

1 Anchun Jean Su (D.C. Bar No. CA285167) (admitted *pro hac vice*)
2 Howard M. Crystal (D.C. Bar. No. 446189) (admitted *pro hac vice*)
3 Center for Biological Diversity
4 1411 K Street, N.W. Suite 1300
5 Washington, D.C. 20005
6 (202) 809-8396
7 Jsu@biologicaldiversity.org
8 Hcrystal@biologicaldiversity.org
9 **Pro hac vice*

10 *Attorneys for the Center for Biological Diversity*

11 **UNITED STATES DISTRICT COURT**
12 **DISTRICT OF ARIZONA**
13 **PHOENIX DIVISION**

14 William Ellis, Robert Dill, Edward
15 Rupprecht, and Robert Gustavis,
16 individually and on behalf
17 of all others similarly situated,

18 Plaintiffs,

19 vs.

20 Salt River Project Agricultural
21 Improvement and Power District,

22 Defendant.

No. 2:19-cv-1228-SMB

**BRIEF OF AMICUS CURIAE THE
CENTER FOR BIOLOGICAL
DIVERSITY IN OPPOSITION TO
DEFENDANT'S MOTION TO DISMISS**

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. SRP IS NOT ENTITLED TO WIELD STATE-ACTION IMMUNITY AS A SHIELD AGAINST ANTITRUST LIABILITY 2

A. SRP’S Rate-Making Authority Does Not Establish That SRP Is Entitled To State-Action Immunity 3

 1. Arizona’s Strong Support For Renewable Energy And Rooftop Solar Expansion Demonstrate That SRP’s Discriminatory Rates Are Not State-Authorized. 3

 2. Regulated Utilities Are Not Exempt From The Antitrust Laws 5

B. SRP Could Only Invoke State Action Immunity By Demonstrating Active State Supervision 7

II. STATE-ACTION IMMUNITY SHOULD, IN ANY EVENT, NO LONGER BE AVAILABLE TO ALLOW DISCRIMINATORY RATE-MAKING THAT STIFLES ROOFTOP SOLAR DEVELOPMENT. 9

III. BECAUSE THEY HAVE NO RATIONAL BASIS, SRP’S RATES ALSO VIOLATE THE EQUAL PROTECTION CLAUSE. 12

CONCLUSION 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

TABLE OF AUTHORITIES

CASES

Aerotec Int’l, Inc. v. Honeywell Int’l, Inc.,
4 F. Supp. 3d 1123 (D. Ariz. 2014) 6

Alabama Power Co. v. Ickes,
302 U.S. 464 (1938)..... 6

Ariz. Corp. Comm’n v. Ariz. ex rel. Woods,
171 Ariz. 286 (1992)..... 4

Ariz. Corp. Comm’n v. People’s Freight Line, Inc.,
16 P.2d 420 (Ariz. 1932)..... 9

Ball v. James,
451 U.S. 355 (1981)..... 7, 8, 16

FERC v. Elec. Power Supply Ass’n,
136 S. Ct. 760 (2016)..... 10

FTC v. Phoebe Putney Health Sys., Inc.,
568 U.S. 216 (2013)..... 3, 5

FTC v. Ticor,
504 U.S. 621 (1992)..... 8

Garden Lakes Cmty. Ass’n v. Madigan,
204 Ariz. 238 (Ariz. Ct. App. 2003) 3

Hughes v. Talen Energy Mktg., LLC,
136 S. Ct. 1288 (2016)..... 9

Kay Elec. Coop. v. Newkirk,
647 F.3d 1039 (10th Cir. 2011) 45

*Morgan Stanley Capital Grp. Inc. v. Pub. Util. Dist. No. 1 of Snohomish
Cty.*,
554 U.S. 527 (2008)..... 10

N. C. State Bd. of Dental Exam’rs v. FTC,
135 S. Ct. 1101 (2015)..... 7, 8, 9

New York v. FERC,
122 S. Ct. 1012 (2002)..... 11

Niedner v. Salt River Project Agric. Improvement & Power Dist.,
121 Ariz. 331 (1979)..... 7

Otter Tail Power Co. v. United States,
410 U.S. 366 (1973)..... 6, 7

1 *Smyth v. Ames*
 2 169 U.S. 466 (1898)..... 10
 3 *SolarCity Corp. v. Ariz. Dep't of Revenue,*
 4 243 Ariz. 477 (2018)..... 4
 5 *SolarCity Corp. v. SRP,*
 6 2015 U.S. Dist. LEXIS 146904 (D. Az. 2015) 6, 9
 7 *Tenn. Electric Power Co. v. Tenn. Valley Auth.,*
 8 306 U.S. 118, 139 (1939)..... 6
 9 *Town of Hallie v. Eau Claire,*
 10 471 U.S. 34 (1985)..... 7
 11 *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko LLP,*
 12 540 U.S. 398 (2004)..... 6

11 **STATUTES**

12 Ariz. Admin. Code § R14-2-703, 1801 (2017) 4
 13 Ariz. Rev. Stat. § 30-800 (2017), *et seq.*..... 5
 14 Ariz. Rev. Stat. § 30-805 (2017) 5
 15 Ariz. Rev. Stat. § 40-332 (2017) 4
 16 Ariz. Rev. Stat. § 42-11054 (2017) 4
 17 Ariz. Rev. Stat. § 42-5061 (2017) 4
 18 Ariz. Rev. Stat. § 43-1083 (2017) 4
 19 Energy Policy Act of 1992,
 20 Pub. L. 102-486, 106 Stat. 2776 11
 21 Public Utility Regulatory Policies Act of 1978,
 22 Pub. L. 95-617, 92 Stat. 3117 11

22 **EXECUTIVE ORDERS**

23 Ariz. Exec. Order No. 2006-13 (Sept. 9, 2006)..... 5
 24 Ariz. Exec. Order No. 2010-006 (July 1, 2010)..... 5
 25
 26
 27

OTHER AUTHORITIES

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

Ari Peskoe,
Unjust, Unreasonable, and Unduly Discriminatory: Electric Utility Rates and the Campaign Against Rooftop Solar, 11 Tex. J. Oil Gas & Energy L. (2016) 11

Ariz. Climate Change Advisory Group,
Climate Change Action Plan (2006)..... 5

B. Baatz, American Council for an Energy-Efficient Economy,
Rate Design Matters: The Intersection of Residential Rate Design and Energy Efficiency (2017) 2

B. Norris, *et al.*, *Maine Distributed Solar Valuation Study* (2015) 15

D. Wagman,
Arizona Utility Opts for Solar and Storage to Meet Peak Demand, IEEE Spectrum (2018)..... 14

G. Weissman *et al.*,
Shining Rewards: The Value of Rooftop Solar Power for Consumers and Society (2016) 13, 14

H. Taha,
The potential for air-temperature impact from large-scale deployment of solar photovoltaic arrays in urban areas, Sol. Energy (2013)..... 15

John Farrell, Inst. for Local Self-Reliance,
Is Bigger Best in Renewable Energy? (2016)..... 11

N.C. Clean Energy Tech. Ctr., *Find Policies & Incentives by State*..... 3

P. Garfield & W. Lovejoy,
Public Utility Economics (1964)..... 9

R. Hernandez *et al.*,
Techno-ecological Synergies of Solar Energy Produce Outcomes that Mitigate Global Change, Nature Sustainability (2019) (In Press) 15

R. Perez *et al.*, *Clean Power Research, The Value of Distributed Solar Electric Generation to New Jersey and Pennsylvania*, November (2012)..... 15

1 R. Revesz *et al.*,
 2 *The Future of Distributed Generation: Moving Past Net Metering*,
 3 Environmental Law Reporter, Environmental Law Institute, (2018)..... 14

4 Robert Anglen,
 5 *SRP Spends Millions On Executive Education Perks*, USA Today (Feb.
 6 6, 2015) 8

7 Robert Walton,
 8 *Arizona Regulator Wants To Adopt 80% Clean Energy Plan Before Gas*
 9 *Moratorium Ends*, Utility Dive, Oct. 8, 2018,
 10 [https://www.utilitydive.com/news/arizona-regulator-wants-to-adopt-80-](https://www.utilitydive.com/news/arizona-regulator-wants-to-adopt-80-clean-energy-plan-before-gas-moratorium/539019)
 11 [clean-energy-plan-before-gas-moratorium/539019](https://www.utilitydive.com/news/arizona-regulator-wants-to-adopt-80-clean-energy-plan-before-gas-moratorium/539019) 3

12 Stephen Breyer,
 13 *Regulation and Its Reform* (1982)..... 10

14 U.S. Global Change Research Program,
 15 *Climate Change Impacts in the United States: The Fourth National*
 16 *Climate Assessment, Volume II* (2018) 1

17 United Nations Intergovernmental Panel on Climate Change,
 18 *Special Report: Global Warming of 1.5°C* (2018) 1

19 W.M. Warwick, U.S Department of Energy,
 20 *A Primer on Electric Utilities, Deregulation, and Restructuring of U.S.*
 21 *Electricity Markets 2.0* (2002) 10

22
 23
 24
 25
 26
 27
 28

INTRODUCTION

1
2 Amicus Curiae Center for Biological Diversity (the “Center”) respectfully submits
3 this brief opposing Defendant Salt River Project’s (“SRP”) motion to dismiss (“Def.
4 Mem.”) (ECF No. 14-1). The Center is an Arizona-based non-profit environmental
5 organization dedicated to the preservation, protection and restoration of biodiversity,
6 ecosystems, and public health. On behalf of its more than 1.5 million members and online
7 activists nationwide, including more than 890 members, and over 15,000 supporters, who
8 live in SRP service territory, the Center advocates for a rapid transition to a clean and just
9 energy system that optimizes renewable energy sources such as distributed solar in order
10 to reduce U.S. greenhouse gas (“GHG”) emissions and combat climate change.

11 In October 2018, the United Nations Intergovernmental Panel on Climate Change
12 (“IPCC”), the authoritative international scientific body for the assessment of climate
13 change, released a report stating the necessity of limiting warming to 2.7 degrees
14 Fahrenheit (or 1.5 degrees Celsius) in order to avoid catastrophic impacts to people and
15 life on earth. United Nations Intergovernmental Panel on Climate Change, *Special Report:*
16 *Global Warming of 1.5°C SPM-4* (2018), available at <https://www.ipcc.ch/sr15/> (“IPCC
17 Report”). In parallel, the U.S. Fourth National Climate Assessment, undertaken by the
18 federal government’s most preeminent scientists, detailed the stark realities of climate
19 change impacts on Americans should the government make no substantial and sustained
20 reductions in GHG emissions: increased hurricanes, extended wildfire seasons, severe
21 impacts on the health and safety of communities, and billions of dollars in damage by the
22 century’s end. U.S. Global Change Research Program, *Climate Change Impacts in the*
23 *United States: The Fourth National Climate Assessment, Volume II* ch.1,14 (2018),
24 available at <https://nca2018.globalchange.gov/>. In order to avoid these consequential
25 impacts, the IPCC makes clear that governments must take “unprecedented” action within
26 the next eleven years to rapidly transition away from a fossil fuel-based economy to an
27 energy system that is majority-powered by renewable energy. IPCC Report at SPM-21.
28

1 As the world's second largest GHG emitter, the United States must play a critical
2 role in accelerating the deployment of domestic distributed solar energy, including rooftop
3 solar systems at issue in this case, to achieve the energy transition demanded by climate
4 science. However, SRP's discriminatory rate structure is an obstacle to this clean energy
5 transition, because it undermines the value of homeowner investment in these systems. B.
6 Baatz, American Council for an Energy-Efficient Economy, *Rate Design Matters: The*
7 *Intersection of Residential Rate Design and Energy Efficiency* 33 (2017), available at
8 <https://aceee.org/sites/default/files/publications/researchreports/u1703.pdf>.

9 The Center files this Amicus brief to present three discrete arguments against
10 SRP's motion to dismiss. First, SRP should not be permitted to rely on state action
11 immunity to shield its discriminatory rate structure from antitrust liability, and certainly
12 not at the pleading stage. Second, state-action immunity for utilities like SRP should in
13 any event be constrained to open the door for distributed solar competition. And finally,
14 SRP is violating the Equal Protection clause because its anti-solar electricity rates have no
15 rational basis.

16 ARGUMENT

17 **I. SRP IS NOT ENTITLED TO WIELD STATE-ACTION IMMUNITY AS A** 18 **SHIELD AGAINST ANTITRUST LIABILITY.**

19 In asserting a right to state-action immunity, SRP wrongly presumes that its anti-
20 competitive policies are state authorized and unreviewable because SRP's rates are set
21 through regulated ratemaking. SRP Mem. at 11-14. SRP also assumes its immunity does
22 not require active supervision by Arizona. *Id.* at 11, n.12. SRP is wrong on both counts.

23

24

25

26

27

28

1 **A. SRP’s Rate-Making Authority Does Not Establish That SRP Is Entitled**
2 **To State-Action Immunity.**

3 **1. Arizona’s Strong Support For Renewable Energy And Rooftop**
4 **Solar Expansion Demonstrate That SRP’s Discriminatory Rates**
5 **Are Not State-Authorized.**

6 SRP claims that its authority to establish utility rates constitutes the “clearly
7 articulated and affirmatively expressed state policy,” *FTC v. Phoebe Putney Health Sys.,*
8 *Inc.*, 568 U.S. 216, 219 (2013), necessary to establish that its anti-solar rates are state
9 authorized. Def. Mem. at 11-13. To the contrary, Arizona’s numerous affirmative policies
10 promoting self-generated, renewable electricity demonstrates that no such state
11 authorization exists.¹

12 “[T]he Arizona legislature’s enactment of laws encouraging the use of solar energy
13 dates back to at least 1974.” *Garden Lakes Cmty. Ass’n v. Madigan*, 204 Ariz. 238, 241
14 (Ariz. Ct. App. 2003). Like many states, Arizona requires utilities to procure solar
15 generation as part of a Renewable Energy Standard, where utilities obtain renewable
16 energy credits (“RECs”), including from home solar systems. *See* Ariz. Admin. Code §
17 R14-2-703, 1801 (2017); N.C. Clean Energy Tech. Ctr., Find Policies & Incentives by
18 State, available at <http://www.dsireusa.org> (showing that almost thirty states have
19 mandatory renewable electricity standards). The Arizona Corporation Commission is
20 presently considering policies that would further strengthen these requirements. *See*
21 Robert Walton, *Arizona Regulator Wants To Adopt 80% Clean Energy Plan Before Gas*

22 ¹ SRP mistakenly suggests that the Supreme Court’s decision in *S. Motor Carriers*
23 *Rate Conference v. United States*, 471 U.S. 48 (1985), stands for the proposition that a
24 legislative delegation of rate-making necessarily shows state authorization. Def. Mem. at
25 13. In that case, however, the Court found immunity by noting that the rate-making
26 authorities were “regulatory agenc[ies]” acting on the state’s behalf. 471 U.S. at 63-65.
27 Here, by contrast, as explained below, it is well-established that, “in conducting its
28 ordinary business [SRP] is not exercising governmental or political prerogatives as it is
not operated for the direct benefit of the general public” *Mesa v. Salt River Project*
Agric. Improvement & Power Dist., 373 P.2d 722, 731 (Ariz. 1961).

1 *Moratorium Ends*, Utility Dive, Oct. 8, 2018, available at
2 [https://www.utilitydive.com/news/arizona-regulator-wants-to-adopt-80-clean-energy-](https://www.utilitydive.com/news/arizona-regulator-wants-to-adopt-80-clean-energy-plan-before-gas-moratorium/539019)
3 [plan-before-gas-moratorium/539019](https://www.utilitydive.com/news/arizona-regulator-wants-to-adopt-80-clean-energy-plan-before-gas-moratorium/539019).

4 The Arizona legislature has also adopted tax incentives to encourage rooftop solar
5 installation, including: (i) the Solar Energy Credit program, allowing tax deductions for
6 renewable energy projects, Ariz. Rev. Stat. § 43-1083 (2017); (ii) a “solar energy devices”
7 exemption from state sales tax, *id.* § 42-5061 (2017); and (iii) a prohibition on considering
8 solar systems as an element of home value for property tax assessments. *Id.* § 42-11054
9 (2017). And just last year the Arizona Supreme Court ruled that state law forbids taxation
10 on the value of leased rooftop solar panels. *SolarCity Corp. v. Ariz. Dep’t of Revenue*, 243
11 Ariz. 477 (2018).

12 The Arizona legislature has further sought to insure that electricity “self-
13 generators”—such as consumers who install rooftop solar systems—obtain the same “just
14 and reasonable” rates as all other utility customers. Ariz. Rev. Stat. § 40-332 (2017). This
15 policy preference furthers the legislature’s overall intent for Arizona citizens to obtain
16 “consumer protection against overreaching by” those selling electricity and other essential
17 services. *Ariz. Corp. Comm’n v. Ariz. ex rel. Woods*, 171 Ariz. 286, 290 (1992).

18 Finally, the legislature’s framework for electricity restructuring, which would
19 allow for some level of competition in the State, runs contrary to SRP’s efforts to remove
20 solar competition, and thus further undermines SRP’s claim that its challenged
21 discriminatory rates are state-authorized. Ariz. Rev. Stat. § 30-800 (2017), *et seq.* While
22 SRP claims such restructuring is irrelevant because it has not yet been carried out, SRP
23 Mem. at 15-16, to the contrary it is the *framework* that matters for this analysis. *See Kay*
24 *Elec. Coop. v. Newkirk*, 647 F.3d 1039, 1045 (10th Cir. 2011) (Gorsuch, J.) (relying on
25 electricity competition framework “on the books” to find “a policy preference for
26 competition”). That framework also indicates that the legislature expects public power
27 entities to treat “self-generators” (like those with rooftop solar) like any other “demand
28 reduction” effort (such as those installing better insulation or other energy efficiency

1 measures)—an approach also at odds with the discriminatory rates which SRP has
2 imposed on distributed solar customers alone. *See* Ariz. Rev. Stat. § 30-805 (2017)
3 (discussing restrictions on recovering stranded costs after restructuring).²

4 The authorization prong of the state-action immunity defense requires SRP to show
5 that Arizona has “foreseen and implicitly endorsed the anticompetitive effects” of the
6 challenged action “as consistent with its policy goals.” *Phoebe Putney*, 568 U.S. at 229.
7 Given the numerous Arizona policies promoting rooftop solar deployment as a vital
8 component of the renewable energy transition, and the tension between these goals and
9 SRP’s rates allegedly designed to unlawfully stifle rooftop solar expansion, SRP cannot
10 demonstrate that its discriminatory rate structure is state-authorized, and is certainly not
11 entitled to judgment as a matter of law on that issue.

12 2. Regulated Utilities Are Not Exempt From The Antitrust Laws.

13 SRP also suggests that that as a “public electric utility and natural monopoly”
14 subject to a regulatory ratemaking statute, it is automatically empowered to take action
15 with “anticompetitive effects” free from antitrust liability. SRP Br. at 14. Again, SRP is
16 mistaken.

17
18
19 ² Two Governors have also issued Executive Orders expressing support for solar
20 generation as a tool to address the climate change crisis. In 2010, Governor Janice Brewer
21 declared that Arizona “strive[s] for pragmatic, pro-active approaches to climate change
22 mitigation and adaptation by advancing clean and renewable energy, including solar
23 power,” as the State becomes “a leader in the field of solar and renewable energy.” Ariz.
24 Exec. Order No. 2010-006 (July 1, 2010). Similarly, in 2006 Governor Janet
25 Napolitano—recognizing that a “scientific consensus has developed that increasing
26 emissions of carbon dioxide [], methane and other greenhouse gases [] released to the
27 atmosphere are affecting the Earth’s climate”—committed Arizona to reducing
28 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>.

1 As the Supreme Court has repeatedly recognized, regulated power companies are
2 not immune from competition and antitrust laws. For example, in *Otter Tail Power Co. v.*
3 *United States*, 410 U.S. 366 (1973), the Court decisively held that the Federal Power Act
4 does not “immunize” power companies from “antitrust regulation.” *Id.* at 374-75. To the
5 contrary, a power company’s “franchise to exist as a corporation, and to function as a
6 public utility . . . creates no right to be free of competition.” *Tenn. Electric Power Co. v.*
7 *Tenn. Valley Auth.*, 306 U.S. 118, 139 (1939) (overruled in part on other grounds); *see*
8 *also, e.g., Ala. Power Co. v. Ickes*, 302 U.S. 464, 480 (1938) (holding that power utilities
9 do not “possess” any inherent legal “right to be immune from lawful . . . competition.”).
10 These precedents are grounded in the recognition that “[t]he public interest is far broader
11 than the economic interest of a particular power supplier.” *Otter Tail Power Co.*, 410 U.S.
12 at n.10.

13 Moreover, SRP’s utility monopoly status is not a license to engage in
14 discriminatory ratemaking against solar competition. It is a basic premise of antitrust law
15 that, while “the possession of monopoly power alone is not an antitrust violation,” an
16 entity is liable should it actively engage in “anticompetitive conduct.” *SolarCity Corp. v.*
17 *SRP*, 2015 U.S. Dist. LEXIS 146904, *34 (D. Az. 2015) (quoting *Aerotec Int’l, Inc. v.*
18 *Honeywell Int’l, Inc.*, 4 F. Supp. 3d 1123, 1136-37 (D. Ariz. 2014)); *see also Verizon*
19 *Communications Inc. v. Law Offices of Curtis V. Trinko LLP*, 540 U.S. 398, 407 (2004)
20 (“To safeguard the incentive to innovate, the possession of monopoly power will not be
21 found unlawful unless it is accompanied by an element of anticompetitive *conduct*.”). For
22 that reason, as the Supreme Court reminded another power utility that protested its
23 antitrust liability, antitrust law “assumes that an enterprise will protect itself against a loss
24 by operating with superior service, lower costs, and improved efficiency”—and not by
25 using its market power to exclude competition. *Otter Tail Co.*, 410 U.S. at 380.
26 Accordingly, SRP’s discriminatory ratemaking is not a condoned “anticompetitive effect,”
27 but rather anticompetitive conduct in violation of antitrust law, as to which it is not
28 immune from liability.

1 **B. SRP Could Only Invoke State Action Immunity By Demonstrating**
2 **Active State Supervision.**

3 In addition to general state authorization, a reviewing court considering a state-
4 action immunity defense also closely examines whether a state-created entity has
5 sufficient active state supervision to warrant possessing the power to “limit competition to
6 achieve public objectives.” *N. C. State Bd. of Dental Exam’rs v. FTC*, 135 S. Ct. 1101,
7 1109 (2015). SRP cursorily asserts that it may exercise that power just like a municipality
8 because its leadership consists of elected officials. SRP Mem. at 11 n.12; *Town of Hallie*
9 *v. Eau Claire*, 471 U.S. 34, 46 (1985). However, for these purposes SRP must be
10 considered an essentially private enterprise, not an arm of the state.

11 The Supreme Court’s ruling in *Ball v. James*, 451 U.S. 355 (1981), makes this
12 absolutely clear, for there the Court upheld SRP’s election eligibility rules—under which
13 only certain landowners have the right to vote, and the more property one owns, the more
14 heavily weighted one’s vote—by explicitly relying on SRP’s essentially *private* character.
15 *Id.* at 368, 372 (finding that water districts like SRP are “essentially business enterprises,
16 created by and chiefly benefiting a specific group of landowners,” and thus do “not
17 exercise the crucial powers of sovereignty typical of a general purpose unit of government
18 such as a state, county, or municipality”).³ Moreover, as regards electricity sales in
19 particular, the Court in *Ball* noted that the “sale of electric power” by SRP is “not for the
20 primary purpose of providing electricity to the public,” but rather that SRP uses electricity
21 sales “to defray the expense in irrigating these private lands for personal profit.” 451 U.S.
22 at 368-69 and n.17; *see also Niedner v. Salt River Project Agric. Improvement & Power*
23 *Dist.*, 121 Ariz. 331 (1979) (rejecting due process claim against SRP on the grounds that it
24 is “a business corporation with attributes of sovereignty which are only incidental”).

25 _____
26 ³ To its credit, SRP has filed an errata correcting the assertion that its ratepayers may
27 “vote to elect” SRP officials, SRP Mem. at 3, clarifying that decades after *Ball* it still
28 remains the case that only “eligible” ratepayers may participate in such elections. SRP
 Notice of Erratum (ECF No. 17).

1 Contrary to SRP’s claim, then, it is not at all like a municipality, which does not require
2 active supervision because it is assumed to act in the public interest by virtue of electoral
3 accountability. *See* SRP Mem. at 14 (seeking to compare SRP to a municipality).⁴

4 Accordingly, to invoke state-action immunity, SRP must demonstrate it is subject
5 to active supervision by Arizona. *See N.C Dental*, 135 S. Ct. at 1111-12. Indeed, it is
6 precisely because of the “risk of self-dealing,” *id.* at 1114, that SRP must be subject to
7 active supervision to avoid antitrust exposure, for absent such supervision the antitrust
8 laws must remain available to protect consumers and competitors from the very kind of
9 injuries at stake in this case.⁵

10 Moreover, the need for active supervision is particularly acute where, as in this
11 case, SRP is an active participant in the relevant market. As the Supreme Court has
12 explained, “where a private party is engaging in anticompetitive activity, there is a real
13 danger that he is acting to further his own interests, rather than the governmental interests
14 of the State.” *FTC v. Ticor*, 504 U.S. 621, 634 (1992) (citations omitted). That is
15 precisely what plaintiffs allege here, and thus without active supervision—a factual issue
16

17 ⁴ Serious questions have also been raised about the parochial manner in which SRP
18 spends ratepayer funds. *See* Robert Anglen, *SRP Spends Millions On Executive*
19 *Education Perks*, USA Today (Feb. 6, 2015) (discussing SRP’s multi-million dollar
tuition reimbursements for children of SRP executives).

20 ⁵ SRP claims the anti-solar rates are necessary to recover unique “cost of serving
21 rooftop solar customers,” SRP Mem. at 7, but, as Plaintiffs explain, there is nothing
22 unique about some customers using less SRP electricity than others, because they have
23 rooftop solar, use gas appliances, only winter in Arizona, or otherwise reduce their energy
24 usage. FAC ¶ 105. In addition, meta-analyses of solar cost-benefit studies have revealed
25 that even solar customers who are compensated via retail-rate net metering (which is a
26 higher compensation rate than solar customers in SRP territory receive) still provide a net
27 benefit to *all* customers, in light of grid benefits such as solar displacing the need for
28 other, more expensive “peaker” plants to ramp up quickly during daytime hours when air
conditioning and other high-electricity use activities increase. Overwhelmingly, the
studies’ results debunk the idea that solar customers cause “cost-shifting” to occur, when
appropriately examined. *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/>.

1 that cannot be resolved at the pleading stage—SRP is not immune from antitrust liability.
2 *See SolarCity Corp. v. SRP*, 2015 U.S. Dist. LEXIS 146904, *42; *see also N.C. Dental*,
3 135 S. Ct. at 1111 (“[l]imits on state-action immunity are most essential when the State
4 seeks to delegate its regulatory power to active market participants, for established ethical
5 standards may blend with private anticompetitive motives in a way difficult even for
6 market participants to discern.”).

7 **II. STATE-ACTION IMMUNITY SHOULD, IN ANY EVENT, NO LONGER**
8 **BE AVAILABLE TO ALLOW DISCRIMINATORY RATE-MAKING THAT**
9 **STIFLES ROOFTOP SOLAR DEVELOPMENT.**

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

17 “Until relatively recently, most state energy markets were vertically integrated
18 monopolies—*i.e.*, one entity . . . controlled electricity generation, transmission, and sale to
19 retail consumers.” *Hughes v. Talen Energy Mktg., LLC*, 136 S. Ct. 1288, 1292 (2016). At
20 one time, this made sense in light of the available technology and business structures. The
21 electricity sector faced extreme barriers to entry because power plants and grid
22 infrastructure required massive capital investments and substantial economies of scale,
23 whereby the average cost of delivered power became cheaper with new expansion in
24 demand. Paul Garfield & Wallace Lovejoy, *Public Utility Economics* 15-19 (1964).

25 The foundational premise for granting monopoly power to vertically integrated
26 utilities was to serve the public interest.⁶ The electricity monopoly model sought to

27 ⁶ Regulation, as an oversight mechanism for natural monopolies, and antitrust laws,
28 as an oversight mechanism over competitive markets, have traditionally been viewed as

1 achieve widespread access to electricity as a public good while, at the same time,
2 subjecting utilities to electricity rate regulation in order to prevent price gouging for
3 ultimate consumer benefit. W.M. Warwick, U.S Department of Energy, *A Primer on*
4 *Electric Utilities, Deregulation, and Restructuring of U.S. Electricity Markets 2.0* (2002),
5 available at [https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-](https://www.pnnl.gov/main/publications/external/technical_reports/PNNL-13906.pdf)
6 [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
7 monopolies were “created for [] public purposes [and] perform[] a function of the state,”
8 and the government is obligated to “protect the people against unreasonable charges for
9 services rendered by” the public utility.).

10 However, the century-old premise that vertically integrated monopolies necessarily
11 serve the public interest has been undermined by public policy and modern technology. In
12 terms of policy, electricity regulators have recognized the value of actively encouraging
13 competition in electricity generation in order to serve the public interest. For example, as
14 the Supreme Court noted in *FERC v. Elec. Power Supply Ass’n*, 136 S. Ct. 760 (2016), the
15 Federal Energy Regulatory Commission (“FERC”) “often forgoes the cost-based rate-
16 setting traditionally used to prevent monopolistic pricing[. . .] [and] instead undertakes to
17 ensure ‘just and reasonable’ wholesale rates *by enhancing competition*—attempting . . .
18 ‘to break down regulatory and economic barriers that hinder a free market in wholesale
19 electricity.’” *Id.* at 768 (emphasis added) (quoting *Morgan Stanley Capital Grp.*
20 *Inc. v. Pub. Util. Dist. No. 1 of Snohomish Cty.*, 554 U.S. 527 (2008)).

21 Indeed, Congress passed a series of modern laws intended to promote competition
22 in the electricity sector and unbundle the services of the traditional vertically integrated
23 monopoly, all as a means to advance the public interest. Thus, in light of both
24

25 binary legal approaches serving the same purpose: keeping industry in check and thereby
26 ensuring fair consumer prices. Thus, as Justice Breyer has written, while antitrust laws
27 serve to police competition in traditional competitive markets, regulation serves as “an
28 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).

1 “[te]chnological advances [that] made it possible to generate electricity efficiently in
2 different ways and in smaller plants,” and grids that were “unlike the local power
3 networks of the past,” *New York v. FERC*, 122 S. Ct. 1012, 1017-18 (2002), Congress
4 passed (i) the 1978 Public Utility Regulatory Policies Act, Pub. L. 95-617, 92 Stat. 3117,
5 which directed FERC to promulgate rules requiring monopoly utilities to purchase
6 electricity from independent power production facilities, and (ii) the Energy Policy Act of
7 1992, Pub. L. 102-486, 106 Stat. 2776, authorizing FERC to order individual monopoly
8 utilities to provide transmission services to unaffiliated wholesale generators. *New York*,
9 122 S. Ct. at 1018-19. In short, the assumption that the vertically integrated utility
10 monopoly automatically serves the public interest has been undermined by public policy
11 promoting competition in electricity services.

12 Distributed solar technology further subverts the economic and public interest
13 assumptions justifying the traditional vertically integrated electricity monopoly.
14 Distributed solar technology, with a relatively low barrier of entry, is de-centralized and
15 can be owned or leased by consumers who are otherwise captive to the local utility
16 monopoly. See Ari Peskoe, *Unjust, Unreasonable, and Unduly Discriminatory: Electric*
17 *Utility Rates and the Campaign Against Rooftop Solar*, 11 Tex. J. Oil Gas & Energy L.
18 211, 215 (2016). Distributed solar generation thus dispels the assumption that electricity
19 service necessarily requires large economies of scale. See John Farrell, Inst. for Local
20 Self-Reliance, *Is Bigger Best in Renewable Energy?* 2-4 (2016), available at
21 [https://ilsr.org/wp-content/uploads/2016/12/Is-Bigger-Best-in-Renewable-Energy-Report](https://ilsr.org/wp-content/uploads/2016/12/Is-Bigger-Best-in-Renewable-Energy-Report-Final.pdf)
22 [Final.pdf](https://ilsr.org/wp-content/uploads/2016/12/Is-Bigger-Best-in-Renewable-Energy-Report-Final.pdf). As such, distributed solar generation also disrupts the utility’s traditional
23 business model, obviating the need for power companies like SRP to continuously
24 construct infrastructure as their engine of profit generation. Peskoe, 11 Tex. J. Oil Gas &
25 Energy L. at 228-32.

26 Taken together, these changes in public policy and technology, particularly
27 distributed solar generation, undermine the assumption that when electricity companies—
28

1 and particularly entities like SRP—engage in anti-competitive conduct they are doing so
2 to serve the public interest.

3 Moreover, allowing state-action immunity in these circumstances will serve to
4 further encourage SRP to unfairly obstruct distributed solar development in a manner
5 contrary to antitrust laws, with the expectation that it can avoid liability by invoking the
6 state-action defense. Requiring SRP to defend its rates like any other litigant would level
7 the playing field in an area where it has become increasingly apparent that competition,
8 rather than the perpetuation of insulated monopoly power, will best serve the public
9 interest.

10 **III. BECAUSE THEY HAVE NO RATIONAL BASIS, SRP’S RATES ALSO
11 VIOLATE THE EQUAL PROTECTION CLAUSE.**

12 In response to Plaintiffs’ allegations that SRP’s anti-solar rates violate rooftop solar
13 customers’ rights to equal protection, FAC ¶¶ 180-85, SRP claims that there are sound
14 reasons to treat them differently. Def. Mem. at 25-29. Once again, SRP is mistaken.

15 First, SRP claims that the differences in solar customers’ “load patterns, total
16 electricity consumption, and demands on the grid,” warrant differential treatment, *id.* at
17 26. However, as a threshold matter, this is a factual question, *not* a legal question; the
18 Court could only resolve whether there is a rational basis for SRP’s rates by considering
19 evidence concerning SRP’s rationales—which, again, cannot be done on the pleadings.

20 Second, in any event, none of SRP’s alleged “material differences” between solar
21 customers and non-solar customers form any rational basis for SRP’s discriminatory rates
22 against the former. Def. Mem. at 26. With regards to electricity consumption, SRP seeks
23 to justify its discriminatory rates against solar customers by arguing that their reduced
24 electricity consumption presents cost-recovery challenges due to lost load. *Id.* However,
25 as Plaintiffs explain, while there are a number of reasons certain customers may have
26 different electricity use patterns, FAC ¶¶ 105-06, SRP’s rates do not address all those
27 customers with lower electricity consumption. For example, a customer who invests in
28 energy efficiency measures or natural gas generation may similarly “require less total

1 electricity” from SRP. Def. Mem. at 7. However, rather than designing a rate for all
2 customers purchasing less electricity, SRP designed a rate that solely targets rooftop solar
3 customers, denying them equal protection.

4 Similarly, with regards to demands on the electricity grid, SRP’s argument is based
5 on the false—and widely disproven—premise that adding rooftop solar to the grid mix
6 adds to overall costs, rather than overall benefits. To the contrary, as noted, meta-analyses
7 of solar cost-benefit studies have revealed that the marginal beneficial value of solar
8 connected to the grid via solar net metering programs can be calculated as exceeding the
9 retail rate of electricity, and that net-metered solar generation provides a net benefit to *all*
10 customers.⁷ In fact, one of the meta-analyses, which reviewed 16 distributed solar cost-
11 benefit studies, found that not only is solar energy worth more than the credits offered to
12 customers via net metering programs, but that the “studies that find lower values for solar
13 energy often exclude consideration of key benefits that solar panel owners provide to the
14 grid and society.” G. Weissman et al., *Shining Rewards: The Value of Rooftop Solar*
15 *Power for Consumers and Society*, 15 (2016), available at [https://environmentamerica.org](https://environmentamerica.org/sites/environment/files/reports/AME%20ShiningRewards%20Rpt%20Oct16%201.1.pdf)
16 [/sites/environment/files/reports/AME%20ShiningRewards%20Rpt%20Oct16%201.1.pdf](https://environmentamerica.org/sites/environment/files/reports/AME%20ShiningRewards%20Rpt%20Oct16%201.1.pdf).
17 Further, this analysis found that studies conducted by non-utility analysts generally value
18 solar higher than those that are conducted by utilities, suggesting bias in the latter studies.
19 *Id.* at 15.

20 Third, the rationale for SRP’s discriminatory rate penalizing rooftop solar
21 customers is further undermined by the fact that SRP disregards the tremendous benefits
22 that rooftop solar provides, including increasing load management and grid efficiency.
23 SRP’s failure to incorporate these benefits incorrectly leads SRP to an unjustified rate that
24 violates the equal protection rights of rooftop solar customers. Specifically, one primary
25 benefit of rooftop solar is that it avoids the burdensome cost of operating an expensive
26

27 ⁷ See *supra* at n.5. Most distributed solar cost-benefit studies evaluate retail-rate net
28 metering compensation levels.

1 bulk system generator to meet customer demand during daytime hours. Particularly in
2 Arizona’s hot climate, where air conditioning use peaks during summer days, *id.* at 11,
3 distributed generation serves to meet this demand, reducing the need to run more
4 expensive natural gas “peaker” plants or purchase expensive peak power on wholesale
5 markets during daytime hours—leading to significant avoided costs. R. Revesz *et al.*, *The*
6 *Future of Distributed Generation: Moving Past Net Metering*, Environmental Law
7 Reporter, Environmental Law Institute, 4 (2018), available at [https://policyintegrity.org](https://policyintegrity.org/files/publications/Moving_Past_Net_Metering.pdf)
8 [/files/publications/Moving_Past_Net_Metering.pdf](https://policyintegrity.org/files/publications/Moving_Past_Net_Metering.pdf).

9 Moreover, rooftop solar can provide shading benefits for buildings, reducing the
10 on-site overall demand for air conditioning during peak hours. And although grid-wide
11 electricity demand can peak in early evening hours when solar generates less electricity,
12 this does not negate the savings from distributed generation provided at earlier high-
13 energy-demand hours. *Id.* at 4. Finally, the obvious solution to meeting high demand in
14 evening hours is not to curb distributed generation in favor of expensive and polluting
15 fossil fuel generation, but to add storage capacity to take advantage of Arizona’s overall
16 high solar generating potential. Indeed, in 2018, the Arizona Public Service announced a
17 65 megawatt project coupling solar PV with battery storage—a project that outbid
18 prospective fossil fuel-powered “peaker” plants—to meet evening demand. D. Wagman,
19 *Arizona Utility Opts for Solar and Storage to Meet Peak Demand*, IEEE Spectrum,
20 (2018), available at [https://spectrum.ieee.org/energywise/energy/renewables/arizona-](https://spectrum.ieee.org/energywise/energy/renewables/arizona-utility-opts-for-solar-and-storage-to-meet-peak-summer-demand)
21 [utility-opts-for-solar-and-storage-to-meet-peak-summer-demand](https://spectrum.ieee.org/energywise/energy/renewables/arizona-utility-opts-for-solar-and-storage-to-meet-peak-summer-demand).⁸

22
23
24 ⁸ PV solar systems when combined with storage can effectively meet peak evening
25 electricity demands in lieu of fossil fuel power generation, as demonstrated by AES
26 Corporation and Kaua’i island Utility Cooperative (KIUC)’s solar plus storage “peaker”
27 plant—which will provide electricity after sundown and allow the island to meet one-third
28 of its demand from solar. See Christian Roselund, “The birth of the solar + storage
29 peaker,” (January 8, 2019), PV Magazine, available at [https://pv-magazine-](https://pv-magazine-usa.com/2019/01/08/the-birth-of-the-solar-storage-peaker/)
30 [usa.com/2019/01/08/the-birth-of-the-solar-storage-peaker/](https://pv-magazine-usa.com/2019/01/08/the-birth-of-the-solar-storage-peaker/).

1 Further, because distributed solar requires less transmission and distribution
2 infrastructure than remote, centralized generation, it reduces the proportion of electricity
3 losses that occur because of these inefficient power lines—thereby providing value to all
4 customers. In addition to these grid and load management benefits, rooftop solar also
5 provides other robust benefits to the environment and society, including but not limited to:

- 6 • avoided GHG emissions, avoided air pollution, and human health and well-being
7 benefits;
- 8 • urban heat island effect reduction; and
- 9 • land sparing, and improved heating and cooling efficiency.⁹

10 Accordingly, in cost-benefit analyses where even *some* of these benefits have been
11 evaluated, such as in Maine and Pennsylvania, the overall value of solar tends to be
12 significantly higher than in those states that do not.¹⁰ In Arizona, where temperatures
13 reach (literally) deathly high levels, water use is severely limited, and climate change
14

15 ⁹ In areas that experience extreme heat events, such as Arizona, rooftop solar panels
16 have insulating effects on the building envelope, producing human health and comfort
17 benefits. *See V. Masson et al., Solar panels reduce both global warming and urban heat*
18 *island*. *Front. Environ. Sci.* 2 (2014). Separately, in cities, solar panels can provide an
19 albedo effect to reflect sunlight and ultimately cool overall temperatures. For example, in
20 the Los Angeles Basin, researchers modeled a high-density deployment of roof-mounted
21 PV panels and found that, particularly with high efficiency panels, overall air
22 temperatures could decrease up to 0.2 degrees Celsius. *See e.g., H. Taha, The potential for*
air-temperature impact from large-scale deployment of solar photovoltaic arrays in urban
areas, *Sol. Energy* 91, 358–367 (2013); *see also R. Hernandez et al. Techno-ecological*
synergies of solar energy produce outcomes that mitigate global change. *Nature*
Sustainability (2019) (In Press).

23 ¹⁰ Specifically, Maine’s PUC commissioned a study including “Net Social Cost of
24 Carbon,” “Net Social Cost of SO₂,” and “Net Social Cost of NO_x,” the total of which was
25 9.6 cents per kWh in avoided emissions. *See B. Norris, et al., Maine Distributed Solar*
Valuation Study (2015). In Pennsylvania, non-utility analysts included an “Economic
26 Development Value,” an “Environmental Value” representing avoided greenhouse gas
27 emissions, and a “Security Enhancement Value” representing grid resiliency in their cost-
28 benefit analysis for net metering. *See R. Perez et al., Clean Power Research, The Value*
of Distributed Solar Electric Generation to New Jersey and Pennsylvania, November
(2012).

1 serves to exacerbate these problems, the environmental and social benefits of distributed
2 solar are especially relevant.

3 Accordingly, SRP is violating rooftop solar customers' equal protection rights by
4 penalizing them as a particular rate class without a rational basis.¹¹

5 **CONCLUSION**

6 For the foregoing reasons, the Center respectfully urges the Court to deny SRP's
7 motion to dismiss.

8
9 DATED: June 4, 2019

Respectfully submitted,

10 /s/ Anchun Jean Su

11 ANCHUN JEAN SU

(admitted *pro hac vice*)

12 (DC Bar No. CA285167)

13
14 /s/ Howard M. Crystal

HOWARD M. CRYSTAL

(admitted *pro hac vice*)

15 (DC Bar No. 446189)*

16
17 CENTER FOR BIOLOGICAL DIVERSITY

18 1411 K Street N.W., Suite 1300

19 Washington, D.C. 20005

20 Telephone: (202) 849-8399

Email: jsu@biologicaldiversity.org

21 hcrystal@biologicaldiversity.org

22 *Attorneys for Center for Biological Diversity*

23
24
25 ¹¹ Ironically, SRP also asserts the Court should “allow the democratic process to
26 address any alleged” impropriety in SRP’s treatment of its customers, SRP Mem. at 28—a
27 statement that is certainly difficult to square with SRP’s successful argument to the
28 Supreme Court that it should not be compelled to comply with the Constitution’s one-
person, one-vote principle due to its private character. *Ball v. James*, 451 U.S. 355
(1981).