No. 17-368

IN THE

Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

SOLARCITY CORPORATION,
Respondent.

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

BRIEF FOR PETITIONER

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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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BRIEF FOR PETITIONER

INTRODUCTION

Under 28 U.S.C. §1291, the courts of appeals "have jurisdiction of appeals from all final decisions of the district courts." This Court has long held that although "'final decisions' typically are ones that trigger the entry of judgment, they also include a small set of prejudgment orders that are 'collateral to' the merits of an action and 'too important' to be denied immediate review." *Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 103 (2009) (quoting *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949)). For example, the Court has allowed immediate appeal under this rule—known as the collateral-order doctrine—from district-

court orders denying Eleventh Amendment immunity, qualified immunity, absolute immunity, and immunity under the Speech or Debate Clause.

The question in this case is whether collateral-order appeal is likewise available from an order rejecting, on legal grounds, a public entity's claim of state-action immunity. That immunity, which this Court first recognized in *Parker* v. *Brown*, 317 U.S. 341 (1943), bars antitrust claims against states for acts taken in their sovereign capacity, *see id.* at 350-352. It also bars antitrust claims against other electorally accountable public entities (typically political subdivisions of states) that "act[] pursuant to a clearly articulated and affirmatively expressed state policy to displace competition." *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216, 219 (2013).[1]

Orders denying state-action immunity to public entities on legal grounds satisfy each of the three criteria for immediate appeal under the collateral-order doctrine: conclusiveness, separateness from the underlying merits, and effective unreviewability after final judgment, *see Mohawk*, 558 U.S. at 105.

First, such orders "conclusively determine the disputed question," *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 468 (1978). In fact, although the courts of appeals are divided on the answer to the question pre-

[1] Private entities (and public ones that are not electorally accountable) can enjoy state-action immunity if, in addition to acting pursuant to a clearly articulated state policy, they are "actively supervised by the State." *Phoebe Putney*, 586 U.S. at 225. Electorally accountable public entities like the District "are not subject to the 'active state supervision requirement' because they have less of an incentive to pursue their own self-interest under the guise of implementing state policies." *Id.* at 226 (quoting *Town of Hallie* v. *Eau Claire*, 471 U.S. 34, 46 (1985)).

sented here, no court has held that an order denying state-action immunity to a public entity on legal grounds fails to satisfy the conclusiveness requirement. For good reason: Legal rulings, "although technically amendable, are made with the expectation that they will be the final word on the subject addressed," *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988).

Second, the analysis of state-action immunity is separate from the merits of the underlying antitrust claim. To resolve a state-action-immunity claim like the District's, the court must determine, as noted, whether the defendant acted pursuant to a clearly articulated state policy. That "purely legal issue," *Ortiz* v. *Jordan*, 562 U.S. 180, 188 (2011), is resolved by analyzing the state laws under which the defendant acted. The merits of the underlying antitrust claims will turn on different questions, such as what conduct actually occurred and whether it was impermissibly anticompetitive. A court does not answer those questions in resolving a state-action-immunity claim. To the contrary, as in the qualified-immunity context, *see Mitchell* v. *Forsyth*, 472 U.S. 511, 528 (1985), a court adjudicating a claim of state-action immunity assumes that the complaint states a valid claim.

Finally, an order denying state-action immunity to a public entity on legal grounds is effectively unreviewable after final judgment. "[T]he decisive consideration" in applying this requirement "is whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk*, 558 U.S. at 107 (quoting *Will* v. *Hallock*, 546 U.S. 345, 352-353 (2006)). Orders denying state-action immunity to public entities meet this standard for the same reasons that this Court has

held orders denying other immunities to public entities or officials do so. Specifically, like Eleventh Amendment immunity, state-action immunity serves to protect states' dignity and autonomy, including 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 (omission in original). State-action immunity also serves the related purpose of avoiding undue federal intrusion on the states. And like qualified immunity, state-action immunity protects states and their citizens against unwarranted disruption of governmental functions, ensuring that public servants exercise their policymaking discretion without fear of being subjected to protracted litigation. As the Court has recognized with qualified immunity and Eleventh Amendment immunity, all these interests are irredeemably compromised by requiring a defendant to litigate to final judgment before having the opportunity to appeal a district court's rejection of state-action immunity.

In short, orders denying state-action immunity to public entities on legal grounds fall within the collateral-order doctrine because they implicate important public concerns that this Court has previously deemed sufficient to warrant immediate appeal. The Ninth Circuit's contrary conclusion should be reversed.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-17a) is reported at 859 F.3d 720. The unpublished memorandum that the court issued concurrently with its published opinion (Pet. App. 19a-20a) is reported at 692 F. App'x 458. The district court's two relevant orders—denying dismissal of the complaint based on state-action immunity (Pet. App. 37a-69a) and refusing

to certify that denial for interlocutory appeal (Pet. 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. The petition for certiorari was timely filed on September 7, 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). Section 1291 states in relevant part: "The 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 District

1. Petitioner, the Salt River Project Agricultural Improvement and Power District, is a governmental entity that was formed in 1937. *See generally Ball* v. *James*, 451 U.S. 355, 357-359 (1981) (discussing the District's history). Today, the District remains "a public, political, taxing subdivision of" Arizona. Ariz. Rev. Stat. §48-2302. Under the state constitution, the District is, with exceptions not relevant here, "entitled to the immunities and exemptions granted municipalities and political subdivisions under [the] 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).

The District is overseen by elected officials, including a president, a vice president, a fourteen-person board of directors, and a thirty-person council. *Smith* v. *Salt River Project Agricultural Improvement & Power District*, 109 F.3d 586, 589 (9th Cir. 1997) (citing Ariz. Rev. Stat. §§48-2361 to -2368). Individuals who both own land within the District's boundaries and are eligible to vote in state elections can vote in District elections and serve in District offices. Ariz. Rev. Stat. §§48-2309, -2383.

As it has for decades, the District serves as an electric utility—currently providing power to roughly a million members of the public in metropolitan Phoenix. *See Ball*, 451 U.S. at 357; Pet. App. 39a. It also delivers water throughout a 375-square-mile area of central Arizona. *See Ball*, 451 U.S. at 357. "The fact that the Salt River Project sells surplus power as a revenue source in its proprietary capacity," Arizona courts have held, "does not defeat its status as a … political subdivision of the state." *Salt River Project Agricultural Improvement & Power District* v. *City of Phoenix*, 631 P.2d 553, 555 (Ariz. Ct. App. 1981) (citing Arizona Supreme Court precedent).

Arizona has given the District "many governmental powers," including the authority to "establish and enforce laws, rules, and regulations necessary to carry on the District's business, construct works for irrigation, drainage, and power, levy taxes on real property within the District, sell tax-exempt bonds, and exercise the power of eminent domain." *Smith*, 109 F.3d at 589 (citing Ariz. Rev. Stat. §§48-2335, -2336, -2340, -2341(B), -2411 to -2415); *see also Gorenc* v. *Salt River*

Project Agricultural Improvement & Power District, 869 F.2d 503, 507 (9th Cir. 1989) (District possesses "attributes of a sovereign in that it can levy [property] taxes …, sell tax-exempt bonds, exercise eminent domain, and is immune from taxation on the sale of electricity" (citation omitted)). Of particular relevance here, the state has given the District's elected Board ratemaking power, i.e., the authority—as a "public power entity"—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 state 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), along with two separate mechanisms for anyone dissatisfied with the setting of rates to seek redress in state court, *see id.* §§30-811(A), 30-812(A).

B. The 2015 Ratemaking

In 2014, the District announced that it was considering a revised rate structure, including new rates for its thousands (Dist. Ct. Dkt. 232-21) of "self-generating customers." Those are customers who generate electricity through rooftop solar systems or other alternative means, but who still need to buy electricity from the District when those alternatives are insufficient to meet their needs. Pet. App. 40a-41a. The District's announcement came amid a nationwide increase in the number of self-generating customers, which posed well-recognized challenges to utilities seeking to price electricity fairly (for example, pricing it in a way that ensures each class of customers pays its share of the costs of maintaining the electrical grid). *See generally, e.g.*,

Massachusetts Institute of Technology Energy Initiative, *The Future of Solar Energy* xviii (2015), *available at* https://goo.gl/BV4CMg.[2]

After holding public hearings and receiving comments, the District's Board promulgated revised rates in 2015, including a new rate plan for future self-generating customers. Pet. App. 41a. A document the District issued in connection with this plan explained that the plan was meant to address, among other things, concerns that self-generating customers do not "pay an equal share for th[e] fixed costs" of maintaining the electrical grid, forcing the District's "non-solar customers" to "shoulder[]" "[t]he costs solar customers are … avoiding." C.A. Dkt. 34-3, at 6.[3]

C. District Court Proceedings

1. Respondent SolarCity Corporation sold and leased rooftop solar systems to customers in the District and elsewhere. Pet. App. 2a-3a. Claiming that the

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[2] The Arizona Corporation Commission, which regulates the state's private utilities, has recognized such challenges. In 2013, it found that the proliferation of solar installations "results in a cost shift" from solar customers to non-solar customers. Arizona Corporation Commission, *In re Arizona Public Service Commission's Application for Approval of Net Metering Cost Shift Solution*, No. E-01345A-13-0248, Decision 74202 ¶49, at 13 (2013), *available at* https://goo.gl/PVBeHD. In light of this, the Commission last year authorized the utilities it regulates (which do not include public power entities like the District) to treat solar customers as a separate class for rate-setting purposes. *See* Arizona Corporation Commission, *In re the Commission's Investigation of Value and Cost of Distributed Generation*, No. E-00000J-14-0023, Decision 75859 (2017), *available at* https://goo.gl/nQnhZ8.

[3] This Court can take judicial notice of the undisputed fact that the District made the statements in this public document (though not the truth of those statements). *See* Fed. R. Evid. 201.

District's 2015 rate plan diminished demand for its products, SolarCity—forgoing the mechanisms that Arizona law provides for judicial review of electricity rate-setting, *see supra* p.7—filed this action in federal court. Pet. App. 3a.

The operative complaint alleges that the District's conduct in adopting the 2015 rate plan violates federal antitrust law because it constitutes unlawful monopoly maintenance, attempted monopolization, an unreasonable restraint of trade, and exclusive dealing. Pet. App. 41a. SolarCity also brought claims under Arizona's antitrust statute and common law. Pet. App. 41a-42a.

The District moved to dismiss the complaint, arguing among other things that SolarCity's antitrust claims are barred by the doctrine of state-action immunity. Pet. App. 2a. As explained, under that doctrine antitrust law does not "bar States from imposing market restraints 'as an act of government.'" *Phoebe Putney*, 568 U.S. at 224 (quoting *Parker*, 317 U.S. at 352). The District argued that it was entitled to state-action immunity as a political subdivision of Arizona because it acted "pursuant to state policy to displace competition with regulation or monopoly public service," *id.* at 225. In particular, it contended that the challenged conduct is its ratemaking and that Arizona, by delegating ratemaking authority to the District's Board, clearly articulated a policy of allowing that conduct, even if competition was consequently displaced. Pet. App. 45a; *see Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 64 (1985) (the "rate-setting process" is "inherently anticompetitive"). The District's arguments encompassed not only SolarCity's federal antitrust claims but also its state-law ones, because Arizona antitrust law incorporates state-

action immunity. *See Mothershed* v. *Justices of the Supreme Court*, 410 F.3d 602, 609 (9th Cir. 2005).

2. The district court granted the District's motion to dismiss in part and denied it in part, Pet. App. 69a—including rejecting the District's assertion of state-action immunity, Pet. App. 67a.

The court initially held that it could not determine whether the District was entitled to the immunity without making factual determinations that were inappropriate on a motion to dismiss. Pet. App. 67a. More specifically, the court held (as relevant here) that it could not resolve at that stage "whether Arizona ha[d] articulated a clear policy permitting anticompetitive conduct in the retail electricity market." *Id.*

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 doing so it acknowledged an "error" in its prior ruling, recognizing that whether the clear-articulation prong of state-action immunity is satisfied is a "'question … of law,'" not a question of fact. Pet. App. 25a (quoting *Columbia Steel Casting Co.* v. *Portland General Electric Co.*, 111 F.3d 1427, 1442 (9th Cir. 1996)). The court thus rejected the District's claim of state-action immunity on the ground that, as a matter of law, "Arizona has not expressly articulated a clear policy authorizing the conduct of the District." *Id.*

D. Ninth Circuit Proceedings

The District appealed, asserting as a basis for appellate jurisdiction that the denial of its state-action-immunity defense was immediately appealable under the collateral-order doctrine. Pet App. 2a, 6a; Dist. Ct. Dkt. 81.

After briefing and argument, the Ninth Circuit dismissed the District's appeal for lack of jurisdiction, holding that orders denying state-action immunity fall outside the collateral-order doctrine. Pet. App. 17a. The court did not reach two of the doctrine's three prerequisites, conclusiveness and separateness, instead resting its holding on the ground that denials of state-action immunity to public entities are not effectively unreviewable after final judgment. Pet. App. 11a n.4.

The court of appeals recognized that under the collateral-order doctrine, immediate appeals are allowed from the "denial[] of certain particularly important immunities," including Eleventh Amendment immunity, absolute immunity, qualified immunity, foreign sovereign immunity, and tribal sovereign immunity. Pet. App. 7a-8a. But it reasoned that state-action immunity, unlike those others, is a defense against liability rather than an immunity from suit. Pet. App. 8a-11a. And "[u]nlike immunity from suit," the court opined, "immunity from liability can be protected by a post-judgment appeal." Pet. App. 8a.[4]

The Ninth Circuit subsequently denied the District's motion to stay the issuance of the court's mandate pending the filing and disposition of a petition for a writ of certiorari, and hence proceedings in the district court resumed. But after this Court granted certiorari, the district court vacated the scheduled trial date and otherwise stayed further proceedings pending this Court's decision. Dist. Ct. Dkt. 334.

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[4] In an unpublished memorandum issued concurrently with its published opinion, the court of appeals 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. Pet. App. 20a. Those rulings are not before this Court.

SUMMARY OF ARGUMENT

Orders denying state-action immunity to public entities on legal grounds satisfy all three predicates for immediate appeal under the collateral-order doctrine: They are conclusive, separate from the merits, and effectively unreviewable on appeal from a final judgment.

A. Such orders satisfy the conclusiveness requirement because they are legal rulings, which district courts do not ordinarily revisit as litigation processes.

In opposing certiorari, SolarCity argued that the particular order denying immunity in this case was not conclusive because the district court expressed a willingness to revisit it at a later stage. The collateral-order analysis, however, determines the appealability not of a particular order but of a class of orders, and the conclusiveness prong accordingly focuses not on whether a particular judge expects to revisit a particular order but on whether judges generally revisit orders of that type. There can be no doubt that orders denying state-action immunity as a matter of law are generally final, which is why every court of appeals to have considered the question has held that they are conclusive for purposes of collateral-order review.

B. The class of orders at issue also satisfies the separateness requirement, whether the order rests on the absence of clear articulation (as in this case) or the absence as a matter of law of active supervision (which is required of private entities as well as public entities that, unlike the District, lack electoral accountability).

The clear-articulation analysis has nothing to do with the merits of the underlying antitrust claim; in fact, a court conducting that analysis *assumes* the defendant's alleged conduct occurred and was anticompet-

itive. The court instead addresses whether the conduct was authorized by state laws or regulations that inherently or foreseeably displace competition. A court conducting that analysis must of course take note of the factual allegations in a particular case (as is true with other immunities where immediate appeal is allowed), but only to understand what the defendant is accused of doing and thus to determine whether state law authorized that alleged conduct. The Court has held in the qualified-immunity context that such limited overlap with the merits is not enough to defeat separateness.

Legal rulings that active supervision is absent (in cases where it is required) similarly turn on an analysis of the relevant state-law authorities and not on the merits of the underlying antitrust claims.

C. The orders at issue are effectively unreviewable on appeal from a final judgment.

As this Court's recent collateral-order cases make clear, the key factor in the effective-unreviewability analysis is whether denying immediate appeal would threaten a sufficiently important interest. State-action immunity implicates two interests that this Court has recognized as important enough to justify immediate appeal. Like Eleventh Amendment immunity, state-action immunity protects states' dignitary interests. It flows from state sovereignty, and it maintains the boundary between federal antitrust regulation and states' prerogative to regulate their own economies as they see fit. And like qualified immunity, state-action immunity gives state and local policymakers the freedom to exercise their discretion in service of the public interest, rather than with an eye toward avoiding the potentially crippling burdens of litigation. These interests are irreversibly compromised by requiring the de-

fendant to litigate to final judgment before having the opportunity to appeal an erroneous denial of immunity.

ARGUMENT

ORDERS DENYING STATE-ACTION IMMUNITY TO PUBLIC ENTITIES ON LEGAL GROUNDS QUALIFY FOR IMMEDIATE APPEAL UNDER THE COLLATERAL-ORDER DOCTRINE

This Court has long held that "an appeal ordinarily will not lie until after final judgment has been entered in a case." *Cunningham* v. *Hamilton County*, 527 U.S. 198, 203 (1999). But it has also long held that this rule, though "serv[ing] several salutary purposes," *id.*, is not absolute. In particular, a district court's interlocutory order may be appealed immediately under the collateral-order doctrine if the order: (1) is "conclusive" of the relevant issue, (2) "resolve[s] [an] important question[] separate from the merits," and (3) is "effectively unreviewable on appeal from the final judgment in the underlying action." *Mohawk*, 558 U.S. at 106.

In determining whether these prerequisites are satisfied, courts do not "engage in an 'individualized jurisdictional inquiry.'" *Mohawk*, 558 U.S. at 107 (quoting *Coopers & Lybrand*, 437 U.S. at 473). Instead, they "focus … on 'the entire category to which a claim belongs,'" i.e., "the class of claims, taken as a whole." *Id.* (quoting *Digital Equipment*, 511 U.S. at 868). Courts also "assume" that the defendant "has presented a substantial claim of immunity … that warrants appellate consideration." *Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 524 (1988).

Here, the relevant class comprises orders that deny state-action immunity to public entities on legal grounds. Such orders satisfy all three of the collateral-order doctrine's requirements. The contrary judgment

of the court of appeals should be reversed and the case remanded for that court to determine whether the District is entitled to state-action immunity.

A. The Class Of Orders At Issue Is Conclusive

1. For an interlocutory ruling to be appealable as a collateral order, it must "conclusively determine the disputed question." *Will*, 546 U.S. at 349. This requirement ensures that a district court's decisionmaking is "fully consummated," "concluded[,] and closed," as opposed to merely "tentative, informal, or incomplete." *Cohen*, 337 U.S. at 546. That, in turn, ensures that "appellate review is likely needed" to resolve the dispute. *Johnson* v. *Jones*, 515 U.S. 304, 311 (1995).[5]

In applying the conclusiveness requirement, this Court has "contrasted two kinds of nonfinal orders": those that are "inherently tentative" and "those that, although technically amendable, are made with the expectation that they will be the final word on the subject addressed." *Gulfstream*, 485 U.S. at 277 (quotation marks omitted). The latter are "conclusive" for purposes of the collateral-order doctrine. *Id.*

Orders denying state-action immunity on legal grounds fall in that latter category, i.e., they are not "inherently tentative" but rather made "with the expectation that they will be the final word" on the issue,

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[5] As noted, the Ninth Circuit did not reach the conclusiveness requirement, or the separateness requirement addressed in the next subsection. Pet. App. 11a n.4. But the parties briefed both requirements in the court of appeals, as well as at the petition stage in this Court. This Court therefore can address all three requirements. *See Illinois* v. *Gates*, 462 U.S. 213, 218-221 (1983) (the Court can consider issues "pressed or passed upon" below). It should do so because all three are components of the question presented.

Gulfstream, 485 U.S. at 277. That is clear from the purely legal nature of such orders. As this Court has explained in allowing collateral-order appeal in the qualified-immunity context, a district court does not ordinarily revise a legal determination as litigation progresses, because generally "there will be nothing in the subsequent course of the proceedings in the district court that can alter the district court's conclusion." *Mitchell*, 472 U.S. at 527. Unlike the fact-based abstention denial at issue in *Gulfstream*, for example, there are typically no "further developments," 485 U.S. at 278, that would lead a district court to reconsider its legal rulings. Indeed, even SolarCity conceded in its Ninth Circuit brief here (at 21) that an order "turn[ing] on a purely legal issue" is conclusive.

That is the type of order at issue in this case. Applying the clear-articulation prong of the state-action immunity standard involves examining state law to determine whether "the anticompetitive effect [of the challenged conduct] was the 'foreseeable result' of what the State authorized." *Phoebe Putney*, 568 U.S. at 226-227 (quoting *Town of Hallie*, 471 U.S. at 42). And just as with denials on legal grounds of qualified immunity, a denial on such grounds of state-action immunity "finally and conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations," *Mitchell*, 472 U.S. at 527 (emphasis omitted). Every court of appeals that has addressed the conclusiveness requirement in connection with state-action immunity has agreed. *See South Carolina State Board of Dentistry* v. *FTC*, 455 F.3d 436, 441 (4th Cir. 2006); *Martin* v. *Memorial Hospital at Gulfport*, 86 F.3d 1391, 1396 (5th Cir. 1996); *Commuter Transportation Systems, Inc.* v. *Hillsborough County Aviation Authority*, 801 F.2d 1286, 1289-1290 (11th Cir. 1986).

2. In opposing certiorari, SolarCity nonetheless argued (Br. in Opp. 23) that the district court's denial of state-action immunity was not conclusive because the court "anticipated that the question would be raised again with a developed factual record" and invited the District to renew it "at summary judgment" (which of course the District did, reprising the same arguments it had made earlier). That argument fails because the collateral-order doctrine, as noted, requires courts to evaluate "the class of claims, taken as a whole." *Mohawk*, 558 U.S. at 107. For purposes of the conclusiveness requirement, that means examining not whether a particular judge expresses willingness to reconsider a particular order, but rather whether "a district court *ordinarily* would expect to reassess and revise" the type of order in question, *Gulfstream*, 485 U.S. at 277 (emphasis added). This standard makes sense, because the immediate appealability of a denial of state-action immunity should not turn on the fortuity of a certain district judge's views on whether he or she might revisit a prior order. That approach would be inconsistent with this Court's "express[] reject[ion]" of "efforts to reduce the finality requirement of § 1291 to a case-by-case determination of whether a particular ruling should be appealed." *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 439 (1985).

This Court's decision in *Swint* v. *Chambers County Commission*, 514 U.S. 35 (1995), is not to the contrary. The Court ruled in that case that the conclusiveness requirement was not satisfied by a district court's denial of summary judgment regarding whether a sheriff was a county policymaker for purposes of liability under 42 U.S.C. §1983. *See* 514 U.S. at 42. The basis for this Court's ruling was that "[t]he District Court planned to reconsider its ruling … before the case went

to the jury." *Id.* But the county-policymaker issue—albeit "a legal question to be resolved by the trial judge before the case is submitted to the jury," *Jett* v. *Dallas Independent School District*, 491 U.S. 701, 737 (1989) (emphasis omitted)—turns in part on the facts, because it requires examining not only "state and local positive law," but also "custom or usage," *id.* That is why the district court in *Swint* had stated that "the Plaintiffs had come forward with *sufficient evidence* … that Sheriff Morgan may be the final policy maker for the County." 514 U.S. at 39 (emphasis added). And it is why the court went on to state that, at trial, "[t]he parties will have an opportunity to convince [it] that Sheriff Morgan was or was not the final policy maker for the County," allowing the court to make "a ruling as a matter of law on that issue before the case goes to the jury." *Id.* at 39-40. Here, by contrast, further factual development could not affect the district court's clear-articulation ruling, because that ruling, as explained, resolved a purely legal question: whether Arizona law clearly articulated a policy that authorized the District's rate-setting. SolarCity itself apparently recognizes all this, as it never cited *Swint* below in arguing a lack of conclusiveness.

B. The Question Of State-Action Immunity Is Separate From The Merits Of An Antitrust Claim

1. Collateral orders are so named because they "resolve an important issue completely separate from the merits of the action." *Will*, 546 U.S. at 349. In other words, they address questions that are "conceptually distinct from the merits of the plaintiff's claim." *Ashcroft* v. *Iqbal*, 556 U.S. 662, 672 (2009). Orders denying state-action immunity on legal grounds meet that re-

quirement, whether based on the absence of clear articulation (as in this case) or on the absence as a matter of law of any required active supervision.[6]

a. Clear articulation. The clear-articulation inquiry focuses not on the merits of the plaintiff's claim, i.e., the alleged anticompetitive conduct, but on the legal authority "pursuant to" which the alleged conduct occurred. *Phoebe Putney*, 568 U.S. at 219. In particular, it focuses on whether that authority reflects "state policy to displace competition with regulation or monopoly public service." *Id.* at 225. The inquiry therefore involves identifying and interpreting the sources of state law that authorized the defendant's alleged conduct, and then determining (including in light of relevant case law) whether "displacement of competition was the inherent, logical, or ordinary result of the exercise of authority delegated" by that law. *Id.* at 229; *see also id.* at 226-227. That inquiry is distinct from the underlying merits analysis, which addresses questions such as what conduct actually occurred, whether that conduct had an anticompetitive effect and, if so, whether there was a legitimate business justification for the conduct.

This Court's state-action-immunity cases confirm this separateness. In *Phoebe Putney* itself, for example, the Court did not address whether the defendant's

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[6] In *Mohawk*, this Court noted that both the second and third *Cohen* conditions refer to the importance of the issue (explicitly in the case of the second condition and implicitly in the case of the third). *See* 558 U.S. at 107. Importance is addressed in the next subsection rather than this one, however, because *Mohawk* appeared to suggest that importance is "[m]ore significant[]" for the third condition. *Id.* In any event, the arguments in the next subsection regarding the importance of the issue in this case also apply to the second condition.

alleged conduct (hospital consolidation) was in fact anticompetitive; it instead analyzed various provisions of state law governing hospital districts. *See* 568 U.S. at 227 & n.6, 232-233. Similarly, in *City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365 (1991), the Court discussed the state zoning laws "under which the [defendant] acted," and whether such laws foreseeably displaced competition; it did not evaluate whether the defendant's conduct (imposing billboard restrictions) was anticompetitive. *See id.* at 370-373 & n.3. And in *Town of Hallie*, the Court's clear-articulation analysis did not turn on determining the facts of the alleged conduct and its anticompetitive effects. Instead, the Court "examine[d] the [applicable] statutory structure in some detail." 471 U.S. at 41. Finally, in a case factually analogous to this one, the Court discerned clear articulation for ratemaking (by common carriers) solely by citing relevant state statutes. *See Southern Motor Carriers*, 471 U.S. at 63 & n.24.

Likewise here, the clear-articulation inquiry turns on identifying the Arizona statutory and regulatory provisions pursuant to which the District sets rates, and analyzing the results that foreseeably flow from those provisions. That inquiry is not "enmeshed in the factual and legal issues comprising the plaintiff's cause of action," *Coopers & Lybrand*, 437 U.S. at 469; *see California CNG, Inc.* v. *Southern California Gas Co.*, 96 F.3d 1193, 1196-1199 (9th Cir. 1996) (analyzing whether a California utility qualified for state-action immunity by parsing provisions of state law as well as decisions and guidelines of the California Public Utilities Commission).

This Court's decision in *Osborn* v. *Haley*, 549 U.S. 225 (2007), further illuminates the separateness of the

clear-articulation inquiry. *Osborn* addressed the immediate appealability of orders denying substitution of the United States for an individual government defendant pursuant to the Westfall Act. *See id.* at 238-239. More specifically, the orders turned on whether the defendant was "acting within the scope of his office or employment at the time of the incident out of which the claim arose." *Id.* at 230. *Osborn* held that this inquiry was "separate from the merits of the action." *Id.* at 238. The same is true here, because asking whether a defendant was acting within the scope of employment is akin to asking whether a defendant's alleged anticompetitive conduct was undertaken pursuant to (i.e., within the scope of) a clearly articulated state policy.

To be sure, identifying the legal authority relevant to the clear-articulation analysis requires some minimal "consideration of the factual allegations that make up the plaintiff's claim for relief," *Mitchell*, 472 U.S. at 528—enough to know what the defendant allegedly did, which is a necessary predicate to determining whether state law authorized the alleged conduct. But "the same is true … when a court must consider whether a prosecution is barred by a claim of former jeopardy or whether a Congressman is absolutely immune from suit because the complained of conduct falls within the protections of the Speech and Debate Clause." *Id.* In those cases, too, a court must understand enough of the alleged facts to evaluate whether the defendant's double-jeopardy or speech-or-debate rights are implicated. But this Court has made clear that such overlap is not enough to defeat separateness, holding that "a question of immunity is separate from the merits of the underlying action for purposes of the *Cohen* test even though a reviewing court must consider the plaintiff's factual al-

legations in resolving the immunity issue." *Id.* at 528-529.

The reason that degree of overlap is not enough, this Court expounded, is that a court adjudicating an assertion 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." *Mitchell*, 472 U.S. at 528. Rather, the court assumes for purposes of resolving the immunity question that the alleged conduct occurred (and, in the state-action-immunity context, that it was anticompetitive). The Ninth Circuit itself followed these precepts in an earlier state-action-immunity case, stating it would "assume without deciding that the Plaintiffs' allegations … sufficiently allege an antitrust violation," and that it did not "need [to] consider the legality of the alleged conduct," but was "instead called to determine whether … the [defendant's] alleged conduct qualifies for 'state action immunity.'" *Shames* v. *California Travel & Tourism Commission*, 626 F.3d 1079, 1082 (9th Cir. 2010).

b. Active supervision. As noted, state-action immunity can alternatively be denied based on the absence of required active supervision by the state. Although not applicable here, *see supra* n.1, the active-supervision requirement demands "that state officials have and exercise power to review particular anticompetitive acts of private parties and disapprove of those that fail to accord with state policy." *North Carolina State Board of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1112 (2015). A defendant may sometimes fail this test on factual grounds, such as where state officials did not exercise their power to supervise the defendant. But other denials are on legal grounds, namely where state law provides no means for state actors to super-

vise the defendant's alleged conduct in the first place. *See Patrick* v. *Burget*, 486 U.S. 94, 101-105 (1988); *California Retail Liquor Dealers Association* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 105-106 (1980).

Such denials (i.e., denials on legal grounds) satisfy the separateness requirement for essentially the same reasons given above regarding clear articulation. In such cases, the active-supervision inquiry entails analyzing state law and addressing not whether the antitrust laws were violated, but whether state law provides the requisite mechanisms for supervision by state officials. And again, in conducting that analysis, the court assumes that the alleged conduct occurred and was anticompetitive. The analysis thus has nothing to do with the merits of an antitrust claim.

c. Purpose. The purpose of the separateness requirement makes even clearer why denials of state-action immunity on legal grounds are separate from the merits of the underlying claims. The separateness requirement, this Court has explained, serves to ensure that "review now is less likely to force the appellate court to consider approximately the same (or a very similar) matter more than once." *Johnson*, 515 U.S. at 311 (emphasis omitted). Such duplicative review is "an unwise use of appellate courts' time." *Id.* at 317.

Allowing immediate appeal from orders denying state-action immunity to public entities on legal grounds poses very little risk of requiring appellate courts to consider the same issues twice. In a collateral-order appeal, the court considers whether state law authorized the defendant's challenged conduct or whether state law enabled state entities to actively supervise the defendant's alleged conduct (or both). If the court of appeals reverses the denial of immunity,

then the immunity disposes of the claim and there is no later appeal regarding it. If instead the court affirms, the second appeal arises from final judgment on the merits of the antitrust claims, and thus raises questions relating to the merits, such as what conduct the defendant engaged in and what its competitive effects were. Accordingly, there is little or no commonality between the two appeals.

2. In opposing certiorari, SolarCity disputed that the separateness requirement is met here by listing (Br. in Opp. 27-28) various questions that supposedly showed how state-action immunity denials are not separate from the merits. But SolarCity's examples related to *factual* determinations. *See id.* at 27 ("disputed facts"), 28 ("a necessarily factual showing"). Those examples are inapposite here, where the class of orders is those denying state-action immunity on legal grounds.

SolarCity's argument reflected the view it had presented in its Ninth Circuit brief (at 23 n.7), that the relevant class of orders is "*all* orders denying motions to dismiss on state-action grounds," not merely those denying state-action immunity to public entities on legal grounds. But that framing (which the government's Ninth Circuit amicus brief echoed (at 19-20)) is inconsistent with this Court's precedent. This Court has held in the qualified-immunity context that the relevant class of orders is orders rejecting the immunity on "a purely legal issue," *Ortiz*, 562 U.S. at 188—and that those orders are immediately appealable, whereas orders denying the immunity because of "factual issues genuinely in dispute" are not, *id.* Neither SolarCity nor

the government ever explained why the same distinction is not equally applicable in this context.[7]

3. Although the Ninth Circuit did not pass on separateness here, Pet. App. 11a n.4, the Fourth and Sixth Circuits have held that denials of state-action immunity are not separate from the merits. Their reasoning is unpersuasive.

As an initial matter, the Fourth Circuit introduced its separateness analysis with an incorrect statement of the law, asserting—without citing any authority—that the mere "*threat* of substantial duplication of judicial decision making" defeats separateness. *South Carolina State Board*, 455 F.3d at 441. But this Court has held that separateness is defeated only when the type of ruling in question "*generally* involves considerations that are 'enmeshed in the factual/legal issues comprising the cause of action.'" *Coopers & Lybrand*, 437 U.S. at 469

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[7] SolarCity also asserted below and at the petition stage (*e.g.*, Br. in Opp. 6-9, 26-29) that even if denials of state-action immunity to public entities on lega lgrounds are immediately appealable, the separateness requirement is not met in this case because the District is a private entity. But that argument is outside the scope of the question presented, which is limited to "public entities." Pet. i. Indeed, the Court granted review on that question even though SolarCity also pointed to the District's purportedly private nature as a basis to deny certiorari (Br. in Opp. 17-18). In any event, as the District explained in its petition-stage reply brief (at 1-3), SolarCity's contention that the District is private contravenes not only the Arizona code, which declares the District to be a "public, political … subdivision of the state," Ariz. Rev. Stat. §48-2302, but also the decision below, *see* Pet. App. 14-17a; Arizona precedent, *see, e.g.*, *City of Mesa* v. *Salt River Project Agricultural Improvement & Power District*, 373 P.2d 722, 726 (Ariz. 1962); the state constitution, *see supra* pp.5-6; and this Court's decision in *Ball*, *see, e.g.*, 451 U.S. at 355 ("The *public entity* at issue here is the Salt River Project Agricultural Improvement and Power District[.]" (emphasis added)).

(emphasis added) (quoting *Mercantile National Bank* v. *Langdeau*, 371 U.S. 555, 558 (1963)). Hence, this Court held in *Van Cauwenberghe* v. *Biard* that the separateness requirement was unsatisfied by orders denying dismissal on *forum non conveniens* grounds because "*in the main*, the issues that arise in *forum non conveniens* determinations will substantially overlap factual and legal issues of the underlying dispute." 486 U.S. at 529 (emphasis added). Contrary to the Fourth Circuit's statement, then, a mere "threat" of overlap with the underlying merits is insufficient; a given type of order is sufficiently separate unless in fact it generally overlaps with the merits.

The balance of the Fourth Circuit's separateness discussion, which attempted to explain why denials of state-action immunity overlap with the merits, was conclusory. For example, the court stated that "look[ing] to state law and determin[ing] if the state has a clearly articulated policy to displace competition … is inherently 'enmeshed' with the underlying cause of action, which requires a determination of whether a defendant has used 'unfair methods of competition …' or 'unfair or deceptive acts or practices.'" *South Carolina State Board*, 455 F.3d at 442-443. To the extent the court was saying that whether a given entity was authorized to act anticompetitively overlaps with whether it actually acted anticompetitively, that degree of overlap is not, as discussed, sufficient under this Court's case law to defeat separateness. *See supra* pp.21-22. The court did not explain its contrary conclusion.

The Fourth Circuit's separateness discussion also quoted from *Huron Valley Hospital, Inc.* v. *City of Pontiac*, 792 F.2d 563 (6th Cir. 1986), but that case's discussion was similarly conclusory. The Sixth Circuit

stated that "[t]he analysis necessary to determine whether clearly articulated or affirmatively expressed state policy is involved and whether the state actively supervises the anticompetitive conduct overlaps the analysis necessary to determine whether the defendants have violated the rights of" the plaintiff. *Id.* at 567. Like the Fourth Circuit, however, the Sixth Circuit did not engage with the arguments above for why, under this Court's precedent, the separateness requirement *is* met here. Nor did it explain either the statement just quoted or its further statement that determinations "that affirmatively expressed state policy is involved and that the state actively supervises the anticompetitive conduct … are intimately intertwined with the ultimate determination that anticompetitive conduct has occurred." *Id.*

C. Orders Denying State-Action Immunity To Public Entities Are Effectively Unreviewable After Final Judgment

The third collateral-order requirement is that orders in the relevant class be effectively unreviewable on appeal from a final judgment. The court of appeals held here that denials of state-action immunity to public entities do not satisfy that condition. Pet. App. 7a-11a. Its rationale was that state-action immunity is an "immunity from liability" rather than an "immunity from suit." Pet. App. 8a-9a. But while some of this Court's early collateral-order cases employed that dichotomy, more recent decisions make clear that those labels are not the "decisive consideration." *Mohawk*, 558 U.S. at 107. Instead, the decisive consideration is "whether delaying review until the entry of final judgment would imperil a substantial public interest or some particular value of a high order." *Id.* (quotation

marks omitted). Denials of state-action immunity meet that standard; indeed, they implicate the same public interests and values that the Court has held sufficient to justify immediate appeals from orders denying Eleventh Amendment immunity and qualified immunity.

1. An order is effectively unreviewable if delaying an appeal would imperil a sufficiently important interest

In the first several decades after *Cohen*, this Court held that various orders were immediately appealable because they could not be reviewed effectively after final judgment. For example, the Court allowed immediate appeals from orders refusing to require the posting of a security bond, in *Cohen*; denying motions to reduce bail, in *Stack* v. *Boyle*, 342 U.S. 1 (1951); denying motions to dismiss an indictment either on double-jeopardy grounds, in *Abney* v. *United States*, 431 U.S. 651 (1977), or under the Speech or Debate Clause, in *Helstoski* v. *Meanor*, 442 U.S. 500 (1979); and rejecting claims of qualified immunity, in *Mitchell*, or absolute immunity, in *Nixon* v. *Fitzgerald*, 457 U.S. 731 (1982).

In many of these early collateral-order decisions, the Court drew the same line that the Ninth Circuit embraced here, between "entitlement[s] not to stand trial," which cannot be effectively vindicated on appeal from a final judgment, and defenses against liability, which can. *Mitchell*, 472 U.S. at 525. But the Court eventually acknowledged that it is "difficult" to identify "whether 'the essence' of [a] claimed right is a right not to stand trial" or a right to avoid liability, "because in some sense, all litigants who have a meritorious pretrial claim for dismissal can reasonably claim a right not to stand trial." *Van Cauwenberghe*, 486 U.S. at 524.

Justice Scalia's concurring opinion in *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495 (1989), marked a turning point in the Court's articulation of the collateral-order doctrine. The district court in that case had denied a motion to dismiss under a contract's forum-selection clause that identified Naples, Italy, as the venue for any action arising under the contract. *See id.* at 496-497. This Court unanimously held that that denial was not immediately appealable, *see id.* at 500-501, but Justice Scalia wrote separately "to make express what seem[ed] … implicit in [the Court's] analysis," *id.* at 502 (concurring opinion). There was no doubt, he wrote, "that the 'right not to be sued elsewhere than in Naples' is not fully vindicated—indeed, to be utterly frank, is positively destroyed—by permitting the trial to occur" in a different venue and then "reversing its outcome" on appeal from a final judgment. *Id.* at 502-503. But that was "vindication enough" to bar review under the collateral-order doctrine, Justice Scalia explained, because "the law does not deem the right *important enough* to be vindicated by, as it were, an injunction against its violation obtained through interlocutory appeal." *Id.* at 503.

In subsequent cases, this Court essentially adopted Justice Scalia's concurrence as the touchstone for the effective-unreviewability analysis. In *Digital Equipment*, for example, the Court explained—citing that concurrence—that the question "whether a right is 'adequately vindicable' or 'effectively reviewable'" on appeal from a final judgment "cannot be answered without a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement." 511 U.S. at 878-879. And an interest "qualifies as 'important' in *Cohen*'s sense," the Court elaborated, when it is "weightier than the socie-

tal interests advanced by the ordinary operation of final judgment principles." *Id.* at 879. Similarly, the Court observed in *Will* v. *Hallock* that "it 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." 546 U.S. at 353; *see also id.* at 352 (citing Justice Scalia's *Lauro Lines* concurrence). And in *Mohawk*, the Court stated that the "decisive consideration" for effective-unreviewability purposes is whether a sufficiently important interest would be threatened absent immediate appeal. 558 U.S. at 107.

In sum, this Court's recent collateral-order cases establish that the key factor in determining effective unreviewability is the importance of the interests at stake. Hence, the notion of a right not to stand trial—or of "immunity from suit"—is a label that is applied to signify the conclusion that the class of orders at issue is important enough to warrant immediate appeal, not a factor in reaching that conclusion in the first place.[8]

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[8] It is a different matter, of course, when there is "an explicit statutory or constitutional guarantee that trial will not occur—as in the Double Jeopardy Clause … or the Speech or Debate Clause." *Midland Asphalt Corp.* v. *United States*, 489 U.S. 794, 801 (1989) (citation omitted). In that circumstance, i.e., where an express immunity from suit is conferred, immediate appeal is the only way to protect that immunity when its assertion is rejected, and thus "there is little room for the judiciary to gainsay its 'importance.'" *Digital Equipment*, 511 U.S. at 879.

2. State-action immunity implicates important public interests that this Court has held sufficient to justify interlocutory appeal

In *Will*, this Court summarized the kinds of interests it has held important enough that they are not adequately vindicated through appeal from final judgment: "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." 546 U.S. at 352-353. The Court explained that in *Nixon*, for example, it had "stressed the 'compelling public ends,' 'rooted in … the separation of powers,' that would be compromised by failing to allow immediate appeal of a denial of absolute Presidential immunity." *Id.* at 352 (omission in original) (quoting *Nixon*, 457 U.S. at 749, 758). Similarly, *Will* recounted that in *Puerto Rico Aqueduct & Sewer Authority* v. *Metcalf & Eddy, Inc.*, 506 U.S. 139 (1993), the Court had "explained the immediate appealability of an order denying a claim of Eleventh Amendment immunity by adverting not only to the burdens of litigation but to the need to ensure vindication of a State's dignitary interests." *Will*, 546 U.S. at 352. And in *Mitchell*—allowing immediate appeal from the denial of a qualified-immunity claim—the Court "spoke of the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not 'clearly established.'" *Will*, 546 U.S. at 352 (quoting *Mitchell*, 472 U.S. at 526).

State-action immunity implicates two of these "substantial public interest[s]" or "value[s] of a high order," *Mohawk*, 558 U.S. at 107. First, like Eleventh

Amendment immunity, state-action immunity protects and respects states' dignitary interests as sovereigns, including (with federal antitrust claims) by maintaining the proper boundaries between states and the federal government. Second, like qualified immunity, state-action immunity preserves both the efficiency and the initiative of state and local officials, protecting against the disruption of governmental functions and ensuring that public servants exercise their delegated discretion to regulate without fear of being subjected to potentially chilling litigation. As with Eleventh Amendment immunity and qualified immunity, these interests are irredeemably compromised by requiring a public entity to litigate to final judgment before having the opportunity to appeal an erroneous rejection of state-action immunity.

a. State sovereignty and federalism. Since its inception in *Parker*, the doctrine of state-action immunity has been animated by principles of federalism and respect for state sovereignty. *Parker* involved a raisin-marketing program adopted by California, a program the Court assumed "would violate the Sherman Act if" adopted by private entities. 317 U.S. at 350. But the Court—rejecting the United States' contrary submission—found "nothing in the language of the Sherman Act or in its history which suggests that its purpose was to restrain a state or its officers or agents from activities directed by its legislature." *Id.* at 350-351; *compare* U.S. Amicus Br. 59-66, *Parker*, No. 46 (Oct. 1942). The Court observed that "[i]n a dual system of government in which, under the Constitution, the states are sovereign, save only as Congress may constitutionally subtract from their authority, an unexpressed purpose to nullify a state's control over its officers and agents is not lightly to be attributed to Con-

gress." 317 U.S. at 351. Because California had adopted the raisin program "as an act of government," i.e., in its capacity "as sovereign," the Court held that "the Sherman Act did not undertake to prohibit" its conduct. *Id.* at 352.

Since *Parker*, this Court has returned time and again to the principle that state-action immunity rests on federalism and respect for state sovereignty. For example, in *Community Communications Co.* v. *City of Boulder*, 455 U.S. 40 (1982), the Court explained that state-action immunity "reflects Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure of sovereignty under our Constitution," *id.* at 53. Similarly, in its most recent decision on state-action immunity, the Court observed that "[w]hile the States regulate their economies in many ways not inconsistent with the antitrust laws, in some spheres they impose restrictions on occupations, confer exclusive or shared rights to dominate a market, or otherwise limit competition *to achieve public objectives*." *North Carolina State Board*, 135 S. Ct. at 1109 (emphasis added) (quotation marks omitted). State-action immunity, the Court explained, protects "the States' power to regulate" in this way; if instead "every duly enacted state law or policy were required to conform to the mandates of 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." *Id.* (citing *Exxon Corp.* v. *Governor of Maryland*, 437 U.S. 117, 133 (1978)). Several of the Court's earlier state-action-immunity decisions are to the same effect. *See FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 633 (1992) (*Parker* "was grounded in principles of federalism"); *City of Colum-*

bia, 499 U.S. at 372 (similar); *Patrick*, 486 U.S. at 99 (*Parker* rested on "principles of federalism and state sovereignty"); *Town of Hallie*, 471 U.S. at 38 (similar).

The federalism and sovereignty interests underlying state-action immunity apply not only when the defendant is a state but also when (as here) it is a substate governmental entity carrying out a state's economic policies. As a plurality explained in *City of Lafayette* v. *Louisiana Power & Light Co.*, 435 U.S. 389 (1978), state-action immunity in such cases "preserves to the States their freedom under our dual system of federalism to *use their municipalities* to administer state regulatory policies free of the inhibitions of the federal antitrust laws," *id.* at 415 (op. of Brennan, J.) (emphasis added). The Court unanimously reaffirmed that rationale in *Phoebe Putney*. 568 U.S. at 225-226. Applying state-action immunity to entities like the District, therefore, protects each state's ability to decide how to structure its economic policymaking—including whether to implement particular policies itself or, as in this case, to enlist its political subdivisions to carry out its policies "to achieve public objectives." *North Carolina State Board*, 135 S. Ct. at 1109. Absent the immunity, political subdivisions could be subjected to years of antitrust litigation for helping states exercise their fundamental sovereign prerogative to regulate their economies within their borders. Allowing the imposition of such burdens based on the means by which a state chooses to implement its policies substantially infringes the state's dignity and autonomy.[9]

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[9] In fact, absent state-action immunity, states that chose to regulate directly could themselves be sued for purported anticompetitive conduct—and could not invoke Eleventh Amendment immunity if, for example, the claim were brought by the United

This Court has recognized that such infringements warrant immediate appellate review. In *Puerto Rico Aqueduct*, the Court held that orders denying Eleventh Amendment immunity are immediately appealable because of "the importance of ensuring that the States' dignitary interests can be fully vindicated." 506 U.S. at 146. Denying public entities—including states themselves, *see supra* n.9—the ability to obtain immediate review of orders rejecting state-action immunity would threaten those same federalism and sovereignty interests.

b. Government efficiency and effectiveness. State-action immunity also protects a second interest that this Court has held independently sufficient to justify immediate appeals: the need to ensure that government policymakers exercise their discretion efficiently and freely, i.e., with the objective of advancing the public interest rather than of avoiding litigation.

In permitting immediate appeals from orders denying qualified immunity, the Court in *Mitchell* "spoke of the threatened disruption of governmental functions, and fear of inhibiting able people from exercising discretion in public service if a full trial were threatened whenever they acted reasonably in the face of law that is not 'clearly established.'" *Will*, 546 U.S. at 352 (quoting *Mitchell*, 472 U.S. at 526). "The conception animating the qualified immunity doctrine," *Mitchell* explained, "is that 'where an official's duties legitimately require action in which clearly established rights are not implicated, the public interest may be better served by action taken *with independence and without fear of*

States, *see United States* v. *Mississippi*, 380 U.S. 128, 140-141 (1965), or brought against a state official for prospective equitable relief, *see Seminole Tribe* v. *Florida*, 517 U.S. 44, 71 n.14 (1996).

consequences'" arising from legal action. 472 U.S. at 525 (emphasis added) (quoting *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982)). Exposing policymakers to "the risks of trial" can undermine effective government operations in numerous ways, including "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Id.* at 526. Indeed, the Court observed, "even such pretrial matters as discovery … can be peculiarly disruptive of effective government." *Id.* (quotation marks omitted).[10]

This Court reiterated these points more recently, remarking that:

> If a Government official is to devote time to his or her duties, and to the formulation of sound and responsible policies, it is counterproductive to require the substantial diversion that is attendant to participating in litigation and making informed decisions as to how it should proceed. Litigation, though necessary to ensure that officials comply with the law, exacts heavy costs in terms of efficiency and expenditure of valuable time and resources that might otherwise be directed to the proper execution of the work of the Government.

Iqbal, 556 U.S. at 685. This potential for interference with proper government operations, the Court has repeatedly concluded, is too serious for the erroneous de-

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[10] This case is illustrative: In addition to deposing several of the District Board's members, SolarCity subpoenaed 46 citizens who had been elected to serve on the Board or Council, with the objective of (in its words) "gain[ing] discovery into the members' financial interests." Dist. Ct. Dkt. 43, at 9 & n.4.

nial of qualified immunity to be remedied only after final judgment. *See id.* at 671; *Will*, 546 U.S. at 352.

Immediate appeals from denials of state-action immunity to public entities are justified for much the same reason as are immediate appeals from denials of qualified immunity: to ensure that policymakers in state and local government freely exercise their discretion, without the distraction and disruption inflicted by litigation over the merits of their policies, and without the inhibition caused by fear of such litigation. Unless they can obtain prompt appellate review of a denial of state-action immunity, government actors risk serious burdens whenever they make a decision that displeases even a small segment of the public—burdens that include the need to collect and produce documents, to prepare and appear for depositions and trial, and to suffer the prolonged strain and disruption that litigation creates, as well as the potential for unwarranted condemnation of the way they made difficult policy judgments and resolved legitimate competing interests. This risk can chill government policymaking, impelling officials toward decisions that minimize the prospect of their being sued rather than decisions that best advance the public interest.

This risk is especially serious given the unusually onerous nature of antitrust litigation. Such litigation often "involve[s] voluminous documentary and testimonial evidence, extensive discovery, complicated legal, factual, and technical (particularly economic) questions, numerous parties and attorneys, and substantial sums of money." *Manual for Complex Litigation, Fourth*, §30, at 519 (2004); *see also Bell Atlantic Corp.* v. *Twombly*, 550 U.S. 544, 558 (2007) ("proceeding to antitrust discovery can be expensive"); Wagener, Note, *Modeling the Effect of One-Way Fee Shifting on Dis-*

covery Abuse in Private Antitrust Litigation, 78 N.Y.U. L. Rev. 1887, 1898-1899 (2003) ("[C]ourts typically permit antitrust discovery to range further (and costs to run higher) than in most other cases."). In this case, for example, although the district court stayed proceedings after this Court granted certiorari (Dist. Ct. Dkt. 334), the District has already been forced to complete fact discovery (including thirty-nine depositions), expert discovery (involving ten experts), and summary-judgment briefing, all because a disgruntled entity disagrees with the way the District's Board exercised the ratemaking authority delegated to it by Arizona. And beyond the discovery stage, trials in antitrust cases "usually are long, and there often are controversies over settlements and attorney fees." *Manual for Complex Litigation, Fourth*, §30, at 519. As a result, when a district court errs in denying a claim of state-action immunity, a defendant entitled to that immunity will be forced to endure, unnecessarily, significant and protracted burdens unless it can appeal immediately.

The Eleventh Circuit recognized these points in allowing immediate appeals from orders denying state-action immunity; the court stated that "[a]bsent state immunity local officials will avoid decisions involving antitrust laws which would expose such officials to costly litigation and conclusory allegations." *Commuter Transportation*, 801 F.2d at 1289. The leading antitrust treatise similarly observes that it is harmful for public entities to "be intimidated from carrying out their regulatory obligations by threats of costly litigation, even if they might ultimately win." Areeda & Hovenkamp, *Fundamentals of Antitrust Law* §2.04[B], at 2-52 (4th ed. & 2015 Supp.).

All this is particularly true in the context of public utilities like the District. As two organizations representing public power utilities explained in their petition-stage amicus brief (at 13-16), such utilities often lack sufficient resources to undertake complex and protracted litigation. Thus, antitrust litigation "will necessarily draw resources away from the public services these entities provide." *Id.* at 13. The costs of such litigation, moreover, "will ultimately be shouldered by" the state's citizens. *Id.* at 16. In the case of public power utilities, that means higher electricity rates, "reduced services, or both." *Id.*; *see also supra* n.10.

3. Lower courts' reasons for rejecting effective unreviewability in this context are unpersuasive

The Ninth Circuit's rationales for holding that orders denying state-action immunity to public entities do not satisfy the effective-unreviewability requirement are unavailing, as are the similar rationales previously advanced by the Fourth and Sixth Circuits.

First, the Ninth Circuit relied (as the Sixth Circuit had) on the fact that this Court "has cautioned against broad assertions of immunity from suit and has instructed [lower courts] to 'view claims of a right not to be tried with skepticism, if not a jaundiced eye.'" Pet. App. 8a; *accord Huron Valley*, 792 F.2d at 568. But while this Court has reserved collateral-order appeal for circumstances where "delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular value of a high order,'" *Mohawk*, 558 U.S. at 107, it has not hesitated—even in its recent collateral-order decisions—to allow immediate appeal where those circumstances exist. *See Osborn*, 549 U.S. at 237-239 (orders rejecting certification

and substitution under the Westfall Act); *Sell* v. *United States*, 539 U.S. 166, 175-177 (2003) (orders authorizing forced medication of a mentally ill criminal defendant). Simply reciting that such circumstances must be present does nothing to resolve whether they are present here.[11]

Second, the Ninth Circuit relied (as the Fourth Circuit had) on the fact that this Court articulated the state-action-immunity doctrine as a matter of statutory rather than constitutional law. In the Ninth Circuit's words, this Court "assumed in *Parker* that Congress could have blocked the challenged California price regulation" had it wished to do so. Pet. App. 9a; *see also South Carolina State Board*, 455 F.3d at 444. This Court, however, has never limited collateral-order review to constitutional matters. To the contrary, it has repeatedly authorized immediate appeal from orders resolving statutory and common-law issues. *See Osborn*, 549 U.S. at 237-239 (Westfall Act); *Quackenbush* v. *Allstate Insurance Co.*, 517 U.S. 706, 711-715 (1996) (abstention-based stay and remand orders); *Mitchell*, 472 U.S. at 525-526 (qualified immunity). And even if the collateral-order doctrine were limited to orders implicating constitutional issues, that limitation would be satisfied here because this Court has consistently recognized that the foundational constitutional principles of state sovereignty and federalism animate the doctrine of state-action immunity. *See supra* pp.32-35.

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[11] The Sixth Circuit relatedly rested its refusal to permit immediate appeal in this context largely on the fact that this Court had not allowed it. *See Huron Valley*, 792 F.2d at 568. But that same reasoning—which finds no support in this Court's precedent—would have led the court at the time to improperly reject immediate appeal for denials of Eleventh Amendment immunity, which this Court allowed only later (in *Puerto Rico Aqueduct*).

Third, the Ninth Circuit reasoned (somewhat inconsistently with the rationale just discussed) that the "constitutional origins" of state-action immunity are by themselves insufficient to justify collateral-order appeal. Pet. App. 11a. But the District has never argued otherwise. *See* Pet. 26-27; Pet'r C.A. Reply Br. 27 ("[T]he District has never argued … that any constitutional ruling is immediately appealable."). Just as some non-constitutional issues may implicate the kinds of important interests that warrant immediate appeal, some constitutional issues may not. *See, e.g.*, Pet. App. 10a (discussing the *Noerr-Pennington* doctrine of antitrust law, which several courts of appeals have held not to be a basis for immediate appeal, despite its constitutional nature).

Fourth, the Ninth Circuit relied—as the Fourth and Sixth Circuits had—on the notion that state-action immunity is a defense to liability rather than an immunity from suit. Pet. App. 8a-9a; *see also South Carolina State Board*, 455 F.3d at 444-445; *Huron Valley*, 792 F.2d at 567. But as explained, this Court's recent collateral-order cases recognize that that distinction is elusive and analytically unhelpful. *See supra* pp.28-30. That is why the Court has in recent cases prescribed a functional rather than semantic standard for identifying the issues that are effectively unreviewable after final judgment: whether denying immediate appeal would imperil a sufficiently important interest.

Fifth, the Ninth Circuit reasoned that the District may not appeal the denial of state-action immunity because of "the possibility of mere distraction or inconvenience" occasioned by litigation. Pet. App. 12a-13a. But again, that is not what the District has argued. It has instead argued that, for the reasons discussed, state-action immunity protects interests that go well

beyond "the possibility of mere distraction or inconvenience." The burden of defending against antitrust challenges to state economic policies threatens to impair states' ability to adopt and implement economic policies in their citizens' interest. State-action immunity protects against that threat. It also protects states' sovereign prerogative to decide how to regulate their economies within their borders; it prevents the dignitary harm that states suffer when their political subdivisions (or possibly the states themselves) are haled into federal court over their economic policies; and it preserves the boundary between federal and state regulation.

The foregoing shows why the Ninth Circuit's reliance on *Will* was misplaced. The only interest implicated by the order at issue there (refusing to apply the judgment bar of the Federal Tort Claims Act) was "the avoidance of litigation for its own sake," "not the preservation of initiative." 546 U.S. at 353. Accordingly, this Court concluded that "[t]he judgment bar at issue … has no claim to greater importance than the typical defense of claim preclusion." *Id.* at 355. The same cannot fairly be said of state-action immunity.

Finally, the Ninth Circuit invoked the Fourth Circuit's observation that there are certain "incongruities between the state-action doctrine and immunities … that [this] Court has held fall within the collateral-order doctrine." Pet. App. 14a; *see also South Carolina State Board*, 455 F.3d at 446-447. For example, whereas "municipalities may invoke state-action immunity, … they may not rely on qualified or Eleventh Amendment immunity." Pet. App. 15a. Likewise, whereas "the state-action doctrine bars 'all antitrust actions, regardless of the relief sought,' … qualified and sovereign immunities do not prevent suits for certain prospective

relief." *Id.* And whereas "a state cannot rely on sovereign immunity to defend against" most claims brought by the United States, it can "invoke state-action immunity even in a lawsuit by the United States" for alleged antitrust violations. *Id.* Neither the Fourth Circuit nor the Ninth Circuit explained, however, why these distinctions matter in determining whether denials of state-action immunity are subject to immediate appeal. They do not matter. None of them bears on any part of this Court's collateral-order standard, including the question whether state-action immunity, like sovereign and qualified immunity, implicates important public interests that cannot be adequately vindicated by appeal after final judgment. The denial of state-action immunity does implicate such interests, and it is therefore effectively unreviewable on appeal from a final judgment.

D. The Additional Arguments That SolarCity And The Government Offered Below Fail

In the court of appeals, SolarCity and the United States advanced several arguments in addition to those addressed above. Each lacks merit.

First, SolarCity suggested (C.A. Br. 18) that collateral-order review is unavailable here because state-action immunity is an affirmative defense. But both Eleventh Amendment immunity and qualified immunity are also affirmative defenses. *See Raygor* v. *Regents of the University of Minnesota*, 534 U.S. 533, 537 (2002) (answer set forth "eight affirmative defenses, including … Eleventh Amendment immunity"); *Crawford-El* v. *Britton*, 523 U.S. 574, 587 (1998) ("[Q]ualified immunity is an affirmative defense."). Yet immediate appeal is available from a denial of either of those immunities.

Second, SolarCity cited (C.A. Br. 26) cases in which denials of state-action immunity were reviewed after final judgment, asserting that "[a]ppellate review was effective in each of those cases …, without collateral order review." *Accord* U.S. C.A. Br. 16. That assertion, however, assumes the conclusion, i.e., that review after final judgment was "effective" in the *Cohen* sense. If SolarCity's argument were valid, one could just as easily say that because a claim of Eleventh Amendment immunity, qualified immunity, or double jeopardy could in theory be reviewed after final judgment, such review is "effective," and thus collateral-order review is not available on those issues. That is not the law.

Third, the government relatedly argued (C.A. Br. 17) that collateral-order review of denials of state-action immunity is unnecessary because erroneous denials can be remedied via mandamus or an appeal certified under 28 U.S.C. §1292(b). But again, the same could be said of erroneous denials of Eleventh Amendment immunity, qualified immunity, or rulings on any other issue that this Court has held satisfies the collateral-order doctrine. The government's argument thus does nothing to support the claim that denials of state-action immunity are not immediately appealable.

Fourth, the government cited (C.A. Br. 11) 28 U.S.C. §1292(e), which authorizes this Court to promulgate rules allowing collateral-order review of particular types of orders. The Court, however, has not treated that statute as foreclosing courts from recognizing categories of collateral-order review via adjudication. For example, *Osborn* and *Sell*, each of which approved collateral-order review, postdated the enactment of section 1292(e). And even recent cases that denied collateral-order review, such as *Mohawk*, did not rest solely or even primarily on that provision. The

Court has thus recognized that section 1292(e) supplements, rather than replaces, courts' power to permit collateral-order appeals via adjudication. That recognition is consistent with the statutory text. Although section 1292(e) authorizes this Court to use rulemaking, it does not provide that appellate courts lack jurisdiction over any collateral-order appeal unless such appeal has been approved by rulemaking (or by judicial precedent that predates Congress's conferral of rulemaking authority).[12]

Fifth, the government denied that state-action immunity has any basis in Eleventh Amendment immunity, asserting (C.A. Br. 23-24) that state-action immunity "is concerned not with the dignity interests of the states" but with "permitting states to engage in economic regulation." But those two are the same; a central way in which states realize their autonomy and dignity as sovereigns is by engaging in economic regulation. Likewise infirm was the government's related attempt (*id.* at 25-26) to distinguish between state *sovereignty* and state sovereign *immunity* (i.e., Eleventh Amendment immunity). The entire basis for state sovereign immunity is, as the name suggests, states' status as sovereigns. Indeed, this Court has explained that "immunity from private suits [is] central to sovereign

[12] The government's arguments on this point rang particularly hollow given that they constituted an unexplained (indeed, unacknowledged) reversal from cases in which the government (after the adoption of section 1292(e)) urged a broadening of the collateral-order doctrine so as to advance its own interests. In *Mohawk*, for example, the United States—though opposing collateral-order appeal of orders requiring a *private party* to disclose information covered by the attorney-client privilege—"contend[ed] that collateral order appeals should be available for rulings involving certain *governmental* privileges." 558 U.S. at 113 n.4 (emphasis added).

dignity," and that "fear of private suits against nonconsenting States was the central reason" for "preserv[ing] the States' sovereign immunity" in the Eleventh Amendment. *Alden* v. *Maine*, 527 U.S. 706, 715, 756 (1999). Moreover, there is no question that *Parker* held states immune for any violations of federal antitrust law they commit *as sovereigns*. 317 U.S. at 352. It is untenable to say that this holding, the essence of which was conferring an immunity, involved state sovereignty but not sovereign immunity.

Finally, both SolarCity and the government cited this Court's description of state-action immunity as "disfavored." *North Carolina State Board*, 135 S. Ct. at 1110, *quoted in* Resp. C.A. Br. 17 *and* U.S. C.A. Br. 26; *accord* Br. in Opp. 3, 5, 30. As the Court's cases make clear, however (and as SolarCity's own brief recognized), that term simply explains why the Court requires clear articulation and (when applicable) active supervision in order for the immunity to apply. In *Phoebe Putney*, for example, the Court immediately followed its "disfavored" remark by saying: "Consistent with this preference, we recognize state-action immunity only when it is clear that the challenged anticompetitive conduct is undertaken pursuant to a regulatory scheme that 'is the State's own.'" 568 U.S. at 225 (quoting *Ticor*, 504 U.S. at 635). And it then immediately detailed the requirements for state-action immunity, in terms consistent with the description of the requirements above. *See id.* Even if state-action immunity is "disfavored" in the sense that those requirements are not often met, that does not affect its importance when they *are* met, and hence does not affect the need for immediate appeal of orders denying it.

In short, nothing SolarCity or the government has argued in this case undercuts the basic point that state-

action immunity rests on the same principles that this Court has deemed important enough to warrant immediate appeal. Because orders denying the immunity to public entities on legal grounds are also conclusive and separate from the underlying merits, the collateral-order doctrine's requirements are satisfied.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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