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., FKA SOLARCITY CORPORATION,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE AMERICAN ANTITRUST INSTITUTE AS AMICUS CURIAE IN SUPPORT OF RESPONDENT

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

OTHER AUTHORITIES

INTEREST OF AMICUS CURIAE

The American Antitrust Institute ("AAI") is an independent, nonprofit organization devoted to promoting competition that protects consumers, businesses, and society. It serves the public through research, education, and advocacy on the benefits of competition and the use of antitrust enforcement as a vital component of national and international competition policy. AAI enjoys the input of an Advisory Board that consists of over 130 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org.[1]

AAI has long been concerned about the proper scope of the state-action defense. It submitted amicus briefs in *N.C. State Bd. of Dental Exam'rs v. FTC*, 135 S. Ct. 1101 (2015) and *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216 (2013) in support of the positions adopted by the Court. More recently, it filed a brief in the Fifth Circuit in *Teladoc, Inc. v. Texas Medical Bd.*, No. 16-50017 (June 27, 2016), addressing, *inter alia*, the application of the collateral-order doctrine to orders denying state-action protection to state boards controlled by market participants. *See also* Br. for Amicus Curiae American Antitrust Institute, *United Nat. Maintenance, Inc. v. San Diego Convention Center, Inc.,* 749 F.3d 869 (9th

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[1] The written consents of all parties to the filing of this brief have been lodged with the Clerk. Individual views of members of AAI's Board of Directors or Advisory Board may differ from AAI's positions. No counsel for a party has authored this brief in whole or in part, and no person other than amicus curiae has made a monetary contribution to fund its preparation or submission.

Cir. 2014); Br. for Amicus Curiae American Antitrust Institute, *Shames v. Cal. Travel & Tourism Comm'n*, 626 F.3d 1079 (9th Cir. 2010); American Antitrust Inst., *State Occupational Licensing Reform and the Federal Antitrust Laws: Making Sense of the Post-*Dental Examiners *Landscape* (Nov. 6, 2017).

AAI believes that permitting immediate appeals of interlocutory orders denying the state-action defense to public entities would impede antitrust enforcement, upset the state-regulation/competition balance struck by *Parker v. Brown*, 317 U.S. 341 (1943) and its progeny, and lead to significant judicial inefficiencies. AAI takes no position on the merits of either petitioner's state-action defense or respondents' antitrust claim.

SUMMARY OF ARGUMENT

1. The policies underlying *Parker* and sound judicial administration dictate that orders denying a state-action defense ("*Parker* denials") should not be immediately appealable as of right.

Petitioner and its amici focus on the burdens public entities will suffer if a motion to dismiss on state-action grounds is erroneously denied and they are unable to take an immediate appeal. Those burdens are not cognizable under collateral-order jurisprudence for the reasons discussed in argument III, and they are exaggerated insofar as damages are unavailable. More importantly, petitioner and its amici have missed the other side of the equation: the burdens on antitrust plaintiffs *and the public* that would result when the state-action denial is correct and an

immediate appeal delays and increases the cost of a legitimate antitrust claim. In such situations, delay may mean that anticompetitive conduct and injury continues. And just as petitioner asserts a chilling effect from erroneous denials, there is a chilling effect on potential antitrust plaintiffs from allowing appeals of orders that are correct. Public policy should balance the risks and costs of delaying appeals of incorrect *Parker* denials and the risks and costs of allowing immediate appeals of correct *Parker* denials in potentially meritorious antitrust cases. That balance decidedly *disfavors* allowing automatic appeals for two reasons.

First, as an empirical matter, the likelihood of a successful appeal of a *Parker* denial is low. Indeed, the safety valve of discretionary review under 28 U.S.C. § 1292(b) significantly reduces the likelihood that collateral order treatment will capture any additional meritorious appeals. On the other hand, defendants will have an incentive to appeal every *Parker* denial, even if the chances of success are low. Thus the burden and chilling effect on antitrust plaintiffs are high, particularly with only injunctive relief available.

Second, to the extent there is uncertainty over the balance of harms, the *Parker* doctrine itself favors protecting against the risk of delaying legitimate antitrust claims (our national economic policy favoring competition). As this Court has repeatedly emphasized, the state-action doctrine is disfavored. Moreover, a stringent state-action doctrine is itself consistent with federalism principles. Thus, allowing

appeals of correct decisions denying state-action protection imposes a federalism cost, too.

Allowing immediate appeal is also contrary to sound judicial administration because it may not advance the resolution of the case or the state-action issues themselves. For example, appellate resolution limited to the question of whether state law provides a sufficient *mechanism* for active supervision does not carry the day on that issue; defendants must still make a showing that the State provided meaningful review in fact. Determining whether the clear articulation requirement is satisfied also will often require factual development about the alleged anticompetitive conduct, which may look different on the pleadings, on summary judgment, or after trial. And early resolution of the state-action issue may slow the resolution of weak cases when they can be dismissed more easily on the merits.

2. The Local Government Antitrust Act (LGAA) evinces Congress's considered judgment to strike a balance between burdening local government entities with litigation and chilling legitimate antitrust suits. It struck that balance by restricting antitrust remedies to injunctive relief. Congress did not deem the lesser litigation burdens associated with antitrust suits for injunctive relief worthy of special treatment or sufficiently important to provide for immediate appeal of adverse *Parker* rulings. Indeed, the fact that Congress did not provide for collateral appeal of adverse state-action rulings against municipal entities in the LGAA suggests it did not intend to do so, particularly insofar as Congress has demonstrated, for example, in the Charitable Donation Antitrust

Immunity Act, that it knows how to make an antitrust exemption an immunity from suit (rather than mere liability) when it wishes.

3. Orders denying a state-action defense to public entities on legal grounds do not satisfy the collateral-order test under *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541 (1949). In particular, such orders are not "effectively unreviewable" because deferring review of *Parker* denials does not imperil important interests recognized by the Court.

As an initial matter, petitioner's proposed category of orders for collateral appeal ignores the rule that "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll v. United States*, 354 U.S. 394, 405 (1957). Singling out state-action orders decided on "legal grounds" is inappropriate for the same reasons that successful appeals may not advance the resolution of the case. And singling out state-action orders adverse to "public entities" invites courts into individualized jurisdictional inquiries as to whether an entity is acting in a public or private capacity. Petitioner's proposed category ignores the Court's repeated admonitions that, for state-action purposes, the public or private character of an entity's conduct turns not on formalistic designations by the State, but rather on the risks that the entity will pursue private interests.

Even assuming a cognizable category of orders *arguendo*, *Parker* denials to public entities do not satisfy *Cohen*'s requirements for the simple reason that the state-action defense is not an immunity from suit, but a defense to liability. Beyond that, petitioner has

failed to meet the high burden of establishing that deferring review of the category of orders "so imperils" important interests as to justify the cost of allowing immediate appeal.

Although petitioner identifies interests the Court adjudged to be important in previous cases, it can demonstrate only that *Parker* denials "implicate" these interests in an attenuated sense, not that such denials "imperil" them. Moreover, even if *Parker* denials to some public entities could imperil important interests, petitioner must be able to show that *Parker* denials to municipal entities like itself do so.

Contrary to that necessary showing, a variety of factors *minimize* the extent to which *Parker* denials to municipal entities implicate important interests at all. First, petitioner's argument that the State's federalism interests apply when the defendant is a substate governmental entity is incorrect.Only States and arms of the State enjoy the privileges of preratification sovereignty. Municipal entities unequivocally do not possess a "residual" interest in the State's sovereignty, nor may States delegate their sovereignty to municipal entities. States may only delegate authority to regulate anticompetitively, provided they comply with the requirements of *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 107 (1980).

Second, the "government efficiency" interest protected by qualified immunity does not support collateral appeal of *Parker* denials. The interest is not independently protected by *Parker*, which means it is only relevant to the extent it is linked to the State's

federalism interests. But for the reasons discussed above, these interests are attenuated at best when the defendant is a municipal entity. In any event, the qualified immunity doctrine protects public officials' decisionmaking only as to the burden of trial from claims for damages, and it does not protect municipalities at all. Those facts defeat the analogy, because municipal entities like petitioner are exempt from damages under the LGAA.

ARGUMENT

I. THE POLICIES UNDERLYING *PARKER* AND SOUND JUDICIAL ADMINISTRATION DICTATE THAT ORDERS DENYING A STATE-ACTION DEFENSE SHOULD NOT BE IMMEDIATELY APPEALABLE AS OF RIGHT

Two fundamental principles should guide the Court's determination of whether to allow orders denying state-action "immunity" into the exclusive club of collateral orders that are immediately appealable. *See Will v. Hallock*, 546 U.S. 345, 350 (2006) ("[A]lthough the Court has been asked many times to expand the 'small class' of collaterally appealable orders, we have instead kept it narrow and selective in its membership."). One is the bedrock antitrust principle that, "'given the fundamental national values of free enterprise and economic competition that are embodied in the federal antitrust laws, state action immunity is disfavored, much as are repeals by implication.'" *Dental Exam'rs*, 135 S. Ct. at 1110 (quoting *Phoebe Putney*, 133 S. Ct. at 1010) (alteration omitted). The other is the principle of the collateral

appeal doctrine that requires a "sufficiently strong [justification] to overcome the usual benefits of deferring appeal until litigation concludes." *Mohawk Indus., Inc. v. Carptenter*, 588 U.S. 100, 107 (2009). Following these principles leads to the inescapable conclusion that petitioner's membership application should be denied.

A. Denying an Automatic Appeal Imposes Minimal Costs on Defendants Whereas Allowing Such Appeals Imposes Significant Burdens on Our National Policy Favoring Competition

Petitioner and its amici argue that automatic immediate appeal of orders denying a state-action defense is necessary to prevent public entities from having to endure the burden of defending antitrust actions to judgment which, they say, can be expensive, distracting, and chill public officials from exercising their lawful duties. Pet. Br. 35-39. Petitioner's amici acknowledge that the Local Government Antitrust Act of 1984 reduces any burden by immunizing local government entities (like petitioner here) and their officials from damages (treble or otherwise) and attorneys' fees under Section 4 of the Clayton Act. NGA Amicus Br. 11-12; 15 U.S.C. §§ 34-36; *see also Owen v. City of Independence*, 445 U.S. 622, 656 (1980) ("The inhibiting effect [of litigation] is significantly reduced, if not eliminated . . . when the threat of personal liability is removed."). Nonetheless, they claim that even a suit for injunctive relief can be expensive, distracting to defend, and have chilling effects. NGA Amicus Br. 12-13.

Petitioner's burden argument is exaggerated at best. Defending against a suit for injunctive relief is an ordinary cost of business that Congress thought municipal entities should be able to bear. *See infra* argument II. But petitioner's burden argument is fundamentally flawed for two additional reasons.

First, petitioner apparently assumes that district courts will often misapply the state-action defense and that appeals of *Parker* denials thus are likely to succeed. However, if the district court is correct and the appeal fails—and the public entity is *not* entitled to the state-action defense—then there is no cognizable burden at all. *Ex ante* there is only a risk of such a burden, and petitioner offers no evidence to suggest that the risk is high. On the contrary, as a general matter the vast majority of appeals will fail.[2] *See Mohawk,* 588 U.S. at 110 (relevant that "[m]ost district court rulings" on attorney-client privilege matters "are unlikely to be reversed on appeal"); *cf. Mitchell v. Forsyth*, 472 U.S. 511, 544 (1985) (Brennan J., dissenting) ("[L]urking behind [sympathetic] cases is usually a vastly larger number of cases in which relaxation of the final judgment rule would threaten all of the salutary purposes served by the rule.").

The likelihood of success is reduced even further when discretionary appeal under 28 U.S.C. § 1292(b) is not allowed because there is "no substantial ground

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[2] No tracked category of civil appeals involves a reversal rate higher than 14%. *See* Table B-5, U.S. Courts of Appeals Statistical Tables for The Federal Judiciary (December 31, 2016), http://www.uscourts.gov/statistics/table/b-5/statistical-tables-federal-judiciary/2016/12/31.

for difference of opinion" on the *Parker* issue, as the district court found here. Pet. App. 25a. More generally, the availability of this "safety valve" should largely screen out *Parker* denials that involve dispositive, close questions, thereby reducing the likelihood that collateral-order treatment would capture any other meritorious (or judicially efficient) appeals. *See Digital Equip. Corp. v. Desktop Direct, Inc.,* 511 U.S. 863, 883 (1994); *Mohawk*, 558 U.S. at 111.[3] Thus, the *expected* burden on public entities of denying an automatic appeal is likely to be small, even assuming the burden is cognizable under the collateral order doctrine, which it is not. *See* argument III *infra*.

Second, allowing an immediate appeal as of right will impose significant costs on antitrust plaintiffs and impair our national economic policy favoring competition, costs that petitioner and its amici ignore. While appeals will seldom be successful, defendants would have an incentive to assert them in every case as a means of delaying (and thereby discouraging) litigation against them. *See Will*, 546 U.S. at 350 (finality rule serves the "'sensible policy of avoid[ing] the obstruction to just claims that would come from permitting the harassment and cost of a succession of separate appeals from the various rulings to which a litigation may give rise'") (quoting *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981)) (alteration in original; internal quote

[3] The costs and benefits of an appeal as of right should focus on the category of appeals that do not satisfy the requirements of § 1292(b). *See* 15A Charles A. Wright & Arthur R. Miller, *Fed. Prac. & Proc.* § 3911 (2d ed. 2017) ("The adoption of 28 U.S.C. § 1292(b) . . . has an impact on the proper role of collateral order doctrine.").

marks omitted); *cf. Schwartzman v. Valenzuela*, 846 F.2d 1209, 1210 (9th Cir. 1988) ("State government defendants apparently now deem it mandatory to bring these [qualified immunity] appeals from any adverse ruling, no matter how clearly correct the trial court's decision.").

Particularly when no damages are at stake, public entities would have little reason *not* to delay a potential day of reckoning, even if their chances on appeal are low.[4] And while antitrust claims can lack merit like any others,[5] antitrust actions against public entities are often meritorious, as cases decided by this Court illustrate. *See, e.g., Dental Exam'rs*, 135 S. Ct. 1101 (upholding FTC challenge to state dental

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[4] To be sure, "'[i]t is well within the supervisory powers of the courts of appeals to establish summary procedures and calendars to weed out frivolous claims.'" *Behrens v. Pelletier*, 516 U.S. 299, 310 (1996) (quoting *Abney v. United States*, 431 U.S. 651, 662 n.8 (1977)) (alteration in original). But this can be a low bar for appellants to clear. *See, e.g., In re Gulevsky*, 362 F.3d 961, 964 (7th Cir. 2004) ("An appeal is frivolous when the appellant's arguments are utterly meritless and have no conceivable chance of success.").

[5] Petitioner objects to "the potential for unwarranted condemnation of the way [public entities] made difficult policy judgments and resolved legitimate competing interests," and being sued by "a disgruntled entity [that] disagrees with the way the District's Board exercised the ratemaking authority delegated to it by Arizona." Pet. Br. 37, 38. Of course, the state-action question is decided on the assumption that the antitrust claim is *valid*, as petitioner recognizes, *see id.* at 22, and the collateral-order doctrine does not depend on the merits of a particular appeal. The NGA cites a litany of cases challenging "core governmental functions," a category that apparently includes operating an electric utility. NGA Amicus Br. at 9-10. Notably, half of the cited cases were brought before the LGAA barred damage claims.

board's anticompetitive exclusion of teeth-whitening rivals); *Phoebe Putney*, 568 U.S. 216 (allowing FTC to proceed with challenge to hospital authority's blatantly anticompetitive hospital acquisition); *City of Lafayette v. Louisiana Power & Light Co.*, 435 U.S. 389 (1978) (allowing claim that municipal utility violated Sherman Act by, among other things, requiring customers of its rival utility to purchase electricity from it as a condition of continued water and gas service); *Goldfarb v. Virginia State Bar*, 421 U.S. 773 (1975) (holding that State bar participated in conspiracy to maintain minimum fee schedules).[6]

Accordingly, an automatic interlocutory appeal means that some, perhaps many, valid antitrust claims will be delayed, with relief denied to victims or consumers in the interim. Other potentially valid claims will be discouraged because of the delay and increased costs of litigating under a rule allowing

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[6] In the lower courts, notable examples of meritorious cases against public entities include: *Teladoc, Inc. v. Texas Medical Bd.*, 112 F. Supp. 3d 529 (W.D. Tex. 2015) (enjoining medical board from implementing rule restricting competition from telemedicine providers); *Pine Ridge Recyling, Inc. v. Butts Cty.,* 864 F. Supp. 1338 (M.D. Ga. 1994) (enjoining county solid waste authority from interfering with entry by rival landfill that would reduce costs); *see also Shames*, 626 F.3d 1079 (challenge to state tourism board conspiracy with car rental companies to pass on tourism fees to consumers); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436 (4th Cir. 2006) (challenge to dental board regulation restricting dental hygienists from providing services in schools without examination by dentist); *Kay Elec. Co-op v. City of Newkirk*, 647 F.3d 1039 (10th Cir. 2011) (Gorsuch, J.) (challenge by utility to rival municipal electric authority's refusal to provide essential sewage services to a customer unless the customer also purchased the authority's electricity).

immediate appeals, particularly insofar as damages are unavailable. The chilling effect on legitimate antitrust claims is especially significant in light of the myriad other hurdles that antitrust plaintiffs must now surmount. *See* Andrew I. Gavil, *Antitrust Bookends: The 2006 Supreme Court in Historical Context*, 22 Antitrust, Fall 2007, 21, at 25 (citing "more rigorous burdens of pleading, production, and proof, as well as more demanding requirements for standing," as among "the numerous hurdles that now lie in the path of a successful antitrust prosecution [which] have significantly increased the direct costs of bringing and processing antitrust cases").

B. Under *Parker*, the Balance of Harms Favors Competition

The state-action doctrine itself is not agnostic on the question of how to balance the minimal risk of harm from potential delays in overturning the rare erroneous *Parker* denial against the risk of harm to antitrust victims *and the public* from delays in resolving legitimate antitrust claims. The Court recognizes the "conflicts that may arise between principles of federalism and the goal of the antitrust laws," *S. Motor Carriers Rate Conf., Inc. v. United States*, 471 U.S. 48, 62 (1985), and it has resolved that "state-action immunity is disfavored" given "the fundamental national values of free enterprise and economic competition." *Dental Exam'rs*, 135 S. Ct. at 1110 (quoting cases; internal quotation marks omitted).

When such conflicts arise, *Parker* and its progeny do not stand for the proposition that federalism principles tolerate limited intrusions from the national

competition policy, but rather that the national competition policy tolerates limited intrusions from anticompetitive conduct authorized by States. After all, when the *Midcal* (or any other exemption's) requirements are *not* satisfied the antitrust laws preempt anticompetitive state law under the Supremacy Clause. *See Midcal*, 445 U.S. at 111 ("Congress 'exercis[ed] all the power it possessed' under the Commerce Clause when it approved the Sherman Act." (quoting *Atlantic Cleaners & Dyers v. United States*, 286 U.S. 427, 435 (1932))) (alteration in original).

The Court's skepticism of the state-action exemption is reflected in its demanding application of the *Midcal* requirements. For example, the clear-articulation requirement means that a state legislature may well "intend" to authorize particular anticompetitive conduct by local officials, but unless that intent is clearly and affirmatively articulated in state law, *Parker* protection will not apply to non-sovereign actors. *See Phoebe Putney*, 568 U.S. at 231 (state grants of general powers are made "against the backdrop of federal antitrust law"). Likewise, a State may create and implement a supervisory scheme to oversee anticompetitive acts of local officials, but unless the state supervisors both "have *and exercise* power to review particular anticompetitive acts," *Patrick v. Burget*, 486 U.S. 94, 101 (1988) (emphasis added), *Parker* protection does not apply. *See FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 638 (1992) (no defense where "potential for state supervision was not realized in fact").[7]

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[7] Indeed, the Court has squarely considered and repeatedly rejected litigation burdens and chilling risks as a basis for weak-

Importantly, the Court has also emphasized that stringent application of the *Midcal* requirements actually serves to *advance* federalism interests. It has reasoned that "[a] national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people." *Ticor*, 504 U.S. at 632. Accordingly, as Arizona itself and other States have argued when it suits them, "[c]ontinued enforcement of the national antitrust policy grants the States more freedom, not less, in deciding whether to subject discrete parts of the economy to additional regulations and controls." *Id.* at 632.[8]

Thus, throughout its state-action case law, the Court has resolved doubts in favor of the national competition policy. So too here, doubts about the rela-

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ening the *Midcal* factors. *See, e.g., Dental Exam'rs*, 135 S. Ct. at 1115 (regulatory boards); *Patrick*, 486 U.S. at 105-06 (physician peer review).

[8] *See* Br. of Amici Curiae States of Illinois et al. 16-17, *FTC v. Phoebe Putney*, 568 U.S. 216 (2013) (No. 11-1160) (failure to enforce the antitrust laws in appropriate circumstances "disserves rather than serves the federalism principle" and "impedes rather than advances the States' 'freedom of action'"); *id.* at 17 (warning against using *Parker* to undermine "the very interests of federalism it is designed to protect" (internal quotations omitted)). And this Court has found these arguments persuasive. *See Phoebe Putney*, 568 U.S. at 236 (agreeing with States' brief and declining to set "a trap" for unwary state legislatures); *Ticor*, 504 U.S. at 635 (agreeing with States' brief and calling it a "powerful refutation" of view that broad application of state-action defense is warranted under federalism principles).

tive risks of denying or allowing automatic interlocutory appeals should be resolved in favor of promoting competition and avoiding burdening and chilling legitimate antitrust claims.[9]

C. Sound Judicial Administration Militates Against Allowing Immediate Appeals as of Right

Petitioner contends that "[a]llowing immediate appeal from orders denying a state-action immunity to public entities on legal grounds poses very little risk of requiring appellate courts to consider the same issues twice." Pet. Br. 23. Amicus States add that resolving state-action questions "at the earliest possible stage of the litigation" will "not invite piecemeal litigation or cut against finality interests." States' Amicus Br. 24, 32; *see Gelboim v. Bank of America Corp.*, 135 S. Ct. 897, 905 n.5 (2015) ("In delineating the narrow scope of the 'collateral-order' doctrine, we have cautioned against permitting piecemeal, prejudgment appeals.") (emphasis omitted). They are mistaken. Allowing early appeals as of right is a recipe for judicial inefficiency and piecemeal litigation for several reasons besides the fact that (as noted above) most appeals of *Parker* denials will be unsuccessful.

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[9] Petitioner contends that the calculus changes when the *Midcal* requirements *are* met, and hence the disfavored status of the state-action defense does not undermine "the need for immediate appeal of orders denying it." Pet. Br. 46. But this simply ignores the costs on the other side of the *Parker* equation (including for federalism values) of delaying legitimate antitrust claims that do *not* meet the requirements and making them more expensive to litigate.

First, the state-action issue likely cannot be conclusively resolved on the pleadings when active supervision is at issue. Petitioner recognizes the factual nature of the active-supervision issue, *see also supra* at 14, but nonetheless argues that "other [active-supervision] denials are on legal grounds," including denials with respect to "whether state law provides the requisite mechanisms for supervision by state officials." Pet. Br. 22-23. However, defining the "category" of cases at issue to include only orders that deny a state-action defense to public entities on "legal grounds" is inappropriate. *See* Resp. Br. 45-53; *infra* argument III.A. In any event, petitioner would have an appeals court decide half the active-supervision question for naught. An appellate reversal on whether state law provides a legally sufficient means for supervision would *not* itself entitle the public entity to protection. The entity would still have to overcome the additional evidentiary hurdle as to whether supervision was realized in fact. *Ticor*, 504 U.S. at 638.

Second, even the clear-articulation prong often may not be conclusively resolvable on the pleadings. One can measure state law against the allegations in the complaint and *sometimes* conclude that the alleged anticompetitive conduct is within or outside the intended scope of the authorized conduct. But the record will often require factual development of the merits of plaintiff's claim before a conclusive determination can be made, because clear articulation requires a substantial degree of fit between the authorization and the specific conduct at issue. *See Phoebe Putney*, 588 U.S. at 229 ("displacement of competition [must be] the inherent, logical, or ordi-

nary result of the exercise of authority delegated by the state legislature"); *Ticor*, 504 U.S. at 636 (both *Midcal* prongs are "directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended state policy").

Here, for example, petitioner maintains that its "rate plan" for self-generating solar customers was a legitimate effort to ensure that they pay their fair share of fixed costs, and that any exclusion of solar providers was a foreseeable (and incidental) effect of petitioner's rate-making authority. Pet. Br. 7-9. However, the complaint alleged otherwise—that "the purpose of the [rate plan] is not to recoup reasonable grid-related costs from distributed solar customers, but to prevent competition from SolarCity (and other providers of distributed solar) by punishing customers who deal with such competitors." J.A. 34-35 (¶ 113).[10]

Thus, a district court (as here) might deny a motion to dismiss on state-action grounds based on the allegations in the complaint, but on summary judgment determine that the defendant's purpose was legitimate, and therefore that its conduct was a foreseeable result of exercising its statutory authority with only an incidental harmful effect on competition. An immediate appeal of the 12(b)(6) ruling would likely delay the conclusive resolution of the clear-

[10] As noted above, AAI takes no position on the merits of respondent's antitrust claim or of petitioner's state-action defense. The facts are used here only for illustrative purposes.

articulation issue with no offsetting benefit.[11] *Cf. FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987) (Breyer, J.) (holding that evaluation of state-action defense asserted by regulatory board required development of the facts as to the details of the anticompetitive conduct at issue, including whether the challenged rules were justified by legitimate regulatory purposes).

Finally, early resolution of the state-action issue is wasteful because other defenses may more efficiently terminate a case. A public entity may seek to appeal the denial of a motion to dismiss on state-action grounds in a case where the antitrust claims are weak and otherwise would be dismissed on summary judgment (say because of a lack of market power). Again, an immediate appeal is likely to be a waste of time and to delay the more efficient resolution of the matter. Indeed, the leading antitrust treatise goes so far as to counsel courts and litigants against "elaborate inquiry . . . into the legal basis for immunity" when issues of liability can be "easily resolved" on a Rule 12(b)(6) motion or with minimal discovery. Phillip E. Areeda & Herbert Hovenkamp,

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[11] The risk that an appeals court may have to consider the same issues on multiple occasions is high. The appeals court may need to consider the clear-articulation issue in light of the anticompetitive conduct alleged in the complaint. Then it may need to consider the same issue in light of the facts as to the conduct adduced at summary judgment. And then it may need to consider the same issue on appeal from a final judgment based on the facts established at trial. *Cf. Behrens*, 516 U.S. at 321 (Breyer, J., dissenting) (Court's rationale for allowing two prejudgment appeals of qualified immunity rulings would "in principle, justify several appeals where discovery, proceeding in stages, continuously turns up new facts").

Antitrust Law ¶ 228a-b, at 227 (4th ed. 2014); *see also id.* ¶ 228b, at 230 ("One area where turning to the antitrust merits may resolve the dispute more quickly than a search for immunity is where the government is a market participant . . . .").

While an automatic appeal therefore will often result in the waste of judicial resources, increased litigation costs, and delay, the availability of discretionary appeal under 28 U.S.C. § 1292(b) ensures that an interlocutory appeal will be available in close cases when resolution of the state-action issue "may materially advance the ultimate termination of the litigation."

II. THE LGAA MILITATES AGAINST ALLOWING IMMEDIATE APPEALS OF ORDERS DENYING STATE-ACTION PROTECTION

The enactment of the Local Government Antitrust Act of 1984 militates against extending *Cohen* to *Parker* denials. Seeking to limit the burden on local government entities from being subject to the Sherman Act, Congress carefully chose to exempt them and their officials from exposure to suits for damages and attorneys' fees, but not to completely immunize them from liability. Rather, the Act "does not apply to claims for injunctive relief under the Sherman Act." *Montauk-Caribbean Airways, Inc. v. Hope*, 784 F.2d 91, 95 (2d Cir. 1986).[12]

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[12] The Act provides, in a damage action under the Clayton Act, "No damages, interest on damages, costs, or attorney's fees may be recovered . . . from any local government, or official or employee thereof acting in an official capacity," or from "a [private] person based on any official action directed by a local govern-

As the NGA emphasizes, "the LGAA reflects Congress's recognition of the burden antitrust suits place on local governments." NGA Amicus Br. 12. The House Judiciary Committee acknowledged the concern that municipalities may be subject to damage judgments borne by taxpayers, "substantial" litigation costs, and difficulties attracting qualified persons to serve. H.R. Rep. No. 98-965, 98th Cong., 2d Sess. at 10-11 (1984). And, the Committee recognized the argument that "governmental operations" may be dislocated "should an obstructionist plaintiff threaten a local government with an antitrust suit simply because he disagrees with a regulatory decision," and that "[s]uch threats could paralyze government decisionmaking or divert it from the course elected officials believe to be in the public interest." *Id.*

But Congress also recognized the benefits of continuing to subject local government entities to the antitrust laws and chose to confer only a limited exemption. For example, the Committee quoted the Court's majority opinion in *City of Lafayette*, 435 U.S. at 408, with emphasis: "'*If municipalities were free to make economic choices counseled solely by their own parochial interests and without regard to the anticompetitive effects, a serious chink in the armor of antitrust protection would be introduced at odds with the comprehensive national policy Congress established.*'" *Id.* at 9; *see also id.* at 18. The Committee concluded: "Any legislative solution . . . should weigh the chilling effect of potential or actual antitrust liti-

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ment, or official or employee thereof acting in an official capacity." 15 U.S.C. §§ 35(a), 36(a).

gation on local governments and their officials against the need to preserve some right of redress for private persons (including consumers) harmed by anticompetitive conduct." *Id.* at 12-13. Accordingly, rather than enact a broader immunity, the Committee concluded that the "most balanced legislative response at this time would be to restrict private remedies to injunctive relief." *Id.* at 18.

This legislative history demonstrates three points. First, insofar as the LGAA "endorsed and expanded the state action doctrine," *Martin v. Mem'l Hosp.*, 86 F.3d 1391, 1397 (5th Cir. 1996), it also limited it as well, and it struck the balance between burdening local government entities and chilling legitimate antitrust suits by restricting antitrust remedies to injunctive relief. That balance would be undone by tilting the final-decision rule to favor municipal defendants.

Second, the LGAA demonstrates Congress's belief that public entities' interest in avoiding being subject to litigation is not sufficiently important to treat the state-action defense differently from other defenses subject to ordinary appellate procedure. *See* H.R. Rep. No. 98-965, at 12 (finding "merit" in critics' assertion that "the costs of responding to antitrust litigation . . . are no more unmanageable for local governments than the costs of responding to other litigation").

Third, that Congress chose to address the supposed "deluge" of antitrust litigation against municipal entities without providing for an immediate appeal of adverse state-action rulings suggests it did

not intend to do so. *See id.* at 11. Congress certainly knows how to make an antitrust exemption an immunity from suit when it wishes. For example, the Charitable Donation Antitrust Immunity Act of 1997 provides for "immunity from suit under the antitrust laws, including the right not to bear the cost, burden, and risk of discovery and trial, for the [specified] conduct." 15 U.S.C. § 37; *cf. Manion v. Evans*, 986 F.2d 1036 (6th Cir. 1993) (holding that Health Care Quality Improvement Act of 1986, which shields physician peer reviewers from antitrust (and other) damages liability, but not from injunctive relief, did not create an "immunity from suit" which would support an immediate appeal).

To be sure, the LGAA does not apply to all public entities, but other immunity may provide similar protection to state agencies and officials. *See infra* note 16. In any event, as demonstrated below, if municipal entities like petitioner do not satisfy the requirements for a collateral appeal, then petitioner's proposed class of appealable orders (*Parker* denials to "public entities") is defective and the collateral order doctrine is not applicable. *See infra* III.B.

III. DEFERRING APPEAL OF STATE-ACTION DENIALS TO PUBLIC ENTITIES DOES NOT IMPERIL IMPORTANT INTERESTS

The Ninth Circuit correctly held that the collateral-order rule does not apply because the *Parker* doctrine is not an immunity from suit; it is merely a defense and limit on the scope of the Sherman Act. Hence denials are effectively reviewable after final judgment and ineligible for collateral appeal under the third prong of the *Cohen* test. *See Cohen,* 337 U.S. at 546 ("rights . . . will have been lost, probably irreparably"). Petitioner argues that what counts under the third prong is merely whether a sufficiently important interest is implicated, Pet. Br. 28-30, but respondent correctly points out that an important interest is an *additional* requirement where immunities are concerned, not an independent substitute for the right to avoid the burdens of litigation. Resp. Br. 24-29. In any event, petitioner has failed to show that *Parker* denials to "public entities" satisfy the third *Cohen* prong, for several reasons.

A. Petitioner's Proposed Category of Appealable Orders Fails Because It Depends on the Facts of a Particular Case

As an initial matter, petitioner's proposed category of collaterally appealable orders is improper because it depends on whether an entity is acting as a "public" entity on a given set of facts. The Court has held that the fact that Congress "draw[s] the jurisdictional statutes in terms of categories" means "[a]ppeal rights cannot depend on the facts of a particular case." *Carroll*, 354 U.S. at 405; *see United*

States v. MacDonald, 435 U.S. 850, 857 n.6 (1978) (Congress defined the concept of "'final decisions'" under § 1291 "'in terms of categories'" (quoting *Carroll*, 354 U.S. at 405)); *cf. Digital Equip.*, 511 U.S. at 868 (appealability under *Cohen* must be satisfied for "the entire category to which a claim belongs"); Resp. Br. 39, 42-45 (discussing factual differences among claims within a proposed category as fatal under second *Cohen* prong).

At one end of the spectrum, petitioner's proposed category includes orders against the "State itself" and "arms of the State," which operate in the public interest and are *ipso facto* exempt under *Parker*. It also includes orders against nonsovereign substate entities (*e.g.,* inferior state agencies), which are presumed to operate in the public interest and are therefore entitled to state-action protection so long as they are not market participants and are acting pursuant to clearly articulated state policy. *See Town of Hallie v. City of Eau Claire*, 471 U.S. 34, 46 n.10 (1985). And it includes orders against nonsovereign municipal agencies, which are also presumed to operate in the "public" interest so long as they are not market participants and satisfy the first *Midcal* prong, but the Court is mindful that there is a "real danger" they may be pursuing "purely parochial public interests at the *expense* of more overriding state goals." *Id.* at 47 (explaining that clear-articulation requirement is necessary to mitigate this risk) (emphasis added).[13]

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[13] Although they may be engaging in "public" conduct, the fact that municipal entities may be pursuing parochial interests at the expense of overriding state goals, that they are not themselves sovereign, and that they are immune from damages under the LGAA, all bear significantly on whether the State's

More dubiously, petitioner's proposed category could include orders against nonsovereign substate and municipal entities that are controlled by (or are themselves) market participants, which though "public" in some respects, are treated as "private" for state-action purposes under *Midcal*, because they "are more similar to private trade associations vested by States with regulatory authority than to the agencies *Hallie* considered." *Dental Exam'r*s, 135 S. Ct. at 1114; *see also City of Columbia v. Omni Outdoor Advert., Inc.*, 499 U.S. 365, 379 (1991) (discussing market-participant exception); *City of Lafayette*, 435 U.S. at 419 (Burger, C.J., concurring) (same).

Finally, at the far end of the spectrum are purely private entities, which petitioner's *logic* suggests should be treated like public entities insofar as they satisfy the *Midcal* test and act in furtherance of state policy. *See* Pet. Br. 34 ("Absent the immunity, [they] could be subject to years of antitrust litigation for helping states exercise their fundamental sovereign prerogative to regulate their economies within their borders.").

Except where sovereign entities constitute the "State itself," the question of whether an entity claiming the state-action defense is acting in a public or private capacity is inherently fact driven. *See, e.g., Dental Exam'rs*, 135 S. Ct. at 1114 (state-action defense "turns not on the formal designation given by States to regulators but on the risk that active mar-

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federalism interests are imperiled, as discussed throughout the remainder of this section.

ket participants will pursue private interests in restraining trade"). Accordingly, the distinction is unacceptable as a basis for forming a "category" of final decisions under § 1291. *Mohawk*, 558 U.S. at 107 ("we do not engage in an 'individualized jurisdictional inquiry.'" (quoting *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 473 (1978))).[14]

B. Petitioner Has a High Burden of Showing that Important Interests Are Imperiled

At a minimum, petitioner's argument that the third *Cohen* prong is satisfied depends on its ability to demonstrate that important interests are imperiled when immediate appeal of state-action orders is denied to municipal entities like itself. The Court does not allow collateral appeal of categories of orders that include identifiable subcategories which fail to satisfy the *Cohen* requirements. *See supra* argument III.A; *cf. Mohawk*, 558 U.S. at 112 ("That a fraction of orders" in the category may "harm individual litigants in ways that are 'only imperfectly reparable' does not justify making all such orders immediately appealable as of right under § 1291" (quoting *Digital Equip.*, 511 U.S. at 872)).

Petitioner has not made the required showing. At most, it has suggested that the federalism interests it has identified are "implicated" with respect to

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[14] Of course, the fact-driven inquiry into whether a *Parker* denial is decided on "legal grounds," *see supra* argument I.C (explaining why fact issues prevent both active supervision and clear articulation from being conclusively resolved on the pleadings), also independently renders the category unacceptable.

suits against municipal entities, not that they are imperiled. Moreover, petitioner's analogy to the important interests underlying Eleventh Amendment immunity and qualified immunity is unavailing as to municipal entities. Indeed, the nature and scope of those immunities, as well as the immunity from damages provided by the LGAA to local governments and their officials, *minimizes* the extent to which the State's important interests are implicated at all.

Petitioner has identified two interests that this Court has previously held are "important in *Cohen*'s sense," *Digital Equip.*, 511 U.S. at 879 (internal quote marks omitted), namely the State's dignitary (and related federalism) interests and the interest in not chilling public officials' exercise of regulatory discretion, which supported immediate appealability of Eleventh Amendment and qualified immunity denials respectively, *see Will*, 546 U.S. at 352 (discussing *Puerto Rico Aqueduct* and *Mitchell*). Petitioner repeatedly states that denials of state-action protection to municipal entities "implicate" these interests. Pet. Br. 13 (state-action defense "implicates" two interests the Court previously recognized as important); *see also id.* at 28, 31, 41, 43. That is not the Court's standard, nor should it be.

Instead, the Court's "importance" test is "whether deferring review until final judgment so imperils the [important] interest as to justify the cost of allowing immediate appeal of the entire class of relevant orders." *Mohawk*, 558 U.S. at 108. *Parker* denials against municipal entities fall far short of meeting this exacting standard. To deem an important interest "imperiled" if it has only an attenuated connection

to an adverse order would be contrary to this Court's admonition to "view claims of a right not to be tried with skepticism, if not a jaundiced eye," *Digital Equip.*, 511 U.S. at 873, and would "raise the lawyer's temptation to generalize," *Will*, 546 U.S at 350. *See also Mohawk*, 558 U.S. at 108 ("The crucial question . . . is not whether an interest is important in the abstract"); *Digital Equip.*, 511 U.S. at 872 ("mere identification of some interest that would be irretrievably lost has never sufficed to meet the third *Cohen* requirement").

C. The States' Federalism Interests Are Not Imperiled by Denials of State-Action Protection to Municipal Entities

Petitioner points out, "Since its inception in *Parker*, the doctrine of state-action immunity has been animated by principles of federalism and respect for state sovereignty." Pet. Br. 32. From this unexceptional premise, petitioner argues that the State's federalism interests "apply not only when the defendant is a state but also when (as here) it is a sub-state governmental entity carrying out a state's economic policies." Pet. Br. 34. But when a state-action defense is denied to municipal entities, those interests are attenuated, if they are implicated at all.

"Ours is a *dual* system of government, which has no place for sovereign cities." *Cmty. Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 53 (1982) (emphasis in original) (internal quotation and citation omitted). The Court has squarely rejected the argument that the privileges of sovereignty extend to sub-state government entities asserting a "residual" federalism

interest belonging to the State. *N. Ins. Co. of New York v. Chatham Cty.*, 547 U.S. 189, 194 (2006) (only States and arms of the State, not counties, enjoy the privileges of preratification sovereignty that States retain today). It has faithfully honored this principle in the state-action context. *See, e.g., Hoover v. Ronwin*, 466 U.S. 558, 576 (1984) (suit is against State itself and defendant is *ipso facto* immune where state supreme court is the real party in interest); *Bates v. State Bar of Ariz.*, 433 U.S. 350, 361 (1977) (defense granted where Arizona Supreme Court was real party in interest); *City of Boulder*, 455 U.S at 53 (rejecting argument that city ordinance was "an 'act of government' performed by the city *acting as the State* in local matters" as "both misstat[ing] the letter of the law and misunderstand[ing] its spirit") (emphasis in original).

Municipal actors like the District have no claim to Arizona's federalism interests if the State of Arizona is not the real party in interest, which the District does not claim here. Arizona cannot delegate its *sovereignty* to municipal subdivisions; it can only delegate authority to regulate anticompetitively, provided it complies with the applicable *Midcal* factors. *Cf. Dental Exam'rs*, 135 S. Ct. at 1111 ("[U]nder *Parker* and the Supremacy Clause, the States' greater power to attain an end does not include the lesser power to negate the congressional judgment embodied in the Sherman Act through unsupervised delegations to active market participants.").

Petitioner asserts that an independent interest in "government efficiency" analogous to that protected by qualified immunity is at stake. But this inter-

est cannot be viewed as an independent interest protected by *Parker*; rather, it is only relevant insofar as it its tied to federalism concerns, which are attenuated when it comes to municipalities, for the reasons stated above.[15] In any event, the qualified immunity analogy is not helpful to petitioner's cause. That doctrine protects public officials' decisionmaking only as to the burden of trial from claims for damages. *See, e.g., Scott v. Lacy*, 811 F.2d 1153, 1154 (7th Cir. 1987) ("The 'right not to be tried' pertains to the request for damages alone, for that is the source of the distraction."). And it does not protect municipalities at all. It hardly can justify an immediate appeal in actions against local governments or their officials for injunctive relief, which is the only relief available after the LGAA. And, indeed, Congress has determined that the burden on local government authorities of standing trial for injunctive relief does not warrant special treatment. *See supra* argument II; *cf.* Wright & Miller § 3914.10 ("Many government parties . . . can fairly be described as institutional litigants that routinely bear the burdens of trial.").[16]

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[15] Another significant difference between orders denying Eleventh Amendment or qualified immunity on the one hand, and orders denying a state-action defense on the other, is that "erroneous" appeals of the former do not themselves sacrifice federalism interests, whereas "erroneous" appeals of *Parker* denials may well do so. *See supra* argument I.B.

[16] The availability of sovereign immunity to bar damages against state entities also minimizes the extent to which the State's federalism interests could be imperiled by orders denying automatic appeals of adverse state-action rulings to state agencies and officials. Several lower courts have held that such immunity precludes damages in federal antitrust cases against state entities and officials. *See, e.g. Visiglio v. Bd. of Dental Ex-*

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

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am'rs of Ala., 686 F.3d 1290 (11th Cir. 2012); *Earles v. State Bd. of Certified Pub. Accountants*, 139 F.3d 1033 (5th Cir. 1998); *cf. Dental Exam'rs*, 135 S. Ct. at 1115 (acknowledging, but not addressing point). To be sure, as petitioner points out, Eleventh Amendment immunity does not apply to suits against States brought by the United States, Pet. Br. 34-35 n.9, but that raises collateral appealability questions for what is undoubtedly a miniscule category of state-action orders. In any event, the Court need not decide whether continued antitrust suits against a State or state officials imperils important federalism interests, because any such category would exclude petitioner.