No. 17-368



IN THE

# Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
*Petitioner*,

*v.*

SOLARCITY CORPORATION,
*Respondent.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTION PRESENTED

Whether orders denying state-action immunity to public entities are immediately appealable under the collateral-order doctrine.

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## PETITION FOR A WRIT OF CERTIORARI

The Salt River Project Agricultural Improvement and Power District respectfully petitions for a writ of certiorari to review the judgment in this case of the United States Court of Appeals for the Ninth Circuit.

## INTRODUCTION

Starting with *Parker* v. *Brown*, 317 U.S. 341 (1943), this Court has consistently "interpreted the antitrust laws to confer immunity on anticompetitive conduct by the States when acting in their sovereign capacity," *North Carolina State Board of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1110 (2015). This immunity, known as state-action immunity or *Parker* immunity, "reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitu-

tion." *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40, 53 (1982). State-action immunity covers not only states but also their political subdivisions, so long as a subdivision's alleged anticompetitive conduct was undertaken pursuant to a "clearly articulated and affirmatively expressed" state policy to displace competition. *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216, 226 (2013).[1]

This petition presents a question about state-action immunity that has divided the courts of appeals: Is immediate appeal available under the collateral-order doctrine from an interlocutory order denying a public entity's assertion of the immunity?

The Fifth and Eleventh Circuits have held that the answer is yes. *See Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391, 1395-1397 (5th Cir. 1996); *Commuter Transportation Systems, Inc.* v. *Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289-1290 (11th Cir. 1986). These courts have held that state-action immunity, like sovereign immunity and qualified immunity, is an immunity against suit rather than a mere defense against liability. They have accordingly concluded that if a denial of state-action immunity cannot be appealed immediately, then in effect it cannot be appealed at all. Once a public entity has been subjected to the burdens of litigation beyond a

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[1] Private entities (and public entities that are not electorally accountable) can receive state-action immunity if they act pursuant to a clearly articulated state policy *and* are actively supervised by the state. *See FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 633 (1992) (citing *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980)); *North Carolina State Board*, 135 S. Ct. at 1112 (citing *Town of Hallie* v. *City of Eau Claire*, 471 U.S. 34, 46-47 (1985)).

motion to dismiss, the immunity against suit has been irredeemably lost; no subsequent appeal can restore it.

By contrast, the Fourth and Sixth Circuits—and now in this case the Ninth Circuit—have held that the interlocutory denial of state-action immunity to a public entity is not immediately appealable. *See* App. 14a-15a; *South Carolina State Board of Dentistry* v. *FTC*, 455 F.3d 436, 441-447 (4th Cir. 2006); *Huron Valley Hospital, Inc.* v. *City of Pontiac*, 792 F.2d 563, 567-568 (6th Cir. 1986). They have reached that result by holding that state-action immunity is merely a defense against liability rather than an immunity from suit.

This entrenched division among the courts of appeals—which has been acknowledged by courts on both sides of the divide as well as by commentators—warrants resolution. It has been illuminated by extensive judicial analysis, leaving little to be gained from further percolation. It will not be resolved without this Court's intervention. And it is important to the administration of the antitrust laws. This Court has repeatedly agreed to clarify whether particular orders fall within the scope of the collateral-order doctrine, and the need for clarity is especially acute in the antitrust context, where the Court has emphasized the need for national uniformity.

Finally, the decision below is incorrect. Like the Fourth and Sixth Circuits, the Ninth Circuit gave short shrift to the sovereignty and federalism interests that underlie state-action immunity. An important part of states' sovereignty is the ability to choose how they will regulate their economies within their own borders. Some may choose to do so indirectly rather than directly, by enlisting the assistance of political subdivisions—and state-action immunity is meant to "'preserve[] ...

their freedom ... to use their municipalities to administer state regulatory policies free of the inhibitions of the federal antitrust laws.'" *Phoebe Putney*, 568 U.S. at 226 (quoting *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389, 415 (1978) (plurality opinion)). Allowing states' subdivisions to be haled into court under federal law for providing such assistance, i.e., for acting pursuant to a state's clearly articulated policy, intrudes sharply on the state's sovereignty and prerogatives. It also inhibits states' ability to set policy—and subdivisions' ability to carry out that policy—with the goal of promoting the public interest, rather than the goal of simply avoiding an antitrust lawsuit. A denial of state-action immunity is thus precisely the sort of consequential decision, irreparable on appeal from a subsequent final judgment, that warrants immediate appellate review.

## OPINIONS BELOW

The opinion of the court of appeals (App. 1a-17a) is reported at 859 F.3d 720. The court's unpublished memorandum (App. 19a-20a), issued concurrently with the published opinion, is not yet reported but is available at 2017 WL 2535579. The district court's two relevant orders—denying dismissal based on state-action immunity (App. 37a-69a) and refusing to certify that ruling for interlocutory appeal (App. 21a-35a)—are unreported but available at 2015 WL 6503439 and 2015 WL 9268212, respectively.

## JURISDICTION

The court of appeals entered judgment on June 12, 2017. This Court's jurisdiction rests on 28 U.S.C. §1254(1).

## STATUTORY PROVISION INVOLVED

This Court has described the collateral-order doctrine as a "practical construction" of 28 U.S.C. §1291. *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994). That provision states that "[t]he courts of appeals ... shall have jurisdiction of appeals from all final decisions of the district courts of the United States, ... except where a direct review may be had in the Supreme Court."

## STATEMENT

### A. The Collateral-Order Doctrine

Courts of appeals normally have jurisdiction only over district courts' final judgments. *See* 28 U.S.C. §1291. But "[u]nder the collateral order doctrine, an order may be deemed 'final' if it disposes of a matter separable from, and collateral to the merits of the main proceeding." *Gelboim* v. *Bank of America Corp.*, 135 S. Ct. 897, 905 n.5 (2015) (quotation marks omitted). To fall within the collateral-order doctrine, a ruling must (1) be "conclusive," (2) "resolve important questions completely separate from the merits," and (3) be "effectively unreviewable on appeal from final judgment." *Digital Equipment*, 511 U.S. at 867. In applying this standard, a court looks to "the entire category to which a claim belongs," *id.* at 868.

Although this Court has emphasized that collateral-order appeal is a narrow exception to the final-judgment rule, it has held that a variety of orders qualify for such appeal. These include orders denying absolute immunity, state sovereign immunity, or (where it turns on a question of law) qualified immunity; rejecting a double-jeopardy defense; authorizing the forced medication of a mentally ill criminal defendant so that

he can be tried; denying certification and substitution under the Westfall Act; and refusing to reduce bail, to dismiss an indictment on speech-or-debate grounds, or to require the posting of a security bond. *See infra* pp.20-21 (citing cases).

### B. The District And The 2015 Ratemaking

Petitioner, the Salt River Project Agricultural Improvement and Power District, is "a public, political, taxing subdivision of" Arizona. Ariz. Rev. Stat. §48-2302; *see also, e.g.*, *Salt River Project Agricultural Improvement & Power District* v. *City of Phoenix*, 631 P.2d 553, 555 (Ariz. Ct. App. 1981) (noting this fact). The District is a public utility that delivers water to a 375-square-mile area of central Arizona. It supports those operations by selling electricity to roughly a million members of the public in metropolitan Phoenix. With caveats not relevant here, the Arizona Constitution provides that the District is "entitled to the immunities and exemptions granted municipalities and political subdivisions under this constitution or any law of the state or of the United States." Ariz. Const. art. XIII, §7, *quoted in Hohokam Irrigation & Drainage District* v. *Arizona Public Service Co.*, 64 P.3d 836, 839 (Ariz. 2003) (en banc).

Arizona law classifies the District as a "public power entity," and the state legislature has delegated to such entities the right to set electric rates—i.e., to "determine terms and conditions for competition in the retail sale of electric generation service," including "distribution service rates and charges." Ariz. Rev. Stat. §30-802(A), (B); *see also id.* §30-801(16) (defining "[p]ublic power entity"). The legislature has also prescribed notice-and-comment procedures for the District and other public power entities to follow in exercising

their ratemaking authority, *see id.* §48-2334(B), (E), as well as mechanisms for those who are dissatisfied with the setting of electricity rates to seek redress in state court, *see id.* §§30-811(A), 30-812(A).

In 2014, the District provided public notice that it was considering a new rate structure for "self-generating customers," meaning those who generate some electricity through rooftop solar systems or other alternative sources, but who still need to buy electricity from the District when alternative sources are insufficient to meet their needs. App. 40a-41a. After holding hearings and receiving comments, the District promulgated new rates in 2015. *Id.*

### C. District Court Proceedings

SolarCity sold and leased rooftop solar systems to customers in the District and elsewhere. App. 2a-3a. Shortly after the District's new rate structure took effect, SolarCity (forgoing the state-provided mechanisms for judicial review) filed this action in federal court in Arizona, claiming that the new rates harmed it and its customers, including by diminishing demand for its products. App. 3a.[2]

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[2] SolarCity's response to this petition may rehash its preferred narrative about the supposed illegality of the District's conduct and the harm that conduct has purportedly inflicted on competition generally and SolarCity in particular. That narrative is irrelevant to the question presented, and in any event difficult to reconcile with the facts. For example, hundreds of District customers have installed solar systems—through SolarCity's competitors—since SolarCity withdrew from the District's service area upon filing this action. *See* http://arizonagoessolar.org/Utility Programs/SaltRiverProject.aspx (visited Sept. 6, 2017). And SolarCity's claim to have been irreparably harmed by the new rate structure is belied by the fact that it waited over sixteen months

The operative complaint alleges that the District's ratemaking violated federal antitrust law, and in particular that the District engaged in monopoly maintenance and attempted monopolization, each in violation of §2 of the Sherman Act; an unreasonable restraint of trade, in violation of §1; and exclusive dealing, in violation of §3 of the Clayton Act. App. 41a. SolarCity also brought claims under Arizona's antitrust statute and common law. App. 41a-42a.[3]

The District moved to dismiss the complaint on numerous grounds, including that it is immune from SolarCity's antitrust claims under the state-action doctrine because the alleged anticompetitive conduct is ratemaking and Arizona's explicit delegation of ratemaking authority to the District means the state has clearly articulated a policy of allowing the District to engage in that conduct. App. 45a. The district court granted the motion in part and denied it in part; of particular relevance here, it rejected the District's assertion of state-action immunity. App. 67a.

The court initially held that application of the state-action immunity doctrine here required factual determinations that were inappropriate on a motion to dismiss. App. 67a. The District then moved for certification of an interlocutory appeal under 28 U.S.C. §1292(b). The district court denied that motion, but in

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after suing to seek a preliminary injunction (and even then did so only conditionally). *See, e.g., Beame* v. *Friends of the Earth*, 434 U.S. 1310, 1313 (1977) (Marshall, J., in chambers); *Wreal, LLC* v. *Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir. 2016) (citing cases).

[3] The district court had subject-matter jurisdiction over SolarCity's federal antitrust claims under 28 U.S.C. §§1331 and 1337(a), and over SolarCity's state-law claims under 28 U.S.C. §1367(a). *See* S. Ct. R. 14.1(g)(ii).

doing so it recognized, contrary to its initial opinion, that "'[t]he state-action immunity question is one of law.'" App. 25a (quoting *Columbia Steel Casting Co.* v. *Portland General Electric Co.*, 111 F.3d 1427, 1442 (9th Cir. 1996)). The court then reaffirmed its denial of immunity as a matter of law, opining that "Arizona has not expressly articulated a clear policy authorizing the conduct of the District." *Id.*

### D. Ninth Circuit Proceedings

The District filed a timely notice of appeal, asserting as a basis for appellate jurisdiction that "denials of immunities from suit are subject to immediate appellate review" under the collateral-order doctrine. C.A. Excerpts of Record 42.

After briefing and argument, the Ninth Circuit disagreed and dismissed the appeal for lack of jurisdiction. The court did not address the first two prerequisites for immediate appealability, namely that the order sought to be appealed be "conclusive" and "resolve important questions separate from the merits," *Swint* v. *Chambers County Commission*, 514 U.S. 35, 42 (1995). *See* App. 11a n.4. Instead, the court focused on the third prerequisite, that the order be "effectively unreviewable on appeal from the final judgment in the underlying action," *Swint*, 514 U.S. at 42. The court recognized that the collateral-order doctrine allows immediate appeals from the "denial[] of certain particularly important immunities from suit"—including "Eleventh Amendment immunity," "absolute immunity," "qualified immunity," "foreign sovereign immunity," and "tribal sovereign immunity." App. 7a-8a. But the court reasoned that state-action immunity, unlike the others, is a defense against liability rather than an immunity from suit. App. 8a-11a. And "[u]nlike immunity from

suit," the court opined, "immunity from liability can be protected by a post-judgment appeal." App. 8a.

The court of appeals recognized that its holding deepened an established conflict among the circuits. It first stated that its "conclusion that an order denying state-action immunity is not appealable under the collateral-order doctrine comports with decisions of the Fourth and Sixth Circuits." App. 14a (citing *South Carolina State Board* and *Huron Valley*). But it went on to "acknowledge that two circuits have reached the opposite conclusion." App 15a-16a (citing *Martin* and *Commuter Transportation*).

In an unpublished memorandum issued concurrently with its published opinion, the Ninth Circuit held that it lacked jurisdiction to consider the District's alternative arguments for dismissal of the complaint under Arizona Revised Statutes §12-820.01 and the filed-rate doctrine. App. 20a. This petition does not address those holdings.

The court of appeals subsequently denied the District's motion to stay the issuance of its mandate pending the filing and disposition of this petition.

## REASONS FOR GRANTING THE PETITION

This case implicates an established and recognized conflict between the Fourth, Sixth, and Ninth Circuits on one hand, and the Fifth and Eleventh Circuits (supported by dicta of the Third and Seventh Circuits) on the other. The question presented is important and the Ninth Circuit's resolution of it was incorrect. Certiorari is therefore warranted.

## I. THE QUESTION PRESENTED HAS DIVIDED THE COURTS OF APPEALS

### A. The 3-2 Circuit Conflict On This Issue Is Entrenched And Widely Acknowledged

As the decision below discussed at length, the question presented has engendered a division among the circuits—a division recognized by courts on both sides (which have engaged with each other's reasoning) as well as by commentators. This division is very unlikely to be resolved without this Court's intervention.

1. The Fifth and Eleventh Circuits have held that denials of state-action immunity to public entities are immediately appealable under the collateral-order doctrine.

The Eleventh Circuit so held in *Commuter Transportation*. It reasoned that state-action immunity, like qualified immunity, is an "immunity from suit rather than a mere defense to liability." 801 F.2d at 1289 (emphasis omitted). Like qualified immunity, the court expounded, state-action immunity is meant "to avoid needless waste of public time and money" by ensuring that government officials do not "avoid decisions involving antitrust laws which would expose [them] to costly litigation and conclusory allegations." *Id.* The court thus held that orders denying state-action immunity are "effectively unreviewable on appeal from a final judgment," and further held that such orders satisfy the other two predicates for collateral-order review: They are "conclusive[]" and they "resolve[] an important issue separate from the merits" of antitrust liability. *Id.* at 1289-1290.

The Eleventh Circuit has adhered to its holding in subsequent cases, including *Danner Construction Co.*

v. *Hillsborough County*, 608 F.3d 809, 812 n.1 (11th Cir. 2010); *TEC Cogeneration Inc.* v. *Florida Power & Light Co.*, 76 F.3d 1560, 1564 (11th Cir. 1996), *modified on reh'g*, 86 F.3d 1028 (11th Cir. 1996); *Praxair, Inc.* v. *Florida Power & Light Co.*, 64 F.3d 609, 611 (11th Cir. 1995); *Askew* v. *DCH Regional Health Care Authority*, 995 F.2d 1033, 1036-1037 (11th Cir. 1993); and *Bolt* v. *Halifax Hospital Medical Center*, 980 F.2d 1381, 1389 n.5 (11th Cir. 1993).

The Fifth Circuit followed the Eleventh in *Martin*, holding that "state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances'"—and that a denial of such immunity is therefore "effectively unreviewable on appeal from a final judgment." 86 F.3d at 1395-1396 (quoting *Mitchell* v. *Forsyth*, 472 U.S. 511, 525 (1985)). "One of the primary justifications of state action immunity," the court explained, "is the same as that of Eleventh Amendment 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 States' dignitary interests can be fully vindicated.'" *Id.* (quoting *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 146 (1993)). The court of appeals also relied on the need to avoid "the general costs of subjecting officials to the risks of trial," such as "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 1396. And, like the Eleventh Circuit, the court held that orders denying state-action immunity are both conclusive and separate from the merits of antitrust liability. *Id.* at 1396-1397.

The Fifth Circuit adhered to *Martin*'s holding in *Earles* v. *State Board of Certified Public Accountants of Louisiana*, 139 F.3d 1033, 1036 (5th Cir. 1998).

2. In conflict with the Fifth and Eleventh Circuits, the Fourth, Sixth, and now Ninth Circuits have held that denials of state-action immunity to public entities are not immediately appealable.

The Sixth Circuit reached that conclusion first, in *Huron Valley*. The court based its holding on the premise that "the [state-action] exemption is not an 'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim." 792 F.2d at 567. The court did not explain how it ranked immunity doctrines by "magnitude," or why a given form of immunity must qualify as an "'entitlement'" for its denial to be appealable. But on the premise that state-action immunity is a mere "defense," the court reasoned that "[r]eview of the denial on direct appeal" suffices to "afford[] the necessary protection if the defense is valid." *Id.* It further held that denials of state-action immunity are not "completely separate from the merits of the original claim." *Id.*

The Fourth Circuit followed the Sixth in *South Carolina State Board*. The court there opined that this Court, in first articulating state-action immunity in *Parker*, "did not identify or articulate a constitutional or common law 'right not to be tried,'" nor did it "protect against any harm other than a misinterpretation of federal antitrust laws." 455 F.3d at 444-445. The court thus interpreted *Parker* as "recogniz[ing] a 'defense' qualitatively different from the immunities" for which collateral-order appeal is available—i.e., immunities that "focus on the harms attendant to litigation it-

self"—and accordingly held that a denial of state-action immunity "is not 'effectively unreviewable' after trial." *Id.* at 443-444. A majority of the panel further held that orders denying state-action immunity are "not separable from the merits of the underlying action." *Id.* at 442. *Contra id.* at 447 (Traxler, J., concurring in part and concurring in the judgment).

As discussed, the Ninth Circuit in this case joined the Fourth and Sixth Circuits in holding that a denial of state-action immunity to a public entity is not immediately appealable because it is effectively reviewable on appeal from a final judgment. *See supra* pp.9-10. Like those courts, the Ninth Circuit explained that it regards state-action immunity as "a defense to liability," rather than an "immunity from suit" or "a safeguard of state sovereign immunity." App. 8a-9a.

3. As the Fourth Circuit recognized, the Third and Seventh Circuits have "suggested ... in dicta" that "the denial of *Parker* protection" is immediately appealable. *South Carolina State Board*, 455 F.3d at 441. The Seventh Circuit did so in *Segni* v. *Commercial Office of Spain*, 816 F.2d 344 (7th Cir. 1987), which concluded that the denial of an asserted First Amendment immunity is not appealable under the collateral-order doctrine. In reaching that conclusion, the court distinguished *Commuter Transportation* on the basis that the Eleventh Circuit "was careful to point out that the [state-action] doctrine had been interpreted to create an immunity from suit and not just from judgment—to spare state officials the burdens and uncertainties of the litigation itself as well as the cost of an adverse judgment." *Id.* at 346. In *We, Inc.* v. *City of Philadelphia*, 174 F.3d 322 (3d Cir. 1999), the Third Circuit recounted *Segni*'s rationale for distinguishing state-action

immunity and "agree[d] with [its] conclusion," *id.* at 329.

4. Both courts and commentators have recognized the circuit conflict, and they agree on its contours. *See* App. 14a-17a; *Auraria Student Housing at the Regency, LLC* v. *Campus Village Apartments, LLC*, 703 F.3d 1147, 1150 (10th Cir. 2013); *South Carolina State Board*, 455 F.3d at 441; Kornmehl, *State Action on Appeal:* Parker *Immunity and the Collateral Order Doctrine in Antitrust Litigation*, 39 Seattle U. L. Rev. 1, 4-5 (2015). Courts on both sides of the conflict, moreover, have acknowledged each other's decisions and engaged with each other's reasoning. *See Martin*, 86 F.3d at 1396; *South Carolina State Board*, 455 F.3d at 441, 443, 446; App. 15a-17a. This is therefore not a conflict that could plausibly be sharpened or eliminated through further percolation. The courts of appeals are divided along clear lines, and there is every reason to believe they will remain divided unless this Court intervenes.

### B. The Contrary Arguments That SolarCity And The Government Made Below Lack Merit

1. In opposing the District's motion for the Ninth Circuit to stay the issuance of its mandate, SolarCity argued (at 10) that certiorari is unnecessary because the courts of appeals are already "aligning" around the view that there is no immediate appeal in these circumstances. That is incorrect.

To begin with, SolarCity cited nothing to suggest "alignment" by the Eleventh Circuit—and there is nothing. That alone rebuts SolarCity's contention, because a conflict with even one circuit on one side would be a sufficient basis for certiorari. *See, e.g.*, *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 917 (2017).

As to the Fifth Circuit, SolarCity argued (Stay Opp. 10-11) that *Martin* had implicitly been abrogated by *Surgical Care Center of Hammond, L.C.* v. *Hospital Service District No. 1 of Tangipahoa Parish*, 171 F.3d 231 (5th Cir. 1999) (en banc). That is wrong. Although the court in *Surgical Care* observed that the "parentage" of the state-action immunity doctrine "differs from the qualified and absolute immunities of public officials," *id.* at 234, *Surgical Care* had nothing to do with collateral-order jurisdiction, and the court never even cited *Martin*. The court has since made clear, moreover—in an opinion also citing *Surgical Care*—that *Martin* remains controlling. *See Acoustic Systems, Inc.* v. *Wenger Corp.*, 207 F.3d 287, 290-291 (5th Cir. 2000); *see also id.* at 292 n.3 (discussing *Surgical Care*). Not surprisingly, then, the Ninth Circuit here rejected SolarCity's contention, explicitly recognizing (as noted) that its decision departed from Fifth Circuit law. App. 15a-16a.[4]

More generally, SolarCity argued below (Stay Opp. 11-12) that "alignment" of the circuits was inevitable because this Court, over the past two decades, has consistently narrowed the collateral-order doctrine. In reality, the Court's recent collateral-order decisions have gone both ways. Some decisions have held that particu-

[4] *Acoustic Systems* held that *private* parties cannot immediately appeal a denial state-action immunity. 207 F.3d at 292. The Tenth Circuit—after noting but expressly not "weigh[ing] in on the circuit split" regarding the question presented here—reached the same conclusion in *Auraria*. 703 F.3d at 1151. Those holdings are irrelevant here because the District is a public entity. *See supra* pp.6-7; *infra* pp.18-19; App. 3a. Lower courts' willingness to allow immediate appeal by public but not private defendants who are denied state-action immunity mirrors what the circuits have done "in the context of qualified immunity." *Auraria*, 703 F.3d at 1151.

lar orders were not immediately appealable, while others—such as *Osborn* v. *Haley*, 549 U.S. 225, 237-239 (2007), and *Sell* v. *United States*, 539 U.S. 166, 175-177 (2003)—have allowed immediate appeals from other orders. That may explain why SolarCity cited nothing from the Fifth Circuit or the Eleventh Circuit suggesting "alignment" over the *seven years* since *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100 (2009), the last collateral-order decision by this Court that SolarCity cited.

Likewise meritless is the related argument made in merits briefing below (by both SolarCity and the government) that the Fifth and Eleventh Circuit decisions on this issue predate decisions from this Court making clear that the collateral-order doctrine is narrow. This Court actually made that point in its seminal collateral-order case, *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949), and reiterated the point several times before the Fifth and Eleventh Circuit held denials of state-action immunity immediately appealable, *see, e.g.*, *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 430 (1985); *Flanagan* v. *United States*, 465 U.S. 259, 265, 270 (1984). Contrary to SolarCity's and the government's suggestion below, moreover, the mere fact that the collateral-order doctrine is narrow says nothing about whether particular orders fall within it. Indeed, the same generic point could be made in a case involving denials of sovereign immunity or qualified immunity, which are indisputably subject to immediate appeal.[5]

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[5] The government's arguments below about the need to keep the collateral-order doctrine narrow (C.A. Br. 9-12) rang particularly hollow given its repeated willingness to urge this Court to *broaden* the doctrine when doing so served its interests. *See* U.S.

Put simply, there is no realistic prospect that the circuit conflict on the question presented will resolve itself.

2. SolarCity also asserted below (Stay Opp. 14) that the circuit conflict is not implicated here because the District is a private entity, and no court of appeals has held that denials of state-action immunity to private entities are immediately appealable. That argument also lacks merit.

This Court has described the District as both a "public entity" and "a governmental entity." *Ball* v. *James*, 451 U.S. 355, 357 (1981). Those observations were correct: Under Arizona law, the District is "a public, political, taxing subdivision of the state." Ariz. Rev. Stat. §48-2302. And the state constitution imbues the District with all "immunities and exemptions granted municipalities and political subdivisions under" state or federal law. Ariz. Const. art. XIII, §7. None of the issues SolarCity has persistently raised about the District's history, structure, or operations changes these dispositive points about the District's status.

In *Ball*, moreover, this Court held that although the District is not subject to the Equal Protection Clause's one-person, one-vote requirement (as the plaintiff there alleged), it *is* subject to a less-stringent equal-protection standard. Were the District a private

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Br. 13-15, *Osborn*, No. 05-593 (U.S. Sept. 1, 2006), at https://www.justice.gov/sites/default/files/osg/briefs/2006/01/01/2005-0593.mer.aa.pdf; U.S. Br. 28-32, *Mohawk*, No. 08-678 (U.S. July 13, 2009), at https://www.justice.gov/sites/default/files/osg/briefs/2009/01/01/2008-0678.mer.ami.pdf.

entity, the Court would have held simply that the District is not subject to the Equal Protection Clause.[6]

All this likely explains why the Ninth Circuit did not agree with SolarCity's argument that the District is a private entity. In fact, although SolarCity presented that argument at length in its brief, the court of appeals never mentioned it. And as discussed, the court described its decision as taking sides in the entrenched circuit conflict concerning denials of state-action immunity to public entities.

## II. THE QUESTION PRESENTED WARRANTS REVIEW IN THIS CASE

### A. The Issue Is Important

The circuit conflict described above warrants resolution by this Court. Nationwide uniformity as to the scope of the collateral-order doctrine is important, as is uniformity in the application of the antitrust laws. That is particularly true where the division among the courts of appeals leaves states with disparate degrees of protection for their sovereignty interests, violating the "'fundamental principle of *equal* sovereignty' among the States," *Shelby County* v. *Holder*, 133 S. Ct. 2612, 2623 (2013).

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[6] To be sure, private conduct can be challenged on equal-protection grounds if "there is such a close nexus between the State and the challenged action that seemingly private behavior may be fairly treated as that of the State." *Brentwood Academy* v. *Tennessee Secondary School Athletic Ass'n*, 531 U.S. 288, 295 (2001) (quotation marks omitted). But nothing in *Ball* remotely suggests that this Court deemed equal-protection requirements applicable to the District because of such a nexus. The Court instead assumed the state-action requirement was met—because it (rightly) did not view the District as private.

This Court—perhaps recognizing that it is wasteful and disruptive for courts and litigants to struggle with whether an order may be appealed before reaching the merits of an appeal—has frequently agreed to decide whether particular orders are immediately appealable. More specifically, the Court has addressed the immediate appealability of orders:

- rejecting attorney-client privilege, in *Mohawk*;
- rejecting certification and substitution under the Westfall Act, in *Osborn*;
- rejecting a judgment-bar defense under the Federal Tort Claims Act, in *Will* v. *Hallock*, 546 U.S. 345 (2006);
- authorizing forced medication of a mentally ill criminal defendant so that trial can proceed, in *Sell*;
- imposing sanctions under Federal Rule of Civil Procedure 37(a)(4), in *Cunningham* v. *Hamilton County*, 527 U.S. 198 (1999);
- denying effect to settlement agreements, in *Digital Equipment*;
- denying Eleventh Amendment immunity, in *Puerto Rico Aqueduct*;
- denying motions to dismiss on the basis of a forum-selection clause, in *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495 (1989);
- denying motions to dismiss under Federal Rule of Criminal Procedure 6(e), in *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794 (1989);
- denying motions to dismiss on the ground of forum non conveniens or of an extradited person's

immunity from service of process, in *Van Cauwenberghe* v. *Biard*, 486 U.S. 517 (1988);

- rejecting qualified immunity, in *Mitchell*;
- disqualifying counsel in a civil case, in *Richardson-Merrell*, or declining to do so, in *Firestone Tire & Rubber Co.* v. *Risjord*, 449 U.S. 368 (1981);
- disqualifying counsel in a criminal case, in *Flanagan*;
- denying class certification, in *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463 (1978);
- denying a motion to dismiss on speech-or-debate grounds, *Helstoski* v. *Meanor*, 442 U.S. 500 (1979);
- denying motions to dismiss on double-jeopardy grounds, in *Abney* v. *United States*, 431 U.S. 651 (1977);
- denying a motion to reduce bail, in *Stack* v. *Boyle*, 342 U.S. 1 (1951); and
- refusing to require posting of a security bond, in *Cohen*.

The Court has also regularly taken up other issues regarding the finality requirement for appellate jurisdiction. In just the past few Terms, the Court has decided such questions in *Microsoft Corp.* v. *Baker*, 137 S. Ct. 1702 (2017), *Bullard* v. *Blue Hills Bank*, 135 S. Ct. 1686 (2015), and *Gelboim*, 135 S. Ct. 897.

The issue here is as worthy of review as those the Court has considered in the past. "The fact that seven of the thirteen federal courts of appeals have addressed the [question presented] ... demonstrates the signifi-

cance and complexity of this procedural issue in antitrust litigation." Kornmehl, *supra*, at 5. And state-action immunity is regularly litigated in antitrust lawsuits; in fact, this Court itself has considered the scope of the immunity twice in just the past five years, first in *Phoebe Putney* and then in *North Carolina State Board.*

Although the United States argued below against immediate appealability—predictably so, given its role as a frequent antitrust plaintiff—it acknowledged that "whether denial of a motion to dismiss an antitrust claim under the state action doctrine is immediately appealable as a collateral order" is "a significant issue." Mot. to Participate in Oral Arg. (Dkt. 72) at 2 (July 1, 2016). Indeed, the government's decision to file an unsolicited amicus brief in the court of appeals itself reflects the importance of the issue. *See* U.S. Attorneys' Manual §2-2.123 (requiring authorization from the Solicitor General before any amicus brief can be filed). Nor is this the first case in which the government has participated as amicus curiae on the question presented. *See* U.S. Br. 5-22, *Auraria*, No. 11-1569, 2012 WL 1387342 (10th Cir. Jan. 4, 2013).

Litigants need a clear answer to that question, and the courts of appeals have been unable to provide one. Procedural uniformity across the circuits is desirable in any context, and especially in the context of antitrust law, which often generates litigation with high financial stakes for the litigants and the national economy. *See, e.g., Tidewater Oil Co.* v. *United States*, 409 U.S. 151, 156 (1972) (recognizing "the importance of uniform interpretation of the antitrust law"). Those interests are magnified here by the sovereignty interests at stake. This Court can and should supply the needed clarity.

**B. This Case Is A Good Vehicle**

This case provides a good vehicle to answer the question presented. The Ninth Circuit addressed the question in a lengthy published opinion that acknowledged and responded to the decisions of other circuits. The court found it necessary to address only one of the three prerequisites for immediate appealability, but all three were fully briefed below and hence could be addressed by this Court if necessary. *See, e.g., Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467, 530 (2002) ("Any issue 'pressed or passed upon below' by a federal court is subject to this Court's broad discretion over the questions it chooses to take on certiorari[.]" (citation omitted)). Those issues have also been addressed by other courts of appeals, so this Court would have the benefit of reasoned judicial review. *See South Carolina State Board*, 455 F.3d at 442; *Martin*, 86 F.3d at 1396-1397; *Commuter Transportation*, 801 F.2d at 1290; *Huron Valley*, 792 F.2d at 567.

Resolution of the question presented, moreover, will conclusively determine whether the District is required to endure the burdens of litigation from which it claims immunity before having a definitive adjudication of its claim to immunity. That is obviously true as to the federal claims against the District, as the Ninth Circuit offered no alternative ground for its holding that the District could not appeal. And it is equally true as to the state-law antitrust claims, because Arizona antitrust law incorporates the doctrine of state-action immunity. *See Mothershed* v. *Justices of the Supreme Court*, 410 F.3d 602, 609 (9th Cir. 2005).

In opposing the District's motion to stay the Ninth Circuit's mandate, SolarCity argued (at 7-9) that a reversal here might *not* affect its state-law antitrust

claim, because on remand the Ninth Circuit might abandon *Mothershed* and conclude that Arizona law does not incorporate state-action immunity. Those speculative arguments lacked merit (as the District's reply explained), but at any rate they are irrelevant to whether certiorari should be granted. Even if SolarCity were correct, that would in no way prevent this Court from answering the question presented, nor would it mean that a reversal of the decision below would have no effect on the litigation.

Lastly, although proceedings in the district court have resumed in the wake of the Ninth Circuit's refusal to stay the issuance of its mandate, the question presented will not become moot in this case by virtue of the entry of final judgment. As an initial matter, the appealability of an interlocutory order falls within a well-recognized exception to mootness: It is a controversy capable of repetition, yet evading review. *See Kingdomware Technologies, Inc.* v. *United States*, 136 S. Ct. 1969, 1975-1976 (2016) (applying exception); *Texaco, Inc.* v. *Department of Energy*, 663 F.2d 158, 164 (D.C. Cir. 1980) (applying exception to an issue of appealability). The District (and other public utilities) will unquestionably engage in ratemaking again in the future, and anyone feeling aggrieved by such ratemaking would—emboldened by the district court's denial of state-action immunity here—be capable of following SolarCity's lead by seeking to make a federal case out of it. In any event, with trial set for April 17, 2018, it is unlikely (unless the district court grants summary judgment) that a final judgment will be entered before this Court disposes of the petition. And if the Court grants certiorari, the District will ask the district court—and, if necessary, the Ninth Circuit or this Court—to stay proceedings so as to eliminate any con-

ceivable doubt about this Court's jurisdiction to decide the question presented. Alternatively, this Court could enter a stay of district-court proceedings concurrently with any grant of certiorari.

## III. THE DECISION BELOW IS WRONG

Finally, certiorari is warranted here because the Ninth Circuit's decision is incorrect.

### A. Orders Denying State-Action Immunity Are Effectively Unreviewable On Appeal From A Final Judgment

1. Contrary to the court of appeals' holding, a denial of state-action immunity is not effectively reviewable on appeal from a final judgment—for reasons similar to those that led this Court to hold that denials of both state sovereign immunity and qualified immunity are immediately appealable.

A denial of state-action immunity, like a denial of state sovereign immunity, offends state sovereignty, dignity, and autonomy. Indeed, when this Court recognized state-action immunity in *Parker*, it did so on the ground that "[i]n a dual system of government in which ... the states are sovereign, ... an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Congress." 317 U.S. at 351. The Court has repeatedly reiterated that sovereignty is a basis of state-action immunity. Most recently, the Court in *North Carolina State Board* explained that *Parker* "recognized Congress' purpose to respect the federal balance and to 'embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution.'" 135 S. Ct. at 1110 (quoting *Community Communications*, 455 U.S. at 53); *see also City of Lafayette*,

435 U.S. at 400 (citing *Parker*, 317 U.S. at 351). The Court also observed that "[i]f every ... state law or policy were required to conform to ... the Sherman Act, thus promoting competition at the expense of other values a State may deem fundamental, federal antitrust law would impose an impermissible burden on the States' power to regulate." *North Carolina State Board*, 135 S. Ct. at 1109. In other words, the Court has recognized that a state should not have its prerogative to enlist political subdivisions in regulating its economy within its borders infringed by the possibility that such subdivisions could be sued for violating antitrust law.

State sovereign immunity is undoubtedly an immunity from suit, and hence the Court has recognized that a denial of that immunity is immediately appealable. *See Puerto Rico Aqueduct*, 506 U.S. at 143-144. Otherwise, the Court explained, "the States' dignitary interests" could not be "fully vindicated." *Id.* at 146. It would make little sense to treat state-action immunity, predicated on state sovereign immunity, with any less respect for federalism. *See, e.g.*, *Martin*, 86 F.3d at 1395-1396; Areeda & Hovenkamp, *Fundamentals of Antitrust Law* §2.04[B], at 2-51 (4th ed. & 2015 Supp.) (state-action doctrine is "designed to be an immunity, not merely a defense that can be offered at trial").

The court of appeals misunderstood this point, dismissing it as an argument that denials of state-action immunity are appealable simply "because that immunity has constitutional origins." App. 11a-12a. But that is not the District's argument; indeed, the District expressly disavowed the argument before the Ninth Circuit, stating that "the District has never argued ... that any constitutional ruling is immediately appealable." Pet'r C.A. Reply Br. 27. It is certainly true, as the

Ninth Circuit observed, that not *all* defenses derived from the Constitution permit an immediate appeal. *Id.* But that is because not all such defenses are immunities from suit rather than defenses against liability. The reason it matters that state-action immunity derives from state sovereignty is not that state sovereign immunity is constitutional in origin; it is that state sovereign immunity is an immunity from suit. By extension, so is state-action immunity.

State-action immunity is likewise similar to qualified immunity: Both seek to ensure that state and local officials exercise their discretion in the manner that best promotes the public interest, rather than the manner that minimizes their likelihood of being sued. As this Court has explained in the qualified-immunity context, "the public interest may be better served by action taken 'with independence and without fear of consequences.'" *Harlow* v. *Fitzgerald*, 457 U.S. 800, 819 (1982). That is equally true of state-action immunity, which serves "to avoid needless waste of public time and money" by ensuring that officials do not "avoid decisions involving antitrust laws which would expose [them] to costly litigation and conclusory allegations." *Commuter Transportation*, 801 F.2d at 1289. As the leading antitrust treatise elaborates, "[t]he importance of *Parker*'s status as an immunity is particularly strong when the defendant is a government agency [or] subdivision," because it would be harmful for "[s]uch entities" to "be intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they might ultimately win." Areeda & Hovenkamp §2.04[B], at 2-52.

The Ninth Circuit misunderstood this argument as well, characterizing it as seeking to avoid "mere distraction or inconvenience to the ... District." App. 12a-13a.

If "inconvenience" were the only value at stake, there would indeed be no basis for an immediate appeal. This Court made that clear in *Will*, on which the Ninth Circuit relied heavily. But the argument is actually about preserving state and local officials' ability to set economic policy without having to worry about being subjected to the prolonged burdens of baseless litigation—a particularly significant issue in antitrust litigation, where "proceeding to ... discovery can be expensive," *Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007); *accord Manual for Complex Litigation, Fourth* §30 p.519 (2004) (describing extensive scope of discovery in antitrust cases).

Had the court of appeals applied *Will* correctly, it would have followed the Court's admonition there to examine "the value of the interests that would be lost through rigorous application of a final judgment requirement." 546 U.S. at 351-352; *see also Lauro Lines*, 490 U.S. at 502 (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine."). And had the court of appeals done that, it would have seen the clear difference between the "value[s]" at stake in that case and this one. In *Will*, where customs officials sought to dismiss a suit under the judgment bar of the Federal Tort Claims Act, the Court explained that there really *was* nothing more than inconvenience at stake. 546 U.S. at 353-355. Not so here, where the cost of denying an immediate appeal would be to impair economic policymaking by state and local governments.[7]

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[7] The similarities between state-action immunity on the one hand, and sovereign and qualified immunity on the other, also show the flaw in the Ninth Circuit's attempt to analogize state-action immunity to both *Noerr-Pennington* immunity and a de-

The Ninth Circuit (echoing *South Carolina State Board*) also based its denial of immediate appealability on the fact that state-action immunity can be invoked in some circumstances where sovereign immunity and qualified immunity cannot. *See* App. 14a-15a. But like the Fourth Circuit, the Ninth Circuit did not explain why such differences in the substantive scope of immunities should bear on the availability of collateral-order review. The two concepts are distinct, and the Ninth Circuit (again like the Fourth Circuit) cited no decision of this Court that based the availability or unavailability of collateral-order review on the substantive reach of the underlying defense.

Disputing this, SolarCity argued below (Stay Opp. 15-16) that *Will* did rest on differences among the underlying immunities. But the comparisons that *Will* made concerned the immunities' importance, which is part of the effective-unreviewability standard. *See* 546 U.S. at 352-353. By contrast, the "incongruities" among immunities that the Ninth Circuit invoked, App. 14a-15a, had no connection to the collateral-review standard.

Put simply, the decision below threatens the dignity and autonomy of the states, as well as the division of regulatory power between the state and federal governments, by allowing a political subdivision of a state to be subjected to prolonged litigation for engaging in conduct that was clearly authorized by the state. State-action immunity is of course not a free pass to evade antitrust liability; if a particular policy is not actually authorized by the relevant state, then a claim

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fense of statutory preemption. App. 10a. Neither of those doctrines implicates the same concerns and values as sovereign immunity or qualified immunity (let alone both).

may proceed. But states and their subdivisions are entitled to have that determination reviewed by a court of appeals promptly, rather than being forced to endure months or years of burdensome and intrusive litigation as a result of an erroneous district court ruling.

2. Below, SolarCity and the government ventured a number of responses to the foregoing points about why denials of state-action immunity are immediately appealable. None of those responses has merit.

For example, in response to the District's point that state-action immunity has its roots in sovereign immunity, the government attempted (Br. 23-24) to distinguish sovereign immunity from state sovereignty, arguing that even if state-action immunity has roots in the latter, that does not mean it has any connection to the former. But the entire basis for sovereign immunity is (as the name suggests) states' status as sovereigns. In fact, this Court has explained that "immunity from private suits [is] central to sovereign dignity." *Alden* v. *Maine*, 527 U.S. 706, 715 (1999); *see also id.* at 756 ("fear of private suits against nonconsenting States was the central reason" for "preserv[ing] the States' sovereign immunity"). Moreover, there is no question that *Parker* held states *immune* for any violations of the Sherman Act. It is untenable to assert that this holding involved state sovereignty but not sovereign immunity.

SolarCity also argued below (Stay Opp. 15) that states do not need state-action immunity to protect themselves because they can invoke sovereign immunity—a point the court of appeals also embraced, App. 13a n.5. But political subdivisions cannot invoke sovereign immunity—and as discussed, denying them prompt resolution of a state-action immunity defense

impairs states' autonomy by infringing states' ability to choose to regulate their economies indirectly, by enlisting political subdivisions, rather than directly.

Finally, the government contended below (Br. 16-17) that immediate appeals are unnecessary here because erroneous denials of state-action immunity can be remedied after final judgment, or via §1292(b) certification or mandamus. (The Ninth Circuit embraced this point as well. App. 13a n.5.) But the same could be said of denials of sovereign immunity or qualified immunity, or rulings on other issues that indisputably satisfy the collateral-order doctrine. These points do nothing to support the claim that denials of state-action immunity are not immediately appealable.

### B. Denials Of State-Action Immunity On Legal Grounds Conclusively Resolve An Important Issue Separate From The Merits

In addition to being effectively unreviewable on appeal from a final judgment, an interlocutory order must satisfy two requirements to be immediately appealable: It must be "conclusive" and "resolve important questions separate from the merits," *Swint*, 514 U.S. at 42. Denials of state-action immunity to public entities that, as here, turn on a question of law satisfy those requirements as well.

1. An interlocutory order is conclusive when it is a "fully consummated decision[]"—i.e., one that is not "tentative, informal, or incomplete." *Cohen*, 337 U.S. at 546. A denial of state-action immunity satisfies this requirement, because such "denials ... clearly purport to be conclusive determinations that [a state entity] ha[s] no right not to be sued under federal antitrust laws." *Martin*, 86 F.3d at 1396-1397. The conclusiveness of a

denial of state-action immunity is confirmed by the fact that entitlement to the immunity—certainly when it turns, as here, on the clear-articulation prong—is a question of law. The government did not dispute conclusiveness below, and even the Fourth Circuit, though concluding that other requirements of the collateral-order doctrine are not satisfied in these circumstances, said there "is no dispute" that the denial of state-action immunity satisfies the conclusiveness requirement. *South Carolina State Board*, 455 F.3d at 441. SolarCity has never cited any case holding to the contrary.

What SolarCity argued instead (Stay Opp. 13) was that conclusiveness is a subjective standard, turning on the "expectation" of the particular judge who issued the ruling in question. But the case from which SolarCity drew the term "expectation" shows that the standard is objective; the Court there described the relevant question as whether "a district court *ordinarily* would expect to reassess and revise [the] ... order" at issue. *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988) (emphasis added). That standard makes sense, because whether a political subdivision has to wait for an appellate ruling on its asserted immunity should not turn on the fortuity of a particular district judge's views on whether he or she might revisit a prior order.

2. State-action immunity is also important—as discussed, it implicates questions of state autonomy and sovereignty—as well as separate from the merits of the underlying antitrust claims. And as to separateness, the Fifth Circuit explained that:

> An appellate court reviewing the denial of the state or state entity's claim of immunity need not consider the correctness of the plaintiff's

> version of the facts, nor even determine whether the plaintiff's allegations actually state a claim.... [A]ll it need determine is a question of law: whether the state entity acted pursuant to a clearly articulated and affirmatively expressed state policy.

*Martin*, 86 F.3d at 1397; *see also Shames* v. *California Travel & Tourism Commission*, 626 F.3d 1079, 1082 (9th Cir. 2010) (stating that in order to resolve whether an "agency's alleged conduct qualifies for 'state action immunity,'" a court "need not consider the legality of the alleged [anticompetitive] conduct"); *South Carolina State Board*, 455 F.3d at 447-448 (Traxler, J., concurring in part and concurring in the judgment) ("In my view, ... whether the actor represents the state is separate and severable from ... whether the action taken is unlawful."). In fact, the Fifth Circuit concluded that the denial of state action immunity "easily" met the separateness requirement. *Martin*, 86 F.3d at 1397.

This Court's precedent confirms the Fifth Circuit's explanation of why state-action immunity is separate from the merits of an antitrust claim. In *Phoebe Putney*, for example, this Court addressed whether Georgia had a clearly articulated policy allowing hospitals to make acquisitions that substantially lessened competition. *See* 568 U.S. at 219-220. And the Court's analysis did not look to the hospital's alleged anticompetitive conduct (beyond reciting what that alleged conduct was, which this Court has made clear is not enough to defeat separateness, *see Mitchell*, 472 U.S. at 528-529). Instead, the Court parsed various provisions of state law. *See Phoebe Putney*, 568 U.S. at 227-228; *accord, e.g.*, *Southern Motor Carriers Rate Conference* v. *United States*, 471 U.S. 48, 63 (1985) (finding clear articulation based solely on a review of state statutes). Here,

the District's claim to immunity likewise turns not on whether its conduct violated the antitrust laws but on whether the alleged anticompetitive conduct flowed from Arizona's clearly articulated policy to displace competition with regulation—a question that involves an analysis of Arizona's statutory and regulatory landscape divorced from the merits of SolarCity's claims.

To be sure, where a claim of state-action immunity turns on factual questions, the requisite separateness may not be present. If, for example, immunity depends on whether state officials are providing "active supervision" to an entity that—unlike the District—requires supervision in order to be immune, then separateness might be lacking. But that does not preclude collateral-order review in a case that, like this one, turns on a purely legal question (clear articulation).

SolarCity and the government contended otherwise below, asserting that the relevant class of orders (which is what courts consider when addressing immediate appealability, *see supra* p.5) is "*all* orders denying motions to dismiss on state-action grounds." SolarCity Br. 23 n.7 (emphasis added); *accord* U.S. Br. 19. But *Mitchell* makes clear that that framing is incorrect. The Court there held that the relevant class of orders was denials of qualified immunity that "turn[] on an issue of law." 472 U.S. at 530. If SolarCity's and the government's framing were correct, the Court in *Mitchell* would have defined the relevant class of qualified-immunity denials as "all orders denying motions to dismiss on [qualified-immunity] grounds." Consistent with *Mitchell*, the relevant class of orders in this context is denials of state-action immunity to public entities that turn on a question of law. Such orders resolve important legal questions separate from the underlying merits.

In short, orders denying state-action immunity to public entities on legal grounds satisfy all three requirements for collateral-order appeal.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2017

# APPENDICES

# APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLARCITY CORPORATION,
*Plaintiff-Appellee,*

*v.*

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
*Defendant-Appellant.*

No. 15-17302
D.C. No. 2:15-cv-00374-DLR

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted November 18, 2016
San Francisco, California

Filed June 12, 2017

Before: Alex Kozinski, Ronald Lee Gilman,* and Michelle T. Friedland, Circuit Judges.

Opinion by Judge Friedland

## OPINION

FRIEDLAND, Circuit Judge:

* The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

Solar-panel supplier SolarCity Corporation filed a federal antitrust lawsuit against the Salt River Project Agricultural Improvement and Power District (the Power District), alleging that the Power District had attempted to entrench its monopoly by setting prices that disfavored solar-power providers. The Power District moved to dismiss the complaint based on the state-action immunity doctrine. That doctrine insulates states, and in some instances their subdivisions, from federal antitrust liability when they regulate prices in a local industry or otherwise limit competition, as long as they are acting as states in doing so. *See, e.g., N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1109 (2015); *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1007 (2013); *Parker v. Brown*, 317 U.S. 341, 352 (1943).

The district court denied the motion, and the Power District appealed. We must decide whether we can consider the appeal immediately under the collateral-order doctrine, or whether any appeal based on state-action immunity must await final judgment.[1] We join the Fourth and Sixth Circuits in holding that the collateral-order doctrine does not allow an immediate appeal of an order denying a dismissal motion based on state-action immunity.

## I

SolarCity sells and leases rooftop solar-energy panels. These solar panels allow its customers to reduce but not eliminate the amount of electricity they buy from other sources.

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[1] We address two other issues in an unpublished memorandum filed with this opinion.

Many SolarCity customers and prospective customers live near Phoenix, Arizona, where the Power District is the only supplier of traditional electrical power. Allegedly to prevent SolarCity from installing more panels, the Power District changed its rates. Under the new pricing structure, any customer who obtains power from his own system must pay a prohibitively large penalty. As a result, SolarCity claims, solar panel retailers received ninety-six percent fewer applications for new solar-panel systems in the Power District's territory after the new rates took effect.

SolarCity filed a complaint in federal district court in Arizona. Among other claims, it alleged that the Power District had violated the Sherman and Clayton Acts because it had attempted to maintain a monopoly over the supply of electrical power in its territory.

The Power District is not only a supplier of power; it is also a political subdivision of Arizona. *See* Ariz. Rev. Stat. § 48-2302; *accord, e.g.*, *City of Mesa v. Salt River Project Agric. Improv. & Power Dist.*, 416 P.2d 187, 188–89 (Ariz. 1966) (summarizing the Power District's history and status); *Salt River Project Agric. Improv. & Power Dist. v. City of Phoenix*, 631 P.2d 553, 555 (Ariz. Ct. App. 1981) (same). It moved to dismiss under Federal Rule of Civil Procedure 12(b)(6), arguing, among other things, that it has authority to set prices under Arizona law and so is immune from federal antitrust lawsuits. The district court denied the motion, citing uncertainties about the specifics of the Power District's state-law authority and business. The district court also decided not to certify an interlocutory appeal, but the Power District appealed nonetheless.

## II

Federal circuit courts have jurisdiction over appeals from "final decisions" of district courts. *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009) (quoting 28 U.S.C. § 1291). "A 'final decision' is typically one 'by which a district court disassociates itself from a case.'" *Id.* at 106 (alteration omitted) (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995)). If non-final decisions were generally appealable, cases could be interrupted and trials postponed indefinitely as enterprising appellants bounced matters between the district and appellate courts. *Bank of Columbia v. Sweeny*, 26 U.S. (1. Pet.) 567, 569 (1828); *Alaska v. United States*, 64 F.3d 1352, 1357–58 & n.9 (9th Cir. 1995). Costs would be inflated by such a multiplication of proceedings, *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981), and district courts would be inhibited in their ability to manage litigation efficiently, *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 436 (1985). Moreover, "piecemeal appeals would undermine the independence of the district judge." *Firestone*, 449 U.S. at 374.

In limited circumstances, however, appeals may be allowed before a final judgment. For example, a district court may certify an order for an immediate appeal. *See* 28 U.S.C. § 1292(b). Alternately, some statutes and rules allow an early appeal of decisions on certain specific issues.[2] Relief from a court order may also

[2] *See, e.g.*, 28 U.S.C. § 1292(a) (giving circuit courts jurisdiction to hear appeals from interlocutory orders "granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions"; "appointing receivers, or refusing orders to wind up receiverships or to take steps to accomplish the purposes thereof, such as directing sales or other disposals of property"; and "determining the rights and liabilities of the parties

be obtained in extraordinary circumstances through a writ of mandamus. *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380–81 (2004). Or, as the Power District argues is true here, a piece of the case may become effectively "final" under the collateral-order doctrine, even though the case as a whole has not ended. *See Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1949).

The collateral-order doctrine has three requirements. First, an interlocutory order can be appealed only if it is "conclusive." *See Mohawk Indus.*, 558 U.S. at 106 (quoting *Swint*, 514 U.S. at 42). Second, the order must address a question that is "separate from the merits" of the underlying case. *Id.* Third, the separate question must raise "some particular value of a high order" and evade effective review if not considered immediately. *Will v. Hallock*, 546 U.S. 345, 351–53 (2006); *see also Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 878–79 (1994). All three requirements must be satisfied for the ruling to be immediately appealable. *McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1140 (9th Cir. 2007).

The Supreme Court has repeatedly emphasized that these requirements are stringent and that the collateral-order doctrine must remain a narrow exception. *See, e.g., Mohawk Indus.*, 558 U.S. at 106; *Will*, 546 U.S. at 349–50; *Dig. Equip.*, 511 U.S. at 868. In addition, the Court has held that in evaluating these three requirements, we must consider "the entire category to which a claim belongs." *Dig. Equip.*, 511 U.S. at 868. "As long as the class of claims, taken as a whole, can be ade-

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to admiralty cases in which appeals from final decrees are allowed"); *id.* § 2072(c) (giving the Supreme Court power to prescribe rules defining "when a ruling of a district court is final"); Fed. R. Civ. P. 23(f) (permitting courts of appeals to hear appeals from orders granting or denying class certification).

quately vindicated by other means, 'the chance that the litigation at hand might be speeded, or a particular injustice averted,' does not provide a basis for jurisdiction under § 1291." *Mohawk Indus.*, 558 U.S. at 107 (alterations omitted) (quoting *Dig. Equip.*, 511 U.S. at 868).

## III

The Power District argues that an interlocutory order denying state-action immunity is immediately appealable under the collateral-order doctrine. We begin our analysis by summarizing the state-action immunity doctrine, so as to provide context for our evaluation of the Power District's argument.

State-action immunity was first recognized in *Parker v. Brown*, 317 U.S. 341 (1943). In *Parker*, a California raisin producer alleged that a state commission that set supra-competitive raisin prices had violated federal antitrust law. *Id.* at 346–49. The Supreme Court assumed the state's price program would violate federal antitrust law if it were privately operated. *Id.* at 350. It also assumed that Congress could have prohibited California from setting such prices. *Id.* But because the commission "derived its authority ... from the legislative command of the state" and "nothing in the language of the Sherman Act or in its history ... suggest[ed] that its purpose was to restrain a state ... from activities directed by its legislature," the Court held that the commission's price-setting did not violate antitrust law. *Id.* at 350–51. As the Court explained, "In a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its

officers and agents is not lightly to be attributed to Congress." *Id.* at 351.

The Supreme Court's more recent state-action immunity cases likewise emphasize that the doctrine protects "the States' coordinate role in government," which "counsels against reading the federal antitrust laws to restrict the States' sovereign capacity to regulate their economies and provide services to their citizens." *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1016 (2013). The doctrine also protects local governmental entities if they act "pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *Id.* at 1007.

## IV

We have not previously addressed whether an interlocutory order denying state-action immunity is immediately appealable under the collateral-order doctrine, nor has the Supreme Court. We now take on this question, mindful of the Supreme Court's admonition that the collateral-order doctrine is a "narrow exception," *Firestone*, 449 U.S. at 374, that must be "strictly applied," *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985).

### A

The collateral-order doctrine allows interlocutory appeals in only a "limited category of cases." *Flanagan v. United States*, 465 U.S. 259, 265 (1984) (quoting *United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 265 (1982) (per curiam)). That category includes interlocutory denials of certain particularly important immunities from suit. The Supreme Court has allowed immediate appeals from denials of Eleventh Amendment immunity, *P.R. Aqueduct & Sewer Auth. v. Metcalf & Eddy, Inc.*,

506 U.S. 139, 144 (1993), absolute immunity, *Nixon v. Fitzgerald*, 457 U.S. 731, 742 (1982), and qualified immunity, *Mitchell v. Forsyth*, 472 U.S. 511, 526–27 (1985). We have also permitted such appeals from denials of foreign sovereign immunity, *Terenkian v. Republic of Iraq*, 694 F.3d 1122, 1130 (9th Cir. 2012), and tribal sovereign immunity, *Burlington N. & Santa Fe Ry. Co. v. Vaughn*, 509 F.3d 1085, 1089–91 (9th Cir. 2007).

The Power District argues that the state-action doctrine is akin to those immunities and thus that the rejection of such a defense should also be immediately appealable. But those immunities are immunities from suit, which differ from mere immunities from liability. *See Nunag-Tanedo v. E. Baton Rouge Par. Sch. Bd.*, 711 F.3d 1136, 1139–40 (9th Cir. 2013); *see also United States v. Hollywood Motor Car Co.*, 458 U.S. 263, 269 (1982) (explaining the "crucial distinction between a right not to be tried and a right whose remedy requires the dismissal of charges"). Unlike immunity from suit, immunity from liability can be protected by a post-judgment appeal. *Nunag-Tanedo*, 711 F.3d at 1139–40. Denials of immunity from liability therefore do not meet the requirements for immediate appeal under the collateral-order doctrine. *Id.* Accordingly, we must consider whether the state-action immunity doctrine provides immunity from suit or immunity from liability.

The Supreme Court has cautioned against broad assertions of immunity from suit and has instructed us to "view claims of a right not to be tried with skepticism, if not a jaundiced eye." *Dig. Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 873 (1994) (internal quotation marks omitted). Reading *Parker* with appropriate skepticism toward the Power District's claim of immunity from suit shows that the state-action doctrine is a defense to liability, not immunity from suit.

The Supreme Court assumed in *Parker* that Congress could have blocked the challenged California price regulation, but the Court found no evidence in the Sherman Act that Congress actually intended to block the regulation or other similar state laws. *Parker v. Brown*, 317 U.S. 341, 350–51 (1943). *Parker* thus recognizes a limit on liability under the Sherman Act rather than a safeguard of state sovereign immunity. Consistent with that reading of *Parker*, we and the Supreme Court have described state-action immunity as an immunity from liability. *Patrick v. Burget*, 486 U.S. 94, 95 (1988) ("The question presented in this case is whether the state-action doctrine ... protects physicians in the State of Oregon from federal antitrust liability."); *Snake River Valley Elec. Ass'n v. PacifiCorp*, 357 F.3d 1042, 1044 (9th Cir. 2004) ("[W]e again assess the scope of state action immunity from liability under federal antitrust law.").

A denial of a motion to dismiss based on state-action immunity is thus no different from other denials of dismissal under Federal Rule of Civil Procedure 12(b)(6). When a defendant is sued under a statute that he believes was never meant to apply to him, he may move to dismiss for failure to state a claim on which relief can be granted. His motion would then be granted if the court could not reasonably infer his liability under that statute. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Orders denying motions to dismiss on such grounds cannot ordinarily be appealed immediately. *See, e.g., Alaska v. United States*, 64 F.3d 1352, 1357 (9th Cir. 1995) (explaining why an interlocutory appeal is not justified to ascertain "whether the plaintiff's claim falls within the language of a statute or common law cause of action"). We are not persuaded that a mo-

tion based on state-action immunity should be treated differently.

In this sense, state-action immunity is analogous to so-called "*Noerr–Pennington* immunity." Grounded in the First Amendment, that doctrine insulates defendants from antitrust liability for petitioning the government. *See, e.g., Octane Fitness, LLC v. ICON Health & Fitness, Inc.*, 134 S. Ct. 1749, 1757 (2014); *see also Nunag-Tanedo*, 711 F.3d at 1138–40. We have held that *Noerr–Pennington* immunity is not an immunity from suit but rather an immunity from liability. *Nunag-Tanedo*, 711 F.3d at 1140. It is a "principle of statutory interpretation" and "no more a protection from litigation itself than is any other ordinary defense." *Id.* Accordingly, we have held that decisions about *Noerr–Pennington* immunity are not immediately appealable. *Id.* at 1141.

Similar reasoning has led us to hold that defendants cannot immediately appeal an order rejecting their reliance on statutory preemption. *See Miranda B. v. Kitzhaber*, 328 F.3d 1181, 1189–90 (9th Cir. 2003) (per curiam). In *Miranda B.*, the defendants had unsuccessfully moved to dismiss a 42 U.S.C. § 1983 suit, arguing that a § 1983 remedy was precluded by other statutory remedies. *See id.* at 1190. We determined that we had no jurisdiction over their immediate appeal, because the defendants were merely asserting a defense to liability, not an immunity from suit. *Id.* ("The 'essence' of the [defendants'] argument is thus not immunity from suit or a right not to stand trial, but a defense to suit."). The same is true here.

In sum, because the state-action doctrine is a defense to liability and not an immunity from suit,[3] the collateral-order doctrine does not give us jurisdiction here.[4] *Nunag-Tanedo*, 711 F.3d at 1139–40.

**B**

The Power District's two primary counterarguments are unavailing.

First, the Power District argues that the collateral-order doctrine embraces interlocutory orders denying assertions of state-action immunity because that immunity has constitutional origins. To be sure, *Parker* depended on California's constitutionally protected sovereign status. *See* 317 U.S. at 351 (emphasizing the "dual system of government in which, under the Constitution, the states are sovereign"). But a defense's constitutional pedigree does not necessarily confer the right to an immediate appeal. As noted above, a claim of *Noerr-Pennington* immunity—a defense derived

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[3] Even if the state-action doctrine could be characterized as an immunity from suit, interlocutory denials of that defense still might not be immediately appealable under the collateral-order doctrine. *See Will v. Hallock*, 546 U.S. 345, 353 (2006) ("[I]t is not mere avoidance of a trial, but avoidance of a trial that would imperil a substantial public interest, that counts when asking whether an order is 'effectively' unreviewable if review is to be left until later.").

[4] Because we hold that an interlocutory appeal is not necessary to guarantee meaningful appellate review of an order denying state-action immunity, we need not decide whether the district court's order was conclusive and collateral (the two other requirements for immediate appealability under the collateral-order doctrine). *See McElmurry v. U.S. Bank Nat'l Ass'n*, 495 F.3d 1136, 1140 (9th Cir. 2007) ("Because collateral jurisdiction requires all three elements, we lack collateral order jurisdiction if even one is not met.").

from the First Amendment—does not entitle one to an immediate appeal under the collateral-order doctrine. *Nunag-Tanedo*, 711 F.3d at 1141. And a criminal defendant is not entitled to an immediate appeal after his attorney is removed, even though he has a constitutional right to counsel of his choice. *See Flanagan*, 465 U.S. at 266–68. Constitutional provenance therefore does not ensure the availability of an immediate appeal. *See id.* at 268–70; *Nunag-Tanedo*, 711 F.3d at 1140.

Second, the Power District argues that an immediate appeal is necessary to avoid litigation that would distract government officials. The Supreme Court rejected a similar argument in *Will v. Hallock*, 546 U.S. 345 (2006). In *Will*, the plaintiffs lost their business after customs agents destroyed data stored in their computers. *Id.* at 348. They sued the United States under the Federal Tort Claims Act (FTCA) and in a separate complaint sued the individual agents under *Bivens v. Six Unknown Federal Narcotics Agents*, 403 U.S. 388 (1971). The district court dismissed the case against the United States under an exception in the FTCA. *See* 546 U.S. at 348 (citing 28 U.S.C. § 2680(e)). The agents then moved to dismiss the *Bivens* case, citing the "judgment bar" in 28 U.S.C. § 2676, which essentially prohibits unsuccessful FTCA plaintiffs from suing again for the same events. The district court denied the agents' motion to dismiss the *Bivens* case, holding that its dismissal of the action against the United States did not trigger the judgment bar. *Will*, 546 U.S. at 348–49.

The Supreme Court held that the agents could not appeal immediately, rejecting the argument that immediate review was necessary to prevent distraction to the government. *See id.* at 353. The Court acknowledged "that if the Bivens action goes to trial the efficiency of Government will be compromised and the officials bur-

dened and distracted, as in ... qualified immunity case[s]." *Id.* But despite this similarity to qualified immunity cases, the Court reasoned that "[q]ualified immunity is not the law simply to save trouble for the Government and its employees." *Id.* Rather, state officials enjoy qualified immunity "because the burden of trial is unjustified in the face of a colorable claim that the law on point was not clear when the official took action, and the action was reasonable in light of the law as it was." *Id.* The Court held that the same could not be said of the judgment bar, which is simply designed to "avoid[] ... litigation for its own sake." *Id.* If the avoidance of litigation alone sufficed as justification for an interlocutory appeal, then "28 U.S.C. § 1291 would fade out whenever the Government or an official lost an early round that could have stopped the fight." *Id.* at 354. The collateral-order doctrine thus did not confer jurisdiction over the agents' appeal. *See id.* at 355. Likewise, the possibility of mere distraction or inconvenience to the Power District does not give us jurisdiction here.[5]

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[5] Of course, our holding here does not prevent states from taking advantage of other avenues for immediate review. In appropriate antitrust cases, states may assert Eleventh Amendment immunity, individual officials may assert qualified immunity, or district courts may grant early-case motions to dismiss or certify appeals under § 1292(b). As a last resort, a defendant may petition for a writ of mandamus. *Cf. Cheney v. U.S. Dist. Court*, 542 U.S. 367, 381-82 (2004) (explaining that mandamus relief may be appropriate in a case that threatens the separation of powers, intrudes "on a delicate area of federal-state relations," or implicates an officer's ability to perform constitutional duties (quoting *Will v. United States*, 389 U.S. 90, 95 (1967))). Although such appeals might be possible in some circumstances, jurisdiction under the collateral-order doctrine does not turn on the existence of any subset of exceptional cases; rather, the collateral-order doctrine is evaluated with the "entire category" of orders in mind. *Mohawk*

## C

Our conclusion that an order denying state-action immunity is not appealable under the collateral-order doctrine comports with decisions of the Fourth and Sixth Circuits.

In *Huron Valley Hospital, Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986), the Sixth Circuit held that unsuccessful assertions of state-action immunity failed the second and third parts of the collateral-order test. The court concluded that questions of state-action immunity could not be separated from the merits of the underlying antitrust claim itself. *Id.* at 567. It also held that state-action immunity is not an "'entitlement' of the same magnitude as qualified immunity or absolute immunity, but rather is more akin to a defense to the original claim." *Id.* Because the Supreme Court had allowed appeals from collateral orders "in very few situations," the Sixth Circuit declined to broaden the right to an immediate appeal to encompass assertions of state-action immunity. *Id.* at 568.

The Fourth Circuit agreed in *South Carolina State Board of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006). It similarly held that the second and third parts of the collateral-order test were not satisfied. *Id.* at 441–47; *see also id.* at 444 ("*Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.'").

The Fourth Circuit also persuasively identified three specific incongruities between the state-action doctrine and immunities from suit that the Supreme Court has held fall within the collateral-order doctrine.

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*Indus., Inc. v. Carpenter*, 558 U.S. 100, 107 (2009) (quoting *Dig. Equip.*, 511 U.S. at 868).

*See* 455 F.3d at 446–47. First, municipalities may invoke state-action immunity, but they may not rely on qualified or Eleventh Amendment immunity. *Id.* at 446 (citing, among other cases, *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389, 413 (1978), and *Will v. Mich. Dep't of State Police*, 491 U.S. 58, 70 (1989)). Second, the state-action doctrine bars "all antitrust actions, regardless of the relief sought," but qualified and sovereign immunities do not prevent suits for certain prospective relief. *Id.* at 446–47 (citing, among other cases, *Am. Fire, Theft & Collision Managers, Inc. v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991)). And third, an antitrust defendant can invoke state-action immunity even in a lawsuit by the United States. *Id.* at 447. *See, e.g., N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) (addressing state-action immunity in a suit by the Federal Trade Commission); *FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003 (2013) (same); *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621 (1992) (same). By contrast, a state cannot rely on sovereign immunity to defend against such a lawsuit. *S.C. State Bd.*, 455 F.3d at 447 (citing *United States v. Mississippi*, 380 U.S. 128, 140–41 (1965)). Those discrepancies suggest that state-action immunity should not be treated the same as absolute, qualified, or Eleventh Amendment immunity.

We acknowledge that two circuits have reached the opposite conclusion. First, in *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986), the Eleventh Circuit held that state-action immunity was comparable to qualified immunity because both doctrines protected officials from "costly litigation and conclusory allegations." *Id.* at 1289; *see also, e.g., Danner Constr. Co. v. Hillsborough County*, 608 F.3d 809, 812 n.1 (11th Cir.

2010); *Askew v. DCH Reg'l Health Care Auth.*, 995 F.2d 1033, 1036–37 (11th Cir. 1993).

Second, in *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), the Fifth Circuit held that "state action immunity shares the essential element of absolute, qualified and Eleventh Amendment immunities—'an entitlement not to stand trial under certain circumstances.'" *Id.* at 1395 (quoting *Mitchell*, 472 U.S. at 525). The Fifth Circuit opined that state-action immunity protects states from the indignity of private lawsuits and spares state officials the threat and distraction of discovery and trials. *Id.* at 1395–96. It held that those interests—like the parallel protections afforded by qualified and absolute immunities—could be vindicated only if evaluated before trial.[6] *Id.*

In our view, the Fourth and Sixth Circuits' decisions are more persuasively and thoroughly reasoned. Neither *Martin* nor *Commuter Transportation Systems* meaningfully grappled with the Supreme Court's persistent emphasis that the collateral-order doctrine must remain narrow. *See Firestone*, 449 U.S. at 374; *Richardson-Merrell*, 472 U.S. at 431; *Flanagan*, 465 U.S. at 265–66; *Hollywood Motor Car Co.*, 458 U.S. at 265).

Our conclusion that the Fourth and Sixth Circuits have the better view is further bolstered by the Su-

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[6] Two other circuits have cited *Martin and Commuter Transportation Systems* without endorsing their conclusions. *See Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 703 F.3d 1147, 1150-51 (10th Cir. 2013) (noting circuit split on immediate appealability of *Parker* immunity claims but deciding the case without reaching the issue); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (7th Cir. 1987) (citing *Commuter Transportation Systems*); *see also We, Inc. v. City of Philadelphia*, 174 F.3d 322, 329 (3d Cir. 1999) (citing *Segni's discussion of Commuter Transportation Systems*).

preme Court's more recent decisions. If anything, the Supreme Court's emphasis on the narrowness of the collateral-order doctrine has grown stronger since *Martin* and *Commuter Transportation Systems* were decided. *See, e.g., Mohawk Indus.*, 558 U.S. at 106 (stressing the doctrine must "never be allowed to swallow the general rule" (quoting *Dig. Equip.*, 511 U.S. at 868)); *Will*, 546 U.S. at 349–50 ("emphasizing its modest scope"); *Cunningham v. Hamilton County*, 527 U.S. 198, 204 (1999) (referring to the "small category" of appealable non-final orders (quoting *Swint v. Chambers Cty. Comm'n*, 514 U.S. 35, 42 (1995))); *Dig. Equip.*, 511 U.S. at 868 (labeling the doctrine's requirements "stringent"); *P.R. Aqueduct*, 506 U.S. at 143 (describing a "small class" of orders (quoting *Cohen*, 337 U.S. at 546)); *Van Cauwenberghe v. Biard*, 486 U.S. 517, 524 (1988) (referring to the "narrow circumstances" in which the rule applies). Moreover, in both *Martin* and *Commuter Transportation Systems*, an early appeal was deemed necessary to avoid the distraction of state officials. *See Martin*, 86 F.3d at 1396; *Commuter Transp.*, 801 F.2d at 1289. But, as explained above, the Supreme Court's more recent decision in *Will* held that governmental defendants may not rely solely on the distraction or indignity of a lawsuit to justify immediate appealability. *See* 546 U.S. at 353–55.

We therefore join the Fourth and Sixth Circuits in holding that defendants cannot invoke the collateral-order doctrine to immediately appeal the rejection of a state-action immunity defense.

## V

For the foregoing reasons, the appeal is **DISMISSED** for lack of jurisdiction.

# APPENDIX B

NOT FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLARCITY CORPORATION,
*Plaintiff-Appellee,*

*v.*

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
*Defendant-Appellant.*

No. 15-17302
D.C. No. 2:15-cv-00374-DLR

Appeal from the United States District Court
for the District of Arizona
Douglas L. Rayes, District Judge, Presiding

Argued and Submitted November 18, 2016
San Francisco, California
Filed June 12, 2017

## MEMORANDUM*

Before: KOZINSKI, GILMAN,** and FRIEDLAND, Circuit Judges.

* This disposition is not appropriate for publication and is not precedent except as provided by Ninth Circuit Rule 36-3.

** The Honorable Ronald Lee Gilman, United States Circuit Judge for the U.S. Court of Appeals for the Sixth Circuit, sitting by designation.

We lack jurisdiction to consider the Power District's arguments based on Arizona Revised Statutes section 12-820.01. That section establishes an immunity against claims for damages, but not against claims for injunctive relief. *AlliedSignal, Inc. v. City of Phoenix*, 182 F.3d 692, 697 (9th Cir. 1999) (citing *Zeigler v. Kirschner*, 781 P.2d 54, 61 (Ariz. Ct. App. 1989)). SolarCity's claims for antitrust damages were dismissed, and neither it nor the Power District has appealed that decision. SolarCity also abandoned its previously asserted claim for tort damages in favor of an earlier trial. Thus, section 12-820.01 can become relevant only after judgment is entered, if at all—for example, if SolarCity eventually appeals the district court's order dismissing its damages claims. The Power District's current appeal of the issue is thus not ripe.[1] *See, e.g.*, *Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 106 (2009) (emphasizing that a collateral order can be appealed only if review would be ineffective after final judgment); *Texas v. United States*, 523 U.S. 296, 300 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.'" (quoting *Thomas v. Union Carbide Agric. Prods. Co.*, 473 U.S. 568, 580-81 (1985))).

Lastly, as to the filed-rate doctrine, the Power District argues only that we have pendent jurisdiction to consider its appeal. We cannot have pendent jurisdiction without appellate jurisdiction over some other matter—which we lack for the reasons stated above and in our concurrently filed opinion.

**DISMISSED.**

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[1] The Power District's motion for judicial notice is accordingly denied as moot.

## APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SOLARCITY CORPORATION,

*Plaintiff,*

*v.*

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, et al.

*Defendants.*

No. CV-15-00374-PHX-DLR
Filed December 21, 2015

## ORDER

Before the Court are Defendant Salt River Agricultural Improvement and Power District's (the "District") Motion for Certification under 28 U.S.C. § 1292(b), (Doc. 82), and Motion to Stay, (Doc. 83). The motions are fully briefed, and neither party requested oral argument. For the reasons below, both motions are denied.

## BACKGROUND

Plaintiff SolarCity Corporation, a manufacturer and distributor of solar panels, filed suit against the District and the Salt River Valley Water Users' Association (the "Association") alleging violations of federal and state antitrust laws. (Doc. 39.) SolarCity alleges that the District and the Association, operating as the Salt River Project ("SRP"), exercise monopoly power over the sale of retail electricity in the greater Phoenix-metro area. (*Id.*, ¶¶ 1-2.) It claims SRP imposed a

fee that makes it economically infeasible for customers to obtain some of their electricity from solar systems and that the fee has the effect of eliminating competition from SolarCity and other solar companies in the market. (*Id.*, ¶¶ 4, 13.)

The District and the Association both filed motions to dismiss, which raised several immunities based on the District's status as a political subdivision of the State of Arizona. (Docs. 52, 53.) On October 27, 2015, the Court dismissed the Association and several of SolarCity's antitrust claims. (Doc. 77.) It also found that the Local Government Antitrust Act ("LGAA") barred SolarCity's claims for damages under federal antitrust law because the District is a political subdivision of Arizona, but denied the District's motion with respect to the remaining immunity defenses. (*Id.* at 22-26.) SolarCity's claims for equitable relief under § 2 of the Sherman Act (monopolization and attempted monopolization) and damages claims under state antitrust and tort law survived. The District now moves for the Court to certify three issues for interlocutory appeal pursuant to 28 U.S.C. § 1292(b): (1) whether it is immune from all remaining claims under the state action doctrine, (2) whether it is immune from all damages claims under Arizona Revised Statute ("A.R.S.") § 12-820.01, and (3) whether it immune from all remaining claims under the filed-rate doctrine. (Doc. 82.) The District also requests that the Court stay the case pending its appeal. (Doc. 83.)

## LEGAL STANDARD

Under § 1292(b), the district court shall state in a non-appealable order if the court is of the "opinion that such order involves a controlling question of law as to which there is substantial ground for difference of opin-

ion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation[.]" 28 U.S.C. § 1292(b). The "requirements of § 1292(b) are jurisdictional," and the procedure is a "narrow exception to the final judgment rule[.]" *Couch v. Telescope Inc.*, 611 F.3d 629, 633 (9th Cir. 2010) (internal quotations omitted). "The party seeking certification has the burden of showing that exceptional circumstances justify a departure from the 'basic rule of postponing appellate review until after the entry of a final judgment.'" *Fukuda v. L.A. Cty.*, 630 F. Supp. 228, 229 (C.D. Cal. 1986) (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 475 (1978)). "[A] party's strong disagreement with the Court's ruling is not sufficient for there to be a 'substantial ground for difference.' [In addition,] [t]hat settled law might be applied differently does not establish a substantial ground for difference of opinion." *Couch*, 611 F.3d at 633.

## ANALYSIS

### I. Motion for § 1292(b) Certification

The District argues that each immunity issue satisfies the requirements of § 1292(b). It claims that resolution of these issues would avoid the risk of piecemeal litigation and multiple appeals, which would lower the costs and burden for both the parties and the Court. (Doc. 82 at 2.) The Court disagrees.

#### A. State-Action Immunity

State-action immunity "exempts qualifying state and local government regulation from federal antitrust, even if the regulation at issue compels an otherwise clear violation of the federal antitrust laws." *Cost Mgmt. Servs. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 941 (9th Cir. 1996) (internal quotation marks omitted). The

doctrine originated in *Parker v. Brown*, 317 U.S. 341 (1943), in which the Supreme Court found that the "Sherman Act was not intended to apply to acts of the States 'as sovereigns.'" *Springs Ambulance Serv., Inc. v. City of Rancho Mirage, Cal.*, 745 F.2d 1270, 1272 (9th Cir. 1984). But "this state-action immunity does not apply automatically to the state's political subdivisions." *Id.* "As with private parties, immunity will only attach to the activities of local governmental entities if they are undertaken pursuant to a 'clearly articulated and affirmatively expressed' state policy to displace competition." *F.T.C. v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 (2013). "[G]iven the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, 'state-action immunity is disfavored[.]'" *Id.* at 1010 (quoting *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)).

The District argues that the question of state-action immunity is a controlling question of law because, if it applies, it bars all of SolarCity's antitrust claims.[1] An issue is "controlling" if its resolution on appeal "could materially affect the outcome of litigation in the district court." *In re Cement Antitrust Litig.*, 673 F.2d 1020, 1026 (9th Cir. 1982). Because equitable relief under the federal antitrust laws is the crux of SolarCity's case, the Court concludes that application of state-action immunity is a controlling question of law under § 1292(b). *See Springs Ambulance*, 745 F.2d at 1272 (granting permission for interlocutory appeal of district court's order denying state-action immunity on motion to dismiss after district court found that it is a controlling issue of law). However, the Court finds that the

[1] It would not bar SolarCity's remaining state law tort claims.

District has failed to demonstrate a substantial ground for difference of opinion on this issue.

In ruling on the motion to dismiss, the Court concluded that whether Arizona has articulated a clear policy permitting the District's conduct is a question of fact and noted that SolarCity had adequately alleged that Arizona has no such policy. (Doc. 77 at 25.) The District argues that the "clear articulation" prong is a question of law that the Court should have decided in its Order. The Court agrees with the District. "[T]he state-action immunity question is one of law that turns on whether the displacement of competition with monopolies in the [relevant] market was 'clearly articulated and affirmatively expressed as state policy.'" *Columbia Steel Casting Co. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1442 (9th Cir. 1996).

However, correction of this error on appeal would not materially advance the ultimate termination of the litigation because there is no substantial ground for difference of opinion that the District's alleged conduct is not protected by state-action immunity. Had the Court decided the issue as a matter of law, it would have found that Arizona has not expressly articulated a clear policy authorizing the conduct of the District. *See Cost Mgmt.*, 99 F.3d at 942 ("the relevant question is whether the regulatory structure which has been adopted by the state has specifically authorized the conduct alleged to violate the Sherman Act"). In fact, the opposite is true. A.R.S. § 40-202(B), cited by SolarCity in its response to the District's motion to dismiss, provides that "[i]t is the public policy of this state that a competitive market shall exist in the sale of electric generation service." The District did not address this statute in its reply brief, even though, as the moving party, it had the burden of demonstrating that state-action immuni-

ty protects its conduct. In light of the statute, there are no substantial grounds for disagreement that Arizona has no clearly expressed and affirmative policy displacing competition in the retail electricity market.[2]

Nonetheless, the District argued that "Arizona's clearly articulated policy, which is expressed in the Arizona Constitution and statutes, has been to displace unfettered competition with an elaborate regulatory structure." (Doc. 53 at 10.) It claimed "[r]etail electric rates in Arizona are not determined by competition," and cited a litany of statutes and regulations pertaining to the Arizona Corporation Commission's ("ACC") authority to prescribe rates for public service corporations and the ratemaking process in general. (*Id.* at 10-11.); *see also* Ariz. Const. Art. 15 § 3 (mandating that the ACC "shall, prescribe just and reasonable rates and charges to be made and collected, by public service corporations"). In essence, the District argued that its conduct is a foreseeable result of Arizona's regulatory scheme pertaining to electricity rates because the retail electric market is heavily regulated, no other companies are certified to provide retail electricity, and electricity rates are set by the ACC, not the market. *See Hallie v. Eau Claire*, 471 U.S. 34, 43 (1985) (finding that state-action immunity applies if "anticompetitive effects logically would result from [the State's] authority to regulate").

At most, the District demonstrated that Arizona does not permit retail electricity rates to be determined in the open market. This is the function of the ACC. But

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[2] The District presents no additional arguments on the merits of its state-action immunity defense. Instead, it only takes issue with the Court's finding that whether Arizona has a clearly expressed and articulated policy displacing competition in the retail electricity market was a question of fact.

the fact that electricity rates are heavily regulated does not mean that the District is free to act anticompetitively when setting its own prices for distribution of electricity, which incorporates those rates. *See Phoebe*, 133 S. Ct. at 1012 ("Our case law makes clear that state-law authority to act is insufficient to establish state-action immunity; the substate governmental entity must also show that it has been delegated authority to act or regulate anticompetitively."). Nor is the District's anticompetitive conduct a foreseeable result of fixed electricity rates. The District adheres to an administrative scheme when setting its "terms and conditions for customer selection, complaint resolution, consumer protection, stranded costs, distribution service rates and charges, system benefit charges and other related matters[.]" A.R.S. § 30-802(B). But this hardly indicates that the District is free to act anticompetitively. Rather, the purpose of the administrative process governing the District's prices is to "promote consistent statewide application of [the public power entities'] respective rules, procedures and orders." *Id.* § 3-802(A).

In summary, had the Court reached the issue as a matter of law, it would have concluded that Arizona does not have a clearly articulated policy to displace competition in the retail electricity market. The clearly articulated policy in Arizona *favors* competition. Although the Court erroneously concluded that application of state-action immunity presented questions of fact, correction of this error on appeal would not materially advance the ultimate termination of this case because, given the undisputed language of A.R.S. § 40-202(B), it is beyond substantial dispute that the District's alleged conduct is not protected by state-action immunity. Therefore, the Court declines to certify this issue for interlocutory appeal.

**B. Absolute Immunity Under Arizona Law**

A.R.S. § 12-820.01 provides "absolute immunity" for a public entity's "exercise of a judicial or legislative function." As a political subdivision of the state, the District is a "public entity" under Arizona law. *See* A.R.S. § 12-820(7) ("'Public entity' includes this state and any political subdivision of this state."). This immunity applies to damages only, not equitable relief. *See AlliedSignal, Inc. v. City of Phx.*, 182 F.3d 692, 697 (9th Cir. 1999) (citing *Zeigler v. Kirschner*, 781 P.2d 54, 61 (Ariz. Ct. App. 1989)). Because this issue turns on questions of fact and would only bar damages, not SolarCity's claims for equitable relief under the federal antitrust laws, it is not a controlling question of law. *See In re Cement Antitrust Litig.*, 673 F.2d at 1026.

In addition, there are no substantial grounds for difference of opinion regarding the Court's decision. The Court found that whether the District's alleged ratemaking ability is a legislative function is a question of fact. (Doc. 77 at 23.) The District argues this is a question of law. (Doc. 82 at 8.) Absolute immunity is generally a question of law for the court to decide; however, "[b]ecause absolute immunity is related to a defendant's status, usually there are limited factual determinations necessary to resolve the issue." *Link v. Pima Cty.*, 972 P.2d 669, 674 (Ariz. Ct. App. 1998) (internal citations omitted). "If an absolute immunity defense is raised and related factual issues exist, those issues should be resolved by the jury as in qualified immunity cases." *Id.*

The District labels its conduct as ratemaking, but there is no authority holding that the District's adoption of prices for sale of retail electricity is ratemaking, let alone that it is a legislative function. The cases cited by the District in its motion applied to the ACC's rate-

making ability, not the District's. *See Arizona Corp. Comm'n v. State ex rel. Woods*, 830 P.2d 807, 812 (Ariz. 1992) (noting ratemaking is a legislative power of the ACC); *Arizona Corp. Comm'n v. Superior Court*, 480 P.2d 988, 991 (Ariz. 1971) (same). The prices set by the District for its distribution of electricity are wholly separate from the ACC's process for setting the rate of a commodity sold by a public utility.

The District claims "it is the *substance* of the public function at issue that determines whether it is legislative in character and that if ratemaking is legislative in character for the ACC, it is legislative in character for the District as well." (Doc. 83 at 13.) But when ruling on a motion to dismiss, the Court is limited to the allegations in the complaint. Here, the allegations of the complaint do not allow the Court to make any determination about the District's price setting function, i.e., whether this function has the same features that make the ACC's rate setting functions legislative in character. Instead, SolarCity alleges that the District acts more like a private corporation because its Board approves the prices after it receives comment from interested parties, it is not subject to any regulation by any state agency with respect to determining its prices, it refused to release information about the process, and it never released a final decision stating the factual and legal bases for the prices. (Doc. 39, ¶¶ 42, 91-102.) Whether the District engages in ratemaking at all, let alone any legislative functions as a traditional branch of government, remains to be determined on a fully-developed factual record. The Court will not certify this issue for interlocutory appeal.

**C. Filed-Rate Doctrine**

The filed-rate doctrine "precludes interference with the rate setting authority of an administrative

agency[.]" *Wah Chang v. Duke Energy Trading & Mktg.*, 507 F.3d 1222, 1225 (9th Cir. 2007). Rates that are deemed reasonable by a regulatory agency are insulated from challenge. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981).[3] Originally, the doctrine applied to rates reviewed and filed by federal agencies. *See id.* at 578. Several states have adopted the doctrine, *see Qwest Corp. v. Kelly*, 59 P.3d 789, 800 (Ariz. Ct. App. 2002) (listing cases), but Arizona has not, *see id.*; *see also Johnson v. First Am. Title Ins. Co.*, No. CV-08-01184-PHX-DGC, 2008 WL 4850198, at *4 (D. Ariz. 2008) (Arizona "has never adopted the filed-rate doctrine"). Here, the Court concluded that the doctrine did not apply because, even assuming the prices set by the District are "rates," "SolarCity does not challenge the District's electricity rates as unreasonable, but instead alleges the District imposed the rates to exclude it from the market." (Doc. 77 at 25.)

Assuming *arguendo* that this is a controlling question of law, there are no substantial grounds for difference of opinion regarding the Court's finding. The filedrate doctrine is one of deference for a regulatory agency's conclusion that a rate for some type of public good or service is reasonable. *See Hall*, 453 U.S. at 577. The purpose of the doctrine is to prevent "price discrimination among rate payers" and preserve "the role of regulatory agencies in deciding reasonable rates for public utilities and services." Qwest, 59 P.3d at 799. Federal courts "apply the filed rate doctrine out of deference to a 'congressional scheme of uniform ... regulation.' Otherwise [courts] would impermissibly 'usurp[ ]

[3] Although refined in *Hall*, the doctrine originated in *Keogh v. Chicago & Northwestern Railway, Co.*, 260 U.S. 156 (1922), and has been criticized and narrowed by the Ninth Circuit in *Cost Management*, 99 F.3d at 943-48.

a function that Congress has assigned to a federal regulatory body.'" *Cty. of Stanislaus v. Pac. Gas & Elec. Co.*, 114 F.3d 858, 862 (9th Cir. 1997) (quoting Hall, 453 U.S. at 579, 582) (internal citations omitted).

SolarCity does not challenge the reasonableness of any "filed rate" set by any regulatory agency. It does not claim the District's prices are too high, too low, or that they are artificially inflated to increase profit. Rather, they challenge the District's discriminatory pricing directed at restricting competition. The result would be the same had the District decided to refuse electric service to customers who purchase some of their electricity from SolarCity.

The District also conflates the *rate* for electricity, which is determined by the ACC, and the *prices* set by the District for distributing that electricity via the grid. The District does not claim to be a regulatory authority, it does not argue that Arizona grants it any authority to set uniform prices for distributing electricity, and it does not file the prices with any other governmental unit but itself.[4] No regulatory authority, such as the ACC, approved the District's electricity prices, and thus there is no reason to assume the prices are reasonable as a matter of law.[5]

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[4] If, for instance, SolarCity filed suit challenging the rates for electricity set by the ACC, the doctrine would apply and bar the suit. *See Hall*, 453 U.S.

[5] The District argues that its Board approved the prices, and thus they are entitled to deference. But the District cannot self-police its own rates, especially given the Board is elected by its "shareholders," much like a for-profit corporation . (Doc. 39, ¶¶ 24, 25).

Furthermore, the doctrine does not bar antitrust suits by competitors alleging that "the rates which were adopted were adopted in part because of an antitrust violation on the part of the defendant." *Cost Mgmt.*, 99 F.3d at 947. The District argues SolarCity brings this action "in the shoes" of electric customers. (Doc. 99 at 11.) But the Court has concluded that SolarCity is a competitor of the District, and SolarCity alleges the District violated antitrust laws when it changed its pricing structure. The doctrine simply does not apply to this case, and the Court declines to certify this issue for interlocutory appeal.

**D. Conclusion**

The District has failed to establish exceptional circumstances that would justify immediate appeal of these issues. *See Livesay*, 437 U.S. at 475. The motion is denied.

**II. Motion to Stay**

The District requests that the Court stay this action pending resolution of its appeal on two issues: state-action immunity and absolute immunity under Arizona law. (Doc. 83.) The District appealed the Court's ruling on these issues on November 20, 2015. (Doc. 81.) It argues these two immunities are immediately appealable at this stage, and thus the Court should stay the case.[6]

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[6] The cases cited by the District in support of immediate appeal are not Ninth Circuit authority, and each case dealt with a trial court's denial of an immunity at the summary judgment stage, not the 12(b) stage. *See Commuter Transp. Sys., Inc. v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1289 (11th Cir. 1986) (finding district court's order denying summary judgment on state-action immunity grounds a final appealable decision); *Tucson Unified Sch. Dist. v. Borek*, 322 P.3d 181, 184 (Ariz. Ct. App. 2014) (accepting special action jurisdiction of trial court order denying

Even assuming these issues are appealable as of right, it "is firmly established that an appeal from an interlocutory order does not divest the trial court of jurisdiction to continue with other phases of the case." *Plotkin v. Pac. Tel. & Tel. Co.*, 688 F.2d 1291, 1293 (9th Cir. 1982).[7] Although the Court must wait for the Ninth Circuit's determination before proceeding on those issues, the Court is not required to stay the entire case. *See Britton v. Co-op Banking Grp.*, 916 F.2d 1405, 1412 (9th Cir. 1990) ("Absent a stay, an appeal seeking review of collateral orders does not deprive the trial court of jurisdiction over other proceedings in the case, and an appeal of an interlocutory order does not ordinarily deprive the district court of jurisdiction except with regard to the matters that are the subject of the appeal."). As stated above, the Court declines to certify the three immunity issues for direct appeal, and it sees no reason to further delay the case.

The District asks the Court to use its discretion and stay the case because the District is likely to succeed on its immunity claims, and it will suffer irreparable injury if the Court denies the stay. (Doc. 83 at 9.) "A stay is not a matter of right, even if irreparable injury might otherwise result." *Nken v. Holder*, 556 U.S.

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summary judgment on absolute immunity under A.R.S. § 12-820.01); *Pinal Cty. v. Cooper*, 2015 WL 6157397, at *2 (Ariz. Ct. App. Oct. 20, 2015) (allowing appeal of immunity claims denied on motion for summary judgment).

[7] The Court has serious doubts as to whether the two immunity issues are immediately appealable. "Federal appellate jurisdiction is generally limited to review of 'final decisions of the district courts of the United States.'" *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1012 (9th Cir. 2013) (quoting 28 U.S.C. § 1291)). The Court did not make a final decision on the state-action doctrine or absolute immunity under Arizona law. The District is free to raise these immunities at summary judgment.

418, 433 (2009). Whether to impose a stay is an exercise of judicial discretion guided by four factors: "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other [parties]; and (4) where the public interest lies." *Id.* at 434.

The Court has already concluded that the District is unlikely to succeed on its state-action immunity defense and that questions of fact preclude a determination that the District is absolutely immune under Arizona law. In addition, were the Court inclined to grant the stay, the harm suffered by SolarCity would likely outweigh the harm suffered by the District. SolarCity has allegedly been ousted from the market by the District. Not only does it lose sales, it loses customer goodwill and market share. The District, meanwhile, suffers only monetary harm as a result of litigation, i.e., the money it spends defending itself. Monetary harm is not irreparable. *See Sampson v. Murray*, 415 U.S. 61, 90 (1974) ("Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay, are not enough."). As such, the Court will not exercise its discretion to stay this case.

Because the Court declines to certify these issues for appeal, and because the Court finds that the District failed to present "a substantial case for relief on the merits," see *Lair v. Bullock*, 697 F.3d 1200, 1204 (9th Cir. 2012), the District's motion to stay is denied.

**IT IS ORDERED** that the District's motion for certification pursuant to 28 U.S.C. § 1292(b), (Doc. 82), and motion to stay, (Doc. 83), are **DENIED**.

Dated this 21st day of December, 2015.

/s/ Douglas L. Rayes
Douglas L. Rayes
United States District Judge

## APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA

SOLARCITY CORPORATION,

*Plaintiff,*

*v.*

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT, et al.

*Defendants.*

No. CV-15-00374-PHX-DLR
Filed October 27, 2015

## ORDER

In December 2014, the Salt River Project ("SRP") announced a new rate structure for sale of retail electricity, which included additional fees for consumers who obtain part of their electricity from rooftop solar energy systems. Solar energy companies, environmentalists, and other interest groups opposed the rate change, arguing the new fee would dissuade consumers from installing solar energy systems. SRP approved the new rates in February 2015. Plaintiff SolarCity Corporation brings this action challenging the new rate structure under federal and state antitrust laws.

Before the Court are Defendant Salt River Project Agricultural Improvement and Power District's (the "District") motion to dismiss, (Doc. 53), and Defendant Salt River Valley Water Users' Association's (the "Association") motion to dismiss, (Doc. 52). The District has also filed a request for judicial notice. (Doc. 54.)

The Court held oral argument on October 14, 2015. For the reasons stated below, the District's motion to dismiss is granted in part, the Association's motion to dismiss is granted, and the District's motion for judicial notice is granted in part.

## BACKGROUND

### I. The Parties

SolarCity is the country's "largest installer of distributed solar energy systems." (Doc. 39, ¶ 15.) It sells and leases solar energy systems to residential and commercial customers "who then use the systems to generate electricity and thereby displace a portion of their electricity purchases from an electric utility." (*Id.*, ¶ 16.) Prior to the rate change, SolarCity "averaged almost 400 installations per month in SRP's service area." (*Id.*, ¶ 17.)[1]

SRP is a power-and-water utility comprised of two separate entities: the District and the Association (collectively referred to as "SRP"). (*Id.*, ¶¶ 18-19.) "The Association is a private, for-profit corporation that files reports with the state listing its Board members as 'directors' of the corporation." (*Id.*, ¶ 26.) It was formed in 1903 by private Salt River Valley landowners in order to "enter into contracts with the federal government for the irrigation of their land." (*Id.*, ¶ 27.) It continues to operate as a private corporation for the benefit of private landowners. (*Id.*, ¶ 29.)

The District was created in 1937 "for the purpose of refinancing the Association's debts by issuing interest-free bonds, thereby saving the private landowners very

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[1] "Distributed solar systems generate electricity when the sun shines on them" and reduce "electric demand during the electric system's peak hours." (Doc. 39, ¶¶ 70-71.)

large sums of money each year." (*Id.*, ¶ 28.) The District is responsible for power and water storage work, and the Association manages "water delivery as an agent of the District." (*Id.*) The revenues generated from the District's sale of electricity subsidize the Association's "money-losing water operations, by [$100 million] per year." (*Id.*, ¶ 35(b).) The District "cannot impose ad valorem property taxes or sales taxes, enact any laws governing the conduct of citizens, or administer [other] such normal functions of government[.]" (*Id.*, ¶ 40.) The Arizona Corporation Commission ("ACC"), Arizona's public utility regulatory authority, "has no rate-setting or review authority over the District or its retail operations." (*Id.*, ¶ 42.)

**II. Industry Allegations**

SRP operates in the Phoenix-metro area. It provides electricity to residential and commercial customers through a variety of plans: (1) a Standard Plan based on perkilowatt usage, (2) a Time-of-Use Plan where rates vary according to the time of day, (3) a Community Solar Plan where customers purchase power generated by solar power plants at different rates, and (4) other governmental and commercial plans. (*Id.*, ¶ 56.)

SolarCity participates in this market, which it defines as "the provision of electric power to end-use residential, governmental, and businesses consumers[.]" (*Id.*, ¶¶ 48- 49.) It alleges it "directly competes with SRP because it offers equipment and services that provide electricity—specifically solar-generated electricity—to customers." (*Id.*, ¶ 50.) When customers purchase SolarCity's equipment and services, it reduces the amount of electricity they must purchase from SRP. (*Id.*)

SolarCity alleges "SRP has monopoly power in the retail market within the geographic market, currently providing more than 95% of the electricity used by retail customers in SRP territory." (*Id.*, ¶ 53.) This is evidenced by SRP's ability to "extract supra-competitive profits from its electrical operations and use them to fund its moneylosing water operations," as well as the high-barriers to entry in the market. (*Id.*, ¶¶ 54- 55.) Moreover, "[w]hether SRP customers self-generate power ... or not, all or virtually all of them still need to purchase both retail electric power and grid access from SRP to have access to power at times that alternative sources of power ... cannot meet the customers' needs." (*Id.*, ¶ 63.)

**III. The Dispute**

For several years, SRP provided incentives for customers to install distributed solar systems. (*Id.*, ¶ 72.) In 2011, however, "distributed solar increased in popularity and efficiency [and] SRP began to recognize that distributed solar could become a competitive threat in the longer term." (*Id.*, ¶ 78.) In response, "SRP developed its 'Community Solar' program, where customers purchase solar-generated electricity." (*Id.*, ¶ 79.) SolarCity alleges SRP implemented this program in part to ensure its ability to perform under several output requirement contracts with privately-owned solar farms. (*Id.*, ¶ 80.) However, it could not compete with distributed solar.

In December 2013, SRP lowered pricing for the Community Solar program, and shortly thereafter, "eliminated incentives to install distributed solar." (*Id.*, ¶¶ 82, 85.) One year later, in December 2014, "SRP announced its intent to adopt new [Standard Electric Price Plans ("SEPPs")] to apply new service terms and

rates to its customers." (*Id.*, ¶ 89.) Around the same time, SRP held several hearings and disclosed information relating to the SEPPs. (*Id.*, ¶ 91.) SolarCity participated in this process and voiced its opposition to the SEPPs. (*Id.*)

On February 26, 2015, the District's Board of Directors approved the SEPPs. (*Id.*, ¶¶ 97, 100.) The SEPPs retain the normal rate structure for customers that purchase all of their electricity from SRP. (*Id.*, ¶ 105.) These customers are charged a specific rate per kilowatt usage along with a fixed monthly service charge. (*Id.*) But for customers that purchase electricity from SRP and also generate their own electricity, the SEPPs impose a nearly 65% rate increase from the previous rate structure. (*Id.*, ¶ 107.) This increase appears as several additional charges applicable only to self-generating customers, as well as "reduced bill credits for the power that distributed solar customers send back into SRP's grid for SRP to re-sell to other customers." (*Id.*, ¶ 108(c) (emphasis in original).)

On March 2, 2015, SolarCity filed this action seeking damages and injunctive relief under federal and state antitrust laws. (Doc. 1.) On May 20, 2015, SolarCity filed an amended complaint alleging nine counts: (1) Monopoly Maintenance in violation of § 2 of the Sherman Act; (2) Attempted Monopolization in violation of § 2 of the Sherman Act; (3) Unreasonable Restraint of Trade in violation of § 1 of the Sherman Act, (4) Exclusive Dealing in violation of § 3 of the Clayton Act; (5) Monopoly Maintenance in violation of the Arizona Uniform State Antitrust Act ("AUSAA"); (6) Attempted Monopolization in violation of AUSAA; (7) Unreasonable Restraint of Trade in violation of AUSAA; (8) Intentional Interference with Prospective Economic Advantage; and (9) Intentional Interference

with Contract. (Doc. 39.) The District and the Association both move to dismiss all counts.

**REQUEST FOR JUDICIAL NOTICE**

The District requests the Court to take judicial notice of eleven exhibits, (Docs. 54-1 through 54-11). It asserts each exhibit contains information that is publicly available and directly related to allegations in the amended complaint. SolarCity objects to each of these documents except Exhibit 10, which is a copy of SolarCity's Notice of Claims sent to SRP in March 2015, (Doc. 54-10).

Rule 201 permits courts to take judicial notice of a fact "not subject to reasonable dispute because it ... can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Ev. 201(b)(2). The advisory committee notes accompanying Rule 201 "explain that '[a] high degree of indisputability is the essential prerequisite' to taking judicial notice of adjudicative facts and that 'the tradition [of taking judicial notice] has been one of caution in requiring that the matter be beyond reasonable controversy.'" *Rivera v. Philip Morris, Inc.*, 395 F.3d 1142, 1151 (9th Cir. 2005) (quoting Fed. R. Ev. 201(a) & (b) advisory committee's notes). In addition, "[b]ecause the effect of judicial notice is to deprive a party of an opportunity to use rebuttal evidence, cross-examination, and argument to attack contrary evidence, caution must be used in determining that a fact is beyond controversy under Rule 201(b)." *Id.* (internal quotation marks and citation omitted).

SolarCity does not dispute the accuracy of Exhibit 10, nor does it object to the Court taking judicial notice of this document. Because the document is publicly

available and not subject to reasonable dispute, the Court will take judicial notice of Exhibit 10.

The District argues Exhibits 1-4 are necessary for the Court to apply judicial estoppel and preclude SolarCity from taking a position inconsistent from one taken before a different tribunal. It asserts Exhibits 1 and 2, which contain 153 pages from the record of a tax case SolarCity filed against the Arizona Department of Revenue and purportedly contain statements relating to SolarCity's lack of "competition" with public utilities, should be noticed by the Court. It also asserts Exhibits 3 and 4 contain additional evidence that SolarCity does not "compete" with SRP in the antitrust context. But SolarCity disputes the relevancy of the statements given the context in which they were made. It claims the District mischaracterizes the statements, and thus they should be narrowly interpreted to apply only to the issues considered during each proceeding. The Court agrees. Taking judicial notice of the documents would require analysis of the context in which the statements were made and may give rise to factual issues. Such an inquiry is not appropriate at the 12(b)(6) stage.

The District also requests judicial notice of Exhibits 5-7, which are documents from an administrative proceeding that purportedly indicate "the ACC has declined to certify any retail electricity competitor in Arizona and that, as a result, the State of Arizona has a policy in favor of regulation, not competition." (Doc. 63 at 7.)[2] But again, SolarCity disputes the context in which the documents were produced. The documents contain hearsay and opinions of non-experts that are

[2] Citations to pages in the Court's docket are to the page numbers stamped at the top of the page by the Court's CM/ECF system, not the page numbers at the bottom of each page.

subject to reasonable dispute. Taking judicial notice is not appropriate where the Court would be required to weigh evidence without providing SolarCity an opportunity to rebut. *See Rivera*, 395 F.3d at 1151.

Last, the District seeks judicial notice of three self-created documents, two of which are posted on the District's website and contain information related to the SEPPs, and one prepared in response to SolarCity's Notice of Claims submitted in March 2015. (Docs. 54-8, 54-9, 54-11.) SolarCity argues the documents are irrelevant to this case and disputes the accuracy of the statements contained therein. It also challenges the authenticity of the documents posted on the District's website as they contain no information as to when they were prepared and when they were posted online. Because these documents were prepared by the District, and because SolarCity challenges their content, the Court cannot conclude they are beyond reasonable dispute.

Accordingly, the Court will only take judicial notice of Exhibit 10. The remaining exhibits lack the "high degree of indisputability" necessary under Rule 201, and taking notice of the documents for the purposes suggested by the District would require the Court to engage in evidentiary and factual analysis inappropriate at this stage. The District's motion is therefore granted only with respect to Exhibit 10 and denied as to the remaining exhibits.

## MOTIONS TO DISMISS

### I. Legal Standard

When analyzing a complaint for failure to state a claim under Rule 12(b)(6), the well-pled factual allegations are taken as true and construed in the light most favorable to the nonmoving party. *Smith v. Jackson*,

84 F.3d 1213, 1217 (9th Cir. 1996). Legal conclusions couched as factual allegations are not entitled to the assumption of truth, *Ashcroft v. Iqbal*, 556 U.S. 662, 680 (2009), and therefore are insufficient to defeat a motion to dismiss for failure to state a claim, *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1108 (9th Cir. 2008). To avoid a Rule 12(b)(6) dismissal, the complaint "must plead 'enough facts to state a claim to relief that is plausible on its face.'" *Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1022 (9th Cir. 2008) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Dismissal is appropriate when the complaint lacks a cognizable legal theory, lacks sufficient facts alleged under a cognizable legal theory, or contains allegations disclosing some absolute defense or bar to recovery. *See Weisbuch v. Cty. of L.A.*, 119 F.3d 778, 783 n.1 (9th Cir. 1997); *Balistreri v. Pacifica Police Dep't*, 901 F.2d 696, 699 (9th Cir. 1988).

**II. Analysis**

Both the District and the Association move to dismiss SolarCity's amended complaint. The District argues: (1) it is absolutely immune from antitrust damages claims under federal and state law, (2) it is immune from antitrust liability under the state action immunity doctrine, (3) the filed-rate doctrine bars SolarCity's claims, (4) the *Noerr-Pennington* doctrine bars SolarCity's claims, (5) SolarCity lacks standing because it fails to adequately plead an antitrust injury, (6) SolarCity fails to state a claim under federal or state antitrust law, (7) SolarCity's state law claims are barred because it failed to comply with administrative procedures, and (8) SolarCity fails to adequately plead its tortious interference claims. The Association's motion raises similar arguments and differs only in that it argues (1) the amended complaint fails to implicate it in any wrongdoing, and (2) it and the District are not alter

egos. The Court will address the Association's motion first.

**A. Allegations Against the Association**

The Association argues SolarCity fails to directly implicate it in any wrongful conduct. It claims it has nothing to do with setting electricity rates and that the District enacted the SEPPs on its own. The Court agrees.

An antitrust plaintiff must "include allegations specific to each defendant alleging defendant's role in the alleged [misconduct]." *See In re TFT-LCD (Flat Panel) Antitrust Litig.*, 586 F. Supp. 2d 1109, 1117 (N.D. Cal. 2008). Here, the District is alleged to be responsible for the anticompetitive conduct – not the Association. SolarCity does not allege that the Association had any role in promulgating the SEPPs, nor does it otherwise implicate the Association in any wrongdoing. SolarCity acknowledges that the Association's functions are limited to "managing water delivery as agent of the District." (Doc. 39, ¶ 28.) Moreover, SolarCity has admitted that it did not directly allege any wrongful conduct attributable to the Association. (*See* Doc. 76 at 18 ("It's true, Your Honor, that we don't specifically allege conduct that the Association engages in as opposed to the District[.]").)

SolarCity alleges the District and the Association are alter egos and hold themselves out as one entity: SRP. It alleges the District is a mere instrumentality of the Association, and therefore both are liable for the alleged anticompetitive conduct. The Association argues the doctrine does not apply between a political subdivision of the state and a private entity, and even if it does, the Association should be able to raise the same governmental defenses as the District.

The District is a "municipal corporation" formed under Arizona law and entitled to "the powers and privileges conferred ... or granted generally to municipal corporations by the constitution and statutes of the state, including immunity of its property and bonds from taxation." A.R.S. § 48-2302; *see also* Ariz. Const. art. 13, § 7 ("Irrigation, power, electrical, [and] agricultural improvement ... districts ... shall be political subdivisions of the state, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this constitution and laws of the state[.]"). The Association is a private corporation operating for the benefit of its shareholders. (Doc. 39, ¶ 29.)

The alter ego doctrine is generally applied between private parent and subsidiary corporations or between a private corporation and one of its shareholders. *See, e.g., Gatecliff v. Great Republic Life Ins. Co.*, 821 P.2d 725, 728 (Ariz. 1991); *Dietel v. Day*, 492 P.2d 455, 457 (Ariz. Ct. App. 1972). The rationale is that a corporation should not be used to shield assets or avoid liability for fraud or other tortious conduct. *See Dietel*, 492 P.2d at 728 ("If a corporation was formed or is employed for fraudulent purposes then clearly the corporate fiction should be disregarded."). Arizona courts have not addressed whether the doctrine applies between a political subdivision of the state and a private entity, and other jurisdictions have refused to apply it between two governmental entities. *See Foster Wheeler Energy Corp. v. Metro. Knox Solid Waste Auth., Inc.*, 970 F.2d 199, 202 (6th Cir. 1992) (rejecting the plaintiffs' attempt to hold the city and county liable for the contractual obligations of the city waste authority, a nonprofit corporation created by the city and the county); *McDaniel v. Bd. of Educ. of City of Chi.*, 956 F. Supp. 2d 887, 896 (N.D. Ill.

2013) ("It bears repeating that Plaintiffs have offered no Illinois or Seventh Circuit authority that applies a corporate veil-piercing theory to hold a municipality liable for the actions of a statutorily-created independent corporation."); *Katz v. Holzberg*, No. 13-1726 (FSH), 2013 WL 5523488, at *4 (D.N.J. Oct. 2, 2013) ("Katz does not provide a single case, from New Jersey or otherwise, supporting the application of corporate veil-piercing theory or parent-subsidiary law to the public authority context."); *Newcrete Prods. v. City of Wilkes-Barre*, 37 A.3d 7, 14 (Pa. Commw. Ct. 2012) (finding alter ego theory inapplicable between a city and city redevelopment authority); *DBT Yuma, L.L.C. v. Yuma Cty. Airport Auth.*, 340 P.3d 1080, 1082 (Ariz. Ct. App. 2014) (finding that a county and a statutorily-created "nonprofit civic corporation" were not alter egos).

SolarCity cites no Arizona case or statute that permits holding a private corporation liable for the acts of a municipal corporation, or vice versa. Because the Court agrees with *McDaniel*, which noted: "the traditional veil-piercing analysis employed by [state] courts is ill-suited to these circumstances," 956 F. Supp. 2d at 897, it finds the doctrine is not applicable to this case.

Arizona law requires "such unity of interest and ownership that the separate personalities of the corporation and owners cease to exist." *Dietel*, 492 P.2d at 457. But SolarCity does not allege the Association has any ownership interest in the District, nor could it, as the District is a political subdivision of the state. It does not allege the District has purchased shares of the Association or that funds were commingled between the entities. Perhaps most importantly, it fails to allege any resulting fraud or injustice. *See Loiselle v. Casa Mgmt. Grp., LLC*, 228 P.3d 943, 950 (Ariz. Ct. App. 2010) ("[D]isregarding the corporation's separate legal status

[must be] necessary to prevent injustice." (internal quotation marks omitted)). SolarCity's sole argument is that it would be unjust for the District to take advantage of its status as a political subdivision and raise its governmental defenses. But during argument, SolarCity admitted that holding the District and the Association as alter egos would not strip the District of these defenses, and under Arizona law, the District is entitled to raise them. SolarCity does not claim that the District is used as a vehicle to shield the Association's assets, or that it lacks the funds to satisfy an award of damages. No fraud or injustice is present here.

Last, SolarCity asserts the alter ego doctrine applies because the District and the Association were found to be alter egos in *Miller v. Salt River Valley Water Users Ass'n*, 463 P.2d 840 (Ariz. Ct. App. 1970). In *Miller*, the court held that the District and the Association were alter egos for purposes of performing a contractual obligation owed by the Association and later assumed by the District. *Id.* at 845-46. But *Miller*'s holding was based primarily on an assumption agreement executed between the District and the Association. It did not analyze whether the two entities were alter egos based on the similarities between the two entities.

Accordingly, because SolarCity has failed to provide any Arizona authority applying the alter ego doctrine to a municipal corporation and a private entity, the Court declines to apply the doctrine in this case. The Association is dismissed.

**B. Antitrust Claims Alleged Against the District**

The District raises two threshold arguments: (1) SolarCity fails to properly allege a relevant market, and (2) SolarCity fails to allege antitrust injury. The District also argues SolarCity fails to adequately allege

several elements of its antitrust claims. The Court will address the threshold issues first.

### 1. Threshold Issues

#### a. Relevant Market

SolarCity alleges violations of § 1 and § 2 of the Sherman Act, which govern monopolization and attempted monopolization, and § 3 of the Clayton Act, which governs exclusive dealing. These claims are brought under section 4 of the Clayton Act, which provides that "any person ... injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefore[.]" 15 U.S.C. § 15(a). Each claim requires SolarCity to allege "that the defendant has market power within a 'relevant market.'" *Newcal Indus., Inc. v. Ikon Office Solution*, 513 F.3d 1038, 1044 (9th Cir. 2008). "Without a definition of [the relevant] market there is no way to measure [the company's] ability to lessen or destroy competition." *Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 177 (1965).

"[T]he [relevant] market must encompass the product at issue as well as all economic substitutes for the product." *Newcal Indus.*, 513 F.3d at 1045. "The outer boundaries of a product market are determined by the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe Co. v. United States*, 370 U.S. 294, 325 (1962). Interchangeability and cross-elasticity of demand refer to "the availability of products that are similar in character or use to the product in question and the degree to which buyers are willing to substitute those similar products for the product." *F.T.C. v. Swedish Match*, 131 F. Supp. 2d 151, 157 (D.D.C. 2000). Ultimately, "the relevant mar-

ket must include 'the group or groups of sellers or producers who have actual or potential ability to deprive each other of significant levels of business.'" *Newcal Indus.*, 513 F.3d at 1045 (quoting *Thurman Indus., Inc. v. Pay N Pak Stores, Inc.*, 875 F.2d 1369, 1374 (9th Cir. 1989)). The relevant market need not "be pled with specificity," and "[a]n antitrust complaint therefore survives a Rule 12(b)(6) motion unless it is apparent from the face of the complaint that the alleged market suffers a fatal legal defect" or is "facially unsustainable." *Id.*

SolarCity alleges "the relevant product market is the provision of electric power to end-use residential, governmental, and businesses consumers. ... In this market, power may be provided by various sources, such as through outright sale of power, or by the lease or sale of distributed systems. ..." (Doc. 39, ¶ 49.) It alleges that its rooftop solar energy systems provide customers the ability to "generate their own electricity on their own property," which "reduces the amount of electricity that customers need to buy from SRP [and] allows customers to save money, and conserve natural resources." (*Id.*, ¶ 3.) In addition, distributed solar systems and SRP's Community Solar plan are close substitutes. (*Id.*, ¶ 57.)

SolarCity's relevant market, though narrowly defined, is not facially unsustainable. The product market is the provision of electricity to residential and commercial customers, which includes public utilities and distributed solar systems. The geographic market extends to the outer boundaries of SRP's service area, at which point consumers must purchase electricity from another regional source. Because distributed solar systems produce electricity at a cheaper rate than from public utilities, customers increasingly made the switch

to self-generate, reducing the amount of electricity they had to purchase from the District. Outside of distributed solar and public utility electricity, there are no other economically feasible electricity sources for consumers.

The District argues that a "retail electricity market that includes self-generated power *and* equipment suppliers to self-generating customers is facially implausible." (Doc. 53 at 21 (emphasis in original).) It asserts SolarCity's product is not interchangeable with retail electricity because customers who self-generate still must purchase retail electric power from SRP. Accepting SolarCity's market definition, "*any* supplier of *any* equipment used to generate electricity would be included," such as "companies that manufacture and supply wind turbines, hydroelectric dams, or gasoline generators." (*Id.* at 20, 21.)

The fact that customers who purchase SolarCity's product still have to purchase electricity from the District does not undermine the interchangeability of the two products. Customers can either purchase electricity from the District, or they can purchase SolarCity's product (or other distributed solar products) and generate some of their own electricity, which reduces their need to purchase the District's product. The extent to which the product is entirely interchangeable is lessened, but either way, the customer is receiving electricity. Moreover, "when a customer can replace the services of an external product with an internally-created system, this 'captive output' (i.e. the self-production of all or part of the relevant product) should be included in the same market." *United States v. Sungard Data Sys., Inc.*, 172 F. Supp. 2d 172, 186 (D.D.C. 2001) (internal quotations omitted). In addition, unlike distributed solar, gasoline generators, wind turbines, and hydroelec-

tric dams are not reasonable substitutes for public utility electricity because they are not economically feasible options for the average consumer.

SolarCity's alleged relevant market is defined narrowly because electricity customers allegedly have only two economically feasible choices for obtaining electricity in the area, either from the District or from solar power. Prior to the District's implementation of the SEPPs, SolarCity was installing a large number of distributed solar systems in the District's territory. (Doc. 39, ¶ 17.) Distributed solar systems were reducing the amount of electricity the District sold, thereby depriving it of business. *See Newcal Indus.*, 513 F.3d at 1045. When SRP imposed an extra fee for customers with self-generating systems, customers switched back to purchasing all of their electricity from SRP. This dynamic illustrates that SolarCity and the District have the actual ability to deprive each other of significant business in the relevant market. *See Newcal Indus.*, 513 F.3d at 1045 (quoting *Thurman*, 875 F.2d at 1374).

**b. Antitrust Injury**

In order to have standing to bring its claims, SolarCity must demonstrate antitrust injury. "Only those who meet the requirements for 'antitrust standing' may pursue a claim under the Clayton Act; and to acquire 'antitrust standing,' a plaintiff must adequately allege and eventually prove 'antitrust injury.'" *Glen Holly Entm't, Inc. v. Tektronix Inc.*, 343 F.3d 1000, 1007 (9th Cir. 2003) (quoting *Am. Ad Mgmt, Inc. v. Gen. Telephone Co. of Cal.*, 190 F.3d 1051, 1054 (9th Cir. 1999)).

"Antitrust injury is defined not merely as injury caused by an antitrust violation, but more restrictively as 'injury of the type the antitrust laws were intended to prevent and that flows from that which makes de-

fendants' acts unlawful.'" Glen Holly, 343 F.3d at 1007-08 (quoting *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977)). In addition, "'the injured party [must] be a participant in the same market as the alleged malefactors.'" *Id.* at 1008 (quoting *Am. Ad*, 190 F.3d at 1057). "In other words, the party alleging the injury must be either a consumer of the alleged violator's goods or services or a competitor of the alleged violator in the restrained market." *Eagle v. Star- Kist Foods, Inc.*, 812 F.2d 538, 540 (9th Cir. 1987). "In analyzing whether [the plaintiff] participate[s] in the same market, the focus is upon the reasonable interchangeability of use or the cross-elasticity of demand between the services provided by [the plaintiff] and by [the defendants]." *Bhan v. NME Hosp., Inc.*, 772 F.2d 1467, 1470-71 (9th Cir. 1985). The antitrust laws are meant to "protect competition as a whole, not individual competitors." *Brunswick*, 429 U.S. at 488.

SolarCity plausibly alleges that it is a competitor of the District. It claims that it "offers equipment and services that provide electricity—specifically solar-generated electricity—to customers. By using SolarCity's equipment and services, customers reduce the amount of power that consumers purchase from SRP." (Doc. 39, ¶ 50.) It alleges it has the ability to deprive SRP of business. SolarCity further claims that "SRP fully recognizes that SolarCity and other distributed solar providers are competitors," given that at least one SRP employee has referred to SolarCity as "the enemy." (*Id.*, ¶ 51.) In addition, "a trade group with which SRP corresponded during the SEPPs' approval process—has published a report noting that distributed solar is one of many 'disruptive technologies ... *that may compete with utility-provided services*' and that '[a]s the cost curve for these technologies improves,

they could directly threaten the centralized utility model.'" (*Id.* (emphasis in original).) SolarCity alleges the Arizona legislature has "expressly recognized that 'self-generation' by customers reduces demand from entities such as SRP." (*Id.*, ¶ 52.)

The District asserts that SolarCity does not compete with the District as a matter of law because it has not applied for or obtained the certificate necessary to supply retail electricity in Arizona. But the statutes cited by the District apply to "electricity suppliers," which are defined as "public service corporation[s] that offer[] to sell electricity to a retail electric customer in this state." A.R.S. §§ 40-201, 40-207. They do not apply to private companies that provide alternate access to retail electricity.

The District also argues that SolarCity fails to allege harm to competition. But SolarCity alleges the SEPPs "have the purpose and effect of eliminating future distributed solar installations" and that the "only practicable way to escape the charges is to forgo installing distributed solar systems or to radically reduce peak usage," which is impracticable. (Doc. 39, ¶¶ 107, 109.) SolarCity further alleges the SEPPs make it "impossible for commercial, municipal, and educational customers to obtain any viable return on a new distributed solar investment," and that the "clear purpose of the SEPPs is not to recoup reasonable grid-related costs from distributed solar customers, but to prevent competition from SolarCity (and other providers of distributed solar) by punishing customers who deal with such competitors[.]" (*Id.*, ¶¶ 111, 113.) It asserts it has lost substantial business because the SEPPs have "made rooftop solar profoundly uneconomical." (*Id.*, ¶ 123.) These allegations sufficiently allege harm to competi-

tion in the retail electricity market. SolarCity has adequately alleged antitrust injury.

**2. Antitrust Claims**

**a. Claims Based on an Illegal Agreement**

Count three alleges unreasonable restraint of trade in violation of § 1 of the Sherman Act. Count four alleges exclusive dealing in violation of § 3 of the Clayton Act. Count seven alleges unreasonable restraint of trade in violation of Arizona's antitrust act.[3] An essential element of these counts is an illegal agreement between two or more persons to retrain trade or exclusively deal with one another. *See* 15 U.S.C. §§ 1, 14; A.R.S. § 44-1402. The District argues SolarCity has failed to plead an agreement.

SolarCity alleges the "SEPPs are agreements (indeed, agreements in restraint of trade) within the meaning of the antitrust laws because they form [] a critical part of the express contract that customers have with SRP." (Doc. 39, ¶ 118.) "The SEPPs are exclusionary because they punish customers for dealing with SRP's competitors by raising prices those customers must pay for a product[.]" (*Id.*, ¶ 119.) SolarCity alleges these agreements restrain trade and "constitute unreasonable exclusive-dealing agreements[.]" (*Id.*, ¶ 119(a).)

SolarCity fails to plausibly allege an agreement or conspiracy to restrain trade. Section 1 of the Sherman Act "prohibits agreements that unreasonably restrain trade by restricting production, raising prices, or oth-

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[3] The language of the AUSAA is derived from the Sherman Act, and thus the two claims will be analyzed together. *See Lake Havasu City v. Rancho Disposal Serv., Inc.*, 860 F.2d 1089 (9th Cir. 1988) (unpublished table decision).

erwise manipulating markets to the detriment of consumers." *In re Musical Instruments & Equip. Antitrust Litig.*, 798 F.3d 1186, 1191 (9th Cir. 2015). Such agreements are either horizontal (between competitors), or vertical (between manufacturer and retailer). *Id.* SolarCity claims the SEPPs are unlawful vertical restraint agreements between the District and its customers. But an agreement requires at least two participants, and SolarCity does not allege that the customers agreed to restrain trade by raising rates. Rather, the District unilaterally set price terms that have an allegedly anticompetitive effect. Although "a single firm's restraints directly affect prices and have the same economic effect as concerted action might have, there can be no liability under § 1 in the absence of agreement." *Fisher v. City of Berkeley*, 475 U.S. 260, 266 (1986).

SolarCity argues "[u]nreasonable restraints of trade are often contained in agreements between firms and their customers, regardless of whether the customer shares the anticompetitive motivation of the supplier." (Doc. 58 at 27.) But it points to no authority in support, and finding that such an agreement exists between an antitrust malefactor and an unwitting customer would potentially subject the customer to criminal and civil liability simply for entering into a sales contract. An antitrust plaintiff must allege the antitrust defendant and another party "had a conscious commitment to a common scheme designed to achieve and unlawful objective." *49er Chevrolet, Inc. v. Gen. Motors Corp.*, 803 F.2d 1463, 1467 (9th Cir. 1986). SolarCity's complaint contains no such allegations.

SolarCity also fails to allege an agreement necessary for its exclusive dealing claim. Section 3 of the Clayton Act prohibits exclusive dealing arrangements.

*Allied Orthopedic Appliances Inc. v. Tyco Health Care Grp. LP*, 592 F.3d 991, 996 n.1 (9th Cir. 2010). "An exclusive dealing arrangement is an agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012). Generally, the buyer is precluded by contract, either expressly or implicitly, from dealing with other vendors. *See id.* The plaintiff must show an agreement with the defendant, "though not necessarily [] explicit," that the buyer not purchase a competing product. *Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 392 (7th Cir. 1984).

SolarCity fails to plausibly allege an agreement to exclusively deal. Two scenarios exist in this case: either customers who want to use distributed solar will pay the extra fee, or they will not self-generate to avoid the fee. Although the District allegedly intends the latter, charging a higher rate to customers who use distributed solar systems is not the same as an agreement to exclusively deal. The amended complaint does not allege an agreement, express or implied, in which customers will only purchase their electricity from the District.

In sum, the complaint does not allege facts that "raise a reasonable expectation that discovery will reveal evidence of an illegal agreement." *Twombly*, 550 U.S. at 556. Accordingly, count four will be dismissed.

**b. Tying Arrangement Claim**

Count three also alleges a tying arrangement under § 1 of the Sherman Act. "A tying arrangement exists when a seller conditions the sale of one product or service (the tying product or service) on the buyer's purchase of another product or service (the tied product or

service)." *Cty of Tuolumne v. Sonora Cmty. Hosp.*, 236 F.3d 1148, 1157 (9th Cir. 2001). Tying arrangements "cannot exist unless two separate product markets have been linked." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 21 (1984), *abrogated on other grounds by* 547 U.S. 28 (2006). Whether separate markets exist depends "on the character of the demand for the two items," i.e., whether the items are "distinguishable in the eyes of buyers." *Id.* at 20. The District argues SolarCity has failed to plausibly allege that two distinct markets exist for grid access and retail electricity.

SolarCity claims the District is only selling grid access if customers also purchase electricity. It alleges "SRP uses its appreciable market power in the grid access market to coerce purchases from SRP in the retail market (or, alternatively, to use its appreciable economic power in one retail sub-market to coerce the purchase of power from SRP in another sub-market)[.]" (Doc. 39, ¶ 164.) It further alleges that "[t]hese markets are separate markets, as is illustrated by the separate demand for the products and services in each." (Id.) SolarCity alleges the grid access market has inelastic demand, has high barriers to entry, and that SRP has unbundled grid access from power sales. (*Id.*, ¶¶ 59, 61, 63, 67.) It claims that "the growth of distributed generation confirms that consumers have separate demand for power and for the facilities that enable always-on power." (Doc. 58 at 27.)

SolarCity fails to plausibly allege that a separate market exists for grid access. It alleges the "power delivery system," which includes "transmission" and "distribution" of electricity, is the "the grid." (Doc. 39, ¶ 61 (chart).) In other words, the grid is the delivery system for electricity. But without electricity running

through it, the grid is simply the District's infrastructure necessary to deliver its product to customers. Access to this infrastructure does not provide customers the ability to produce their own electricity, and SolarCity does not allege otherwise. It is thus implausible that a separate demand exists for grid access, especially given customers "still need to purchase *both* retail electric power and grid access from SRP to have access to power at all times[.]" (*Id.*, ¶ 63 (emphasis added).) Customers cannot simply "plug in" to the grid and generate power. The two products are not "distinguishable in the eyes of" customers, *see Jefferson Parish*, 466 U.S. at 20, as customers would have little use or demand for grid access alone.

SolarCity asserts this is a factual question. But its own allegations give rise to the inference that the two products are one and the same, not separate with distinct markets. As such, this claim fails.[4]

**c. Monopoly Claims**

Counts one and two allege monopoly maintenance and attempted monopolization in violation of § 2 of the Sherman Act, respectively. Counts five and six allege monopoly maintenance and attempted monopolization in violation of the AUSAA, respectively. The District does not dispute allegations that it has monopoly power in the relevant market. Instead, it argues SolarCity fails to adequately plead any anticompetitive conduct because there are no allegations of below-cost pricing or an antitrust duty to deal. These arguments mischaracterize SolarCity's theory and are unpersuasive.

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[4] Count three also alleges unreasonable restraint of trade in violation of § 1 of the Sherman Act. Because both theories are implausible, count three is dismissed.

"Section 2 of the Sherman Act makes it unlawful for a person to monopolize or attempt to monopolize 'any part of the trade or commerce among the several States.'" *Aerotec Intern., Inc. v. Honeywell Intern., Inc.*, 4 F. Supp. 3d 1123, 1136 (D. Ariz. 2014) (quoting 15 U.S.C. § 2). "The possession of monopoly power alone is not an antitrust violation. It must be accompanied by an element of anticompetitive conduct." *Id.* at 1136-37. An antitrust plaintiff must demonstrate both the monopoly power of the defendant in the relevant market, and "'the willful acquisition or maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" *Verizon Commc'ns Inc. v. Law Offices of Curtis v. Trinko, LLP*, 540 U.S. 398, 407 (2004) (quoting *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966)).

In *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S 585, 595 (1985), the owner of a ski resort brought suit under § 2 of the Sherman Act against a competing owner of three ski resorts. The plaintiff alleged the defendant monopolized the market for downhill skiing services by opting out of participating in an interchangeable liftticket, which provided customers access to all four resorts. *Id.* The parties had jointly offered this ticket for several years, but after the defendant opted out, the plaintiff's market share dropped significantly because customers found it inconvenient to only have access to the plaintiff's resort. *Id.* at 594. The defendant did not dispute that it had acquired a monopoly, but argued that it had no duty to deal or cooperate with the plaintiff and that its conduct was not anticompetitive. *Id.* at 600.

The Court disagreed. It found that although high value has been placed on the "right to refuse to deal

with other firms," such a right is not unqualified. *Id.* at 601. The defendant "elected to make an important change in a pattern of distribution that had originated in a competitive market and had persisted for several years." *Id.* at 603. Such a decision is not necessarily anticompetitive, however, unless "the conduct in which it engaged to implement that decision, can fairly be characterized as exclusionary[.]" *Id.* at 604. The Court noted the important distinction between practices that exclude or restrict competition and those that reflect superior business acumen, success of a business, or luck. *Id.* Whether conduct is exclusionary depends on "its impact on consumers and whether it has impaired competition in an unnecessarily restrictive way." *Id.* at 605. The Court found the "evidence supports an inference that [the defendant] was not motivated by efficiency concerns" and that it "made a deliberate effort to discourage its customers from doing business with its smaller rival." *Id.* at 610.

SolarCity's allegations are similar to those in *Aspen Skiing*. It alleges the District is a monopolist and imposed the SEPPs to exclude SolarCity from a market that was previously supporting such competition: "SRP has reversed a long-time course of conduct that had generated customer goodwill, benefitted SRP in the short-[term] and medium-term ... for the sake of excluding longer-term competition by preventing customers in its service area from installing distributed solar from competitors like SolarCity." (Doc. 39, ¶ 119(c).) SolarCity claims the SEPPs limit the choices of consumers because they will decide against purchasing SolarCity's products. These allegations plausibly allege anticompetitive conduct by an alleged monopolist.

The District argues that SolarCity fails to allege that the District "is willing to forsake short-term prof-

its to achieve an anticompetitive end." (Doc. 65 at 16.) But SolarCity expressly alleges this in its complaint. (*See* Doc. 39, ¶ 119(c).) The District also claims *Aspen Skiing* only applies in rare circumstances, (Doc. 65 at 16 n.9), but fails to explain why it does not apply to this case.

Accordingly, SolarCity has plausibly alleged that (1) the District has monopoly power, (2) it made a decision to change the market, (3) this decision was motivated by a desire to restrict competition, and (4) the decision has the effect of limiting competition. Counts one, two, five, and six survive.[5]

**C. State Law Claims Alleged Against the District**

Count eight alleges intentional interference with prospective economic advantage. Count nine alleges intentional interference with contract. The District argues these claims should be dismissed because SolarCity fails to demonstrate that its actions were "improper." (Doc. 53 at 29.)

SolarCity alleges SRP retroactively applied the SEPPs by only grandfathering in customers who installed distributed solar systems prior to December 8, 2014. (Doc. 39, ¶ 116.) SolarCity claims SRP chose this date to interfere with its contract with Maricopa Community Colleges "to implement multiple solar installations," which Maricopa County voted to authorize on

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[5] The District argues SolarCity's state law antitrust claims are barred by A.R.S. § 30-810(B), which requires a "party" to a decision of the Board of the District to file an application for rehearing before it may bring an action in court. But SolarCity claims it was not a party to the decision, and the Court has declined to take judicial notice of the evidence on which the District relies that purportedly demonstrates otherwise. The Court will not dismiss the claims on this basis.

December 9, 2014. (*Id.*, ¶ 120(b).) Coupled with SolarCity's allegations of illegal anticompetitive conduct by the District, these allegations are sufficient, and these claims will not be dismissed.

**D. The District's Defenses**

The District raises several defenses to SolarCity's claims, many of which rest on its status as a political subdivision of the state. Each will be addressed in turn.

**1. Local Government Antitrust Act**

The Local Government Antitrust Act ("LGAA") provides that "[n]o damages, interest on damages, costs, or attorney's fees may be recovered under section 4 ... of the Clayton Act ... from any local government[.]" 15 U.S.C. § 35(a). "Local government" is defined in relevant part as "a school district, sanitary district, or any other special function governmental unit established by State law in one or more States[.]" *Id.* § 34(1). The LGAA "provides absolute immunity when the terms of the statute are met" and "courts should strive to resolve the immunity issue as early as possible, with minimum of expense and time to the parties." *Sandcrest Outpatient Servs., P.A. v. Cumberland*, 853 F.2d 1139, 1148 n.9 (9th Cir. 1988); *see also Palm Springs Med. Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. 454 (C.D. Cal. 1986). "The question of whether a defendant is entitled to absolute immunity is a question of law[.]" *Tennison v. City & Cty. of S.F.*, 570 F.3d 1078, 1087 (9th Cir. 2008).

The District argues it falls under the protection of the LGAA because it is a special function governmental unit established under A.R.S. § 48-2301. As a matter of law, the District is a political subdivision of the state

created by state law and the state constitution. *See* A.R.S. § 48-2302; *see also* Ariz. Const. art. 13, § 7. SolarCity's allegations do not undermine the District's status. Consequently, the LGAA shields the District from SolarCity's antitrust damages claims.[6]

**2. Absolute Immunity under State Law**

The District argues it is absolutely immune from SolarCity's state law damages claims under Arizona law. A.R.S. § 12-820.01 provides "absolute immunity" for a public entity's "exercise of a judicial or legislative function." As a political subdivision of the state, the District is a "public entity" under A.R.S. § 12-820(7) ("'Public entity' includes this state and any political subdivision of this state.").

The District argues that ratemaking by a public utility is a legislative function. *See Arizona Corp. Comm'n v. State ex rel. Woods*, 830 P.2d 807, 812 (Ariz. 1992) (noting ratemaking is a legislative power of the Arizona Corporation Commission); *Arizona Corp. Comm'n v. Superior Court*, 480 P.2d 988, 991 (Ariz. 1971) (same). But the cases it cites apply to the Arizona Corporation Commission's ratemaking power, not that of the District. Whether the District's ratemaking power is a legislative function is a question of fact not appropriately before the Court.

Alternatively, the District argues it is immune because it exercised "an administrative function involving

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[6] SolarCity argues the District must demonstrate that an award of antitrust damages would fall upon taxpayers in the absence of immunity. It cites *United Nat'l Maint., Inc. v. San Diego Conv'tn Ctr. Corp.*, 2010 WL 3034024, at *4 (S.D. Cal. Aug. 3, 2010) in support of this requirement. But that case cites no authority for such a requirement, and the Court finds none in the language of the statute.

the determination of fundamental governmental policy." A.R.S. § 12-820.01(B). It asserts the rate changes were necessary "to cover the fixed costs of maintaining the electrical grid so that the District can provide electricity and water to hundreds of thousands of customers." (Doc. 53 at 8.) But this is question of fact not appropriately addressed at this stage, and the Court will not dismiss the state claims on these grounds.

**3. Arizona's Notice of Claim Statute**

The District claims SolarCity's state law claims should be dismissed because it failed to comply with A.R.S. § 12-821.01, which requires claimants to submit a notice of claim specifying the amount of damages it seeks against the public entity prior to filing suit. SolarCity argues it submitted the required notice, but the District argues it failed to comply with the statute because it did not identify a specific sum that it would accept to settle its claims. "Rather, SolarCity's notice states that it 'is not willing to settle damages independent of [the District's] consent to cease and desist from the business practices at issue ... in a manner enforceable by court injunction or contempt proceedings.'" (Doc. 53 at 9.)

SolarCity's notice of claim, which the Court has taken judicial notice of, specified the amount of damages as $45 million, but conditioned settlement on injunctive relief. (Doc. 54-10 at 2.) Conditional settlement offers do not violate the statute, *see Auble v. Maricopa Cty.*, No. CV 08-1822-PHX-MHM, 2009 WL 3188378, at *3 (D. Ariz. Sept. 30, 2009), and thus the Court will not dismiss SolarCity's state law claims on this ground.

**4. State Action Doctrine**

The District argues it is immune from antitrust liability under the state action doctrine, which "exempts qualifying state and local government regulation from federal antitrust, even if the regulation at issue compels an otherwise clear violation of the federal antitrust laws." *Cost Mgmt. Servs., Inc. v. Wash. Nat. Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996) (internal quotation marks and citation omitted). "A state law or regulatory scheme cannot be the basis for antitrust immunity unless, first the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and second, the State provides active supervision of anticompetitive conduct undertaken by private actors." *F.T.C. v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992).

The question of whether Arizona has articulated a clear policy permitting anticompetitive conduct in the retail electricity market and "the question of whether a state has 'actively supervised' a state regulatory policy [are] a factual one[s] which [are] inappropriately resolved in the context of a motion to dismiss." *Cost Mgmt. Servs.*, 99 F.3d at 942-43. SolarCity alleges that Arizona has a policy permitting competition in the relevant market and that the District operates without supervision. (Doc. 39, ¶¶ 42, 65.) This is all that is necessary at this stage.

**5. Filed-Rate Doctrine**

The District argues all of SolarCity's claims are barred by the filed-rate doctrine, which "precludes interference with the rate setting authority of an administrative agency[.]" *Wah Chang v. Duke Energy Trading & Mktg.*, 507 F.3d 1222, 1225 (9th Cir. 2007). Rates that are deemed reasonable by a regulatory agency are insulated from challenge. *See Ark. La. Gas Co. v. Hall,*

453 U.S. 571, 577 (1981). Originally, the doctrine applied to rates reviewed and filed by federal agencies. *See id.* at 578 (applying doctrine to bar claim challenging rates set by the Federal Energy Regulatory Commission for sale of natural gas). Several states have adopted the doctrine, *see Qwest Corp. v. Kelly*, 59 P.3d 789, 800 (Ariz. Ct. App. 2002) (listing cases), but Arizona has not, *see id.*; *see also Johnson v. First Am. Title Ins. Co.*, No. CV-08-01184-PHX-DGC, 2008 WL 4850198, at 4 (D. Ariz. 2008) (Arizona "has never adopted the filed-rate doctrine").

The Court need not determine whether Arizona would adopt the filed-rate doctrine because it does not apply here. SolarCity does not challenge the District's electricity rates as unreasonable, but instead alleges the District imposed the rates to exclude it from the market. Whether the rates are reasonable has no bearing on whether the District engaged in anticompetitive conduct. The Court will not dismiss SolarCity's claims on this ground.

### 6. *Noerr-Pennington* Doctrine

Last, the District argues the *Noerr-Pennington* doctrine bars all of SolarCity's claims. But the *Noerr-Pennington* doctrine protects those who lobby in favor of anticompetitive governmental action, not those who actually commit it. *See Allied Tube & Conduit Corp. v. Indian Head, Inc.*, 486 U.S. 492, 499 (1988). It has no application in this case, and the District appears to have abandoned the argument in its reply brief. (See Doc. 65.)

## CONCLUSION

Accordingly, the Association is dismissed from this action. Counts three and four, as well as SolarCity's

claims for damages under federal and state antitrust laws, are dismissed.

**IT IS ORDERED** that

1. The District's motion to dismiss, (Doc. 53), is **GRANTED IN PART.**
2. The Association's motion to dismiss, (Doc. 52), is **GRANTED.**
3. The District's request for judicial notice, (Doc. 54), is **GRANTED IN PART.**

Dated this 27th day of October, 2015.

/s/ Douglas L. Rayes
Douglas L. Rayes
United States District Judge