No. 16-1056

IN THE

Supreme Court of the United States

STEVE BLACK,

Petitioner,

v.

DIXIE CONSUMER PRODUCTS LLC; GP CONSUMER PRODUCTS HOLDINGS LLC,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

Kentucky requires most of its employers to provide workers' compensation coverage. To ensure that employers do not contract away that responsibility, Kentucky also requires those who "contract[] with another … [t]o have work performed of a kind which is a regular or recurrent part of the work of the trade … of such person" to pay workers' compensation benefits after an accident if the worker's actual employer does not. Ky. Rev. Stat. § 342.610(2)(b). In exchange, these contractors receive "up-the-ladder" immunity; like the worker's actual employer, they cannot be sued in tort if the worker has received compensation through the workers' compensation system.

In Kentucky, up-the-ladder immunity is important enough to be an immunity from suit, not just a defense against liability. The Sixth Circuit held below that denials of up-the-ladder immunity are immediately appealable in federal court under the collateral-order doctrine, just as they are in Kentucky courts under its analogous finality rules.

The questions presented are:

1. Whether private parties may collaterally appeal the denial of up-the-ladder immunity.

2. Whether courts properly ask whether the asserted right is a true immunity from suit when applying the collateral-order doctrine.

3. Whether this Court should overrule the source of the collateral-order doctrine—*Cohen v. Beneficial Industrial Loan Corp.*, 334 U.S. 541 (1949)—and its decades-old interpretation of 28 U.S.C. § 1291.

RULE 29.6 STATEMENT

Respondent Dixie Consumer Products LLC is a subsidiary of Respondent GP Consumer Products Holdings LLC.[1] Respondent GP Consumer Products Holdings LLC's ultimate corporate parent is Koch Industries, Inc. No publicly held company owns a 10% or greater interest in any of these entities.

[1] Petitioner incorrectly identifies GP Consumer Products Holdings LLC as "Georgia-Pacific Consumer Products Holdings LLC." Pet. ii.

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STATUTES

OTHER AUTHORITIES

Petitioner claims that courts are divided over whether private parties may immediately appeal a denial of "immunity," that the decision below wrongly turned on whether the immunity in question was immunity from suit rather than immunity from liability, and that this Court should overrule the collateral-order doctrine entirely. *See* Pet. i, 10–21.

None of these questions is worthy of review. Every circuit allows private parties to collaterally appeal in certain circumstances, and where they have denied such appeals, their decisions have turned on the kind of immunity at issue, not a general rule against appeals by private parties. Petitioner does not even allege disagreement with respect to the Sixth Circuit's focus on immunity from suit, and its approach fits perfectly with this Court's cases. Finally, this Court's longstanding interpretation of 28 U.S.C. § 1291 should be left just as Congress has left it over all these years since *Cohen*—untouched.

STATEMENT

1. This case involves Kentucky's Workers' Compensation Act, which is "a product of compromises by workers and employers." *Labor Ready, Inc. v. Johnston*, 289 S.W.3d 200, 204 (Ky. 2009). "Workers agree to forego common law remedies in exchange for statutory benefits awarded without regard to fault." *Id.* Employers, for their part, "agree to pay such benefits and to forego common law defenses in exchange for immunity from tort liability." *Id.*; *see also* Ky. Rev. Stat. §§ 342.610(1), 342.690.

To "assure that contractors and subcontractors [also] provide workers' compensation coverage," *Gen.*

Elec. Co. v. Cain, 236 S.W.3d 579, 587 (Ky. 2007), Kentucky additionally provides for benefits where someone contracts out certain tasks to others:

> A contractor who subcontracts all or any part of a contract and his or her carrier shall be liable for the payment of compensation to the employees of the subcontractor unless the subcontractor primarily liable for the payment of such compensation has secured the payment of compensation as provided for in this chapter.

Ky. Rev. Stat. § 342.610(2). This statute further specifies:

> A person who contracts with another … [t]o have work performed of a kind which is a regular or recurrent part of the work of the trade, business, occupation, or profession of such person … shall for the purposes of this section be deemed a contractor, and such other person a subcontractor.

Ky. Rev. Stat. § 342.610(2)(b). Through these provisions, Kentucky "discourage[s] a contractor from subcontracting work that is a regular or recurrent part of its business to an irresponsible subcontractor" just to "avoid the expense of workers' compensation benefits." *Doctors' Assocs., Inc. v. Uninsured Emp'rs' Fund*, 364 S.W.3d 88, 91 (Ky. 2011).

Just as ordinary employers may not be sued in tort if the employee has received workers' compensation benefits, contractors covered by section 342.610(2)(b) enjoy so-called "up-the-ladder" immunity. *Beaver v. Oakley*, 279 S.W.3d 527, 530 (Ky. 2009); *see also* Ky. Rev. Stat. § 342.690. This immunity applies "whether or not the immediate

employer"—that is, the subcontractor—"actually provided workers' compensation coverage." *Cain*, 236 S.W.3d at 585; *see also* Ky. Rev. Stat. § 342.690.

Kentucky courts have referred to up-the-ladder immunity as "immunity from tort lawsuits," *Beaver*, 279 S.W.3d at 528 n.1, not just immunity from liability. They have also treated it as such. Kentucky ordinarily allows appeals only from "final … judgment[s]" that "adjudicat[e] all the rights of all the parties in an action." Ky. R. Civ. P. 54.01. But because up-the-ladder immunity "is designed to free the possessor not only from liability, but also from the costs of defending an action," the denial of a claim to up-the-ladder immunity is "immediate[ly] appeal[able]" under Kentucky's version of the collateral-order doctrine. *Ervin Cable Constr., LLC v. Lay*, 461 S.W.3d 422, 423 (Ky. Ct. App. 2015); *see Breathitt Cty. Bd. of Educ. v. Prater*, 292 S.W.3d 883, 885–87 (Ky. 2009) (recognizing a collateral-order doctrine analogous to the federal one).

2. Respondent Dixie Consumer Products LLC makes paper cups and plates at its factory in Bowling Green, Kentucky. Pet. App. 2a. Dixie does not itself transport raw paper materials to the factory for processing; instead, it contracts with forty-eight different truck and freight services to do so. *Id.* One of those contractors is Western Express. *Id.* Petitioner Steve Black was one of Western's drivers. *Id.*

On July 11, 2008, Black delivered a truck loaded with 41,214 pounds of raw paper materials to the factory. Pet. App. 3a. After parking his truck, Black asked Larry Chinn, Dixie's forklift operator, for

permission to enter the loading dock. *Id.* Chinn agreed; as Black later noted, it was "common practice" for the truck driver to unload the ten-pound rubber mats separating the rolls of raw paper so that Chinn would not "have to get off each time and get them himself." *Id.* (internal quotation marks omitted). Although the unloading process started smoothly—"Chinn … remov[ing] a layer of paper rolls with his forklift," and "Black … remov[ing] the rubber mats and walk[ing] them to the trash compactor"—at some point they "fell out of rhythm." *Id.* Chinn ran over Black's foot, which ultimately had to be amputated. *Id.*

Black received a lump sum of $116,289 in workers' compensation benefits as a result of his injury. He also received $21,666 in temporary disability benefits, $202,702 for past medical expenses, and a promise to pay all future medical expenses stemming from the accident. R. 84-10, PageID#1363–68; R. 84-10, PageID#1333. Had his employer not secured these benefits for him, Dixie would have been responsible for them. *See Matthews v. G&B Trucking, Inc.*, 987 S.W.2d 328 (Ky. 1999).

3. Black filed suit against Dixie and its parent company, Respondent GP Consumer Products Holdings LLC, in the United States District Court for the Western District of Kentucky. Pet. App. 3a. As relevant here, Respondents argued that they were entitled to up-the-ladder immunity under Kentucky law. After brief discovery, the district court agreed, but the Sixth Circuit reversed for further factual development. *See Black v. Dixie Consumer Prods. LLC*, 516 F. App'x 412 (6th Cir. 2013). On remand, the district court denied Respondents' motion for

summary judgment, concluding that they had not proven their entitlement to up-the-ladder immunity. Pet. App. 4a.

4. Respondents appealed. In an opinion authored by Judge Sutton, the Sixth Circuit reversed. The panel first held that it had jurisdiction over Respondents' appeal. It noted that this Court "has frequently applied the collateral-order doctrine in the context of decisions rejecting immunity-from-suit defenses," including "qualified immunity," "state sovereign immunity," and "absolute immunity." Pet. App. 5a. It recognized, however, that "[n]ot all invocations of the word 'immunity'" fall within the collateral-order doctrine. *Id.* Instead, "[w]hat matters is the nature of the protection," and "what counts in terms of protection is whether the relevant state or federal law provides immunity from suit rather than immunity from liability." *Id.* (internal quotation marks omitted).

The court held that up-the-ladder contractor immunity is an "immunity from suit, not just from liability." Pet. App. 6a. "Black concede[d] as much," and "Kentucky courts agree[d]": the Kentucky Supreme Court had described it as "'a contractor's immunity from tort lawsuits,'" *id.* (quoting *Beaver*, 279 S.W.3d at 528 n.1), and others had "*treat[ed]*" it as such "by permitting interlocutory appeals from the denial of contractor immunity," Pet. App. 7a (citing *Ervin Cable*, 461 S.W.3d at 423). As Judge Sutton explained, this treatment makes sense. "The immunity plays a pivotal role in maintaining the tradeoffs contained in Kentucky's workers' compensation scheme." Pet. App. 6a. "A workers' compensation system works best when there is no

litigation on the front end or the back end." Pet. App. 7a.

The court then rejected Black's argument that private parties may not appeal under the collateral-order doctrine. Pet. App. 7a–9a. *Cohen v. Beneficial Industrial Loan Corp.*, 337 U.S. 541 (1949)—the "decision that gave birth to the collateral-order [doctrine]"—itself "arose from a private corporation's interlocutory appeal." Pet. App. 8a. Moreover, while public officials claiming immunity most "typically" benefit from the collateral-order doctrine, the Sixth Circuit has "frequently allowed" immediate appeals by "private parties" where they are "immun[e] from suit." *Id.* (collecting cases). Other circuits have also allowed private parties to appeal in such circumstances. Pet. App. 8a–9a (collecting cases). As one noted, because "an immunity from suit is imbued with a significant public interest that is not always present with regard to a defense against liability," "the denial of an immunity from suit—whether created by state or federal law—is an immediately appealable collateral order." Pet. App. 9a. (quoting *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013)).

Turning to the merits, the majority concluded that Georgia-Pacific and Dixie were "contractors" for purposes of up-the-ladder immunity under Kentucky law and were entitled to summary judgment. Pet. App. 9a–14a.

Judge Clay dissented. Pet. App. 14a–27a. He agreed with the majority about the relevant jurisdictional rule: "[A]n order denying statutory immunity is appealable [if but] only if the state law

provides immunity from suit, as opposed to immunity simply from liability." Pet. App. 15a–16a (quoting *Chesher v. Neyer*, 477 F.3d 784, 793 (6th Cir. 2007)) (emphasis omitted). He also agreed that private parties, not just public officials, could take collateral appeals, notwithstanding Black's "incorrect[]" belief otherwise. Pet. App. 17a n.1. However, even though he had previously stated that up-the-latter immunity is "immunity from tort lawsuits," *Ditts v. United Grp. Servs., LLC*, 500 F. App'x 440, 449 (6th Cir. 2012), Judge Clay now concluded that it was "mere immunity from liability," not "immunity from suit," under Kentucky law, Pet. App. 16a.

REASONS FOR DENYING THE PETITION

Petitioner first seeks review of the decision below because it allowed a private party to collaterally appeal from an order denying "immunity," deepening an alleged split. But there is no split. Every circuit allows private parties to collaterally appeal in some circumstances, and none has held that the denial of "immunity" in general—whatever that means—cannot be appealed by private parties.

Petitioner also seeks review of the decision below because it focused on whether the immunity in question was immunity from suit or merely a defense against liability. But Petitioner does not even allege disagreement on this question, and there is no conflict with this Court's cases. As this Court and circuit courts have recognized, the denial of a true immunity from suit may generally be collaterally appealed because such an immunity protects important public interests, interests irreparably harmed by the erroneous denial of that immunity.

Finally, Petitioner asks this Court to scrap the collateral-order doctrine entirely. It should not do so. That doctrine embodies this Court's decades-old interpretation of 28 U.S.C. § 1291. Under principles of statutory *stare decisis*, it is Congress's job, not this Court's, to alter that longstanding interpretation if it thinks that the Court has made a mistake.

I. THERE IS NO DISAGREEMENT ABOUT WHETHER PRIVATE PARTIES MAY COLLATERALLY APPEAL THE DENIAL OF UP-THE-LADDER IMMUNITY.

Petitioner claims that there is a "deep and mature circuit conflict" regarding "whether the collateral-order doctrine is available to a private party seeking to pursue an interlocutory appeal after a failed attempt to invoke immunity." Pet. 10. But there is no split, and the question actually presented by this case—whether a denial of up-the-ladder immunity under Kentucky law may be immediately appealed—does not deserve this Court's time.

1. Every circuit allows private parties to take collateral appeals in certain circumstances. For example, a newspaper that successfully intervened in a criminal case immediately appealed the district court's denial of its motion to unseal information about the defendant's assets and legal fees. *See In re Boston Herald, Inc.*, 321 F.3d 174, 177–78 (1st Cir. 2003). An admiralty plaintiff appealed an order vacating the attachment of an electronic funds transfer. *See Hawknet, Ltd. v. Overseas Shipping Agencies*, 590 F.3d 87, 91 n.5 (2d Cir. 2009). And an inmate appealed a decision that he had to pay the filing fee for his $4.20 lawsuit about stolen pens. *See*

Deutsch v. United States, 67 F.3d 1080, 1083 (3d Cir. 1995). Every circuit has similar cases.[2]

This unanimity is unsurprising. *Cohen*'s factors—whether the order "conclusive[ly]" "resolve[s an] important question[] separate from the merits" that is "effectively unreviewable on appeal from the final judgment in the underlying action," *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009)—do not turn on private-party status. And *Cohen* itself was an appeal brought by a private-party defendant in a shareholder-derivative suit after the district court refused to apply a state statute requiring the

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[2] *See, e.g.*, *James v. Jacobsen*, 6 F.3d 233, 236–38 (4th Cir. 1993) (order refusing to allow civil plaintiffs to testify anonymously); *Newby v. Enron Corp.*, 443 F.3d 416, 420–21 (5th Cir. 2006) (order granting intervention so that the intervening party could access confidential filings); *Brandon v. Blech*, 560 F.3d 536, 537 (6th Cir. 2009) (order denying counsel's request to withdraw for non-payment); *McCarthy v. Fuller*, 714 F.3d 971, 974–76 (7th Cir. 2013) (order refusing to defer to the Holy See regarding a party's ecclesiastical status in private litigation); *Sanford v. Maid-Rite Corp.*, 816 F.3d 546, 549 (8th Cir. 2016) (per curiam) (order denying motion to withdraw as counsel in a civil case); *Does I thru XXIII v. Advanced Textile Corp.*, 214 F.3d 1058, 1065–67 (9th Cir. 2000) (order denying civil plaintiffs' request to proceed anonymously); *United States v. Angelo D.*, 88 F.3d 856, 857–59 (10th Cir. 1996) (order transferring a juvenile defendant for trial as an adult); *Plaintiff B. v. Francis*, 631 F.3d 1310, 1314–15 (11th Cir. 2011) (order denying civil plaintiffs' request to remain anonymous at trial); *CalPortland Co. v. Fed. Mine Safety & Health Review Comm'n*, 839 F.3d 1153, 1159–61 (D.C. Cir. 2016) (order temporarily reinstating a mineworker who was allegedly discharged in retaliation for whistleblowing); *Apple Inc. v. Samsung Elecs. Co.*, 727 F.3d 1214, 1220 (Fed. Cir. 2013) (order unsealing previously filed confidential information about the parties' businesses).

plaintiffs to post a bond. *See* 337 U.S. at 545–46. Cases too numerous to detail later followed suit.[3] It is bad enough for Petitioner to suggest that Justice Jackson overlooked this point in *Cohen*. *But see* Pet. 13. It is worse still to imply that the whole Court has been asleep at the switch ever since.[4]

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[3] *See, e.g.*, *Sell v. United States*, 539 U.S. 166, 176–77 (2003) (order authorizing forcible medication); *Moses H. Cone Mem'l Hosp. v. Mercury Constr. Corp.*, 460 U.S. 1, 11–12 & n.13 (1983) (order staying motion to enforce arbitration agreement pending state-court proceedings); *Abney v. United States*, 431 U.S. 651, 659–62 (1977) (order denying motion to dismiss an indictment on double jeopardy grounds); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 169–72 (1974) (order requiring defendants to pay for class notification); *Stack v. Boyle*, 342 U.S. 1, 6 (1951) (order setting allegedly excessive bail); *Roberts v. U.S. Dist. Ct. for the N. Dist. of Cal.*, 339 U.S. 844, 845 (1950) (per curiam) (order denying permission to proceed *in forma pauperis* in civil prisoner litigation because of state statute); *Swift & Co. Packers v. Compania Colombia Del Caribe, S.A.*, 339 U.S. 684, 688–89 (1950) (order dissolving the attachment of a vessel during civil litigation).

[4] Indeed, even when declining to authorize collateral appeals brought by private parties, the Court has never suggested a categorical ban on them. Rather, it has applied *Cohen*'s factors and held that they were not met. *See, e.g.*, *Mohawk*, 558 U.S. at 108–14 (order denying a claim of attorney-client privilege in civil litigation); *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 871–84 (1994) (order refusing to enforce a settlement agreement); *Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 498–501 (1989) (order refusing to enforce a forum selection clause in civil litigation); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524–27 (1988) (order refusing to dismiss because of unlawful service of process and *forum non conveniens*); *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 430–40 (1985) (order disqualifying counsel in a civil case); *Flanagan v. United States*, 465 U.S. 259, 267–69 (1984) (order disqualifying counsel in a criminal case); *Firestone*

2. Perhaps in light of this unanimity regarding the permissibility of collateral appeals by private parties as a general matter, Petitioner claims more narrowly that courts disagree about whether private parties may collaterally appeal the denial of "immunity" in particular. Pet. 10. But immunities come in many stripes, and none of Petitioner's cases hold that private parties may not appeal from the denial of "immunity" in general. Rather, these cases rejected appeals from orders denying a specific *kind* of immunity, for reasons inapplicable to the up-the-ladder immunity at issue here.

Take first the decades-old cases Petitioner cites involving claims to qualified immunity raised by private defendants in certain suits brought under 42 U.S.C. § 1983. Pet. 11–12. In both *Lovell v. One Bancorp*, 878 F.2d 10 (1st Cir. 1989), and *Chicago & N. W. Transp. Co. v. Ulery*, 787 F.2d 1239 (8th Cir. 1986), the plaintiffs alleged the defendants conspired with public officials to violate their constitutional rights. The circuit courts declined to hear the private defendants' collateral appeals, not because private defendants may not collaterally appeal denials of "immunity" in general, but because of the nature of qualified immunity in particular: qualified immunity exists to prevent "the disruptive effect litigation has on effective government," *Lovell*, 878 F.2d at 13, a rationale with "no application" where private defendants pursuing private ends are sued for

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Tire & Rubber Co. v. Risjord, 449 U.S. 368, 376–78 (1981) (order refusing to disqualify counsel in a civil case); *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468–69 (1978) (order denying class certification).

colluding with state actors, *Ulery*, 787 F.2d at 1240. So too for *Rambo v. Daley*, 68 F.3d 203 (7th Cir. 1995), where Illinois police officers who traveled to Indiana and made an arrest claimed both that they were not acting under color of state law (because they were outside their jurisdiction) and that they were entitled to appeal the rejection of their claim to qualified immunity. The Seventh Circuit disagreed, reasoning that qualified immunity "prevent[s] the distraction of officials from their governmental duties" and thus cannot be invoked by those claiming they were mere citizens at the time. *Id.* at 206.

The reasoning in these cases has no bearing on this case. In stark contrast with qualified immunity, up-the-ladder immunity has nothing to do with government officials and everything to do with private parties. As the Sixth Circuit explained, Kentucky recognizes up-the-ladder immunity from suit because of the "pivotal role" it plays "in maintaining the tradeoffs contained in Kentucky's workers' compensation scheme"; by strictly, quickly, and correctly enforcing the bar against tort suits, Kentucky encourages employers to pay into the workers' compensation system. Pet. App. 6a. Given this critical difference, there is no reason to think the First, Seventh, or Eighth Circuits would reach a different conclusion than the Sixth Circuit did here.[5]

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[5] Petitioner also claims that the Sixth Circuit has allowed private-party collateral appeals in qualified-immunity cases where other circuits have not. Pet. 10. This workers' compensation case would be a bad vehicle in which to resolve any such disagreement, and there is no dispute anyway. In *United Pet Supply, Inc. v. City of Chattanooga*, 768 F.3d 464

Petitioner's case involving state-action antitrust immunity—*Auraria Student Housing at the Regency, LLC v. Campus Village Apartments, LLC*, 703 F.3d 1147 (10th Cir. 2013)—is similarly distinguishable. So-called "*Parker*" immunity "exists to avoid conflicts between state sovereignty and the Nation's commitment to a policy of robust competition" by shielding sovereign conduct—performed both by state officials and by private parties acting subject to the state's active supervision and pursuant to clearly articulated state policy—from antitrust liability. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015). Because private parties cannot

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(6th Cir. 2014), and *Brotherton v. Cleveland*, 173 F.3d 552 (6th Cir. 1999), the defendants were not merely private parties who allegedly conspired with state actors, but private parties who contracted to perform government functions, a distinction that triggers the collateral-order doctrine because it puts government efficiency at risk. *See DeVargas v. Mason & Hanger-Silas Mason Co.*, 844 F.2d 714, 716–17 (10th Cir. 1988) (drawing this line); *Lovell*, 878 F.2d at 12 n.4 (reserving decision on jurisdiction where the "allegedly wrongful conduct arises from acts that were required to be performed under a contract with a governmental body to perform a governmental function").

Moreover, after the decisions Petitioner cites, this Court clarified that those acting for purely private ends may not claim qualified immunity under section 1983, *see Wyatt v. Cole*, 504 U.S. 158 (1992), while private parties working on the government's behalf should generally receive qualified immunity on the same terms as public employees, *see Filarsky v. Delia*, 566 U.S. 377, 383–93 (2012); *see also Richardson v. McKnight*, 521 U.S. 399, 402 (1997) (entertaining a case brought on collateral appeal by a private party claiming immunity as a government contractor). Thus, even if there had been disagreement about qualified-immunity appeals, it does not matter now.

claim the sovereign's interests—and because any inquiry into whether the lawsuit *really* sought to challenge a state statute would have overlapped with the merits of the *Parker* defense—the Tenth Circuit declined to hear the appeal. 703 F.3d at 1151, 1152. Again, however, it did not hold that private parties generally may not take collateral appeals from denials of "immunity," and nothing it said suggested it would have reached a different result in Petitioner's tort suit, where the immunity in question matters *only* to private parties and can be assessed without getting into the merits of Petitioner's case.

Petitioner's last supposedly diverging case—*Herx v. Diocese of Fort Wayne-South Bend, Inc.*, 772 F.3d 1085 (7th Cir. 2014)—is farthest afield of all. There, the Diocese unsuccessfully moved for summary judgment against the plaintiff's Title VII and Pregnancy Discrimination Act claims, arguing that it fell with certain statutory exemptions and the ministerial exception. *See id.* at 1086–87. The Diocese immediately appealed. *See id.* at 1087.

In assessing its jurisdiction, the Seventh Circuit explained that, where collateral appeals have been allowed, "'some particular value of a high order was marshaled in support of the interest *in avoiding trial*,' not just an interest in avoiding an adverse judgment." *Id.* at 1090 (quoting *Will v. Hallock*, 546 U.S. 345, 352 (2006)). After setting forth that rule, the court did state that because the case "involve[d] private parties," it did not "imperil" a "public interest." *Id.* But it rested its decision on the grounds that the Diocese "ha[d] not established that the Title VII exemptions or the First Amendment more generally provides an immunity *from trial*, as

opposed to an ordinary defense to liability," *id.*; as a result, the Diocese's interests, no matter how "importan[t]," "w[ould] not be irreparably harmed by enforcement of the final-judgment rule," *id.* at 1091–92. That line is precisely the one that the Sixth Circuit used to conclude that Respondents, who *do* have an immunity *from suit* under Kentucky law, could take an immediate appeal. Pet. App. 5a–7a. Thus, none of Petitioner's cited cases present any disagreement worthy of this Court's review.

3. Indeed, Petitioner himself does not really believe the circuits differ on whether private parties claiming "immunity" may take collateral appeals. He recognizes that several have allowed private parties to take immediate appeals of orders denying immunity under state anti-SLAPP statutes, and one has allowed a private military contractor to immediately appeal the denial of derivative *Feres* immunity. Pet. 15. But rather than disagree with those cases or place them on the Sixth Circuit's side of the split—an awkward fit, given that the First Circuit would then be on *both* sides, *see supra* 11—he tries to distinguish them. On his view, those cases involved important public interests, while here "[t]he exclusivity of a state workers' compensation scheme … hardly protects … a 'high order' public interest." Pet. 15; *see also id.* (delaying appeal here "interferes with no public institution or public interest").

The Kentucky legislature and the Kentucky courts disagree with Petitioner about whether up-the-ladder immunity from suit serves important public interests. *See supra* 1–3; *see infra* 20–21. More importantly, however, Petitioner's attempt to distinguish these cases makes clear what he

otherwise covers over: that no circuit has barred private parties from collaterally appealing the denial of "immunity" generally. Instead, each has evaluated such claims on a case-by-case basis, focusing on the nature and purposes of the particular immunity in question. So understood, this case presents, at most, the question of whether the denial of up-the-ladder immunity under Kentucky law triggers an immediate appeal. Petitioner does not allege a split on that narrow question, and even if there were one, it would not be worthy of review by this Court. Petitioner's first question presented should be denied.

II. THE CIRCUITS AGREE THAT APPEALS FROM DENIALS OF IMMUNITY FROM SUIT GENERALLY FALL WITHIN THE COLLATERAL-ORDER DOCTRINE

Petitioner also complains that the decision below "turned on the *type* of immunity that a workers' compensation scheme offers" because the court based its decision on whether Kentucky law "'provides immunity from suit rather than immunity from liability.'" Pet. 16 (quoting Pet. App. 5a–6a). In his view, this focus on immunity from suit conflicts with this Court's decision in *Will* because it allows for collateral appeals in any case involving such an immunity, no matter how trivial the interests supporting that immunity. Pet. 16–18.

There is no need for the Court to review "[w]hether the collateral-order doctrine's applicability turns on the type of immunity asserted (immunity from suit versus immunity from liability)." Pet. i. The decision below comports with the approach used

by other courts of appeals and with this Court's precedents, including *Will*.

1. Petitioner does not allege any conflict among the circuits about the role that immunity from suit plays in the collateral-order analysis. That is because other courts have regularly emphasized the presence (or absence) of immunity from suit in allowing (or rejecting) collateral appeals from orders denying the immunity in question.

Take for instance the line of cases mentioned above that apply the collateral-order doctrine to issues arising under various state anti-SLAPP laws. The appealability of such orders has largely turned on whether the state law in question conferred something more akin to immunity from suit or merely a defense against liability.

The Ninth Circuit's handling of Oregon's anti-SLAPP statute proves the point. In *Englert v. MacDonell*, 551 F.3d 1099, 1105 (9th Cir. 2009), it rejected a collateral appeal under Oregon's statute because it "was not intended to provide a right not to be tried," only a "right to have the legal sufficiency of the evidence underlying the complaint reviewed by a … judge" before trial. After the Ninth Circuit's decision, Oregon amended its statute to make clear—by, for example, including immediate-appeal provisions applicable in state court—that the statute conferred "immunity from suit." *Schwern v. Plunkett*, 845 F.3d 1241, 1244–45 (9th Cir. 2017). Afterward, the Ninth Circuit held that it "ha[s] jurisdiction to review denials of Oregon anti-SLAPP motions" because defendants now have a right to "not proceed to trial," not just to avoid "liability." *Id.* at 1244.

Other decisions trace the same line, both in the anti-SLAPP context[6] and elsewhere in the law.[7]

This uniformity, too, is unsurprising. This Court has often authorized collateral appeals because the

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[6] *Compare, e.g.*, *Royalty Network, Inc. v. Harris*, 756 F.3d 1351, 1357 (11th Cir. 2014) (allowing appeals under Georgia's statute because "[f]orcing a defendant to wait until the conclusion of such proceedings to appeal … would subject defendants to the very judicial process and chilling effects the state legislature intended to curtail"); *NCDR, L.L.C. v. Mauze & Bagby, P.L.L.C.*, 745 F.3d 742, 751 (5th Cir. 2014) (allowing appeals under Texas's statute because it granted "not simply the right to avoid ultimate liability in a SLAPP case, but rather … the right to avoid trial in the first instance"); *Godin v. Schenks*, 629 F.3d 79, 85 (1st Cir. 2010) (allowing appeals under Maine's statute because it "protect[ed] speakers from the trial itself rather than merely from liability"); *Henry v. Lake Charles Am. Press, L.L.C.*, 566 F.3d 164, 177–79 (5th Cir. 2009) (allowing appeals under Louisiana's statute because it offered immunity from suit); *Batzel v. Smith*, 333 F.3d 1018, 1025 (9th Cir. 2003) (allowing appeals under California's statute because "California lawmakers wanted to protect speakers from the trial itself rather than merely from liability"), *with Metabolic Research, Inc. v. Ferrell*, 693 F.3d 795, 802 (9th Cir. 2012) (denying appeals under Nevada's statute because it did not "function as an immunity from suit," but rather as an "immunity from civil liability").

[7] *Compare, e.g.*, *Gen. Steel Domestic Sales, L.L.C. v. Chumley*, 840 F.3d 1178, 1181 (10th Cir. 2016) (order denying summary judgment based on the Communications Decency Act is not immediately appealable because "[s]ection 230 of the CDA provides immunity only from liability, not suit") *with, e.g.*, *Troice v. Proskauer Rose, L.L.P.*, 816 F.3d 341, 346 (5th Cir. 2016) (order denying motion to dismiss based on attorney immunity is immediately appealable because "attorney immunity [under Texas law] is properly characterized as a true immunity from suit, not as a defense to liability").

right in question was best categorized as an immunity from suit. For example, orders denying motions to dismiss an indictment as barred by double jeopardy may be immediately appealed because the Double Jeopardy Clause is "a guarantee against being twice put to trial," a guarantee that "would be lost if the accused were forced to 'run the gauntlet' a second time before an appeal could be taken." *Abney*, 431 U.S. at 660–61, 662. Similarly, orders denying qualified immunity may be appealed because qualified immunity "is an *immunity from suit* rather than a mere defense to liability" and is thus "effectively lost if a case is erroneously permitted to go to trial." *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985). The list goes on.[8]

2. Nothing in *Will* eliminates or even undermines this approach. *Will* noted that, "'loosely'" speaking, any right "to prevail without trial"—the right to win a motion to dismiss or for summary judgment in everyday litigation, for example—might be said to confer a "'right not to stand trial'" demanding a collateral appeal. 546 U.S. at 351 (quoting *Digital Equipment*, 511 U.S. at 873). To prevent this erosion of the final-judgment rule, the Court explained that

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[8] *See P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993) (defendants may appeal denials of Eleventh Amendment immunity because that amendment "prevent[s] the indignity of subjecting a State to the coercive process of judicial tribunals," in addition to "protect[ing them] from liability"); *Helstoski v. Meanor*, 442 U.S. 500, 508 (1979) (defendants may appeal denials of Speech and Debate Clause immunity because it "protect[s] Congressmen not only from the consequences of litigation's results but also from the burden of defending themselves").

"it is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts" in determining appealability. *Id.* at 353.

This focus on public interest, however, squares perfectly with an emphasis on whether the right in question is an immunity from suit or a mere defense against liability. "When a policy is embodied in a constitutional or statutory provision entitling a party to immunity from suit (a rare form of protection), there is little room for the judiciary to gainsay its 'importance.'" *Digital Equipment*, 511 U.S. at 879.[9] Thus, as the Ninth Circuit explained in rejecting an argument identical to Petitioner's, true immunity from suit remains "dispositive" to the collateral-order analysis: "an immunity from suit is imbued with a significant public interest that is not always present with regard to a defense against liability," and protecting those public interests demands an immediate appeal because the interests at stake are "effectively lost if a case is erroneously permitted to go to trial." *DC Comics*, 706 F.3d at 1015.

3. Judge Sutton's decision followed these principles to the letter. As *Will* commands, it acknowledged that "[n]ot all invocations of the word 'immunity'" count. Pet. App. 5a. Then, just as this Court and others have done, it focused on the "nature of the protection" afforded by Kentucky's Workers' Compensation Act, concluding that—as Black

[9] In this way, legislatively created immunities from suit "differ[]" in importance from privately created rights such as promises not to sue and forum selection clauses. *See Digital Equipment*, 511 U.S. at 878–79.

"concede[d]"—up-the-ladder immunity is "an immunity from suit, not just from liability," under Kentucky law. Pet. App. 6a. To top it all off, the court recognized the important public interest furthered by this immunity, noting that it "plays a pivotal role in maintaining the tradeoffs contained in Kentucky's workers' compensation scheme." Pet. App. 6a; *see also* Pet. App. 9a ("[A]n immunity from suit is imbued with a significant public interest that is not always present with regard to a defense against liability" (quoting *DC Comics*, 706 F.3d at 1015)). Indeed, the panel could not have done otherwise. The Sixth Circuit has squarely held that, to be immediately appealable, a challenged order "must 'imperil a substantial public interest,'" "*[i]n addition* to violating an asserted right not to stand trial." *Kelly v. Great Seneca Fin. Corp.*, 447 F.3d 944, 948 (6th Cir. 2006) (quoting *Will*, 546 U.S. at 353) (emphasis added).

To be sure, Petitioner takes issue with the panel's conclusions: he (now) asserts that up-the-ladder immunity is not immunity from suit under Kentucky law, Pet. 17, and he (baldly) insists that there is "nothing 'high order'" about maintaining Kentucky's workers' compensation system, Pet. 18. But the panel's legal approach—a focus on immunity from suit, with an understanding that such immunities reflect important public policies—flows directly from this Court's precedents and coheres with other circuits' approach. His second question presented, then, must be seen for what it is: a request for splitless error correction, largely on a matter of Kentucky law. It should be denied accordingly.

III. THIS COURT SHOULD NOT OVERRULE THE COLLATERAL-ORDER DOCTRINE

Finally, Petitioner asks the Court to grant certiorari to "reverse *Cohen* … and abrogate (or at least cabin) the collateral-order doctrine." Pet. 19. This request, too, should be denied.

1. "Overruling precedent is never a small matter"; "the idea that today's Court should stand by yesterday's decisions" is "a foundation stone of the rule of law." *Kimble v. Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015) (internal quotation marks omitted). But the "burden borne by the party advocating the abandonment of an established precedent" is even "greater where the Court is asked to overrule a point of statutory construction." *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989), *superseded by statute on other grounds as recognized in CBOCS West, Inc. v. Humphries*, 553 U.S. 442, 449–50 (2008). This "superpowered form of *stare decisis*" makes sense: "unlike in a constitutional case, critics of [a statutory] ruling can take their objections across the street" to Congress. *Kimble*, 135 S. Ct. at 2409, 2410.

2. *Cohen* and the collateral-order doctrine easily qualify for protection under statutory *stare decisis*. "The collateral order doctrine is best understood not as an exception to the 'final decision' rule laid down by Congress in § 1291, but as a 'practical construction' of it." *Digital Equipment*, 511 U.S. at 867 (quoting *Cohen*, 337 U.S. at 546). After all, "it is a final *decision* that Congress has made reviewable," not just "a final judgment." *Stack*, 342 U.S. at 12 (Jackson, J., concurring).

Cohen's 68-year-old reading of section 1291 has stood the test of time. This Court has relied on that interpretation roughly a dozen times in upholding appellate jurisdiction.[10] And even when concluding that certain kinds of orders do not fall within the scope of the doctrine, the Court has reiterated and deployed its basic principles. *See, e.g.*, *Mohawk*, 558 U.S. at 106, 108. Indeed, even Justice Thomas—Petitioner's chief source for criticism of the doctrine, Pet. 19–21—would not overrule *Cohen* and its progeny, only limit their expansion. *See Mohawk*, 558 U.S. at 115 (Thomas, J., concurring in part and concurring in the judgment) (declining to find jurisdiction in part because the order was not "on all fours with orders [the Court] previously ha[s] held to be appealable").

Even more importantly, Congress has "long acquiesced" in *Cohen*'s interpretation of section 1291. *John R. Sand & Gravel Co. v. United States*, 552 U.S. 130, 139 (2008). Twice since *Cohen* came down, Congress has amended section 1291's companion, section 1292's rules regarding interlocutory appeals. *See* Pub. L. No. 85-919, 72 Stat. 1770 (1958); The Federal Courts Administration Act, Pub. L. No. 102-572, 106 Stat. 4506 (1992). Each time, Congress increased the availability of interlocutory appeals, first by giving district courts discretion to authorize

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[10] *See Sell*, 539 U.S. at 176–77; *Puerto Rico Aqueduct*, 506 U.S. at 143–47; *Mitchell*, 472 U.S. at 524–30; *Moses H. Cone Mem'l Hosp.*, 460 U.S. at 11–12 & n.13; *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982); *Helstoski*, 442 U.S. at 506–08; *Abney*, 431 U.S. at 659–62; *Eisen*, 417 U.S. at 169–72; *Stack*, 342 U.S. at 6; *Roberts*, 339 U.S. at 845; *Swift & Co.*, 339 U.S. at 688–89.

(and circuit courts discretion to hear) appeals from additional orders, *see* 28 U.S.C. § 1292(b), then by giving this Court power to authorize other interlocutory appeals through rulemaking, *see id.* § 1292(e). At the same time, Congress left section 1291 untouched.[11] "Congress's continual reworking" of section 1292—to *expand* the number of orders subject to immediate appeal, while leaving section 1291's collateral-order doctrine unscathed—"further supports leaving [*Cohen*] in place." *Kimble*, 135 S. Ct. at 2410.

3. Against all this, Petitioner claims that the collateral-order doctrine should be jettisoned because it requires "value judgments" that are better made by Congress or through rulemaking. Pet. 19 (internal quotation marks omitted). That is not enough. To begin, courts will not be pressed to make value judgments as often as Petitioner supposes; in this case and many others, a *legislature* will have made those judgments by authorizing immunity from suit, not just a defense against liability. *See supra* 19–20.

Moreover, insofar as Petitioner thinks it is bad policy for courts to decide collateral-order questions "on an *ad hoc* basis," Pet. 20, that reasoning "may give *Congress* cause to upset [*Cohen*], but does not warrant this Court's doing so," *Kimble*, 135 S. Ct. at

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[11] Since *Cohen*, Congress has made minor changes to section 1291. *See, e.g.*, Pub. L. No. 85-508, § 12(e), 72 Stat. 339, 348 (1958) (deleting the reference to the District Court for the Territory of Alaska in light of Alaska's admission to the Union); Pub. L. No. 97-164, Title I, § 124, 96 Stat. 36, 36 (1982) (excepting the new Federal Circuit from section 1291's jurisdictional grant).

2412 (emphasis added). For two-thirds of a century, this Court has given section 1291 a "practical" construction that allows an immediate appeal where the absence of one will mean the "irreparable" loss of the "rights asserted," provided those rights are "too important to be denied review." *Cohen*, 337 U.S. at 546. Congress has not taken issue with that approach over the last seven decades, and the "ball[]" is in "[its] court"—not this one—if it wishes to do so now. *Kimble*, 135 S. Ct. at 2409.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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