Nos. 20-15301, 20-15476

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

WILLIAM ELLIS, ET AL.,
Plaintiffs-Appellants and Cross-Appellees,

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Defendant-Appellee and Cross-Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA (JUDGE SUSAN M. BRNOVICH)

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PLAINTIFFS-APPELLANTS

MAKAN DELRAHIM
Assistant Attorney General
MICHAEL F. MURRAY
Deputy Assistant Attorney General
ANDREW J. ROBINSON
Counsel to the Assistant Attorney General
DANIEL E. HAAR
MATTHEW C. MANDELBERG
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice,
Antitrust Division
950 Pennsylvania Ave., NW
Washington, DC 20530-0001
Tel. 202-353-0256

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STATEMENT OF INTEREST

The United States has primary responsibility for enforcing the federal antitrust laws, *United States v. Borden Co.*, 347 U.S. 514, 518 (1954); 15 U.S.C. §§ 4, 25, and has a strong interest in their correct application. The United States investigates antitrust violations arising from exclusionary conduct, and analysis of the "antitrust injury" doctrine is generally intertwined with proper analysis of the alleged theory of harm. In addition, because private enforcement—when rooted in sound interpretation of the antitrust laws—can be an important adjunct to government enforcement, doctrines such as "antitrust injury" should not keep a private action out of court when the plaintiff is a consumer injured by the very conduct the court has found to be anticompetitive.

The United States also has a strong interest in the proper application of the state-action defense articulated in *Parker v. Brown*, 317 U.S. 341 (1943). That defense protects the deliberate policy choices of sovereign states to displace competition with regulation or monopoly public service. Overly broad application of the state-action defense,

however, sacrifices the important benefits that antitrust laws provide consumers and undermines the fundamental national policy favoring robust competition. The United States has filed amicus curiae briefs in appropriate cases to prevent such overly broad applications, including a case in this Court challenging the same Salt River Project Agricultural Improvement and Power District (hereafter "SRP") rate plan that is challenged here. *SolarCity Corp. v. Salt River Project Agricultural Improvement and Power Dist.*, 859 F.3d 720 (9th Cir. 2017); *Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769 (9th Cir. 2018).

We file this brief under Federal Rule of Appellate Procedure 29(a) and urge the Court to reverse the district court's holding on the issue of antitrust injury. If the Court reaches the state-action defense, we urge the Court to affirm the district court's holding that SRP did not meet its burden to show that the "clear-articulation" requirement of the defense is satisfied.[1]

[1] The United States takes no position on any other issue in the case at this time.

STATEMENT OF ISSUES PRESENTED

Whether, when the district court has found that Plaintiffs-Appellants sufficiently allege facts to establish the exclusionary conduct element of a Sherman Act Section 2 claim, Plaintiffs-Appellants adequately allege "antitrust injury" when they are customers who allege that they paid higher prices or suffered a loss of choice in electric service supply because of Defendant-monopolist's exclusionary conduct.

Whether, when the Arizona legislature has expressly adopted de-regulatory legislation, SRP can meet its burden to show that the clear-articulation requirement of the state-action defense has been satisfied.

STATEMENT

Defendant-Appellee SRP is a public power entity that provides electricity to residential and commercial customers in the Phoenix, Arizona metropolitan area. Plaintiffs allege,[2] however, that SRP *inter alia* "is not recognized by the State of Arizona or by any law as a regulator or regulatory authority in the retail [electricity] market," First Amended Class Action Complaint ("FAC") ¶ 35, and, unlike other

[2] For the purposes of this brief addressing a motion to dismiss, we take as true the facts alleged in the First Amended Class Action Complaint.

utility providers, SRP's rates, rules, and regulations are exempt from the control of Arizona's public utility regulator, the Arizona Corporation Commission. *Id*. ¶ 37. SRP has monopoly power, providing over 95% of retail customers' electricity in its central Phoenix service territory through a variety of plans and sources. *Id*. ¶¶ 48-49. SRP competes with solar energy systems, and the third-party vendors who sell, lease, or install such systems, in the market to provide electricity to retail consumers. *Id*. ¶¶ 44-46, 66.

The named Plaintiffs are four residential customers of SRP who self-generate some of their electricity through personal solar energy systems. FAC ¶¶ 20-27. By investing in solar energy systems, SRP customers such as Plaintiffs "significantly reduce the amount of electricity that they need to purchase from [SRP]," *id*. ¶ 44, but "[s]ince technologies that would allow customers to completely remain off the grid are not yet economically viable," "all customers within [the market] generally must purchase some retail electricity" from SRP. *Id*. ¶ 52.

In 2015 SRP adopted a new rate structure ("Standard Electric Price Plans" or "SEPPs") that included a new E-27 price plan required for self-generating solar customers. FAC ¶¶ 72-73. The E-27 price plan

applies only to customers who began self-generating solar power after December 8, 2014. Customers who self-generated solar energy before December 8, 2014 are treated like non-solar customers. *Id*. ¶¶ 81, 88-89. "The E-27 price plan is a demand based rate plan, which is exclusively applied to SRP's customers who use solar energy systems to self-generate electricity for their property. The E-27 plan for solar energy customers includes a high 'distribution charge' of approximately $16.64 or $29.64 per month. In comparison, SRP charges its non-solar customers approximately $4.20 as an equivalent 'distribution charge.'" *Id*. ¶ 75. "In addition to a higher distribution charge, SRP solar customers are charged a monthly 'demand charge' for each kilowatt of usage calculated in the solar customer's most intensive 30 minute peak period, regardless of who generates the power used during that peak period. The 'demand charge' is based on the highest usage of power during the 30 minute peak period based on SRP's on-peak hours." *Id*. ¶ 76.

"According to SRP data, solar customers subject to the E-27 plan will pay approximately an additional *$600 a year* compared to what that customer would have paid under the previous rate plans that applied to

solar customers." FAC ¶ 78. "Furthermore, solar customers under the E-27 plan are required to maintain service under this discriminatory plan for as long as they are self-generating electricity with a solar energy system. Since the demand charge is only applied with a solar energy system, if a customer opted to remove his or her solar energy system the demand charge would no longer be applied to their monthly bill." *Id*. ¶ 79.

According to the FAC, the SEPPs make self-generating solar energy uneconomical, and they thereby force market customers to purchase electricity exclusively from SRP. "The only practicable way to avoid the charges under the E-27 price plan is to forego installing a solar system or to radically reduce usage during on-peak hours." FAC ¶ 78. Plaintiffs allege that the SEPPs are "aimed at maintaining [SRP's] monopoly power; impeding solar development despite its recognized benefits; quashing competition for electricity from self-generating customers with solar energy systems; and generating additional revenues for [SRP] through exploitation of its monopoly power." *Id*. ¶¶ 5-10, 46, 71-72, 84. They further allege "[t]here is no rational basis" for adopting the SEPPs and that SRP's rationale of recouping fixed

expenses required to service post-2014 solar customers is pretextual. *Id*. ¶¶ 9, 96, 100, 104-05.

Plaintiffs filed this suit on February 22, 2019, claiming that the SEPPs violate federal antitrust law (specifically, claims for monopolization and attempted monopolization under the Sherman Act, 15 U.S.C. § 2), Arizona antitrust law, federal and Arizona equal protection clauses, and other Arizona laws. SRP moved to dismiss under Rule 12(b)(6), Fed. R. Civ. P.

In an Order filed January 10, 2020, the district court granted SRP's motion in part and denied it in part.

With respect to SRP's assertion of the state-action defense to antitrust liability, the court found that under the test of *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), Arizona has not articulated a clear and affirmative policy to permit SRP's alleged anticompetitive conduct. Order at 14-17. The court found that "[t]he numerous, conflicting statutes cited by the parties belie any adoption of a clear and affirmative policy or foreseeable result of a statute permitting anticompetitive conduct in the retail electricity market. If anything, the statutes signal a shift by Arizona's legislature

to *promote* competition in the retail electricity market in the future." *Id*. at 16.

Addressing Plaintiffs' claims of monopolization and attempted monopolization under 15 U.S.C. § 2, the court first found that SRP did not challenge Plaintiffs' allegation that SRP has monopoly power in a relevant market, but in any event the FAC plausibly alleges monopoly power. Order at 23. The court further found that the FAC plausibly alleges that SRP engaged in exclusionary conduct. "The FAC alleges a pricing scheme differentiating between self-generating solar energy customers and other customers with the sole purpose of fortifying its monopoly against the rising competitive threat of solar power." *Id*. at 24.

With respect to antitrust injury, a required showing for private plaintiffs, the court found that "the FAC contains no allegations that the District unlawfully restrained competition, the principal evil of antitrust laws. If anything, the District's higher prices for solar energy customers encourages competition in alternative energy investment by allowing for new market entrants with its higher prices." Order at 27.

The court explained that the FAC accepts that "technologies that would allow consumers to completely remain off the grid are not yet economically viable." Order at 27 (quoting FAC ¶ 52). From this, the court read the FAC as conceding that household solar energy systems themselves are "*still* uneconomical." *Id.* Therefore, SRP's "alleged anticompetitive conduct of adopting the SEPPs did not cause Plaintiffs' injury because they would have been harmed anyway from using an uneconomical product." *Id*. The court accordingly dismissed the Sherman Act claims. [3]

The district court then granted Plaintiffs leave to amend their Sherman Act claims. Order at 27-28. On February 21, 2020, however, Plaintiffs filed their notice of appeal.

SUMMARY OF ARGUMENT

On antitrust injury, the district court made analytic errors in its decision that warrant reversal and remand. First, when SRP adopts

[3] The district court stated in a footnote that it was not addressing the requirement of private plaintiff antitrust standing, but still noted that it agreed with SRP that the party with antitrust standing to bring a claim of attempted monopolization is the competitor, not the consumer. Order at 27 n.17.

pricing practices that "penalize solar energy investments," Order at 25, and "force consumers to exclusively purchase electricity from [SRP] by making solar energy system installation uneconomical," *id.*, SRP engages in unlawful exclusionary conduct by foreclosing competition. Plaintiff customers, the beneficiaries of that competition, suffer antitrust injury when they are forced to pay higher prices due to Defendant's exclusionary conduct. Second, the antitrust laws protect competition to meet portions of consumer demand. Third, SRP's high prices that result from unlawful exclusionary practices and that raise costs on customers that opt to use its solar energy rivals cannot reasonably be said to simultaneously "*encourage[]* competition in alternative energy investment," *id.* at 27. Even if they did, this would not prevent Plaintiffs from establishing antitrust standing.

With respect to the state-action defense, however, the district court held correctly that SRP did not meet its burden to satisfy the clear-articulation requirement. The state-action doctrine is disfavored as a defense, and construed narrowly, because it conflicts with the fundamental national policy in favor of competition. Under these

standards, SRP did not satisfy the clear-articulation requirement because Arizona statutes express a state policy to transition from a regulated monopoly system for the retail sale of electricity to a competitive one. Although SRP has authority to set its own rates, the limits on that authority further demonstrate the Arizona legislature's intent to rely on competition to displace regulation, rather than the reverse.

ARGUMENT

I. Plaintiffs Sufficiently Allege Antitrust Injury.

"Because protecting consumers from monopoly prices is the central concern of antitrust, buyers have usually been preferred plaintiffs in private antitrust litigation. As a result, consumer standing to recover for an overcharge paid directly to an illegal cartel or monopoly is seldom doubted." IIA P. Areeda & H. Hovenkamp, *Antitrust Law* ¶ 345 (4th ed. 2014). Antitrust standing includes the concept of antitrust injury, which is "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977).

As the district court correctly recognized, *see* Order at 25, this Circuit has parsed antitrust injury into four elements: "(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of California*, 190 F.3d 1051, 1055 (9th Cir. 1999). Here, in light of the district court's findings on exclusionary conduct, the Plaintiff-customers' allegations can satisfy this test.

The district court found that Plaintiffs "sufficiently allege[d] exclusionary conduct" by SRP against its solar competition, Order at 24-25. Plaintiffs also alleged that SRP's conduct foreclosed its solar rivals, *e.g.*, FAC ¶ 29 ("ma[king] it economically unfeasible"), and substantially reduced uptake of solar power by SRP's retail customers, *e.g.*, FAC ¶ 86 (by 50 to 96 percent). Nevertheless, the district court illogically concluded that Plaintiffs (SRP's customers) did not suffer antitrust injury due to Defendant's conduct. *Id.* at 27.

The district court's findings contradict its conclusion on antitrust injury. As the district court noted, "[u]ndoubtedly, the FAC alleges harm to Plaintiffs." Order at 26. In particular, SRP foreclosed

competition by imposing higher prices on its customers that made it "economically unfeasible for customers to install solar energy systems," *id.* (quoting FAC ¶ 29), whereas "self-generating solar energy was economically feasible before [SRP] adopted [its pricing scheme,]" *id.* at 27. In other words, SRP's price increases on solar energy systems were both the *source* of harm to competition and the resulting *effect* on consumers.

This alleged harm is "injury of the [antitrust] type." *Brunswick Corp.*, 429 U.S. at 489. To put it simply, and as explained more fully below, it cannot both be true that Plaintiffs have adequately pleaded anticompetitive conduct sufficient for a Section 2 claim, as the court found, and that "the FAC contains no allegations that the District unlawfully restrained competition" for purposes of the antitrust-injury analysis, *id*. at 27.

These contradictory findings on anticompetitive conduct and antitrust injury are inconsistent with the antitrust laws and require reversal of the district court's holding on antitrust injury.[4]

A. The District Court Correctly Held that the FAC Adequately Alleges Unlawful Conduct.

Taking as true the facts alleged in the FAC, the district court found that SRP adopted its new pricing scheme to "(1) deter the competitive threat of solar energy systems," "(2) penalize solar energy

[4] The district court, in dicta, also agreed with SRP that the "competitor, not the consumer [like Plaintiffs], is the party with antitrust standing to bring a claim of *attempted monopolization*." Order at 27 n.17. SRP relies on attempted monopolization cases alleging predatory pricing, which is not what the FAC alleges. In predatory pricing cases, "Only when the defendants achieve monopoly . . . is there harm to consumers." Doc. 14-1 at 24 (quoting *Simpson v. U.S. West Commc'ns, Inc.*, 957 F. Supp. 201, 205-206 (D. Or. 1997)). By contrast, in *In re Live Concert Antitrust Litig.*, a class of antitrust consumers was found to have antitrust standing and certified because the court recognized that "the crucial difference between the alleged conduct and predatory pricing is the effect on the ultimate consumer." 247 F.R.D. 98, 152 (C.D. Cal. 2007). In particular, consumers can have antitrust standing in attempted monopolization cases when "consumers suffer harm in the short-run even though Defendants have not yet attained monopoly power." *Id.* at 153. Here, where SRP already has market power and the penalty imposed on consumers for using solar rivals is the means of exclusion, consumers can suffer harm in the short-run even if SRP does not ultimately succeed in removing solar from the marketplace.

investments to fortify the District's monopoly," and (3) "force consumers to exclusively purchase electricity from [SRP] by making solar energy system installation uneconomical." Order at 25. By raising the cost to customers for using its solar rivals, SRP's practices give rise to "the main antitrust objection" to exclusionary conduct: "its tendency to 'foreclose' existing competitors or new entrants from competition in the covered portion of the relevant market." *Omega Environmental, Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997). SRP's pricing practices applied to all its customers in its service territory, FAC ¶ 73, and thus "foreclose competition in a substantial share of the line of commerce affected." *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327 (1961). As the court recognized, these factual pleadings "adequately alleged exclusionary conduct," Order at 25.

B. The District Court Misapplied the Causation Element of Antitrust Injury.

The district court held that the FAC falters on the second element—whether defendant's anticompetitive conduct *caused* harm to the plaintiff. *See* Order at 27. Yet the district court observed that "[u]ndoubtedly, the FAC alleges harm to Plaintiffs." *Id*. at 26. In

particular, SRP's conduct "made it economically unfeasible for customers to install solar energy systems," *id.* (quoting FAC ¶ 29), whereas "self-generating solar energy was economically feasible before [SRP] adopted [its pricing scheme,]" *id.* at 27. Plaintiffs thus suffered harm in the form of higher prices resulting from this exclusionary conduct. Despite its conclusions that the FAC alleges harm to Plaintiffs, Order at 26, the district court determined that Plaintiffs did not suffer antitrust injury, purportedly because they "would have been harmed anyway from using an uneconomical product." *Id*. at 27.

As an initial matter, the district court erred in finding on a motion to dismiss that consumers "would have been harmed anyway" by their purchasing decisions, especially when Plaintiffs claim otherwise in factual allegations that must be taken as true. *E.g.*, FAC ¶¶ 44, 62, 70 (describing consumer demand for solar—even without incentives). Even setting aside the procedural posture, the district court's view of causation is too narrow. Economic theory generally presumes that consumers rationally choose products that enhance their welfare, and the antitrust laws protect competition to serve those consumer preferences. In designing the Sherman Act "as a consumer welfare

prescription," Congress specifically sought to protect "the importance of consumer preference in setting price and output," an aim that the Supreme Court described as "the fundamental goal of antitrust law." *See, e.g.*, *NCAA v. Bd. of Regents*, 468 U.S. 85, 107 (1984). Thus, the relevant question is whether Plaintiffs have alleged that the anticompetitive conduct foreclosed a competitive alternative and resulted in higher prices, not whether Plaintiffs—who opted to pay SRP's inflated prices—exercised the most efficient option available to them.

The district court compounded this error by concluding that solar energy systems are uneconomical because "technologies that would allow consumers to completely remain off the grid are not yet economically viable." Order at 27 (quoting FAC ¶ 52).[5] In other words, the court reasoned that unless solar energy systems can meet a

[5] The district court mistakenly pointed to FAC ¶ 92 to find that Plaintiffs supposedly conceded that "solar energy systems are *still* uneconomical." Order at 27. FAC ¶ 92 alleges that SRP "made [solar energy systems] economically unfeasible" "[b]y implementing the E-27 plan." In other words, solar energy systems are only "uneconomical" *because of SRP's conduct*. Therefore, Plaintiffs made no such concession.

customer's *entire* electric needs, the competition offered by solar power is unprotected by the antitrust laws. This, too, was error.

Customers can make economically sound decisions to rely on more than one supplier, and competition to be one of those suppliers is protected by the antitrust laws. Basic principles of supply and demand suggest that providing purchasers with the option of shifting even part of their demand to a lower-priced, alternative source likely would impact the price at which a product is sold. Accordingly, the antitrust laws protect competition even when firms compete with one another for only a portion of consumer demand. For example, in *ZF Meritor v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012), the court found an antitrust violation when, as here, rivals could fulfill only a portion of customer demand. *See id*. at 283 (rivals could not "satisfy customer demand without at least some [of the dominant supplier's] products"). This Court recognizes "the threat of anticompetitive impact by excluding less diversified but more efficient producers"—rival producers that can only efficiently compete to meet some customer needs. *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 897 (9th Cir. 2008). *See also McWane, Inc. v. FTC*, 783 F.3d 814, 841 (11th Cir. 2015) (finding

anticompetitive a "full-line forcing" strategy using exclusive dealing contracts that were intended to foreclose a rival that could not develop a full line of products before entering the market). In other words, the customer's decision of how much demand to allocate among competing suppliers is protected by the antitrust laws to the same degree as a customer's decision about whom to select among competing suppliers. When plaintiffs allege that defendant's conduct impacted that decision and resulted in higher prices, the necessary causal element is satisfied.

C. Plaintiffs Adequately Allege Harm Flowing From That Which Makes the Conduct Unlawful.

As to the third element, the FAC sufficiently alleges that SRP's exclusionary conduct resulted in solar customers' harm. Retail electricity customers in SRP's service territory have three choices in response to exercises of market power like a price increase from their monopoly electricity provider SRP: (1) pay the increase, (2) reduce electricity usage, or (3) turn to solar competition and meet some of their demand through solar energy systems. Per the FAC, SRP's conduct foreclosed option (3), restricting competition and enhancing SRP's ability to exercise market power. *See* FAC ¶¶ 87, 89-95, 104. The

district court agreed that "[t]hese allegations, if true, rise to the level of exclusionary conduct by the District to oust competition by solar energy system installers and users in the retail electricity market." Order at 20. According to the FAC, SRP's conduct resulted in an estimated "decrease in solar installations rang[ing] from 50 to 96 percent," *id*. ¶ 86, and caused a solar installer that was a competitor to SRP to begin relocating out of state, *id*. ¶ 88. Thus, Plaintiffs' antitrust injury—higher prices resulting from foreclosed access to their preferred solutions on economical terms and from the elimination of the benefits of competition—"flows from that [exclusionary conduct] which makes defendants' acts unlawful." *Brunswick Corp.*, 429 U.S. at 489.

D. The District Court Erred in Concluding that the Antitrust Laws Are Not Intended to Prevent Higher Prices to Consumers.

Finally, the FAC sufficiently alleges facts as to the last element—whether the harm suffered is "of the type the antitrust laws were intended to prevent." *Am. Ad Mgmt.*, 190 F.3d at 1055. On this issue, the district court erred when it found that SRP's conduct did not cause its customers antitrust injury because, "[i]f anything, the District's

higher prices for solar energy customers *encourages* competition in alternative energy investment." Order at 27. The district court's reasoning is paradoxical: there is little incentive to invest in alternative energy when SRP can wield its market power to *penalize* customers who seek to fulfill their energy needs through alternative sources.

In reaching its conclusion, the district court appears to have misunderstood the reasoning from *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004). The Supreme Court explained in that case that the opportunity to prevail in a market and profitably charge high unit prices can induce competition and innovation, *see id.* at 407, but it did not hold that high prices are procompetitive when they result from unlawful exclusionary conduct. That is why the Court in *Trinko* explained that "the possession of monopoly power" alone (which allows a firm to charge high prices) "will not be found unlawful unless it is accompanied by an element of anticompetitive conduct." *Id.* The district court here *did* find that the FAC adequately alleged anticompetitive conduct, and so its use of *Trinko*'s reasoning is misplaced.

As the FAC explains, and the district court accepts, SRP's pricing scheme for its customers who also self-generate solar power was part of what made SRP's conduct exclusionary. The court noted that SRP's objective is to "penalize" and "deter" its solar customers and "force consumers to exclusively purchase electricity from [SRP] by making solar energy system installation uneconomical." Order at 25. Per the FAC, SRP achieved these objectives by "charging solar customers more money for less service" and by "charging solar customers far more than the amount of fixed costs than are attributed to such customers, while charging all other customers a small fraction of the fixed costs attributable to their use of the SRP grid." FAC ¶ 104. In other words, Plaintiffs allege that SRP has selectively raised costs on customers who use its rivals as a way to stamp out competition.

When a monopolist can penalize customers for use of its rivals, the penalty does *not* encourage but rather *discourages* investment in those rivals. *E.g.*, *McWane, Inc.*, 783 F.3d at 838-39 (finding antitrust violation based on monopolist's "supracompetitive prices" that resulted from exclusive dealing contracts making it "infeasible for distributors to

drop the monopolist," while depriving its rival of "the sales and revenue needed to invest in [manufacturing capabilities] of its own").

That charging high prices alone does not constitute anticompetitive conduct in a Section 2 case does not prevent the charging of high prices (especially when done selectively to exclude rivals) from being part of a Section 2 claim. That is the case here: SRP's price increases on customers who rely on solar energy was both the source of unlawful exclusion and the resulting harm that SRP consumers suffered. When anticompetitive conduct results in high consumer prices, that is precisely the type of harm the antitrust laws were designed to prevent. *See United States v. Microsoft Corp.*, 253 F.3d 34, 58 (D.C. Cir. 2001) (antitrust laws protect against conduct that "harm[s] the competitive process and thereby harm[s] consumers"); *Nat'l Soc. of Prof'l Engineers v. United States*, 435 U.S. 679, 695 (1978) ("The Sherman Act reflects a legislative judgment that ultimately competition will produce . . . lower prices"). The district court erred in concluding otherwise.

II. The District Court Correctly Held that SRP is Not Entitled to State-Action Protection from Plaintiffs' Antitrust Claims.

The district court correctly found that the state-action defense does not apply in light of Arizona law and the facts alleged in the FAC, and so this defense does not provide an alternative basis for affirmance.

A. The State-Action Defense to Antitrust Liability is Limited and Disfavored.

Competition is "the fundamental principle governing commerce in this country," *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389, 398 (1978). The Supreme Court, however, has recognized a limited defense to antitrust liability to accommodate principles of federalism and state sovereignty. In *Parker v. Brown*, 317 U.S. 341 (1943), the Court held that "because 'nothing in the language of the Sherman Act . . . or in its history' suggested that Congress intended to restrict the sovereign capacity of the States to regulate their economies, the Act should not be read to bar States from imposing market restraints 'as an act of government.'" *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 (2013) (quoting *Parker*, 317 U.S. at 350, 352).

The Court repeatedly has emphasized, however, that the state-action defense "is disfavored, much as are repeals by implication." *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1110 (2015) (quoting *Phoebe Putney*, 568 U.S. at 225, and *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 636 (1992)). This is because it detracts from "the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws." *Id.* Courts, including this Circuit, therefore interpret the state-action defense "narrowly." *Shames v. California Travel & Tourism Commission*, 626 F.3d 1079, 1084 (9th Cir. 2010); *see also Chamber of Commerce of the United States v. City of Seattle*, 890 F.3d 769, 781 (9th Cir. 2018).

To ensure that the defense is appropriately limited, the Supreme Court has imposed requirements on sub-state entities and private parties that seek to invoke it. Sub-state entities—such as municipalities and state agencies—qualify for state-action protection "when they act pursuant to state policy to displace competition with regulation or monopoly public service." *Phoebe Putney*, 568 U.S. at 225-26. Private actors (and state regulatory boards controlled by active

market participants) can invoke the state-action defense only when they can show (1) that the alleged anticompetitive conduct was taken pursuant to a "clearly articulated and affirmatively expressed . . . state policy" to displace competition, and (2) that the conduct was "actively supervised by the State itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

The district court did not reach the active-supervision requirement, and we take no position on whether that requirement applies to this case or was satisfied. We note, however, this Court's statement that "the question whether a state has 'actively supervised' a state regulatory policy is a factual one which is inappropriately resolved in the context of a motion to dismiss." *Cost Mgmt. Servs., Inc. v. Wash. Nat'l Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996).

B. The District Court Correctly Found that SRP Did Not Show a "Plain and Clear" State Policy to Displace Competition.

The "inquiry with respect to the clear-articulation test is a precise one." *Chamber of Commerce*, 890 F.3d at 782. Courts must determine "whether the regulatory structure which has been adopted by the state

has *specifically authorized the conduct* alleged to violate the Sherman Act." *Id*. Such authorization "must be plain and clear" and demonstrate a "clear[] inten[t] to displace competition . . . with a regulatory structure." *Id*. at 782-83.

The district court correctly found that the Arizona legislature has not articulated a "plain and clear" intention to displace competition in the retail sale of electricity. Although it once may have been accurate to describe the market as a regulated monopoly, in 1998 the legislature dramatically changed direction and enacted a deregulatory scheme in a deliberate effort to move to a system that allows substantial competition. The legislature declared: "It is the public policy of this state that a competitive market shall exist in the sale of electric generation service." A.R.S. § 40-202(B). It then adopted a series of provisions "to transition to competition for electric generation service." *Id*. *See also* A.R.S. § 30-802(A) (referring to "the transition to competition in electric generation service"); Ariz. Sess. Laws 1222-23 (stating legislative intent to move from regulation "to a framework under which competition is allowed in the sale of electricity to retail customers"). Based on these statutes, a different Arizona district court

held, in a case challenging the same SRP rate plan at issue here, that "Arizona has not expressly articulated a clear policy authorizing the conduct of [SRP]. . . . In fact, the opposite is true." *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 2015 WL 9268212, *3 (D. Ariz. Dec. 21, 2015).

The statutory scheme enacted in 1998 promotes the transition to competition by requiring "public power entities" such as SRP to take pro-competitive action and prevent anticompetitive acts. For example, public power entities "shall allow any provider of electric generation service access to [their] electric power transmission and distribution facilities" under rates and conditions that are "comparable to the rates charged for the public power entity's own use of the same facilities." A.R.S. § 30-805(E). In this way, the scheme sought to encourage competitive entry by permitting new competitors to rely on the public power entity's existing transmission and distribution facilities and by limiting those entities' ability to set rates for using those facilities that might discourage competitive entry.

In addition, the legislature directed the governing body of each public power entity to "adopt a code of conduct to prevent

anticompetitive activities that may result from the public power entity providing both competitive and noncompetitive services to retail electric customers." A.R.S. § 30-803(F). Public power entities must provide public notice stating that they are "adopting terms and conditions for competition in the retail sale of electric generation service." A.R.S. § 30-802(B)(1)(a). The legislature also expressly recognized that "self-generation" will reduce electricity demand from public power entities and prohibited them from using that reduction to "recover any stranded cost from a customer." A.R.S. § 30-805(D).

Underscoring all this, the legislature added in 1998 that "[n]otwithstanding any other law"—thereby including an antitrust exemption adopted in 1974 cited by SRP below—"the provisions of [state antitrust law, which is similar to federal antitrust law] apply to the provisions of competitive electric generation service or other services by public power entities." A.R.S. § 30-813.

Despite these deregulatory statutes, SRP asserted several arguments in the district court in an attempt to show a state policy to displace competition, but those arguments are legally wrong and unpersuasive.

1. SRP Arguments Based on State Statutes

SRP cited statutory sections from which it claimed one could *infer* an intent to displace competition. *E.g.*, Doc. 14-1 at 11-12 (SRP's rate schedules are subject to public notice, hearings, and approval by an elected board). This Court, however, has made clear that when a state statute does not expressly adopt a choice to eliminate competition, "[t]o read into the plain text of the statute *implicit* state authorization and intent to displace competition . . . would be to apply the clear-articulation test 'too loosely.'" *Chamber of Commerce*, 890 F.3d at 784 (quoting *Phoebe Putney*, 568 U.S. at 229).

To the extent that SRP is able to identify any (pre-1998) statutes that expressly state an Arizona public policy to displace competition, this argument fails. Ordinarily, a later in time statute controls. At most, SRP shows nothing more than that the state previously had expressed different goals. The district court properly applied *Chamber of Commerce* to conclude that when state statutes appear to conflict on whether the legislature prefers competition or monopoly, the defendant has not met its burden to show a "plain and clear" state policy to displace competition. Order at 16-17.

2. SRP Arguments Based on the Arizona Corporation Commission

SRP suggested that the ACC can articulate state policy separately from the legislature. Doc. 14-1 at 12 n.15. As an initial point, the Supreme Court has never recognized any state entity other than the legislature, or the state supreme court when acting legislatively, as sovereign for state-action purposes. *See Dental Exam'rs*, 135 S. Ct. at 1110. Moreover, in *Chamber of Commerce*, this Court emphasized that "[s]overeign capacity matters. . . . A 'substate governmental entity' is simply not equivalent to a state[.]" 890 F.3d at 789-90. In sum, a sub-state entity cannot set a state policy that trumps statutes enacted by the legislature that express a policy preference for competition.

SRP also argued that competition is not the Arizona state policy *in practice* because the ACC has not certificated competing electric suppliers. Doc. 14-1 at 15-16. That "[t]he sort of competition it envisions has yet to emerge on the scale the legislature hoped" does not deny the reality that deregulation "*is* on the books or that it expresses a policy preference for competition in electricity generation and supply." *Kay Electric Cooperative v. City of Newkirk, Oklahoma*, 647 F.3d 1039,

1045 (10th Cir. 2011) (Gorsuch, J.). "Neither is it the place of a court to say whether . . . [the state] has moved too slowly or quickly in its efforts to restructure an entire industry." *Id*. In any event, as explained above, the ACC itself is not sovereign for purposes of the federal state-action defense, and so its actions (or inactions) do not express, and cannot negate, the intent of the sovereign. [6]

3. SRP Arguments Based on Ratemaking

SRP argued that its legislatively-granted ratemaking authority inherently displaces competition. Even on the narrow issue of ratemaking, however, 1998-enacted A.R.S. § 40-202(D) declares "the public policy of this state" that "the most effective manner of establishing just and reasonable rates for electricity is to permit electric

[6] SRP cited *Cal. CNG v. S. Cal. Gas Co.*, 96 F.3d 1193, 1198 (9th Cir. 1996), *amended*, 1996 U.S. App. LEXIS 35321 (9th Cir. 1997), but over-read it for the proposition that any anticompetitive activity by a utility is protected until a regulatory agency allows competition. In fact, this Court held only that California articulated different state policies at different time periods to permit or not permit utilities to use ratepayer funds to subsidize natural-gas-vehicle fueling stations, so SoCalGas enjoyed state-action protection only during the specific periods when the state expressly allowed utility activities in the NGV-infrastructure market.

generation service prices to be established in a competitive market." This statute undermines SRP's contention (Doc. 14-1 at 13) that the concept of "just and reasonable" rates necessarily means that rates are not set by market competition. In 1998, the Arizona legislature said precisely the opposite.[7]

Nor does SRP cite any statutory provision giving it authority to use its rates to exclude competition. In this respect the case is analogous to *Phoebe Putney*, in which the Supreme Court held that the clear-articulation requirement was not satisfied because the Georgia statute authorizing hospital acquisitions did not affirmatively express a state policy empowering the local authority "to make acquisitions of existing hospitals that will substantially lessen competition." 568 U.S. at 228; *cf. Community Communications Co. v. City of Boulder*, 455 U.S. 40, 55-56 (1982) (general grant of power to enact ordinances did not

[7] A.R.S. § 40-202(D) also undermines SRP's argument (Doc. 14-1 at 16) that the deregulatory scheme enacted in 1998 allows competition only in limited areas like billing, metering, and meter reading. Instead, the legislature plainly declared a state policy that rates for the sale of electricity itself are to be determined by a competitive market.

necessarily imply authority to enact specific anticompetitive ordinances).

When SRP refers to ratemaking as inherently anticompetitive it also confuses its authority to set only its own rates (an authority akin to that of private businesses' right to set prices for their own products)—not the rates of competing suppliers—with the broader authority of state public utility commissions to set rates for an entire market. A company's unilateral setting of prices (what SRP does here) is a feature of a typical competitive market; in stark contrast, collective ratemaking—by a cartel or a regulatory agency—for all competitors market-wide reflects the elimination of price competition. SRP would thus conflate competition with its elimination. In short, legislation allowing an individual seller in the market, such as SRP, to set only its own rates is far from a clear articulation that competition in ratemaking should be displaced. [8]

[8] SRP relied below on *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 64 (1985), for the proposition that a formal ratemaking process is "inherently anticompetitive." That reliance is misplaced because the Court was describing ratemaking by the Mississippi Public

CONCLUSION

The Court should reverse the district court's holding on antitrust injury. If the Court reaches the state-action defense, it should affirm the district court's holding that SRP did not carry its burden to show that the clear-articulation requirement is satisfied.

Respectfully submitted.

July 8, 2020

/s/ Steven J. Mintz
MAKAN DELRAHIM
Assistant Attorney General

Service Commission which, unlike SRP, exercised "ultimate authority and control over all intrastate rates" for all common carriers. *Id*. at 51.

For a similar reason—that SRP acts as both a seller in the market and the approver of its own rates—the district court held correctly that SRP is not entitled to the filed-rate doctrine defense. Order at 12. The filed-rate doctrine, which provides a limited defense to antitrust claims for damages, presumes that the challenged rate has been approved by a federal regulatory agency that is separate from the provider that charges the rate. *E.g.*, *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 581 (1981) ("under the filed rate doctrine, the [Federal Energy Regulatory] Commission alone is empowered to make that judgment [that a rate is reasonable]").

MICHAEL F. MURRAY
Deputy Assistant Attorney General

ANDREW J. ROBINSON
Counsel to the Assistant Attorney General

DANIEL E. HAAR
MATTHEW C. MANDELBERG
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice, Antitrust Division
950 Pennsylvania Ave., NW
Washington, DC 20530-0001
Tel. 202-353-0256

CERTIFICATE OF COMPLIANCE

I. This brief complies with the type-volume limitations of Rules 29 and 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,646 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

II. This brief complies with the typeface requirements of Rule 32(a)(5) of the Federal Rules of Appellate Procedure and the type style requirements of Rule 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2019 with 14-point New Century Schoolbook font.

July 8, 2020 /s/ Steven J. Mintz

Attorney

CERTIFICATE OF SERVICE

I hereby certify that on July 8, 2020, I electronically filed the foregoing Brief for the United States of America as Amicus Curiae Supporting Plaintiffs-Appellants with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System.

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

/s/ Steven J. Mintz

Attorney