No. 15-17302

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SOLARCITY CORPORATION,
Plaintiff-Appellee,

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ARIZONA
(JUDGE DOUGLAS L. RAYES)

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE SUPPORTING PLAINTIFF-APPELLEE

RENATA B. HESSE
Principal Deputy Assistant Attorney General

KRISTEN C. LIMARZI
JAMES J. FREDRICKS
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., NW
Room 3224
Washington, DC 20530-0001
(202) 353-0256

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STATEMENT OF INTEREST

The United States enforces the federal antitrust laws and has a strong interest in whether interlocutory orders refusing to dismiss an antitrust claim under the "state action" doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), are immediately appealable under the collateral order doctrine. Courts have dismissed immediate appeals from such orders in prior enforcement actions for lack of appellate jurisdiction. *See* Order, *United States v. Blue Cross Blue Shield of Mich.*, No. 11-1984 (6th Cir. Feb. 23, 2012), *reh'g en banc denied* (Mar. 20, 2012); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006).

The United States also has a strong interest in the proper application of the state action doctrine. That doctrine is intended to protect the deliberate policy choices of states to displace competition with regulation or monopoly public service. Overly broad application of the state action doctrine, however, sacrifices the important benefits that antitrust law provides consumers and undermines the national policy favoring robust competition.

We file this brief under Federal Rule of Appellate Procedure 29(a) and urge the Court to dismiss the state action doctrine portion of the

appeal for lack of appellate jurisdiction. If the Court finds appellate jurisdiction over the state action issue, we urge the Court to reject application of the state action doctrine to this case because the "clear articulation" requirement of the doctrine was not satisfied.[1]

STATEMENT OF ISSUES PRESENTED

Whether an order denying a motion to dismiss an antitrust claim under the state action doctrine of *Parker v. Brown*, 317 U.S. 341 (1943), is immediately appealable as a collateral order.

Whether the clear articulation requirement of the state action doctrine has been satisfied.

STATEMENT

Plaintiff-Appellee SolarCity describes itself as the country's "largest installer of distributed solar energy systems." Amended Complaint ¶ 16. It sells and leases rooftop solar energy systems to residential and commercial customers "who then use the systems to

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[1] The United States takes no position on the merits of Plaintiff's claims; on whether this Court has appellate jurisdiction over the other issues raised by Defendant (absolute immunity under A.R.S. § 12-820.01(A) and the filed-rate doctrine); and on whether the active supervision requirement of the state action doctrine applies to this case or was satisfied.

generate electricity and thereby displace a portion of their electricity purchases from an electric utility." *Id*. SolarCity alleges that it has "over 7,000 active customers in [Defendant's] service area" and that before the pricing plan change at issue here, it "averaged almost 400 installations per month in [that] service area." *Id*. ¶ 17.

Defendant-Appellant Salt River Project ("SRP") is a public power entity that provides electricity to residential and commercial customers in the Phoenix, Arizona metropolitan area. SolarCity alleges that it "directly competes with SRP . . . because SolarCity offers equipment and services that provide electricity—specifically solar-generated electricity—to customers." *Id*. ¶ 50. SolarCity alleges that SRP has monopoly power, "currently providing more than 95% of the electricity used by retail customers in SRP territory." *Id*. ¶ 53.

SolarCity alleges that in 2011 "[rooftop] solar increased in popularity and efficiency [and] SRP began to recognize that [rooftop] solar could become a competitive threat in the longer term." *Id*. ¶ 78. After SRP's own solar energy programs allegedly proved unable to compete with SolarCity, SRP announced in December 2014 its intent to impose a new rate plan on new customers who also generate their own

electricity. These new customers must pay "an increase of approximately ***65%*** . . . compared to what that customer would have paid under the previous rate structure that applied to self-generating customers." *Id*. ¶ 107. SolarCity alleges that "[t]he only practicable way to escape the charges is to forgo installing distributed solar systems or to radically reduce peak usage." *Id*. ¶ 109.

SolarCity filed this suit on March 2, 2015, seeking damages and injunctive relief under federal and Arizona antitrust laws and Arizona tort law. On motions to dismiss, the district court, with respect to the issues in this appeal, (1) refused to dismiss SolarCity's claims of monopoly maintenance and attempted monopolization in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, or its monopolization claims under state law; (2) rejected SRP's defense of absolute immunity, under A.R.S. § 12-820.01, against SolarCity's state-law damages claims, and refused to apply the filed-rate doctrine as a defense; and (3) refused to apply the state action doctrine to bar SolarCity's antitrust claims. Under the latter doctrine, federal antitrust law does not reach anticompetitive conduct that is (1) in furtherance of a clearly articulated state policy to displace competition, and (2) actively

supervised by the state. The district court ruled that these requirements raise factual questions, quoting *Cost Management Services., Inc. v. Washington Natural Gas Co.*, 99 F.3d 937, 943 (9th Cir. 1996), which stated that the issue of active supervision "is a factual one which is inappropriately resolved in the context of a motion to dismiss."

On November 20, 2015, SRP appealed the district court's rulings on the state action doctrine and absolute immunity under Arizona law, contending that the denial of its motion to dismiss is immediately appealable as a final judgment under the collateral order doctrine.

SRP also moved for certification, under 28 U.S.C. § 1292(b), of three issues for interlocutory appeal: (1) whether SRP is "immune" from all remaining claims under the state action doctrine; (2) whether SRP is immune from all damages claims under A.R.S. § 12-820.01(A); and (3) whether SRP is immune from all remaining claims under the filed-rate doctrine.

In an Order filed December 21, 2015, the district court denied certification. With respect to the state action doctrine, the court agreed with SRP that the "clear articulation" requirement is a question of law that the court should have decided in its Order resolving the motions to

dismiss. But the court reasoned that if it had decided the issue as a matter of law, it would have found that Arizona has not expressly articulated a clear policy authorizing SRP's alleged conduct:

> In fact, the opposite is true. A.R.S. § 40-202(B) . . . provides that "[i]t is the public policy of this state that a competitive market shall exist in the sale of electric generation service." . . . 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.

Order at 4-5.

SolarCity moved to dismiss this appeal for lack of jurisdiction. The Appellate Commissioner, in an Order dated March 14, 2016, denied SolarCity's motion "without prejudice to renewing the arguments in the answering brief."

SUMMARY OF ARGUMENT

This Court lacks jurisdiction over the state action issue. There is no final judgment resolving the underlying litigation, and an order denying a motion to dismiss an antitrust claim under the state action doctrine is not immediately appealable under the collateral order doctrine.

The collateral order doctrine applies only to a "small class" of rulings that satisfy "stringent" conditions. *Will v. Hallock*, 546 U.S. 345, 349 (2006). Interlocutory orders rejecting state action arguments do not fall into this small class of cases. State action is a defense to antitrust liability predicated on the absence of any indication in the text or history of the Sherman Act that Congress sought to condemn state-imposed restraints of trade. Unlike qualified or sovereign immunity, the state action doctrine does not create a right to avoid trial. The state action doctrine thus does not satisfy the requirement that an order rejecting its application be "effectively unreviewable" on appeal from a final judgment. Orders denying a state action defense also do not qualify for review under the collateral order doctrine because state action issues are not completely separate from the merits of the underlying antitrust action. The Fourth and Sixth Circuits have squarely held that denials of motions to dismiss predicated on the state action doctrine are not immediately appealable. *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006); *Huron Valley Hosp., Inc. v. City of Pontiac*, 792 F.2d 563 (6th Cir. 1986).

If this Court does find jurisdiction, it should hold that the state action doctrine does not shield SRP's alleged conduct from federal antitrust law because the clear articulation requirement of the doctrine is not satisfied. The state action doctrine is disfavored as a defense, and construed narrowly, because it conflicts with the fundamental national policy in favor of competition. In addition, the burden of proving the defense falls on SRP.

Under these standards, SRP did not satisfy the clear articulation requirement because Arizona statutes express a state policy to transition from a regulatory 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. Thus, any anticompetitive efforts to exclude SolarCity were not the "foreseeable result" of the state's regulatory system.

ARGUMENT

I. The Court Lacks Jurisdiction Over the State Action Issue Because the District Court's Order Is Not Collaterally Appealable.

SRP seeks review of the district court's order under the collateral order doctrine. But that doctrine is narrow and does not apply to an order denying a motion to dismiss an antitrust claim under the state action doctrine.[2]

A. The Collateral Order Doctrine Is Narrow.

The Supreme Court has identified a "small class" of collateral rulings that, although not disposing of the litigation, are appropriately deemed final and immediately appealable because they are "too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated." *Will v. Hallock*, 546 U.S. 345, 349-51 (2006); *see also Mohawk Indus., Inc. v. Carpenter*, 558 U.S. 100, 103 (2009).

The "requirements for collateral order appeal have been distilled down to three conditions: that an order [1] conclusively determine the

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[2] SRP has the burden of establishing this Court's jurisdiction. *See* Fed. R. App. P. 28(a)(4); *Rodriguez v. AT&T Mobility Servs. LLC*, 728 F.3d 975, 978 (9th Cir. 2013).

disputed question, [2] resolve an important issue completely separate from the merits of the action, and [3] be effectively unreviewable on appeal from a final judgment." *Will*, 546 U.S. at 349. An order that "fails to satisfy any one of these requirements . . . is not appealable under the collateral-order exception to [28 U.S.C.] § 1291." *Gulfstream Aerospace Corp. v. Mayacamas Corp.*, 485 U.S. 271, 276 (1988); *see S.C. State Bd. of Dentistry*, 455 F.3d at 441.

The three conditions are "'stringent,'" because otherwise the [collateral order] doctrine "will overpower the substantial finality interests [28 U.S.C.] § 1291 is meant to further," *Will*, 546 U.S. at 349-50 (quoting *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994)), and "swallow the general rule that a party is entitled to a single appeal, to be deferred until final judgment has been entered," *Digital Equip.*, 511 U.S. at 868 (citation omitted). "Permitting piecemeal, prejudgment appeals . . . undermines 'efficient judicial administration' and encroaches upon the prerogatives of district court judges, who play a 'special role' in managing ongoing litigation." *Mohawk*, 558 U.S. at 106 (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)).

For these reasons, the Supreme Court repeatedly has emphasized that "the class of collaterally appealable orders must remain 'narrow and selective in its membership.'" *Mohawk*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). "In case after case in year after year, the Supreme Court has issued increasingly emphatic instructions that the class of cases capable of satisfying this stringent test should be understood as small, modest, and narrow." *United States v. Wampler*, 624 F.3d 1330, 1334 (10th Cir. 2010) (internal quotation marks omitted). The Court's "admonition has acquired special force in recent years with the enactment of legislation designating rulemaking, 'not expansion by court decision,' as the preferred means for determining whether and when prejudgment orders should be immediately appealable." *Mohawk*, 558 U.S. at 113 (quoting *Swint v. Chambers County Commission*, 514 U.S. 35, 48 1995)); *see also id.* (discussing relevant amendments to the Rules Enabling Act, 28 U.S.C. § 2071 *et seq.*, and Congress's enactment of 28 U.S.C. § 1292(e)).

Moreover, the collateral order doctrine's applicability to interlocutory rulings must be ascertained in light of the entire class of such orders and not based on the features of individual cases. *Van*

Cauwenberghe v. Biard, 486 U.S. 517, 529 (1988). For this reason, this Court is "cautious in applying the collateral order doctrine, because once one order is identified as collateral, *all* orders of that type must be considered collaterally." *United States v. Guerrero*, 693 F.3d 990, 997 (9th Cir. 2012) (internal quotation omitted).

B. An Order Denying a Motion to Dismiss an Antitrust Claim Under the State Action Doctrine Is Not Collateral.

1. State action determinations are not effectively unreviewable on appeal from a final judgment.

An order is "effectively unreviewable" when it protects an interest that would be "essentially destroyed if its vindication must be postponed until trial is completed." *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 498-99 (1989). The quintessential such interest is a "right not to be tried," *Midland Asphalt Corp. v. United States*, 489 U.S. 794, 800 (1989). But the Supreme Court has rejected arguments that a right to collateral appeal arises whenever a district court denies "an asserted right to avoid the burdens of trial." *Will*, 546 U.S. at 351. "[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." *Id.* at 353 (emphasis added).

As the Court explained in *Will*, "[p]rior cases mark the line between rulings within the class [of appealable collateral orders] and those outside." 546 U.S. at 350. "On the immediately appealable side" are orders denying: (1) absolute Presidential immunity; (2) qualified immunity; (3) Eleventh Amendment sovereign immunity; and (4) double jeopardy. *Id.* "In each case," the Court noted, "some particular [public] value of a high order was marshaled in support of the interest in avoiding trial: honoring the separation of powers, preserving the efficiency of government and the initiative of its officials, respecting a State's dignitary interests, and mitigating the government's advantage over the individual." *Id.* at 352-53.

An order denying a motion to dismiss an antitrust claim under the state action doctrine is materially different from these types of appealable collateral orders, because the state action doctrine is a defense to antitrust liability, not a right to be free from suit. *See Huron Valley Hosp.*, 792 F.2d at 567. As the Fourth Circuit explained: "The *Parker* doctrine did not arise from any concern about special harms that

would result from trial. Instead, *Parker* speaks only about the proper interpretation of the Sherman Act." *S.C. State Bd. of Dentistry*, 455 F.3d at 444. Similarly, in *Surgical Care Center of Hammond, L.C. v. Hospital Service District No. 1*, 171 F.3d 231, 234 (5th Cir. 1999) (en banc), the unanimous Fifth Circuit acknowledged that the state action doctrine is an interpretation of the "reach of the Sherman Act" and has a "parentage [that] differs from the qualified and absolute immunities of public officials" and from Eleventh Amendment immunity.

The Supreme Court based the *Parker* doctrine not on concerns about facing trial, but instead on the assumption that Congress would not have intended the Sherman Act to include "an unexpressed purpose to nullify a state's control over its officers and agents." 317 U.S. at 351. *Accord S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985) (*Parker* was "premised on the assumption that Congress . . . did not intend to compromise the States' ability to regulate their domestic commerce."). The Supreme Court therefore interprets the reach of the Sherman Act consistent with that assumption, and the state action doctrine is "an interpretation of the Sherman Antitrust

Act," *Nugget Hydroelectric , L.P. v. Pac. Gas & Elec. Co.*, 981 F.2d 429, 433 (9th Cir. 1992), not an immunity from suit.

Despite this origin of the state action doctrine, this Court and others have continued to refer loosely to "*Parker* immunity" as a "convenient shorthand," while recognizing that "immunity" is "an inapt description" of the doctrine. *Surgical Care Ctr. of Hammond*, 171 F.3d at 234.[3] That shorthand labeling does not make state action rulings equivalent to the narrow classes of "immunity" cases that present the concerns that justify collateral appeal. As the Fourth Circuit observed: "*Parker* construed a statute. It did not identify or articulate a constitutional or common law 'right not to be tried.' *Parker* therefore recognizes a 'defense' qualitatively different from the immunities described in *Will*, which focus on the harms attendant to litigation

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[3] "[A]lthough *Parker* issued in 1943, it was not until 1978 . . . that the Court first used the term '*Parker* immunity.'" *S.C. State Bd. of Dentistry*, 455 F.3d at 445. The Court has since "alternated between calling the *Parker* protection an 'immunity' and an 'exemption.'" *Id*. (citations omitted). In any event, even consistent use of the "immunity" label "would not mandate that *Parker* created a right not to be tried." *Id*. at 446. The treatise cited by SRP (Br. 43) uses the term "immunity" only in the sense of an issue that can be disposed of summarily on the pleadings or summary judgment. But that is true of many defenses to liability as well. The treatise does not say that *Parker* created a right not to be tried.

itself." *S.C. State Bd. of Dentistry*, 455 F.3d at 444; *see also Huron Valley Hosp.*, 792 F.2d at 567 ("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").

Claims that effective government will be disrupted by subjecting governmental defendants to the burdens of discovery do not warrant expansion of the collateral order doctrine. That effect may occur in many cases, antitrust or non-antitrust, in which a state or federal government entity is a defendant. If an order were rendered "effectively unreviewable" merely because its denial led to litigation burdens for the government, the final judgment rule would be drastically reduced in scope. Thus, the Supreme Court explained in *Mohawk* "[t]hat a ruling may burden litigants in ways that are only imperfectly reparable by appellate reversal of a final district court judgment . . . has never sufficed" to justify collateral order appeals. 558 U.S.at 107 (internal quotations omitted; ellipsis in original).

If a district court erroneously rejects a state action defense in denying a motion to dismiss, and the defendant later is found liable, that judgment can be reversed on appeal. Again, that post-judgment

appeal may afford only an "imperfect" remedy in some cases does not justify making all such orders immediately appealable as of right. *Mohawk*, 558 U.S. at 112.

Moreover, a defendant who believes that its state action defense was rejected because of an error of law "may ask the district court to certify, and the court of appeals to accept, an interlocutory appeal pursuant to 28 U.S.C . § 1292(b)." *Id*. at 110-11. Or, "in extraordinary circumstances," a defendant "may petition the court of appeals for a writ of mandamus." *Id.* at 111. "While these discretionary review mechanisms do not provide relief in every case, they serve as useful 'safety valve[s]' for promptly correcting serious errors." *Id.* (quoting *Digital Equip.*, 511 U.S. at 883).

2. State action issues are not completely separate from the antitrust merits.

An issue is not completely separate from the merits when it "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action.'" *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978) (quoting *Mercantile Nat'l Bank v. Langdeau*, 371 U.S. 555, 558 (1963)). That is the case with state action determinations: "The analysis necessary to determine whether clearly

articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct" typically is "intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Huron Valley Hosp.*, 792 F.2d at 567; *S.C. State Bd. of Dentistry*, 455 F.3d at 442-43 & n.7 (the state action inquiry is "inherently 'enmeshed' with the underlying [antitrust] cause of action").[4]

The state action doctrine requires a court to identify anticompetitive effects and their causes. Under the clear articulation requirement, the defendant must show that the cause was conduct pursuant to a state policy to displace competition. Under the active supervision requirement, the defendant must show that the cause was conduct attributable to the state itself. *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101, 1112 (2015) (The state action doctrine requires courts to determine "whether anticompetitive policies and

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[4] SRP asserts (Br. 40) that this Court already has decided that state action and merits determinations are separate, citing *Shames v. California Travel & Tourism Commission*, 626 F.3d 1079, 1082 (9th Cir. 2010). But *Shames* had nothing to do with the collateral order doctrine's separateness requirement. Read in context, the court's statement that it "need not consider the legality of the alleged conduct" means only that the court did not need to *decide* the merits.

conduct are indeed the action of a State."). The underlying cause of action requires the court to determine whether the defendant is responsible for the alleged anticompetitive effects. These two causation inquiries typically are intertwined. Thus, "time and again the Supreme Court has refused to find an order to be 'collateral' when entertaining an immediate appeal might require it to consider issues intertwined with—though not identical to—the ultimate merits inquiry." *S.C. State Bd. of Dentistry*, 455 F.3d at 441-42.

Moreover, it does not matter that a court can sometimes evaluate a state action defense without considering facts and circumstances relevant to the antitrust merits. The separateness determination must be made by evaluating "the entire category to which a claim belongs," not the facts of particular cases. *Digital Equip.*, 511 U.S. at 868; *see also Cunningham v. Hamilton Cty.*, 527 U.S. 198, 206 (1999) ("[W]e have consistently eschewed a case-by-case approach to deciding whether an order is sufficiently collateral."). As a category, orders denying a motion to dismiss an antitrust claim under the state action doctrine are not collateral because the *Parker* analysis tends to be significantly enmeshed with the factual and legal issues underlying the antitrust

cause of action. *Cf. Van Cauwenberghe,* 486 U.S. at 529 (holding that *forum non conveniens* determinations were not collaterally appealable, although some do not "require significant inquiry into the [underlying] facts and legal issues," because "[i]n fashioning a rule of appealability . . . we [must] look to categories of cases, not to particular injustices" and there was substantial overlap "in the main").

C. Contrary Out-of-Circuit Decisions Are Not Persuasive.

SRP (Br. 38-40) relies principally on *Martin v. Memorial Hospital at Gulfport*, 86 F.3d 1391 (5th Cir. 1996), and *Commuter Transportation Systems, Inc. v. Hillsborough County Aviation Authority*, 801 F.2d 1286 (11th Cir. 1986). In *Martin*, the Fifth Circuit reasoned that the state action doctrine serves the same purposes as Eleventh Amendment immunity and the absolute and qualified immunity afforded to public officials, so that orders denying state action protection likewise should be immediately appealable. 86 F.3d at 1395-96. But *Martin* was wrong when it was decided, and its reasoning has been undermined by later Supreme Court and Fifth Circuit decisions.

Martin was decided several years before *Will* and *Mohawk*, which emphasized repeatedly that "the class of collaterally appealable orders

must remain 'narrow and selective in its membership.'" *Mohawk*, 558 U.S. at 113 (quoting *Will*, 546 U.S. at 350). *Martin* does not acknowledge the narrowness of the collateral order doctrine in any way, and it creates an entirely new class of collaterally appealable orders not recognized by the Supreme Court. *See Huron Valley Hosp.*, 792 F.2d at 568 ("We . . . decline to extend the right of immediate appeal any farther than the Supreme Court already has extended the right."). *Martin* therefore is out of step with the Supreme Court's collateral order jurisprudence.

Furthermore, *Martin*'s analogy of the state action doctrine to absolute, qualified, and Eleventh Amendment immunities from trial has been undercut by the Fifth Circuit's own decisions. In *Surgical Care Ctr. of Hammond* that court explained, *en banc* and unanimously, that "immunity" is an "inapt" description of the state action doctrine; the term "*Parker* immunity" is "a convenient shorthand" for "locating the reach of the Sherman Act." 171 F.3d at 234. The Fifth Circuit went on to note, contrary to *Martin*, that *Parker* protection for state officials does not follow the Eleventh Amendment. *See id.*; *accord Acoustic Sys., Inc. v. Wenger Corp.*, 207 F.3d 287, 292 n.3 (5th Cir.

2000) (noting that the state action doctrine is not an immunity but rather "a recognition of the limited reach of the Sherman Act").

Commuter Transportation suffers from the same flaws. Like *Martin*, it antedated, and is inconsistent with, the Supreme Court's "increasingly emphatic instructions" that the test for satisfying the collateral order doctrine is "'stringent'" and only capable of being satisfied by a "'small,' 'modest,' and 'narrow'" class of cases. *Mohawk*, 558 U.S. at 113; *Will*, 546 U.S. at 350; *Swint*, 514 U.S. at 42; *Digital Equip.*, 511 U.S. at 868. Also, the Eleventh Circuit made no attempt to explain its rationale for declaring that the state action doctrine provides an "*immunity from suit* rather than a mere defense to liability." 801 F.2d at 1289. The court's conclusion that the requirements for collateral order review are met proceeds entirely from this (flawed) assumption that the state action doctrine is an "immunity." *Commuter Transportation*, therefore, is not persuasive. *See* 15A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 3914.10, at 693-94 & nn.85-86 (1992) (finding *Huron Valley Hospital* "more persuasive" than *Commuter Transportation* because

"there is little to distinguish this defense from many other defenses to antitrust or other claims"). [5]

Contrary to the supposition in *Martin* and *Commuter Transportation*, the state action doctrine serves purposes distinct from those underlying qualified, absolute, and Eleventh Amendment immunities afforded to public officials. SRP argues that the purpose of the state action doctrine is to protect state sovereignty (Br. 44), but that is incorrect. The protections of the state action doctrine apply to conduct by private parties as well as governmental defendants. As the Fourth Circuit explained, the state action defense may be asserted in antitrust suits against municipalities, suits that seek purely equitable relief, and suits brought by the federal government. But such suits do not offend a state's dignity, and thus qualified or sovereign immunity is not available. *S.C. State Bd. of Dentistry*, 455 F.3d at 446-47. As explained above (pp. 14-16), the state action doctrine is concerned not with the dignity interests of the states or the impact of damage suits on

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[5] SRP also cites *Danner Construction Co. v. Hillsborough Cty.*, 608 F.3d 809, 812 n.1 (11th Cir. 2010), but *Danner* does not add anything to *Commuter Transportation* because *Danner* simply treated the issue as settled circuit precedent and cited *Martin*.

the functioning of government. Rather, its purpose is to permit states to engage in economic regulation and shield anticompetitive conduct when states enact deliberate policies to do so.

Martin and *Commuter Transportation* thus failed to heed the Supreme Court's admonition to courts of appeals just two years before *Martin* to "view claims of 'a right not to be tried' with skepticism, if not a jaundiced eye." *Digital Equip.*, 511 U.S. at 873.

SRP next contends (Br. 44) that this Court's treatment of the state action doctrine outside the context of attempted collateral order appeals more closely resembles the discussion of the doctrine in *Martin* and *Commuter Transportation*, citing *Miller v. Wright*, 705 F.3d 919 (9th Cir. 2013). In *Miller*, this Court held that the Sherman Act did not abrogate the sovereign immunity of an Indian tribe. The decision found "relevant legal authority" in *Parker* and suggested that *Parker* "involved sovereign immunity." *Id*. at 927. The Court took guidance from a footnote in *Jefferson County Pharm. Ass'n v. Abbott Labs.*, 460 U.S. 150, 177 n.5 (1983) (O'Conner, J., dissenting), which quotes *Parker*'s recognition that "states are sovereign" and as such, "an unexpressed purpose to nullify a state's control over its officers and

agents is not lightly to be attributed to Congress." *Id*. (quoting *Parker*, 317 U.S. at 251). But the footnote does not mention sovereign immunity. And in *Parker*, this appreciation of state sovereignty did not lead the Court to grant immunity, but to interpret the Sherman Act not to prohibit a restraint imposed "as an act of government." *Parker*, 317 U.S. at 352. The issue of sovereign immunity could not have arisen in *Parker* because the plaintiff sought to invalidate a state program, not impose liability. And unlike the Indian tribe in *Miller*, SRP does not assert sovereign immunity. Rather, it asserts protection under the state action doctrine as any private party might.

SRP also cites *Springs Ambulance Serv., Inc. v. City of Rancho Mirage*, 745 F.2d 1270, 1272 (9th Cir. 1984) and *Nugget Hydroelectric*, 981 F.2d at 434, for the proposition that *Parker* involved sovereign immunity. But neither decision says that the state action doctrine was grounded in sovereign *immunity*. Like *Dental Exam'rs*, which referred to the doctrine as protecting states "acting in their sovereign capacity," 135 S. Ct. at 1110, these decisions reflect that the Sherman Act is read not to reach the states' regulatory conduct. *Springs Ambulance*, 745 F.2d at 1272 (In *Parker*, the Supreme Court held "the Sherman Act was

not intended to apply to acts of the States 'as sovereigns.'"). *Dental Exam'rs* explained that *Parker* interpreted the antitrust laws so as not to "impose an impermissible burden on the States' power to regulate," 135 S. Ct. at 1109. *Nugget Hydroelectric* thus explains, citing *Parker*, that "[t]he state action doctrine is an interpretation of the Sherman Antitrust Act." 981 F.2d at 433.[6]

II. The Clear Articulation Requirement of the State Action Doctrine Is Not Satisfied.

State action protection from the antitrust laws "is disfavored, much as are repeals by implication." *Dental Exam'rs*, 135 S. Ct. at 1110. *See also Shames*, 626 F.3d at 1084 (state action doctrine is "interpreted narrowly"). The doctrine holds that the Sherman Act does not interfere with a state's "own anticompetitive policies" but does not

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[6] SRP correctly declines to argue that collateral order review of the A.R.S. § 12-820.01(A) issue would warrant pendent appellate jurisdiction over the state action doctrine issue. The state action doctrine is legally distinct from A.R.S. § 12-820.01(A), which is not an antitrust statute, and state action is not inextricably intertwined with or necessary to ensure meaningful review of the statutory issue. *See Puente Ariz. v. Arpaio*, 2016 U.S. App. LEXIS 7895 (9th Cir. May 2, 2016); *Huron Valley Hospital*, 792 F.2d at 568 ("This Court is not required to review the state action issue simply because we review the qualified immunity issue.").

shield "the anticompetitive conduct of nonsovereign actors" unless it "result[s] from procedures that suffice to make it the State's own." *Dental Exam'rs*, 135 S. Ct. at 1110-11. Defendants seeking state action protection bear the burden of proving that their actions were taken pursuant to a clearly articulated state policy to displace competition and were actively supervised by the state. *Id*. at 1114; *Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 38-39 (1985) ("municipalities must demonstrate" that their actions were taken pursuant to state policy); *Nugget Hydroelectric,* 981 F.2d at 435 (defendant "did not demonstrate the clear articulation requirement").

With respect to clear articulation, the defendant must show that the state has "clearly articulated and affirmatively expressed" a policy "to allow the anticompetitive conduct." *Dental Exam'rs*, 135 S. Ct. at 1110, 1112. The anticompetitive effect may be the "foreseeable result" of what the state authorized, without that effect having been spelled out expressly in a statute, *see FTC v. Phoebe Putney Health Sys., Inc.*, 133 S. Ct. 1003, 1011 (2013). But a state's grant of broad powers that "does not include permission to use those powers anticompetitively" is insufficient. *Id*. at 1007.

Here, Arizona has chosen not to displace competition. To the contrary, in 1998 the Arizona legislature, acting as sovereign, enacted a deregulatory statutory scheme in a deliberate effort to move from a regulated system for providing retail electricity to a system that allows substantial competition. The state 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"; 1998 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").

The statutory scheme promotes the transition to competition by requiring "public power entities" like SRP to take pro-competitive action and prevent anti-competitive acts.[7] For example, public power entities "shall allow any provider of electric generation service access to [their]

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[7] SRP's brief accepts that SRP is a "public power entity." Br. 7-8.

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 entities' existing transmission and distribution facilities and by limiting those entities' ability to set rates for using those facilities that might discourage competitive entry. *Cf. Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 401-02 (2004) (explaining how Congress required incumbent telephone companies to provide access to their networks on an "unbundled" basis "in order to facilitate market entry by competitors").

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).

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). SRP contended before the district court that this prohibition on recovering stranded costs from self-generating customers applied only to temporary surcharges SRP was authorized to impose during the transition to a competitive market. But that reading only confirms that the Arizona legislature appreciated that self-generation would provide some competition to public power entities and sought to ensure that stranded cost recovery was not used to stifle that competition.

And when public power entities engage in competitive electric services, Arizona law provides that "[n]otwithstanding any other law, the provisions of [state antitrust law, which is similar to federal antitrust law] apply." A.R.S. § 30-813.

Despite these statutes, SRP contends that competition is not the state policy because the Arizona Corporation Commission did not certify competing electric suppliers (Br. 21-22 & n.6). That "[t]he sort of competition it envisions has yet to emerge on the scale the legislature hoped," however, 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). "Neither is it the place of a court to say whether . . . [Arizona] has moved too slowly or quickly in its efforts to restructure an entire industry." *Id*.

SRP (at Br. 22) over-reads *Cal. CNG v. S. Cal. Gas Co.*, 96 F.3d 1193 (9th Cir. 1996), *amended*, 1996 U.S. App. LEXIS 35321 (9th Cir. 1997), which does not say that any anticompetitive activity by a utility is protected until a regulatory agency allows competition. The California Public Utility Commission determined that from July 1991 to July 1993 the utilities' use of ratepayer funds to subsidize natural-gas-vehicle fueling stations was "desirable" because it fostered natural gas infrastructure and "did not pose any dangers to competition because the market contained no competitors." *Id*. at 1200. And thus, the court held merely that during this period, the defendant utility's use of those funds to provide the stations "below-cost, or even for free" was part of a clearly articulated policy. *Id*. After November 1995, the commission determined ratepayer funds should no longer subsidize the fueling stations because other companies were interested in competing in the market. Therefore, the court concluded, subsidized, below-cost pricing

was no longer part of a clearly articulated policy. *Id*. at 1202. *Cal. CNG* also is not germane here because the Court found that the California legislature intended the regulator to reconcile conflicting policy goals. Here, SRP argues that the Arizona Corporation Commission has no authority over SRP's rate-setting (Br. 5-8). State policy therefore must be discerned from Arizona statutes, not ACC decisions.

SRP also cites statutory sections that supposedly illustrate regulatory control rather than competition, but those sections do not expressly state Arizona public policy, and inferences from them do not override the legislature's plain statement of a pro-competition policy. At most, SRP's cited sections show that not every aspect of electricity generation and distribution was intended to become competitive, or perhaps that the state has conflicting goals. But neither continuing pockets of regulation nor conflicting goals establish that the state has articulated a clear policy to displace competition.

SRP claims that its legislatively granted ratemaking authority inherently displaces competition. But even on the narrow issue of ratemaking, 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 generation service prices to be established in a competitive market." And A.R.S. § 30-805(1) bars public power entities from using their control over distribution to exclude competition, by requiring them to "[e]stablish unbundled ancillary electric transmission and distribution and other service prices and terms and conditions that are nondiscriminatory and that reflect the just and reasonable price for providing the service."

SRP tries to analogize its ratemaking authority to the Mississippi Public Service Commission's authority in *S. Motor Carriers Rate Conference*, and the Arizona regulatory scheme to the Mississippi scheme (Br. 18-19). There, under state law, the Mississippi Public Service Commission had, and exercised, "ultimate authority and control over all intrastate rates" for all common carriers. 471 U.S. at 51. Although "the details of the inherently anticompetitive rate-setting process" were left to agency discretion, the Court concluded that the legislature's "intent that intrastate rates would be determined by a regulatory agency, rather than by the market" evidences a clear legislative intent to displace competition. *Id*. at 63-64.

But *S. Motor Carriers* is not analogous to this case. First, SRP's authority is nothing like the rate-making authority there. SRP sets only its own rates, not the rates of any competing suppliers, and unlike a public utility commission, SRP actively participates in the market as a seller of electricity. SRP therefore has parochial interests, unlike a state agency charged only with serving the public interest.

Second, the Arizona regulatory system is not analogous to the Mississippi scheme because the Arizona legislature expressly declared a state policy that "just and reasonable" rates should be "established in a competitive market." A.R.S. § 40-202(D). Indeed, the Arizona system more closely resembles the City of Boulder, Colorado's scheme for cable television regulation at issue in *Community Communications Co. v. City of Boulder*, 455 U.S. 40 (1982), which the *S. Motor Carriers* Court found "in sharp contrast" to the Mississippi system. 471 U.S. at 65 n.25. The Court explained that "Boulder, as a 'home rule municipality,' was authorized to elect free market competition as an alternative to regulation," whereas the Mississippi Public Service Commission was not authorized to choose free market competition. *Id*. Here, the Arizona legislature expressly elected to transition to competition, and

SRP is authorized to "participate in retail electric competition statewide." A.R.S. § 30-803(A). *S. Motor Carriers* therefore does not help SRP but instead confirms that Arizona law does not evince a clear state policy to displace competition with regulation.

SRP does not 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." 133 S. Ct. at 1012. *Cf. Cmty. Commc'ns*, 455 U.S. at 55-56 (general grant of power to enact ordinances did not necessarily imply authority to enact specific anticompetitive ordinances).

Finally, SolarCity's exclusion from the market was not the "foreseeable result" of SRP's authority to set its own rates. SolarCity's allegation is that SRP's massive price increase, for only new customers that generate rooftop solar energy, was not imposed for any public purpose. Amended Complaint ¶¶ 8, 113 ("the purpose of the [new rate

plan] 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"). If SolarCity's allegations are taken as true, then the price increase was not a "foreseeable result" of SRP's authority to set its rates.

CONCLUSION

The Court should dismiss the state action issue for lack of appellate jurisdiction. If the Court finds jurisdiction, however, it should hold that the clear articulation requirement of the state action doctrine was not satisfied.

Respectfully submitted.

/s/ Steven J. Mintz

RENATA B. HESSE
Principal Deputy Assistant Attorney General

KRISTEN C. LIMARZI
JAMES J. FREDRICKS
STEVEN J. MINTZ
Attorneys
U.S. Department of Justice
Antitrust Division
950 Pennsylvania Ave., N.W.
Room 3224
Washington, D.C. 20530

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Rule 32(a)(7)(B) of the Federal Rules of Appellate Procedure because it contains 6,996 words, excluding the parts of the brief exempted by Rule 32(a)(7)(B)(iii).

2. 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 2007 with 14-point New Century Schoolbook font.

June 7, 2016

/s/ Steven J. Mintz
Attorney

CERTIFICATE OF SERVICE

I, Steven J. Mintz, hereby certify that on June 7, 2016, I electronically filed the foregoing Brief for the United States of America as Amicus Curiae Supporting Plaintiff-Appellee with the Clerk of the Court of the United States Court of Appeals for the Ninth Circuit by using the CM/ECF System. I also sent 7 copies to the Clerk of the Court by FedEx 2-Day Delivery.

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

June 7, 2016 /s/ Steven J. Mintz
Attorney