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Nos. 20-15301, 20-15476  
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**In the United States Court of Appeals for the Ninth Circuit**

WILLIAM ELLIS, *et al.*,  
*Plaintiffs – Appellants,*

v.

SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT  
AND POWER DISTRICT,  
*Defendant – Appellee.*

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WILLIAM ELLIS, *et al.*,  
*Plaintiffs – Appellees,*

v.

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

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ON APPEAL FROM THE U.S. DISTRICT COURT, DISTRICT OF ARIZONA,  
NO. 2:19-cv-01228-SMB  
The Honorable Judge Susan M. Brnovich

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BRIEF OF CENTER FOR BIOLOGICAL DIVERSITY,  
FOOD AND WATER WATCH, FRIENDS OF THE EARTH, INSTITUTE FOR  
LOCAL SELF-RELIANCE, AND NC WARN, INC. AS *AMICI CURIAE*  
IN SUPPORT OF REVERSAL

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**CORPORATE DISCLOSURE STATEMENT**

Pursuant to Fed. R. App. P. 26.1, *Amici Curiae* Center for Biological Diversity, Food and Water Watch, Friends of the Earth, Institute for Local Self-Reliance, and NC WARN, Inc., state that they are not publicly-held corporations, do not issue stock, and do not have parent corporations.

Dated: July 8, 2020

/s/ Howard M. Crystal  
Howard M. Crystal

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**INTERESTS OF AMICI CURIAE<sup>1</sup>**

*Amici* are leading advocacy organizations working toward a just energy transition, from a fossil fuel-based economy to one powered by clean and renewable energy systems, in order to combat the climate emergency and protect the health of communities and the planet. Because rapid expansion of distributed solar generation is central to this effort, *Amici* are concerned with public power companies like the Salt River Project Agricultural Improvement and Power District (“SRP”) exercising monopoly power to stifle consumer adoption of distributed solar systems.

Particularly in light of both ever-increasing greenhouse gas concentrations, and the negative impacts of fossil fuel extraction and combustion on public health, wildlife, and the environment, public power companies like SRP should not be permitted to stifle rooftop solar competition in violation of the Sherman Act, which is contrary to the public interest premise on which they were granted monopoly status. Accordingly, *Amici* urge the Court to reverse the district court’s ruling and permit plaintiffs’ antitrust and related claims to go forward.

**The Center for Biological Diversity** (“the Center”) is a non-profit environmental organization with over 1.7 million members and online activists

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<sup>1</sup> All parties, through counsel, have consented to the filing of this Amicus brief. No person other than *Amici* and their counsel authored this brief in whole or in part or provided funding related to its preparation or submission.

dedicated to protecting endangered species and wild places through rigorous science, advocacy, and environmental law. The Center's Energy Justice Program implements campaigns to advance a new energy future that is democratic, fueled by distributed solar and other clean energy, and protects communities and wildlife most impacted by the climate emergency and systemic inequities.

**Food & Water Watch** ("FWW") is a national, nonprofit, public interest consumer advocacy organization with over one million supporters. Because climate change is caused by our ongoing reliance on dirty fossil fuels, FWW advocates for policies that shift energy use to 100% renewable energy, like clean solar power, by 2030. It is critical to FWW's mission and interests that solar power providers be allowed to compete fairly with fossil fuel energy providers and without unwarranted obstruction by state-supported, anti-competition regulatory schemes.

**Friends of the Earth** ("FoE") is a non-profit organization, founded in 1969, with more than 325,000 members in all 50 states, and more than 1.7 million activists around the country. FoE's mission is to defend the environment and champion a healthy and just world. Its current campaigns focus on promoting clean energy and solutions to climate change, ensuring the food we eat and products we use are safe and sustainable, and protecting marine ecosystems and the people who live and work near them.

**The Institute for Local Self-Reliance** focuses on enabling people to individually and collectively exercise their rights to generate energy on their own property. The group’s interest in this case is the aging concept of a monopoly utility in an era when power generation technology can no longer be monopolized, and the right of residents and businesses of all states to be able to capture the energy falling on their own property without interference from a monopoly company.

**NC WARN, Inc.** is a not-for-profit corporation under North Carolina law, with approximately one thousand individual members and families across North Carolina. Its purpose is to minimize the impacts of the climate crisis—and other hazards posed by electricity generation—by building people power for a swift North Carolina transition to clean, renewable and affordable power generation and increased energy efficiency.

### **STATEMENT OF THE CASE**

Antitrust laws were explicitly designed to protect society—both consumers and small suppliers—from the anticompetitive conduct of dominant corporations in particular markets. Through antitrust legislation, Congress aimed to prevent corporations from gaining market power through anticompetitive means, including driving out competitors.<sup>2</sup> Senator Sherman, author of the country’s anchor antitrust

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<sup>2</sup> See Gregory J. Werden, *Monopsony and the Sherman Act: Consumer Welfare in a New Light*, 74 *Antitrust L.J.* 707, 714 (2007) (“Congress intended to protect sellers victimized by trusts and other conduct within the scope of the Sherman Act’s

statute, warned against dominant corporations operating under “[t]he law of selfishness, uncontrolled by competition, [which] compels [a dominant corporation] to disregard the interest of the consumer.” 21 Cong. Rec. 2461, 2457 (1890).

The unlawful acts of a dominant corporation to extirpate competitors in a particular market could be neither more apparent nor more compelling than in this case. Defendant SRP, a monopoly power corporation, has imposed a discriminatory pricing scheme on residential customers who install rooftop solar energy systems. While residential customers like Plaintiffs choose to install such systems for both their economic benefits and as a means to protect the climate and boost electricity resilience in the face of climate-fueled disasters and pandemics, SRP financially penalizes them for these decisions and stifles their ability to produce and compete against SRP with alternative clean and distributed solar energy.

SRP’s actions are particularly egregious in the light of the climate emergency. As detailed in the U.S. Fourth National Climate Assessment, prepared by the federal government’s most preeminent scientists, absent substantial and sustained reductions in the greenhouse gas emissions fueling climate change, the nation will experience increased hurricanes, extended wildfire seasons, catastrophic sea level rise, severe impacts on the health and safety of communities, and billions of dollars

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prohibitions.”).

in damage by the century’s end.<sup>3</sup> To mitigate these harms, the United Nations Intergovernmental Panel on Climate Change (“IPCC”)—the authoritative international scientific body for the assessment of climate change—has explained that governments must take “unprecedented” action within the next decade to rapidly transition away from a fossil fuel-based economy to an energy system largely powered by renewable energy.<sup>4</sup> In particular, the IPCC has emphasized the need for “rapid and far-reaching transitions” across all sectors, including significant progress by 2030 and “virtually full decarbonization” of electricity generation in the next few decades. *Id.* at SPM-15.

One of the vital opportunities to advance this clean energy transition is the deployment of domestic distributed solar energy, including rooftop solar systems.<sup>5</sup> SRP’s discriminatory rate structure challenged in this case thus thwarts this critical clean energy transition because it undermines the value of homeowner investments in these systems—and ultimately drives these alternative and competing power

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<sup>3</sup> U.S. Global Change Research Program, *Climate Change Impacts in the United States: The Fourth National Climate Assessment, Volume II* ch.1,14 (2018).

<sup>4</sup> United Nations Intergovernmental Panel on Climate Change, *Special Report: Global Warming of 1.5°C SPM-4* (2018), available at <https://www.ipcc.ch/sr15/>.

<sup>5</sup> See, e.g., Gagnon, P. *et al.*, *Estimating rooftop solar technical potential across the US using a combination of GIS-based methods, lidar data, and statistical modeling*, *Environ. Res. Lett.* (2018).

providers off the market.<sup>6</sup> Particularly as millions across the country face the threat of electricity shutoffs due to coronavirus-precipitated job losses, it is more urgent than ever that families have opportunities to generate their own power, increase household resilience, and decrease their dependence on centralized utilities. These investments advance the fight against the climate emergency, while at the same time providing customers the energy freedom necessary to weather additional crises — crises which are only likely to continue, and be further exacerbated, in the face of growing wealth inequality and increasing climate impacts in coming years.

Accordingly, and for the additional legal reasons discussed below, *Amici* urge the Court to reverse the district court’s ruling and permit this case to proceed.

### **SUMMARY OF ARGUMENT**

1. The district court properly held that SRP cannot advance a state action immunity defense against antitrust liability. Arizona has clearly articulated policies that advance clean and renewable energy, and the State does not provide active supervision over SRP, an “essentially business enterprise[ ].” *Ball v. James*, 451 U.S. 355, 368 (1981).

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<sup>6</sup> B. Baatz, American Council for an Energy-Efficient Economy, *Rate Design Matters: The Intersection of Residential Rate Design and Energy Efficiency*, 33 (2017), available at <https://aceee.org/sites/default/files/publications/researchreports/u1703.pdf>.

2. The district court properly held that SRP is not immune from antitrust liability, in spite of its monopoly status as a power provider in its specific Phoenix territory. Moreover, any such claim of antitrust immunity is further undermined by the fact that the foundational premise of SRP’s monopoly status—granted as part of a historical regulatory compact to advance the public interest—no longer holds when SRP is forwarding solar-discriminating rates that contravene the public interest.

3. The district court erred in finding Plaintiffs did not sufficiently allege antitrust injury. At minimum, Plaintiffs properly pled antitrust injury as a competitor whose financial viability decreased due to SRP’s discriminatory anti-solar rates.

4. The district court also erred in dismissing Plaintiffs’ equal protection claim. Plaintiffs have adequately pled that SRP’s anti-solar discriminatory rates violate Constitutional equal protection principles because they treat solar customers differently from other consumers.

## ARGUMENT

### **I. SRP IS NOT FREE TO ENGAGE IN FLAGRANT ANTI-COMPETITIVE PRACTICES BY VIRTUE OF STATE-ACTION IMMUNITY.**

Before the district court, SRP argued that it is free to impose an anti-competitive rate structure under the state-action immunity doctrine, on the grounds that it is an arm of government whose policies are state-authorized and established through regular rate-making. SRP Mot. to Dismiss Mem. (“Def. Mem.”) (May 7,

2019, ECF No. 14-1) at 11-14. The district court properly rejected these arguments, Jan. 10, 2020 Order at 14-17 (ER014-17), and this Court should similarly reject any effort by SRP to seek refuge in state-action immunity.

As the Supreme Court has explained, a “state law or regulatory scheme cannot be the basis for antitrust immunity unless, (1) first the State has articulated a clear and affirmative policy to allow the anticompetitive conduct, and (2) second, the State provides active supervision of anticompetitive conduct undertaken by private actors.” *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) (citing *Cal. Retail Liquor Dealers Ass’n v. Midcal Aluminum, Inc.*, 455 U.S. 97, 105 (1980)). Here, SRP fails both prongs.

**A. Arizona’s Strong Support For Renewable Energy And Rooftop Solar Expansion Refutes SRP’s Argument That Its Discriminatory Rates Are State-Authorized.**

The authorization prong of the state-action immunity defense requires SRP to show that Arizona has “foreseen and implicitly endorsed the anticompetitive effects” of the challenged action “as consistent with its policy goals.” *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 229 (2013). Given the numerous Arizona policies promoting rooftop solar deployment as a vital component of the renewable energy transition, and the tension between these goals and SRP’s rates allegedly designed to unlawfully stifle rooftop solar expansion, SRP cannot demonstrate that its



discriminatory rate structure is state-authorized, and is certainly not entitled to judgment as a matter of law on that issue.

Specifically, SRP has asserted that its undisputed authority to establish utility rates is alone sufficient to demonstrate the requisite “clearly articulated and affirmatively expressed state policy,” *id.* at 219, authorizing its discriminatory rate structure. Def. Mem. at 11-13. However, in fact, Arizona’s numerous affirmative policies promoting self-generated, renewable electricity demonstrates that no such state authorization exists.

First, “the Arizona legislature’s enactment of laws encouraging the use of solar energy dates back to at least 1974.” *Garden Lakes Cmty. Ass’n v. Madigan*, 204 Ariz. 238, 241 (Ariz. Ct. App. 2003). Like many states, Arizona requires utilities to procure solar generation as part of a Renewable Energy Standard, where utilities obtain renewable energy credits (“RECs”), including from home solar systems.<sup>7</sup>

Second, the Arizona legislature has adopted tax incentives to encourage rooftop solar installation, including: (1) the Solar Energy Credit program, allowing tax deductions for renewable energy projects, Ariz. Rev. Stat. § 43-1083 (2017); (2) a “solar energy devices” exemption from state sales tax, *id.* § 42-5061 (2017); and (3) a prohibition on considering solar systems as an element of home value for

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<sup>7</sup> See Ariz. Admin. Code § R14-2-703, 1801 (2017); N.C. Clean Energy Tech. Ctr., Find Policies & Incentives by State, available at <http://www.dsireusa.org> (showing that almost thirty states have mandatory renewable electricity standards).

property tax assessments. *Id.* § 42-11054 (2017); *see also SolarCity Corp. v. Ariz. Dep't of Revenue*, 243 Ariz. 477 (2018) (finding state law forbids taxation on the value of leased rooftop solar panels.).

Third, the Arizona legislature has further sought to insure that electricity “self-generators”—such as consumers who install rooftop solar systems—obtain the same “just and reasonable” rates as all other utility customers, Ariz. Rev. Stat. § 40-332 (2017), and has also protected homeowners’ rights to solar by ensuring homeowner associations may not prohibit or impede the installation or use of solar panels and associated devices. Ariz. Rev. Stat. § 33-1816 (2007). These enactments have furthered the legislature’s overall intent for Arizona citizens to obtain “consumer protection against overreaching by” those selling electricity and other essential services. *Ariz. Corp. Comm’n v. Ariz. ex rel. Woods*, 171 Ariz. 286, 290 (1992).

Moreover, while these laws all belie SRP’s argument, the legislature’s overall framework for electricity restructuring—which would allow for some level of retail electricity competition in the State—even further demonstrates Arizona’s “policy preference for competition,” *Kay Elec. Coop. v. Newkirk*, 647 F.3d 1039, 1045 (10th Cir. 2011) (Gorsuch, J.). *See* Ariz. Rev. Stat. § 30-800 (2017). Accordingly, the district court properly concluded Arizona’s moves to “promote competition in the

retail electricity market in the future” demonstrate SRP’s discriminatory rates are not state-authorized. Order at 16-17.<sup>8</sup>

**B. SRP Is Also Ineligible For State-Action Immunity Because It Is Not Subject To Active State Supervision.**

Even assuming *arguendo* that SRP’s rates were state-authorized, SRP’s bid for state-action immunity would fail on the second part of the immunity test: “active

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<sup>8</sup> Two Arizona Governors have also issued executive orders expressing support for solar generation as a tool to address the climate crisis: (1) in 2010, Governor Janice Brewer declared that Arizona “strive[s] for pragmatic, pro-active approaches to climate change mitigation and adaptation by advancing clean and renewable energy, including solar power,” as the State becomes “a leader in the field of solar and renewable energy,” Ariz. Exec. Order No. 2010-006 (July 1, 2010), and (2) in 2006 Governor Janet Napolitano—recognizing that a “scientific consensus has developed that increasing emissions of carbon dioxide [], methane and other greenhouse gases [] released to the atmosphere are affecting the Earth’s climate”—committed Arizona to reducing greenhouse gas emissions pursuant to advice from the State’s Climate Change Advisory Group. Ariz. Exec. Order No. 2006-13 (Sept. 9, 2006). That Advisory Group, in turn, recommended that Arizona pursue this goal by, *inter alia*, removing “barriers to renewable energy and clean distributed generation [] to enable more clean generation to enter Arizona’s energy supply mix.” Ariz. Climate Change Advisory Group, *Climate Change Action Plan* 12 (2006), available at <http://azmemory.azlibrary.gov/cdm/ref/collection/statepubs/id/3104>.

Similarly, the Arizona Corporation Commission has directed its staff to develop rules to reach 100 percent clean energy by 2050, and Chairman Burns has suggested adopting a distributed renewable energy generation standard of 10 percent by 2030 exclusively for non-utility-owned sources (e.g., rooftop solar). See Letter from Chairman Robert Burns to Arizona Corporate Commission (Mar. 25, 2020), <https://docket.images.azcc.gov/E000005560.pdf>.

state supervision.” *N. C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101, 1109 (2015) (citing *Town of Hallie v. City of Eau Claire*, 471 U.S. 34 (1985)).<sup>9</sup>

The Supreme Court’s ruling in *Ball v. James*, 451 U.S. 355 (1981) makes this absolutely clear, for there the Court upheld SRP’s election eligibility rules—under which only certain landowners have the right to vote, and the more property one owns, the more heavily weighted one’s vote is—by explicitly relying on SRP’s essentially *private* character. *Id.* at 368, 372 (finding that water districts like SRP are “essentially business enterprises, created by and chiefly benefiting a specific group of landowners,” and thus do “not exercise the crucial powers of sovereignty typical of a general purpose unit of government such as a state, county, or municipality”). Moreover, as regards electricity sales in particular, the Court in *Ball* noted that the “sale of electric power” by SRP is “not for the primary purpose of providing electricity to the public,” but rather that SRP uses electricity sales “to defray the expense in irrigating these private lands *for personal profit*.” 451 U.S. at 368-69 and n.17 (emphasis added); *see also Niedner v. Salt River Project Agric. Improvement & Power Dist.*, 121 Ariz. 331 (1979) (rejecting a due process claim against SRP on

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<sup>9</sup> The district court did not reach the active supervision issue in light of its threshold ruling that SRP had failed to demonstrate state authorization, Order at 17 n. 11 (ER017), and this Court only needs to reach the issue if it disagrees with the district court’s threshold ruling.

the grounds that it is “a business corporation with attributes of sovereignty which are only incidental”).

Accordingly, to invoke state-action immunity, SRP must demonstrate it is subject to active supervision by Arizona. *See N.C. Dental*, 135 S. Ct. at 1111-12. Indeed, it is precisely because of the “risk of self-dealing,” *id.* at 1114, that the antitrust laws must remain available to protect consumers and competitors from the very kind of injuries at stake in this case. *See Ticor*, 504 U.S. at 634 (“where a private party is engaging in anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State”) (citations omitted); *N.C. Dental*, 135 S. Ct. at 1111 (“[L]imits on state-action immunity are most essential when the State seeks to delegate its regulatory power to active market participants, for established ethical standards may blend with private anticompetitive motives in a way difficult even for market participants to discern.”).<sup>10</sup>

Thus, since SRP is not subject to active supervision by the State, it is not entitled to state-action immunity on this basis as well.

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<sup>10</sup> In the district court, SRP also claimed its anti-solar rates are necessary to recover unique “cost of serving rooftop solar customers,” Def. Mem. at 7, but, as detailed in Plaintiffs’ complaint, there is nothing unique about some customers using less SRP electricity than others, because they have rooftop solar, use gas appliances, only winter in Arizona, or otherwise reduce their energy usage. *See* FAC ¶ 105 (ER063).

## **II. SRP’S REGULATORY STATUS AS A POWER MONOPOLY IS NOT LICENSE TO UNDERTAKE DISCRIMINATORY RATE-MAKING THAT STIFLES ROOFTOP SOLAR DEVELOPMENT.**

As the district court held, it is undeniable that SRP holds monopoly power through a regulated utility structure, where it provides 95% of retail electricity to its designated territory in Phoenix. Order at 23 (ER023). Contrary to SRP’s claims, however, this possession of monopoly status through regulatory compact does not bar the entity from antitrust liability. What is more, the underlying premise for granting such monopoly power no longer holds when SRP’s discriminatory rate structures against distributed solar competitors contravene the public interest—thereby diminishing SRP’s use of its monopoly status as a shield against antitrust liability.

### **A. SRP’s Monopoly Status Does Not Exempt It From Antitrust Liability.**

SRP persistently argued below that as a “public electric utility and natural monopoly” subject to a regulatory ratemaking statute, it is automatically empowered to take action with “anticompetitive effects” free from antitrust liability. Def. Mem. at 14. To the contrary, as the Supreme Court has repeatedly recognized, regulated power companies are *not* immune from competition and antitrust laws. For example, in *Otter Tail Power Company v. United States*, 410 U.S. 366 (1973), the Court decisively held that the Federal Power Act does not “immunize” power companies from “antitrust regulation.” *Id.* at 374-75. Rather, a power company’s “franchise to

exist as a corporation, and to function as a public utility . . . creates no right to be free of competition.” *Tenn. Electric Power Co. v. Tenn. Valley Auth.*, 306 U.S. 118, 139 (1939) (overruled in part on other grounds); *see also, e.g., Ala. Power Co. v. Ickes*, 302 U.S. 464, 480 (1938) (holding that power utilities do not “possess” any inherent legal “right to be immune from lawful . . . competition.”).

Similarly, SRP’s regulated utility monopoly status is not a license to engage in discriminatory ratemaking against solar competition. *Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.*, 4 F. Supp. 3d 1123, 1136-37 (D. Ariz. 2014) (while “the possession of monopoly power alone is not an antitrust violation,” an entity is liable should it engage in “anticompetitive conduct”); *see also Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004) (“To safeguard the incentive to innovate, the possession of monopoly power will not be found unlawful unless it is accompanied by an element of anticompetitive *conduct*.”) (emphasis added).

For that reason, as the Supreme Court reminded another power utility that protested its antitrust liability, antitrust law “assumes that an enterprise will protect itself against a loss by operating with superior service, lower costs, and improved efficiency”—and not by using its market power to exclude competition. *Otter Tail Co.*, 410 U.S. at 380. Accordingly, SRP’s discriminatory ratemaking is not a

condoned “anticompetitive effect,” but rather anticompetitive conduct in violation of antitrust law, as to which it is not immune from liability.

**B. SRP’s Claim To Antitrust Liability As A Product Of Its Regulatory Monopoly Rights Is Further Undermined Because Its Discriminatory Rate-Making Against Distributed Solar Energy Competition Contravenes The Public Interest.**

In any event, the premise for SRP’s asserted right to engage in anti-competitive conduct no longer holds given changes in markets and technology related to distributed solar generation. SRP seeks to justify its discriminatory ratemaking by claiming that it advances the public good. Def. Mem. at 4 (“competition among public utilities ‘in the end injures rather than helps the general good’”) (quoting *Ariz. Corp. Comm’n v. People’s Freight Line, Inc.*, 16 P.2d 420, 422 (Ariz. 1932)). However, SRP is neither advancing public objectives nor the public interest when it improperly targets distributed solar generation.

“Until relatively recently, most state energy markets were vertically integrated monopolies—*i.e.*, one entity . . . controlled electricity generation, transmission, and sale to retail consumers.” *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016). At one time, this made sense in light of the available technology and business structures. The electricity sector faced extreme barriers to entry because power plants and grid infrastructure required massive capital investments and substantial economies of scale, whereby the average cost of delivered power became



cheaper with new expansion in demand. Paul Garfield & Wallace Lovejoy, *Public Utility Economics* 15-19 (1964).

The foundational premise for granting monopoly power to vertically integrated utilities was to serve the public interest.<sup>11</sup> The electricity monopoly model sought to achieve widespread access to electricity as a public good while, at the same time, subjecting utilities to electricity rate regulation in order to prevent price-gouging for ultimate consumer benefit.<sup>12</sup>

However, the century-old premise that vertically integrated monopolies necessarily serve the public interest has been undermined by public policy and modern technology. In terms of policy, electricity regulators have recognized the

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<sup>11</sup> Regulation, as an oversight mechanism for natural monopolies, and antitrust laws, as an oversight mechanism over competitive markets, have traditionally been viewed as binary legal approaches serving the same purpose: keeping industry in check and thereby ensuring fair consumer prices. Thus, as Justice Breyer has written, while antitrust laws serve to police competition in traditional competitive markets, regulation serves as “an alternative to antitrust, necessary when antitrust cannot successfully maintain a workably competitive marketplace or when such a marketplace is inadequate due to some other serious defect.” Stephen Breyer, *Regulation and Its Reform*, 156-57 (1982).

<sup>12</sup> W.M. Warwick, U.S Department of Energy, *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets* 2.0 (2002), available at [https://www.pnnl.gov/main/publications/external/technical\\_reports/PNNL-13906.pdf](https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf); see also *Smyth v. Ames*, 169 U.S. 466, 544-46 (1898) (public utility monopolies were “created for [] public purposes [and] perform[] a function of the state,” and the government is obligated to “protect the people against unreasonable charges for services rendered by” the public utility.).

value of actively encouraging competition in electricity generation in order to serve the public interest. For example, as the Supreme Court noted in *FERC v. Elec. Power Supply Ass'n*, 136 S. Ct. 760 (2016), the Federal Energy Regulatory Commission (“FERC”) “often forgoes the cost-based rate-setting traditionally used to prevent monopolistic pricing[. . .] [and] instead undertakes to ensure ‘just and reasonable’ wholesale rates *by enhancing competition*—attempting . . . ‘to break down regulatory and economic barriers that hinder a free market in wholesale electricity.’” *Id.* at 768 (emphasis added) (quoting *Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527, 536 (2008)).

Indeed, Congress passed a series of modern laws intended to promote competition in the electricity sector and unbundle the services of the traditional vertically integrated monopoly, all as a means to advance the public interest. Thus, in light of both “[t]echnological advances [that] made it possible to generate electricity efficiently in different ways and in smaller plants,” and grids that were “unlike the local power networks of the past,” *New York v. FERC*, 535 U.S. 1, 7 (2002), Congress passed (1) the 1978 Public Utility Regulatory Policies Act, Pub. L. 95-617, 92 Stat. 3117, which directed FERC to promulgate rules requiring monopoly utilities to purchase electricity from independent power production facilities, and (2) the Energy Policy Act of 1992, Pub. L. 102-486, 106 Stat. 2776, authorizing FERC to order individual monopoly utilities to provide transmission

services to unaffiliated wholesale generators. *New York*, 535 U.S. at 7. In short, the assumption that the vertically integrated utility monopoly automatically serves the public interest has been undermined by public policy promoting competition in electricity services.

Distributed solar technology further subverts the economic and public interest assumptions justifying the traditional vertically integrated electricity monopoly. Distributed solar technology, with a relatively low barrier of entry, is de-centralized and can be owned or leased by consumers who are otherwise captive to the local utility monopoly. Distributed solar generation thus dispels the assumption that electricity service necessarily requires large economies of scale. As such, distributed solar generation also disrupts the utility's traditional business model, obviating the need for power companies like SRP to continuously construct infrastructure as their engine of profit generation.<sup>13</sup>

Accordingly, rooftop solar energy systems deliver public social, environmental, technical, and economic benefits that SRP is actively obstructing with the discriminatory rate-making systems. These include grid benefits, avoided

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<sup>13</sup> See Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar*, 11 *Tex. J. Oil Gas & Energy* L. 211, 215 (2016); John Farrell, Inst. for Local Self-Reliance, *Is Bigger Best in Renewable Energy?* 2-4 (2016), available at <https://ilsr.org/wp-content/uploads/2016/12/Is-Bigger-Best-in-Renewable-Energy-Report-Final.pdf>.

water use, avoided air pollution and related human health and well-being benefits, urban heat island effect reduction, land sparing, and improved heating and cooling efficiency.<sup>14</sup> Further, customer-owned distributed solar can increase equitable community development, local job generation, customer choice, and the energy security and resilience of communities. As millions of Americans face the threat of electricity shut-offs due to coronavirus-precipitated job losses, investing in decentralized solar systems also boosts the resilience of families, allowing them to generate their own power and decrease dependence on dirty centralized generation to weather future climate, public health, and economic crises.<sup>15</sup> In Arizona, where many communities—particularly Black, Latinx, Indigenous and other communities of color—are regularly and disproportionately harmed by climate-exacerbated heat

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<sup>14</sup> See R.R. Hernandez *et al.*, *Techno-Ecological Synergies of Solar Energy for Global Sustainability*, Nature Energy (2019).

<sup>15</sup> See, e.g., Al Weinrub and Denise Fairchild, *Energy Democracy: Advancing Equity in Clean Energy Solutions*, (2018), [https://islandpress.org/sites/default/files/9781610918510\\_excerpt.pdf](https://islandpress.org/sites/default/files/9781610918510_excerpt.pdf); National Renewable Energy Laboratory, *Distributed Energy Planning for Climate Resilience* (2018), available at <https://www.nrel.gov/docs/fy18osti/71310.pdf>; see also John Farrell, *Community Solar Power: Obstacles and Opportunities*, The New Rules Project (2010), available at <https://ilsr.org/wp-content/uploads/files/communitysolarpower2.pdf>.

waves,<sup>16</sup> air pollution,<sup>17</sup> and high energy burdens,<sup>18</sup> as well as the ongoing public health and economic COVID crises,<sup>19</sup> these resilience benefits of distributed solar cannot be overstated.

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<sup>16</sup> See, e.g., J.S. Hoffman *et al.*, *The Effects of Historical Housing Policies on Resident Exposure to Intra-Urban Heat: A Study of 108 US Urban Areas*, *Climate* (2020), available at <https://www.mdpi.com/2225-1154/8/1/12/htm>.

<sup>17</sup> See, e.g., R. Pope *et al.*, *Spatial patterns of air pollutants and social groups: a distributive environmental justice study in the phoenix metropolitan region of USA*, *Environ Manage.* 58(5) (2016), available at <https://pubmed.ncbi.nlm.nih.gov/27631674/>.

<sup>18</sup> See A. Drebholl and L. Ross, *Lifting the High Energy Burden in America's Largest Cities: How Energy Efficiency Can Improve Low Income and Underserved Communities*, American Council for an Energy Efficient Economy (2016), available at [https://assets.ctfassets.net/ntcn17sslow9/1UEmqh5159cFaHMqVwHqMy/1ee1833cbf370839dbbdf6989ef8b8b4/Lifting\\_the\\_High\\_Energy\\_Burden\\_0.pdf](https://assets.ctfassets.net/ntcn17sslow9/1UEmqh5159cFaHMqVwHqMy/1ee1833cbf370839dbbdf6989ef8b8b4/Lifting_the_High_Energy_Burden_0.pdf); see also M.A. Brown, *et al.*, *Low-Income Energy Affordability: Conclusions from a Literature Review*, Oak Ridge National Laboratory (2020), available at <https://info.ornl.gov/sites/publications/Files/Pub124723.pdf>; accord D. Hernández *et al.*, *Housing hardship and energy insecurity among native-born and immigrant low-income families with children in the United States*, *Journal of children & poverty* 22(2):77-92 (2016), available at <https://www.tandfonline.com/doi/full/10.1080/10796126.2016.1148672>.

<sup>19</sup> CDC reports as of June 12, 2020 show that “Non-Hispanic American Indian or Alaska Native persons have a [COVID-related hospitalization] rate approximately 5 times that of non-Hispanic white persons, non-Hispanic black persons have a rate approximately 5 times that of non-Hispanic white persons, and Hispanic or Latino persons have a rate approximately 4 times that of non-Hispanic white persons.” See Centers for Disease Control and Prevention, *COVID-19 in Racial and Ethnic Minority Groups* (June 25, 2020), available at <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/racial-ethnic-minorities.html>.

Taken together, these changes in public policy and technology, particularly distributed solar generation, undermine the assumption that when electricity companies—and particularly entities like SRP—engage in anti-competitive conduct, they are doing so to serve the public interest. Moreover, allowing state-action immunity or immunity otherwise from antitrust laws in these circumstances will serve to further encourage SRP to unfairly obstruct distributed solar development in a manner contrary to antitrust laws, with the expectation that it can avoid liability by invoking the state-action defense. Requiring SRP to defend its rates like any other litigant would level the playing field in an area where it has become increasingly apparent that competition, rather than the perpetuation of insulated monopoly power, will best serve the public interest.

### **III. THE DISTRICT COURT ERRED IN CONCLUDING THAT PLAINTIFFS FAILED TO ARTICULATE A COGNIZABLE ANTITRUST INJURY.**

The district court found that SRP’s discriminatory pricing plans (Standard Electric Price Plans or “SEPPs”) fulfilled only the first two out of the three elements of an antitrust violation of Section 2 of the Sherman Act: (1) “possession of monopoly power in the relevant market”; (2) “willful acquisition or maintenance of that power”; and (3) “causal ‘antitrust injury.’” Order at 23 (ER023) (citing *Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924 (9th Cir. 1980)).

Contrary to the district court's holding, however, Plaintiffs have validly alleged the third element of causal injury by the SEPPs.

The Ninth Circuit identifies four elements to validly allege antitrust injury as a competitor: “(1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is the type the antitrust laws were intended to prevent.” *Am. Ad. Mgmt, nc. V. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999). While the district court upheld the SEPPs as unlawful conduct in finding that the first two of three elements of a Section 2 Sherman Act violation had been fulfilled, Order at 23, it nevertheless erroneously concluded that the SEPPs had “not restrained competition”—“the principal evil of antitrust laws,” *id.* at 27—thereby rejecting Plaintiffs’ bid to fulfill elements 2 and 3 of antitrust injury.

To the contrary, the SEPPs restrain the ability of Plaintiffs and other rooftop solar generators to compete with SRP by decreasing these competitors’ financial viability and survival to generate electricity in SRP’s designated electricity territory. Specifically, as Plaintiffs allege, the SEPPs’ unlawful conduct of increasing electricity payments on rooftop solar generators—by \$600 more per year than under the previous rate plan for rooftop solar generators—injures Plaintiffs’ ability to earn a return on their rooftop solar energy investment, thus threatening their financial viability to enter and remain in the market as a competitor. *See* Appellants’ Opening

Br. at 44 (citing FAC ¶¶84-86, 88-90); *see also Blue Shield of Va. v. McCready*, 457 U.S. 465, 482 (1982) (“[C]ompetitors may be able to prove antitrust injury before they actually are driven from the market and competition is thereby lessened.”)(other citations omitted).

When an alleged monopolist’s unlawful conduct directly harms the financial viability of a competitor to continue to operate in the market, this Circuit has repeatedly held that such competitor has alleged antitrust injury. “A competitor of an alleged attempted monopolist has standing where it is either driven out of business or suffers reduced profits because of the alleged anticompetitive acts of the attempted monopolist.” *Amarel v. Connell*, 102 F.3d 1494, 1509 (9th Cir. 1996) (plaintiffs, independent farmers and millers, suffered antitrust injury when cooperative rice grower competitors engaged in predatory pricing that harmed plaintiffs’ financial viability due to resulting depressed rice market); *see also William Inglis & Sons Baking Co. v. ITT Continental Baking Co.*, 668 F.2d 1014, 1024 (9th Cir. 1981) (antitrust suit premised on allegations that defendant used discriminatory and below-cost pricing to drive out competition from independent bakers in market for wholesale bread), *cert. denied*, 459 U.S. 825 (1982).

Indeed, the district court in *SolarCity Corp. v. SRP*, which addressed the same anticompetitive effects of the SEPPs challenged here, upheld that plaintiff SolarCity had adequately alleged antitrust injury because the SEPPs made “rooftop solar



profoundly uneconomical,” as rooftop solar customers could “not obtain any viable return on a new distributed solar investment.” 2015 U.S. Dist. LEXIS 146904, \*27 (D. Az. 2015). Under that same reasoning, Plaintiffs’ alleged antitrust injuries here are cognizable.

Moreover, the district court held that the SEPPs were merely “market injuries tangentially related to antitrust violations from using uneconomical products.” Order at 27 (ER027). Again, the district court erred; the injuries directly derive from SRP’s unlawful conduct of enacting the SEPPs. Plaintiffs would have earned a return on their solar investments and maintained financial viability were it not for SRP’s new rates penalizing rooftop solar generators. The antitrust injury suffered by Plaintiffs was the direct result of SRP’s antitrust violation.

What is more, the SEPPs’ harm to rooftop solar competitors like Plaintiffs was directly foreseeable by SRP. For example, as revealed in *SolarCity*, Edison Electric Institute—a trade group “with which SRP corresponded during the SEPPs’ approval process—. . . published a report noting that distributed solar is one of the many ‘disruptive technologies . . . that *may compete with utility-provide services* and that as the cost curve for these technologies improves, they could directly threaten the centralized utility model.” *SolarCity*, 2015 U.S. Distr. LEXIS at \*25 (internal quotations omitted); *see also* Phillip E. Areeda and Herbert Hovenkamp, 2 Antitrust Law Par. 373d (revised ed. 1995) (“Standing is clear . . . when the plaintiff alleges

that its rival engaged in an exclusionary practice designed to rid the market of the plaintiff . . . so that the defendant could maintain or create a monopoly.”).

Accordingly, the Court should find that Plaintiffs have adequately pled antitrust injury, and reverse the district court’s contrary ruling.

#### **IV. THE DISTRICT COURT ALSO ERRED IN DISMISSING PLAINTIFFS’ EQUAL PROTECTION CLAIM.**

“The Equal Protection Clause of the Fourteenth Amendment commands that no State shall ‘deny to any person within its jurisdiction the equal protection of the laws,’ which is essentially a direction that all persons similarly situated should be treated alike.” *City of Cleburne v. Cleburne Living Or.*, 473 U.S. 432, 439 (1985); *Arizona Dream Act Coal. v. Brewer*, 757 F.3d 1053, 1063 (9th Cir. 2014). SRP’s discriminatory rates violate key principles of the Equal Protection clause.

In the district court, SRP principally argued that its rates comported with equal protection principles because they justifiably treat solar customers differently from other consumers. Def. Mem. at 25-29. SRP is mistaken.

First, SRP has claimed that the differences in solar customers’ “load patterns, total electricity consumption, and demands on the grid,” warrant differential treatment. *Id.* at 26. Even putting aside the salient fact that this raises questions of fact that cannot be resolved on a motion to dismiss, none of SRP’s alleged differences provides a rational basis for SRP’s discriminatory rates.

With regards to electricity consumption, for example, there are a number of kinds of customers who may have lower electricity use patterns, due to investing in energy efficiency measures, distributed gas generation, or other measures. *See* FAC ¶¶ 105-06. However, SRP’s rates only address *one kind of such customer*: those investing in rooftop solar energy systems.

As for grid demands, SRP’s argument below is based on the false—and widely disproven—premise that adding rooftop solar to the grid adds to overall costs, rather than overall benefits. To the contrary, two meta-analyses of solar cost-benefit studies have revealed that the marginal beneficial value of solar connected to the grid via solar net metering programs actually exceeds the retail rate of electricity, and that net-metered solar generation provides a net benefit to *all* customers.<sup>20</sup>

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<sup>20</sup> *See, e.g.*, M. Muro & D. Saha, *Rooftop Solar: Net Metering is a Net Benefit*, Brookings Institution (May 23, 2016), available at <https://www.brookings.edu/research/rooftop-solar-netmetering-is-a-net-benefit/>; G. Weissman *et al.*, *Shining Rewards: The Value of Rooftop Solar Power for Consumers and Society*, 15 (2016) available at <https://environmentamerica.org/sites/environment/files/reports/AME%20ShiningRewards%20Rpt%20Oct16%201.1.pdf>; *see also, e.g.*, William Driscoll, *SEIA finds rooftop solar is worth 24¢/kWh in Michigan*, PV Magazine, June 29, 2020, available at <https://pv-magazine-usa.com/2020/06/29/seia-finds-rooftop-solar-is-worth-24%C2%A2-kwh-in-michigan/>; accord G. Barbose, Lawrence Berkeley Nat’l Lab, *Putting the Potential Rate Impacts of Distributed Solar into Context* (2017) (“for the vast majority of states and utilities, the effects of distributed solar on retail electricity prices will likely remain negligible for the foreseeable future”), available at <https://emp.lbl.gov/sites/default/files/lbnl-1007060.pdf>.

Indeed, SRP’s arguments ignore the tremendous benefits that rooftop solar provides to the grid, including increasing load management and grid efficiency. Specifically, one primary benefit of rooftop solar is that it avoids the burdensome cost of operating an expensive bulk system generator to meet customer demand during daytime hours. Particularly in Arizona’s hot climate, where air conditioning use peaks during summer days, *see Shining Rewards* at 11, distributed generation serves to meet this demand, reducing the need to run more expensive natural gas “peaker” plants or purchase expensive peak power on wholesale markets during daytime hours—leading to significant avoided costs.<sup>21</sup>

Further, because distributed solar requires less transmission and distribution infrastructure than remote, centralized generation, it reduces the proportion of electricity losses that occur because of these inefficient power lines—thereby providing value to all customers. In addition to these grid and load management benefits, rooftop solar also provides other robust benefits to the environment and society. *See supra* Section II.B.

Accordingly, in cost-benefit analyses where even *some* of these benefits have been evaluated, such as in Maine and Pennsylvania, the overall value of solar tends

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<sup>21</sup> R. Revesz *et al.*, *The Future of Distributed Generation: Moving Past Net Metering*, Environmental Law Reporter, Environmental Law Institute, 4 (2018), available at [https://policyintegrity.org/files/publications/Moving\\_Past\\_Net\\_Metering.pdf](https://policyintegrity.org/files/publications/Moving_Past_Net_Metering.pdf).

to be found to be significantly higher than in other states.<sup>22</sup>

Accordingly, Plaintiffs have adequately alleged that SRP is violating rooftop solar customers' equal protection rights by treating them differently without any rational basis.<sup>23</sup>

### **CONCLUSION**

The judgment of the district court should be reversed, and the case should be remanded for further proceedings.

Respectfully submitted,

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<sup>22</sup> See B. Norris, *et al.*, *Maine Distributed Solar Valuation Study* (2015); R. Perez *et al.*, *Clean Power Research, The Value of Distributed Solar Electric Generation to New Jersey and Pennsylvania*, November (2012).

<sup>23</sup> In the district court, SRP also argued Plaintiffs could not pursue an equal protection claim based on “economics and social welfare” because of the “courts’ preference to allow the democratic process to address any alleged wrongs by public officials.” Def. Mem. at 28. SRP cannot take refuge in those principles, however, given that, as noted, it is a uniquely undemocratic creature. See *supra* at 12 (discussing, *e.g.*, *Ball v. James*, 451 U.S. at 370).

**CERTIFICATE OF COMPLIANCE**

Pursuant to Fed. R. App. P. 29(a)(4)(g), undersigned counsel certifies that this Amicus brief complies with the type-volume and typeface limitations of this Court. Specifically:

1. The Amicus brief complies with the type-volume limitation of Fed. R. App. P. 29(a)(5) and Circuit Rule 32-1(a) and 28.1-1(b) because the brief contains 6,626 words, including footnotes, but excluding the parts of the brief exempted by Circuit Rule 28.1-1(e).
2. This Amicus brief complies with the typeface requirements of Fed. R. Civ. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because it was prepared in a proportionally spaced typeface using Microsoft Word 365 in Times New Roman 14-point font.

Dated: July 8, 2020

/s/ Howard M. Crystal

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**CERTIFICATE OF SERVICE**

I hereby certify that today, July 8, 2020, I electronically filed the foregoing Brief of *Amici Curiae* with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the CM/ECF system.

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

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