Case Nos. 20-15301, 20-15476

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

WILLIAM ELLIS; et al.,
Plaintiffs – Appellee,
v.
SALT RIVER PROJECT AGRICULTURAL IMPROVEMENT AND POWER DISTRICT,
Defendant-Appellant

Appeal from Decision of the United States District Court of Arizona
No. 2:19-cv-01228-SMB *Honorable Susan M. Brnovich*

APPELLANTS' OPENING BRIEF

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INTRODUCTION

Solar power has long been a promising source of clean renewable energy, the use of which has been incentivized by states throughout the country and in other nations that are committed to reducing dependency on fossil fuels and greenhouse gas emissions in light of the global climate crisis. Arizona, its cities, and some utilities are among those attempting to incentivize such reductions. Defendant Salt River Project Agricultural Improvement and Power District ("SRP" or "Defendant"), an Arizona public power entity, however, has undermined those crucial efforts by illegally imposing discriminatory service rates—through the abuse of its monopoly power—on home solar panel users. The dismissal below is a death knell to continued adoption of clean solar energy in SRP's service territory based on legally erroneous interpretations of the law.

Plaintiffs-Appellants commenced this action challenging Defendant's conduct aimed at unlawfully maintaining its existing monopoly power over the retail delivery of electricity to customers throughout its service territory in Arizona. Plaintiffs allege Defendant implemented a discriminatory pricing scheme intended to discourage continued solar power use by its customers and eliminate solar energy competition. Defendant's exploitation of consumers with solar energy systems is only possible because it holds monopoly power over the provision of the supplemental electricity all solar users must purchase from it. Arizona has enacted

laws that specifically open its retail electricity market to competition, mandate non-discriminatory rates and subject violations to antitrust laws. SRP's imposition of discriminatory, higher rates on solar customers both to penalize them, and to drive out solar competitors, conflicts with those laws. Thus, the discriminatory rates were not adopted for any rational reason but rather solely to discourage further use and investment by consumers in solar energy sources. Such conduct is anti-competitive and caused an injury-in-fact to solar customers like Plaintiffs and the putative Class.

In dismissing the case, the District Court made four separate and independent errors by specifically holding that: (1) Plaintiffs' state law claims and Equal Protection claim were untimely; (2) Plaintiffs' state law claims were barred by procedural notice requirements of the Actions Against Public Entities and Public Employees Act, A.R.S. § 12-821.01(A); (3) the Local Government Antitrust Act, 15 U.S.C. §§ 34–36 ("LGAA"), barred Plaintiffs' ability to seek antitrust damages, while ignoring Plaintiffs' claims for injunctive and declaratory relief under antitrust laws; and (4) finding that Plaintiffs failed to allege any antitrust injury. As a result, the Court of Appeals should reverse and remand the case for further proceedings.

JURISDICTIONAL STATEMENT

The District Court had original jurisdiction pursuant 28 U.S.C. § 1331, 28 U.S.C. § 1337(a), and 15 U.S.C. § 22, and supplemental jurisdiction over Plaintiffs' state law claims pursuant to 28 U.S.C. § 1367. On February 21, 2020, Plaintiffs

timely filed a notice of appeal from both the District Court's Order dated January 10, 2020 (ER001-029) and the Final Order dated February 20, 2020. ER030. Accordingly, this Court has jurisdiction pursuant to 28 U.S.C. § 1291 as an appeal from a final decision of a district court.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

1. Whether the District Court erred in determining that Plaintiffs' Equal Protection claims accrued when the discriminatory E-27 rates were initially adopted, years before Plaintiffs were subjected to the rates and suffered injury, rendering them untimely;

2. Whether the District Court erred in determining that Plaintiffs' pre-suit notice was insufficient to sustain Plaintiffs' state law claims under A.R.S. § 12-821.01(A);

3. Whether the District Court erred in failing to preserve Plaintiffs' claims for injunctive and declaratory relief in holding that the LGAA barred Plaintiffs' antitrust claims; and

4. Whether the District Court erred in holding that Plaintiffs failed to allege any antitrust injury.

STATEMENT OF THE CASE

I. Factual Background

A. The Parties.

1. SRP

SRP is a public power entity operating the Phoenix, Arizona metropolitan area. Under the Arizona Constitution, districts such as SRP are "political subdivisions of the State, and vested with all the rights, privileges and benefits, and entitled to the immunities and exemptions granted municipalities and political subdivisions under this Constitution or any law of the State or of the United States." Ariz. Const., Art. 13, § 7. *See* First Amended Complaint ("FAC"), at ¶¶28-38 (Apr. 23, 2019). ER086-089. Despite this, SRP lacks traditional governmental powers and regulation. *Ball v. James*, 451 U.S. 355, 366-68 (1981) (recognizing SRP as a "nominal public entity"); FAC ¶¶28-38. For instance, SRP lacks most governmental powers including the ability to impose taxes or enact laws. *Id.* SRP is not a democratic institution but is instead controlled by a small group of private landowners. *Id.* SRP is not subject to regulation or oversight by the Arizona Corporation Commission or any other entity exercising State sovereignty as to its services and rates. Its retail electricity operations are that of an ordinary "business enterprise." *Id.* Despite these limited functions, SRP remains a political subdivision

subject to constitutional challenges for its discriminatory conduct.[1]

SRP provides electricity to approximately two million retail customers within its service area, including Plaintiffs. FAC ¶¶2, 32. With complete control over the electrical grid in its service territory, SRP has monopoly power over the pricing, sale, and distribution of electricity to all grid-dependent retail customers in its service territory, and provides more than 95% of the electricity used by customers in its territory. FAC ¶¶2, 5-6, 42-53. SRP's only competition comes from the use of solar energy systems, which allow SRP customers who purchase them to self-generate some of their power and reduce their reliance on retail electricity. FAC ¶¶13, 48, n.9.[2] However, even those customers are captive to SRP's monopoly power, as the electricity they self-generate cannot meet their total energy requirements, requiring them to purchase the difference from SRP. FAC ¶4.

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[1] *See Smith v. Salt River Project Agric. Improvement & Power Dist.*, 109 F.3d 586, 593-94 (9th Cir. 1997) ("To the extent it enjoys the powers and privileges of a political subdivision, the District also should bear the duties and obligations of a political subdivision. The fact that the District is a limited-purpose public entity makes it no less public.").

[2] In *SolarCity Corp. v. Salt River Project Agric. Improvement & Power Dist.*, No. cv-15-00374, 2015 WL 6503439, at *1, 8–9 (D. Ariz. Oct. 27, 2015), a case brought by a solar company challenging SRP's anticompetitive conduct in adopting discriminatory rates, the court concluded: "SolarCity plausibly alleges that it is a competitor of the District."

2. Plaintiffs

Plaintiffs William Ellis, Robert Dill, Edward Rupprecht, and Robert Gustavis are SRP customers who self-generate electricity through solar energy systems that they purchased. FAC ¶¶3, 20-27, 62, 109, 113. Each Plaintiff acquired their solar energy system and were first charged the discriminatory rates by SRP *after* the rates were adopted. *Id.* Since most solar energy systems produce and store less electricity than what consumers need, Plaintiffs still must purchase some additional electricity from SRP to fill the gap. FAC ¶¶4, 52, 155. As described below, SRP exploits its monopoly power as the only available provider of this electricity.

B. The expanded use of solar electricity has long been recognized as beneficial in Arizona, and competition from self-generation is protected under Arizona law.

Solar energy has long been viewed as beneficial for society providing a clean source of renewable energy, reducing electric transmission costs, and helping states, cities, and other entities comply with environmental regulations and to achieve policy goals. FAC ¶¶1, 60-64. Homeowners' use of solar energy systems benefits not only the environment and the general public, but also utility companies like SRP by *inter alia*, reducing transmission costs and helping them comply with regulatory requirements. FAC ¶12, 62-63, 101, 105. In addition, electricity generated by solar energy systems in SRP's service territory assists in meeting electricity demand during peak hours, especially during the summer. FAC ¶62. Recognizing these

benefits, utility companies have offered financial incentives to customers to encourage the installation of solar energy systems. FAC ¶¶5, 12, 63.

However, as solar increased in popularity, SRP began to recognize its adoption as a competitive threat due to the increased energy independence of its customers. FAC ¶¶34, 44-47, 65-69.[3] In 2013 the Edison Electric Institute, an electrical utility trade group, published articles that acknowledged direct competition between solar energy system vendors and electric utilities, highlighting the "competitive threat" and "disruption" solar energy companies present to utilities' business model, and how that "threat" can be addressed to utilities' financial benefit through the adoption of new pricing, rates, and policies aimed at *discouraging*

[3] *See Solar City*, 2015 WL 6503439, at *8-9:

> But SolarCity alleges the SEPPs "have the purpose and effect of eliminating future distributed solar installations" and that the "only practicable way to escape the charges is to forgo installing distributed solar systems or to radically reduce peak usage," which is impracticable. SolarCity further alleges the SEPPs make it "impossible for commercial, municipal, and educational customers to obtain any viable return on a new distributed solar investment," and that the "clear purpose of the SEPPs is not to recoup reasonable grid-related costs from distributed solar customers, but to prevent competition from SolarCity (and other providers of distributed solar) by punishing customers who deal with such competitors[.]". It asserts it has lost substantial business because the SEPPs have "made rooftop solar profoundly uneconomical." These allegations sufficiently allege harm to competition in the retail electricity market. SolarCity has adequately alleged antitrust injury.

consumers' investment in solar power systems, despite the related public benefits. FAC ¶46-47. Plaintiffs allege that SRP followed this model in adopting discriminatory rates aimed at disrupting this competition and disincentivizing consumers to invest in solar systems. As the *Arizona Republic* newspaper reported, an SRP executive went so far as to refer to solar energy system vendors as the "enemy." FAC ¶¶45, 73 (describing email sent with the subject line "The Solar Tax Issue" and stating "Hold the fort down ... feeling restless while the enemy is preparing for attack!").

To promote both competition and renewable energy, Arizona has adopted laws that open electricity markets and prevent discriminatory pricing. The Electric Power Competition Act, A.R.S. §30-801 *et seq.* ("EPCA"), *inter alia*, requires public power entities to open their service territory to competition for the sale of electric power to retail customers. A.R.S. §30-803; FAC ¶54-55. *See also* A.R.S. §40-202(B). The EPCA prohibits public power entities from using "any reduction in electricity in purchases… resulting from self-generation" to rationalize calculating or recovering "stranded costs from a customer." A.R.S. §30-805(D); FAC ¶56. The EPCA further provides that discriminatory prices for electricity are unlawful. A.R.S. §30-805(A)(1) and (2). Finally, the EPCA calls for the application of antitrust laws to curtail anticompetitive conduct by public power entities. A.R.S. §30–813; FAC ¶¶55-59.

C. SRP adopted discriminatory rates to lessen competition from solar electricity, injuring Plaintiffs, the putative Class, and the general public.

Despite these laws, in order to eliminate the growing competition from solar energy systems, maintain its monopoly power, and increase its revenues, SRP implemented a new discriminatory pricing scheme called Standard Electric Price Plans ("SEPPs"), effective February 26, 2015, which included the E-27 price plan for customers, like Plaintiffs, who self-generate electricity. FAC ¶¶6, 72-73.

Under the E-27 price plan new customers generating electricity through solar energy systems were charged approximately $600 more per year than both non-solar customers buying the same electricity and existing solar customers (as of December 2014) who were grandfathered into the old rates, resulting in a substantial increase in solar customers' bills (by approximately 65%). FAC ¶¶7, 73. These higher rates effectively penalized customers who used solar and, as detailed below, were designed to discourage further purchases and investments in solar energy systems. The rate change was not to further environmental, social, or other policies that pass the requisite judicial scrutiny, but instead was aimed at maintaining monopoly power, impeding solar development despite its recognized benefits, quashing competition for electricity from self-generating consumers with solar energy systems, and generating additional revenues for SRP through exploitation of its monopoly power. FAC ¶¶5. As SRP's conduct was contrary to the EPCA, there was

no rational basis for its decision to implement the discriminatory rates. FAC ¶¶96-107.[4]

Rather than increase rate plans for all consumers equally across-the-board, SRP adopted a far smaller rate increase for its non-solar and grandfathered consumers. FAC ¶8. The E-27 price plan was designed to penalize and discriminate against customers with solar energy systems, and disincentivize further solar investment and use. FAC ¶¶7-9. Costs incurred by SRP to serve solar customers do not justify the increase as these customers offset or reduce the cost of the service they receive and therefore, confer substantial benefit to SRP. FAC ¶11. While SRP could have designed a rate structure that treated all customers using reduced or similar levels of electricity the same, SRP designed a rate structure that solely targeted new solar electricity users for higher rates, denying them equal protection. FAC ¶¶11-12, 105.

Under the discriminatory rates, solar customers, like Plaintiffs, pay higher rates than SRP's non-solar and grandfathered solar customers for purchases of the same electricity, causing them financial injury. FAC ¶¶6-7, 15-17, 19-27, 85-95. Further, consumers recognize that SRP's pricing plan is discriminatory and strips

[4] *See Otter Tail Pwr. Co. v. United States*, 410 U.S. 366, 368, 380 (1973) (disapproving conduct of electric utility that used its lost revenues to justify anticompetitive conduct).

the economic value in investing in solar energy systems, as shown by the fact applications for solar energy systems in SRP's territory fell significantly after the E-27 effective date, harming competition. FAC ¶¶10, 86-87.

II. Procedural History

On December 9, 2018, Plaintiffs timely served a notice of claim on Defendant pursuant to A.R.S. §12-821.01. ER123-124,133-135. After Defendant denied the claim, indicating no willingness to resolve the dispute, Plaintiffs commenced this action on February 22, 2019. ER177,181-182. Plaintiffs' First Amended Complaint asserts nine causes of action: monopolization and attempted monopolization in violation of the Sherman Antitrust Act and the Arizona Uniform State Antitrust Act; price discrimination under the Arizona Constitution and A.R.S. §40-334; violation of the Equal Protection Clause of the Fourteenth Amendment and the Arizona Constitution; and violation of the Arizona Consumer Fraud Act. FAC ¶¶120–195. Defendant moved to dismiss (ER183), and on January 10, 2020 the District Court granted the motion (ER001-029,185) (the "Order"). The order terminating the case was issued on February 20, 2020. ER030,185. Plaintiffs' Notice of Appeal was filed on February 22, 2020. ER136-137,185.

SUMMARY OF ARGUMENT

While the District Court correctly rejected Defendant's arguments that the filed-rate doctrine and state-action immunity barred Plaintiffs' claims, the January

10, 2020 Order contained four reversable errors. First, the District Court held that Plaintiffs' causes of action accrued when the E-27 rate was initially adopted by Defendant in February 2015 despite that being several years before any Plaintiff acquired their solar electricity systems and were first charged the discriminatory rates, causing financial injury. As a cause of action accrues when a plaintiff realizes that he or she is injured, the District Court's determination that Plaintiffs' claims accrued before they were ever charged is reversable error.

Second, the District Court committed reversable error when determining that Plaintiffs' pre-filing notice of claim was deficient. Plaintiffs' notice detailed the facts on which Plaintiffs' claims were based, supplemented by the draft complaint, and presented a concise formula from which Defendant could derive the amount to settle the class claims using data it exclusively possessed. *See* ER133-135. This is all the rules require. *See Mountainside Mar LLC v. City of Flagstaff*, No. 1 CA-cv-18-0049, 2019 WL 3235025, *3 (Ariz. Ct. App. July 18, 2019).

Moreover, Plaintiffs dispute not only the deficiency of the notice, but whether such notice was required at all. Because this procedural requirement is incompatible with the Federal Rules of Civil Procedure, the federal rules govern. Specifically, Fed. R. Civ. P. 23 prohibits the forced "pick-off" of class representatives before they have had a fair opportunity to move for class certification, which is in direct conflict with the fiduciary duties a class representative assumes. Arizona's procedural

mandate that Plaintiffs' present an offer of settlement and surrender their Article III standing before that time, as the District Court interpreted A.R.S. §12-821.01(A) to require, conflicts with federal law and is invalid. *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406-07 (2010). The foregoing notwithstanding, A.R.S. §12-821.01(A) does not apply to Plaintiffs' federal claims or claims seeking injunctive and declaratory relief, and dismissal of such claims on this basis was improper.

Third, the District Court erred in finding that the LGAA barred Plaintiffs from recovering damages under the federal antitrust laws. The LGAA protects government entities, and SRP is only a "nominal governmental unit" that is essentially a business enterprise benefiting a private group of landowners. *Ball*, 451 U.S. at 366. In any event, the LGAA does not impact Plaintiffs' claims for injunctive and declaratory relief, or any claims under Arizona's antitrust laws.

Finally, with respect to Plaintiffs' Sherman Act claims, the District Court erred in ruling that Plaintiffs failed to allege antitrust injury.

STANDARD OF REVIEW

The Court of Appeals reviews "*de novo* a district court's grant of a motion to dismiss and all constitutional questions." *Tedards v. Ducey*, 951 F.3d 1041, 1048 (9th Cir. 2020).

ARGUMENT

I. Plaintiffs' Equal Protection Claims Are Timely.

The District Court erred in concluding that Plaintiffs' equal protection claim was barred because it was not brought within two years from "the Board's approval of the SEPPs on February 26, 2015." Order at 17-18. ER17-18.[5] First, although the SEPPs were initially adopted in 2015, Plaintiffs were not injured until well after that when they acquired solar energy systems and were first charged the higher rates at issue. *See, e.g.*, FAC ¶¶21, 23 (alleging Plaintiffs Ellis and Dill installed their solar energy systems and first became subject to the E-27 rates in May and July, 2018, respectively). Therefore, those Plaintiffs had no standing to bring claims for damages until they were charged the discriminatory rates. A cause of action accrues when the plaintiff incurs the actual injury for which she seeks redress. *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 401 U.S. 321, 338 (1971); *Flynt v. Shimazu*, 940 F.3d 457, 462 (9th Cir. 2019); *Canyon Del Rio Investors, L.L.C. v. City of Flagstaff*, 258 P.3d 154, 159 (Ariz. Ct. App. 2011). Since all Plaintiffs (except Rupprecht) filed their claims seeking damages, injunctive, and declaratory relief within two years of the date they were first charged the discriminatory rates, their claims were timely.

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[5] While the District Court's ruling on the accrual of claims only addressed Plaintiffs' Equal Protection claim, Plaintiffs' analysis applies to all claims.

Second, regardless of when Plaintiffs' claims first accrued, all Plaintiffs (including Rupprecht) continue to be charged the unlawful rates on an ongoing monthly basis. Under the continuing violation doctrine, a new claim accrues each time additional unlawful charges are imposed. *Flynt*, 940 F.3d at 462. There is "a series of repeated violations" where each monthly charge creates a new injury and a new actionable violation. *Id.*; *Zenith*, 401 U.S. at 338, n.3. As a result, Plaintiffs' claims are timely and the District Court erred in dismissing them.

A. Plaintiffs' claims did not accrue in 2015 when the E-27 rates were initially adopted, but rather when Plaintiffs first became subject to the discriminatory rates and were injured financially by paying them.

1. Plaintiffs' claims for monetary damages accrued then they were charged the discriminatory rates.

"Section 1983 does not contain its own statute of limitations." *Campbell v. Nat'l Comm. Renaissance of Cal.*, 766 F.3d 1191, 1198 (9th Cir. 2014). Instead, federal equal protection claims under 42 U.S.C. §1983 are subject to the forum state's statute of limitations for personal injury claims. *Taylor v. Regents of Univ. of Cal.*, 993 F.2d 710, 711-12 (9th Cir. 1993). Arizona's personal injury statute of limitations is "two years after the cause of action accrues[.]" A.R.S. §12-542.

While state law determines the length of the limitations period, federal law determines when a civil rights claim accrues. *Olsen v. Idaho State Bd. of Med.*, 363 F.3d 916, 926 (9th Cir. 1991). "It is the standard rule that accrual occurs when the

plaintiff has a complete and present cause of action," that is, when the plaintiff "knows or has reason to know of the actual injury." *Flynt*, 940 F.3d at 462 (citations omitted).[6] Thus, the plaintiff must suffer an "actual injury" *before* a claim accrues. *Id*.

The District Court erroneously held that Plaintiffs' claims accrued in February 2015 when the discriminatory rates under the SEPPs were first approved by SRP's board, even though that was *before* Plaintiffs installed or first used a solar energy system, *before* Plaintiffs were even solar customers, and *before* Plaintiffs were ever subject to the discriminatory rates that caused actual injury and financial loss when paid. In turn, the District Court erroneously found that the statute of limitations had run and Plaintiffs' claims were untimely by the time this action was filed in February 2019.

As an initial matter, had Plaintiffs filed their action in 2015 when the discriminatory rates were adopted but not yet applied to them, their action would likely have been dismissed due to justiciability issues. The mere existence of a statute (or rate) is not sufficient to satisfy the 'case or controversy' requirement under Article III. *See, e.g.*, *Thomas v. Anchorage Equal Rights Comm'n*, 220 F.3d 1134,

[6] *See also Lukovsky v. City & Cnty. of S. F.*, 535 F.3d 1044, 1051 (9th Cir. 2008); *Ervine v. Desert View Regional Med. Ctr. Holdings, LLC*, 753 F.3d 862, 869 (9th Cir. 2014).

1138-39 (9th Cir. 2000). Even a general intent by Plaintiffs to install solar energy systems at some point in the future would not confer Article III injury necessary to confer standing to bring suit. *Id*. A speculative threat of injury, "wholly contingent upon the occurrence of unforeseeable events," namely whether Plaintiffs here would actually complete a transaction to purchase a solar system three years in the future, "though theoretically possible—is not reasonable or imminent." *Id.* at 1141; *Babbit v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979).

Instead, Plaintiffs filed their action within the applicable limitation period after they were actually charged the higher discriminatory rates and suffered actual injury. FAC ¶¶21, 23. Plaintiffs' initial claims accrued at the time of the first payments pursuant to the E-27 rate plan that caused financial injury and damage. *Allstate Life Ins. Co. v. Robert W. Baird & Co., Inc.*, 756 F. Supp. 2d 1113, 1154 (D. Ariz. 2010), *on reconsideration in part*, 2012 WL 1900560 (May 24, 2012) (cause of action against a public entity accrues for purposes of the notice of claim provision and the statute of limitations when the damaged party realizes he or she has been damaged and knows its cause); *Stulce v. Salt River Project Agric. Improvement & Power Dist.*, 3 P.3d 1007, 1010 (Ariz. Ct. App. 1999)(same); *Manrique v. City of Phoenix*, No. CV11-01981-PHX-DCG, 2012 WL 1985640, *2 (D. Ariz. June 4, 2012)(same). Subsequent charges resulted in the accrual of new claims, supported by distinct financial injuries.

The District Court erroneously relied on *RK Ventures, Inc. v. City of Seattle*, 307 F.3d 1045, 1058 (9th Cir. 2002), in holding that a cause of action accrues when the "operative decision" to enact the discriminatory rates occurred and that "[i]nevitable consequences resulting from the operative decision are not separately actionable." Order at 17-18. Such an approach makes little sense and would lead to the absurd result that an unconstitutional statute could never be challenged except in the first two years after enactment because all subsequent injuries that result are "inevitable consequences" resulting from the operative decision to enact the law and thus, not separately actionable.

Moreover, the District Court's determination of what constitutes the "operative decision" to trigger the statute of limitations is not actually supported by *RK Ventures*. In *RK Ventures* the City of Seattle enacted a public nuisance abatement ordinance in September 1992. *RK Ventures*, 307 F.3d at 1051. Two years after the ordinance was enacted, the City decided to institute a formal abatement proceeding against plaintiffs' nightclub that catered to the African-American community. *Id*. A letter addressing the abatement proceedings and notifying plaintiffs that the discriminatory ordinance was being specifically applied to them, was first sent to them on October 18, 1994. *Id*. The formal abatement proceeding began on November 14, 1994, and exactly three years later, plaintiffs filed their lawsuit challenging the ordinance. *Id*. at 1054. Since the statute of limitations was

three years, plaintiffs' federal claims were dismissed as untimely based on the date of the first letter. *Id*. at 1058.

In addressing the timeliness of plaintiffs' §1983 claim, this Court held that the claims accrued when the "operative decision" occurred on October 18, 1994 when the plaintiffs received the letter specifically notifying them of the upcoming abatement action against them personally. *Id*. Thus, for the claim to accrue, *RK Ventures* required specific application of the ordinance against the particular plaintiff, not the mere enactment of the ordinance. The "operative decision" is consistent with the "discovery rule" under federal law which provides that claims accrue when the plaintiff knows or has reason to know of the injury that forms the basis of their action. *Id*. Critically, this Court did not conclude that the plaintiffs' claims began to accrue two years earlier in September 1992 when the challenged ordinance was initially enacted, but instead held that accrual only occurred at a later date when it was actually applied to the particular plaintiffs. *Id*. A similar conclusion is warranted here to determine that Plaintiffs' claims accrued when the discriminatory E-27 rates were actually applied to Plaintiffs, causing injury. *See Bird v. Dept. of Human Servs.*, 935 F.3d 738, 745-46 (9th Cir. 2019) (claims challenging a statute accrue when "the statute is enforced—in other words, [when] it is applied.").

Additionally, in rejecting Plaintiffs' arguments that their claims could not

have accrued until they became subject to the discriminatory rates, the District Court reasoned that allowing the claims to accrue based on the date the solar energy systems are installed permits solar customers to challenge the E-27 rate plan in "perpetuity." Order at 18. The District Court's decision illogically immunizes SRP from future suits by holding that all customer's claims accrued in 2015 when SRP's Board approved the rates for customers not yet subject to the rates and damaged.[7]

The District Court's misapplication of the accrual date forever immunizes an unconstitutional rate plan, which is inconsistent with Ninth Circuit precedent. The Ninth Circuit has held that "[t]he only way for a state to immunize itself from further suit by future plaintiffs would be to stop enforcing its statute. As long as [the state] continues to enforce its statute, it is subject to a facial challenge by every individual it affects." *Bird,* 935 F.3d at 745. This position is aligned with decisions of other Circuits. For instance, in *Virginia Hosp. Ass'n v. Baliles*, the Fourth Circuit explained that "[t]he continued enforcement of an unconstitutional statute cannot be insulated by the statute of limitations." 868 F.2d 653, 663 (4th Cir. 1989) (citing

[7] The District Court's rationale that Plaintiffs' claims accrued in February 2015, long before they were actually injured, because they "knew or reasonably knew the SEPPs were adopted at that time" is incorrect. Order at 18. The mere occurrence of a meeting by a governmental entity does not change the fact that "claims do not accrue until the claimant realizes he or she has been injured." *Long v. City of Glendale*, 93 P.3d 519, 525 (Ariz. Ct. App. 2004) ("The open meeting law does not compel the general public to know the content of every public meeting or search public records pertaining to those meetings.").

Brown v. Bd. of Educ., 347 U.S. 483 (1954)). Similarly, the Sixth Circuit in *Kuhnle Brothers, Inc. v. Cnty. of Geauga*, concluded that a "law that works an ongoing violation of constitutional rights does not become immunized from legal challenge for all time merely because no one challenges it within two years of its enactment." 103 F.3d 516, 521-22 (6th Cir. 1997).

Likewise, in *Mountainside Mar LLC*, the Arizona Court of Appeals concluded that plaintiff's claim accrued on the date a challenged fee imposed by the City of Flagstaff was paid. 2019 WL 3235025, at *2. The city argued that an earlier invoice should have triggered the statute of limitations, because "by that point [developer] Mountainside was aware the so-called capacity fees 'would be assessed' against it." *Id.* The Court of Appeals rejected that argument, explaining "until it paid the fees … [it] had not yet suffered the damage for which it now seeks redress." Accordingly, "its claims did not accrue until that date." *Id*.

Similarly, the Arizona Court of Appeals in *Canyon Del Rio*, concluded that the earliest time that a damage claim accrues and a limitations period can begin to run is the time that an injury occurs. 258 P.3d at 159. The Court further explained that a §1983 claim for damages, as opposed to a declaratory relief claim, would not be ripe before the plaintiff is even injured. *Id.* at 343, ¶ 31.[8] *See Hopi Tribe v. City*

[8] *See S. Shell Inv. v. Town of Wrightsville Beach, N.C.*, 703 F. Supp. 1192, 1195

of Flagstaff, No. cv-12-0370, 2013 WL 1789859, *4 (Ariz. Ct. App. Apr. 25, 2013) (same).

Finally, Plaintiffs' arguments that their claims began to accrue when the discriminatory rates were applied to them, rather than when the E-27 rates were first adopted is consistent with Supreme Court precedent. The Supreme Court has a long-standing history of hearing and upholding challenges to statutes that were enacted decades before commencement of the plaintiff's challenges. For example, *Brown v. Board of Education* resolved challenges to state statutes that codified the separate-but-equal doctrine decades prior to the commencement of the actions underlying that opinion. 347 U.S. at 468 n.1; *see also Obergefell v. Hodges*, 135 S.Ct. 2584, 2593 (2015) (invalidating state statues that barred same sex-marriage or that refused to recognize such marriages if solemnized in states where same-sex marriage was lawful even though such statutes were enacted decades before commencement of the underlying actions). Therefore, this Court should reverse the District Court's incorrect determination of when Plaintiffs' claims accrued and remand for further proceedings.

(E.D.N.C. 1988), *aff'd* 900 F.2d 255 (4th Cir. 1990) ("the limitations period began to run upon payment of the impact and tap fees to the Town"); *Paul v. City of Woonsocket*, 745 A.2d 169 (R.I. 2000) (statute of limitation "began to accrue for each plaintiff upon individual payment of the tapping fee" to city).

2. Plaintiffs' claims for declaratory and injunctive relief similarly accrued when they were charged.

Courts have made a distinction between the time a justiciable controversy arises for purposes of filing an action for declaratory or injunctive relief and when an action accrues for statute of limitations purposes. While Plaintiffs' arguably could have attempted to bring an action for declaratory relief earlier, the statute of limitations on claims seeking monetary relief did not begin to run until they were actually charged and paid the unlawful rates.

Canyon Del Rio is again instructive. The Court of Appeals there explained that although a declaratory judgment claim *may* be filed once a justiciable controversy arises, no statute of limitations begins to run until there is actual damage:

> When a justiciable controversy exists, the [Uniform Declaratory Judgements] Act allows adjudication of rights before the occurrence of a breach or injury necessary to sustain a coercive action (one seeking damages or injunctive relief).
>
> * * *
>
> The time when a breach or injury occurs is the earliest time that a coercive claim can accrue and a limitations period can begin to run.... We have, therefore, recognized that a distinction exists between the point in time when a justiciable controversy arises which permits the filing of a declaratory relief action, and when an action accrues for purposes of a period of limitations.

258 P.3d at 159 (citing *W. Casualty & Surety Co. v. Evans*, 130 Ariz. 333, 336 (Ariz. Ct. App. 1981)) ("the fact that either party could have sought a declaration regarding coverage as of the filing of the reservation of right does not mean that the action

accrued at that time for statute of limitations purposes.").

A similar result was reached in *Homebuilders Ass'n of Cent. Ariz. v. City of Surprise*, where a homebuilders' association challenged development fees paid by homebuilders at time of receiving construction permits. No. 1 CA-CV 14-0466, 2015 WL 7454104 (Ariz. Ct. App. 2015). The Court held that the plaintiff's damage claims only accrued once the charges were imposed.

> [T]he City argued Home Builders' cause of action accrued when the City passed the resolution on May 31, 2011. Although it may be that declaratory relief could have been obtained immediately after the passage of that resolution, the City has not shown how Home Builders' cause of action in this case accrued before assessments were imposed.

Id. at *1, n.3.

B. Plaintiffs' claims are timely under the continuing violation doctrine.

Plaintiffs' claims are also timely based on the continuing violation doctrine as Defendant violated Plaintiffs' constitutional rights through a series of repeated violations each month it imposed a discriminatory charge, continuing through the limitations period. *Flynt*, 940 F.3d at 462. The continuing violation doctrine holds that when a plaintiff is suffering an ongoing violation of rights and not a discrete, particular injury, the plaintiff may file suit at any time within the limitations period after the most recent incident. *Ledbetter v. Goodyear Tire & Rubber Co.*, 550 U.S. 618, 628 (2007); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 380-81 (1982) (where plaintiff "challenges not just one incident of conduct violative of the Act, but

an unlawful practice that continues into the limitations period, the complaint is timely when it is filed within [the limitations period] of the last asserted occurrence of that practice."); *see also Green v. L.A. Cnty. Superintendent of Schools*, 883 F.2d 1472, 1480 (9th Cir. 1989) ("[A] systematic policy of discrimination is actionable even if some or all of the events evidencing its inception occurred prior to the limitations period.") (internal citations omitted).[9]

As the Court in *Flynt* explained, the term continuing violation is "something of a misnomer" in that it "implies that there is but one incessant violation and that the plaintiffs should be able to recover for the entire duration of the violation, without regard to the fact that it began outside the statute of limitations window." *Flynt*, 940 at n.3 (citing *Knight v. Columbus*, 19 F.3d 579, 582 (11th Cir. 1994)). Rather than "one on-going violation," a continuing violation is really "a series of repeated violations." *Id.* And "[b]ecause each violation gives rise to a new cause of action, each [violation] begins a new statute of limitations period as to that particular event." *Id.*

Therefore, "[w]hen the continued enforcement of a statute inflicts a continuing or repeated harm, a new claim arises (and a new limitations period

[9] The continuing violations doctrine applies to §1983 claims. *Gutowsky v. Cnty. of Placer*, 108 F.3d 256, 259 (9th Cir. 1997); *Centifanti v. Nix*, 865 F.2d 1422, 1432-33 (3d Cir.1989) (applying the doctrine to a procedural due process claim).

commences) with each new injury." *Flynt*, 940 F.3d at 462 (citing *Kuhnle Bros.*, 103 F.3d at 521-22; *Palmer v. Bd. of Educ. of Comm. Unit Sch. Dist. 201-U*, 46 F.3d 682, 686 (7th Cir. 1995)); *cf. Nat'l R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 113 (2002) ("Each discrete discriminatory act starts a new clock for filing charges alleging that act."). *See also Zenith*, 401 U.S. at 338 ("Each time a plaintiff is injured by an act of the defendants a cause of action accrues to him to recover the damages caused by that act and that, as to those damages, the statute of limitations runs from the commission of the act.").

To invoke the continuing violations doctrine, a plaintiff must show "a series of related acts, one or more of which falls within the limitations period, or the maintenance of a discriminatory system both before and during [that] period." *Gutowsky*, 108 F.3d at 259 (citing *Green*, 883 F.2d at 1480). Thus, a continuing violation may be established through a series of related acts against one individual, or by a systematic policy or practice of discrimination. *Id.*

For instance, in *Reed v. Lockheed Aircraft Corp.*, an employment discrimination case, this Court made the distinction between the continuing impact of past violations and continuing violations and explained that the plaintiffs' claims were timely because: "[t]he violations of which she complains occurred each day of her employment, including the days within the appropriate limitations period." 613 F.2d 757, 760 (9th Cir.1980). *See Gutowsky*, 108 F.3d at 259-60 (same).

The continuing violations doctrine applies to claims that challenge the imposition of unlawful charges on a recurring basis. In such circumstances, a new claim accrues at the time of each new charge, causing additional injury. *See Klehr v. A.O. Smith*, 521 U.S. 179, 189 (1997) ("Antitrust law provides that, in the case of a continuing violation, say, a price-fixing conspiracy that brings about a series of unlawfully high priced sales over a period of years, each overt act that is part of the violation and that injures the plaintiff, *e.g.,* each sale to the plaintiff, starts the statutory period running again, regardless of the plaintiff's knowledge of the alleged illegality at much earlier times.") (quotations omitted); *Hennegan v. Pacifico Creative Serv., Inc.*, 787 F.2d 1299, 1300 (9th Cir.1986) ("When an overt act in furtherance of an antitrust conspiracy damages the plaintiff within the limitations period, the plaintiff possesses a cause of action for that damage that is not barred by the statute of limitations."); *Home Builder's Ass'n*, 2015 WL 7454104, at *2 ("[I]f [Plaintiff] is able to prove that one or more assessments occurred on or after January 15, 2012, [Plaintiff's] cause of action is not time-barred to the extent that it challenges assessment(s) occurring on or after that date") (*citing Floyd v Donahue*, 923 P.2d 875, 880 (Ariz. Ct. App. 1996)).[10]

[10] *See also Ramirez v. GreenPoint Mortg. Funding, Inc.*, 633 F.Supp.2d 922, 929-30 (N.D. Cal. 2008) (minority borrowers' claims against lender for charging discriminatory fees and rates were timely as they challenged not just one incident of

Plaintiffs' allegations are consistent with the Ninth Circuit's application of the continuing violation doctrine. As set forth above, Plaintiffs' claims are predicated on Defendant's maintenance of a discriminatory rate system both before and during the limitations period, continuing through the date the complaint was filed. Plaintiffs clearly allege that Defendant's charging of discriminatory rates to solar customers continues and therefore new injuries and damages accrue each month that the discriminatory rates are charged. FAC ¶19.

The continued enforcement of SRP's discriminatory E-27 rates at the time of each monthly charge is to discourage the purchase and use of solar energy systems and is a systematic policy of constitutional deprivation. Because Plaintiffs' claims arise from this systematic policy, they properly invoked the continuing violation doctrine. The District Court erred in finding that the discriminatory monthly bills under the E-27 rate plan are merely an "inevitable consequence" of SRP's decision

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conduct, but an unlawful practice that continued into the limitations period); *Pac. Gas & Elec. Co. v. City of Union City*, 220 F. Supp. 2d 1070 (N.D. Cal. 2002) (applying continuing violation doctrine to claims challenging City and County's charge of street damage restoration fees, concluding "[c]ities and counties must eventually obey the state laws governing their taxing authority and cannot continue indefinitely to collect unauthorized taxes.") (citing *Howard Jarvis Taxpayers Ass'n v. City of La Habra*, 23 P.3d 601 (Cal. 2001) (each imposition of a utility tax by a municipality constituted an ongoing constitutional violation upon which the limitations period begins anew with each collection)); *Blake v. JP Morgan Chase Bank, N.A.*, 259 F. Supp. 3d 249, 257 (E.D. Pa. 2017) ("I find that RESPA would be violated each and every time an unlawful fee or kickback was delivered or accepted. Each alleged violation, in turn, reset RESPA's one-year statute of limitations.").

to adopt the SEPPs in 2015.

II. Arizona's Notice of Claim Procedure Does Not Apply in Federal Proceedings, and in Any Event, Plaintiffs' Notice of Claim Satisfied Arizona Requirements.

The District Court erred in finding that Plaintiffs' state law claims were barred for failure to satisfy the notice requirements of Arizona's Actions Against Public Entities and Public Employees Act, A.R.S. §12-821.01(A), for several reasons. Most notably, the notice requirements are inapplicable here: first, state procedural requirements are not applicable to state law claims brought in federal court; second, the obvious conflict in the state requirements with the Federal Rules of Civil Procedure dictate application of federal law; and third, regardless of the foregoing, the statutory notice requirements cannot be a condition precedent to bringing any claims arising under federal law or for injunctive and declaratory relief. Separately and independently, to the extent Plaintiffs were required to comply with the notice of claim elements of A.R.S. §12-821.01(A), Plaintiffs duly satisfied Arizona's procedural steps.

A. The notice of claim requirements are inapplicable to the vast majority of Plaintiffs' claims, and otherwise in conflict with federal law, such that purported deficiencies cannot be dispositive of any claims.

1. State procedural laws are not applicable to claims brought in federal court.

As an initial matter, state law procedural requirements are not applicable to state law claims brought in federal court. *Shady Grove*, 559 U.S. at 406-07

(determining that a statutory class action bar on a state law claim is procedural and therefore, preempted by competing federal rules in federal court). Under the *Erie*[11] doctrine, a federal court adjudicating state law claims must apply state substantive law and federal procedural law. *See, e.g.*, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 427 (1996); *United Mine Workers of Am. v. Gibbs*, 383 U.S. 715, 726 (1966) (indicating that the *Erie* doctrine applies to supplemental state claims litigated in federal courts); *Hanna v. Plumer*, 380 U.S. 460 (1965) (when a state procedural rule conflicts with a Federal Rule of Civil Procedure, the federal court must apply the federal rule). The distinction between "procedural" and "substantive" rules is that the former relates to the process for enforcing rights, whereas the latter operates to alter the rights themselves. *Shady Grove*, 559 U.S. at 407-408.

As the Supreme Court recognized, the "*Erie* rule is rooted in part in a realization that it would be unfair for the character of the result of a litigation materially to differ because the suit had been brought in federal court." *Hanna*, 380 U.S. at 467. The outcome-determination test was sharpened in *Hanna* in order to better "reference the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Id.* at 468. As in *Hanna*,

[11] *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938).

where the federal rule allowed the litigation to continue but the state rule compelled dismissal, in the case before us the "choice of the federal or state rule will at this point have a marked effect upon the outcome of the litigation, [but] the difference between the two rules would be of scant, if any, relevance to the choice of a forum." *Id.* at 469.

Arizona's notice of claim statute is a procedural requirement. *Pritchard v. State*, 788 P.2d 1178, 1183 (Ariz. 1990) (describing §12-821.01 as "procedural requirement"); *Swenson v. Cnty. of Pinal*, 402 P.3d 1007, 1010 (Ariz. Ct. App. 2017) ("[t]hose statutes, however, are procedural in nature"); *Manrique*, 2012 WL 1985640, *2 (same); *Allstate*, 756 F.Supp.2d at 1154 (same). As such, it cannot serve to bar Plaintiffs' claims in federal court.

Mace v. Van Ru Credit Corp. is illustrative. 109 F.3d 338, 346 (7th Cir. 1997). In *Mace*, the Seventh Circuit explained that if a state law notice requirement is procedural rather than substantive, a plaintiff's noncompliance with that requirement is excusable:

> If the purpose of the WCA's notice requirement is, as argued by the defendants, to prevent a suit from ever being filed (by encouraging the parties to reach an agreement extra-judicially), such a notice requirement is not substantive. …The application of Rule 23 does not abridge, enlarge or modify any substantive right. Therefore, Mace's WCA class action should be allowed to proceed.

Id.[12] As the notice requirement serves the same purpose here as in *Mace* (to allow the government entity to evaluate settlement[13]), the District Court was in error to enforce procedural requirements of a state notice statute to bar Plaintiffs' claims.

2. Federal Rule of Civil Procedure 23 prohibits enforcement of this conflicting state law.

Worse, the notice requirement of §12-821.01(A) thwarts the provisions of Fed. R. Civ. P. 23 rendering it inapplicable in federal courts. *See Burlington N. Ry. Co. v. Woods*, 480 U.S. 1, 4-7 (1987); *Shady Grove*, 559 U.S. at 409-10. Specifically, under *City of Phoenix v. Fields*, the statute mandates that putative class representatives submit an irrevocable offer to settle only their individual claims prior to moving for class certification and be "picked-off," without regard to absent putative class members, leaving them without an adequate representative, in violation of the fiduciary duties they assume to act in the best interest of the putative class. 201 P.3d 529, 534 (Ariz. 2009). Since this conflicts with Rule 23 and the Rules Enabling Act, 28 U.S.C. §2072, it is invalid and the District Court erred in

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[12] *See also Gallivan v. United States*, 943 F.3d 291 (6th Cir. 2019) (state procedural law requiring a supporting affidavit did not apply in federal court as it conflicted with federal rules, applying *Shady Grove*); *In re Restatsis Antitrust Litig.*, 355 F. Supp. 3d 145, 155-56 (E.D.N.Y. 2018) (failure to comply with state statute requiring notice of claim to be filed with state attorney general did not bar claims, applying *Shady Grove*); *Williever v United States*, 775 F. Supp. 2d 771, 778, 783 (D. Md. 2011) (state procedural law mandating pre-litigation filing of expert certificate and report did not apply as it conflicted with the federal rules).

[13] *Martineau v. Maricopa Cnty.*, 86 P.3d 912, 915-16 (Ariz. Ct. App. 2004).

applying it.

Pursuant to Rule 23, "[w]hen a putative class action is filed, the putative class representatives are under an obligation to represent the interests of the putative class, even before the action has been certified by the court." *Garo v. Global Credit & Collection Corp.*, No. CV-09-2506-PHX-GMS, 2010 WL 5108605, *4-5 (D. Ariz. Dec. 9, 2010). Indeed, this Court has explicitly held that class representatives *cannot be compelled* to accept an individual settlement before they have a fair opportunity to move for class certification under Rule 23 demonstrating their adequacy to represent the class and typicality of their claims. *Chen v. Allstate Insurance Co.*, 819 F.3d 1136, 1146-48 (9th Cir. 2016); *Mavris v. RSI Enters. Inc.*, 303 F.R.D. 561, 566 (D. Ariz. 2014) ("Picking off' class representatives with paltry sums, thereby leaving other putative class representatives in the lurch, is an abuse of the Federal Rules that is designed to do nothing more than frustrate class actions."). As the Supreme Court explained, "[w]hile a class lacks independent status until certified, a would-be class representative with a live claim of her own must be accorded a fair opportunity to show that certification is warranted." *Campbell-Ewald v. Gomez*, 136 S.Ct. 663, 672 (2016) (citation omitted). In turn, a putative class representative "may not be obliged to forfeit her representative status by defendant's offer to her of the maximum individual amount of her claim." *Garo*, 2010 WL 5108605 at *5.

The notice requirement of §12-821.01 is incompatible with this well

recognized duty. More than simply allowing the public entity to consider settlement possibilities prior to litigation, the notice requirement actually forces a representative plaintiff to submit an irrevocable offer to settle only their individual claims for a sum certain in their notice and be "picked-off," surrendering their standing and mooting their claims. *Fields*, 201 P.3d at 534; *Yollin v. City of Glendale*, 191 P.3d 1040, 1044 (Ariz. Ct. App. 2008) ("to satisfy the 'sum certain' requirement, the claimant must be willing to let the government finally settle the claim by paying the amount demanded in the notice of claim… [plaintiff] would have been bound if Glendale had accepted the offer."). This obligates representative plaintiffs to breach their duties and forfeit their representative status at the whim of the defendant without ever having a "fair opportunity to show that certification is warranted," as the Supreme Court held is required. *Chen*, 819 F.3d at 1147-48 (quoting *Campbell-Ewald*, 136 S.Ct. at 672). In turn, this Court recognized: "offers to provide full relief to the representative plaintiffs who wish to pursue a class action must be treated specially, lest defendants find an easy way to defeat class relief." *Id.* (citations omitted). The conflict between the federal and state procedural requirements could not be clearer: one mandates a pick-off attempt, the other prohibits it.

Thus, there is an actual conflict between Fed. R. Civ. P. 23, and particularly its typicality and adequacy requirements, and A.R.S. §12-821.01(A). Whereas under Rule 23, a class representative need not (or should not be required to) make or accept

an offer to settle before they are "accorded a fair opportunity to show that certification is warranted," *Campbell-Ewald*, 136 S.Ct. at 672, the Arizona statute provides no such protections and mandates that an individual offer by the representative plaintiff be made in a such a firm way that all a Defendant need do is accept, mooting the "typical" claim presented by the representative plaintiff and rendering them inadequate to represent the class.

Accordingly, the statutory requirement dictating that a putative class representative accept a settlement of their individual claims prior to moving for class certification, which ignores the relief requested on behalf of a putative class, cannot be enforced in federal court. "Requiring multiple plaintiffs to bring separate action, which effectively could be 'picked off' by a defendant's tender of judgment before an affirmative ruling on class certification could be obtained, obviously would frustrate the objectives of class actions." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339 (1980). "In sum, a district court should decline to enter a judgment affording complete relief on a named plaintiff's individual claims, over the plaintiff's objection, before the plaintiff has had a fair opportunity to move for class certification." *Chen*, 819 F. 3d at 1146-48 (collecting cases). The District Court was in error in enforcing a state procedural requirement that enables defendants to pick-off putative class representatives and fundamentally frustrate the objectives of Fed. R. Civ. P. 23.

Finally, the Court in *Fields* pointed out another significant conflict between the A.R.S. §12-821.01(A) and Rule 23, concluding "it is simply not possible" to comply with both because a representative plaintiff cannot provide a "'specific amount' for which the claim of the entire class 'can be settled'" due to Rule 23(e)'s settlement approval requirements. 201 P.2d at 533; *see also*, *Andrew S. Arena, Inc. v. Super. Ct.*, 788 P.2d 1174 (Ariz. 1990) (Arizona legislature did not intend to exempt public entities from class actions, finding classwide notice of claim under earlier version of statute could be provided). Because of this "impossibility," under *Shady Grove* the state statute's requirement mandating provision of a "specific amount" must yield to the federal law.

3. The notice of claim requirement does not apply to claims for injunctive and declaratory relief, or federal claims.

Regardless, the District Court erred in dismissing Plaintiffs' state law claims seeking injunctive and declaratory relief for failure to comply with the notice of claim provisions in A.R.S. §12-821.01(A). The notice of claim provision does not apply to state claims seeking injunctive or declaratory relief. *Allstate*, 756 F.Supp.2d at 1156; *Martineau*, 86 P.3d at 916 (declaratory relief); *State v. Mabrey Ranch, Co.*, 165 P.3d 211, 223 (Ariz. App. Ct. 2007) (injunctive relief). Nor do the notice provisions apply to Plaintiffs' claims for monetary relief arising under federal law. *Knick v. Township of Scott, Pa.*, 139 S.Ct. 2162, 2167, 2173 (2019)(exhaustion of

state remedies not required before filing §1983 claim); *Nored v. City of Tempe*, 614 F. Supp. 2d 991 (D. Ariz. 2008)(same); *Canyon Del Rio*, 227 Ariz. at 343(same).

B. To the extent required, the notice of claim that Plaintiffs filed with Defendant complied with all requirements of A.R.S. §12-821.01(A).

To the extent compliance with A.R.S. §12-821.01(A) was required, Plaintiffs fully complied. On December 7, 2018, Plaintiffs timely mailed a notice of claim—supported by a copy of the class action complaint to be filed via first-class mail to SRP. ER 133-35. The letter and attached complaint described the factual basis for Plaintiffs' claims, and the relief sought, including the specific amount for which the claim could be settled and the facts supporting that amount. The District Court's contrary conclusions were erroneous.

1. Plaintiffs' notice of claim was properly filed with SRP.

The District Court first took issue with the fact that Plaintiffs filed the notice with Defendant but not the court. Plaintiffs' method was entirely proper under Arizona law. As confirmed by the Arizona Supreme Court, "a filing under A.R.S. §12-821.01(A) may be accomplished through the regular mail, and proof of mailing is evidence that the governmental entity actually received the notice." *Lee v. State*, 182 P.3d 1169, 1173 (Ariz. 2008); *Leibel v. City of Buckeye*, 364 F. Supp. 3d 1027, 1044 (D. Ariz. 2019)(same). Defendant itself concedes that Plaintiffs' notice was filed with it on December 11, 2018. ER123-124. The statute does not require any further filing with the court. Accordingly, any implication that Plaintiffs failed to

"file" the notice is incorrect.

2. Plaintiffs' notice of claim was timely.

The District Court next took issue with the timeliness of Plaintiffs' notice, concluding it was filed more than 180 days after the claims accrued. Order at 21-22. However as explained above, Plaintiffs' claims accrued at the time of each discriminatory charge that SRP assessed. *Mountainside Mar*, 2019 WL 3235025, at *2. Thus, each claim continued to accrue throughout the 180-day period preceding the filing of the notice. For instance, Plaintiff Dill only became a solar customer in July 2018 and thereafter was charged the discriminatory rates through the date the notice was filed. FAC ¶23. In turn, his notice (as with the others') was timely.

3. Plaintiffs' notice of claim provided sufficient facts for SRP to evaluate its claims.

Next, the District Court erred in finding that Plaintiffs' notice "lacks sufficient information to permit [SRP] to settle Plaintiffs' claims." Order at 20. A.R.S. § 12-821.01(A) requires a notice of claim to "contain a specific amount for which the claim can be settled and the facts supporting that amount." The purpose of this requirement is to provide sufficient information to allow a public entity to investigate liability and consider settlement prior to litigation. *Martineau*, 86 P.3d at 915-16.

In analyzing the adequacy of the notice of claim, the court may not divorce the language from its context and must consider the notice as a whole to avoid elevating form over substance. *See Jones v. Cochise Cnty.*, 187 P.3d 97, 102 (Ariz.

Ct. App. 2008) ("although we recognize that a claimant must strictly comply with § 12-821.01, evaluation of that compliance should not turn on a reading of that statute—or of the notice of claim—that risks evaluating form over substance").

In *Vasquez v. State*, the court held that including "any facts to support the proposed settlement amounts, regardless of how meager," satisfies the statutory requirement. 206 P.3d 753, 758 (Ariz. Ct. App. 2008). Shortly after *Vasquez*, the Arizona Supreme Court clarified "that a claimant complies with the supporting-facts requirement of § 12-821.01(A) by providing the factual foundation that *the claimant regards as adequate* to permit the public entity to evaluate the specific amount claimed." *Backus v. State*, 203 P.3d 499, 503 (Ariz. 2009) (emphasis added). The *Backus* Court pointed out that "a public entity can request more facts if needed to evaluate a claim." *Id.* at 505.

Here, the District Court incorrectly valued form over substance in concluding that Plaintiffs' notice of claim—which consisted of a detailed letter describing their claims, attaching a copy of their 39-page draft class action complaint, lacked sufficient factual information to permit SRP to understand the facts necessary to consider resolving Plaintiffs' claims.[14] Order at 20-21. This was simply not the case.

[14] Defendant was also well aware of the factual predicate for the claims at issue stemming from its adoption of the discriminatory E-27 rates, having just resolved the *Solar City* case while it was pending before the United States Supreme Court in

After acknowledging receipt of the notice and draft complaint, counsel for the parties met in person, Plaintiffs' counsel answered any questions SRP had, and SRP indicated it was not interested in exploring settlement. ER165 ("We met with them on two occasions. And on those two occasions there was never any attempt to try to resolve any of those claims, whether it be on an individual basis or a class-wide basis… They weren't interested at all.").

In turn, Plaintiffs' notice in no manner failed to provide information that SRP deemed necessary to evaluate possible resolution of the claims presented. This was confirmed by Defendant's own brief where it failed to identify any facts about the challenged practices that lacked specificity, was ambiguous, or otherwise required clarification. Defendant did not even move to dismiss on the basis that Plaintiffs failed to provide supporting facts for their claims, instead only challenging the notice's failure to provide a "specific amount." SRP's arguments regarding compliance with the notice requirements were never anything but a technical argument, not about legitimately frustrating its' ability to analyze settlement options. *See Jones*, 187 P.3d at 101 (holding that "[i]t was the County's burden to show the Joneses' notice of claim was deficient in that regard, and any supporting evidence

March 2018. *SRP v. Tesla Energy Operations, Inc.*, 138 S.Ct. 1323 (Mem.) (2018). *See also Solar City Corp. v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720 (9th Cir. 2017).

would have been in the County's sole control").

4. Plaintiffs' notice of claim adequately conveyed the amount they would be willing to accept.

The District Court also concluded that Plaintiffs' notice was deficient because it did not provide a specific amount for which the claim could be settled, and requested injunctive and declaratory relief, as well as reasonable attorneys' fees. A.R.S. §12-821.01(A) provides that the notice of claim must contain a "specific amount for which the claim can be settled." *Deer Valley Unified Sch. Dist. No. 97 v. Houser*, 152 P.3d 490, 492 (Ariz. 2007). "Conditional settlement offers do not violate the statute." *SolarCity*, 2015 WL 6503439, at *13 (holding that Notice of Claims which "conditioned settlement on injunctive relief…do not violate the statute."); *Auble v. Maricopa Cnty.*, No. CV 08–1822, 2009 WL 3188378, at *3-4 (D. Ariz. Sept. 30, 2009) (reservation of unspecified other relief, in the form of fees and costs separate from demanded damages, does not violate A.R.S. §12-821.01); *Armstrong v. Town of Huachuca City*, No. CV11-790-TUC-CKJ, 2012 WL 3962764 (D. Ariz. Aug. 7, 2012), *report and recommendation adopted*, 2012 WL 3962760 (D. Ariz. Sept. 11, 2012) (notice of claim demanding unspecified interest satisfied statute).

Here, Plaintiffs' notice of claim accomplished just that by providing a firm "offer" to settle the class claims for a specific monetary amount based on a precise

formula. The formula was necessary as the discriminatory charges under the E-27 plan remained ongoing and continued to result in additional damages each day they were imposed on Plaintiffs and other class members. The notice explained that the daily rate set forth in the notice was simply the $600 annual over-charge reported and described in the complaint, converted into a daily rate ($600/365 days/year = $1.64). Further, due to the fact Defendant exclusively possessed objective data (namely, the number of days each claimant was charged the discriminatory rates, the day it would agree to stop charging those rates creating new damages, and the number of affected customers in the class defined in the draft complaint provided), the formula allowed Defendant to take the data *it possessed* and complete the calculation.

Courts have held that A.R.S. §12-821.01(A) can be satisfied even if requesting an "unspecified amount" as long as the "the method for calculating the [unspecified amount] is clearly identified in the notice" thus giving the public entity a "meaningful opportunity to consider its financial planning and budgeting when considering whether to settle the claim." *A. Miner Contracting, Inc. v. City of Flagstaff*, No. 1 CA-CV 14-0249, 2015 WL 5770613, at *2 (Ariz. Ct. App. Oct. 1, 2015) (mem. decision). For instance, in *Mountainside Mar*, the court explained that a notice is not insufficient where "the notice provided the City a way to compute a precise settlement amount based on information uniquely available to the City."

2019 WL 3235025, *3.[15] In *Department of Revenue v. Dougherty*, 29 P.3d 862, 866 (Ariz. 2001), the Arizona Supreme Court approved the filing of a class administrative claim seeking refunds for all taxpayers denied a certain deduction, specifically noting that "the amount of individual claims will usually be unavailable to the class representative at the time of filing the administrative claim," however, "the grounds of each claim are made perfectly clear." The Arizona Supreme Court, sitting *en banc*, in *Arena, Inc.*, 788 P.2d at 1176-77, similarly found A.R.S. §12-821 satisfied on a classwide basis where a classwide request for refunds of building permit fees was allowed. The Court noted that data, such as the number of affected class members, was "discoverable from the county's own records" providing the county "with the information necessary to investigate the merits of the claims." *Id*. While, as noted in *Fields*, the version of the statute at the time *Arena* was decided did not include the term "specific amount," that in no manner rebuts the Court's conclusion that the total was easily derived through records the defendant already possessed, satisfying the standard approved in *Mountainside Mar*.

As described above, due to the fact the case was pled as a class action pursuant to Rule 23, the representative Plaintiffs' notice indicated that they could not breach

[15] The District Court's reliance on *Estrada v. City of San Luis*, No. CV-07-1071-PHX-DGC, 2007 WL 4025212 (D. Ariz. Nov. 15, 2017) was misplaced as here, Plaintiffs provided a precise formula whose basis was explained in their letter and attached a detailed complaint defining the class.

their fiduciary duties to the class by offering to settle on an individual basis, mooting the class' claims. This was entirely proper as this Court has explained:

> A named plaintiff exhibits neither obstinacy nor madness by declining an offer of judgment on individual claims in order to pursue relief on behalf of members of a class. … A named plaintiff acts sensibly by pursuing all of the relief sought in the complaint…

Chen, 819 F.3d at 1146-48.

5. A class demand and exclusion of attorneys' fees was entirely proper.

Finally, because Plaintiffs would be entitled to recover reasonable attorneys' fees and costs pursuant to, *inter alia*, 42 U.S.C. §1988—a figure also changing on a near-daily basis—and attorneys in a class action are generally prohibited from negotiating attorneys' fees before a settlement is reached to avoid ethical concerns,[16] Plaintiffs properly indicated that provision of this figure should be postponed until all work was completed. In turn, the notice Plaintiffs filed properly balanced the requirements of A.R.S. §12-821.01(A) against the fiduciary duties of both Plaintiffs

[16] *See, e.g.*, *McKenna v. Sears, Roebuck & Co.*, 116 F.3d 1486 (9th Cir. 1997) (acknowledging the conflict of interest in negotiation attorneys' fees settlement concurrently with merits in the class action context); *Roes, 1-2 v. SFBSC Mgmt., LLC*, 944 F.3d 1035, 1049 (9th Cir. 2019) ("This more 'exacting review' is warranted 'to ensure that class representatives and their counsel do not secure a disproportionate benefit 'at the expense of the unnamed plaintiffs who class counsel had a duty to represent.'")(citations omitted); *Lane v. Facebook*, 696 F.3d 811, 819 (9th Cir. 2012) (noting concerns courts have "at the early stage before formal class certification, the court 'cannot as effectively monitor for collusion, individual settlements, buy-offs (where some individuals use the class action device to benefit themselves at the expense of absentees), and other abuses'") (citations omitted).

and counsel implicit in Rule 23, while providing Defendant everything it needed to compute the figure needed to resolve the case.

III. The Local Government Antitrust Act Does Not Preclude Plaintiffs' Claims.

The District Court erred in two respects in dismissing Plaintiffs' federal antitrust claims pursuant to the LGAA. The LGAA should not have been applied to insulate Defendant from liability in the first instance, but more obviously, does not preclude Plaintiffs' entitlement to declaratory or injunctive relief.

A. The LGAA should not operate to insulate SRP from federal antitrust liability.

SRP is not covered by the LGAA, and the District Court was in error to find it insulated SRP from any liability under the federal antitrust laws. 15 U.S.C. § 34. The LGAA is applicable only to "local governments." 15 U.S.C. §§ 34-36. The term "local governments" is narrower than a government entity subject to §1983 liability and is precisely defined to include:

> (A) a city, county, parish, town, township, village, or any other general function governmental unit established by State law, or
>
> (B) a school district, sanitary district, or any other special function governmental unit established by State law in one or more States[.]

15 U.S.C. § 34. Without elaboration, the District Court below agreed with Defendant that it is a "local government entity" based on SRP's self-imposed title as a "special function governmental unit," shielding it from antitrust damages. Order at 22 (citing

SolarCity, 2015 WL 6503439, at *13–14).

An examination of the legislative history makes it clear, however, that SRP is not a governmental unit under the LGAA. *See Zapata Gulf Marine Corp. v. Puerto Rico Mar. Shipping Auth.*, 682 F. Supp. 1345, 1351 (E.D. La. 1988). The legislative history of the LGAA provides that "special function governmental unit" are defined as: "planning districts, water districts, sewer districts [and] mosquito control districts." H.R. Rep. No. 98-965, at 20-21 (1984), reprinted in 1984 U.S.C.C.A.N. at 4602, 4621-22. Supplying retail electricity is overtly omitted from the definition of a "special function governmental unit."

The purpose of the LGAA is similarly instructive. The legislative history emphasizes the LGAA is designed to protect taxpayers from being burdened with antitrust damages. *Id*. In *United Nat'l Maint., Inc. v. San Diego Conv'tn Ctr. Corp.*, the court declined to apply the LGAA because the defendant failed to produce any evidence that taxpayers would bear the ultimate burden of any antitrust damage award. 2010 WL 3034024, at *4 (S.D. Cal. Aug. 3, 2010).[17] Here, SRP does not—

[17] *See also Tarabishi v McAlester Reg. Hosp.*, 951 F.2d 1558, 1565-57 (10th Cir. 1991) ("In this case, the City of McAlester is the beneficiary of the public trust, and as such is clearly not liable for any damage award made against the trust. Thus, the LGAA's concern about imposing unfair burdens on the taxpayers is not implicated."); *Capital Freight Servs., Inc. v. Trailer Marine Transp. Corp.*, 704 F. Supp. 1190, 1199 (S.D.N.Y. 1988) (applying LGAA only after determining that antitrust damage award would be paid by taxpayers of Commonwealth of Puerto

and cannot—assert that taxpayers will be burdened by any antitrust damage award. According to the Supreme Court, SRP is unable to impose taxes because it is not a general taxing district. *Ball*, 451 U.S. at 366. In turn, the Supreme Court described SRP as a "nominal governmental unit." *Id.* ("[T]he districts [SRP] remain essentially business enterprises, created by and chiefly benefiting a specific group of landowners."). In the event SRP is held liable for antitrust damages, taxpayers would not be burdened by that cost because any judgment would be satisfied by SRP's business revenues.

B. Even if the LGAA insulated SRP, it does not preclude claims for injunctive or declaratory relief, nor does it preclude recovery of attorneys' fees.

Even if the LGAA operated to bar Plaintiffs' claims for *damages* under federal antitrust laws, it does not limit Plaintiffs' ability to seek declaratory and injunctive relief, as well as attorneys' fees; the Court erred in dismissing these claims. 15 U.S.C. §35(a) provides:

> **(a) Prohibition in general:** No damages, interest on damages, costs, or attorney's fees may be recovered under section 4, 4A, or 4C of the Clayton Act (15 U.S.C. 15, 15a, or 15c) from any local government, or official or employee thereof acting in an official capacity.

Thus, while the LGAA shields certain defendants from claims seeking monetary damages arising under the federal antitrust laws, it does not insulate them from

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Rico); *Daniel v. Am. Bd. of Emergency Med.*, 988 F. Supp. 127, 195 (W.D.N.Y. 1997).

claims for injunctive and declaratory relief. *Lancaster City. v. Antelope Valley Hosp. Dist.*, 940 F.2d 397, 404 n.14 (9th Cir. 1991). Defendant conceded this point below. ER173. Furthermore, as noted in *Lancaster*, while attorneys' fees under 15 U.S.C. § 15 may be foreclosed, Plaintiffs can nevertheless recover attorneys' fees under 15 U.S.C. § 26:

> We note that there is no support for defendants' assertion that Lancaster cannot be awarded attorney's fees if Lancaster's antitrust action for injunctive relief is successful. Defendants cite in support of their position the [LGAA], 15 U.S.C. §§ 34–36. The LGAA precludes the recovery of damages, costs, or attorneys' fees, on the basis of 15 U.S.C. §§ 15, 15a, or 15c, from local government entities. 15 U.S.C. § 35(a). However, the provision that mandates that costs and attorneys' fees be awarded to plaintiffs who "substantially prevail" in actions for injunctive relief is 15 U.S.C. § 26. Section 35(a), by its clear terms, has no effect on § 26.

Id. (citing *Palm Springs Med. Clinic, Inc. v. Desert Hosp.*, 628 F. Supp. 454 (C.D. Cal. 1986)). *See also Witham v Clallam Cnty. Public Hosp.*, No. C09-5410RJB, 2009 WL 3346041, *5 (W.D. Wash. Oct 15, 2009) ("The plaintiff's claim for injunctive relief, costs, and attorneys' fees for Sherman Act violations should remain"). The District Court, therefore, erred in dismissing these claims.

Finally, the LGAA does not affect Plaintiffs' claims under Arizona's antitrust laws. *See GF Gaming Corp. v. City of Black Hawk, Co.*, 405 F.3d 876, 885 (10th Cir. 2005) (preserving claims under Colorado Antitrust Act). In fact, A.R.S. §30-813 specifically provides that Arizona's antitrust laws apply to SRP's

anticompetitive conduct.

IV. The District Court Erred in Holding That Plaintiffs Inadequately Alleged Antitrust Injury.

A. Plaintiffs plainly allege adequate antitrust injury.

The antitrust laws are "intended to preserve competition for the benefit of consumers." *Am. Ad Mgmt., Inc. v. Gen. Tel. Co. of Cal.*, 190 F.3d 1051, 1055 (9th Cir. 1999) (citing *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 538 (1983)). Thus, for a plaintiff to have antitrust standing, a plaintiff must adequately plead antitrust injury. To satisfy the antitrust injury requirement, a plaintiff must demonstrate "an injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful. The injury should reflect the anticompetitive effect either of the violation or of anticompetitive acts made possible by the violation." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). From this, the Ninth Circuit has identified four requirements for antitrust injury: (1) unlawful conduct, (2) causing an injury to the plaintiff, (3) that flows from that which makes the conduct unlawful, and (4) that is of the type the antitrust laws were intended to prevent. *Am. Ad Mgmt., Inc.*, 190 F.3d at 1055.

The allegations in this case satisfy each of the four requirements for showing antitrust injury. First, the FAC identifies the specific unlawful conduct as SRP's discriminatory E-27 price plan, including both the discriminatorily higher

distribution charge and the demand charge that is applied exclusively to customers with solar energy systems. *See* FAC ¶¶75-78, 82. Second, as the District Court acknowledged, the FAC identifies a credible injury following SRP's unlawful conduct. Order at 26-27 ("Undoubtedly, the FAC alleges harm to Plaintiffs occurring after the District adopted the SEPPs."). The FAC alleges that this injury not only followed, but was caused by, SRP's unlawful conduct. *See* FAC ¶¶87, 90-92, 123-24, 131-33. Third, the FAC demonstrates that the Plaintiffs' injury flows from the illegality of SRP's restriction on competition. Specifically, the FAC alleges that SRP's discriminatory pricing caused solar customers to pay $600 more per year than under the previous rate plan—a rate that eliminated the possibility of obtaining a return on a solar energy investment—and thereby decreasing and eliminating competition from solar energy. *See* FAC ¶¶84-86, 88-90. Finally, Plaintiffs' injury is "of the type the antitrust laws were intended to prevent." *See Brunswick*, 429 U.S. at 489. This requirement is intended to ensure that the antitrust laws do not encompass injuries from *increased* competition or *lower* prices. *Am. Ad Mgmt., Inc.*, 190 F.3d at 1057. In this case, Plaintiffs have never suggested that their harm was caused by lower prices or increased competition. Plaintiffs allege exactly the opposite: that their injury is the result of the artificially and discriminatorily increased prices and as a direct result of Defendant's efforts to eliminate lost revenue as a result of Plaintiffs' use of a competing energy resource.

In not considering these factual allegations, the District Court's Order incorrectly found that Plaintiffs failed to satisfy the second requirement of antitrust injury. The order below states, "the FAC contains no allegations that the District unlawfully restrained competition, the principal evil of antitrust laws." Order at 27. However, the FAC specifically alleges that SRP unlawfully restrained, decreased, and eliminated competition by implementing a discriminatory price plan for solar customers, which caused solar energy systems to become economically unfeasible, driving customers to use more electrical power from SRP. *See* FAC ¶¶85-87. "One form of antitrust injury is 'coercive activity that prevents its victims from making free choices between market alternatives.'" *Glen Holly Entm't, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 374 (9th Cir. 2003) (quoting *Amarel v. Connell,* 102 F.3d 1494, 1509 (9th Cir.1996)). SRP's discriminatory pricing detrimentally impacted the market by limiting consumers' choice to one output—exclusively electrical power from SRP. Plaintiffs no longer have a viable choice between market alternatives.

The District Court also incorrectly found that SRP's conduct did not cause Plaintiffs' injury "because they would have been harmed anyway from using an uneconomical product." Order at 27. The District Court premised this erroneous finding on the FAC's allegation that "technologies that would allow consumers to *completely* remain off the grid are not yet economically viable." Order at 27 (citing FAC ¶52). Just because consumers cannot get 100% of their power from non-grid

sources does not mean that Defendant's punitive pricing for *any* off-grid power use is unharmful. This finding conflates the consumer's choice to weigh the advantages and disadvantages of a service with SRP's efforts to eliminate a competing service. The FAC alleges that consumers may opt to invest in and use solar power systems because of cost advantages, environmental concerns, or public policy benefits of solar power. FAC ¶46. Indeed, as the FAC alleges, so many consumers determined that a solar energy system supplemented with grid power was a beneficial choice prior to SRP's anticompetitive conduct that SRP's territory had one of the highest rates of solar energy system installations in the nation. FAC ¶70. The District Court's Order is clearly erroneous because it failed to address or acknowledge these factual allegations, which satisfy the requirements for antitrust injury.

Moreover, the District Court's willingness to blame Plaintiffs for the damages they have suffered ignores SRP's plain role in forcing a dilemma on its customers. On the one hand, consumers can choose not to install rooftop solar panels and they will not be subject to the higher rates under the E-27 price plan. SRP would argue that, because they have not paid higher rates, and they have not undertaken the expense of installing solar panels, such consumers suffered no harm. On the other hand, where Plaintiffs did install rooftop solar panels, the District Court accepted SRP's argument that Plaintiffs themselves are to blame for "choosing" the route that required them to pay higher rates. Totally absent is the recognition—duly alleged

in the complaint—that SRP forced that dilemma on its customers in order to suppress competition and deprive them of meaningful options. The harm is simple: if Plaintiffs were charged the same rate as other customers for SRP electricity, they would have paid less because some of their energy use would have been freely provided by the sun and they would have used less of SRP's electricity. Because SRP imposed a higher rate on them, those savings vanished and Plaintiffs suffered antitrust injury.

The District Court did not reach the question of whether Plaintiffs adequately allege antitrust standing because it found that antitrust injury was lacking. Order at 27 n.17. Nevertheless, the District Court stated that consumers cannot have antitrust standing to bring a claim of attempted monopolization. *Id.* However, courts in the Ninth Circuit have indicated that consumers can have antitrust standing to assert attempted monopolization claims. *See, e.g.*, *In re Apple iPhone Antitrust Litig.*, 846 F.3d 313, 324 (9th Cir. 2017); *Agron, Inc. v. Lin*, No. CV0305872MM(JWJX), 2004 WL 555377, at *9 (C.D. Cal. Mar. 16, 2004) (citing *Serpa Corp. v. McWane, Inc.*, 199 F.3d 6, 10 (1st Cir. 1999) ("Competitors and consumers in the market where trade is allegedly restrained are presumptively the proper plaintiffs to allege antitrust injury. In contrast, a commercial intermediary, such as a distributor or sales representative, generally lacks standing because its antitrust injury is too remote."). The facts in the complaint demonstrate that the way Defendant attempted to rescue

its complete monopoly was to charge solar users more—there could not be a more direct injury from attempted monopolization alleged—and thus antitrust standing is not a proper basis for the dismissal of Plaintiffs' complaint.

B. The District Court conflated the levels of scrutiny applicable to competitors and consumers.

The District Court incorrectly equated consumers and competitors for the purpose the antitrust injury analysis and, as a result, overlooked the antitrust injury suffered by Plaintiffs as consumers in this case. Order at 26-27. "When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust." *J. Allen Ramey, M.D., Inc. v. Pac. Found. For Med. Care*, 999 F. Supp. 1355, 1360-61 (S.D. Cal. 1998) (quoting *Indiana Grocery, Inc. v. Super Valu Stores, Inc.,* 864 F.2d 1409, 1419 (7th Cir.1989)). A higher level of scrutiny is appropriate only where the plaintiff asserting antitrust injury is a competitor because a competitor gains from higher prices and loses from lower prices. *Id.* at 1360-61.

"[H]arm to consumers by way of increased prices," as alleged by Plaintiffs in this case, "is the type of injury the antitrust laws were designed to prevent." *Novation Ventures, LLC v. J.G. Wentworth Co.*, 156 F. Supp. 3d 1094, 1101 (C.D. Cal. 2015) (quoting *Sprint Nextel Corp. v. AT & T Inc.*, 821 F. Supp. 2d 308, 319 (D.D.C. 2011)). The District Court acknowledged that, in this case, SRP increased prices for

consumers. However, the District Court viewed SRP's increased prices solely from the perspective of a competitor, finding that "the District's higher prices for solar energy customers *encourages* competition . . . by allowing for new market entrants with its higher prices." Order at 27 (emphasis in original). But in this case the opposite is true—such conduct will always stifle *solar* competition. The only competition it could conceivably "encourage" is for other grid producers to enter the market and also charge higher, discriminatory rates to solar customers. Solar competition would never be encouraged, and the lower court erred. Moreover, the FAC expressly alleges that the effect of SRP's supra-competitive prices was to reduce innovation and eliminate competition from solar sources. This finding incorrectly places Plaintiffs, who are also consumers, solely in the shoes of SRP's competitors and fails to address the injury that Plaintiffs suffered as consumers in the market.

C. Plaintiffs have suffered antitrust injury as competitors as well as consumers.

In addition to purchasing electricity from SRP as consumers, Plaintiffs are also competitors of SRP. The "'field of competition [includes] . . . the group or groups of sellers who have actual or potential ability to deprive each other of significant levels of business.'" *Yellow Pages Cost Consultants, Inc. v. GTE Directories Corp.*, 951 F.2d 1158, 1162 (9th Cir. 1991) (quoting *Thurman Indus.,*

Inc. v. Pay 'N Pak Stores, Inc., 875 F.2d 1369, 1374 (9th Cir. 1989)). Plaintiffs purchase retail electricity from SRP, and they compete with SRP by generating their own electricity and selling excess electricity back to SRP via net metering. FAC ¶64. Even when not selling excess electricity back to SRP, Plaintiffs act as competitors by generating their own electricity and reducing the demand for SRP's electricity. As discussed, SRP perceived rooftop solar to pose a significant enough threat to its business to warrant the adoption of an entirely new pricing scheme intended to cripple competition from rooftop solar by increasing solar users' operating costs to supracompetitive levels. By increasing its competitors' operating costs, SRP raised the market price for its own advantage and, ultimately, increased consumer prices. This is exactly the type of injury that the antitrust laws are intended to protect against. *See, e.g.*, *Forsyth v. Humana, Inc.*, 114 F.3d 1467, 1478 (9th Cir. 1997) (finding allegations of increased consumer prices due to conduct that "increased the operating cost of [ ] competitors" sufficient to create a genuine issue of material fact on the issue of antitrust injury to survive summary judgment on monopolization and attempted monopolization claims), *overruled on other grounds by Lacey v. Maricopa Cnty.*, 693 F.3d 896, 925 (9th Cir. 2012); *Multistate Legal Studies, Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 63 F.3d 1540, 1553 n.12 (10th Cir. 1995) (finding that a monopolist's practice of scheduling courses to conflict with a competitor's courses could raise competitor's costs and therefore

"would qualify as anticompetitive conduct"); *Premier Elec. Constr. Co. v. Nat'l Elec. Contractors Ass'n*, 814 F.2d 358, 368 (7th Cir. 1987) (noting that when defendant "raised its rivals' costs," it "raised the market price to its own advantage," and that "[t]he principal purpose of the antitrust laws is to prevent overcharges to consumers"). SRP's pricing scheme goes beyond mere price competition by raising the operating costs of SRP's rivals—rooftop solar users—to levels which force rooftop solar out of the market. This competition-reducing aspect of SRP's monopolistic conduct towards Plaintiffs constitutes the type of injury that the antitrust laws were intended to prevent.

A marketplace participant can be simultaneously harmed from the perspective of a consumer and a competitor. *See Vaughn Med. Equip. Repair Serv., L.L.C. v. Jordan Reses Supply Co.*, No. 10-00124, 2010 WL 3488244, at *12-13 (E.D. La. Aug. 26, 2010). *Vaughn* held that antitrust injury was established by plaintiff's allegations that the seller-defendants sold products to plaintiff at a higher cost than to plaintiff's competitors (i.e. harm as a consumer) and that the competitor-defendant had used its market power and conspired to weaken plaintiff's viability as a competitor in the market and to deprive plaintiff of opportunities to compete (i.e. harm as a competitor). *Id.* at *13. The plaintiff adequately alleged antitrust injury because "[t]hese are the types of injuries that the antitrust laws were intended to prevent." *Id.* Similarly here, SRP harmed Plaintiffs (1) as customers by selling retail

electricity to Plaintiffs at a higher cost than other customers, and (2) as competitors by using those higher prices to weaken the viability of Plaintiffs' solar energy use in the market.

CONCLUSION

Based on the foregoing, Plaintiffs-Appellants respectfully request that the decision below be reversed and the case be remanded to proceed on the merits.

Dated: July 1, 2020

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CERTIFICATE OF COMPLIANCE

I certify that this brief complies with the type-volume limitation set forth in Circuit Rule 32-1(a) and Federal Rules of Appellate Procedure 32(a)(7)(B)(iii). This brief uses a proportional typeface and 14-point font, and contains 13,996 words.

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CERTIFICATE OF SERVICE

I hereby certify that on July 1, 2020, I electronically filed the foregoing with the Clerk of Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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