No. 17-

IN THE
# Supreme Court of the United States

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

*v.*

SOLARCITY CORPORATION,
*Respondent*.

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTION PRESENTED

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

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## PETITION FOR A WRIT OF CERTIORARI

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

## INTRODUCTION

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

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

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

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

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

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

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

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

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

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

## OPINIONS BELOW

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

## JURISDICTION

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

## STATUTORY PROVISION INVOLVED

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

## STATEMENT

### A. The Collateral-Order Doctrine

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

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

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

### B. The District And The 2015 Ratemaking

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

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

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

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

### C. District Court Proceedings

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

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

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

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

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

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

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

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

**D. Ninth Circuit Proceedings**

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

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

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

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

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

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

## REASONS FOR GRANTING THE PETITION

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

### A. The Issue Is Important

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

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

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

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

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

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

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

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

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

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

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

### B. This Case Is A Good Vehicle

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

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

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

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

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

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

## III. THE DECISION BELOW IS WRONG

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 2017