No. _____

In the Supreme Court of the United States

SOUTH CAROLINA STATE BOARD OF DENTISTRY,
Petitioner,

v.

FEDERAL TRADE COMMISSION,
Respondent

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Whether an order denying "state action" antitrust immunity asserted by a state agency under *Parker v. Brown*, 317 U.S. 341 (1943), is immediately appealable under the collateral order doctrine.

PARTIES TO THE PROCEEDING

Petitioner is the South Carolina State Board of Dentistry, a state agency created by statute (*S.C. Code Ann.* §§40-15-10, et seq.). Respondent is the Federal Trade Commission.

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PETITION FOR WRIT OF CERTIORARI

Petitioner South Carolina State Board of Dentistry respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fourth Circuit in this case.

OPINIONS BELOW

The opinion of the Court of Appeals (App., *infra*, 1a-20a) is not yet reported. The opinion and order of the Federal Trade Commission (App., *infra*, 21a-64a) are also unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 1, 2006. A petition for rehearing was denied on June 27, 2006. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This Petition involves the collateral order doctrine, which this Court has described as a "practical construction" of 28 U.S.C. § 1291. *Digital Equipment Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). That statute provides in pertinent part:

> The courts of appeals . . . shall have jurisdiction of appeals from all final decisions of the district courts of the United States . . . except where a direct review may be had in the Supreme Court. . . .

The analogous statute governing appeals from orders of the Federal Trade Commission is 15 U.S.C § 45(c). *See FTC v. Standard Oil Co. of Cal.*, 449 U.S. 232, 246 (1980). That section provides in pertinent part:

> Any person, partnership, or corporation required by an order of the Commission to cease and desist from using any method of competition or act or practice may obtain a review of such order in the court of appeals of the United States, within any circuit where the method of competition or the act or practice in question was used. . .

STATEMENT

This action was brought in September 2003 by the Federal Trade Commission ("FTC" or "Commission") against the South Carolina State Board of Dentistry ("Board").[1] The Complaint sought an Order requiring the Board to cease and desist from requiring an examination by a dentist before certain activities could be performed by dental hygienists. This practice had been effectively abandoned by the Board in January 2002, well before the present action was filed.

The activity of the Board that led to the filing of this action was the enactment of a temporary state regulation in 2001. Dental Board Regulation 39-18, 25-7 S.C. Reg. 79 (2001). Under state law, such temporary regulations expire at

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[1] The terms "FTC" or "Commission" will be used herein to refer to the Commission in its adjudicatory capacity. The term "Respondent" will be used to refer to the Commission in its capacity as a litigating party.

the end of 180 days, App., *infra*, 4a. The regulation in question expired in January 2002.

The underlying issue arose out of conflicting interpretations of certain amendments made in 2000 to the state statutes governing dental hygiene in public health settings.[2] The Board of Dentistry interpreted these amendments as retaining a previous statutory requirement that children in public health settings must be examined by a dentist before dental hygienists could perform such treatments as the application of sealants over teeth. The temporary 180-day regulation that was in effect from July 2001 through January 2002 embodied the Board's interpretation of the 2000 state statutory amendments.

The Board's temporary regulation was the subject of disagreement. A private state court action was filed two years before the Federal Trade Commission brought the present action.[3] The differing views at the state level were eventually resolved in June 2003 with the enactment by of compromise legislation by the South Carolina legislature.[4] As the Court of Appeals noted, this action, which commenced in September 2003, was not filed until "twenty months after the emergency regulation had expired and three months after the South Carolina legislature had enacted compromise legislation supported by both the Board and hygienists. . . . " App., *infra*, 5a.[5] At oral argument before the

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[2] S.C. Act No. 298 of 2000, Jt. App. 168-169.

[3] The private plaintiffs in the state litigation were unsuccessful in obtaining temporary injunctive relief in 2001. The case is still pending in state court as a damage action.

[4] S.C. Act No. 45 of 2003, Jt. App. 172-177.

[5] In a footnote, the Court of Appeals noted that the 2003 state legislation "eliminated the preexamination requirement for patients being treated in the 'public health' setting. . . ." App.,

Court of Appeals, counsel for the Respondent conceded that he was not aware of any subsequent effort by the Board to reinstate the preexamination requirement.

The Board filed a motion to dismiss this action, as specifically authorized by the FTC, asserting two grounds: mootness, as described above, and the application of the state action immunity doctrine as first enunciated in *Parker v. Brown*, 317 U.S. 341 (1943). Jt. App. 13-14. These issues were briefed and orally argued before the full Commission in early 2004. In an opinion and order issued on July 28, 2004, the Commission denied the Board's motion to dismiss based on state action immunity grounds. App., *infra*, 21a-64a. The Commission's decision regarding immunity was based in large part on the Commission's adopting a construction of the pertinent state statutes that differed from the State Board of Dentistry's construction of the same statutes. App., *infra*, 50a-56a. On the mootness issue, the Commission held the Board's motion to dismiss in abeyance, referring the issue to an Administrative Law Judge for limited discovery and for an assessment of whether the complained-of conduct that occurred in 2001 would be likely to occur again in light of the 2003 state statutory amendments and other developments. App., *infra*, 62a-63a.[6]

The Board filed a Petition for Review with the Court of Appeals, seeking review of only the part of the FTC Order

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infra, 5a n.3. The public health setting is the only setting for which the Commission sought a cease and desist order. Complaint, Jt. App. 11.

[6] When the Board filed its Petition for Review in the Court of Appeals, the FTC granted the Board's unopposed motion for stay of further proceedings before the FTC pending appeal. The FTC on August 9, 2006 also granted a similar unopposed motion for stay pending the resolution of the present Petition for Certiorari.

that denied the Board's motion to dismiss based on state action immunity.[7] The Respondent in turn filed a motion to dismiss the appeal on the ground that the appeal was interlocutory. The Court of Appeals received briefs regarding that motion, and after approximately a year, issued an order deferring action on the motion to dismiss appeal until oral argument. The case was then briefed and argued on both the appealability and the immunity issues.

On May 1, 2006, the Court of Appeals dismissed the appeal, holding that the collateral order doctrine did not apply to the issue of *Parker* immunity. The court recognized that its opinion was in conflict with holdings in two circuits and dicta in cases in two others. App., *infra,* 7a-8a. Only one circuit, the Sixth, has reached the same result on this issue as the Court of Appeals in the present case. *Huron Valley Hosp., Inc. v. City of Pontiac,* 792 F.2d 563 (6th Cir. 1986). The Board's petition for rehearing and suggestion for rehearing en banc were denied by order dated June 27, 2006. App., *infra,* 65a-66a.

REASONS FOR GRANTING THE PETITION

This case combines the federalism interests protected by two separate lines of authority dealing, respectively, with state action immunity in antitrust cases and with the immediate appealability of orders denying immunity to public officials and entities. The first line, which began with *Parker v. Brown*, 317 U.S. 341 (1943), effectively immunizes state action from federal antitrust review. The second line, which has arisen in the context of several different governmental immunities, permits immediate appeals by state entities and officials of

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[7] The Board did not assert that the FTC's nonfinal decision ordering discovery on the mootness issue was immediately appealable.

orders denying immunity.[8] As several circuits have held, the state interests protected by *Parker* immunity are of the same kind as the interests protected by other immunities extended to state officials and entities. As a result, orders denying *Parker* immunity to state actors should be uniformly held to be immediately appealable, lest the immunity be rendered largely ineffective.

There is now a substantial split among the circuits on the precise issue presented by this Petition, as the Court of Appeals has acknowledged. App., *infra*, 7a-8a.

A. The Court Of Appeals' Decision Conflicts With Decisions Of Other Courts Of Appeals.

The opinion of the Court of Appeals has revived a circuit split that appeared to be moribund prior to the decision in this case. This issue was first presented at the court of appeals level in 1986, when the Sixth Circuit rejected an appeal of a denial of *Parker* immunity. *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563, 568 (6th Cir. 1986). However, in the ensuing twenty years, and until the present case was decided below, every other court that considered the issue reached the opposite result, and permitted such appeals.

The next case after *Huron Valley* to decide the issue was decided only a few months later in 1986. In that case, *Commuter Transp. Sys. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286 (11th Cir. 1986)("*Hillsborough*"), the

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[8] *See Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982)(absolute immunity); *Mitchell v. Forsyth*, 472 U.S. 511, 530 (1985)(qualified immunity; *Puerto Rico Aqueduct and Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 144-145 (1993)(Eleventh Amendment immunity).

Eleventh Circuit permitted an immediate appeal by a county agency, holding that the case involved the agency's "right not to stand trial because of state action and statutory immunity." 801 F.2d at 1290. In the Eleventh Circuit, *Hillsborough* has been followed by at least four other cases.[9]

The Fifth Circuit has likewise held several times that a denial of *Parker* immunity is immediately appealable. *Martin v. Memorial Hosp.*, 86 F.3d 1391 (5th Cir. 1996); *Earles v. State Bd. of Certified Public Accountants of Louisiana*, 139 F.3d 1033 (5th Cir.), cert. denied 525 U.S. 982 (1998); *Acoustic Systems, Inc. v. Wenger Corp.*, 207 F.3d 287 (5th Cir. 2000).

In the meantime, as the Court of Appeals in this case expressed it, two other circuits have "suggested . . . in dicta," that a denial of *Parker* immunity is immediately appealable. *We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3rd Cir. 1999); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir.1987). App., *infra*, 8a.

The familiar three-part test for reviewability under the collateral order doctrine, first set forth in *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949) requires that the decision below 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." *Will v. Hallock*, ___ U.S. ___, 126 S.Ct. 952, 957 (2006).

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[9] *TEC Cogeneration Inc. v. Florida Power & Light Co.*, 76 F.3d 1560 (11th Cir. 1996); *Praxair, Inc. v. Florida Power & Light Co.*, 64 F.3d 609 (11th Cir. 1995), cert. denied, 517 U.S. 1190 (1996); *Askew v. DCH Regional Health Care Authority*, 995 F.2d 1033 (11th Cir.), cert. denied, 510 U.S. 1012 (1993); *Bolt v. Halifax Hosp. Medical Center, 980 F.2d 1381* (11th Cir. 1993).

In each of the conflicting court of appeals cases where the point was actually decided, there was no factual or procedural aspect that distinguished one case from another. Instead, the circuits have simply disagreed on the manner in which the three tests of the collateral order doctrine apply when state action immunity is claimed.

In the present case, the Court of Appeals held that the FTC's decision was "neither 'completely separate from the merits' nor 'effectively unreviewable' after trial. . . ." App., infra, 8a.[10] The Court of Appeals did not deny that its decision was at odds with the above-cited cases from four other circuits. In *Hillsborough, supra*, the Eleventh Circuit squarely held the opposite, i.e., that the lower court order "denying summary judgment based on immunity resolves an important issue separate from the merits. . . ." 801 F.2d at 1289. *Hillsborough* also held that *Parker*, like *Harlow v. Fitzgerald*, 457 U.S. 800 (1982) and *Mitchell, supra*, created an immunity from suit, making its denial by the lower court "effectively unreviewable on appeal from a final judgment." *Id. Accord, Martin v. Memorial Hosp. at Gulfport*, 86 F.3d 1391, 1397 (5th Cir. 1996)("a claim of such state action immunity is conceptually distinct from the merits of the plaintiff's claim that he has been damaged by the defendants' alleged violation of the federal antitrust laws").

The Court of Appeals in this case, by contrast, held that the *Parker* doctrine is only a defense to the merits, rather than an immunity. Under that view, *Parker* issues do not meet two of the three parts of the test for collateral review, because *Parker* issues, so viewed, are neither separate from

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[10] The Court of Appeals agreed that the first requirement had been satisfied, i.e., that the FTC's decision conclusively determined the disputed question. App., *infra*, 7a.

the merits nor effectively unreviewable on appeal from a final judgment. The Sixth Circuit held likewise with respect to those two aspects of the reviewability test. *Huron Valley*, 792 F.2d at 567. The existence of a circuit conflict is therefore undeniable.

B. The Court Of Appeals Erroneously Held That The FTC's Denial Of *Parker v. Brown* Immunity Was Not Immediately Reviewable.

The decision of the Court of Appeals on both the second and third aspects of the collateral order doctrine was founded solely on the court's erroneous conclusion that *Parker* created only an ordinary defense to liability rather than a federalism-based immunity. In addition to reviving a circuit conflict, this reasoning represents an incorrect analysis of which issues are "merits" issues, as will be outlined briefly herein. In addition, the decision was at odds with this Court's frequent recognition of the important federalism interests protected by *Parker* immunity.

1. The Court Of Appeals Incorrectly Equated "State Action" Analysis With Issues Involving The Merits.

The nature of an "immunity" is that it protects the defendant from suit even if the defendant can be shown to have damaged the plaintiff through some wrongful act. As this Court has held, "a legal [i.e., "merits"] defense may well involve 'the essence of the wrong,' while an immunity frees one who enjoys it from a lawsuit whether or not he acted wrongly." *Richardson v. McKnight*, 521 U.S. 399, 403 (1997) In other words, a claim of immunity does not deny the existence of wrongdoing or damage. In the context of the present case, if a group of private parties had taken a private anticompetitive action that had prevented hygienists from

performing certain functions without an examination by a dentist, the merits issues would be whether the private acts of those defendants constituted an unfair method of competition, caused damage, and should be remedied. There would be no issue of whether the defendants were immune from suit as state actors.

The merits issues in this case are no different: assuming without conceding that the actions of the Dental Board were not state action, the FTC would still need to find that those acts constituted an unfair method of competition, caused damage, and should be remedied. The issue of whether the Board's action was "state action" or not is a preliminary inquiry that determines only whether the Board's action is immunized by *Parker*, regardless of whether it had anticompetitive effect or caused damage. The court below and the Sixth Circuit in *Huron Valley* incorrectly equated the *Parker* inquiry with inquiry into "the essence of the wrong."

The Court of Appeals held that *Parker* involved "a strict standard for locating the reach of the Sherman Act," App., *infra*, 14a, but this does not cause the *Parker* doctrine to lose its effect of creating an immunity from suit. The fact that the immunity arises from a statute does not transform it into something other than an immunity. Stated differently, if a state board had acted so far beyond its jurisdiction as arguably to lose its state action immunity (for instance, if the Dental Board had sought to regulate engineers), the plaintiff would still need to prove that even those unauthorized actions by state officials actually had anticompetitive effects and damaged the plaintiff. If anticompetitive effects and damage to the plaintiff cannot be shown, the plaintiff will be held to have no claim on the merits. The presence or absence of state authorization is relevant only to determine whether the state actor can be sued.

2. The Court Of Appeals Failed To Recognize That *Parker* Protects Important Federalism Interests.

The Court of Appeals failed to recognize that *Parker* represents both Congressional and judicial respect for state sovereignty, as shown by both branches' refusal to extend federal antitrust law to state actions. The Court of Appeals instead characterized *Parker* as aimed only at "protect[ing] against . . . a misinterpretation of federal antitrust laws." This characterization minimizes *Parker* in a way that is inconsistent with this Court's holdings that *Parker* is a doctrine rooted in federalism. Indeed, the Court of Appeals did not mention federalism at all, suggesting an underlying misconception of the rationale for the state action doctrine.

The federalism roots of the doctrine are stated in *Parker* itself, which holds that

> 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.

Parker, 317 U.S. at 351. This Court later expressly held *Parker* to be based on federalism principles:

> The rationale of *Parker* was that, in light of our national commitment to federalism, the general language of the Sherman Act should not be interpreted to prohibit anticompetitive actions by the States in their governmental capacities as sovereign regulators.

City of Columbia v. Omni Outdoor Advertising, 499 U.S. 365, 374 (1991). The Court of Appeals, in contrast, examined *Parker* and concluded that the case's only rationale was only to "protect against . . . a misinterpretation of federal antitrust laws." App., *infra,* 14a.

The present case provides a good illustration of why immediate appeals of denials of *Parker* immunity are necessary for the protection of federalism interests. The defendant is a state regulatory authority. It acted under state law in order to prevent potential harm to the public health. *See* App., *infra*, 4a. The Board was subsequently brought before the Commission, a federal antitrust tribunal, on a claim based solely on that federal agency's disagreement with state authorities over the proper construction of state statutes. *See* App., *infra*, 50a-56a. In so doing, the FTC did exactly what this Court in *City of Columbia v. Omni, supra*, said not to do: it converted a state administrative law dispute about the Board's authority under state law "into a federal antitrust job." 499 U.S. at 372.

If the FTC is given unreviewable authority to require a state agency to stand trial on the merits, based only on the FTC's differing opinion about an issue of state law, the federal-state balance will be skewed greatly to the FTC's advantage. Actions such as the present one are costly and time-consuming for state agencies. Many state agencies may lack the time and the resources to go through the entire FTC adjudicative process. Such agencies would be constrained to consider acquiescing in consent orders, solely because they could not afford to defend a practice they believed to be a valid exercise of their powers as state regulators.

In addition, *Mitchell* has recognized that one reason for immediate review of denials of immunity is to prevent "distraction of officials from their governmental duties [and]

inhibition of discretionary action. . . .” 472 U.S. at 526. The possibility of lengthy and costly antitrust litigation presents obvious possibilities of disruption to state regulatory activities. As a result, the issue of state action immunity should be reviewable at the earliest opportunity.

This Court should therefore grant the petition and reverse the decision of the Court of Appeals in order to provide for a uniform national rule permitting that state actors to appeal immediately when federal antitrust authority is invoked in an effort to enjoin the regulatory activity of a state agency.

CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be granted.

Respectfully submitted,

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