is drawn from sovereign immunity doctrine, which often allows federal officials to pursue federal law claims against States where Congress has chosen not to prohibit them. But the whole premise of *Parker* immunity is that Congress has *not* authorized *anyone* to pursue state actors under the federal antitrust laws. And that includes the FTC. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 635 (1992) (applying existing state-action immunity doctrine to FTC Act case). It would thus be a radical departure from precedent to hold that the FTC (alone) *can* pursue state actors under federal antitrust law, so long as courts can immunize those state entities from liability long after the fact.

II. The Eleventh Circuit Is Unlikely to Resolve the Circuit Conflict.

Next, the FTC asks this Court to forestall its review because the Eleventh Circuit granted rehearing en banc to reconsider its approach to appealability of denials of state action immunity in *SmileDirectClub, LLC v. Battle*, 969 F.3d 1134 (11th Cir.), *reh'g en banc granted*, 981 F.3d 1014 (11th Cir. 2020). But even assuming the *en banc* court reverses long-standing precedents in that case, the Commission vastly overstates the effect that would have on the need for this Court's intervention.

1. First, the posture of *SmileDirectClub* means that it is exceedingly unlikely to resolve the circuit

conflict presented here. The appellants in that case were the *individual members* of the state board; the board itself had been dismissed under sovereign immunity. 969 F.3d at 1137. The issue presented here, by contrast, concerns the *public* entities themselves. And that distinction makes the difference, because the board has the ongoing interest in enforcing state policies for its local markets without federal antitrust interference. Moreover, given that the Eleventh Circuit has thus far permitted appeals by even *private* entities, it seems unlikely that court will swing to the entirely other side of this issue and bar even governmental entities from immediately appealing—in a case that does not even present that question.

2. Second, even if the courts do move towards the Ninth Circuit's position that state-action immunity denials are never appealable, that is a good reason to grant review now rather than pretermitting it. That is because this may be one of the last chances this Court has to correct that errant rule—a rule this Court has already once decided merits its review. *See Salt River*, *supra*. As more circuits adopt the position that state-action immunity determinations are unappealable, it will become far less likely that state entities will endure the disruption, expense, and risks associated with bringing a petition to this Court. That is especially true because (1) they will know that another entity has tried and failed, and (2) all they can win is the right to an appeal they could still lose. And while they are hoeing that long row, the FTC could easily moot such a petition by forging ahead with its trial while it is pending—as it is trying to do in this very case. Accordingly, if this Court is ever going to hear this issue, it should do so now.

III. The Government's Vehicle Arguments Are Meritless.

Finally, the FTC tries two vehicle arguments that collapse under even modest scrutiny.

1. First, that this case arises from an APA suit rather than a district court dismissal is irrelevant. As the FTC recognizes, the Fifth Circuit assumed below that the APA's final agency action requirement mirrors the collateral-order doctrine, and so adopted a rule that would govern *both* FTC proceedings and district court cases. That rule is now squarely before this Court, and its decision will resolve the lingering disagreements among jurists and the state and federal governments no matter what venue is involved. That makes this case a *good* vehicle for considering the question presented.

Moreover, the FTC is wrong that "this Court has never addressed whether the APA's reference to the finality of agency action" embraces the collateral-order doctrine. Opp. 22. In *FTC v. Standard Oil Co.*, 449 U.S. 232, 246 (1980), this Court applied the collateral-order doctrine in a final-agency action case and held that the issue presented there was non-final because it "[wa]s a step toward, and will merge in, the Commission's decision on the merits." Others have recognized that this is the correct analytical approach. *See, e.g.*, *DRG Funding Corp. v. Sec'y of Hous. & Urb. Dev.*, 76 F.3d 1212, 1220 (D.C. Cir. 1996) (Ginsburg, J., concurring); *Rhode Island v. EPA*, 378 F.3d 19, 24-25 (1st Cir. 2004).

And notably, while the FTC disputes in passing whether *Standard Oil* resolves this issue (Opp. 22), it does not bother to provide a *reason* why this Court

would use something other than the collateral-order doctrine to determine when an agency order is final enough for review. Nor does it suggest what an alternative test might look like. And that is because there is no precedential basis we can discern for any other approach. There is thus no reason to believe that the Fifth Circuit would suddenly discover a novel alternative on remand. And *even if it did*, that would still not impair the conclusiveness of this Court's resolution of the certworthy question presented here.

2. The FTC's second supposed vehicle argument is that, if this Court reverses, the Fifth Circuit might still hold on remand that the FTC Act precludes *all* APA review of final FTC actions other than cease-and-desist orders. Again, this is not much of a vehicle problem even if it were right, because it will have no effect on this Court's resolution of the question presented. But it is not right.

APA Section 704 provides that "final agency action *for which there is no other adequate remedy in a court* [is] subject to judicial review." 5 U.S.C. §704. And no other adequate court remedy exists for an FTC final action denying state-action immunity before trial, because the FTC Act only permits direct review in the courts of appeals for "cease and desist" orders. 15 U.S.C. §45(c). Indeed, in this very case, LREAB asked the Fifth Circuit to directly review this order under the FTC Act and it declined, suggesting that LREAB try an APA action instead. *See La. Real Estate Appraisers Bd. v. FTC*, 917 F.3d 389, 391 (5th Cir. 2019). That at least makes it unlikely that the Fifth Circuit will conclude on remand that the FTC Act provision it was considering before had always foreclosed the very APA action that court suggested.

Meanwhile, this Court's *Standard Oil* decision strongly signals that the FTC's argument is incorrect. In *Standard Oil*, this Court reviewed under the APA whether the issuance of an administrative complaint was a "'final agency action' subject to judicial review before administrative adjudication concludes." 449 U.S. at 233. It decided that it was not (applying the collateral-order doctrine). *See supra* p.8. But under the FTC's position, it should never have done so, because the federal courts lack jurisdiction to consider such FTC actions under the APA even if they are final agency actions. Were that right, this Court would not have issued an opinion on the merits in *Standard Oil* at all. But it did, specifically noting its jurisdiction under 5 U.S.C. §704 and 28 U.S.C. §1331. *Standard Oil*, 449 U.S. at 235 n.4.[2]

The reality is that Section 5(c) of the FTC Act—which channels review of only cease-and-desist orders to the courts of appeals—does not include a comprehensive system for judicial review of FTC actions that expressly or impliedly precludes APA review of other orders, and so APA review does not "duplicate existing procedures for review of agency action." *Bowen v. Massachusetts*, 487 U.S. 879, 903 (1988) (cited Opp. 23). The FTC's sole contrary argument requires an incomplete citation to what appears to be exclusivity language in FTC Act Section 5(d). Read in full, that section is just a procedural provision about who has jurisdiction when the record is filed with the circuit court in a cease-and-desist-order case. *Compare* Opp.

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[2] *See also Soundboard Ass'n v. FTC*, 888 F.3d 1261, 1267-69 (D.C. Cir. 2018) (applying APA to FTC), *cert. denied*, 139 S. Ct. 1544 (2019); *LabMD, Inc. v. FTC*, 776 F.3d 1275, 1278 (11th Cir. 2015) (same).

2, 22, *with* 15 U.S.C. §45(d) ("*Upon the filing of the record with it* the jurisdiction of the court of appeals of the United States to affirm, enforce, modify, or set aside orders of the Commission shall be exclusive") (emphasis added).

Nor does the FTC Act impliedly bar APA review. The FTC invokes *Thunder Basin Coal Co. v. Reich*, 510 U.S. 200 (1994), for that proposition. Opp. 23. But this Court held there that the Mine Act foreclosed APA review precisely because that Act channeled review of *all* final orders to "the appropriate court of appeals … whose jurisdiction 'shall be exclusive.'" 510 U.S. at 207-08. Unlike the Mine Act's comprehensive judicial-review provision, the FTC Act grants direct review *only* of cease-and-desist orders, and so only excludes APA review of *those* orders in the district courts. The government's far broader reading of *Thunder Basin* would read the FTC Act to radically restrict the scope of judicial review, and fly in the face of this Court's consistent admonition that it "has so long applied a strong presumption favoring judicial review of administrative action." *Weyerhaeuser Co. v. U.S. Fish & Wildlife Serv.*, 139 S. Ct. 361, 370 (2018) (quoting *Mach Mining, LLC v. EEOC*, 575 U.S. 480, 489 (2015)). To say the very least, the FTC's speculation that the Fifth Circuit will buy this radical argument should give this Court no pause in resolving the important question presented here.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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