

# State Action on Appeal: *Parker* Immunity and the Collateral Order Doctrine in Antitrust Litigation

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## ABSTRACT

The collateral order doctrine is perhaps the most significant exception to the general rule that only final judgments are appealable. The doctrine is particularly important in antitrust litigation when a defendant asserts state action immunity, often referred to as *Parker* immunity. However, the circuit courts have struggled with the question of whether a denial of *Parker* immunity is immediately appealable as a collateral order. This unsettled procedural issue is further complicated by the fact that the substantive law on *Parker* immunity differs depending on the entity asserting state action.

This Article argues that a governmental entity that is deemed part of a state should be able to use the interlocutory appeal process to obtain review of an order denying *Parker* immunity. On the other hand, government defendants deemed not part of the state, as well as private entities, should not be able to immediately appeal an adverse state action determination under the collateral order doctrine. In addition, this Article explores the collateral order doctrine's applicability in FTC adjudicatory proceedings. Cases such as *North Carolina State Board of Dental Examiners v. FTC* and *FTC v. Phoebe Putney Health System, Inc.* demonstrate the Supreme Court's renewed interest in the scope of state action immunity. However, the question of whether a denial of *Parker* immunity is immediately appealable under the collateral order doctrine is also an important issue and is addressed in this Article.

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## INTRODUCTION

The state action doctrine<sup>1</sup> immunizes certain conduct that is the intentional or foreseeable result of state or local government policy from the federal antitrust laws.<sup>2</sup> Although it may seem obscure,<sup>3</sup> the state ac-

1. It merits brief comment that this Article only discusses the antitrust state action doctrine. The concept of state action in the Fourteenth Amendment's Equal Protection Clause is different from and much broader than the antitrust state action doctrine. See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW* ¶ 221a, at 47 (4th ed. 2013) (emphasizing that “conclusions of ‘state action’ in the Fourteenth Amendment context should never be used to support a finding of ‘state action’ in the antitrust context”); see also Herbert Hovenkamp, *Federalism and Antitrust Reform*, 40 U.S.F. L. REV. 627, 628 n.15 (2006) (asserting that the antitrust state action doctrine and Fourteenth Amendment state action doctrine “are rarely confused”).

2. 1 ABA SECTION OF ANTITRUST LAW, *ANTITRUST LAW DEVELOPMENTS* 1271 (7th ed. 2012) [hereinafter *ANTITRUST LAW DEVELOPMENTS*].

3. Indeed, at one point in time the state action doctrine was a minor part of U.S. antitrust law. See Richard Quaresima, Comment, *Antitrust Law—State Action Doctrine—State Agencies Exempt*

tion doctrine is a critical part of antitrust law.<sup>4</sup> The doctrine is important because it implicates two key constitutional principles—federalism and state sovereignty.<sup>5</sup> In addition, the doctrine has a significant impact when state or local governments adopt economic or social policies that conflict with open competition.<sup>6</sup>

After remaining largely dormant, the state action doctrine has seen a resurgence in recent years.<sup>7</sup> For example, in 2013, the United States Supreme Court ruled on the applicability of the state action doctrine to a hospital merger in *FTC v. Phoebe Putney Health System, Inc.*<sup>8</sup> It was the first time in twenty years that the Supreme Court heard a case on the state action doctrine.<sup>9</sup> In 2015, the Supreme Court decided *North Carolina State Board of Dental Examiners v. FTC*,<sup>10</sup> another prominent case involving the state action doctrine.<sup>11</sup> Despite an extended period during

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from the Active Supervision Prong of the Midcal Test. *Hass v. Oregon State Bar*, 883 F.2d 1453 (9th Cir. 1989), *Cert. Denied*, 110 S. Ct. 1812 (1990), 22 RUTGERS L.J. 525, 529 (1991) (highlighting that the “state action doctrine languished in relative obscurity for the first thirty years of its existence”). In fact, only one Supreme Court case in over three decades directly discussed the state action doctrine since it was first articulated in 1943. *See Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 389, *reh’g denied*, 341 U.S. 956 (1951) (addressing state action issues in dicta).

4. *See* John E. Lopatka & William H. Page, *State Action and the Meaning of Agreement Under the Sherman Act: An Approach to Hybrid Restraints*, 20 YALE J. ON REG. 269, 272 (2003) (stating that many “scholars have labored over the nuances of state action immunity”).

5. *See* *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991) (asserting the state action doctrine relies on “principles of federalism and state sovereignty”).

6. *See, e.g.*, *New Motor Vehicle Bd. of Cal. v. Orrin W. Fox Co.*, 439 U.S. 96, 111 (1978) (enforcement of state statute allowing existing auto dealers to obstruct new dealerships within their markets protected under state action doctrine); *Kay Elec. Coop. v. City of Newkirk*, 647 F.3d 1039, 1041 (10th Cir. 2011) (municipality’s tying of electric and sewer services not protected under the state action doctrine).

7. *See* ABA SECTION OF ANTITRUST LAW, STATE ACTION PRACTICE MANUAL 5 (2d ed. 2010) [hereinafter STATE ACTION PRACTICE MANUAL] (noting that the doctrine is “a significant component of recent jurisprudence regarding the appropriate balance of power between both state and national governments and the judicial and legislative branches”); *The Patient Protection and Affordable Care Act and the Consequent Impact on Competition in Healthcare: Hearing Before the H. Comm. on the Judiciary*, 113th Cong. 10 (2013) (statement of Professor Thomas L. Greaney, available at [http://judiciary.house.gov/\\_files/hearings/113th/09192013\\_2/Greaney%20Testimony.pdf](http://judiciary.house.gov/_files/hearings/113th/09192013_2/Greaney%20Testimony.pdf) (proclaiming that the doctrine is currently “[a]mong the important issues on the antitrust agenda”).

8. *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1007 (2013).

9. The last time the Court decided a state action case was in 1992. *See* *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 625 (1992).

10. *See* *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101 (2015).

11. *See* Shepard Goldfein & James Keyte, *Court Demands State Oversight Over Agencies for Antitrust Immunity*, N.Y. L.J., Mar. 12, 2015, at 1, available at <https://www.skadden.com/sites/default/files/publications/070031520Skadden.pdf> (stating, “As a result of the court’s opinion [in *North Carolina State Board of Dental Examiners*], many industries . . . may have to rethink their professional regulatory regimes currently in place nationwide.”); Jacob Gershman, *Cases on Securities Fraud, Teeth-Whitening, Prisoner Beards Enter Supreme Court’s Docket*, WALL ST. J. L. BLOG

which few state action cases were heard by the Supreme Court, the occasions for considering the state action doctrine in antitrust litigation “are numerous and diverse.”<sup>12</sup> Accordingly, the Federal Trade Commission (FTC) has recently increased enforcement actions involving the state action doctrine.<sup>13</sup> Although many Supreme Court decisions have defined the meaning and limits of the state action doctrine,<sup>14</sup> these decisions have left “a great deal of confusion about the source and the scope” of the doctrine.<sup>15</sup>

One area of confusion regarding the scope of the state action doctrine is whether an order denying a motion to dismiss an antitrust claim under the doctrine is immediately appealable as a collateral order.<sup>16</sup> Federal courts of appeals have grappled with this issue in a variety of ways, and a circuit split has emerged. The Fourth<sup>17</sup> and Sixth<sup>18</sup> Circuits held that a ruling denying a motion to dismiss an antitrust claim under the state action doctrine is not immediately appealable as a collateral order. On the other hand, the Fifth<sup>19</sup> and Eleventh<sup>20</sup> Circuits held that such a ruling is immediately appealable as a collateral order. However, the Fifth Circuit held that only governmental defendants asserting the state action

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(Mar. 3, 2014, 12:40 PM), <http://blogs.wsj.com/law/2014/03/03/cases-on-securities-fraud-teeth-whitening-prisoner-beards-enter-supreme-courts-docket/>.

12. AREEDA & HOVENKAMP, *supra* note 1, ¶ 221a, at 47.

13. See J. Thomas Rosch, Commissioner, Fed. Trade Comm’n, Returning the State Action Doctrine to Its Moorings (Oct. 3, 2012), available at [http://www.ftc.gov/sites/default/files/documents/public\\_statements/returning-state-action-doctrine-its-moorings/121003stateaction.pdf](http://www.ftc.gov/sites/default/files/documents/public_statements/returning-state-action-doctrine-its-moorings/121003stateaction.pdf) (revealing that “the FTC has sought to clarify the state action doctrine by bringing administrative and federal court cases [and] filing amicus briefs”).

14. See STATE ACTION PRACTICE MANUAL, *supra* note 7, at 9–14, 15 (examining the “flurry of Supreme Court cases in the mid- to late 1970s” on the state action doctrine and observing that the “abundance of state action cases in the 1970s demonstrated the importance of the doctrine”); Steven Semeraro, *Demystifying Antitrust State Action Doctrine*, 24 HARV. J.L. & PUB. POL’Y 203, 210 (2000) (noting that “the Court decided more than a dozen antitrust state action cases” from the mid-1970s through the early 1990s).

15. David McGowan & Mark A. Lemley, *Antitrust Immunity: State Action and Federalism, Petitioning and the First Amendment*, 17 HARV. J.L. & PUB. POL’Y 293, 293 (1994); see STATE ACTION PRACTICE MANUAL, *supra* note 7, at 109 (stating that the “doctrine has presented a number of recurring policy issues since its creation”); see also FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 57 (2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf> (recognizing that “Supreme Court case law has left open many important questions regarding the scope of the state action doctrine”).

16. See AREEDA & HOVENKAMP, *supra* note 1, ¶ 228e, at 245–46; STATE ACTION PRACTICE MANUAL, *supra* note 7, at 156–60.

17. S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 442 (4th Cir. 2006).

18. Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 568 (6th Cir. 1986).

19. Martin v. Mem’l Hosp., 86 F.3d 1391, 1397 (5th Cir. 1996).

20. Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986).

doctrine can take advantage of an immediate appeal and that private defendants cannot immediately appeal an order denying a motion to dismiss under the state action doctrine.<sup>21</sup> Likewise, the Tenth Circuit, in the most recent decision on the issue of interlocutory appeals of state action rulings, held that a private defendant is not entitled to an immediate appeal of a trial court order on the state action doctrine.<sup>22</sup> The Third<sup>23</sup> and Seventh<sup>24</sup> Circuits have also contributed to this circuit split, albeit in dicta, suggesting that the denial of a governmental defendant's state action immunity is subject to immediate appeal. The fact that seven of the thirteen federal courts of appeals have addressed the immediate appealability of an order denying a motion to dismiss under the state action doctrine demonstrates the significance and complexity of this procedural issue in antitrust litigation.<sup>25</sup>

This Article attempts to resolve the question of immediate appealability by applying the Supreme Court's test for the availability of interlocutory appeals to orders denying a motion to dismiss under the state action doctrine. This Article asserts that a governmental entity that is deemed part of a state should be able to use the interlocutory appeal process to obtain review of an order denying a motion to dismiss under the state action doctrine. However, governmental defendants deemed not part of the state itself and private entities should not be able to immediately appeal an adverse state action determination under the collateral order doctrine.

Part I of this Article provides a historical overview of the state action doctrine and presents background information on how the doctrine is

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21. *Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 292 (5th Cir. 2000). In contrast, the Eleventh Circuit has held that private defendants may immediately appeal an order denying a motion to dismiss under the state action doctrine. *See Praxair, Inc. v. Fla. Power & Light Co.*, 64 F.3d 609, 611 (11th Cir. 1995).

22. *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 703 F.3d 1147, 1153 (10th Cir. 2013). The Tenth Circuit felt it "unnecessary to weigh in on the circuit split" on whether governmental defendants could immediately appeal an order denying a motion to dismiss under the state action doctrine and only ruled on whether private defendants could immediately appeal. *Id.* at 1151.

23. *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999) (holding denial of *Noerr-Pennington* immunity not immediately appealable under the collateral order doctrine).

24. *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (ruling private defendant was not entitled to an immediate appeal from a denial of a defense based on the First Amendment's Petition Clause, but that an order denying foreign government immunity under Foreign Sovereign Immunities Act was immediately appealable as a collateral order).

25. The Supreme Court has recently recognized the importance of procedural issues in antitrust actions. *See Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 903–04 (2015) (considering whether bondholder plaintiffs accusing several banks of violating antitrust law by rigging the London Inter-Bank Offered Rate (LIBOR) had the right to immediately appeal the dismissal of their case even though broader multidistrict litigation was still ongoing).

applied to different entities. Part II outlines the requirements for appellate jurisdiction, discussing both the final judgment rule and the collateral order doctrine. Part III explains the Article's finding that those governmental defendants that are deemed part of the state are entitled to an immediate appeal. Next, Part IV examines the immediate appealability of rulings on the state action doctrine when the defendant is a governmental entity not part of the state itself or a private party, and analyzes why these defendants should not be entitled to an immediate appeal. Finally, Part V explores the immediate appealability of state action orders in the context of FTC adjudicative proceedings.

### I. OVERVIEW OF THE STATE ACTION DOCTRINE

The federal antitrust laws have been described as the "Magna Carta of free enterprise."<sup>26</sup> As a result, the Supreme Court has asserted that these laws "are as important to the preservation of economic freedom and our free-enterprise system as the Bill of Rights is to the protection of our fundamental personal freedoms."<sup>27</sup> Although the federal antitrust laws are integral to competition and free enterprise, Congress has adopted many exemptions. For example, the McCarran-Ferguson Act affords insurers an exemption from the federal antitrust laws,<sup>28</sup> the Norris-LaGuardia Act immunizes certain activities involving organized labor from the federal antitrust laws,<sup>29</sup> and the Shipping Act of 1984 exempts from antitrust liability any agreement between ocean common carriers that is filed with the Federal Maritime Commission.<sup>30</sup> In the absence of a specific statutory exemption, federal courts have developed exemptions and immunities to federal antitrust laws as well. One such "judicially created exemption" is the state action doctrine.<sup>31</sup>

The state action doctrine was first recognized in 1943 when the Supreme Court decided *Parker v. Brown*.<sup>32</sup> As a result, the state action doc-

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26. *United States v. Topco Assocs.*, 405 U.S. 596, 610 (1972).

27. *Id.*

28. 15 U.S.C. §§ 1011–1015 (West, Westlaw through P.L. 114-40).

29. 29 U.S.C. §§ 101–110, 113–115 (West, Westlaw through P.L. 114-40).

30. 46 U.S.C. § 40307(a)(1)–(2) (West, Westlaw through P.L. 114-25).

31. Darren Bush, *Mission Creep: Antitrust Exemptions and Immunities as Applied to Deregulated Industries*, 2006 UTAH L. REV. 761, 770 (2006); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 256 (1987).

32. *Parker v. Brown*, 317 U.S. 341 (1943). However, it is important to note that the state action doctrine's genesis can be traced to several prior decisions, some of which the Court cited to in *Parker*. See, e.g., *N. Sec. Co. v. United States*, 193 U.S. 197, 344–47 (1904) (rejecting claim that mere state authorization immunized a merger); *Olsen v. Smith*, 195 U.S. 332, 344–45 (1904) (finding the Sherman Act inapplicable to a claim that a state governor was restraining trade by refusing to grant a

trine is also known as *Parker* immunity.<sup>33</sup> In *Parker*, a California state statute, the Agricultural Prorate Act, authorized state officials to establish marketing programs for agricultural commodities produced in the state.<sup>34</sup> The express purpose of the program was to restrict competition among growers of those commodities.<sup>35</sup> In that case, the plaintiff, Porter I. Brown, produced, purchased, and packed raisins.<sup>36</sup> Brown challenged the validity of California's Agricultural Prorate Act as a violation of the Sherman Antitrust Act,<sup>37</sup> and sued the California Director of Agriculture, W.B. Parker, who helped administer the marketing program.<sup>38</sup> A three-judge district court panel permanently enjoined California's program.<sup>39</sup> However, the Supreme Court reversed the injunction.<sup>40</sup>

The Court in *Parker* upheld the California program regulating the marketing of raisins as an "act of government which the Sherman Act did not undertake to prohibit."<sup>41</sup> In its unanimous decision, the Court primarily relied on legislative intent to conclude that California's raisin marketing program was valid under the Sherman Act.<sup>42</sup> Based on the Sherman Act's legislative history, the Court determined that Congress did not intend to restrain state action.<sup>43</sup> The Court noted that "an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."<sup>44</sup> Accordingly, the Court interpreted the Sherman Act as "a prohibition of individual and not state action."<sup>45</sup>

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pilot's license); *Lowenstein v. Evans*, 69 F. 908, 911 (C.C.D.S.C. 1895) (upholding South Carolina statute creating a state liquor monopoly).

33. ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 1271; *see also* *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 415 (1978) (referring to the state action doctrine as "*Parker* immunity"). This Article will use the terms "state action doctrine" and "*Parker* immunity" interchangeably. As discussed in more detail later in this Article, the state action doctrine, as applied to governmental entities deemed part of the state, is in fact an immunity and the term "*Parker* immunity" is not a misnomer. *See infra* Part III.A.

34. *Parker*, 317 U.S. at 346.

35. *Id.*

36. *Id.* at 344.

37. *Id.* at 348–49.

38. *Id.* at 344.

39. *Id.*

40. *Id.* at 368.

41. *Id.* at 352 (citing *Olsen v. Smith*, 195 U.S. 332, 344–45 (1904) and comparing *Lowenstein v. Evans*, 69 F. 908, 910 (C.C.D.S.C. 1895)).

42. STATE ACTION PRACTICE MANUAL, *supra* note 7, at 43 (stating that "the *Parker* Court largely focused on legislative intent").

43. *Parker*, 317 U.S. at 350–51 (finding "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature").

44. *Id.* at 351.

45. *Id.* at 352.

The *Parker* decision left open the issue of whether the conduct of private actors and subordinate government entities could be exempt from federal antitrust laws based on the state action doctrine.<sup>46</sup> However, in a series of cases in the 1980s, the Supreme Court found that private actors and certain subordinate government entities could rely on the state action doctrine to shield their conduct from federal antitrust scrutiny. In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum*, the Court established a two-part test for determining whether private actors could take advantage of *Parker* immunity.<sup>47</sup> The unanimous Court stated that (1) the challenged restraint must be “one clearly articulated and affirmatively expressed as state policy[,]” and (2) “the policy must be ‘actively supervised’ by the State itself.”<sup>48</sup> Because actions of a state legislature and a state’s highest court acting in a legislative capacity are treated as the action of a state itself, the state action doctrine applies to these entities without a need to establish the clear articulation and active supervision requirements of *Midcal*.<sup>49</sup>

*Midcal*’s two-part test has long supplied the framework within which courts have determined the availability of the state action defense to private parties.<sup>50</sup> However, actions taken by subordinate government entities such as counties and municipalities may also be entitled to *Parker* immunity. Subordinate government entities are not entitled to the

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46. *See id.* (clarifying that “no question of the state or its municipality becoming a participant in a private agreement or combination by others for restraint of trade” was presented).

47. *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

48. *Id.* (internal citation omitted).

49. *Hoover v. Ronwin*, 466 U.S. 558, 568–69 (1984) (“Where the conduct at issue is in fact that of the state legislature or supreme court, we need not address the issues of ‘clear articulation’ and ‘active supervision.’”). There is a paucity of case law on whether actions of the governor are treated as actions of the state itself and thus need not meet *Midcal*’s two prongs. *See id.* at 568 n.17 (noting that its ruling did not address “whether the Governor of a State stands in the same position as the state legislature and supreme court for purposes of the state-action doctrine”). However, many antitrust scholars believe that courts should treat the actions of a governor as actions of the state itself. *See* PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTITRUST PRINCIPLES AND THEIR APPLICATION* ¶ 224b, at 405 (2d ed. 2000); JOHN E. LOPATKA & WILLIAM H. PAGE, *NARROWING THE SCOPE OF THE STATE ACTION DOCTRINE: REPORT PREPARED FOR THE FEDERAL TRADE COMMISSION* 32–33 (2001); C. Douglas Floyd, *Plain Ambiguities in the Clear Articulation Requirement for State Action Antitrust Immunity: The Case of State Agencies*, 41 B.C. L. REV. 1059, 1081–83 (2000) (arguing that all public authorities that have the power to formulate a general policy in favor of the anticompetitive arrangements for the state as a whole need not meet both *Midcal* prongs).

50. *See* Daniel J. Gifford, *The Antitrust State-Action Doctrine After Fisher v. Berkeley*, 39 VAND. L. REV. 1257, 1266–67 (1986) (stating that “[a]lthough the clear articulation and supervision standards were drawn from the Court’s prior state-action decisions, only in *Midcal* did they attain the status of *sine qua non*s for application of the state-action defense” and that “*Midcal* has remained a significant precedent because its standards have continued, at least formally, to govern the application of the state-action doctrine”).



same protection from the federal antitrust laws as a state itself, and thus also fall under the *Midcal* framework.<sup>51</sup> However, municipalities and local government entities need only satisfy *Midcal*'s first prong for their conduct to be exempt from federal antitrust laws under the state action doctrine.<sup>52</sup>

The state action doctrine is a strong weapon, or perhaps more appropriately, a shield, in the arsenal of antitrust defendants.<sup>53</sup> Because the state action doctrine “derive[s] from principles of federalism and other constitutional considerations,”<sup>54</sup> and is a long-term priority of the Federal Trade Commission,<sup>55</sup> it is an important exemption that governmental and private entities will continue to invoke in antitrust litigation.

## II. THE FINAL JUDGMENT RULE AND COLLATERAL ORDER DOCTRINE

Generally, federal courts of appeals only have jurisdiction to review “final decisions” of the federal district courts.<sup>56</sup> This is known as the “final judgment rule.”<sup>57</sup> The final judgment rule is codified in 28 U.S.C. § 1291 and provides that “the courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States.”<sup>58</sup> Thus, the requirement that there be a “final decision” serves as

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51. See *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978) (finding that “[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them”); *Cnty. Commc’ns Co. v. City of Boulder*, 455 U.S. 40, 55 (1982) (narrowly construing the meaning of *Midcal*'s first prong as applied to a municipality acting under a home rule statute).

52. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 47 (1985) (“Once it is clear that state authorization exists, there is no need to require the State to supervise actively the municipality’s execution of what is a properly delegated function.”). It is unclear whether state executive departments and agencies are part of the state itself or are considered subordinate government entities that must satisfy *Midcal*'s first prong. ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 1279.

53. See Elizabeth Trujillo, *State Action Antitrust Exemption Collides with Deregulation: Rehabilitating the Foreseeability Doctrine*, 11 FORDHAM J. CORP. & FIN. L. 349, 352 (2006) (describing the state action doctrine as a “particularly useful tool for potential antitrust defendants”).

54. ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 1271.

55. Jon Leibowitz, Chairman, Fed. Trade Comm’n, Remarks as Prepared for Delivery at the Sixth Annual Georgetown Law Global Antitrust Enforcement Symposium (Sept. 19, 2012), *available at* 2012 WL 4339298 (asserting that the state action doctrine is an “example of the [Federal Trade] Commission’s long-term priorities”).

56. 28 U.S.C. § 1291 (West, Westlaw current through P.L. 114-40).

57. See JACK H. FRIEDENTHAL, MARY KAY KANE & ARTHUR R. MILLER, CIVIL PROCEDURE 600 (3d ed. 1999) (stating “the question of when an appeal can be taken is governed by the so-called ‘final judgment rule’”). See generally Carleton M. Crick, *The Final Judgment as a Basis for Appeal*, 41 YALE L.J. 539 (1932) (tracing the roots of the final judgment rule to English writ of error practice where the King’s Bench corrected errors of the other common law courts).

58. 28 U.S.C. § 1291 (West, Westlaw current through P.L. 114-40).

a precondition to review by the federal appellate courts.<sup>59</sup> The Supreme Court has described a “final decision” as one that “ends the litigation on the merits.”<sup>60</sup> The most salient rationale underlying the final judgment rule is a desire to achieve judicial economy and efficiency.<sup>61</sup> The rule protects the appellate courts from the “intolerable burden” of reviewing countless pretrial orders and prevents parties from driving up costs by appealing every order in an effort to avoid a decision on the merits.<sup>62</sup>

Nonetheless, there is an eclectic array of statutory<sup>63</sup> and common law<sup>64</sup> exceptions to the final judgment rule. Perhaps the most important exception to the final judgment rule is the collateral order doctrine,<sup>65</sup> which was introduced by the Supreme Court in *Cohen v. Beneficial In-*

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59. *Id.* The Supreme Court encountered the concept of finality of judgments as early as 1848. See *Forgay v. Conrad*, 47 U.S. (6 How.) 201 (1848).

60. *Catlin v. United States*, 324 U.S. 229, 233 (1945).

61. See *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (stating that the final judgment rule “serves the important purpose of promoting efficient judicial administration”); Note, *Appealability in the Federal Courts*, 75 HARV. L. REV. 351, 351 (1961) (asserting “[t]he basic rationale of the finality rule is conservation of judicial resources” and constant interruption by interlocutory appeals “would consume trial court time, forestall the ultimate resolution of the case, and facilitate the harassment of one party by his opponent”); *infra* Part III.D for an explanation of how judicial economy is not undermined by allowing immediate appeals by governmental defendants deemed part of the state. See generally Gary L. Davis & Joseph E. Reber, *Cost of Appeal*, 27 MONT. L. REV. 49 (1965) (detailing costliness of appeals).

62. Lloyd C. Anderson, *The Collateral Order Doctrine: A New “Serbian Bog” and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 542 (1998).

63. See, e.g., 28 U.S.C. § 1292(a)(1) (West, Westlaw through P.L. 114-49 (excluding P.L. 114-41)) (allowing appeal of interlocutory orders “granting, continuing, modifying, refusing or dissolving injunctions”); 28 U.S.C. § 1292(a)(2) (permitting appeal of interlocutory orders involving the appointment of receiverships); 28 U.S.C. § 1292(a)(3) (authorizing appeal of interlocutory orders that determine “the rights and liabilities of the parties” in admiralty cases); 28 U.S.C. § 1292(b) (providing that, despite the absence of a final judgment, a party may obtain interlocutory review of “an order not otherwise appealable” with the consent of both the trial court and the court of appeals).

64. One judicially developed exception to the final judgment rule involves cases in which some immediate harm might occur to the appellant if review is postponed. See *Forgay*, 47 U.S. (6 How.) at 206 (allowing appeal on the ground that there would have been irreparable harm to the losing party if review was delayed and the appellant was forced to comply with the trial judge’s decree).

65. See FRIEDENTHAL, KANE & MILLER, *supra* note 57, at 608 (stating that the collateral order doctrine is the “most widely used” judicial exception to the final judgment rule); Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 387 (2010) (characterizing the collateral order doctrine as “the most significant exception to the final judgment rule”); Michael E. Solimine & Christine Oliver Hines, *Deciding to Decide: Class Action Certification and Interlocutory Review by the United States Courts of Appeals under Rule 23(F)*, 41 WM. & MARY L. REV. 1531, 1548 (2000) (describing the collateral order doctrine as a “major qualification to the final judgment rule”). However, the Supreme Court has avoided labeling the collateral order doctrine an “exception” to the final judgment rule. See *Will v. Hallock*, 546 U.S. 345, 349 (2006) (noting the collateral order doctrine is “best understood not as an exception to the ‘final decision’ rule laid down by Congress in [28 U.S.C.] § 1291, but as a ‘practical construction’ of it”); see also GREGORY A. CASTANIAS & ROBERT H. KLONOFF, *FEDERAL APPELLATE PRACTICE AND PROCEDURE* 82 (2008) (explaining that an order under the collateral order doctrine “is a species of a final judgment”).

*dustrial Loan Corp.* in 1949.<sup>66</sup> In *Cohen*, a shareholder brought a derivative action in federal court against a corporation's officers and directors under the court's diversity jurisdiction.<sup>67</sup> The company moved for an order requiring the shareholder to post security for costs, as required under a state statute.<sup>68</sup> The district court denied the motion and the corporation appealed to the Third Circuit, which ultimately concluded that the order was appealable.<sup>69</sup> The U.S. Supreme Court affirmed.<sup>70</sup> In making its ruling, the Court held that the final judgment rule, as articulated in 28 U.S.C. § 1291, did not prevent immediate review of rulings that "finally determine claims of right separable from, and collateral to, rights asserted in the action, 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."<sup>71</sup> The Supreme Court later established a three-pronged test for determining whether an order falls within this definition.<sup>72</sup>

Under the collateral order doctrine's three-pronged test, 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."<sup>73</sup> Each condition—conclusiveness, separability, and unreviewability—must be satisfied for the ruling to fall within the collateral order doctrine.<sup>74</sup> The Court has explicated that these three conditions are "stringent" because otherwise, "the [collateral order] doctrine will overpower the substantial finality interests [that 28 U.S.C.] § 1291 is meant to further."<sup>75</sup> In addition, the Court has emphasized that the class of orders satisfying this "stringent" test should be understood as "small," "modest," and "narrow."<sup>76</sup>

The Court has found that orders denying absolute immunity,<sup>77</sup> qualified immunity,<sup>78</sup> state sovereign immunity,<sup>79</sup> and federal employees'

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66. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 545–47 (1949).

67. *Id.* at 543.

68. *Id.* at 544–45.

69. *Id.* at 545.

70. *Id.* at 545–47.

71. *Id.* at 546.

72. *See Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

73. *Id.*

74. *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988).

75. *Will v. Hallock*, 546 U.S. 345, 349–50 (2006) (internal citations omitted).

76. *Id.* at 350 (internal citations omitted).

77. *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982).

78. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

79. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144–45 (1993).

claims of immunity under the Westfall Act<sup>80</sup> are immediately appealable under the collateral order doctrine. The Court has also ruled that orders adverse to a criminal defendant on the defense of double jeopardy fall within the collateral order doctrine.<sup>81</sup> Conversely, orders refusing to dismiss a case on *forum non conveniens* grounds,<sup>82</sup> imposing discovery sanctions,<sup>83</sup> disqualifying counsel,<sup>84</sup> and declining to enforce a contractual forum selection clause<sup>85</sup> are not immediately appealable under the collateral order doctrine. Although the collateral order doctrine has been criticized by jurists<sup>86</sup> and commentators,<sup>87</sup> it nonetheless remains the “most important judicially-crafted exception to the final judgment rule”<sup>88</sup> and is a fundamental part of appellate procedure.

### III. GOVERNMENTAL ENTITIES DEEMED PART OF THE STATE

The division among federal appellate courts<sup>89</sup> over the immediate appealability of orders denying a motion to dismiss an antitrust claim under the state action doctrine is particularly acute where governmental entities are antitrust defendants.<sup>90</sup> However, orders denying *Parker* immunity to governmental entities that are deemed part of the state itself, such as certain state-level executive departments and administrative agencies,<sup>91</sup> likely fall within the “small class”<sup>92</sup> of immediately appealable

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80. *Osborn v. Haley*, 549 U.S. 225, 237–40 (2007).

81. *Abney v. United States*, 431 U.S. 651, 660 (1977).

82. *Van Cauwenberghe v. Biard*, 486 U.S. 517, 527–30 (1988).

83. *Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 208 (1999).

84. *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 424–25 (1985).

85. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 496 (1989).

86. *See, e.g., Sell v. United States*, 539 U.S. 166, 189 n.4 (2003) (Scalia, J., dissenting) (contending that the Court “invented” the collateral order doctrine, for which “[t]he statutory text [of 28 U.S.C. § 1291] provides no basis”).

87. *See, e.g., Anderson, supra* note 62, at 540–41 (criticizing the Supreme Court’s collateral order doctrine jurisprudence as confusing and causing an “explosion of purely procedural litigation over what orders are appealable”); Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 204–05 (2001) (claiming that the collateral order doctrine “has had a troubled history” and is “the most maligned of the exceptions” to the final judgment rule); Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237, 1252–57 (2007) (discussing “three principal problems” with the collateral order doctrine).

88. *Petty, supra* note 65, at 377.

89. *See supra* text accompanying notes 15–25.

90. *See Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 703 F.3d 1147, 1151 (10th Cir. 2013) (explaining that the circuit split on the question of whether denial of *Parker* immunity is immediately appealable by private parties “is much less pronounced” than the circuit split on the question of whether denial of *Parker* immunity is immediately appealable by governmental defendants).

91. Just as it is unclear whether actions of the governor constitute actions of the state itself, *see supra* note 49, it is unclear which state executive agencies or state regulatory bodies are part of the state. *Compare Ajax Aluminum, Inc. v. Goodwill Indus.*, 564 F.Supp. 628, 629 (W.D. Mich. 1983)

ble orders because they satisfy the Supreme Court's three-pronged test for determining whether a ruling falls within the collateral order doctrine. Embedded within the larger issue of interlocutory appeals of a state action ruling as a collateral order is the "unsettled issue" of whether the state action doctrine provides immunity from suit or merely a defense to liability.<sup>93</sup> Resolving this unsettled issue is critical to determining whether a state action ruling against the government satisfies each of the three prongs of the collateral order doctrine.<sup>94</sup>

The three prongs of the collateral order doctrine overlap,<sup>95</sup> making the doctrine extremely difficult to apply.<sup>96</sup> Despite the overlap between the three prongs, this Part analyzes each prong of the collateral order doctrine individually. Furthermore, although it is immersed in each prong,<sup>97</sup> the question of whether the state action doctrine is an immunity from suit or merely a defense to liability is most important to the third prong, the condition of unreviewability upon appeal from final judgment. Accordingly, this Part considers the application of the three-pronged test for the collateral order doctrine in the reverse order—unreviewability, separability, and conclusiveness—from which the prongs were articulated by the Supreme Court.

#### A. Unreviewability

The unreviewability prong of the collateral order doctrine is the requirement that an issue be effectively unreviewable on appeal from a final judgment.<sup>98</sup> An order is effectively unreviewable when it protects

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(ruling that Michigan's department of labor was part of the state), *with* *Midwest Constr. Co. v. Ill. Dep't of Labor*, 684 F.Supp. 991, 997 (N.D. Ill. 1988) (determining Illinois's department of labor was not part of the state). The Supreme Court has not provided much guidance for distinguishing between the state itself and subordinate agencies, but has cautioned that "[s]tate agencies are not simply by their governmental character sovereign actors for purposes of state-action immunity." *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1111 (2015). For conflicting judicial approaches in determining whether an entity qualifies as an "arm of the state" for purposes of state sovereign immunity under the Eleventh Amendment, see *infra* note 174.

92. *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

93. STATE ACTION PRACTICE MANUAL, *supra* note 7, at 156.

94. *See id.* ("If the [state action] doctrine properly immunizes a defendant from standing trial, it would follow that the denial of a defendant's preliminary motion on state action grounds is immediately appealable.").

95. *See Palmer v. City of Chicago*, 806 F.2d 1316, 1318 (7th Cir. 1986) (noting that the multi-pronged test for collateral orders is "redundant" and that the "[conclusiveness] 'prong' is part of the [unreviewability prong]").

96. *See Palmer*, 806 F.2d at 1318 (stating the Supreme Court's brief discussion of collateral orders in *Cohen* "has spawned an immense jurisprudence of collateral orders"); *Petty*, *supra* note 65, at 396.

97. STATE ACTION PRACTICE MANUAL, *supra* note 7, at 156.

98. *Will v. Hallock*, 546 U.S. 345, 349 (2006).

an interest that would be “essentially destroyed if its vindication must be postponed until trial is completed.”<sup>99</sup> One such interest is a “right not to be tried.”<sup>100</sup> A denial of the right not to be tried is effectively unreviewable on appeal from a final judgment because to get to such a final judgment, the defendant must endure the trial-related burdens that the right is supposed to prohibit. In other words, a defendant’s right to not stand trial cannot be effectively vindicated after the trial has occurred. Accordingly, the classic case of an issue essentially unreviewable on appeal from a final judgment is a denial of immunity.<sup>101</sup>

The Supreme Court has consistently invoked the collateral order doctrine to permit the review of orders denying immunity to governmental defendants. For example, as stated previously, the Court has found denials of executive immunity,<sup>102</sup> qualified immunity for government officials,<sup>103</sup> state sovereign immunity,<sup>104</sup> and federal employees’ claims of immunity under the Westfall Act<sup>105</sup> to be immediately appealable under the collateral order doctrine. Because the immunity theory has been so favorably received under the collateral order doctrine, one commentator noted that the Supreme Court has “narrowed the scope of the doctrine to the point where today it is largely limited to immunities from trial” and that “nearly all other [types of] orders . . . [are] excluded from the collateral order club.”<sup>106</sup> In contrast to an order denying immunity from suit, the rejection of a defense to a claim is not effectively unreviewable on appeal from a final judgment because a finding of liability can be reversed on appeal.<sup>107</sup> Determining whether the state action doctrine is an immunity from suit or merely a defense to liability is, therefore, critical to establishing whether the unreviewability prong of the collateral order doctrine is satisfied.

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99. *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 499 (1989).

100. *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989).

101. DANA LIVINGSTON COBB, INTERLOCUTORY APPEALS AND MANDAMUS IN FEDERAL COURT 4 (2004), available at <http://www.adjitlaw.com/assets/Federal%20Interloc%20Appeal%20and%20Mandamus%20UT%20App%202004.pdf>.

102. *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982).

103. *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985).

104. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144–45 (1993).

105. *Osborn v. Haley*, 549 U.S. 225, 237–40 (2007).

106. *Petty*, *supra* note 65, at 362, 384.

107. *See Mitchell*, 472 U.S. at 526 (accentuating that the right not to stand trial is an immunity from suit, not a “mere defense to liability” and that such an entitlement is “effectively lost if a case is erroneously permitted to go to trial”).

### 1. State Sovereignty and Federalism as Evidence of Immunity

This Article asserts that the state action doctrine is an immunity from suit for governmental defendants deemed part of the state and not merely a defense to liability. Concededly, the Supreme Court's own characterization of the state action doctrine is not very helpful in determining whether the doctrine operates as an immunity or a defense.<sup>108</sup> The Court has used a variety of terms to describe the state action doctrine. For example, the Court has alternated between calling the *Parker* protection an "immunity"<sup>109</sup> and an "exemption."<sup>110</sup> Some commentators, however, have suggested that the terms "*Parker* immunity" and "state action immunity" are nothing more than misnomers.<sup>111</sup> Indeed, Justice Brennan in his dissent in *Mitchell v. Forsyth*—a case approving the immediate appealability of an order denying qualified immunity to governmental officials—questioned the accuracy of the term "state action immunity."<sup>112</sup>

Despite these views, the constitutional principles underlying the state action doctrine demonstrate that the term "*Parker* immunity" is not a misnomer and accurately describes a right to be free from suit. In this regard, state sovereignty and federalism form a strong basis for the state action doctrine.<sup>113</sup> The Court in *Parker v. Brown* explicated that "[i]n a

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108. STATE ACTION PRACTICE MANUAL, *supra* note 7, at 2 n.7 (noting "the lack of a uniform characterization of the state action doctrine by the courts").

109. *See, e.g.*, *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1010 (2013) (using the term "state-action immunity"); *City of Columbia v. Omni Outdoor Adver., Inc.*, 499 U.S. 365, 370 (1991) (using the term "*Parker* immunity" to refer to the state action doctrine); *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (using the phrase "standards for antitrust immunity under *Parker v. Brown*"); *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412, 415 (1978) (also using "*Parker* immunity" to refer to the state action doctrine).

110. *See, e.g.*, *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 37 (1985) (using the term "state action exemption"); *Cnty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 50 (1982) (using the term "*Parker* exemption"); *see also* *Hoover v. Ronwin*, 466 U.S. 558, 573 (1984) (using the phrase "exempt from Sherman Act liability").

111. *See, e.g.*, Randall S. Abate & Mark E. Bennett, *Constitutional Limitations on Anticompetitive State and Local Solid Waste Management Schemes: A New Frontier in Environmental Regulation*, 14 YALE J. ON REG. 165, 174 (1997) (deeming the term "state action immunity" a "misnomer"); *see also* *Duke & Co. Inc. v. Foerster*, 521 F.2d 1277, 1279 n.5 (1975) (acknowledging the uncertainty in the proper characterization of the state action doctrine and that the issue "may be open to question").

112. *See Mitchell*, 472 U.S. at 552–53 n.8 (1985) (Brennan, J., dissenting) (stating "numerous legal rights traditionally recognized as immunities include . . . the state-action immunity in antitrust law" but doubting "that the ordinary characterization of a wide variety of legal claims as 'immunities' establishes that trial court orders rejecting such claims are necessarily unreviewable at the termination of proceedings").

113. *Omni Outdoor Adver.*, 499 U.S. at 370 (asserting the state action doctrine relies on "principles of federalism and state sovereignty"); *see* STATE ACTION PRACTICE MANUAL, *supra* note 7, at 1–2 ("At its heart, the state action doctrine respects the reserved authority of the several states to

dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress."<sup>114</sup> Thus, the Court reasoned that, in light of states' sovereign status and principles of federalism, Congress would not have intruded on states prerogatives through the Sherman Act without expressly saying so.<sup>115</sup>

Subsequent Supreme Court decisions have recognized<sup>116</sup> and accepted<sup>117</sup> the constitutional principles of state sovereignty and federalism as a justification for the state action doctrine. Notably, in its most recent state action decision, *North Carolina State Board of Dental Examiners v. FTC*, the Supreme Court recognized that "the Sherman Act confers immunity on the States' own anticompetitive policies out of respect for federalism."<sup>118</sup> Even the FTC has acknowledged that the state action doctrine is rooted in the constitutional notions of federalism and state sovereignty.<sup>119</sup> The Court's steadfast justification of the state action doctrine on federalism and state sovereignty grounds,<sup>120</sup> therefore, proves that the doctrine is an immunity from suit.

regulate economic activity within their respective borders as against the power of Congress to regulate interstate commerce.").

114. *Parker v. Brown*, 317 U.S. 341, 351 (1943).

115. *Id.* The state action doctrine's logic has even been invoked to restrict the FTC's rulemaking authority to abrogate state regulations. See *Cal. State Bd. of Optometry v. FTC*, 910 F.2d 976, 978 (D.C. Cir. 1990). In that case, the D.C. Circuit struck down an FTC rule that created a defense to any state proceeding brought against an optometrist for violating certain state restrictions upon the practice of optometry. The court directly relied upon state action cases to conclude that a federal agency "may not exercise authority over States as sovereigns unless that authority has been unambiguously granted to it." *Id.* at 982.

116. See, e.g., *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38 (1985) ("In *Parker*, relying on principles of federalism and state sovereignty, the Court refused to construe the Sherman Act as applying to the anticompetitive conduct of a State acting through its legislature"); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 633 (1992) (asserting "[o]ur decision [*in Parker*] was grounded in principles of federalism").

117. See, e.g., *Omni Outdoor Adver.*, 499 U.S. at 372 (concluding that "in order to prevent *Parker* from undermining the very interests of federalism it is designed to protect, it is necessary to adopt a concept of authority broader than what is applied to determine the legality of the municipality's action under state law").

118. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S.Ct. 1101, 1110 (2015).

119. FTC OFFICE OF POLICY PLANNING, REPORT OF THE STATE ACTION TASK FORCE 5 (2003), available at <http://www.ftc.gov/os/2003/09/stateactionreport.pdf> (recognizing that "[t]his refrain [respecting state sovereignty in our dual system of government] runs through Supreme Court jurisprudence up through its most recent state action opinion").

120. See *supra* notes 113–118 and accompanying text; see also Daniel J. Gifford, *Federalism, Efficiency, the Commerce Clause, and the Sherman Act: Why We Should Follow a Consistent Free-Market Policy*, 44 EMORY L.J. 1227, 1242 (1995) (opining that "the state-action antitrust exemption has always been justified primarily on the grounds of federalism"); Jean Wegman Burns, *Embracing Both Faces of Antitrust Federalism: Parker and ARC America Corp.*, 68 ANTITRUST L.J.



Like its interpretation of the state action doctrine, the Court's interpretation of the Eleventh Amendment has also been guided by the concepts of state sovereignty and the balance of power between the states and the federal government.<sup>121</sup> For example, in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc.*, the Court held that a denial of Eleventh Amendment immunity was immediately appealable under the collateral order doctrine because of the importance of protecting a state's dignitary interests.<sup>122</sup> Because the Court's interpretation of the scope of the state action doctrine and Eleventh Amendment rely on the common interests of federalism and state sovereignty, they should be analyzed similarly. Thus, like denial of Eleventh Amendment immunity, denials of *Parker* immunity for governmental defendants should be immediately appealable under the collateral order doctrine.

Additionally, in attempting to articulate a line between cases that involve collateral orders and those that do not, the Supreme Court has stated, "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."<sup>123</sup> The Court explained that a party asserting that an order is effectively unreviewable upon final judgment because of a right not to go to

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29, 29 (2000) ("Beginning with its 1943 decision in *Parker v. Brown*, the Supreme Court has used federalism principles to define the scope of the federal antitrust laws and to protect state activity in the same area") (footnote omitted). Interestingly, some scholars criticize the state action doctrine for failing to promote economic efficiency, which they posit, is a fundamental goal of federalism itself. See, e.g., Robert P. Inman & Daniel L. Rubinfeld, *Making Sense of the Antitrust State-Action Doctrine: Balancing Political Participation and Economic Efficiency in Regulatory Federalism*, 75 TEX. L. REV. 1203, 1207 (1997) (contending that "[f]ederalism's goal of economic efficiency . . . is not well protected by present state-action doctrine"); see also John Shepard Wiley Jr., *Revision and Apology in Antitrust Federalism*, 96 YALE L.J. 1277, 1280 (1987) (arguing that the current state action doctrine is "irrational antitrust policy" and "offend[s] every antitrust goal").

121. See *Fed. Mar. Comm'n v. S.C. State Ports Auth.*, 535 U.S. 743, 751 (2002) (asserting that "[d]ual sovereignty is a defining feature of our Nation's constitutional blueprint" and states "did not consent to become mere appendages of the Federal Government") (internal citations omitted); *Alden v. Maine*, 527 U.S. 706, 709 (1999) ("Federalism requires that Congress accord States the respect and dignity due them as residuary sovereigns and joint participants in the Nation's governance."); Stewart A. Baker, *Federalism and the Eleventh Amendment*, 48 U. COLO. L. REV. 139, 172 (1977) (noting that "[c]onsiderations of federalism seem to underlie all aspects of the [E]leventh [A]mendment"). See generally Richard H. Fallon, Jr., *The "Conservative" Paths of the Rehnquist Court's Federalism Decisions*, 69 U. CHI. L. REV. 429, 439, 457 (2002) (exploring the "role of sovereign immunity in the Court's federalism agenda" and noting that a "prominent line" of "federalism cases involves the Eleventh Amendment and state sovereign immunity").

122. *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993) (ruling that states "may take advantage of the collateral order doctrine to appeal a district court order denying a claim of Eleventh Amendment immunity").

123. *Will v. Hallock*, 546 U.S. 345, 353 (2006) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)).

trial must identify “some particular value of a high order . . . in avoiding trial.”<sup>124</sup> The Court identified “respecting a State’s dignitary interests” as a “particular value of a high order.”<sup>125</sup> Because the state action doctrine protects important dignitary and public interests, which would be lost if an antitrust suit against a state or an entity deemed part of the state is allowed to proceed to trial,<sup>126</sup> denial of an order to dismiss is effectively unreviewable after trial.

State action immunity is analogous to Eleventh Amendment immunity because each is designed “to prevent the indignity of subjecting a State to the coercive process of judicial tribunals . . . and to ensure that the States’ dignitary interests can be fully vindicated.”<sup>127</sup> In fact, antitrust lawsuits that are allowed to proceed against a state are more offensive to a state’s dignitary interests than other types of lawsuits because of the costliness of antitrust litigation.<sup>128</sup> Forcing state governmental defendants to undergo a costly trial process is unfair and incompatible with the spirit of the Eleventh Amendment and *Parker* immunity. Just as orders denying Eleventh Amendment immunity are immediately appealable under the collateral order doctrine,<sup>129</sup> so too should rulings denying *Parker* immunity be immediately appealable under the doctrine.

## 2. Challenges to Characterizing the State Action Doctrine as Something Other Than an Immunity

Despite the similarities between the Eleventh Amendment and the state action doctrine, some circuits have found rulings denying state action immunity not immediately appealable under the collateral order doctrine. These courts maintain that the Court in *Parker v. Brown* was simply construing the Sherman Act, rather than “identify[ing] or articulat[ing] a constitutional or common law ‘right not to be tried,’”<sup>130</sup> and point to the following passage from *Parker* for support:

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124. *Id.* at 352.

125. *Id.* (citing *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 146).

126. However, the state action doctrine does not protect these same important interests if suit against a municipality or other governmental entity not deemed part of the state is allowed to proceed to trial. See *infra* Part IV.A.

127. *Martin v. Mem’l Hosp.*, 86 F.3d 1391, 1395–96 (5th Cir. 1996) (citing *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 146).

128. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558 (2007) (noting that “proceeding to antitrust discovery can be expensive”); see also William Kolasky, *Antitrust Litigation: What’s Changed in Twenty-Five Years?*, 27 ANTITRUST 9, 15 (2012) (explaining that “e-discovery has been one of the main reasons antitrust litigation has become increasingly expensive, both for plaintiffs and defendants”).

129. *P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 147.

130. *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 444 (4th Cir. 2006).

We find nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature. In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress.<sup>131</sup>

However, such reasoning seems unsound and tends to ignore the similar justification of protecting the state's dignitary interests underlying the Court's interpretation of the Eleventh Amendment and the state action doctrine. Alternatively, it appears as if the Court was creating a common law right not to be tried.

Some scholars observe that the Court in *Parker* went out of its way to create the state action doctrine and that the Court "displayed extraordinary confidence and willingness to make law in *Parker*."<sup>132</sup> One possible explanation as to why the Court went out of its way to create the state action doctrine is that the Court recognized the importance of state sovereignty as well as federalism and felt the need to articulate these principles in the context of antitrust law. Consequently, the argument that the state action doctrine is not an immunity because the Court in *Parker* did not expressly articulate "a constitutional or common law right not to be tried" conveniently overlooks the important, parallel rationales underlying both the state action doctrine and Eleventh Amendment immunity.<sup>133</sup>

Despite what some commentators have asserted,<sup>134</sup> the term "immunity" is not a misnomer when the state action doctrine protects governmental defendants that are deemed part of the state itself. In fact, the term "exemption" is rather inappropriate<sup>135</sup> and "[r]eference to the *Parker* doctrine as the 'state-action exemption' is a confusing misuse of the

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131. *Parker v. Brown*, 317 U.S. 341, 350–51 (1943); see *Acoustic Sys. Inc. v. Wenger Corp.*, 207 F.3d 287, 292 n.3 (5th Cir. 2000) (claiming the term "state action immunity" is "actually a misnomer because the doctrine is but a recognition of the limited reach of the Sherman Act"); see also *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (stating "[w]hile thus a convenient shorthand, '*Parker* immunity' is more accurately a strict standard for locating the reach of the Sherman Act").

132. See, e.g., John Shepard Wiley Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 715–17 (1986).

133. See *supra* Part III.A.1.

134. See *supra* notes 110–112 and accompanying text.

135. See Ricardo J. Bascuas, Note, *Cheaters, Not Criminals: Antitrust Invalidation of Statutes Outlawing Sports Agent Recruitment of Student Athletes*, 105 YALE L.J. 1603, 1622 (1996).

term ‘exemption.’”<sup>136</sup> The Court in *Parker* concluded that Congress did not intend to apply antitrust laws to conduct sanctioned by state governments.<sup>137</sup> Characterizing the state action doctrine as an “exemption” is, therefore, inaccurate because conduct that does not violate an act hardly needs to be exempted from its operation.<sup>138</sup>

One influential antitrust treatise has asserted that the “*Parker* doctrine is designed to be an immunity, not merely a defense that can be offered at trial.”<sup>139</sup> This statement makes sense in light of the fact that the state action doctrine—like the Eleventh Amendment<sup>140</sup>—has consistently been viewed through the lens of federalism and state sovereignty by the Supreme Court.<sup>141</sup> Therefore, like the Eleventh Amendment, the state action doctrine should be considered an immunity in the context of litigation involving state governmental defendants. The unreviewability prong of the collateral order doctrine is frequently found to be met in cases where an immunity is asserted because “‘the bell could not be un-rung’ if the parties had to wait for an appeal from a final judgment.”<sup>142</sup> Because the state action doctrine is in fact an immunity from suit and not merely a defense to liability, *Parker* immunity satisfies the unreviewability prong of the collateral order doctrine.

### B. Separability

*Parker* immunity similarly satisfies the separability prong of the collateral order doctrine, which requires that a ruling resolve an important issue completely separate from the merits of the action.<sup>143</sup> This is

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136. Kenneth J. King, Note, *The Preemption Alternative to Municipal Antitrust Liability*, 51 GEO. WASH. L. REV. 145, 145 n.5 (1982).

137. *Parker v. Brown*, 317 U.S. 341, 350–51 (1943).

138. Paul E. Slater, *Antitrust and Government Action: A Formula for Narrowing Parker v. Brown*, 69 NW. U. L. REV. 71, 72 n.4 (1974).

139. PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW, § 2.04b, at 2-50 (4th ed. 2011). *But see* ANTITRUST LAW DEVELOPMENTS, *supra* note 2, at 1272 (characterizing the state action doctrine as an “affirmative defense”).

140. *Fed. Mar. Comm’n v. S.C. State Ports Auth.*, 535 U.S. 743, 756 (2002) (quoting *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)) (stating the “central purpose” of the sovereign immunity doctrine “is to ‘accord the States the respect owed them as’ joint sovereigns”); *see* *Younger v. Harris*, 401 U.S. 37, 44 (1971) (noting state sovereign immunity is a fundamental principle of “Our Federalism”); John Evans Taylor, Note, *Express Waiver of Eleventh Amendment Immunity*, 17 GA. L. REV. 513, 520–21 (1983) (stating that common law sovereign immunity principles have informed the Eleventh Amendment doctrine and that “courts treat the [E]leventh [A]mendment as a tool of federalism”).

141. *See* Lopatka & Page, *supra* note 4, at 277 (“Oddly, the Court has never explained why federalism dictates the specific form of the [state action] doctrine that has taken shape over the years.”).

142. CASTANIAS & KLONOFF, *supra* note 65, at 85.

143. *Will v. Hallock*, 546 U.S. 345, 349 (2006).

the requirement that an order address a “collateral” issue.<sup>144</sup> The “text-book case” of a collateral issue is a defense of immunity from suit.<sup>145</sup> For example, determinations of *Parker* immunity involving governmental defendants deemed part of the state require an inquiry completely separate from the merits of the underlying issue of whether an antitrust violation occurred.<sup>146</sup> State action determinations for government entities that are deemed part of the state only involve a discrete issue of law: Whether the action is that of a state acting as a sovereign?<sup>147</sup> Thus, a determination of *Parker* immunity for governmental defendants deemed part of the state can be resolved without an elaborate inquiry into the merits of the underlying antitrust action.<sup>148</sup> Even courts that have found a denial of *Parker* immunity not immediately appealable recognize that state action doctrine analysis is separable from the merits of an antitrust action when the defendant is a government entity that is part of the state.<sup>149</sup>

In addition, the Supreme Court has gone out of its way to find that different types of immunity satisfy the collateral order doctrine’s “completely separate from the merits” condition. For example, in *Mitchell v. Forsyth*, the Court plainly altered the “completely separate from the merits” prong to find qualified immunity immediately appealable.<sup>150</sup> The Court asserted that the second prong of the collateral order doctrine was satisfied because the issue of immunity was “conceptually distinct” from the merits.<sup>151</sup> This “significant and unclarified dilution of the separability

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144. CASTANIAS & KLONOFF, *supra* note 65, at 84.

145. *Id.*; see Petty, *supra* note 65, at 399 (averring “that a right not to stand trial passes th[e] test” of being an issue completely separate from the merits).

146. See AREEDA & HOVENKAMP, *supra* note 1, ¶ 228a, at 227 (stating “[i]t bears emphasis that the absence of an immunity does not indicate the presence of an antitrust offense”).

147. See Hoover v. Ronwin, 466 U.S. 558, 570, 574 (1984) (stating “[w]hen the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise” and “[t]he only requirement is that the action be that of the State acting as a sovereign”).

148. This is not to say that the question of whether a governmental entity qualifies as part of the state acting as a sovereign does not involve a complex, fact-laden inquiry. See *supra* note 91. Indeed, a recurring issue raised by the state action doctrine is whether a state regulatory board must meet either or both of the *Midcal* prongs. STATE ACTION PRACTICE MANUAL, *supra* note 7, at 112; see N.C. State Bd. of Dental Exam’rs v. FTC, 135 S. Ct. 1101, 1110 (2015). Thus, an inquiry into the structure of a state regulatory board to determine whether it is a private actor or a governmental entity that is part of the state may sometimes be difficult. However, such a question does not involve an in-depth examination of the merits of the substantive antitrust violation; it is strictly an inquiry into the identity of the defendant.

149. See, e.g., S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 442–43 (4th Cir. 2006) (stating “[t]o be sure, the *Parker* analysis does not always require an inquiry into whether the state acted to displace competition; the *ipso facto* exemption [immunity for government entities part of the state] turns only on the identity of the defendant”).

150. *Mitchell v. Forsyth*, 472 U.S. 511, 527 (1985).

151. *Id.*

requirement” illustrates the Court’s resounding commitment to the immediate appealability of denials of immunity.<sup>152</sup> Because the state action doctrine is an immunity for governmental defendants deemed part of the state itself,<sup>153</sup> there is a strong possibility that the Supreme Court could find that a trial court’s denial of *Parker* immunity satisfies the collateral order doctrine’s separability prong.

### C. Conclusiveness

The conclusiveness prong of the collateral order doctrine requires that a ruling “conclusively determine the disputed question.”<sup>154</sup> This is the most straightforward prong of the collateral order doctrine<sup>155</sup> and the condition that is easiest to satisfy.<sup>156</sup> It is simply an inquiry into whether the district court’s order finally and conclusively determines the disputed question.<sup>157</sup> A court’s denial of a governmental defendant’s motion to dismiss an antitrust claim under the state action doctrine conclusively disposes of the question of whether the governmental entity may be subject to suit. One court that has held denials of *Parker* immunity not immediately appealable has even acknowledged that “[t]here is no dispute that the denial of *Parker* protection satisfies the first collateral order requirement.”<sup>158</sup>

For a question to be “conclusively determined,” it must not be a tentative ruling that is likely to be subject to later reconsideration.<sup>159</sup> Unlike an evidentiary ruling on a motion *in limine*, a ruling on the state action doctrine is not a tentative or informal order. An adverse ruling against a defendant on the state action doctrine is unlikely to be revised before the entry of judgment on the underlying question of whether an

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152. Glynn, *supra* note 87, at 207; see Steinman, *supra* note 87, at 1254 (criticizing the Court’s treatment of the “separate from the merits” requirement in immunity cases).

153. See *supra* Part III.A.

154. P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 144 (1993).

155. Petty, *supra* note 65, at 398.

156. Steinman, *supra* note 87, at 1254–55 (maintaining that the conclusiveness prong is “easily met in connection with almost *all* interlocutory orders,” that the collateral order doctrine embodies a “relaxed definition of finality,” and that the other two elements of the doctrine do most of the “leg-work” in preventing orders from being immediately appealable); see *Moses H. Cone Mem’l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 12–13 (1983) (holding that a district court’s stay order was appealable as a final decision because the requirement that a matter be conclusively determined should be evaluated from a practical, not rigid, standpoint).

157. *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

158. *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 441 (4th Cir. 2006).

159. *Coopers & Lybrand*, 437 U.S. at 468–69 n.11 (finding that before the addition of Rule 23(f) to the Federal Rules of Civil Procedure, which now permits interlocutory review of class certification rulings, denials of class certification were “inherently tentative” and thus not conclusive determinations of the disputed issue).

antitrust violation actually occurred.<sup>160</sup> Consequently, any denial of *Parker* immunity, regardless of whether the defendant is a governmental entity or private party, satisfies the conclusiveness prong of the collateral order doctrine.

#### D. Preserving Judicial Economy

One of the most important rationales behind the final judgment rule limiting immediate appeals is a desire to achieve judicial economy and efficiency. The Supreme Court has maintained that permitting piecemeal, prejudgment appeals “undermines ‘efficient judicial administration.’”<sup>161</sup> Hence, the Court has cautioned that “the class of collaterally appealable orders must remain ‘narrow and selective in its membership.’”<sup>162</sup> However, orders denying state action immunity to governmental defendants deemed part of the state warrant membership within this “narrow and selective” class of orders that are immediately appealable.

Allowing the immediate appeal of orders denying *Parker* immunity to governmental entities deemed part of the state will not undermine “efficient judicial administration”<sup>163</sup> and judicial economy because very few antitrust cases involving the state action doctrine will be immediately appealable under the collateral order doctrine. There are few instances in which the state action doctrine is litigated that will have an actual state as the defendant—the doctrine is mostly invoked by private parties, municipalities, and quasi-governmental entities such as state regulatory boards.<sup>164</sup> Because orders denying *Parker* immunity should not be immediately appealable by those defendants needing to satisfy either or both *Midcal* prongs (i.e., municipalities, state regulatory boards, private parties, etc.),<sup>165</sup> only a small subset of cases will be immediately appeal-

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160. See *Fisher v. City of Berkeley*, 475 U.S. 260, 281 (1986) (upholding municipal rent control scheme without addressing the applicability of the state action doctrine because there was no violation of the substantive antitrust laws).

161. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

162. *Id.* at 113 (quoting *Will v. Hallock*, 546 U.S. 345, 350 (2006)).

163. *Id.* at 106.

164. See STATE ACTION PRACTICE MANUAL, *supra* note 7, at 110 (noting that only a “relatively small group of cases involve the direct actions of a sovereign state authority”); Susan Beth Farmer, *Balancing State Sovereignty and Competition: An Analysis of the Impact of Seminole Tribe on the Antitrust State Action Immunity Doctrine*, 42 VILL. L. REV. 111, 183, 185 (1997) (claiming the Court’s decision in *Seminole Tribe of Florida v. Florida*, 517 U.S. 44 (1996), “essentially eliminates the need for state action immunity with respect to suits against states” and that “the relevance and need for the state action doctrine is now basically limited to private actors”).

165. See *infra* Part IV.A (discussing municipalities and state regulatory boards); *infra* Part IV.B (discussing private parties).

able under the collateral order doctrine. Thus, this Article's conclusion that governmental entities deemed part of the state are allowed to appeal adverse rulings on *Parker* immunity does not thrust open the floodgates to scores of appeals and will not undermine judicial economy.

Even if many state action cases include a governmental defendant that can immediately appeal an adverse ruling under the collateral order doctrine, there still would be no disruption of "efficient judicial administration." Governmental defendants "typically fare well on motions to dismiss based on the state action doctrine" and only in "rare circumstances" will courts deny a governmental defendant's motion to dismiss after invoking *Parker* immunity.<sup>166</sup> Consequently, allowing the immediate appeal of orders denying *Parker* immunity to governmental entities will not undermine judicial economy because very few antitrust cases will be subject to the collateral order doctrine at the outset of litigation.

#### IV. DEFENDANTS NEEDING TO SATISFY ONE OR BOTH OF THE *MIDCAL* PRONGS

Even if defendants are not governmental entities deemed part of the state, they may still be able to successfully assert a claim of *Parker* immunity if they can satisfy one or both of the *Midcal* prongs.<sup>167</sup> However, this Part asserts that defendants needing to satisfy *Midcal*'s clear articulation or active supervision prongs should not be able to immediately appeal an adverse state action determination under the collateral order doctrine.

##### *A. Governmental Entities Not Deemed Part of the State*

Local governmental entities, such as counties and municipalities, may seek protection under the state action doctrine when they act anticompetitively.<sup>168</sup> State regulatory boards, agencies, authorities, and commissions are also entities that sometimes attempt to avail themselves of *Parker* immunity when they act anticompetitively.<sup>169</sup> These govern-

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166. STATE ACTION PRACTICE MANUAL, *supra* note 7, at 135, 138; see PHILIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW § 2.04b, at 2-49 (4th ed. 2011) (claiming "many" state action determinations "can be resolved at the summary judgment stage or earlier").

167. Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105-06 (1980); see *supra* text accompanying notes 47-49.

168. Town of Hallie v. City of Eau Claire, 471 U.S. 34, 36 (1985).

169. See, e.g., Rectrix Aerodrome Ctrs., Inc. v. Barnstable Mun. Airport Comm'n, 610 F.3d 8, 9 (1st Cir. 2010) (airport authority seeking *Parker* protection); S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436, 438-39 (4th Cir. 2006) (state regulatory board); Askew v. DCH Reg'l Health Care Auth., 995 F.2d 1033, 1034 (11th Cir. 1993) (public health care authority); Porter Testing Lab. v. Bd. of Regents, 993 F.2d 768, 769 (10th Cir. 1993) (board overseeing state colleges).



mental entities must satisfy the clear articulation prong of the *Midcal* test because they are not entities deemed part of the state itself.<sup>170</sup> Orders denying *Parker* immunity to governmental defendants who must satisfy *Midcal*'s clear articulation prong should not be immediately appealable because such orders fail to satisfy the second and third conditions of the collateral order doctrine.

### 1. Unreviewability

Actions against governmental entities that must satisfy the clear articulation requirement are not effectively unreviewable upon final judgment because the state action doctrine functions as a defense rather than an immunity for these types of entities. The Eleventh Amendment once again provides guidance on whether the state action doctrine is an immunity from suit or a defense to liability. The Supreme Court has ruled that municipalities and other local government entities are not treated as sovereign and do not receive immunity under the Eleventh Amendment.<sup>171</sup> Correspondingly, the Court has asserted that local government entities are ineligible for “sovereign” treatment under the state action doctrine. The Court stated, “[c]ities are not themselves sovereign; they do not receive all the federal deference of the States that create them.”<sup>172</sup> Therefore, when used in the context of subordinate government entities, “*Parker* immunity” is a misnomer.

Furthermore, orders denying state action protection to governmental entities that must satisfy *Midcal*'s clear articulation prong are not effectively unreviewable upon final judgment because those entities cannot

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170. *Town of Hallie*, 471 U.S. at 40; *Hoover v. Ronwin*, 466 U.S. 558, 569–574 (1984); *see* *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 63 (1985) (stating “*Parker* immunity is available only when the challenged activity is undertaken pursuant to a clearly articulated policy of the State itself, such as a policy approved by a state legislature or a State Supreme Court”). It should be noted that some regulatory boards and commissions will be deemed private actors. *See* *N.C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1114 (2015) (concluding that state dentistry board must satisfy both *Midcal* prongs because board was controlled by active market participants and was akin to a private trade association vested with regulatory authority). Thus, in addition to the difficult task of distinguishing an agency part of the “state itself” from a subordinate government agency, *see supra* note 91, courts may also have to address the “vexatious question” of whether an agency is a public or private actor. AREEDA & HOVENKAMP, *supra* note 1, ¶ 227a, at 215 (emphasizing that “establishing immunity in a particular case requires a determination of whether the relevant actor is properly classified as the “state itself” [neither clear articulation nor active supervision required], a subordinate agency or subdivision [clear articulation required but not active supervision], or merely a private actor [requiring both clear articulation and active supervision]”).

171. *See* *Lincoln Cnty. v. Luning*, 133 U.S. 529, 533 (1890) (holding the Eleventh Amendment does not bar an individual’s suit in federal court against a county for nonpayment of a debt).

172. *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 412 (1978).

identify a “particular value of a high order . . . in avoiding trial.”<sup>173</sup> Local government entities are not entitled to the same protection as a state itself, and the same concern about protecting a sovereign’s dignitary interests is not present. Accordingly, the state action doctrine does not operate as an immunity for local governmental entities and thus fails to meet the unreviewability prong of the collateral order doctrine.

Similar to the treatment of local governmental entities, the state action doctrine does not operate as an immunity for those state regulatory boards and agencies that are not granted independent sovereign status. The Eleventh Amendment provides immunity only to a governmental entity deemed an “arm of the state.”<sup>174</sup> Likewise, courts considering the applicability of the state action doctrine must also make a determination of whether a governmental entity is part of the state itself and eligible for sovereign treatment since an entity deemed part of the state need not meet the *Midcal* test.<sup>175</sup> Just as a determination must be made regarding whether an entity qualifies as sovereign in the Eleventh Amendment context in order to ascertain whether an entity qualifies for immunity, a similar determination of whether an entity qualifies as part of the state is made in the antitrust state action framework. Because the state action doctrine does not operate as an immunity for governmental entities that are not part of the state, the unreviewability prong of the collateral order doctrine is not satisfied. Drawing the line between the state itself and subordinate governmental entities that are not part of the state in determining whether state action protection is an immunity may seem artificial; however, this distinction makes sense when analogized to how entities are granted Eleventh Amendment protection.<sup>176</sup>

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173. Compare *Will v. Hallock*, 546 U.S. 345, 352 (2006) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978)), with *supra* text accompanying notes 123–126.

174. *N. Ins. Co. of N.Y. v. Chatham Cnty.*, 547 U.S. 189, 193 (2006) (asserting that “only States and arms of the State possess immunity from suits authorized by federal law”). It is important to note that the courts appear to employ different tests to determine whether a particular governmental entity is an “arm of the state” and thus able to benefit from the state’s Eleventh Amendment immunity from suit. See also Héctor G. Bladuell, Note, *Twins or Triplets?: Protecting the Eleventh Amendment Through a Three-Prong Arm-of-the-State Test*, 105 MICH. L. REV. 837 (2007) (surveying case law and proposing a unified arm-of-the-state test).

175. See *supra* notes 49–51 and accompanying text.

176. Indeed, “fiction and illogic” pervade Eleventh Amendment immunity. Camille Gearhart, Note, *Confronting the Fictions of the Eleventh Amendment: Pennhurst State School and Hospital v. Halderman*, 104 S. Ct. 900 (1984), 60 WASH. L. REV. 407, 407 (1985); see *Idaho v. Coeur d’Alene Tribe*, 521 U.S. 261, 269 (1997) (describing the principle of *Ex Parte Young* as “rest[ing] on a fictional distinction”). Thus, there is no reason why an artificial distinction cannot exist in determining when the antitrust state action doctrine acts as an immunity.

## 2. Separability

Actions against governmental entities that must satisfy *Midcal*'s first prong—the clear articulation requirement—also do not satisfy the collateral order doctrine's separability condition. The analysis necessary to determine whether a governmental entity satisfies the “clear articulation” prong of the *Midcal* test is sometimes significantly enmeshed with the ultimate merits determination of whether anticompetitive conduct occurred. Governmental entities that must meet the clear articulation requirement must answer more than the relatively simple question of whether the action is that of a state acting as a sovereign.<sup>177</sup> Specifically, determining whether a governmental entity satisfies the clear articulation requirement involves an inquiry not separable from the merits of the antitrust action.<sup>178</sup> In determining whether the clear articulation requirement is met, a court must examine state law and establish that the state has a clearly articulated policy to displace competition. This inquiry is inherently intertwined with the underlying cause of action, which requires a determination of whether anticompetitive conduct occurred. As a result, actions against governmental entities that must satisfy *Midcal*'s clear articulation prong are not completely separate from the merits of the underlying antitrust action.

### *B. Private Parties*

The division among federal appellate courts<sup>179</sup> over the immediate appealability of orders denying a motion to dismiss an antitrust claim under the state action doctrine is not as broad when private entities are the defendants.<sup>180</sup> Private parties cannot satisfy the unreviewability prong of the collateral order doctrine because the state action doctrine does not operate as an immunity when the defendant is not a governmental entity that is part of the state.<sup>181</sup> Moreover, the same concerns about respecting a state's dignitary interests are not present when the defendant is a private entity. Because private parties are not governmental entities deemed

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177. See *Hoover v. Ronwin*, 466 U.S. 558, 569, 574 (1984) (stating “[w]hen the conduct is that of the sovereign itself . . . the danger of unauthorized restraint of trade does not arise” and “[t]he only requirement is that the action be that of ‘the State acting as a sovereign’”).

178. *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 442–43 (4th Cir. 2006)

179. See *supra* text accompanying notes 15–21.

180. See *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 703 F.3d 1147, 1151 (10th Cir. 2013) (explaining that the circuit split on the question of whether denial of Parker immunity is immediately appealable by private parties “is much less pronounced” than the circuit split on the question of whether denial of Parker immunity is immediately appealable by governmental defendants).

181. See *supra* Part IV.A.1.

part of the state and must satisfy both prongs of *Midcal*,<sup>182</sup> there is no fear of impinging on a state's dignitary interests. With the exception of rulings adverse to criminal defendants on double jeopardy issues,<sup>183</sup> the Court has only found orders denying immunity to *governmental* defendants to be immediately appealable under the collateral order doctrine.<sup>184</sup>

According to the Court, orders denying defenses may be effectively reviewed on appeal from a final judgment because, even after a trial on the merits, the appellate court can reverse the earlier denial and order the case dismissed.<sup>185</sup> Private parties, therefore, cannot satisfy the unreveivability prong of the collateral order doctrine because the state action doctrine does not operate as an immunity when the defendant is not a governmental entity. In addition, private parties must satisfy both prongs of *Midcal*, which makes the state action determination not completely separate from the antitrust merits.<sup>186</sup>

#### V. PARKER IMMUNITY AND THE COLLATERAL ORDER DOCTRINE IN APPEALS FROM FTC ADMINISTRATIVE PROCEEDINGS

Adjudicative procedures for FTC administrative litigation are governed by the Federal Trade Commission Act<sup>187</sup> and by the Administrative Procedure Act.<sup>188</sup> Analogous to the final judgment rule for appellate review of district court decisions, only "final" agency actions are subject to judicial review.<sup>189</sup> In other words, nonfinal agency action is generally unreviewable by federal courts. However, the federal courts of appeals have held that nonfinal agency action that meets the requirements of the collateral order doctrine is subject to judicial review.<sup>190</sup> As the "nation's

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182. See *supra* Part I.

183. *Abney v. United States*, 431 U.S. 651, 660 (1977).

184. *Osborn v. Haley*, 549 U.S. 225, 237–40 (2007); *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144–45 (1993); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985); *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982).

185. See *supra* notes 93–94 and accompanying text.

186. See *supra* Part IV.A.2.

187. 15 U.S.C. § 45(b) (West, Westlaw through P.L. 114-9).

188. 5 U.S.C. § 554 (West, Westlaw through P.L. 114-9).

189. *Id.* § 704 (West, Westlaw through P.L. 114-9) ("Agency action made reviewable by statute and final agency action for which there is no other adequate remedy in a court are subject to judicial review. A preliminary, procedural, or intermediate agency action or ruling not directly reviewable is subject to review on the review of the final agency action."). See *generally* *FTC v. Standard Oil Co.*, 449 U.S. 232, 239–40 (1980) (examining when FTC action is final under the Administrative Procedure Act).

190. *Rhode Island v. EPA*, 378 F.3d 19, 25 (1st Cir. 2004) (asserting that "every circuit to have considered the question to date has determined (often with little or no analysis) that the collateral order doctrine applies to judicial review of administrative determinations"); *Chehazeh v. Attorney Gen. of U.S.*, 666 F.3d 118, 136 (3d Cir. 2012) (noting that "the nine Courts of Appeals that have

premier circuit court for administrative law review”<sup>191</sup> put it, the collateral order doctrine “extends beyond the confines of 28 U.S.C. § 1291 to encompass the principle of administrative finality.”<sup>192</sup> Although it has not squarely addressed the issue, the Supreme Court has suggested that the collateral order doctrine applies to judicial review of agency action.<sup>193</sup> Thus, parties to an administrative adjudication may also invoke the collateral order doctrine when they seek to gain immediate review of agency decisions in Article III courts.

The FTC’s internal procedures, which govern the way the agency operates, also do not serve as a barrier to review of nonfinal agency action under the collateral order doctrine. The FTC Rules of Practice state that adjudicative proceedings shall be conducted expeditiously.<sup>194</sup> On the one hand, this may seem to counsel in favor of prohibiting a procedural game of ping-pong every time a governmental agency deemed part of the state seeks to appeal the Commission’s denial of state action immunity to the relevant federal circuit court of appeals. On the other hand, the FTC’s policy explicitly notes that proceedings shall be conducted expeditiously “to the extent practicable and consistent with requirements of law.”<sup>195</sup> Case law suggests that the collateral order doctrine applies to judicial review of agency decisions.<sup>196</sup> As a result, the FTC Rules of Practice do not pose an obstacle to judicial review of nonfinal agency action.

Because agency action can be subject to judicial review under the collateral order doctrine, the sole issue presented by immediate appeals from agency denials of state action immunity is whether such appeals fall within the collateral order doctrine. This Article’s analysis of the immediate appealability of orders denying state action immunity in Article III

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addressed [whether the collateral order doctrine applies to judicial review of agency decisions] have all concluded that it does”); *Carolina Power & Light Co. v. U.S. Dep’t of Labor*, 43 F.3d 912, 916 (4th Cir. 1995) (“It is well-settled that [the *Cohen*] requirements of the collateral order doctrine apply not only to judicial decisions, but also to appeals from executive agency action.”).

191. Timothy H. Gray, Note, *Manual Override? Accardi, Skidmore, and the Legal Effect of the Social Security Administration’s HALLEX Manual*, 114 COLUM. L. REV. 949, 962–63 (2014).

192. *Meredith v. Fed. Mine Safety and Health Review Comm’n*, 177 F.3d 1042, 1051 (D.C. Cir. 1999) (permitting judicial review of administrative decision that had denied immunity from suit claimed by employees of the Mine Safety and Health Administration).

193. See *FTC v. Standard Oil Co.*, 449 U.S. 232, 246–47 (1980) (applying collateral order doctrine’s elements to a nonfinal FTC decision). The Supreme Court has further concluded that, “at least in the absence of an appealable collateral order, the federal courts may exercise jurisdiction only over a final order of the Department [of Education].” *Bell v. New Jersey*, 461 U.S. 773, 778 (1983) (emphasis added) (internal citations omitted).

194. 16 C.F.R. § 3.1 (2015).

195. *Id.*

196. See *supra* notes 189–192 and accompanying text.

courts<sup>197</sup> is, therefore, equally applicable when parties appeal from an FTC proceeding. Thus, governmental defendants deemed part of the state should have the right of an immediate appeal from an FTC decision denying state action immunity. In contrast, governmental defendants not deemed part of the state and private parties should not be able to gain immediate review under the collateral order doctrine of an FTC decision denying state action immunity.

The state action doctrine is frequently raised in FTC adjudicative proceedings.<sup>198</sup> One notable case stemming from an FTC adjudication is *South Carolina State Board of Dentistry v. FTC*.<sup>199</sup> In that case, the FTC alleged in an administrative complaint that the South Carolina State Board of Dentistry restrained competition in violation of Section 5 of the FTC Act.<sup>200</sup> The State Board of Dentistry then moved to dismiss the complaint on state action grounds;<sup>201</sup> however, the Commission denied the State Board of Dentistry's motion to dismiss.<sup>202</sup> The Commission's decision was not a final order because the matter had not yet proceeded to an administrative trial on the merits (often referred to as an evidentiary hearing) before an administrative law judge.<sup>203</sup> The State Board of Dentistry immediately challenged the Commission's order denying its motion to dismiss on state action grounds by seeking judicial review in the U.S. Court of Appeals for the Fourth Circuit.<sup>204</sup> The Fourth Circuit ruled that orders denying *Parker* immunity were not immediately appealable because such orders fail to satisfy the unreviewability and separability prongs of the collateral order doctrine.<sup>205</sup>

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197. See *supra* Parts III–IV.

198. *E.g.*, Ky. Household Goods Carriers Ass'n, Inc., 139 F.T.C. 404, 405 (2005); N.H. Motor Transp. Ass'n, 136 F.T.C. 869, 884 (2003); Ala. Trucking Ass'n, 136 F.T.C. 886, 903 (2003); Minn. Transp. Servs. Ass'n, 136 F.T.C. 719, 734 (2003).

199. S.C. State Bd. of Dentistry v. FTC, 455 F.3d 438, 438–39 (4th Cir. 2006).

200. See Complaint, *In re* S.C. State Bd. of Dentistry, 138 F.T.C. 229 (Sept. 15, 2003) (No. 9311).

201. See Memorandum in Support of Motion to Dismiss, *In re* S.C. State Bd. of Dentistry, 138 F.T.C. 229 (Oct. 21, 2003) (No. 9311).

202. *In re* S.C. State Bd. of Dentistry, 138 F.T.C. 229, 266 (2004). The State Board of Dentistry also moved to dismiss the complaint on mootness grounds, but the Commission determined that it could not resolve the mootness issue without additional discovery and referred the case to an FTC administrative law judge for limited discovery on that issue. *Id.*

203. Pursuant to the FTC Rules of Practice, motions to dismiss filed before an evidentiary hearing are referred directly to the Commission and are ruled on by the Commission unless the Commission in its discretion refers the motion to the administrative law judge. 16 C.F.R. § 3.24(a)(1)–(2) (2015).

204. Brief for Petitioner at 1–2, S.C. State Bd. of Dentistry v. FTC, 455 F.3d 436 (4th Cir. 2006) (No. 04-2006), 2005 WL 3775766, at \*1.

205. *S.C. State Bd. of Dentistry*, 455 F.3d at 441. Interestingly, the court did not address the threshold question of whether the collateral order doctrine even applies to judicial review of agency

The state action doctrine was also raised by a different state dental board in a case originating from an unrelated FTC adjudicative proceeding. In *North Carolina State Board of Dental Examiners v. FTC*,<sup>206</sup> the FTC had issued an administrative complaint claiming the Board of Dental Examiners violated Section 5 of the FTC Act. Subsequently, the Board of Dental Examiners moved to dismiss the administrative complaint before an evidentiary hearing had taken place on the ground that its conduct was exempted by the state action doctrine.<sup>207</sup> However, the Commission denied the Board of Dental Examiners' motion to dismiss. In contrast to the South Carolina State Board of Dentistry, the North Carolina State Board of Dental Examiners did not immediately seek judicial review of the Commission's order denying its motion to dismiss on state action grounds.<sup>208</sup> Instead, the North Carolina State Board of Dental Examiners waited until after the Commission affirmed the administrative law judge's finding that the Board violated the FTC Act to appeal the denial of state action immunity to the Fourth Circuit.<sup>209</sup> The North Carolina State Board of Dental Examiners likely did not immediately appeal the Commission's denial of state action immunity on tactical grounds because the Fourth Circuit had already held in *South Carolina State Board of Dentistry* that denials of *Parker* immunity were not immediately appealable. Although the Fourth Circuit has found an FTC denial of state action immunity to not be immediately appealable as a collateral order,<sup>210</sup> it will be interesting to see how a circuit that has not encountered this issue will rule.

#### CONCLUSION

The state action doctrine is an important area of antitrust law. Not only is the doctrine conceptually interesting because it implicates federalism and state sovereignty issues, but it also has great practical impact. A fairly significant number of antitrust disputes involve *Parker* immuni-

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action. However, a concurring opinion noted that it was assumed that the collateral order analysis applied to the FTC's decision. *Id.* at 448 (Traxler, J., concurring) (citing *FTC v. Standard Oil Co.*, 449 U.S. 232, 246 (1980)).

206. N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).

207. See *In re* N.C. State Bd. of Dental Exam'rs, 151 F.T.C. 607, 609 (2011).

208. *Id.*; Brief for Petitioner at 1–3, 24–25, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).

209. *In re* N.C. State Bd. of Dental Exam'rs, 151 F.T.C. 607 (2011); Brief for Petitioner at 1–3, 24–25, N.C. State Bd. of Dental Exam'rs v. FTC, 135 S. Ct. 1101 (2015).

210. S.C. State Bd. of Dentistry, 455 F.3d at 439.

ty questions.<sup>211</sup> One of the areas of confusion over the scope of the state action doctrine is whether an order denying a motion to dismiss an anti-trust claim under the state action doctrine is immediately appealable as a collateral order. The profound circuit split on this complex question demonstrates the significance of this issue in antitrust appellate practice.

Because the state action doctrine's parentage derives from the same principles of federalism and state sovereignty as the Eleventh Amendment,<sup>212</sup> the best understanding of the doctrine is as an immunity when applied to governmental defendants that are considered part of the state itself. On the other hand, the state action doctrine does not function as an immunity when defendants must satisfy the *Midcal* framework (i.e., government entities that are not considered part of the state and private parties). Finally, allowing the immediate appeal of orders denying *Parker* immunity to governmental entities that are part of the state will not undermine the final judgment rule's goal of ensuring efficient judicial administration.

The state action doctrine is essentially "an attempt to resolve the tension between federalism concepts favoring states' rights and national policies favoring competition."<sup>213</sup> This Article's conclusion—that some governmental defendants should have the right of an immediate appeal while denying an immediate appeal to other governmental defendants and private parties—is in accord with the state action doctrine's delicate balancing act.

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211. See STATE ACTION PRACTICE MANUAL, *supra* note 7, at 83 (asserting that the state action doctrine is most commonly encountered in certain industries, including health care, transportation, and energy and utilities).

212. See *supra* Part III.A.1.

213. STATE ACTION PRACTICE MANUAL, *supra* note 7, at 44; see *N.C. State Bd. of Dental Exam'rs*, 135 S. Ct. at 1117 (asserting that the "Sherman Act protects competition while also respecting federalism").