No. 17-368

IN THE
Supreme Court of the United States

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Petitioner,

v.

TESLA ENERGY OPERATIONS, INC., F/K/A SOLARCITY CORPORATION
Respondent.

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

REPLY BRIEF FOR PETITIONER

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID M. LEHN
DAVID GRINGER
DANIEL WINIK
ARPIT K. GARG
WILMER CUTLER PICKERING HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING HALE AND DORR LLP
350 S. Grand Ave.
Los Angeles, CA 90071
(213) 443-5300

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ARGUMENT

A. Conclusiveness

1. Disagreeing with every circuit that has addressed the question, *see* Opening Br. ("O.B.") 16, SolarCity contends that denials of state-action immunity on legal grounds are not conclusive. Its first rationale (Br. 54) is that the immunity "depends on … facts." The cases it cites, however, refute that claim; the analysis in each was legal. *See North Carolina State Board of Dental Examiners* v. *FTC*, 135 S. Ct. 1101, 1110-1116 (2015) (reviewing cases, state statutes, and other legal

authorities); *FTC* v. *Phoebe Putney Health System, Inc.*, 568 U.S. 216, 227-236 (2013) (examining Georgia's hospital laws).

To be sure, denials of state-action immunity (like qualified-immunity denials) *can* be fact-based, as in the litigation SolarCity recounts (Br. 54-55). But usually they are not. *See* Areeda & Hovenkamp, *Fundamentals of Antitrust Law* ¶222b (4th ed. & 2015 Supp.). And specifically, they are not fact-based when (again, as with qualified immunity) they rest on "purely legal" grounds, *Mitchell* v. *Forsyth*, 472 U.S. 511, 528 n.9 (1985). Those denials—the class at issue here—are conclusive under this Court's precedent. O.B. 16.

SolarCity also notes (Br. 54) that state-action immunity is an affirmative defense. But the District already addressed that (O.B. 43), explaining that this Court has allowed collateral-order appeals with some affirmative defenses.

Finally, SolarCity never squarely addresses the District's central point: that, "as with denials on legal grounds of qualified immunity, a denial on such grounds of state-action immunity '… conclusively determines the defendant's claim of right not to stand trial on the plaintiff's allegations.'" O.B. 16 (quoting *Mitchell*, 472 U.S. at 527). SolarCity's response (Br. 56) is that state-action immunity does not provide "any 'right not to stand trial.'" That misdirection fails. The District's point was that, just as *Mitchell* held that a qualified-immunity denial on legal grounds "conclusively determines the defendant's claim" to that immunity, so a denial on such grounds of state-action immunity "conclusively determines the defendant's claim" to *that* immunity. O.B. 16. SolarCity ignores this, focusing on *Mitchell*'s reference to standing trial in order to divert

attention toward arguments about effective unreviewability. That does not change *Mitchell*'s rejection of SolarCity's conclusiveness arguments.

2. SolarCity alternatively contends (Br. 56) that even if denials of state-action immunity are "generally" conclusive, the denial here was not. "This Court, however, has expressly rejected efforts to reduce the finality requirement … to a case-by-case determination[.]" *Richardson-Merrell, Inc.* v. *Koller*, 472 U.S. 424, 439 (1985); *accord Mohawk Industries, Inc.* v. *Carpenter*, 558 U.S. 100, 107 (2009) (citing *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 473 (1978)); *Gulfstream Aerospace Corp.* v. *Mayacamas Corp.*, 485 U.S. 271, 277 (1988); *Digital Equipment Corp.* v. *Desktop Direct, Inc.*, 511 U.S. 863, 868 (1994); *Johnson* v. *Jones*, 515 U.S. 304, 315 (1995). Indeed, *Johnson* v. *Jones* refutes SolarCity's claim (Br. 57) that collateral-order review is available only if both the overall class of claims *and* the specific order being challenged meet the requirements. *Johnson* acknowledged that some purely legal qualified-immunity denials might not meet the separateness requirement, yet it made clear that even those orders could be immediately appealed. *See* 515 U.S. at 319.

In any event, although the district court initially "determined there were [relevant] 'factual' questions," SolarCity Br. 56, it later recognized that clear articulation raises a legal question, Pet. App. 25a. And once it held clear articulation lacking, no factual development—on either state-action-immunity prong—could change its immunity denial; its (purely legal) clear-articulation ruling by itself dictated that denial.

This point also rebuts SolarCity's claim (Br. 57) that "[t]he circumstances here parallel those … in *Swint*" v. *Chambers County Commission*, 514 U.S. 35

(1995). There, factual development could have affected the court's pretrial ruling, because the pertinent issue there did turn on the facts. O.B. 17-18. Again, the same is not true here. That is why SolarCity cites no fact that could change the court's denial.[1]

SolarCity also invokes (Br. 58) the district court's reference to factual development regarding the active-supervision requirement. But even putting aside that that requirement can itself present a legal question, *see* O.B. 22-23, no such development, as explained, could affect the immunity denial.

Lastly, SolarCity asserts (Br. 56, 58) that the denial here is inconclusive because the district court declared it so. Even if it were relevant that one particular denial might realistically be reconsidered, however, the district court here has concluded that there are "no substantial grounds for disagreement" with its clear-articulation holding, Pet. App. 26a. More fundamentally, SolarCity's position would mean that any judge rejecting a claim of Eleventh Amendment immunity, qualified immunity, and so on could thwart this Court's precedent (and insulate herself from immediate review) simply by claiming she might revisit her denial. As noted, this Court has repeatedly rejected that position. *See supra* p.3. SolarCity never addresses this dispositive point.

B. Separateness

1.a. In denying that state-action immunity is separate from the merits of an antitrust claim, SolarCity

[1] *Swint* is the only decision of this Court mentioned in the treatise passage SolarCity cites (Br. 58). That passage thus does not support SolarCity's position.

first argues (Br. 40) that the "*Parker* doctrine is an interpretation of the scope of the Sherman Act."[2] State-action immunity, that is, supposedly differs from immediately appealable immunities because it is "internal" to antitrust statutes, rather than an "external" doctrine based in the Constitution, another statute, or common law. Consequently, SolarCity argues, state-action immunity, unlike "external" immunities, prevents the alleged conduct from being unlawful. This logic—which to the District's knowledge no court has adopted—lacks merit.

To begin with, state-action immunity is *not* wholly "internal." It rests on external constitutional considerations: federalism and state sovereignty. O.B. 32-35. That aside, defining "merits" as anything internal to a statute makes no sense. On that theory, there would be no collateral-order appeal even if, for example, Congress had expressly provided in the antitrust laws that states and state officers acting in their official capacity had absolute immunity against any claim under those laws, or that no action could be maintained under those laws against a defendant raising a meritorious qualified-immunity defense. Those immunities would then be "internal" and thus not separate from the merits—even though this Court has held that they are separate.

If SolarCity's response is that state-action immunity is not merely "internal" but specifically an interpretation of the antitrust laws' liability provisions (Br. 12, 21-22), that simply assumes the conclusion, i.e., assumes (Br. 41) that "[i]f *Parker* applies, … no antitrust law is violated." And that assumption is wrong. In address-

[2] The government echoes SolarCity's arguments on separateness (and on effective unreviewability and alternative appeal mechanisms).

ing a challenge to a California wine-pricing system, the Court stated that the system "plainly constitutes resale price maintenance in violation of the Sherman Act.... Thus, we must consider whether the State's involvement … establish[es] antitrust immunity under *Parker* v. *Brown*, 317 U.S. 341 (1943)." *California Retail Liquor Dealers Ass'n* v. *Midcal Aluminum, Inc.*, 445 U.S. 97, 103 (1980). *Parker* itself, of course, shows that—as the District argued (O.B. 22)—a court need not even decide whether there would be a violation absent state-action immunity; the Court there stated: "We may assume … that the California prorate program would violate the Sherman Act if … organized … by … private persons." 317 U.S. at 350.

State-action immunity therefore operates just like "external" immunities that satisfy the separateness requirement; it "frees one who enjoys it from a lawsuit whether or not he acted wrongly," *Richardson* v. *McKnight*, 521 U.S. 399, 403 (1997); *accord Cantor* v. *Detroit Edison Co.*, 428 U.S. 579, 600 (1976) (plurality). The leading treatise agrees, saying that state-action immunity "shield[s] the challenged conduct even if such conduct were … otherwise offensive to the antitrust laws." *Fundamentals of Antitrust Law* ¶224a.

b. SolarCity next asserts that separateness is lacking even if "merits" means (as the District contends) only the "factual and legal issues comprising the plaintiff's cause of action," *Coopers & Lybrand*, 437 U.S. at 469. In antitrust actions, those issues boil down to whether the defendant engaged in injurious anti-competitive conduct. *E.g.*, *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328, 344 (1990). State-action immunity is separate—i.e., "conceptually distinct" and "significantly different" *Johnson*, 515 U.S. at 314—from those issues. It turns not on whether the

defendant engaged in injurious anticompetitive conduct but on whether it acted on a state's behalf. O.B. 19-23.

Disputing this, SolarCity argues (Br. 42) that separateness is lacking whenever resolving a claim "may require" any consideration of the merits. In fact, separateness is lacking only when a claim "*generally* involves considerations … *enmeshed* in the … issues comprising the" plaintiff's cause of action. *Coopers & Lybrand*, 437 U.S. at 469 (emphases added); *accord Van Cauwenberghe* v. *Biard*, 486 U.S. 517, 529 (1988) (no separateness because, "*in the main*, the issues that arise in *forum non conveniens* determinations will *substantially* overlap" with the merits (emphases added)); *Johnson*, 515 U.S. at 314 (no separateness where "it will often prove difficult to find any 'separate' question"). SolarCity's authority for a may-require standard is *Cunningham* v. *Hamilton County*, 527 U.S. 198 (1999). But the sentence in *Cunningham* immediately before the one SolarCity cites explains that separateness was lacking there because, "[m]uch like the orders … in *Van Cauwenberghe* and *Coopers & Lybrand*, a Rule 37(a) sanctions order *often will be* inextricably intertwined with the merits." *Id.* at 205 (emphasis added). SolarCity's suggestion that *Cunningham* nevertheless changed prior cases' separateness standard—even while citing those cases—is untenable, particularly given that subsequent cases also reject a may-require standard. Separateness would thus be lacking here only if state-action immunity often or generally overlapped substantially with the merits of an antitrust claim.

That is not the case—certainly not with purely legal denials, the class at issue here. SolarCity asserts (Br. 43-44) that the clear-articulation inquiry "requires examination of the [alleged] conduct … to determine

whether … anticompetitive consequences were" foreseeable. But that level of overlap, i.e., consideration of the factual allegations, is what *Mitchell* held insufficient to defeat separateness. O.B. 21-22 (citing 472 U.S. at 528-529). SolarCity ignores this, perhaps because such consideration was the limit of the overlap with the merits in *Phoebe Putney*, on which SolarCity relies; the analysis there mostly involved a review of Georgia's (separate) hospital laws. *See* O.B. 19-20. SolarCity also ignores the other three state-action-immunity decisions the District cited (O.B. 20) similarly illustrating the lack of overlap between the merits and the clear-articulation inquiry.

The foregoing points likewise answer SolarCity's arguments (Br. 44-45) about separateness and the active-supervision requirement. To decide whether that requirement applies, a court examines state laws addressing the defendant's nature and composition, including the nature of its electoral system, if any. *See North Carolina State Board*, 135 S. Ct. at 1110-1116 (conducting such an examination). That inquiry does not generally or substantially overlap with the merits of an antitrust claim, which turn not on the defendant's composition and nature but on the "impact on competition" of the alleged "restraint on trade," *NCAA* v. *Board of Regents of University of Oklahoma*, 468 U.S. 85, 104 (1984). Finally, SolarCity's argument that separateness is absent when the question is whether there actually was active supervision (Br. 45) is also wrong. When such denials are purely legal, they involve only looking at whether state law provided adequate mechanisms for active supervision. *See* O.B. 22-23.

2. SolarCity's fallback separateness argument is that the relevant class of orders is *all* denials of state-

action immunity to public entities, not denials on purely legal grounds. That is meritless.

To begin with, SolarCity contends (Br. 45-46) that the District has shifted positions from its petition, which purportedly embraced SolarCity's all-denials definition. To the contrary, the petition argued that "orders denying state-action immunity to public entities *on legal grounds*" are immediately appealable. Pet. 35 (emphasis added); *accord* Pet. 31 (header), 34; Cert. Reply 7-8, 10. SolarCity points to the wording of the question presented, but that would help SolarCity only if this Court had to answer questions presented either "yes" or "no." In fact, the Court's answer could parallel its answer in the qualified-immunity context: yes, if the denial is on "purely legal" grounds, *Mitchell*, 472 U.S. at 528 n.9.

SolarCity also argues (Br. 52-53) that even purely legal denials overlap with the merits. That simply restates SolarCity's core separateness contention (which fails for the reasons given earlier); it is irrelevant to the proper class definition. Likewise immaterial is SolarCity's argument (Br. 46-48) that this case does not involve a purely legal denial. Whether a particular denial falls inside or outside the relevant class has nothing to do with the class's proper definition. In any event, the denial here *was* purely legal; again, once the district court recognized that clear articulation is a legal question, and deemed such articulation lacking, the immunity claim was defeated. Were there doubt about that, the proper course would be to answer the question presented in the way suggested above and then—because this is "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005)—allow the lower courts to resolve SolarCity's never-addressed case-specific arguments "on remand," *Puerto Rico Aqueduct*

& Sewer Authority v. *Metcalf & Eddy, Inc.*, 506 U.S. 139, 147 (1993).

SolarCity's lone pertinent contention regarding how to define the class (Br. 48-52) is that the District's definition is "unworkable." But this Court rejected the same contention—that this definition "will prove unworkable"—in *Johnson*, 515 U.S. at 318. *Johnson* explained that "where purely legal matters are at issue," (1) appellate judges enjoy "comparative expertise," such that interlocutory appeals are more "likely to bring important error-correcting benefits"; (2) appeals generally do not "require reading a vast pretrial record," minimizing the "delay" from interlocutory appeal; and (3) there is "less risk" of courts "wast[ing] time in duplicating investigations of the same facts on successive appeals." *Id.* at 316-317. In short, "considerations of delay, comparative expertise of trial and appellate courts, and wise use of appellate resources" favor immediate appealability of orders involving "abstract issues of law." *Id.* at 317. This reasoning applies equally here.

SolarCity's effort to distinguish denials of qualified immunity, which *Johnson* addressed, from denials of state-action immunity is unavailing. First, SolarCity points (Br. 49) to the possibility of multiple interlocutory appeals. But that exists in qualified-immunity cases as well. *See Behrens* v. *Pelletier*, 516 U.S. 299 (1996). Second, SolarCity asserts (Br. 51) that "qualified immunity generally turns on a single legal question." The case it cites, *Johnson*, does not say that; *Johnson* says immediate appeal is available *when* the immunity claim raises a legal question, *see* 515 U.S. at 313-314. The same should be true in this context. Third, SolarCity argues (Br. 50) that appellate courts, to confirm their jurisdiction, may have to make threshold decisions

about whether a state-action-immunity denial (or the appealed component) is purely legal. That too is true with qualified immunity. *See Johnson*, 515 U.S. at 319 (contemplating courts "separat[ing] an appealed order's reviewable determination … from its unreviewable determination"). For example, in *Plumhoff* v. *Rickard*, 134 S. Ct. 2012 (2014), this Court, to conclude that the Sixth Circuit "properly exercised jurisdiction," had to hold that the qualified-immunity denial there "raise[d] legal issues … different from any purely factual issues that the trial court might confront if the case were tried," *id.* at 2019-2020; *see also Hartman* v. *Moore*, 547 U.S. 250, 257 n.5 (2006).

Finally, SolarCity observes (Br. 48-49) that this Court has not applied the purely-legal definition beyond the qualified-immunity context. But that definition was apparently raised in this Court in only one other context, Eleventh Amendment immunity. *See Puerto Rico Aqueduct*, 506 U.S. at 147. And "[w]hether an action is barred by the Eleventh Amendment is a question of law." *Hutto* v. *South Carolina Retirement Systems*, 773 F.3d 536, 542 (4th Cir. 2014); *accord, e.g.*, *United States ex rel. Lesinski* v. *South Florida Water Management District*, 739 F.3d 598, 602 (11th Cir. 2014). By contrast, orders denying state-action immunity are not always legal—making the distinction appropriate for purposes of assessing immediate appealability.

C. Effective Unreviewability

1. The proper standard

SolarCity's arguments regarding the standard for effective unreviewability (Br. 17-29) mischaracterize

the District's position and misunderstand relevant precedent.

a. SolarCity claims (Br. 25-26) that the District espouses a "novel[]" standard under which "any order involving an 'important interest'" qualifies. In reality, the District's position is that "[a]n order is effectively unreviewable if delaying an appeal would imperil a sufficiently important interest." O.B. 28 (header); *accord* O.B. 3, 30. Importance alone is therefore insufficient; the asserted interests must be jeopardized by deferred review.[3]

Far from being novel, that standard comes directly from this Court's cases. *Mohawk*, for example, stated that in assessing effective unreviewability, "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.'" 558 U.S. at 107; *see also id.* at 108 (similar statement in describing the "crucial question"). Indeed, the Court's seminal collateral-order decision referred to rights that are "too important to be denied [immediate] review." *Cohen* v. *Beneficial Industrial Loan Corp.*, 337 U.S. 541, 546 (1949).

b. Undaunted, SolarCity offers two proposals regarding the effective-unreviewability standard. First, it argues (*e.g.*, Br. 2, 12, 29) that an immunity from suit is required (and that state-action immunity does not qualify, instead providing only immunity from liability). Second, it contends that importance is a prerequisite on

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[3] This argument is not an "abandon[ment]" (SolarCity Br. 24-25) of the District's position below. *Compare, e.g.*, Pet. C.A. Br. 41 *with* O.B. 3 (each quoting the same language from *Mohawk* about the effective-unreviewability standard).

top of an immunity from suit, i.e., that effective unreviewability exists only if "an immunity from suit … *also* meets a certain threshold 'level of importance'" (Br. 26). Both arguments fail.

i. In analyzing effective unreviewability, some older collateral-order cases (on which SolarCity relies in making this argument (*e.g.*, Br. 19-20)) employed the shorthand of "immunity from suit" and "immunity from liability." *See* O.B. 28. But as litigants attempted to characterize more and more threshold grounds for dismissal as immunities from suit, the Court clarified that having the effective-unreviewability analysis actually turn on that label "is too easy to be sound and, if accepted, would leave the final order requirement … in tatters." *Will* v. *Hallock*, 546 U.S. 345, 351 (2006); *see* O.B. 29-30. That is because "[t]here is no single, 'obviously correct way to characterize' an asserted right"; "virtually every right that could be enforced appropriately by pretrial dismissal might loosely be described as conferring a 'right not to stand trial.'" *Digital Equipment*, 511 U.S. at 873. If that sufficed, "almost every [interlocutory] order might be called 'effectively unreviewable.'" *Will*, 546 U.S. at 351.

Will therefore "combed" the Court's cases "for some further characteristic that merits [immediate] appealability," *id.*—a characteristic beyond the fact that a particular right would entitle the defendant to a threshold dismissal. And it determined that, "as *Digital Equipment* explained, that something further boils down to 'a judgment about the value of the interests that would be lost through rigorous application of a final judgment requirement.'" *Id.* at 351-352. Thus, "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." *Id.* at 353. That, again, is the standard the District espouses here.

SolarCity insists (Br. 25-26) that this recitation "misreads this Court's decisions," both because the Court has not overruled older collateral-order cases and because some recent cases (*Plumhoff* and *Osborn* v. *Haley*, 549 U.S. 225 (2007)) refer to immunity from suit. But no overruling was necessary; as *Will*'s review of precedent showed, the Court had been using *Will*'s standard all along, *see* 546 U.S. at 352, albeit with "immunity from suit" as a shorthand—one that litigants had come to abuse. *Will*, again, thus explained that "immunity from suit" is at most a label used at the conclusion of the effective-unreviewability analysis, not (as SolarCity contends) a premise of it.

As for recent cases, *Plumhoff*, in labeling qualified immunity an immunity from suit, was repeating *Mitchell*'s phrasing decades earlier, *see* 134 S. Ct. at 2019—for which *Will*'s re-examination, as explained, already accounted. And *Osborn* referred to immunity from suit because that was what this Court held the Westfall Act explicitly conferred. *See* 549 U.S. at 238-239. In that situation, courts need not judge whether sufficiently important interests are imperiled by delayed review; Congress has already done so. *See* O.B. 30 n.8. But that does nothing to support SolarCity's argument (which *Will* rejected) that those judgments can be short-circuited via the label "immunity from suit" *absent* such a legislative (or constitutional) command.

Indeed, immunity from suit has never been a prerequisite to collateral-order appeal. For example, *Stack* v. *Boyle*, 342 U.S. 1 (1951), allowed immediate appeal from orders denying bail, *id.* at 6, which involve

no such immunity. Similarly, the right asserted in *Sell* v. *United States*, 539 U.S. 166 (2003), was not an immunity from suit; as the Court noted, defendants who could not be involuntarily medicated in order to be prosecuted could still be committed civilly, *see id.* at 180. SolarCity (Br. 18) puts *Sell* in a separate category: cases involving an issue that "cannot be meaningfully addressed following final judgment." But that is just another way of saying (as *Sell* did, *see* 539 U.S. at 176-177) that the interests underlying the right would be imperiled by delayed review. It does not reconcile *Sell* (or *Stack*) with the notion that collateral-order review requires an immunity from suit. If that were true, *Mohawk* (and other cases) could have been resolved much more quickly, given the undisputed absence of any such immunity. Instead, *Mohawk*—which never even mentioned immunity from suit—undertook an extended analysis of whether the underlying interests were sufficiently important and would be lost by delayed appeal (the standard the District embraces). *See* 558 U.S. at 108-113.[4]

Put simply, SolarCity's urging of a standard that *Will* said "would leave the final order requirement … in tatters," 546 U.S. at 351, should be rejected.

ii. Equally infirm is SolarCity's argument (Br. 24-29) that importance is a separate effective-unreviewability requirement, stacked atop the purported immunity-from-suit requirement. As explained, there is no freestanding immunity-from-suit requirement. Rather, to the extent "immunity from suit" sur-

[4] Cases like *Sell* also rebut SolarCity's claim (Br. 19) that absent an "explicit statutory or constitutional guarantee that trial will not occur," denial of a right is effectively unreviewable only if it is "well-grounded in 'public law.'" This Court has never so held.

vives in the doctrine, as a label drawn from early decisions, *see supra* p.14, importance—and in particular whether delayed review would threaten a sufficiently important interest—is the "decisive consideration" and "crucial question" in deciding whether that label applies, *Mohawk*, 558 U.S. at 107, 108.

SolarCity's authorities (Br. 26-29) do not support its contrary claim. They refute only the strawman argument (Br. 26) that "any order involving an 'important interest'" is effectively unreviewable. Knocking down strawmen does not show that importance is a requirement in addition to, rather than in lieu of, an immunity from suit—nor does anything else in SolarCity's discussion.

c. SolarCity's attempt to apply the immunity-from-suit/immunity-from-liability dichotomy here confirms the Court's wisdom in rejecting that dichotomy as the actual standard. First, SolarCity *declares*, repeatedly (*e.g.*, Br. 2, 21), that state-action immunity is not an immunity from suit—the very kind of conclusory declaration that led this Court to explain that such labels are at most the conclusion, not the premise, of effective-unreviewability analysis. Second, SolarCity asserts (Br. 23) that state-action immunity is an immunity from liability because it "shield[s] state-regulated *activities*," whereas immunities from suit supposedly protect "classes of government defendants." That is incorrect.

State-action immunity is both class- and activity-based—just like other immunities that fall within the collateral-order doctrine. State-action immunity covers two classes: states and non-state entities acting on a state's behalf. It thus also requires looking at activities, to determine whether a non-state defendant is in

fact acting on a state's behalf. Other immunities function the same way. Qualified immunity, for example, protects a class (public officials), but only for conduct that does not violate "clearly established law." *Mitchell*, 472 U.S. at 528. Speech-or-debate immunity similarly depends on "whether the plaintiff seeks to hold a Congressman liable for protected legislative actions or for other, unprotected conduct." *Id.* And absolute immunity likewise applies only if the defendant was engaging in particular activities. *See Nixon* v. *Fitzgerald*, 457 U.S. 731, 749 (1982) ("official acts"); *Stump* v. *Sparkman*, 435 U.S. 349, 356-357 (1978) (judicial acts); *Imbler* v. *Pachtman*, 424 U.S. 409, 431 (1976) (prosecutorial conduct).

SolarCity claims (Br. 20) that support for its class-activities distinction comes from *Parker*'s statement that the Sherman Act is "a prohibition of individual and not state action," 317 U.S. at 352. That statement, however, distinguishes between "individual … action" and "state action," i.e., distinguishes based on the defendant's identity, *not* activity. In any event, state-action immunity (like other immunities) is, as explained, about both classes and activities. Nothing in *Parker*—or any other decision of this Court—is inconsistent with denials of the immunity being immediately appealable.

In sum, the effective-unreviewability standard is (as SolarCity eventually acknowledges (Br. 29)) exactly what this Court's recent collateral-order cases have said: whether denying immediate appeal would imperil a sufficiently important interest.

2. Applying the standard

SolarCity offers various arguments (Br. 29-39) for why effective unreviewability is absent here under the correct standard. None has merit.[5]

a. SolarCity claims (Br. 31-32) that although state-action immunity rests on the same sovereignty and governmental interests that "render qualified- and sovereign-immunity claims effectively unreviewable," collateral-order review is unwarranted here because state-action immunity "applies to defendants and remedies to which neither qualified nor sovereign immunity extend[s]." Specifically, SolarCity notes (Br. 30-32) that state-action immunity, unlike Eleventh Amendment immunity, can be invoked by non-state entities. But state-action immunity—just like state-sovereign immunity—"does not apply … directly" to non-state entities, *Phoebe Putney*, 568 U.S. at 225. It applies if they function as the state's "agent[]," carrying out "activities directed by its legislature." *Parker*, 317 U.S. at 350-351; *cf. Mount Healthy City School District Board of Education* v. *Doyle*, 429 U.S. 274, 280 (1977) (political subdivision "partak[es] of the State's Eleventh Amendment immunity" if it is "an arm of the State"); *Filarsky* v. *Delia*, 566 U.S. 377, 387 (2012) (qualified immunity extends to "private individuals engaged in public service"). When state-action immunity applies,

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[5] In making these arguments, SolarCity reprises (Br. 32) its petition-stage contention that the District's "public status is purely 'nominal.'" That is wrong, but regardless it concerns the District's entitlement to state-action immunity, not whether denials are immediately appealable. *See* O.B. 25 n.7. It thus provides no basis to affirm—nor any basis to dismiss the writ as improvidently granted, given that the issue was raised at the petition stage, *see United States* v. *Williams*, 504 U.S. 36, 40 (1992).

therefore, it is precisely out of respect for "the sovereign capacity of the States to regulate their economies." *Phoebe Putney*, 568 U.S. at 224; *accord id.* at 226 (state-action immunity preserves states' "freedom ... to *use their municipalities* to administer state regulatory policies" (emphasis added)); *FTC* v. *Ticor Title Insurance Co.*, 504 U.S. 621, 633 (1992) ("Immunity is conferred [on private actors] out of respect for ongoing regulation by the State[.]").

Indeed, although the opening brief highlighted (at 33-34) the state-sovereignty interests jeopardized by delayed review of state-action-immunity denials—interests underscored by the amicus briefs supporting the District (including one from 24 states)—SolarCity ignores those interests, focusing on the defendants that are sued for carrying out states' economic policies. But it is the states themselves that choose how to regulate their economies. SolarCity's position would subject states to the indignity of having their policy choices inhibited via years of litigation initiated by disgruntled private actors against those effectuating the states' policies.

SolarCity also argues (Br. 30) that Eleventh Amendment and qualified immunities bar "only … damages suits." In fact, the Eleventh Amendment bars "any suit in … equity," U.S. Const. amend. XI, and hence precludes injunctions against states as well as retrospective equitable relief against their agents, *e.g.*, *Quern* v. *Jordan*, 440 U.S. 332, 337 (1979). Contrary to SolarCity's argument, moreover, this Court has explained that injunctions against states and their agents implicate essentially the same interests as damages actions:

> [T]he relief sought … is irrelevant to … whether the suit is barred by the Eleventh Amendment.… The Eleventh Amendment does not exist solely … to "prevent federal-court judgments that must be paid out of a State's treasury"; it also serves to avoid "the indignity of subjecting a State to the coercive process of judicial tribunals at the instance of private parties."

Seminole Tribe v. *Florida*, 517 U.S. 44, 58 (1996) (brackets and citations omitted).

Qualified immunity is likewise concerned with not only "liability for money damages," but also "the general costs of subjecting officials to [both] the risks of trial" and "such pretrial matters as discovery," because those too cause "distraction of officials from their governmental duties, inhibition of discretionary action, and deterrence of able people from public service." *Mitchell*, 472 U.S. at 526; *accord Ashcroft* v. *Iqbal*, 556 U.S. 662, 685 (2009). These costs are imposed by injunctive suits as well as damages actions.

To be sure, qualified and Eleventh Amendment immunities do not bar prospective equitable relief against state officials. But that is because their underlying interests, although present in cases requesting such relief, are outweighed by the need to provide adequate remedies for constitutional violations. As this Court put it, "certain suits for declaratory or injunctive relief against state officers must … be permitted if the Constitution is to remain the supreme law of the land." *Alden* v. *Maine*, 527 U.S. 706, 747 (1999) (citing *General Oil Co.* v. *Crain*, 209 U.S. 211, 226-227 (1908)). In the state-action-immunity context, however, there is no constitutional imperative to provide remedies for anti-

competitive state policies, so the immunity's scope reflects the full range of situations where the underlying interests are at stake. *See* States Br. 23-31; National Governors Association Br. 8-18; American Public Power Association Br. 21-24. That the countervailing interests are weaker with state-action immunity than with other immunities provides no basis to deny collateral-order appeal here.

For similar reasons, SolarCity errs in invoking (Br. 31) *Swint*'s refusal to permit collateral-order appeal from orders denying a municipality's claim of immunity from damages under 42 U.S.C. §1983. *See* 514 U.S. at 41-43. That refusal flowed from the Court's earlier rejection of qualified immunity for municipalities under §1983, a rejection based partly on the fact that conferring qualified immunity on municipalities would undermine §1983's "central aim" of "provid[ing] protection to those persons wronged by the misuse of [government] power." *Owen* v. *City of Independence*, 445 U.S. 622, 650 (1980) (brackets and quotation marks omitted); *accord id.* at 656. Again, then, this Court deemed the governmental interests underlying qualified immunity outweighed by other interests. By contrast, the entire rationale of state-action immunity is that when the immunity applies, the balance tips the other way, i.e., the underlying sovereignty, federalism, and other governmental interests outweigh the interests underlying the antitrust laws. *See, e.g.*, *North Carolina State Board*, 135 S. Ct. at 1109-1110. In those circumstances, immediate appeal is indeed warranted—just as when those same interests outweigh other interests in the context of Eleventh Amendment or qualified immunity.

b. SolarCity's contention (Br. 33-34) that "other doctrines" protect "the interests [the District] invokes"

is belied by the preceding discussion, and by the procedural history here. The litigation has continued despite partial dismissal under the Local Government Antitrust Act, and as SolarCity says (Br. 34), the District cannot assert Eleventh Amendment or qualified immunity. Furthermore, SolarCity does not explain why the potential availability of one defense renders the denial of another effectively reviewable after final judgment. At bottom, this argument (like much of SolarCity's brief) is really an attack on state-action immunity itself. Given the "over [7]0 years of congressional acquiescence" in the doctrine, that attack should be rejected. *Southern Motor Carriers Rate Conference, Inc.* v. *United States*, 471 U.S. 48, 55 n.18 (1985).

c. SolarCity frets (Br. 3, 11, 34-38) that allowing collateral review here would require allowing it with many other types of orders. That concern is misplaced.

As an initial matter, SolarCity cites nothing suggesting that the consequences it darkly forecasts have materialized in either of the two circuits where collateral-order review from denials of state-action immunity has been allowed for decades. That severely undercuts SolarCity's predictions. *See Johnson*, 515 U.S. at 319.

In any event, although SolarCity contends (Br. 34-35) that reversal here would allow *private* entities to immediately appeal denials of state-action immunity, courts of appeals have distinguished such denials from denials to public entities—just as in the qualified-immunity context. Pet. 16 n.4. SolarCity does not acknowledge this, let alone explain why it fails to allay the professed concern.

Also baseless is SolarCity's argument (Br. 35-36) that if collateral-order review is available here, it would be available from any ruling "rejecting a defendant's

argument that a state law survives federal preemption." But while various types of litigants can argue against preemption, state-action immunity can be asserted—and thus its denial immediately appealed—only by a state or its agent. *See City of Columbia* v. *Omni Outdoor Advertising, Inc.*, 499 U.S. 365, 379-380, 382-383 (1991) (city defendant successfully asserted state-action immunity but private co-conspirator had to rely on other defenses). Most preemption cases, moreover, would not also involve the interests underlying qualified immunity, as state-action immunity does.

Finally, SolarCity contends (Br. 36) that if the "efficiency interests" the District identifies sufficed, then interlocutory appeal would be available "whenever" a public entity's motion to dismiss was denied, because those interests "are present in all suits involving public entities." State-action immunity, however—like qualified immunity—promotes efficiency not for its own sake but to encourage government *initiative* in policymaking. O.B. 36-39. Immediate appeal is therefore available only when an asserted right is designed to protect those interests, *see Iqbal*, 556 U.S. at 685, *quoted in* SolarCity Br. 38, not anytime a defense asserted by a governmental actor is rejected. SolarCity's citations to *Swint* and *Will* (Br. 36-37) are unavailing for the same reason: As SolarCity recognizes (Br. 37), no such right was asserted there, *see* O.B. 42. Similarly, it is irrelevant that qualified immunity applies only when the law was not clearly established (SolarCity Br. 37), because that limitation does not exist to promote initiative. It instead reflects a "balancing of competing values"—avoiding the "costs" of litigation while preventing and remedying unlawful actions, *Harlow* v. *Fitzgerald*, 457 U.S. 800, 816 (1982).

D. Alternative Appeal Mechanisms

SolarCity argues (Br. 1, 59) that collateral-order appeal is unnecessary here because defendants who are denied state-action immunity can seek mandamus or certification under 28 U.S.C. §1292(b). That argument fails.

Unlike collateral-order appeal, mandamus and (as this case illustrates) §1292(b) appeal are discretionary; an appeal proceeds only if the court finds certain preconditions met. They are thus not a substitute for collateral-order appeal of right. Precedent confirms this: As the District explained (O.B. 44), mandamus and §1292(b) appeal are available for other orders this Court has held immediately appealable. Yet the Court did not regard those alternatives as a reason to deny collateral-order appeal. SolarCity offers no response.

SolarCity's final argument (Br. 60-61) is that this Court should affirm because it has rulemaking authority to permit collateral-order appeals. But the District addressed that too (O.B. 44-45), explaining that since Congress granted that authority, the Court has continued to use adjudication to approve immediate appeal for certain orders—an approach consistent with the relevant statutory text, which nowhere makes the rulemaking authority exclusive. Here too, SolarCity ignores that point.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

CHRISTOPHER E. BABBITT
DANIEL S. VOLCHOK
DAVID M. LEHN
DAVID GRINGER
DANIEL WINIK
ARPIT K. GARG
WILMER CUTLER PICKERING
HALE AND DORR LLP
1875 Pennsylvania Ave. NW
Washington, DC 20006
(202) 663-6000

MOLLY S. BOAST
Counsel of Record
WILMER CUTLER PICKERING
HALE AND DORR LLP
7 World Trade Center
250 Greenwich St.
New York, NY 10007
(212) 230-8800
molly.boast@wilmerhale.com

CHRISTOPHER T. CASAMASSIMA
WILMER CUTLER PICKERING
HALE AND DORR LLP
350 S. Grand Ave.
Los Angeles, CA 90071
(213) 443-5300

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