No. 11-1569

IN THE UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AURARIA STUDENT HOUSING AT THE REGENCY, LLC,
Plaintiff-Appellee,

v.

CAMPUS VILLAGE APARTMENTS, LLC,
Defendant-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR
THE DISTRICT OF COLORADO
(JUDGE WILLIAM J. MARTINEZ)

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE SUPPORTING PLAINTIFF-APPELLEE ON THE LACK OF JURISDICTION

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

FEDERAL CASES

FEDERAL STATUTES AND RULES

MISCELLANEOUS

STATEMENT OF INTEREST

The United States and the Federal Trade Commission enforce the federal antitrust laws and have a strong interest in whether an order denying a motion to dismiss an antitrust claim under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), is immediately appealable under the collateral order doctrine. Courts have dismissed immediate appeals from such orders in prior enforcement actions for lack of appellate jurisdiction. *See* Order, *United States v. Blue Cross Blue Shield of Mich.*, No. 11-1984 (6th Cir. Feb. 23, 2012), *reh'g en banc denied* (Mar. 20, 2012); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006), *cert. denied*, 549 U.S. 1165 (2007). We file this brief pursuant to Federal Rule of Appellate Procedure 29(a) and urge the Court to dismiss the appeal for lack of appellate jurisdiction. We do not address the merits of the district court's decision.

STATEMENT OF ISSUE PRESENTED

Whether an order denying a motion to dismiss an antitrust claim under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), is immediately appealable as a collateral order.

STATEMENT

1. Auraria Student Housing at the Regency, LLC (Auraria) and Campus Village Apartments, LLC (Campus Village) operate apartment complexes near the University of Colorado Denver (UCD). A10-A11. In 2006, UCD adopted a rule requiring most first-term freshmen and international students to reside at Campus Village for two semesters (the residency restriction). A15.

Auraria sued Campus Village for, among other things, conspiring with UCD to monopolize "the rental of off-campus dedicated student housing apartment community facilities to first-time UCD freshmen and international students" in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2. A31.[1] According to the complaint, Campus Village was funded by $50.365 million in revenue bonds issued by the Colorado Educational and Cultural Facilities Authority (CECFA), and UCD had agreed with Campus Village to the residency restriction to ensure Campus Village sufficient occupancy to meet its payment obligations on the bonds. A16, A18.

[1] Auraria also brought several state law claims that are not at issue in this appeal.

2. Campus Village moved to dismiss the antitrust claim on state action grounds, claiming that its agreement with UCD on the residency restriction was a foreseeable consequence of Colorado's state policy governing CECFA's operations. A52, A56. The district court held that the state action doctrine did not apply because the "broad and general legislative authority provided to CECFA by the Colorado legislature" was insufficient to authorize the alleged anticompetitive conduct. A61.

3. Campus Village appealed the district court's denial of its motion. A78. The Court ordered the parties to address whether it has jurisdiction over an appeal from an order denying a motion to dismiss a Sherman Act claim under the state action doctrine.

SUMMARY OF ARGUMENT

The Court lacks jurisdiction over this appeal. There is no final judgment resolving the underlying litigation, and an order denying a motion to dismiss an antitrust claim under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), is not immediately appealable under the collateral order doctrine.

State action is a defense to antitrust liability which the *Parker* Court created because of the absence of any indication in the text or history of

the Sherman Act that Congress sought to condemn state-imposed restraints of trade. The state action doctrine does not create a right to avoid trial like qualified or sovereign immunity. Orders denying *Parker* protection do not satisfy the second and third "stringent" conditions for review under the collateral order doctrine, *Will v. Hallock*, 546 U.S. 345, 349 (2006), because state action issues are not completely separate from the antitrust merits and are not effectively unreviewable on appeal from a final judgment. The Fourth and Sixth Circuits have squarely so held. *See S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006), *cert. denied*, 549 U.S. 1165 (2007); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986). Although the Fifth and Eleventh Circuits have held to the contrary, *see Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996); *Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986), their analyses have been undercut by subsequent circuit and Supreme Court precedent and do not persuasively support appellate jurisdiction here.

ARGUMENT

THE COURT LACKS JURISDICTION BECAUSE THE DISTRICT COURT'S ORDER IS NOT COLLATERALLY APPEALABLE

No final judgment has fully resolved the litigation in this case, and so appellant seeks review of the district court's order under the collateral order doctrine. *See* Appellant Br. 41-50. The collateral order doctrine, however, is narrow and does not apply to an order denying a motion to dismiss an antitrust claim under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943). Thus, this Court lacks jurisdiction over this appeal.[2]

A. The Collateral Order Doctrine Is Narrow.

In general, courts of appeal only have jurisdiction to review "final decisions" of district courts that effectively end the litigation. 28 U.S.C. § 1291. The Supreme Court, however, also has identified a "small class" of collateral rulings that, although not disposing of the litigation, are appropriately deemed final and immediately appealable because they are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole

[2] Appellant has the burden of establishing this Court's jurisdiction. *See, e.g.*, *Lopez v. Behles (In re Am. Ready Mix, Inc.)*, 14 F.3d 1497, 1499 (10th Cir.), *cert. denied*, 513 U.S. 818 (1994).

case is adjudicated." *Will v. Hallock*, 546 U.S. 345, 349-51 (2006) (quoting *Behrens v. Pelletier*, 516 U.S. 299, 305 (1996); and *Cohen v. Beneficial Indus. Loan Corp*., 337 U.S. 541, 546 (1949)); *see also Mohawk v. Carpenter*, 130 S. Ct. 599, 604-05 (2009).

The "requirements for collateral order appeal have been distilled down to three conditions: that an order [1] conclusively determine the disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349 (citations and internal quotation marks omitted). An order that "'fails to satisfy any one of [these] requirements' is not reviewable under the collateral order doctrine." *Mesa Oil, Inc. v. United States*, 467 F.3d 1252, 1254-55 (10th Cir. 2006) (quoting *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988)).

The three conditions are "'stringent,'" because otherwise, "the [collateral order] doctrine will overpower the substantial finality interests [28 U.S.C.] § 1291 is meant to further," *Will*, 546 U.S. at 349-50 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)), and risk "swallow[ing] the general rule that a party is

entitled to a single appeal, to be deferred until final judgment has been entered," *Digital Equip.*, 511 U.S. at 868. Moreover, "[p]ermitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk*, 130 S. Ct. at 605 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

For these reasons, the Supreme Court has repeatedly emphasized that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk*, 130 S. Ct. at 609 (quoting *Will*, 546 U.S. at 350); *see also United States v. Wampler*, 624 F.3d 1330, 1334 (10th Cir. 2010) ("In case after case in year after year, the Supreme Court has issued increasingly emphatic instructions that the class of cases capable of satisfying this 'stringent' test should be understood as 'small,' 'modest,' and 'narrow.'") (quoting *Mohawk*, 130 S. Ct. at 609; *Will*, 546 U.S. at 350; *Swint v. Chambers Cnty. Comm'n*, 514 U.S. 35, 42 (1995); and *Digital Equip.*, 511 U.S. at 868), *cert. denied*, 131 S. Ct. 3045 (2011). "This admonition has acquired special force in recent years with the enactment of legislation designating rulemaking,

'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 130 S. Ct. at 609 (quoting *Swint*, 514 U.S. at 48); *see also id.* (discussing relevant amendments to the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, and Congress's enactment of 28 U.S.C. § 1292(e)).

B. An Order Denying a Motion To Dismiss an Antitrust Claim Under the State Action Doctrine of *Parker v. Brown* Is Not Collateral.

The "state action" doctrine originated in *Parker v. Brown*, 317 U.S. 341 (1943), and it provides that "the [Sherman] Act's terms should not be read to preempt *state imposed* restraints of trade." *Kay Elec. Coop. v. City of Newkirk, Okla.*, 647 F.3d 1039, 1042 (10th Cir. 2011), *cert. denied*, 132 S. Ct. 1107 (2012). "Although the doctrine was aimed at protecting state legislatures and state supreme courts acting in their legislative capacities, it can provide protection to other individuals or entities acting pursuant to state authorization." *Zimomra v. Alamo Rent-A-Car, Inc.*, 111 F.3d 1495, 1498 (10th Cir.), *cert. denied*, 522 U.S. 948 (1997). A municipality may invoke the doctrine if it can "demonstrate that it is engaging in the challenged activity pursuant to

a clearly expressed state policy" to displace competition. *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 40 (1985). The doctrine also protects private parties when the challenged restraint is "'clearly articulated and affirmatively expressed as state policy'" and the policy is "'actively supervised' by the State itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980) (quoting *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 410 (1978) (plurality op.)).

Whether an order denying a motion to dismiss an antitrust claim under the state action doctrine of *Parker v. Brown* is immediately appealable as a collateral order is an issue of first impression in this Circuit. The Supreme Court's stringent test for the collateral order doctrine, however, makes clear that such orders are not collateral. *Parker* determinations are not "completely separate from the merits of [an antitrust] action." *Will*, 546 U.S. at 349. Nor are they "effectively unreviewable on appeal from a final judgment." *Id.* The state action doctrine is a defense to antitrust liability, not a right to avoid trial. And like any other defense to liability, the denial of the state action defense is reviewable after final judgment.

1. State action issues are not completely separate from the antitrust merits.

An issue is not completely separate from the merits when it "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). That is the case with state action determinations because "[t]he analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct" is "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 567 (6th Cir.), *cert. denied*, 479 U.S. 885 (1986). In particular, the state action and antitrust merits determinations typically both require substantial factual inquiry into the challenged conduct and its surrounding circumstances. *See S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 442-43 & n.7 (4th Cir. 2006) (the state action inquiry is "inherently 'enmeshed' with the underlying [antitrust] cause of action"), *cert. denied*, 549 U.S. 1165 (2007).

Of course, the presence or absence of state action sometimes can be determined without an elaborate inquiry into the antitrust merits. *Cf.* Philip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law* § 2.04b, at 2-49 (4th ed. 2011) ("many" state action determinations "can be resolved at the summary judgment stage or earlier"). But that does not make an issue completely separate from the merits for purposes of the collateral order doctrine, because the separateness determination must be made by evaluating "the entire category to which a claim belongs," not the facts of particular cases. *Digital Equip.*, 511 U.S. at 868; *see also Cunningham v. Hamilton Cnty.*, 527 U.S. 198, 206 (1999) ("[W]e have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral."). An order denying a motion to dismiss an antitrust claim under the state action doctrine is not collateral because the *Parker* analysis tends to be significantly enmeshed with the factual and legal issues underlying the antitrust cause of action. *Cf. Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988) (holding that *forum non conveniens* determinations were not collaterally appealable, although some do not "require significant inquiry into the [underlying] facts and legal issues," because "[i]n

fashioning a rule of appealability . . . we [must] look to categories of cases, not to particular injustices" and there was substantial overlap "in the main").

This case is illustrative. Although appellant claims that state action determinations involve only a discrete "question of law," Appellant Br. 42, much of its extensive argument that state action exists here—especially its contentions that "The University's Housing Rule was a Reasonably Foreseeable Result of the State's Policy," *id.* at 31-38, and that "Applying Federal Antitrust Law Would Disrupt the Operation of the Act, in Violation of the Purpose of State Action Immunity," *id.* at 38-40—are intertwined with the facts central to the allegations of anticompetitive conduct. While the state action and ultimate merits issues are not in all respects "identical," they are sufficiently enmeshed as to render the order non-collateral. *Cf. S.C. State Bd.*, 455 F.3d at 441-42 ("time and again the Supreme Court has refused to find an order to be 'collateral' when entertaining an immediate appeal might require it to consider issues intertwined with—though not identical to—the ultimate merits inquiry") (discussing *Cunningham*, 527 U.S. at 205;

Van Cauwenberghe, 486 U.S. at 528; and *Coopers & Lybrand*, 437 U.S. at 469).[3]

2. State action determinations are not effectively unreviewable on appeal from a final judgment.

An order is "effectively unreviewable" when it protects an interest that would be "essentially destroyed if its vindication must be postponed until trial is completed." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-99 (1989). The quintessential such interest is a "right not to be tried," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989), yet not all "orders denying an asserted right to avoid the burdens of trial qualify." *Will*, 546 U.S. at 350-51. "[I]t 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." *Id.* at 353.

As the Court explained in *Will*, "[p]rior cases mark the line between rulings within the class [of appealable collateral orders] and those outside." 546 U.S. at 350. "On the immediately appealable side" were

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[3] Though the district court held that appellant did not need to prove that its anticompetitive conduct was actively supervised by the State here, A57-A58, proof of active supervision by the State is also significantly enmeshed with the antitrust merits. *See Huron Valley*, 792 F.2d at 567.

orders denying: (1) absolute Presidential immunity; (2) qualified immunity; (3) Eleventh Amendment sovereign immunity; and (4) double jeopardy. *Id.* "In each case," the Court noted, "some particular [public] value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." *Id.* at 352-53.

An order denying a motion to dismiss an antitrust claim under the state action doctrine is materially different from these types of appealable collateral orders, because the state action doctrine is a defense to antitrust liability, not a right to be free from suit. *See Huron Valley*, 792 F.2d at 567. *Parker* provides that certain state-imposed restraints do not violate the antitrust laws. *See* pp. 8-9, *supra*. As the Fourth Circuit explained: "The *Parker* doctrine did not arise from any concern about special harms that would result from trial. Instead, *Parker* speaks only about the proper interpretation of the Sherman Act." *S.C. State Bd.*, 455 F.3d at 444. This Court recently examined the state action doctrine and likewise concluded that it is an interpretation

of statutory silence, as the *Parker* Court "assumed without deciding that Congress *could* constitutionally preempt state law directing state actors to behave anticompetitively" but saw "no hint" that Congress sought to accomplish that objective through the Sherman Act. *Kay*, 647 F.3d at 1041-42; *cf. Midland Asphalt*, 489 U.S. at 801-02 (holding that an order denying a motion to dismiss an indictment for an alleged violation of Federal Rule of Criminal Procedure 6(e) is not collaterally appealable because "[t]he text of Rule 6(e) contains no hint that a governmental violation of its prescriptions gives rise to a right not to stand trial").

Appellant is wrong to contend (Br. 45-47) that the purposes of the state action doctrine are undermined by deferring appeals like this one until after final judgment. As appellee notes, several of the Supreme Court and Tenth Circuit cases holding the state action doctrine applicable (including *Parker*) came on review of final judgments in favor of plaintiffs. *See* Appellee Br. 19-20. The purposes of the doctrine are undermined only when an antitrust court enjoins a state-imposed

restraint or damages are imposed, not by the trial process itself.[4] Indeed, while appellant argues that "broad-reaching discovery" is "peculiarly disruptive of effective government," Appellant Br. 46-48 (citations and internal quotation marks omitted), that is true in many cases in which the state or federal government is a defendant. If an order was rendered "effectively unreviewable" merely because its denial led to additional litigation burdens for the government, the final judgment rule would be drastically reduced in scope. *Cf. In re Motor Fuel Temperature Sales Practices Litig.*, 641 F.3d 470, 482 (10th Cir. 2011) (discussing the important purposes served by the "final judgment rule" including "the substantial burden that would be imposed on the courts of appeals by the 'fragmentary and piecemeal review of the district court's myriad rulings in the course of a typical case'" (quoting *Boughton v. Cotter Corp.*, 10 F.3d 746, 748 (10th Cir. 1993))), *cert. denied sub nom. NATSO, Inc. v. 3 Girls Enters., Inc.*, 132 S. Ct. 1004 (2012).

[4] If a court granted a preliminary injunction, that could be appealed immediately regardless of whether an order denying *Parker* protection is collateral. *See* 15 U.S.C. § 29(a); 28 U.S.C. § 1292(a)(1).

To be sure, this Court has referred to the state action defense as an "immunity." *See, e.g.*, *Zimomra*, 111 F.3d at 1498; *Allright Colo., Inc. v. City & Cnty. of Denver*, 937 F.2d 1502, 1506-11 (10th Cir.), *cert. denied*, 502 U.S. 983 (1991), *reh'g denied*, 502 U.S. 1082 (1992). But this Court also has recognized that "the term 'immunity' may be a bit strong since the [*Parker*] Court held only that Congress *hadn't* covered state action [in the Sherman Act], not that it *couldn't*." *Kay*, 647 F.3d at 1042. As the Fifth Circuit explained in a unanimous en banc opinion, "immunity" is an "inapt" description of the doctrine; the term "*Parker* immunity" is most accurately understood as "a convenient shorthand" for "locating the reach of the Sherman Act." *Surgical Care Ctr. of Hammond, L.C. v. Hosp. Serv. Dist. No. 1 of Tangipahoa Parish*, 171 F.3d 231, 234 (5th Cir.) (en banc), *cert. denied*, 528 U.S. 964 (1999); *see also Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 292 n.3 (5th Cir. 2000) ("[t]hough the state action doctrine is often labeled an immunity, that term is actually a misnomer because the doctrine is but a recognition of the limited reach of the Sherman Act").[5]

[5] The Supreme Court "did not characterize the state action antitrust doctrine as an 'immunity' in the *Parker* decision itself." *S.C. State Bd.*, 455 F.3d at 445. "Indeed, although *Parker* issued in 1943, it was not

In any event, the Fourth Circuit also has referred to the state action defense as an "immunity," *TFWS, Inc. v. Schaefer*, 242 F.3d 198, 210 (4th Cir. 2001), but nevertheless expressly held that orders rejecting the defense are not collateral. *S.C. State Bd.*, 455 F.3d at 445-46. As the Fourth Circuit observed: "*Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.' *Parker*, therefore recognizes a 'defense' qualitatively different from the immunities described in *Will*, which focus on the harms attendant to litigation itself." *Id.* at 444; *see also Surgical Care*, 171 F.3d at 234 (*Parker's* "parentage differs from the qualified and absolute immunities of public officials"); *Huron Valley*, 792 F.2d at 567 ("the [state action] exemption is not an 'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim").

If a district court erroneously rejects a state action defense to an antitrust claim in adjudicating a motion to dismiss and the defendant is

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until [*City of Lafayette*, 435 U.S. at 415] that the Court first used the term '*Parker* immunity.'" *Id.* The Court has since "alternated between calling the *Parker* protection an 'immunity' and an 'exemption.'" *Id.* (citations omitted); *see, e.g.*, *Hoover v. Ronwin*, 466 U.S. 558, 573 (1984) (holding that the challenged conduct "is exempt from Sherman Act liability under the state-action doctrine of *Parker v. Brown*").

found liable, that judgment can be reversed on appeal. As this Court has recently explained: "While a post-judgment appeal may afford the defendant only an 'imperfect[]' remedy to an improperly denied motion to dismiss, *some* meaningful review is available after trial—after all, an appellate court can still undo an unlawful conviction. And this, the Court has said, is generally all that's required or permitted by § 1291." *Wampler*, 624 F.3d at 1335 (quoting *Mohawk*, 130 S. Ct. at 605).

Moreover, a defendant that believes that its state action defense was rejected because of an error of law in a private antitrust case (such as this one) "may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C. § 1292(b)." *Mohawk*, 130 S. Ct. at 607.[6] Or, "in extraordinary circumstances," a defendant "may petition the court of appeals for a writ of mandamus." *Id.* "While these discretionary review mechanisms do not provide relief in every case, they serve as useful 'safety valve[s]' for promptly correcting serious errors." *Id.* at 607-08 (quoting *Digital Equip*, 511 U.S. at 883). Appellant, however, has not used either mechanism.

[6] The district court may not certify questions for interlocutory appeal in civil antitrust enforcement actions "in which the United States is the complainant and equitable relief is sought." 15 U.S.C. § 29(a).

3. Appellant's arguments in support of jurisdiction are not persuasive.

a. Appellant argues that this Court should not follow the clear holdings of the Fourth and Sixth Circuits in *S.C. State Board* and *Huron Valley* that an order denying *Parker* protection is not collaterally appealable because those decisions conflict with decisions of the Fifth and Eleventh Circuits. *See* Appellant Br. 20, 40-50 & n.7 (citing *Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391 (5th Cir. 1996); *Commuter Transp. Sys., Inc. v. Hillsborough Cnty. Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986); *Praxair, Inc. v. Fla. Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995)). But the cases relied on by appellant have been undercut by subsequent circuit and Supreme Court precedent and do not persuasively support jurisdiction here.

i. Appellant relies primarily on the Fifth Circuit's decision in *Martin v. Memorial Hospital*, in which the court "conclude[d] that *Parker v. Brown* state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances.'" 86 F.3d at 1395. But a unanimous en banc panel of the Fifth Circuit subsequently acknowledged that "*Parker* immunity is an inapt description, for its

parentage differs from the qualified and absolute immunities of public officials." *Surgical Care*, 171 F.3d at 234. Even more recently, the Fifth Circuit expressly stated that it is a "misnomer" to call the state action doctrine an "immunity" and held that private parties like appellant cannot immediately appeal an order denying *Parker* protection. *See Acoustic Sys.*, 207 F.3d at 291-94 & n.3.

ii. The Eleventh Circuit has held that an order denying a motion for summary judgment on state action grounds is appealable under the collateral order doctrine. *See Commuter Transp.*, 801 F.2d at 1289-91. But the court's analysis in reaching that conclusion antedated, and is inconsistent with, the Supreme Court's "increasingly emphatic instructions" that the test for satisfying the collateral order doctrine is "'stringent'" and only capable of being satisfied by a "'small,' 'modest,' and 'narrow'" class of cases. *Wampler*, 624 F.3d at 1334 (quoting *Mohawk*, 130 S. Ct. at 609; *Will*, 546 U.S. at 350; *Swint*, 514 U.S. at 42; and *Digital Equip.*, 511 U.S. at 868). Indeed, the Eleventh Circuit made no attempt to explain its rationale for declaring that the state action doctrine provides an "*immunity from suit* rather than a mere defense to liability." *Commuter Transp.*, 801 F.2d at 1289 (quoting

Mitchell v. Forsyth, 472 U.S. 511, 526 (1985)). Thus, Eleventh Circuit precedent does not persuasively support jurisdiction here either.[7] *Cf.* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.10, at 693-94 & nn.85-86 (1992) (finding *Huron Valley* "more persuasive" than *Commuter Transportation* because "there is little to distinguish this defense from many other defenses to antitrust or other claims").

b. Appellant also relies on the government's amicus brief in *Filarsky v. Delia*, No. 10-1018 (S. Ct. Nov. 21, 2011). But *Filarsky* involves whether a private attorney has qualified immunity when sued under 42 U.S.C. § 1983, not the collateral order doctrine. The portions of the government's brief cited by appellant (Br. 47-48) are inapposite to the jurisdictional question before this Court because, unlike qualified immunity, the state action doctrine does not provide a right to avoid trial. *See* pp. 8-9, 14-18, *supra*. For the reasons explained above, appellate jurisdiction is lacking here.

[7] *Praxair* does not add anything to *Commuter Transportation* since *Praxair* simply treated the issue as settled circuit precedent. *See* 64 F.3d at 610.

CONCLUSION

The Court should dismiss the appeal for lack of appellate jurisdiction.

Respectfully submitted.

/s/ Nickolai G. Levin

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April 13, 2012

CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 4,235 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 with 14-point New Century Schoolbook font.

April 13, 2012

/s/ Nickolai G. Levin
Attorney

CERTIFICATE OF SERVICE

I, Nickolai G. Levin, hereby certify that on April 13, 2012, I electronically filed the foregoing Brief for the United States and the Federal Trade Commission as Amici Curiae Supporting Plaintiff-Appellee on the Lack of Jurisdiction with the Clerk of the Court of the United States Court of Appeals for the Tenth Circuit by using the CM/ECF System. I also sent 7 copies to the Clerk of the Court by FedEx 2-Day Delivery.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the CM/ECF system.

April 13, 2012

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