# Appealability of State Action Immunity: Navigating Federal Courts past the Crossroads Where *Parker* Immunity Meets the Collateral Order Doctrine

*"A subordinate state government body is not* ipso facto *exempt from the operation of the antitrust laws. Rather, a district court must ask whether the state legislature contemplated a certain type of anticompetitive restraint. . . . Whether a government body's actions are comprehended within the powers granted to it by the legislature is, of course, a determination which can be made only under the specific facts in each case."*[1]

## I. INTRODUCTION

Title 28, § 1291 of the United States Code states that federal appeals courts have jurisdiction to review "final decisions" of district courts.[2] Appeals are ordinarily not available under § 1291 until the district court enters a final judgment on the merits of the case.[3] However, the collateral order doctrine—which is understood as a "practical construction" of § 1291—permits interlocutory appeals from a small set of orders that "have [a] final and irreparable effect on the rights of the parties."[4] Inherent in the collateral order doctrine is a concern for the effective preservation of rights and benefits that an asserted defense affords a party, which would be lost but for a prompt interlocutory appeal.[5]

Federal antitrust law, under the Sherman Antitrust Act (Sherman Act), is intended to protect the public by promoting a stable market and preventing

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

2. 28 U.S.C. § 1291 (2018); *see* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 106 (2009) (explaining appellate court has jurisdiction over appeals of final district court decisions).

3. *See* Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 374 (1981) (clarifying grounds for party to take appeal).

4. *See* Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 867 (1994) (describing proper characterization of collateral order doctrine distinguishable from exceptions to § 1291); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 545-46 (1949) (characterizing orders appealable before final judgment under § 1291). An order denying a government official's motion for summary judgment on qualified immunity grounds is among the limited collateral orders identified in *Cohen* that would irreparably affect the party's rights. *See* Mitchell v. Forsyth, 472 U.S. 511, 525-27 (1985) (expounding how commencing suit destroys defendant's qualified immunity benefit of freedom from litigation); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 816-17 (1982) (explicating burden litigation places on government officials).

5. *See Cohen*, 337 U.S. at 546 (emphasizing importance of reviewability in determining appealability).

market failure caused by conduct that tends to destroy competition.[6] In *Parker v. Brown*,[7] decided in 1943, the Supreme Court held that actions taken by state governments were exempt from antitrust restrictions under the Sherman Act, thereby creating the "state action immunity" doctrine.[8] Inherent in state action immunity is the desire to preserve federalism and state independence in regulating market stability.[9]

Federal circuit courts are split as to whether a defendant can immediately appeal a denial of state action immunity through the collateral order doctrine.[10] The circuit split stems from one simple yet controlling proposition: Is state action immunity an absolute immunity from suit, or merely a defense to liability?[11] If construed as an immunity from suit, then the denial of a motion to dismiss for lack of immunity would be deemed to have an "irreparable effect" on the rights of the movant, which in turn would allow for an interlocutory appeal under the collateral order doctrine.[12] On the other hand, if state action immunity is interpreted as merely a defense to liability, the denial of a motion to dismiss

6. *See* 15 U.S.C. §§ 1, 2; Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 458 (1993) (clarifying Sherman Act favors public interest in stable market over private business's interest against competition); *see also* Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc., 429 U.S. 477, 487-88 (1977) (holding merger through anticompetitive acts cognizable injury over business's loss of income).

7. 317 U.S. 341 (1943).

8. *See* Joel L. Frank, Note, *The Development of the* Parker *Doctrine*, 10 DEL. J. CORP. L. 785, 786-87 (1985) (elaborating on development of state action immunity in *Parker*); *see also Parker*, 317 U.S. at 351 (revealing Sherman Act legislative history shows no congressional intent to regulate state action). The California Agricultural Prorate System—the state legislative action disputed in *Parker*—intended to use state officials' actions to institute programs that regulated agricultural products in the state in order to prevent market destabilizing competition. *Parker*, 317 U.S. at 346. Analyzing the scope of the Sherman Act, the Court stated "[t]he Sherman Act . . . gives no hint that it was intended to restrain state action or official action directed by a state." *Id.* at 351; *see* AM. BAR ASS'N, STATE ACTION PRACTICE MANUAL 1 (3rd ed. 2017) (explaining scope of state action immunity).

9. *See* S. Motor Carriers Rate Conference, Inc. v. United States, 471 U.S. 48, 61 (1985) (recognizing conflicts between antitrust laws and federalism); Electrical Inspectors, Inc. v. Vill. of E. Hills, 320 F.3d 110, 118-19 (2d Cir. 2002) (reasoning over burdensome antitrust laws undermine federalism interests *Parker* intended to protect).

10. *See* Keith Goldberg, *Utility Plots High Court Appeals in SolarCity Monopoly Suit*, LAW 360 (Jun. 21, 2017), https://www.law360.com/articles/936870/utility-plots-high-court-appeal-in-solarcity-monopoly-suit [https://perma.cc/8DN3-YEAM] (identifying Ninth, Fourth, and Sixth Circuits in contention with Fifth and Eleventh Circuits).

11. *See* Jason Kornmehl, *State Action on Appeal:* Parker *Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 SEATTLE U. L. REV. 1, 14 (2015) (discussing application of collateral order doctrine to governmental entities deemed part of state). Jason Kornmehl maintains that the question of whether state action immunity constitutes immunity from suit or a mere defense to liability is "critical" in determining whether the collateral order doctrine applies. *Id. Compare* SolarCity Corp. v. Salt River Project Agric. Improvement and Power Dist., 859 F.3d 720, 727 (9th Cir. 2017) (holding state action not defense from suit and rejecting appeal under collateral order doctrine), *cert. granted*, 138 S. Ct. 499 (2017), *and cert. dismissed sub nom.* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018), *with* Earles v. State Bd. Of Certified Pub. Accountants of La., 139 F.3d 1033, 1040 (5th Cir. 1998) (holding state action immunity defense from suit and allowing appeal under collateral order doctrine).

12. *See* AM. BAR ASS'N, *supra* note 8, at 184 (discussing effect of denial of motion to dismiss based on state action immunity); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 814-19 (1982) (explaining repercussions of litigation rationalizing immunity from suit).

could be effectively reviewed on appeal after final judgment, and the collateral order doctrine would not apply.[13]

The Supreme Court has not yet decided whether a denial of state action immunity can be the subject of an interlocutory appeal under the collateral order doctrine.[14] The most recent federal appellate case addressing the issue is *SolarCity Corp. v. Salt River Project Agricultural & Power District*,[15] in which the Ninth Circuit dismissed an interlocutory appeal from a denial of state action immunity asserted in a motion to dismiss, reasoning that state action immunity is not an immunity from suit.[16] On December 1, 2017, the Supreme Court granted the case certiorari, and would have likely settled the circuit split stemming from this issue.[17] However, the parties engaged in settlement discussions, and on March 20, 2018, the case was dismissed pursuant to the United States Supreme Court Rule 46.1.[18]

This Note begins by explaining the history of the final judgment rule and the collateral order doctrine.[19] Next, this Note clarifies the function of state action immunity in the realm of antitrust litigation.[20] Then, after analyzing each circuit's precedent on state action immunity, this Note argues that state action immunity should be considered a mere defense to liability and, therefore, denial does not warrant an interlocutory appeal pursuant to the collateral order doctrine.[21] This Note uses *SolarCity* to frame its analysis and focus its perspective on antitrust litigation.[22] Ultimately, this Note proposes that only denials of a sovereign state's assertion of state action immunity are immediately appealable under the collateral order doctrine, and any entity acting on a state's behalf must wait to appeal until a final judgment is issued on the merits of the case.[23]

13. *See* Kornmehl, *supra* note 11, at 13-14 (comparing immunity from suit denial's unreviewability and immunity from liability denial's reviewablity post final judgment); *see also* Mitchell v. Forsyth, 472 U.S. 511, 526-27 (1985) (establishing review of denial of immunity from liability effective post final judgment).

14. *See* AM. BAR ASS'N, *supra* note 8, at 185 (stating "Court has yet to decide . . . whether . . . state action doctrine is immediately reviewable").

15. 859 F.3d 720 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 499 (2017), *and cert. dismissed sub nom.* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018).

16. *Id.* at 726-27.

17. Salt River Project and Agric. Improvement and Power Dist. v. SolarCity Corp., 138 S. Ct. 499 (2017), *cert. dismissed sub nom.* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018); *see* Petition for Writ of Certiorari at i, 11, Salt River Project Agric. Improvement and Power Dist. v. SolarCity Corp., 138 S. Ct. 499 (2017) (No. 17-368), 2017 WL 4022786, at *i, *11 (presenting issue Supreme Court would have decided).

18. *See* Stipulation of Dismissal, Salt River Project Agric. Improvement and Power Dist. v. Tesla Energy Operations Inc., 138 S. Ct. 1323 (2018) (No. 17-368) (dismissing suit by Rule 46.1); Letter from Daniel S. Volchok, Counsel for Petitioner, & Deanne E. Maynard, Counsel for Respondent, to Denise McNerney, Merits Court Clerk, Supreme Court of the United States (Mar. 8, 2018) (explaining parties' intent to resolve dispute and dismiss suit); *see also* SUP. CT. R. 46.1.

19. *See infra* Section II.A.

20. *See infra* Section II.B.

21. *See infra* Part III.

22. *See infra* Part III.

23. *See infra* Part IV.

## II. HISTORY

### *A. Appellate Court Jurisdiction: Balancing Judicial Efficiency and Justice*

#### *1. The Finality Requirement Under § 1291: Promoting Judicial Efficiency*

Article III, Section 1 of the United States Constitution vests federal judicial power in one Supreme Court and the inferior courts that Congress "may from time to time" create, while Article III, Section 2 gives Congress the power to confer federal jurisdictional authority.[24] In creating the federal judicial system, Congress granted to the appellate courts jurisdiction over "final decrees and judgments."[25] This final judgment principle is currently codified in § 1291 of the United States Code.[26] Congress enacted § 1291 to promote judicial efficiency and safeguard effective trial and appellate review.[27] The final judgment rule, or final decision principle, promotes efficiency by preventing the circuit courts from becoming inundated by appeals from non-dispositive lower court rulings.[28]

24. *See* U.S. CONST. art. III, §§ 1, 2. The Supreme Court has interpreted Article III, Section 2 to vest Congress with the power to determine the jurisdiction of the lower federal courts, for "[c]ourts created by statute can have no jurisdiction but such as the statute confers." *See* Sheldon v. Sill 49 U.S. 441, 449 (1850). The Supreme Court has also held that Congress has the authority to restrict even the Supreme Court's appellate jurisdiction. *See Ex parte* McCardle, 74 U.S. 506, 514 (1868) (dismissing appeal from habeas denial for lack of jurisdiction where Congress repealed statute conferring jurisdiction).

25. *See* Judiciary Act of 1789, ch. 20, §§ 21-25, 1 Stat. 73, 83-87 (1789) (enacting final judgment rule); *Judiciary Act of 1789*, LIBR. CONGRESS (Apr. 25, 2017), https://www.loc.gov/rr/program/bib/ourdocs/judiciary.html [https://perma.cc/3BBR-6VBE] (explaining Congress exercised its Article III powers through Judiciary Act of 1789); *see also* Di Bella v. United States, 369 U.S. 121, 124 (1962) (recounting history of final judgment rule). The final decision requirement for federal appellate jurisdiction was derived from common law principles and enacted by the 1st Congress to discourage litigiousness. *See Di Bella*, 369 U.S. at 124; *see also* Riyaz A. Kanji, Note, *The Proper Scope of Pendent Appellate Jurisdiction in the Collateral Order Context*, 100 YALE L. J. 511, 512 (1990) (noting Congress structured judiciary to predominantly permit appeals "only from . . . final judgment[s]").

26. *See* 28 U.S.C. § 1291 (2018).

27. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949) (identifying § 1291's purpose). The Supreme Court stated that § 1291's purpose was to coordinate all phases of proceedings, which can be assessed and corrected after the final decision, into one appellate review. *See id.* When appeals are withheld until final judgment, trials are more effective because they are uninterrupted and produce a more fully developed record for appellate review. *See* Kanji, *supra* note 25, at 512 (explaining intended positive effect of congregating appeals into one review). Minimizing the number of appeals also expedites trials, limits the burden on judicial resources, and prevents extraneous review of matters that may become moot by the time final judgment is entered. *See* Patrick E. Sweeney, Note, *Interlocutory Appeals of Orders Denying Claims of State Action Animal Immunity*, 49 OHIO ST. L.J. 653, 657-58 (1988) (discussing rationale of final decision requirement). The Supreme Court has also recognized that the final judgment rule serves the practical purpose of preventing litigants with weak claims from harassing the opposition with excessive appeals that increase litigation's financial burden. *See* Cobbledick v. United States, 309 U.S. 323, 325 (1940) (discussing potential strategic implementation of interlocutory appeals); Michael E. Harriss, Note, *Rebutting the Roberts Court: Reinventing the Collateral Order Doctrine through Judicial Decision-Making*, 91 WASH. U. L. REV. 721, 725 (2014) (recognizing Supreme Court's concern about harassment in *Cobbledick*).

28. *See* Kornmehl, *supra* note 11, at 10 (ascertaining rationale behind final judgment rule); *see also supra* note 27 and accompanying text (explicating desired effect of final judgment principle).

The Supreme Court has strictly interpreted the final judgment rule, holding that an order "end[ing] the litigation on the merits and leav[ing] nothing for the court to do but execute the judgment" is required for appellate jurisdiction.[29] The Court, however, will depart from its strict construction of the final judgment rule and allow an appeal if waiting until the end of litigation on the merits would essentially "defeat the right to any review at all."[30] In deciding whether such a departure is warranted, the Court weighs its desire to promote judicial efficiency and avoid piecemeal review against the danger of impeding justice for the litigants.[31]

Because both Congress and the Supreme Court have recognized that unwavering adherence to the final judgment principle poses a significant threat to justice, they have each created exceptions that permit interlocutory appeals of trial court decisions.[32] For example, Congress has promulgated two types of interlocutory appeals through § 1292 of the United States Code: entitled interlocutory appeals, also known as interlocutory appeals as of right, and permissive interlocutory appeals.[33] Entitled interlocutory appeals under § 1292(a) include appeals from district courts granting, continuing, modifying, refusing, or dissolving injunctions; appeals from appointments of receivership; and appeals from determinations of rights and liabilities in admiralty law.[34]

29. *See* Catlin v. United States, 324 U.S. 229, 233 (1945) (identifying elements of final judgment); *see also* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 103 (2009) (articulating finality typically "trigger[s] . . . entry of judgment"). Final orders generally fall under four concepts: orders effectively finalizing the merits of the main action; orders that are, as a practical matter, final; orders that are so collateral to the merits that they are final; and, orders mandating the transfer of property. DAVID G. KNIBB, FEDERAL COURT OF APPEALS MANUAL § 2:1, at 41-42 (6th ed. 2013) (describing non-mutually exclusive final judgment concepts).

30. *See Cobbledick*, 309 U.S. at 324-25 (rationalizing departures from final judgment rule); *infra* Section II.A.2.a.iii (explaining Court's "effectively unreviewable" justification).

31. *See* Dickinson v. Petrol. Conversion Corp., 338 U.S. 507, 511-13 (1950) (acknowledging hardship from delaying appeal until final judgment rendered on all issues). Under the more rigid construction of the final judgment principle, courts overlook the potential burdens on litigants resulting from a trial judge's incorrect decisions in order to prioritize the benefits of uninterrupted trials and the efficient use of judicial resources. *See* Harriss, *supra* note 27, at 725-26 (analyzing potentially detrimental effect litigants face from final judgment principle).

32. *See* Kornmehl, *supra* note 11, at 10 nn.63-64 (identifying statutory and common law exceptions to final judgment rule).

33. 28 U.S.C. § 1292(a)-(b) (2018); *see* KNIBB, *supra* note 29, § 4:1, at 143-44, § 5:1, at 163-64 (explaining statutory exceptions to final judgment rule); *see also* THOMAS E. BAKER, A PRIMER ON THE JURISDICTION OF THE U.S. COURTS OF APPEALS §§ 4.02-.03 (Federal Judicial Center 1989) (chronicling statutory exceptions to finality). Some examples of statutorily permitted interlocutory appeals include appeals of specific orders in criminal cases, appeals of habeas corpus petitions and proceedings for relief from federal criminal sentences, removed cases where claims are made under civil rights laws and are remanded, and removed cases where statutes grant federal agencies the right to appeal their remand. *See* KNIBB, *supra* note 29, § 4:1, at 144.

34. 28 U.S.C. § 1292(a)(1)-(3). Section 1292(a) is the most frequently used statutory qualification for interlocutory appeals, and reflects Congress's recognition that immediate review is necessary to protect litigants in certain circumstances. *See* Kanji, *supra* note 25, at 513-14 (discussing applicability of § 1292(a)). While only permanent injunctions are appealable as final decisions under § 1291, § 1292(a)(1) permits appeals of various other injunctions that would not otherwise be appealable until after final judgment. *See* KNIBB, *supra* note 29, § 4:2, at 144 (expressing § 1292(a)(1)'s expansion of scope of injunction appeals).

Permissive interlocutory appeals under § 1292(b) are a limited class of appeals "involv[ing] a controlling question of law as to which there is a substantial ground for difference of opinion"; these appeals are only allowed upon certification by the district court and subsequent permission by the appellate court.[35]

### *2. The Collateral Order Doctrine: The Supreme Court's Means of Safeguarding Justice*

The Supreme Court, concerned with the undue burden litigation may impose on parties, has permitted certain departures from the final judgment rule, with the collateral order doctrine being the most important.[36] The collateral order doctrine is a judicially constructed application of the final judgment rule that establishes particular circumstances where interlocutory orders, not otherwise appealable under the final judgment rule, are appealable.[37] The collateral order doctrine finds its roots in the Supreme Court's decision in *Cohen v. Beneficial Industrial Loan Corp.*,[38] where a shareholder pursued a derivative action in federal court against a corporation's officers and directors.[39] New Jersey had a statute that predicated a shareholder derivative suit on the condition that the plaintiff post a bond covering the defendant's potential, reasonable litigation expenses.[40] The defendant moved to compel the plaintiff to post the statutorily

35. *See* 28 U.S.C. § 1292(b).

36. *See* Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546-47 (1949) (holding immediate appeal appropriate for decision on right collateral to rights in action); Forgay v. Conrad, 47 U.S. 201, 205 (1848) (reflecting on potential detriment presented by final judgment requirement); Kornmehl, *supra* note 11, at 10-11 (stating importance of collateral order doctrine); Martin H. Redish, *The Pragmatic Approach to Appealability in the Federal Courts*, 75 COLUM. L. REV. 89, 111 (1975) (labeling collateral order doctrine primary judicial exception to final judgment rule); Kanji, *supra* note 25, at 515 & n.19 (recognizing history of judicial departure from final judgment rule). In *Forgay*, the Supreme Court established an exception to the final judgment rule for orders regarding property. *See Forgay*, 47 U.S. at 205. The trial court in a bankruptcy proceeding nullified certain deeds as fraudulent and ordered the defendants to deliver the fraudulently conveyed property to the plaintiff—the assignee in the bankruptcy. *See id.* at 203-04. The defendants appealed, but the plaintiff argued that the lower court's order was not final, and thus did not warrant an immediate appeal because the court ordered accounting of property had not been completed. *See id.* The Supreme Court, through a "reasonable" rather than a "strict and technical" understanding of finality, held the defendant could immediately appeal the order because the potential for the plaintiff to sell the property before the accounting was completed would render the defendants' appeal of the order to convey the property "of very little value to him." *See id.* at 203, 205.

37. Rebecca E. Hatch, Annotation, *Construction and Application of Collateral-Order Doctrine—Supreme Court Cases*, 54 A.L.R. Fed. 2d 107, pt. I, § 2 (2011) (detailing collateral order doctrine).

38. 337 U.S. 541 (1949).

39. *See id.* at 543 (recounting procedural history); *see also* Hatch, *supra* note 37, pt. I § 2 (naming *Cohen* leading case in judicial construction of collateral order doctrine); Sweeney, *supra* note 27, at 659 (stating collateral order doctrine derived from *Cohen* decision).

40. *See Cohen*, 337 U.S. at 544-45, 544 n.1 (characterizing purpose and effect of New Jersey's statute). The business enterprise landscape evolved into the aggregation of funds from "numerous and scattered" small shareholders, and corporate officers took advantage of the fact that menial investors could not bring a breach of fiduciary duty claim. *Id.* at 547-48 (depicting history of evolving corporate conduct). As an equitable remedy, courts attempted to redress a stockholder's inability to file suit against the disloyal corporate officers by permitting an individual shareholder to represent the corporate interests. *Id.* at 548. This remedy, however,

mandated bond, but the court held New Jersey law did not apply and denied the motion.[41] The defendant appealed the court's order; the Third Circuit reversed; and the plaintiff filed for a writ of certiorari, which the Supreme Court granted.[42]

The Supreme Court held that the order denying the motion was immediately appealable because the right to the security bond was a "serious and unsettled question" that "fall[s] in that small class which finally determine[s] 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."[43] The Court reasoned that the district court's decision did not constitute a step towards, nor would it merge with, a judgment on the merits because it merely turned on whether state law applied in federal court.[44] Ultimately, the defendant would have irreparably lost its right to the pretrial securities bond if the court did not permit an interlocutory appeal.[45]

### *a. Development of the Collateral Order Doctrine*

After *Cohen*, the Supreme Court refrained from rigorously applying the collateral order doctrine, which resulted in the doctrine's natural expansion.[46]

which was intended to regulate an abuse by the corporate officers, created an avenue for the shareholders to reciprocate the abuse by using strategic litigation to coerce the officers. *Id.* These suits motivated by nuisance value were known as "strike suits." *Id.* New Jersey enacted a statute that made plaintiffs of an unsuccessful shareholder derivative lawsuit liable for the defendant's "reasonable" expenses in litigation. *Id.* at 544-45, 544 n.1. This served as a deterrent from claims intended to "capitalize . . . on [the] harassment value" that shareholders faced a significantly smaller liability than the corporate officers due to the officers' expense to indemnify each individual defendant. *Id.* at 545, 552. The statute also required shareholders to post a bond for the reasonable expenses prior to litigation. *Id.* at 551-53.

41. *See id.* at 545 (noting district court's holding).

42. *See id.* (detailing disposition of lower courts and procedural history).

43. *See id.* at 546-47 (articulating grounds for interlocutory appeal). The Supreme Court stated that appeals courts have the power of "review, not one of intervention" over orders that are final, rather than orders that are merely steps towards final judgment that will merge with a conclusion on the merits. *Id.* at 546.

44. Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 546 (1949). The Court noted that its holding did not create an exception to the final judgment rule, but rather constituted a reasonable, practical construction of the rule. *See id.* at 546 (characterizing final judgment interpretation); *see also* Stack v. Boyle, 342 U.S. 1, 12 (1951) (Jackson, J., concurring) (reiterating claim in *Cohen* decision); Kanji, *supra* note 25, at 516 & n.26 (commenting on *Cohen*'s construction of final judgment and reiteration in *Stack*); Sweeney, *supra* note 27, at 660 (noting reemergence of collateral order doctrine in *Stack* two years after *Cohen*). The Court also added that the statutory right to the security order was "a serious and unsettled question," and not all security orders were immediately appealable. *See Cohen*, 337 U.S. 547; *see also* Robert J. Martineau, *Defining Finality and Appealability by Court Rule: Right Problem, Wrong Solution*, 54 U. PITT. L. REV. 717, 740 (1993) (analyzing Supreme Court's *Cohen* decision).

45. *See Cohen*, 337 U.S. at 546.

46. *See* Aaron R. Petty, *The Hidden Harmony of Appellate Jurisdiction*, 62 S.C. L. REV. 353, 378-79 (2010) (commenting on collateral order doctrine's history); Kanji, *supra* note 25, at 516 (discussing expansive interpretation of *Cohen* elements); Mathew R. Pikor, Note, *The Collateral Order Doctrine in Disorder: Redefining Finality*, 92 CHI.-KENT L. REV. 619, 623 (2017) (noting Court did not specify collateral order doctrine requirements in years following *Cohen*); Sweeney, *supra* note 27, at 659-60 (reflecting on natural development of *Cohen* analysis).

The Court abstained from interfering with the appellate courts' application of the doctrine so that the appellate courts could develop its contours; this abstention led to the circuit courts turning the doctrine's focus toward whether the order could be effectively reviewed after a final judgment, and nearly abandoning the consideration of whether it was a serious and unsettled question.[47] As a result, the Supreme Court's application of the doctrine became inconsistent; the most prominent example being *Gillespie v. United States Steel Corp.*,[48] where the Court adopted a balancing approach—weighing the cost of piecemeal litigation against the potential denial of justice—rather than strictly adhering to the *Cohen* standard.[49] The issue in *Gillespie* was whether the plaintiff's interlocutory appeal was appropriate where the lower court ruled that a federal statute superseded the plaintiff's right to recover under state law claims.[50] Though it purported to rely on *Cohen*, the Court abandoned the *Cohen* standard, holding that the appellate court properly exercised jurisdiction.[51] The Court reasoned in line with its previous "practical" understanding of finality, concluding the issues on appeal were so important that they outweighed the cost of the interlocutory appeal.[52] Additionally, the Court explained that the appeal adhered to Congress's intent in enacting § 1292(b): to certify immediate appeals of controlling questions of law with substantial grounds for deference of opinion.[53]

47. *See* Martineau, *supra* note 44, at 740 (identifying collateral order doctrine usage in cases following *Cohen*); Petty, *supra* note 46, at 378-79 (detailing Court's focus regarding collateral orders in wake of *Cohen*); Harriss, *supra* note 27, at 727 (noting Supreme Court's deference to lower courts to develop doctrine); *see also* Kanji, *supra* note 25, at 516 (identifying unreviewability requirement focus of Court's scrutiny); Pikor, *supra* note 46, at 623 (explaining Court liberally granted jurisdiction after *Cohen*). As a result of the circuit courts directing their focus on the "effective review" requirement, they all but abandoned the "serious and unsettled question" requirement. *See* Martineau, *supra* note 44, at 740.

48. 379 U.S. 148 (1964).

49. *See id.* at 152-55 (using balancing test to determine pretrial order on Jones Act immediately appealable); *see also* Timothy P. Glynn, *Discontent and Indiscretion: Discretionary Review of Interlocutory Orders*, 77 NOTRE DAME L. REV. 175, 205 (2001) (elucidating inconsistent application of collateral order doctrine after *Cohen*). In *Gillespie*, a mother sued her deceased son's employer on behalf of herself and the decedent's siblings under the Jones Act and Ohio's maritime law. *See Gillespie*, 379 U.S. at 149-150. The district court dismissed the Ohio state law claims and all recovery for the decedent's siblings, holding the Jones Act was the exclusive cause of action superseding any state law claims, and that the Act did not permit the siblings to recover so long as the mother was alive. *See id.* at 150. The plaintiff immediately appealed, and respondent moved to dismiss the appeal arguing that the district court's order was not "final" under § 1291. *See id.* at 151. The appellate court, without addressing the jurisdictional issue, affirmed the lower court's decision on the merits. *See id.* at 151-52.

50. *See Gillespie*, 379 U.S. at 150-52 (explicating issue and case's procedural disposition).

51. *See id.* at 152-53 (analyzing appellate court's jurisdiction). The Court even recognized that the dismissed claims were neither separate nor severable from the underlying action, yet still decided appellate jurisdiction was proper. *See id.* at 153-54 (reasoning "not formally severable," yet still immediately appealable); Glynn, *supra* note 49, at 205 n.116.

52. *See Gillespie*, 379 U.S. at 153-54 (rationalizing appellate court's jurisdiction).

53. *See id.* at 154 (justifying § 1291 jurisdiction by imputing § 1292(b) congressional intent). The fact that the appeal conformed to the congressional intent behind § 1292(b) diminished the weight of piecemeal litigation's burden in the Court's balancing test, shifting the balance toward permitting the appeal. *See id.*

After years of unfettered development, the liberal implementation of the collateral order doctrine inundated appellate courts with cases, provoking the Supreme Court to finally parse the collateral order doctrine into three distinct elements in *Coopers & Lybrand v. Livesay*.[54] In doing so, the Court intentionally limited the "practical" finality understanding in favor of a more narrow application of the collateral order doctrine, restricting the *Gillespie* balancing test to the specific facts of *Gillespie*.[55] In *Coopers*, the Supreme Court held that a district court's order that the plaintiff failed to meet class certification requirements under Federal Rule of Civil Procedure 23 was not a final judgment warranting an interlocutory appeal.[56] The *Coopers* Court established a three-prong test to determine whether an order falls within the "small class" described in *Cohen*: The order must "conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from the final judgment."[57] The decertification order failed all three requirements because Rule 23 allows

54. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (analyzing elements of collateral order doctrine); Hatch, *supra* note 37, at pt. II.B, § 8 (recognizing *Coopers*'s three distinct collateral order requirements); Martineau, *supra* note 44, at 740-41 (noting Court's changed disposition on collateral order doctrine application); Brad D. Feldman, Note, *An Appeal for Immediate Appealability: Applying the Collateral Order Doctrine to Orders Denying Appointed Counsel in Civil Rights Cases*, 99 GEO. L.J. 1717, 1721 (2011) (noting *Coopers* created "standard for determining jurisdiction based on the collateral order doctrine"); Harriss, *supra* note 27, at 727-28 (recognizing *Coopers*'s intervention and clarification of *Cohen* conditions); Pikor, *supra* note 46, at 623 (discussing unrestrained development of *Cohen* requirements); Sweeney, *supra* note 27, at 661-62 (explaining *Coopers*'s delineation of *Cohen*'s collateral order elements).

55. *See Coopers*, 437 U.S. at 477 n.30 (addressing *Gillespie* balancing test); Glynn, *supra* note 49, at 205-06, 206 n.18 (identifying *Coopers*'s effect on collateral order doctrine application); Petty, *supra* note 46, at 371-72 (reciting Court's *Gillespie* critique). The Court even stated "[i]f *Gillespie* were extended beyond the unique facts of that case, § 1291 would be stripped of all significance." *Coopers*, 473 U.S. at 477 n.30.

56. *See Coopers*, 437 U.S. at 464-65, 469 (holding collateral order doctrine inapplicable); Kristin B. Gerdy, *"Important" and "Irreversible" but Maybe Not "Unreviewable": The Dilemma of Protecting Defendants' Rights Through the Collateral Order Doctrine*, 38 U.S.F. L. REV. 213, 221 (2004) (explaining *Coopers*'s facts and holding). In a suit for violations of the Securities Act of 1933 and the Securities Exchange Act of 1934, the district court initially certified the class of similarly situated plaintiffs, but decertified the class after further proceedings. *See Coopers*, 437 U.S. at 465-66. Plaintiffs appealed under § 1291, and the appeals court held it had jurisdiction because the order "sounded the 'death knell' of the action"; it also reversed the class decertification. *See id.* at 466-67. Under the "death knell" doctrine, an order is an appealable final decision if the court finds that it makes further litigation improbable, and induces the plaintiff to abandon its claim; in class certifications, an adverse class determination is a "death knell" if the individual plaintiff considers further litigation financially undesirable absent a possible group recovery. *See id.* at 469-71; *see also* KNIBB, *supra* note 29, at 61 & n.1 (explaining "death knell" and stating *Coopers* leading case).

57. *See Coopers*, 437 U.S. at 468 (defining elements of collateral order doctrine); *see also supra* note 43 and accompanying text (excerpting *Cohen* standard). *Coopers*'s three-prong test combines *Cohen*'s two requirements—that the order involve an issue collateral to the rights disputed in the case and that the order affect a right too important to be denied review—into a single requirement that the order resolve an important issue entirely separate from the merits of the suit. *See* Sweeney, *supra* note 27, at 661-62 (describing *Coopers*'s elaboration on *Cohen* collateral order requirements). In its contemporary formulation, the third prong of the *Coopers* test, which requires an order be effectively unreviewable after a final decision, has become the most important. *See* Jack W. Pirozzolo, Comment, *The States Can Wait: The Immediate Appealability of Orders Denying Eleventh Amendment Immunity*, 59 U. CHI. L. REV. 1617, 1621 (1992).

alterations or amendments to class certifications before a final judgment; questions enmeshed in the merits—claims or defenses, the representative's adequacy, and the presence of common questions of law or fact—are required; and individual plaintiffs can effectively appeal the order after a final judgment.[58]

*i. Conclusiveness*

Conclusiveness is considered the most straightforward requirement.[59] Originally, an order was considered conclusive if it was not tentative, informal, incomplete, unfinished, inconclusive, or subject to review at a later time.[60] Though the Supreme Court's initial inception disfavored appeals of orders that could be modified, the Court has since recognized instances where tentative orders are appealable.[61] The Court drew the distinction between orders that were "inherently tentative" and thus not collateral because courts were expected to revisit them, and those that were tentative but unlikely to be reviewed, and thus collateral.[62] Therefore, courts can determine conclusiveness by considering "whether the entering court expects to revise the order later, whether subsequent revision remains possible, and even whether revision is probable."[63]

58. *See Coopers*, 437 U.S. at 469 & nn.11-12 (applying three-prong test); *see also* Petty, *supra* note 46, at 369-70 (recounting *Coopers* analysis). The Court also refuted the appeals court's application of the "death knell" doctrine. *See Coopers*, 437 U.S. at 470 (holding "death knell" inapplicable). It reasoned both parties' policy-based arguments were proper for legislative considerations, and irrelevant in judiciary proceedings. *See id.* at 470. It also refused to consider a case's economic impact, explaining that the "death knell" application in class certifications effectively creates an amount in controversy requirement, which is also a legislative function. *See id.* at 472-73. Further, the Court explained applying the "death knell" would debilitate any effective administration of justice, significantly burden judicial resources, and subvert Congress's intent behind § 1292(b). *See id*. at 473-75.

59. *See* Kornmehl, *supra* note 11, at 22 (characterizing conclusiveness requirement); Petty, *supra* note 46, at 398 (comparing conclusiveness requirement to other *Cohen* factors).

60. *See* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468-69, 469 n.11 (1978) (finding class certification denials inherently tentative); Kornmehl, *supra* note 11, at 22 (stating factors for conclusiveness); Petty, *supra* note 46, at 398 (naming conclusiveness requirement "miniature final judgment"); Pikor, *supra* note 46, at 624 (listing factors of inconclusive orders).

61. *See* Pikor, *supra* note 46, at 624-25 (explaining conclusiveness requirement development after *Coopers*). The Court determined that an order to stay proceedings pursuant to the *Colorado River* doctrine—a stay of federal proceedings during state proceedings on the same question of law—was tentative, but still conclusive, because federal courts generally do not revisit the matter as it is resolved in state court. *See* Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp., 460 U.S. 1, 12 (1983) (rationalizing tentative order conclusiveness); *see also* Colo. River Water Conservation Dist., v. United States, 424 U.S. 800, 819-20 (1976) (rationalizing federal abstention from concurrent state proceedings). "This reasoning suggested that an inquiry into conclusiveness involves some question of judicial expectation, not only whether revision of the order remains possible." Pikor, *supra* note 46, at 625 (analyzing suggestions from *Moses* decision).

62. *Compare* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 278 (1988) (holding "inherently tentative" order inconclusive), *and Coopers*, 437 U.S. at 469 & n.11 (determining class decertification "inherently tentative" inconclusive order), *with Moses*, 460 U.S. at 12-13 (holding tentative orders conclusive).

63. Pikor, *supra* note 46, at 625-26 (parsing out courts' conclusiveness considerations).

*ii. Separability*

Unlike the straightforward conclusiveness requirement, applying the separability requirement has proven to be quite confusing.[64] After *Cohen* established that collateral orders must be completely separate from the merits, the Supreme Court undermined the separability requirement by holding certain orders were collateral though they were merely "conceptually distinct."[65] This opened the door for the Court to authorize a series of cases, which were deemed rights not to stand suit, as immediately appealable despite the fact that the separability requirement's application deviated from its traditional understanding.[66] Ultimately, the Court returned to a "completely separate" from the merits standard, and confined the separability inquiries that overlapped with the merits to the specific classes of cases in which they were applied.[67]

*iii. Unreviewability*

The unreviewability prong, considered the most complex and important, is best illustrated by *Swift & Co. Packers v. Compania Colombiana Del Caribe*,[68] an admiralty case.[69] In *Swift & Co.*, the Court held that vacating an attachment order on a foreign vessel was appropriately appealable under the collateral order doctrine.[70] The reason being, if the petitioner could not appeal until entry of a final judgment, the right to the attachment would have been irreparably lost as

64. *See* Petty, *supra* note 46, at 398-99 (claiming separability source of collateral order doctrine's confusing application); *cf.* Kornmehl, *supra* note 11, at 22 (indicating conclusive requirement application straightforward).

65. *See* Abney v. United States, 431 U.S. 651, 659 (1977) (holding double jeopardy claim dismissal collateral order because distinct from principal issue of guilt); *infra* Section II.A.2.b (identifying further decisions undermining separability requirement). *But see* Lloyd C. Anderson, *The Collateral Order Doctrine: A New "Serbonian Bog" and Four Proposals for Reform*, 46 DRAKE L. REV. 539, 556-57 (1998) (arguing double jeopardy action inherently entangled in merits).

66. *See* Mitchell v. Forsyth, 472 U.S. 511, 528-29 (1985) (citing *Abney* to justify interlocutory appeals of rights, though merely conceptually distinct from merits); *see also infra* Section II.A.2.b (elaborating on right not to stand trial for immunities). *But see* Van Cauwenberghe v. Biard, 486 U.S. 517, 527-28 (1988) (refuting and criticizing interlocutory appeals of orders "enmeshed in . . . merits"); Petty, *supra* note 46, at 383 (describing effect of *Abney*).

67. *See* Johnson v. Jones, 515 U.S. 304, 310-15 (1995) (restricting application of "conceptually distinct" analysis); *Van Cauwenberghe*, 486 U.S. at 527-28 (restoring "completely separate" analysis); Pikor, *supra* note 46, at 628-29 (explaining contemporary separability analysis); *see also* Petty, *supra* note 46, at 396 (stating Court turned back to *Coopers*'s "completely separate" standard after *Mitchell*).

68. 339 U.S. 684 (1950).

69. *See* Gerdy, *supra* note 56, at 223 (identifying case most accurately depicting unreviewability principle); Petty, *supra* note 46, at 378-79 (identifying importance of ineffective review standard); Pirozzolo, *supra* note 57, at 1621 (detailing importance of "unreviewability" requirement in current collateral order doctrine formulation).

70. *See Swift & Co.*, 339 U.S. at 688-89 (applying collateral order doctrine to attachment order).

the foreign vessel would have sailed to its respective port.[71] Since *Swift & Co.*, the unreviewability standard has diverged into two different regimes.[72]

The first regime is focused on the harm litigation will inflict on the party seeking the appeal: whether it is "significant," "permanent," "irreparable," or "irreversible."[73] Under this theory, there must be harm to the extent that it will be permanent absent an immediate appeal.[74] The second regime focuses on the right asserted.[75] This regime is far more stringent, and requires more than mere harm; a right must be asserted where further litigation would destroy its legal and practical value, and necessarily moot decisions on its issues.[76]

### *b. Immunities and the Collateral Order Doctrine: Valuing an Asserted Right's Importance*

The most extreme expansion of the collateral order doctrine was the decision to include denials of certain immunity defenses in the small class of *Cohen* appeals.[77] The main determination in applying the collateral order doctrine to immunities is whether the immunity confers a right to be free from suit entirely, or whether it just serves as a defense to liability.[78] Ultimately, for an asserted right to be properly classified as a right not to stand trial, the right must be

71. *See id.* (rationalizing unreviewability of right asserted by petitioner); Petty, *supra* note 46, at 400 (presuming Court's logical analysis).

72. *See* Gerdy, *supra* note 56, at 235 (identifying two unreviewability camps). The distinguishing factor for each analysis is the object of inquiry—whether it is the right being asserted or the identity of the party. *See id.*

73. *See id.*

74. *See* Behrens v. Pelletier, 516 U.S. 299, 315 (1996) (reciting unreviewability requirement); Gerdy, *supra* note 56, at 236.

75. *See* Gerdy, *supra* note 56, at 238; *see also* Glynn, *supra* note 49, at 210-11.

76. *See, e.g.*, Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 884 (1994) (holding settlement agreement contractual rights not substantial enough to warrant immediate appeal); Van Cauwenberghe v. Biard, 486 U.S. 517, 527 (1988) (finding civil process immunity merely immunity from binding judgment, thus, not immediately appealable); Firestone Tire & Rubber Co. v. Risjord, 449 U.S. 368, 377-78 (1981) (reasoning plaintiff failed in showing right unreviewable on appeal).

77. *See* Harriss, *supra* note 27, at 729 (commenting on collateral order doctrine application to denials of immunity); *see also* Anderson, *supra* note 65, at 568 (stating "collateral order doctrine reached its highwater mark in . . . Mitchell v. Forsyth"); Kornmehl, *supra* note 11, at 11-12 (listing immunities deemed appealable under collateral order doctrine); Pikor, *supra* note 46, at 633 (asserting addition of qualified immunity to collateral orders apex of doctrinal expansion); Sweeney, *supra* note 27, at 660-61 (explaining immunities in collateral order doctrine's landscape). The collateral order doctrine is generally applied uniformly to allow appeals from denials of several types of immunity, including Eleventh Amendment immunity, sovereign immunity, tribal sovereign immunity, speech or debate immunity, legislative immunity, instrumentality immunity, immunity granted under state law, anti-SLAPP defamation immunity, Title VII qualified immunity, and absolute or qualified immunity for government officials or their functional equivalent. *See* KNIBB, *supra* note 29, § 2:7, at 79-80 (identifying immunities warranting collateral order doctrine's application).

78. *See* Anderson, *supra* note 65, at 554 (highlighting collateral order doctrine expansion approaches individualized determination of appealability); Petty, *supra* note 46, at 384 (distinguishing orders denying immunity from all other orders through right not to stand trial).

sufficiently important.[79] In *Abney v. United States*,[80] the Supreme Court ruled an order rejecting a double jeopardy challenge did constitute a final judgment.[81] The Court reasoned double jeopardy does not simply protect one from criminal liability, it ensures one will not be prosecuted more than once for the same crime.[82] Ultimately, the Court held immunity of double jeopardy guarantees that the individual will avoid the burden and public embarrassment of multiple criminal trials—a right so important that the Court characterized it as a right not to stand trial, and immediately appealable.[83]

In *Nixon v. Fitzgerald*,[84] the Court held that a denial of the President's absolute immunity in an action for civil damages—which resulted from his official acts—was immediately appealable under the collateral order doctrine.[85] The Court reasoned that avoiding litigation was necessary to protect the core purpose of absolute immunity, which is to ensure the President's unhindered discretion to make decisions that benefit the public at large, and considered a sufficiently important right protected by absolute immunity.[86] Three years later in *Mitchell v. Forsyth*,[87] the Supreme Court applied this same rationale to qualified immunity, which is a state actor's shield from incurring civil liability in the performance of a discretionary function.[88] The *Mitchell* Court reasoned that a denial of qualified immunity is immediately appealable because forcing public officials into litigation would be contrary to the intent of the doctrine—to prevent officials from being distracted from their duties, to safeguard government officials' discretionary actions, and to inhibit litigation from

79. *See* Gerdy, *supra* note 56, at 227-28 (highlighting requisite importance of right and listing examples); *see also* Abney v. United States, 431 U.S. 651, 658-62 (1977) (analyzing importance of immunity from double jeopardy). Though it was included in the preeminent collateral order doctrine case, *Cohen*, and elaborated in in its progeny, *Coopers*, courts have inconsistently incorporated the importance element. *See* Gerdy, *supra* note 56, at 227 (recounting implementation of importance); *see also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (including "important" in second prong); Cohen v. Beneficial Indus. Loan Corp., 337 U.S. 541, 547 (1949) (articulating orders denying important rights appealable). In its initial implementations, the important requirement was an inherent concern rather than an explicit consideration. *See* Gerdy, *supra* note 56, at 228.

80. 431 U.S. 651 (1977).

81. *See id.* at 662.

82. *See id.* at 660-61.

83. *See id.* at 661-62. The Court's departure from the rigid application of *Cohen* indicates it was willing to "relax some of the scrutiny involved" if the right asserted was sufficiently important. *See* Gerdy, *supra* note 56, at 228.

84. 457 U.S. 731 (1982).

85. *See id.* at 743 (finding denial of asserted immunity appealable collateral order); Pirozzolo, *supra* note 57, at 1631-32 (identifying *Nixon* holding).

86. *See Nixon*, 457 U.S. at 752. In *Nixon*, the Supreme Court determined that absolute immunity ultimately ensures a strong and effective government, reasoning that officials apprehensive about being sued might hesitate to use discretion to implement policies that would benefit the public but harm an individual. *See id.* at 752-53; Pirozzolo, *supra* note 57, at 1632 (expounding considerations of suit against assertions of absolute immunity).

87. 472 U.S. 511 (1985).

88. *See id.* at 517, 526-27.

deterring qualified candidates from running for public office.[89] The Court's decision in *Mitchell* is considered a broad expansion and reconstruction of the collateral order doctrine.[90]

The importance principle of the separability prong gained popularity through two concurring opinions by Justice Scalia, where he recognized § 1291's finality requirement needed further exclusivity and proposed bifurcating the collateral order doctrine's second prong into both "important" and "separable from the merits."[91] Justice Scalia's concurrences took hold in *Digital Equipment Corp. v. Desktop Direct Inc.*,[92] where the Court refused to grant an interlocutory appeal because the right at stake was not sufficiently important.[93] In *Digital Equipment Corp.*, the Court considered whether the frustration of a settlement agreement's "right not to stand trial" was significant enough to necessitate an interlocutory

89. *See id.* at 525-27 (applying *Harlow* rationale to facts in *Mitchell*); Pirozzolo, *supra* note 57, at 1632-33 (outlining *Mitchell* rationalization of qualified immunity through *Harlow* perspective). The Court explained that qualified immunity was fashioned with the explicit intent to minimize the defendant's exposure to litigation, recognizing an entitlement to not stand trial or be burdened by litigation. *See Mitchell*, 427 U.S. at 526.

> Unless the plaintiff's allegations state a claim of violation of clearly established law, a defendant pleading qualified immunity is entitled to dismissal before . . . discovery. Even if the plaintiff's complaint adequately alleges . . . acts that violated clearly established law, the defendant is entitled to summary judgment if discovery fails to uncover evidence sufficient to create a genuine issue as to whether the defendant in fact committed those acts.

*Id.* (explaining motion to dismiss and summary judgment disposition for qualified immunity).

90. *See* Anderson, *supra* note 65, at 568; Feldman, *supra* note 54, at 1723. The Court in *Mitchell* resurrected the balancing test established in *Gillespie*—but limited in *Coopers*—to grant immediate appeals of orders denying immunities. *See* Anderson, *supra* note 65, at 554 (detailing *Mitchell's* effect on collateral order doctrine application after *Coopers*). With respect to orders deciding immunities, the Court has framed the separability requirement as an issue "conceptually distinct" from the merits, notwithstanding its recognition that a decision to grant or deny immunity requires at least a superficial inquiry into the merits. *See Mitchell*, 472 U.S. at 527. The separability requirement, as currently understood, is thus satisfied in the immunity context so long as the issue and the merits are not identical, even if they are "inextricably intertwined." *See* Feldman, *supra* note 54, at 1723; *cf.* Pikor, *supra* note 46, at 627 (claiming *Mitchell* "gutted" separability requirement).

91. *See* Lauro Lines S.R.L. v. Chasser, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) (reasoning immediate appeal not appropriate because right not important enough); Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 291-92 (1988) (Scalia, J., concurring) (suggesting implementing "importance" standard to further support § 1291); Anderson, *supra* note 65, at 581-82, 584-85 (1998) (recalling Justice Scalia's concurrences); Gerdy, *supra* note 56, at 229-30 (noting Justice Scalia's concurrences instigated "importance" implementation); Harriss, *supra* note 27, at 731-32 (explaining Justice Scalia's concurrences); Pikor, *supra* note 46, at 629 (identifying Justice Scalia's *Gulfstream* concurrence).

92. 511 U.S. 863 (1994).

93. *Id.* at 879 (rationalizing opinion); *see* Gerdy, *supra* note 56, at 231 (indicating when importance explicitly implemented); Harriss, *supra* note 27, at 732 (highlighting Court's refusal to broaden "right not to stand trial" line of cases). The Court reasoned that "[i]ncluding a provision in a private contract . . . is barely a[n] . . . indication that the right secured is 'important' . . . let alone that . . . it qualifies as 'important' in *Cohen*'s sense, as being weightier than the societal interests advanced by the ordinary operation of final judgment principals." *Dig. Equip. Corp.*, 511 U.S. at 879. In addition to the prominent use of the "importance" element, the Court has also included two other considerations: that the litigant asserting the appeal has no less-restrictive alternative to the collateral order doctrine, and that the class of claims as a whole, rather than the particular party, cannot adequately vindicate their rights on appeal. *See* Mohawk Indus., Inc. v. Carpenter, 558 U.S. 100, 107-09 (2009) (implementing and applying additional considerations); Harriss, *supra* note 27, at 752.

appeal.[94] The Court concluded that the stipulated right not to stand trial did not "rise to the level of importance needed" for an interlocutory appeal.[95] Unlike statutory and constitutional immunities, settlement agreements are contractual in nature, and the rights they protect are not as inherently important as the rights established by the Constitution or by statute.[96]

An immunity that confers a right that is, by definition, sufficiently important enough to constitute a right not to stand trial is a state's Eleventh Amendment sovereign immunity, as in *Puerto Rico Aqueduct & Sewer Authority v. Metcalf & Eddy, Inc*.[97] In *Puerto Rico Aqueduct*, the Supreme Court reasoned that, at its core, a state's assertion of sovereign immunity is based on a fundamental constitutional principle.[98] Though there are certain exceptions that permit individuals to subject states to the burdens of litigation, those are merely finite exceptions.[99] Further, these exceptions are only possible because the state is not

94. *See Dig. Equip. Corp.*, 511 U.S. at 864-65 (identifying issue before Court). The action arose from a trademark infringement action and subsequent confidential settlement agreement. *See id.* at 863. Pursuant to the settlement agreement, the respondent dismissed the suit, waived all damages, and assigned to petitioner the right to use the previously infringed trade name and trademark in exchange for a sum of money. *Id.* at 866. After dismissal, the district court granted respondent's motion to vacate the dismissal and rescind the settlement based on petitioner's misrepresentation of material facts during negotiation. *Id.* Petitioner appealed, asserting that the settlement agreement gave him a "right not to go to trial." *Id.* at 866-67.

95. *See id.* at 877-78 (elucidating importance of rights asserted in *Digital Equipment Corp.*). The Court commented that the importance of the right asserted by the immunity was "the bone of fiercest contention in the case." *See id.* at 878.

96. *See id.* at 879. The Court conclusively employed a balancing test, weighing the principle judicial efficiency concerns against the rights asserted by the settlement agreement. *See id.* at 884.

> [D]enying effect to the sort of (asserted) contractual right at issue here is far removed from those immediately appealable decisions involving rights more deeply rooted in public policy, and the rights Digital asserts may, in the main, be vindicated through means less disruptive to the orderly administration of justice than immediate, mandatory appeal. We accordingly hold that a refusal to enforce a settlement agreement claimed to shelter a party from suit altogether does not supply the basis for immediate appeal under § 1291.

*Id.*

97. *See* U.S. CONST. amend. XI; P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 147 (1993) (holding denial of assertion of sovereign immunity sufficient collateral order). The Eleventh Amendment confers "[t]he Judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by Citizens of another State, or by Citizens or Subjects of any Foreign State." U.S. CONST. amend. XI. Arguing that the Eleventh Amendment is merely a protection from liability frustrates the core intent of the Amendment, which is to protect states from the indignity of suits by private parties in federal tribunals, and to bestow due respect to the states as members of the federation. *See P.R. Aqueduct*, 506 U.S. at 146 (explicating intentions behind Eleventh Amendment). Ultimately, by "ensuring that the States' dignitary interests can be fully vindicated," the Eleventh Amendment provides a right so important that it is inherently a right not to stand trial. *See id.*

98. *See P.R. Aqueduct*, 506 U.S. at 145 (characterizing Eleventh Amendment immunity); *cf.* Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 879 (1994) (reasoning contractual right inherently inferior to statutory immunity).

99. *See* Pennhurst State Sch. & Hosp. v. Halderman, 465 U.S. 89, 123 n.34 (1984) (explaining no immunity for counties and municipalities except suits awarding money damages from state treasury); *Ex parte* Young, 209

actually a named defendant; thus, the state's underlying right to be free from suit is still preserved.[100]

### *B. Antitrust Litigation: The Sherman Act and State Action Immunity*

In the wake of the Civil War, the aggregation of wealth and economic influence amongst a select few powers led Congress to pass the Sherman Act in 1890, establishing the nation's economic policy that prioritizes market competition.[101] The Sherman Act prohibits conduct that restrains free trade and creates market monopolies.[102] Courts rarely had opportunities to apply the Sherman Act to state-initiated economic activity until the Supreme Court expanded the definition of "interstate commerce" during the New Deal Era, which caused certain state economic activities to fall under the regulatory umbrella of the Act.[103] In response, the Supreme Court created the "state action

U.S. 123, 159-60 (1908) (permitting suit enjoining state officer from violating federal law, even if enjoins state policy); *see also P.R. Aqueduct*, 506 U.S. at 146 (rationalizing *Ex parte Young* suit).

100. *See P.R. Aqueduct*, 506 U.S. at 146 (explaining state's right preserved during *Ex parte Young* officer suit).

101. *See* 15 U.S.C. §§ 1-7 (2018) (codifying Sherman Act); John Shepard Wiley, Jr., *A Capture Theory of Antitrust Federalism*, 99 HARV. L. REV. 713, 713 (1986) (describing characteristics of Sherman Act); Christopher Madsen, Note, *Unfettered Federalism: The State of State Action Immunity to Federal Antitrust Actions in the Eighth Circuit After* Paragould Cablevision v. City of Paragould, 37 S.D. L. REV. 155, 157 (1992) (reciting history of Sherman Act); Achilles M. Perry, Note, *Municipal State Action Antitrust Immunity: A Federalism Argument Against the Bad Faith Exception*, 56 FORDHAM L. REV. 471, 472 (1987) (stating Sherman Act symbolizes nation's commitment to "unfettered competition" in marketplace). Federal antitrust laws like the Sherman Act have been referred to as the "Magna Carta of free enterprise," and the Supreme Court has stated that such 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." *See* United States v. Topco Assocs., 405 U.S. 596, 610 (1972) (depicting importance of federal antitrust laws); Matthew McDonald, Note, *Antitrust Immunity up in Smoke: Preemption, State Action, and the Master Settlement Agreement*, 113 COLUM. L. REV. 97, 97 (2013) (describing federal antitrust laws); *see also* Meredith E. B. Bell & Elena Laskin, *Antitrust Violations*, 36 AM. CRIM. L. REV. 357, 357 (1999) (characterizing § 1 of Sherman Act primary federal antitrust provision).

102. *See* 15 U.S.C. §§ 1-2 (restricting trade restraints in § 1 and monopolies in § 2); Thomas M. Jorde, *Antitrust and the New State Action Doctrine: A Return to Deferential Economic Federalism*, 75 CALIF. L. REV. 227, 227 (1987) (articulating function of federal antitrust laws); Scott D. Makar, *Local Government, Privatization and Antitrust Immunity*, FLA. B.J., Apr. 1994, at 38, 38 (describing purpose of federal antitrust laws). The Supreme Court stated in *Northern Pacific Railway Company v. United States* that the Sherman Act is:

> [A]imed at preserving free and unfettered competition as the rule of trade. It rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress, while at the same time providing an environment conductive to the preservation of our democratic political and social institutions. But even were that premise open to question, the policy unequivocally laid down by the Act is competition. And to this end it prohibits 'Every contract, combination or conspiracy, in restraint of trade or commerce among the several States.' Although this prohibition is literally all-encompassing, the courts have construed it as precluding only those contracts or combinations which 'unreasonably' restrain competition.

N. Pac. Ry. Co. v. United States, 356 U.S. 1, 4-5 (1958).

103. *See* Richard Squire, *Antitrust and the Supremacy Clause*, 59 STAN. L. REV. 77, 80 (2006) (explaining history of state economic action regulation by federal antitrust laws).

immunity" doctrine in *Parker v. Brown*, sometimes referred to as "*Parker* immunity," which permits states to engage in conduct that would otherwise violate federal antitrust laws.[104]

In *Parker*, the issue was whether the Sherman Act invalidated the California Agricultural Prorate Act (Prorate Act).[105] The Court held that while the conduct would violate the Sherman Act if carried out by a private actor, the Prorate Act constituted state action and therefore did not violate the Sherman Act.[106] The Court reasoned that if Congress intended to regulate state economic activity, it would have expressed that intention in the Sherman Act.[107] Further, the Court legitimized its decision by grounding it in federalism principles, reasoning that states are sovereign and Congress must therefore unequivocally express its intent to impose upon state authority.[108] Although the *Parker* Court determined that the Sherman Act does not apply to state action, it failed to expressly state whether the Act applied to actions by municipalities and other state agencies.[109]

After thirty-two years, the Supreme Court began to clarify its ambiguously constructed *Parker* immunity.[110] The Supreme Court restricted the scope of *Parker* immunity under the principle that state agencies are not considered sovereign actors merely because of their governmental features.[111] In *Goldfarb v. Virginia State Bar*,[112] the Court implemented the precondition that a state, acting as a sovereign, must have compelled the anticompetitive activity through rules, regulations, or other acts pursuant to state legislation in order to be

104. *See* Parker v. Brown, 317 U.S. 341, 351-52 (1943) (holding state activity not regulated by Sherman Act); *see also* Wiley, Jr., *supra* note 101, at 715-16 (claiming Court confident and enthusiastic to create *Parker* immunity during New Deal).

105. *Parker*, 317 U.S. at 344. The Prorate Act permitted the California Legislature to establish an agricultural marketing program that restricts competition among raisin growers and stabilizes the price at which raisins were sold to packers. *Id.* at 345-46. The explicit purpose of the Prorate Act is to conserve California's agricultural wealth and minimize economic waste that results from producers marketing more than the market requires. *Id.* at 346. The *Parker* case culminated between the Great Depression and the economic influx after World War II, during which price regulation was typically used to stabilize the economy. *See* Wiley, Jr., *supra* note 101, at 714-15 (identifying political and economic climate of *Parker* era).

106. *Parker*, 317 U.S. at 350-51. The *Parker* Court mentioned that though state conduct is unregulated, the state cannot impute *Parker* immunity on a private actor by authorizing them to violate the Sherman Act. *Id.* at 351; *see* McDonald, *supra* note 101, at 101 (delineating states' inability to impute state action immunity by authorizing antitrust law violations).

107. *Parker*, 317 U.S. at 351 (analyzing text of Sherman Act). The Court pointed out that the statute specifically regulates persons and corporations, and also that the sponsor of the bill expressed that the Sherman Act was intended to regulate individuals and corporations. *Id.*

108. *See id.* at 351; Jorde, *supra* note 102, at 230 (identifying federalism rationale used in *Parker*).

109. *See* Madsen, *supra* note 101, at 159 (identifying history of *Parker* immunity implementation post *Parker*).

110. *See* Madsen, *supra* note 101, at 159 (detailing Court's increased *Parker* immunity cases); Keith E. Moxon, Comment, *Municipal and Private Petitioner Immunity from Antitrust Liability: A Declaration of Independence to Preserve the* Parker *and* Noerr-Pennington *Doctrines*, 65 NEB. L. REV. 330, 335-36 (1986) (discussing presumption that all local government entities exempt from federal antitrust law after *Parker*); *see also* Goldfarb v. Va. State Bar, 421 U.S. 773, 791 (1975).

111. *See Goldfarb*, 421 U.S. at 790-91 (determining factors considered to analyze sovereign entities).

112. 421 U.S. 773 (1975).

protected by *Parker* immunity.[113] Further, in *City of Lafayette v. Louisiana Power & Light Co.*,[114] the Supreme Court determined that cities and municipalities—also known as subordinate state governmental entities—are not "*ipso facto* exempt from the operation of the antitrust laws."[115]

In *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*,[116] the Supreme Court extended *Parker* immunity to private actors so long as their conduct furthered the state's intent to regulate commerce.[117] The Court recognized that for *Parker* immunity to apply the state must clearly and affirmatively permit the anticompetitive activity, and must also actively supervise the anticompetitive conduct in order.[118] Conversely, where the state is acting as a sovereign to conduct anticompetitive activities rather than by and through its entities, the *Midcal* analysis is inapposite; *Parker* immunity applies outright.[119]

113. *See id.* at 790 (reasoning state bar fee schedules not compelled state action). The Court further developed its *Goldfarb* holding in *Cantor v. Detroit Edison Co.*, when it held that a utility company's anticompetitive activity was not protected as state action where the company paid, and the state passively accepted, a tariff to authorize such activity; rather, there must be an affirmative state policy. Cantor v. Detroit Edison Co., 428 U.S. 579, 598 (1976).

114. 435 U.S. 389 (1978).

115. *See id.* at 393, 413. The Court affirmed the Fifth Circuit's denial of a municipal utility company's motion to dismiss asserting *Parker* immunity. *See id.* at 392-94. It certified the appellate court's reasoning that, based on *Goldfarb*, a state governmental entity must be compelled by state legislation in order to benefit from *Parker* immunity, which is a determination made on the specific facts of the case. *See id.* at 393-94. Thus, a motion to dismiss asserting the immunity is inappropriate because the district courts' analysis must encompass the evidence to establish the legislative intent that educed the anticompetitive activity. *See id.* at 394, 414.

116. 445 U.S. 97 (1980).

117. *See id.* at 105; Jorde, *supra* note 102, at 236 (noting requirements established by *Midcal*); Squire, *supra* note 103, at 83 (characterizing *Midcal* formulation of current *Parker* immunity); Madsen, *supra* note 101, at 161 (indicating *Midcal* restricted *Parker* immunity scope after *Lafayette*).

118. *See Midcal*, 445 U.S. at 105 (articulating two requirements for *Parker* immunity). In *Midcal*, the Court determined that California's statutorily-established wine price schedule did not constitute state action. *See id.* at 114; *see also* Frank, *supra* note 8, at 791-92 (explaining *Midcal* decision). The Court found the contested California price-setting system was clearly articulated, but not actively supervised because the state merely set a price threshold and failed to engage in further supervision. *See Midcal*, 445 U.S. at 105-06. The clear articulation prong has been expanded to include state mandates regulating entire areas of economic activity. *See* Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45-46 (1985). Also, the active supervision prong is irrelevant to municipalities because the anticompetitive conduct merely had to have been reasonably foreseeable to the state. *See id.*

119. *See* Hoover v. Ronwin, 466 U.S. 558, 569 (1984) (articulating *Midcal* analysis unnecessary where state judiciary or legislature restrain trade); McDonald, *supra* note 101, at 103 (discussing *Hoover* holding and reasoning). The premiere concern in analyzing assertions of *Parker* immunity is: Is the actor instituting the competition restraint the state or an entity acting on the state's behalf? *See Hoover*, 466 U.S. at 569 (introducing first critical step in *Parker* immunity analysis); McDonald, *supra* note 101, at 103 (recognizing critical issue in *Hoover*). In *Hoover*, an unsuccessful applicant for admission to the Arizona Bar sued the Arizona Supreme Court's Committee on Examinations and Admissions, alleging it employed a grading scale to actively manipulate the number of attorneys in Arizona rather than admitting attorneys based on their level of competency. *See Hoover*, 466 U.S at 558, 565. The Court reversed a denial of the Committee's motion to dismiss, holding that it was charged by the Arizona Supreme Court with establishing a bar examination grading formula, and thus entitled to *Parker* immunity. *See id.* at 572-73, 582 (rationalizing *Parker* immunity application and reversing motion to dismiss denial). The appellate court reversed the initial dismissal of the complaint, reasoning that the Rule

Though the Supreme Court has failed to clearly define what amounts to active supervision, it has defined what does not, holding that merely having the power to potentially review activity is not active supervision.[120] In 2015, the Court further clarified the active supervision requirement in dicta, adding two qualifications: The state supervisor must substantively review the anticompetitive conduct with "the power to veto or modify particular decisions," and the supervisor cannot be an active market participant.[121]

### *C. The Circuit Split on the Collateral Order Doctrine as Applied to* Parker *Immunity*

The federal circuits are split on whether denial of *Parker* immunity warrants an appeal through the collateral order doctrine, with some circuits holding that *Parker* immunity is an immunity from suit, and others holding that *Parker* immunity is just a defense to liability.[122] Currently, the Fifth and Eleventh Circuits characterize *Parker* immunity as an immunity from suit, and an order denying a motion to dismiss based on *Parker* immunity as a collateral order warranting interlocutory appeal.[123] On the other hand, the Fourth, Sixth, and Ninth Circuits characterize *Parker* immunity as a defense to liability, making it not immediately appealable.[124]

12(b)(6) dismissal was premature and, though the Committee may prove they are entitled to the immunity, they are still subject to the strictures of the *Midcal* analysis. *See id.* at 567. The Supreme Court disputed this rationale, concluding that the Committee was merely a conduit through which the Arizona Supreme Court was acting to administer the bar examination. *See id.* at 573. The Arizona Supreme Court reserved the right to conclusively determine which applicants were admitted, thus Arizona as a sovereign restricted the state's field of practicing attorneys. *See id.* Ultimately, "where the action . . . was that of the State itself, the action is exempt from antitrust liability regardless of the State's motives in taking the action." *See id.* at 579-80.

120. *See* F.T.C v. Ticor Title Ins., 504 U.S. 621, 637-38 (1992) (clarifying active supervision requirement).

121. *See* N.C. State Brd. of Dental Examiners v. F.T.C., 135 S. Ct. 1101, 1116-17 (2015) (modifying active supervision requirement); *see also* Reeves, Inc. v. Stake, 447 U.S. 429, 438 (1980) (delineating powers remaining in states).

122. *See* Kornmehl, *supra* note 11, at 4-5 (highlighting tension between circuits regarding interlocutory appeals of *Parker* immunity); Goldberg, *supra* note 10 (identifying Fifth and Eleventh Circuits in contention with Ninth, Fourth, and Sixth Circuits).

123. *See* Kornmehl, *supra* note 11, at 4 (stating Fifth and Eleventh Circuits' positions on appealability of *Parker* immunity).

124. *Compare* SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist., 859 F.3d 720, 727 (9th Cir. 2017) (aligning with Fourth and Sixth Circuits' collateral order application to *Parker* immunity), *cert. granted*, 138 S. Ct. 499 (2017), *and cert. dismissed sub nom.* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018), S.C. State Bd. of Dentistry v. F.T.C., 455 F.3d 436, 445-47 (4th Cir. 2006) (enumerating distinctions between *Parker* immunity and absolute, qualified, and sovereign immunities), *and* Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563, 567 (6th Cir. 1986) (opining *Parker* immunity unaffected by litigation and intimately intertwined in merits), *with* Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391, 1397 (5th Cir. 1996) (holding dismissing government defendants' *Parker* immunity claim immediately appealable when *Midcal* prongs present), *and* Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth., 801 F.2d 1286, 1289 (11th Cir. 1986) (detailing *Parker* immunity intent of avoiding public economic waste and deterring officials from discretionary action).

*1.* Parker *Immunity as an Immunity from Suit*

To determine whether denials of *Parker* immunity are collateral orders, the Eleventh Circuit correlated the central principals of *Parker* immunity to those of qualified immunity.[125] In *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*,[126] the Eleventh Circuit held that the Hillsborough County Aviation Authority (Aviation Authority) could immediately appeal the district court's denial of its motion for summary judgment asserting *Parker* immunity.[127] According to the Eleventh Circuit, *Parker* immunity, like qualified immunity, was intended to prevent the waste of public time and money, and litigation would frustrate this purpose.[128] The court believed that the Aviation Authority could invoke *Parker* immunity simply because it was authorized to negotiate transportation contracts with businesses, which implies that the state legislature must have "contemplated the kind of [anticompetitive] action complained of."[129] Further, the court asserted that denying summary judgment based on *Parker* immunity satisfied each of the three *Cohen* requirements for immediate appealability, but refrained from establishing a factual basis for this contention.[130]

In *Martin v. Memorial Hospital at Gulfport*,[131] the Fifth Circuit held that a hospital established by the Mississippi legislature could immediately appeal the denial of its motion for summary judgment based on *Parker* immunity.[132] In doing so, it analogized *Parker* immunity to absolute immunity, qualified immunity, and Eleventh Amendment sovereign immunity; denials of which are

125. *See Commuter Transp. Sys., Inc.*, 801 F.2d at 1289-90 (comparing *Parker* immunity with qualified immunity); *see also Martin*, 86 F.3d at 1395 (correlating *Parker* immunity to absolute, qualified, and Eleventh Amendment immunities).

126. 801 F.2d 1286 (11th Cir. 1986).

127. *See id.* at 1290. In *Commuter Transportation*, a limousine service brought an antitrust action against the Aviation Authority alleging it unlawfully restricted competition in violation of the Sherman Act by instituting a regulatory scheme dictating who could transport certain passengers from the subject airport. *See id.* at 1286-88. The Aviation Authority was a non-sovereign entity established by the Florida legislature, which the circuit characterized as "a government arm of the state [with the] power of eminent domain and the authority to limit and prohibit competition which is destructive of the promotion of commerce and tourism." *See id.* at 1288; *see also* F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225 (2013).

128. *See Commuter Transp. Sys., Inc.*, 801 F.2d at 1289 (focusing on social costs presented in *Harlow*). The Supreme Court has justified this same rationale by stating the risks of trial included, "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *See* Harlow v. Fitzgerald, 457 U.S. 800, 815, 816 (1982) (characterizing effects of trial on government officials); *accord Commuter Transp. Sys., Inc.*, 801 F.2d at 1289 (explicating social costs government officials experience from trial).

129. *See Commuter Transp. Sys., Inc.*, 801 F.2d at 1289 (making inferential step that state legislature anticipated conduct, thus, warrants *Parker* immunity).

130. *See id.* at 1289-90 (applying *Cohen* requirements).

131. 86 F.3d 1391 (5th Cir. 1996).

132. *See id.* at 1395-96 (holding denial of *Parker* immunity collateral order). In *Martin*, a nephrologist brought suit against a hospital, which was established by the Mississippi legislature and operated by a municipality and a state subdivision, alleging it violated the Sherman Act by enforcing a contract that limited the use of its facilities to a certain class of nephrologists. *See id.* at 1392-93.

immediately appealable.[133] The Fifth Circuit in *Martin* reasoned that *Parker* immunity, like Eleventh Amendment immunity, is intended to preserve the sovereignty and dignity of the states.[134] The court also concluded that, like absolute, qualified, and sovereign immunity, *Parker* immunity is intended to relieve government officials of litigation's burdens.[135] In addition to considering whether a state entity is named as a defendant in federal antitrust cases, the circuit considers certain factors to determine whether the suit is effectively against the sovereign.[136] The Fifth Circuit has articulated that Eleventh Amendment immunity—the bar on federal jurisdiction over the sovereign—coupled with the Sherman Act's allowance of sovereign anticompetitive conduct, entitles defendants to immediate appeal on *Parker* immunity.[137] The Fifth Circuit indicates *Parker* immunity shares the foremost justifications of sovereign immunity, "to prevent the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties, and to ensure that the State's dignitary interests can be fully vindicated."[138]

### *2.* Parker *Immunity as a Mere Defense from Liability*

The Fourth and Sixth Circuits have comparable applications of the collateral order doctrine to *Parker* immunity.[139] Both circuits have held that *Parker* immunity fails the separable and effectively unreviewable elements under *Cohen*, and the Sixth Circuit has even concluded *Parker* immunity fails *Cohen*'s conclusiveness element.[140] Both circuits have also reasoned that a *Parker* immunity analysis cannot be separated from the merits because it requires an

133. *See id.* at 1395-96 (rationalizing interlocutory appeal through Eleventh Amendment principles); *see also* Earles v. State Bd. of Certified Pub. Accountants of La., 139 F.3d 1033, 1036 (5th Cir. 1998) (asserting Eleventh Amendment immunity applicable where state substantial party).

134. *See Martin*, 86 F.3d at 1395-96 (imputing sovereign immunity dignity concern on *Parker* immunity).

135. *See id.* at 1396 (weighing public concern for unhindered official's discretionary action); *see also* Harlow v. Fitzgerald, 457 U.S. 800, 815, 819 (1982) (articulating consequences of trial on government official).

136. *See Earles*, 139 F.3d at 1036-37. Defendant's assertion that it is an entity established by state statute is insufficient to impute a sovereign immunity jurisdictional shield. *See id.* at 1036. Rather, the Fifth Circuit analyzes whether the state is a "real, substantial party in interest" by taking into account the following factors:

> (1) whether the state, through statutes or case law, views the entity as an arm of the state; (2) the source of the entity's funding; (3) whether the entity is concerned with local or statewide problems; (4) the entity's degree of authority independent from the state; (5) whether the entity can sue and be sued in its own name; and (6) whether the entity has the right to hold and use property.

*Id.* at 1036-37.

137. *See* Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391, 1395-96 (5th Cir. 1996) (analogizing *Parker* immunity to sovereign immunity).

138. *See id.* (explaining shared justifications between sovereign immunity and *Parker* immunity).

139. *See generally* S.C. State Bd. of Dentistry v. F.T.C., 455 F.3d 436 (4th Cir. 2006); Huron Valley Hosp., Inc. v. City of Pontiac, 792 F.2d 563 (6th Cir. 1986).

140. *See S.C. State Bd. of Dentistry*, 455 F.3d at 441-45 (concluding *Parker* immunity fails *Cohen* separability and unreviewablity requirements); *Huron Valley Hosp., Inc.*, 792 F.2d at 567 (determining *Parker* immunity fails all three *Cohen* requirements).

inquiry into whether the entity's conduct complied with an affirmative state policy and, in the case of private parties, whether state supervision existed.[141] Moreover, both circuits have reasoned that the underlying rights asserted by *Parker* immunity are not irreparably lost if the defendant is forced to litigate, because those rights are not promulgated in the same fashion as those asserted under absolute, qualified, or sovereign immunity.[142]

### *3.* SolarCity Corp. v. Salt River Agricultural Improvement and Power District*: An Opportunity to Settle the Finality Dispute*

The most recent case addressing the collateral order doctrine as applied to *Parker* immunity is the Ninth Circuit case *SolarCity Corp. v. Salt River Agricultural Improvement and Power District*.[143] Influenced by the reasoning employed by the Fourth and Sixth Circuits, the Ninth Circuit held the denial of a motion to dismiss asserting *Parker* immunity was not immediately appealable under the collateral order doctrine.[144] The *SolarCity* court refused to entertain Salt River Project's (SRP) argument that it was an entity established by Arizona's Constitution, and analogized *Parker* immunity to *Noerr–Pennington* immunity—an immunity derived from the First Amendment—the denial of which is not appealable under the collateral order doctrine.[145] The court also rejected SRP's position that litigation imposes excessive burdens on government officials.[146] Because the Ninth Circuit concluded the denial of *Parker* immunity

141. *See S.C. State Bd. of Dentistry*, 455 F.3d at 441-45 (explaining analysis of affirmative state policy and active supervision inherently enmeshed in merits); *Huron Valley Hosp., Inc.*, 792 F.2d at 567 (identifying requisite analysis intimately intertwined in dispute of substantive facts).

142. *See S.C. State Bd. of Dentistry*, 455 F.3d at 444-45 (stating "*Parker* [immunity] did not arise from . . . concern about special harms that . . . result from trial"); *Huron Valley Hosp., Inc.*, 792 F.2d at 567 (asserting appeal after final judgment sufficient); *cf.* Mitchell v. Forsyth, 472 U.S. 511, 526-28 (1985) (explaining qualified immunity based on deeply entrenched public policy concerns); Nixon v. Fitzgerald, 457 U.S. 731, 749 (1982) (characterizing absolute immunity "functionally mandated incident" of President's unique office).

143. *See* SolarCity Corp. v. Salt River Project and Agric. Improvement and Power Dist., 859 F.3d 720, 720 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 499 (2017), *and cert. dismissed sub nom.* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018).

144. *See id.* at 730 (issuing decision in line with Fourth and Sixth Circuits). In *SolarCity*, the solar panel provider, SolarCity, sued the Salt River Project Agricultural Improvement and Power District (Salt River), alleging that it violated federal antitrust laws when it changed its pricing structure. *See id.* at 722-23. Salt River is the only traditional power supplier in Phoenix, Arizona, and a political subdivision established by Arizona statute. *See id.*; *see also* ARIZ. REV. STAT. § 48-2302 (2018). Salt River implemented an updated price structure for customers who obtain energy from their own source, which SolarCity claims is an attempt to monopolize the Phoenix power market and disfavor solar panel owners and providers. *See SolarCity*, 859 F.3d at 723.

145. *See SolarCity*, 859 F.3d at 727 (rationalizing denial of SRP's assertion of immunity). *Noerr-Pennington* immunity prohibits liability for petitioning the government, in certain circumstances, through the exercise of First Amendment rights. *See* Owen R. Wolfe, *Immediate Appeals: The Circuit Split on the Applicability of the Collateral Order Doctrine to Statutes of Repose*, 48 U. TOL. L. REV. 1, 9-10 (2016) (describing *Noerr-Pennington* immunity); *see also* United Mine Workers of Am. v. Pennington, 381 U.S. 657, 670 (1965) (declaring effort to influence government officials immune from Sherman Act); E.R.R. Presidents Conf. v. Noerr Motor Freight, 365 U.S. 127, 135 (1961) (determining lobbying not violation of Sherman Act).

146. *See SolarCity*, 859 F.3d at 727-28.

was effectively reviewable after final judgment, it declined to decide whether the other two elements of the *Coopers* three-prong test—conclusiveness and separability—were met.[147] The Ninth Circuit also noted that the Supreme Court has continually asserted that the collateral order doctrine should remain narrow.[148] On December 1, 2017, the Supreme Court granted certiorari in the *SolarCity* case to resolve the current circuit split over whether denials of *Parker* immunity are immediately appealable under the collateral order doctrine; the parties subsequently agreed to have the case dismissed.[149]

## III. ANALYSIS

The denial of a state entity's motion to dismiss asserting *Parker* immunity—as in *SolarCity*—does not warrant an interlocutory appeal under the collateral order doctrine.[150] The collateral order doctrine and *Parker* immunity, when examined individually, have strict and narrow applications; when they converge in a single analysis, the class of permissible applications is narrowed further.[151] Immediate appeals of orders denying *Parker* immunity should be permitted only when the movant is so strongly entitled to the right that it becomes too important to not be reviewed.[152] The Supreme Court has recognized that only states acting in their sovereign capacity are entitled to absolute *Parker* immunity, and implemented graduating levels of scrutiny as the connection between the party asserting *Parker* immunity and the sovereign state becomes more tenuous.[153] Circuits that deem *Parker* immunity an immunity from suit—rather than a defense to liability—fail to recognize this, and mistakenly bolster sub-sovereign entities' entitlements to *Parker* immunity.[154] After these circuits' misguided jurisprudence is exposed, and the appropriate analysis is applied to immediate appeals of denials of *Parker* immunity, it is clear that the immunity only shields

147. *See id*. at 728-30.

148. *See id*. at 730.

149. *See* Salt River Project Agric. Improvement and Power Dist. v. SolarCity Corp., 138 S. Ct 499 (2017) (granting certiorari), *cert. dismissed sub nom.* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018); *see also* Stipulation of Dismissal, Salt River Project Agric. Improvement and Power Dist. v. Tesla Energy Operations Inc., 138 S. Ct 1323 (2018) (No. 17-368). On March 22, 2018, the case was dismissed pursuant to the United States Supreme Court Rule 46.1. *See* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018).

150. *See* Kornmehl, *supra* note 11, at 32 (concluding collateral order doctrine inapplicable to *Parker* immunity).

151. *See* Dig. Equip. Corp. v. Desktop Direct, Inc., 511 U.S. 863, 868 (1994) (stating Court stressed preventing *Cohen* from swallowing finality); F.T.C v. Ticor Title Ins., 504 U.S. 621, 636 (1992) (asserting Court disfavors *Parker* immunity).

152. *See supra* notes 91-96 and accompanying text (explaining importance consideration).

153. *See supra* notes 110-121 and accompanying text (identifying Supreme Court disposition on *Parker* immunity based on party identity).

154. *See infra* Section III.B (identifying and explaining Fifth and Eleventh Circuits' mistaken bolstering of *Parker* immunity).

absolute sovereigns from suit.[155] When the entity asserting *Parker* immunity is anything less than a sovereign state, a denial of the immunity fails every *Cohen* requirement.[156]

### *A. Differentiating Between the Sovereign and Non-Sovereign*

Only actions pursuant to a state's regulatory scheme can violate federal antitrust law yet be immune from federal regulation.[157] Based on principles of federalism, states have the right to be free from suit absent express congressional intent to abrogate that right.[158] Congress did not expressly intend to restrain state action through the Sherman Act.[159] While non-sovereign entities can still invoke the right to be free from antitrust liability, the Supreme Court has significantly restricted the right's application by implementing standards the non-sovereign entities must satisfy.[160] Simply put, courts apply *Parker* immunity scrutiny on a spectrum, with sovereign states afforded a by-right immunity, and private actors subjected to the most stringent standard.[161] Thus, it is apparent that non-sovereign entities are not entitled to the same outright immunity to be free from antitrust litigation as sovereign states, or else the successive levels of scrutiny applied to parties other than sovereign states would be superfluous.[162] Ultimately, whether a denial of *Parker* immunity is immediately appealable under the collateral order doctrine depends heavily on the party itself.[163]

### *B. The Misguided Fifth and Eleventh Circuits Wrongfully Bolster Sub-Sovereign Entities' Entitlement to* Parker *Immunity*

In *Commuter Transportation*, the Eleventh Circuit held that a non-sovereign entity could immediately appeal a denial of its motion for summary judgment

155. *See infra* Sections III.B-C.

156. *See infra* Section III.C.

157. *See* F.T.C. v. Phoebe Putney Health Sys., Inc., 568 U.S. 216, 225 (2013). "[W]e recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" *Id.*

158. *See* Parker v. Brown, 317 U.S. 341, 351 (1943); Jorde, *supra* note 102, at 230 (identifying federalism rationale used in *Parker*). The Court indicated the statute specifically regulates persons and corporations, and that the bill's sponsor expressed that the Sherman Act was intended to regulate individuals and corporations. *See Parker*, 317 U.S. at 351 (analyzing text of Sherman Act).

159. *See Parker*, 317 U.S. at 351 (identifying federalism foundation in holding).

160. *See* Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (imposing clear articulation and active supervision requirements).

161. *See* Hoover v. Ronwin, 466 U.S. 558, 568 (1984) (articulating disposition of *Parker* immunity analysis). "Closer analysis is required when the activity at issue is not directly that of the Legislature or Supreme Court, but is carried out by others pursuant to a state authorization." *Id.* Where the conduct at issue is in fact that of the state legislature or supreme court, it is not necessary to address the issues of "clear articulation" and "active supervision." *See id.* at 569.

162. *See id.* at 568-69 (distinguishing sovereign state's *Parker* immunity analysis from non-sovereign entity's).

163. *See infra* Sections III.C.1-3 (analyzing collateral order doctrine applied to *Parker* immunity).

that asserted a right to *Parker* immunity.[164] However, the Eleventh Circuit failed to consider all binding precedent on *Parker* immunity, and selectively applied the Supreme Court's rationale in *Mitchell* to its holding in *Parker*.[165] The court presupposed that the Aviation Authority was entitled to *Parker* immunity, inferring that Florida contemplated the Aviation Authority's anticompetitive action by authorizing it to negotiate transportation contracts.[166] However, the circuit completely disregarded the Supreme Court's *Goldfarb* decision from eleven years prior that would have deemed that the Aviation Authority was not sovereign merely because of its governmental features, and that Florida must have compelled its anticompetitive transportation regulation scheme in order for it to be protected by *Parker* immunity.[167] Further, *Goldfarb*'s restriction of *Parker* immunity contradicts the Supreme Court's reasoning for permitting interlocutory appeals of denials of qualified immunity, and ultimately discredits the Eleventh Circuit's attempt to align *Parker* immunity with qualified immunity.[168] In summary, the Eleventh Circuit's oversight bolstered the sub-sovereign entity's entitlement to *Parker* immunity despite the Supreme Court holding the contrary, and mistakenly permitted the Aviation Authority's interlocutory appeal of the district court's order denying summary judgment.[169]

The Fifth Circuit similarly overlooks binding Supreme Court precedent, and further exacerbates its misinterpretation of *Parker* immunity by extending the

164. *See* Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth., 801 F.2d 1286, 1290 (11th Cir. 1986) (holding district court's order denying *Parker* immunity immediately appealable).

165. *See id.* at 1289-90 (employing only *Mitchell* rationale in *Parker* immunity analysis); *see also Midcal*, 445 U.S. at 105 (imposing clear articulation and active supervision requirements for private actors' *Parker* immunity assertions); Goldfarb v. Va. State Bar, 421 U.S. 773, 790 (1975) (implementing *Parker* immunity requirement that state must compel state entity's anticompetitive action).

166. *See Commuter Transp. Sys., Inc.*, 801 F.2d at 1289 (rationalizing Aviation Authority's right to *Parker* immunity).

167. *See Goldfarb*, 421 U.S. at 791 (requiring state compel action, and differentiating between sovereign and state agency); *Commuter Transp. Sys., Inc.*, 801 F.2d at 1289 (failing to employ *Goldfarb* precedent).

168. *Compare* Mitchell v. Forsyth, 472 U.S. 511, 526 (1985) (explaining qualified immunity developed to protect rights of immunity), *with Goldfarb*, 421 U.S. at 790-91 (instating standards limiting permissible violations of Sherman Act). *Parker* immunity can hardly be likened to qualified immunity when the Court has incorporated more inquiries into its analysis of the immunity rather than fashioning the inquiry to facilitate a dismissal based on the immunity. *See Goldfarb*, 421 U.S. at 790-91 (enhancing inquiry into assertions of *Parker* immunity). *But see Mitchell*, 472 U.S. at 526 (mitigating inquiry into qualified immunity). Further, if qualified immunity's development clearly recognizes a right not to stand trial, then the developments in *Parker* immunity clearly recognize a limited right to regulate competition that is not necessarily afforded to sovereign entities to the same degree as absolute sovereigns, requiring more litigation when it is asserted by any party other than an absolute sovereign. *See Mitchell*, 472 U.S. at 526 (inferring intent behind qualified immunity development). *But see Goldfarb*, 421 U.S. at 790, 791 (requiring different levels of inquiry for different parties asserting *Parker* immunity).

169. *See Commuter Transp. Syst., Inc.*, 801 F.2d at 1289-90 (failing to implement *Goldfarb* considerations and permitting immediate appeal); *Goldfarb*, 421 U.S. at 790-91 (distinguishing sub-sovereign entity's *Parker* immunity from sovereign's *Parker* immunity).

immunity's appealability to the earliest stages of litigation.[170] Notwithstanding other mistakes it makes in *Martin*, the Fifth Circuit's most egregious failure is not recognizing that the Supreme Court expressly limited *Mitchell*'s "conceptually distinct" standard.[171] Had it implemented the appropriate analysis that the order be "completely separate from the merits," the hospital's entitlement to *Parker* immunity would have failed the separability requirement and not warranted an immediate appeal.[172] Consequently, in *Earles*, the Fifth Circuit relied on its *Martin* holding to extend permissible appeals of denials of *Parker* immunity to the pleading stage of litigation.[173]

### *C.* Parker *Immunity and the* Cohen *Test: Applying* Coopers*'s Three Prongs*

Whether *Parker* immunity is granted by right or requires an extensive analysis may be dispositive of the applicability of the collateral order doctrine.[174] Under the collateral order doctrine, an interlocutory appeal is appropriate only where an order denying an asserted right conclusively determines an issue completely separate from the merits of the action, and the denied right is not effectively reviewable after final judgment.[175] Thus, when analyzing *Parker* immunity in the strictures of the collateral order doctrine, the right to an immediate appeal becomes far less likely as the right to be free from antitrust litigation becomes more attenuated.[176] An examination of *Parker* immunity against *Cohen*'s three-prong test demonstrates as such.[177]

170. *See* Martin v. Mem'l Hosp. at Gulfport, 86 F.3d 1391, 1397 (5th Cir. 1996) (applying *Mitchell*'s "conceptually distinct" standard); *see also* Earles v. State Bd. of Certified Pub. Accountants of La., 139 F.3d 1033, 1036 (5th Cir. 1998) (extending Eleventh Circuit's holding in *Martin*).

171. *See Martin*, 86 F.3d at 1397 (applying "conceptually distinct" standard). *But see* Johnson v. Jones, 515 U.S. 304, 311-15 (1995) (restricting application of "conceptually distinct" analysis). The Fifth Circuit determined that the hospital's assertion of *Parker* immunity satisfied the separability requirement in order to warrant the collateral order doctrine because it was conceptually distinct from the merits. *See Martin*, 86 F.3d at 1397.

172. *See Martin*, 86 F.3d at 1394, 1396-99 (applying *Mitchell* and *Town of Hallie* standards). *But see Johnson*, 515 U.S. at 310, 319-20 (holding summary judgment order not appealable if it determines issues of material fact). After determining the summary judgment order's appealability, the Fifth Circuit analyzed the hospital's *Parker* immunity entitlement under *Town of Hallie*, which requires that a municipality's anticompetitive conduct be "pursuant to a clearly articulated state statutory scheme" and have been reasonably foreseeable by the state legislature. *See Martin*, 86 F.3d at 1398. Since the circuit considered the hospital a sub-sovereign entity that must have acted in accordance with an established state statute in order to warrant immunity, and the complaint is founded on the hospital's alleged anticompetitive conduct, a *Parker* immunity assertion is inextricably intertwined with the merits of the underlying cause of action and is not immediately appealable. *See Johnson*, 515 U.S. at 315; *Martin*, 86 F.3d at 1393-94, 1398.

173. *See Earles*, 139 F.3d at 1036, 1044 (citing *Martin* to support reversal of denied motion to dismiss asserting *Parker* immunity).

174. *See* Hoover v. Ronwin, 466 U.S. 558, 567-69 (1984) (articulating aspects of *Parker* immunity analysis); *see also* Coopers & Lybrand v. Livesay, 437 U.S. 463, 468 (1978) (analyzing elements of collateral order doctrine).

175. *See* Van Cauwenberghe v. Biard, 486 U.S. 517, 527-28 (1988) (explicating separability analysis).

176. *See supra* text accompanying note 153 (identifying conflicting applications).

177. *See infra* Sections III.C.1-3.

*1. Conclusiveness*

A denial of a state's *Parker* immunity right is clearly conclusive, as Congress never intended to restrict states' actions under the Sherman Act.[178] Thus states are not permissible defendants and should not be subject to the burdens of litigation.[179] Non-sovereign entities, however, fail in this regard because their right is tentative, and the court will likely return to address their entitlement in subsequent stages of litigation.[180] When a court determines a sub-sovereign entity's right to *Parker* immunity asserted through a motion to dismiss, it makes its decision on the facts alleged by the plaintiff; if denied, the court will return to assess the entity's entitlement after factual evidence is produced during discovery.[181] As such, because *Parker* immunity as applied to non-sovereign entities is tentative, and the issue will likely resurface later in litigation, denials of *Parker* immunity for non-sovereign entities fail the conclusiveness prong of the collateral order doctrine.[182]

*2. Separability*

Non-sovereign entities' denials of *Parker* immunity also fail the separability requirement because they are inextricably intertwined with the merits; simply put, whether such entities warrant the right to the immunity is dependent upon the facts relating their conduct to a state regulatory scheme.[183] A state's assertion of *Parker* immunity inherently satisfies the separability requirement because there is only one inquiry necessary, and it does not require any considerations of the facts: Is the party committing the anticompetitive activity a sovereign state?[184] The Supreme Court has developed *Parker* immunity jurisprudence to include increasing levels of scrutiny for parties asserting the right, which

178. *See Hoover*, 466 U.S. at 568; McDonald, *supra* note 101, at 103 (discussing *Hoover* holding and reasoning); *see also* Moses H. Cone Mem'l Hosp. v. Mercury Const. Corp., 460 U.S. 1, 12-13 (1983) (analyzing elements of conclusiveness).

179. *See* Parker v. Brown, 317 U.S. 341, 351 (1943) (finding states not considered people under the Sherman Act).

180. *See* City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 394 (1978); *see also* Gulfstream Aerospace Corp. v. Mayacamas Corp., 485 U.S. 271, 278 (1988) (holding order inconclusive).

181. *See City of Lafayette*, 435 U.S. at 394 (detailing effects of stages of litigation on *Parker* immunity analysis).

182. *See id.*; Goldfarb v. Va. State Bar, 421 U.S. 773, 790-91 (1975); *supra* notes 178-181 and accompanying text (analyzing conclusiveness prong applied to sovereign and sub-sovereign entities).

183. *See Lafayette*, 435 U.S. at 393-94; *see also* Johnson v. Jones, 515 U.S. 304, 310-15 (1995) (fortifying "completely separate" from merits standard). A state governmental entity must be compelled by state legislation to benefit from *Parker* immunity, which is a determination made on the specific facts of the case. *See Lafayette*, 435 U.S. at 393-94; Hoover v. Ronwin, 466 U.S. 558, 568 (1984) (articulating disposition of *Parker* immunity analysis). Thus, a motion to dismiss is premature, because the district court's analysis requires a determination of the evidence to establish the legislative intent the anticompetitive action was in furtherance of. *See Lafayette*, 435 U.S. at 394, 414.

184. *See Hoover*, 466 U.S. at 569 (articulating analysis unnecessary where state judiciary or legislature restrain trade).

increases as the party becomes more attenuated from the sovereign state.[185] Thus, every assertion of *Parker* immunity by a party other than an absolute sovereign requires an analysis into the alleged anticompetitive activity, assessing whether it was pursuant to a state regulatory scheme or clearly articulated and actively supervised; these factual inquiries are obnoxious to the separability requirement.[186]

*3. Unreviewability*

States also satisfy the unreviewability element, as they have a right to be free from suit in federal tribunals for any alleged anticompetition engaged in on their behalf.[187] As such, denying states this right and subjecting them to trial is unreviewable on appeal, because subjecting them to any litigation absolutely nullifies their right to *Parker* immunity.[188] State entities, though, do not directly benefit from the right to immunity like sovereigns, and are merely conduits for state-imposed regulatory policies; thus, their right does not rise to the level of importance needed for an immediate appeal.[189]

### *D. Applying the Appropriate* Cohen *Standard to* SolarCity

With regards to *SolarCity*, SRP is not a sovereign and is not afforded an immediate entitlement to *Parker* immunity.[190] The Ninth Circuit identified SRP as a political subdivision of Arizona.[191] Accordingly, SRP must comply with a clearly articulated state regulatory scheme to invoke *Parker* immunity.[192] The order denying SRP's motion to dismiss asserting *Parker* immunity is not conclusive because the court would have presumably returned to determine SRP's entitlement to the immunity in later stages of litigation, most likely after

185. *See id.* (requiring no test for sovereigns asserting *Parker* immunity); Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc., 445 U.S. 97, 105 (1980) (implementing two-prong test for private parties asserting *Parker* immunity); *Goldfarb*, 421 U.S. at 790 (establishing precondition of sub-sovereign compelled by state statutes and regulations).

186. *See Midcal*, 445 U.S. at 105 (outlining requirement of analysis whether policy supervised by state); *Goldfarb*, 421 U.S. at 790-91 (noting assertion of *Parker* immunity required factual assessment of state regulatory scheme); *see also Johnson*, 515 U.S. at 310-15 (describing necessity for analysis into alleged anticompetitive activity).

187. *See* Parker v. Brown, 317 U.S. 341, 351 (1943); *see also* P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc., 506 U.S. 139, 146 (1993) (holding denial of assertion of sovereign immunity collateral order).

188. *See Parker*, 317 U.S. at 351; *see also P.R. Aqueduct & Sewer Auth.*, 506 U.S. at 146.

189. *See* Goldfarb v. Va. State Bar, 421 U.S. 773, 790-91 (1975).

190. *See* SolarCity Corp. v. Salt River Project Agric. Improvement and Power Dist., 859 F.3d 720, 730 (9th Cir. 2017) (dismissing for lack of jurisdiction), *cert. granted*, 138 S. Ct. 499 (2017), *and cert. dismissed sub nom.* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018).

191. *See id.* at 723.

192. *See* City of Lafayette v. La. Power & Light Co., 435 U.S. 389, 413 (1978); Town of Hallie v. City of Eau Claire, 471 U.S. 34, 45-46 (1985).

discovery.[193] Nor is the order separable from the merits because the court must consider whether SRP's pricing structure was pursuant to a clearly articulated state regulatory scheme enacted by Arizona's legislature, and whether Arizona had reasonably foreseen that SRP would institute the pricing structure that SolarCity alleges violates the Sherman Act.[194] Finally, the denial of SRP's assertion of *Parker* immunity is effectively reviewable after final judgment because a sub-sovereign entity's right to *Parker* immunity—dissimilar to a sovereign state's right—does not rise to the level of importance where it would be lost absent immediate appeal.[195] Thus, an analysis into whether SRPs coercive pricing inherently fails all three elements of the *Coopers* test.[196]

## IV. CONCLUSION

Section 1291's finality requirement was crafted to apply strictly to ensure judicial efficiency and effective appellate review. The Supreme Court judicially constructed the collateral order doctrine as a practical implementation of § 1291—as opposed to an exception—ensuring justice where unwavering finality was impractical. The collateral order doctrine initially expanded in response to Supreme Court inaction, though it was ultimately restricted to permit only appeals of a small class of orders that conclusively determine an important question that is separable from the merits and thus unreviewable after final judgment.

*Parker* immunity arose from the Supreme Court's interpretation of the Sherman Act. Rather than as the result of an affirmative congressional act conferring a right on states and state-controlled entities, it arose from congressional oversight coming to light when state regulation of intrastate commerce was desirable during an economic influx after World War II. This is the inherent derivation of the doctrine for the benefit of the public at large, instead of the interest of the state. *Parker* immunity is identical to sovereign immunity in its inception, in that it results from a statute and appears to imbue the states with the right to avoid federal jurisdiction, however there is no affirmative right conferred. *Parker* immunity is merely a recognition that Congress never intended to regulate the states, not that it intended to empower them.

193. *See City of Lafayette*, 435 U.S. at 394, 414 (explaining motion to dismiss inappropriate time to assert *Parker* immunity).

194. *See Goldfarb*, 421 U.S. at 790-91 (articulating standard for sub-sovereign entity's *Parker* immunity analysis).

195. *See id.* (explaining sub-sovereign entity less entitled to *Parker* immunity).

196. *See* SolarCity Corp. v. Salt River Project Agric. Improvement and Power Dist., 859 F.3d 720, 730 (9th Cir. 2017), *cert. granted*, 138 S. Ct. 499 (2017), *and cert. dismissed sub nom.* Salt River Project v. Tesla Energy Operations, Inc., 138 S. Ct. 1323 (2018); *see also supra* Sections III.A-C (analyzing interplay between *Parker* immunity and collateral order doctrine).

The contemporary interpretation of the collateral order doctrine is restrictive, and *Parker* immunity has been mischaracterized as a right that would satisfy the *Cohen* requirements. When adequately understood as a mere defense against federal regulation, *Parker* immunity fails to satisfy the threshold requirements for the collateral order doctrine. Thus, the Supreme Court would have likely determined that, in *SolarCity Corp. v. Salt River Project Agricultural Improvement and Power District*, the denial of a motion to dismiss based on *Parker* immunity was not appealable under the collateral order doctrine.

*Christopher Joseph Redd*