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You Might Just Have to Wait: Interpreting State Action Immunity and the Ability to Appeal Following the Ninth Circuit's Decision in *SolarCity Corp. v. Salt River Project*

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YOU MIGHT JUST HAVE TO WAIT: INTERPRETING STATE ACTION IMMUNITY AND THE ABILITY TO APPEAL FOLLOWING THE NINTH CIRCUIT’S DECISION IN *SOLARCITY CORP. v. SALT RIVER PROJECT*

Abstract: On June 12, 2017, the United States Court of Appeals for the Ninth Circuit held in *SolarCity Corp. v. Salt River Project Agricultural Improvement and Power District* that the doctrine of state action immunity confers immunity from liability, and therefore a court ruling granting or denying state action immunity may not be immediately appealed. In concluding this, the Ninth Circuit joined the Fourth and Sixth Circuits in opposition to the Fifth and Eleventh Circuits, which held that state action immunity confers immunity from suit and may be immediately appealed. The interpretation of state action immunity thus directly affects whether a party may immediately appeal a court’s ruling on state action immunity. This Comment argues that state action immunity only grants immunity from liability and thus is not immediately appealable, following the decision of the Ninth Circuit.

INTRODUCTION

The Sherman Antitrust Act (“Sherman Act”), passed in 1890, was the first piece of legislation seeking to protect the United States economic market from monopolization and unfair competition.¹ Following the statute’s enactment, the Federal Government was able to use its expanded regulatory powers under the Sherman Act to disrupt powerful private actor monopolies that employed anti-competitive measures to control markets.² Although the Sherman Act applies

¹ See PHILLIP E. AREEDA & HERBERT HOVENKAMP, *ANTITRUST LAW: AN ANALYSIS OF ANTI-TRUST PRINCIPLES AND THEIR APPLICATION* § 103 (4th ed. 2017) (providing insight into the creation of the Sherman Act as a means to combat monopolies and rising prices); DOUGLAS BRODER, *U.S. ANTITRUST LAW AND ENFORCEMENT: A PRACTICE INTRODUCTION* 6 (3d ed. 2016) (identifying the Sherman Act as the first piece of antitrust legislation that paved the way for antitrust regulations in the United States); see also *Sherman Antitrust Act*, *ENCYCLOPEDIA BRITANNICA*, <http://www.britannica.com/event/Sherman-Antitrust-Act> [<http://perma.cc/8PPE-Q3TU>]. The Sherman Act gives rise to the subject of this Comment, state action immunity. See *infra* notes 3–113 and accompanying text. As such, the topic of this Comment is not substantively about the Sherman Act, but background knowledge of the Sherman Act is necessary to properly view and understand state action immunity. See *infra* notes 2–8 and accompanying text.

² See *United States v. Am. Tobacco Co.*, 221 U.S. 106, 188 (1911) (finding American Tobacco Co. violated the Sherman Act by controlling the tobacco market through monopolistic contracts in restraint of trade); *Standard Oil Co. v. United States*, 221 U.S. 1, 75 (1911) (finding that Standard Oil Co. violated the Sherman Act by consolidating stocks in an attempt to create a monopoly over the oil industry, resulting in unfair competition and restraint of trade). For an overview of antitrust history

to private actors, the text of the statute has been interpreted to exclude government actors, creating state action immunity.³ This Comment discusses the interpretation of state action immunity and the resultant United States circuit court split.⁴ With the Ninth Circuit's decision in *SolarCity Corp. v. Salt River Project Agricultural Improvement and Power District*, the circuits are split with three circuits finding that state action immunity grants immunity from liability, and two circuits concluding that it grants immunity from suit.⁵ An appeal to the United States Supreme Court to review the decision in *SolarCity Corp.* and resolve the discrepancy amongst the circuits was granted in December 2017.⁶ Part I of this Comment provides a brief history of the Sherman Antitrust Act and state action immunity.⁷ Part II provides the legal history of state action immunity and examines the various interpretations of state action immunity that created a Circuit split regarding the ability to immediately appeal a state action immunity order.⁸ Finally, Part III argues that the Ninth Circuit decision in *SolarCity Corp.* was correct in interpreting state action immunity and the subsequent effect on appealing lower court decisions of immunity.⁹

I. THE SHERMAN ANTITRUST ACT AND STATE ACTION IMMUNITY

Originally enacted in 1890, the Sherman Antitrust Act 15 U.S.C. § 1 (“Sherman Act”) makes it illegal to contract or conspire in restraint of trade among the States.¹⁰ The Supreme Court of the United States has interpreted

and policy in the United States, see Maurice E. Stucke, *Reconsidering Antitrust Goals*, 53 B.C. L. REV. 551 (2012) (providing an analysis of antitrust policy in the United States and the current framework of antitrust law).

³ See *Martin v. Mem'l Hosp.*, 86 F.3d 1391, 1394 (5th Cir. 1996) (using “state action immunity” to refer to the government’s immunity to antitrust claims). State action immunity is a doctrine stating that the government is immune from antitrust claims. See *id.* *Parker v. Brown* was the first case in which the Supreme Court expressly recognized state action immunity, and as a result many scholars often refer to state action immunity as *Parker* immunity. See N.C. State Bd. of Dental Exam’r v. F.T.C., 135 S. Ct. 1101, 1110 (2015) (referring to state action immunity as *Parker* immunity); *Parker v. Brown*, 317 U.S. 341, 350 (1943); PHILLIP E. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW, § 2.04 (2003) (using *Parker* immunity to refer to state immunity to the Sherman Act).

⁴ See *infra* note 12 and accompanying text.

⁵ 859 F.3d 720, 726 (9th Cir. 2017) (finding that state action immunity grants immunity from liability, joining the Fourth and Sixth Circuits); see *infra* notes 50–74 and accompanying text.

⁶ See *Supreme Court of the United States Granted & Noted List of Cases for Argument in October Term 2017*, SUPREME COURT OF THE UNITED STATES, <https://www.supremecourt.gov/orders/17grantednotedlist.pdf> [<http://perma.cc/PFE2-H42Y>] (listing *SolarCity* petition as granted).

⁷ See *infra* notes 10–50 and accompanying text.

⁸ See *infra* notes 51–94 and accompanying text.

⁹ See *infra* notes 95–113 and accompanying text.

¹⁰ See The Sherman Antitrust Act, 15 U.S.C. § 1 (2012) (making illegal monopolistic tactics and unfair competition between the States). Throughout this Comment, “State” capitalized refers to the State or States comprising the United States, whereas “state” is used to describe the governmental entity.

that the Sherman Act applies to private businesses and persons, but not to state governments or state actors.¹¹ This inapplicability of the Sherman Act to state governments and actors has since been termed state action immunity.¹² Although it is well established that state actors have immunity from the Sherman Act, it is not immediately clear whether the immunity grants an immunity from lawsuits or an immunity from legal liability.¹³ The subsequent use of state ac-

¹¹ See *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 (2013) (implying that the Sherman Act applies to private persons, and the Act is not intended to apply to state actors); *Parker* 317 U.S. at 350 (finding that the Sherman Act may be violated if contraction or conspiracy occurs amongst private persons, but the Sherman Act does not apply to States acting as sovereigns); see also John P. Ludington, *Valid Governmental Action as Conferring Immunity or Exemption from Private Liability Under Federal Antitrust Laws*, 12 A.L.R. FED. 329 (2017) (stating that government action cannot be found to violate the Sherman Act). The Sherman Act does not include any direct language indicating a State is subject to antitrust regulations, and federal courts have expressly declined to apply the Sherman Act to state governments. See *Phoebe Putney Health Sys.*, 568 U.S. at 224; *Parker*, 317 U.S. at 350–51. Because the U.S. Congress has the authority to directly impose restrictions on state economies using the commerce power granted by the U.S. Constitution, courts are historically hesitant to interpret the Sherman Act as imposing a restriction without a further act from Congress. See U.S. CONST. art. I, § 8, cl. 3; *Parker*, 317 U.S. at 350 (stating that Congress could exercise authority over a state’s economic power by asserting the federal government’s commerce power, but without a more explicit law, the Sherman Act does not apply to States); see also *Phoebe Putney Health Sys.*, 568 U.S. at 224. Moreover, courts have referred to the Senate Committee Report in considering the intended scope of the Sherman Act, which highlights that the intent of the Sherman Act is to restrict businesses and corporations. See *Parker*, 317 U.S. at 351 (citing the congressional record as evidence that the Sherman Act only applies to businesses); 21 CONG. REC. 2562 (1890).

¹² See *Martin*, 86 F.3d at 1394 (using state action immunity to describe the defendant’s claim of immunity from antitrust claims as a state actor). “State action immunity” has become a term-of-art with respect to antitrust claims, referring to the principle that state actors are immune from antitrust claims. See *id.* Although state action immunity as used herein refers specifically to immunity from antitrust claims, it is not to be confused with the state action doctrine. See *infra* notes 13–113 and accompanying text. In a simplified sense, the state action doctrine describes the principle that the Fourteenth Amendment of the U.S. Constitution applies to states, not private entities, however the Fourteenth Amendment may apply to a private actor when such actor acts on behalf of the state through sufficient entanglement or by providing a “public function” to such an extent that the private actor may be fairly deemed as acting as the State. See U.S. CONST. amend. XIV, § 2; *Burton v. Wilmington Parking Auth.*, 365 U.S. 715, 725 (1961) (finding state action where a coffee shop located in a building operated by public funds violated the Fourteenth Amendment); *Marsh v. Alabama*, 326 U.S. 501, 506 (1946) (finding state action because a privately owned town served a public function). For an extensive review of the state action doctrine, see G. Sidney Buchanan, *A Conceptual History of the State Action Doctrine: The Search for Governmental Responsibility*, 34 HOUS. L. REV. 333 (1997).

¹³ See *SolarCity Corp.*, 859 F.3d at 726 (interpreting state action immunity as immunity from liability); *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 445 (4th Cir. 2006) (finding that state action immunity provides only immunity from liability); *Huron Valley Hosp. Inc., v. City of Pontiac*, 792 F.2d 563, 567 (6th Cir. 1986) (interpreting state action immunity to mean immunity from liability). But see *Martin*, 86 F.3d at 1396 (finding that state action immunity provides immunity from suit); *Commuter Transp. Sys., Inc., v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1287 (11th Cir. 1986) (finding that state action immunity provides immunity from suit). Immunity from suit completely protects a party from the “burdens of trial” whereas immunity from liability only relieves the party from assuming liability for injuries caused. See *SolarCity Corp.*, 859 F.3d at 726 (stating that immunity from liability in a Sherman Act claim limits the extent to which a party may be found liable

tion immunity has since caused a U.S. Circuit split.¹⁴ Section A of this Part introduces state action immunity and the circuit split that has resulted because of the differing interpretations of state action immunity.¹⁵ Section B discusses immunity from suit and the benefits it confers.¹⁶ Section C discusses immunity from liability and the difference between it and immunity from suit.¹⁷ Section D addresses the ability to immediately appeal a decision of state action immunity pursuant to the collateral order doctrine.¹⁸

A. *Interpreting State Action Immunity: A Circuit Split*

Although the general concept of state action immunity with respect to the Sherman Act is understood to provide some sort of immunity to a state or even a private actor via the state action doctrine, the specific type of immunity conferred is the subject of a circuit split.¹⁹ The Fifth and Eleventh Circuit courts have interpreted state action immunity to confer immunity from suit.²⁰ In contrast, the Fourth, Sixth, and now Ninth Circuit courts have defined state action immunity to grant immunity from liability, meaning that although the party claiming immunity must go to trial, the party cannot be liable for any civil damages resulting from the antitrust claim.²¹ The primary difference between the types of immunity is that immunity from suit completely protects the party from trial, whereas immunity from liability requires the party to assert immunity as an affirmative defense and argue the case on the merits.²² Both types of immunity, however, may be raised as defenses at the outset of a trial and consequently, a judge may issue an interlocutory order affirming or denying immunity.²³ The type of immunity asserted directly affects whether or not the

under the law); *Huron*, 792 F.2d at 566–67 (stating that immunity from suit relieves the party from the burdens of trial, but it is not a defense to liability).

¹⁴ See *supra* note 13 and accompanying text.

¹⁵ See *infra* notes 19–25 and accompanying text.

¹⁶ See *infra* notes 26–32 and accompanying text.

¹⁷ See *infra* notes 33–36 and accompanying text.

¹⁸ See *infra* notes 37–50 and accompanying text.

¹⁹ See *supra* notes 11–13 and accompanying text.

²⁰ See *supra* notes 11–13 and accompanying text. Immunity from suit and immunity from liability are categorical terms used to describe a specific type of immunity. See *Immunity to Suit or from Liability*, 72 AM. JUR. 2d STATES, ETC. § 103 (2017) (using immunity from suit and immunity from liability as categories to describe sovereign immunity). For example, absolute immunity, qualified immunity, and sovereign immunity are all types of immunity from suit. See *infra* notes 26–32 and accompanying text. The differences between these immunities stems largely from the party asserting the immunity, which is further discussed in Part I section B. See *infra* notes 26–32 and accompanying text.

²¹ See *infra* notes 62–94 and accompanying text.

²² See *infra* notes 26–36 and accompanying text.

²³ The Federal Rules of Civil Procedure provide that an affirmative defense, such as immunity, may be asserted in a responsive pleading. FED. R. CIV. P. 8(c). The Federal Rules of Civil Procedure also provides that certain defenses may be asserted prior to a responsive pleading, such as Rule

interlocutory order is appealable under the collateral order doctrine, and that in turn depends on the circuit in which the case is heard.²⁴ Consequently, it is important to understand the type of immunity granted by state action immunity in order to determine how a party may proceed at trial.²⁵

B. Immunity from Suit: You Can't Touch Me

Immunity from suit prevents a party from being sued, and it can take the form of absolute immunity, qualified immunity, or sovereign immunity.²⁶ Im-

12(b)(6), failure to state a claim upon which relief can be granted, which may reasonably include an assertion of immunity. FED. R. CIV. P. 12(b)(6). *Black's Law Dictionary* defines interlocutory order as "an order that relates to some intermediate matter in the case; any order other than a final order." *Interlocutory Order*, BLACK'S LAW DICTIONARY (10th ed. 2014). As such, a party may seek an interlocutory appeal to settle an intermediate matter relating to a case. See *SolarCity Corp.*, 859 F.3d at 723 (illustrating an appellant seeking an interlocutory appeal to settle the intermediate issue of the type of immunity conferred by state action immunity).

²⁴ See *id.* at 726 (finding that state action immunity grants immunity from liability and therefore it cannot be immediately appealed); *Board of Dentistry*, 455 F.3d at 445 (finding that because state action immunity grants immunity from liability, orders concerning state action immunity may not be immediately appealed); *Martin*, 86 F.3d at 1396 (finding that state action immunity confers immunity from suit, so orders concerning state action immunity can be immediately appealed); *Commuter Transp.*, 801 F.2d at 1287 (finding that state action immunity grants immunity from suit and therefore orders on state action immunity can be immediately appealed); *Huron*, 792 F.2d at 567 (interpreting state action immunity as an immunity from liability, and therefore orders on state action immunity may not be immediately appealed). The collateral order doctrine was first fully defined in *Cohen v. Beneficial Indus. Loan Corp.*, where the Court described "that small class [of issues] which finally determine claims of right separable, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require appellate consideration be deferred until the whole case is adjudicated." 337 U.S. 541, 546 (1948); see also *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 374 (1981) (stating that the collateral order doctrine provides a limited exception to the general rule that issues determined by lower courts are reviewable only after final judgment). Since its first use, the collateral order doctrine has been consistently applied in order to determine whether interlocutory orders of lower courts are immediately reviewable, i.e. ripe for an interlocutory appeal. See *SolarCity Corp.*, 859 F.3d at 724 (using the collateral order doctrine to determine whether immunity from liability may be immediately appealed); *Commuter Transp.*, 801 F.3d at 1289 (applying the collateral order doctrine to determine whether the lower court decision of state action immunity is immediately appealable); *Huron*, 792 F.3d at 566 (using the collateral order doctrine in reviewing whether the order concerning of state action immunity in the lower court is immediately appealable); *Board of Dentistry*, 455 F.3d at 440 (using the collateral order doctrine to explain when an interlocutory order may be immediately appealed); *Martin*, 86 F.3d at 1396 (applying the collateral order doctrine to determine that because state action immunity confers immunity from suit, a lower court order concerning state action immunity is immediately appealable).

²⁵ See *supra* note 13.

²⁶ See *supra* note 20; see also *Mitchell v. Forsyth*, 472 U.S. 511, 526 (1985) (finding that qualified immunity grants the same immunity as absolute immunity, that is, immunity from suit). Sovereign immunity comes from the Eleventh Amendment to the United States Constitution, which does not allow a citizen of one state to sue another State, thereby granting each State sovereign immunity i.e. immunity from suit. U.S. CONST. amend. XI; see also *Hans v. Louisiana*, 134 U.S. 1, 20 (1890) (finding that States also cannot be sued by citizens of that State unless the State consents to suit, expanding sovereign immunity). Although immunity from suit most often takes the form of absolute immunity, qualified immunity, or sovereign immunity, this is not an exhaustive list of the types of

munity from suit relieves the party from the “burdens of trial.”²⁷ Absolute immunity is immunity from suit granted to high-ranking public officers by the Constitution or by courts as a matter of public policy.²⁸ Qualified immunity is reserved for lower-level executive officials, such as governors, as a means to protect such officials in their use of discretionary power.²⁹ The primary difference between absolute immunity and qualified immunity is that absolute immunity is assumed, whereas qualified immunity requires proof that the actor did not intend to violate a law and the actor acted reasonably under the circumstances.³⁰ Similarly, sovereign immunity granted to the United States through the Eleventh Amendment generally provides states with immunity from suit.³¹ Courts reason that immunity from suit is important not only to curb any potential disruption of the government, but also to protect the general public by preventing needless waste of public resources.³²

immunity from suit. *See* *Abney v. United States*, 431 U.S. 651, 660–61 (1977) (stating that the Fifth Amendment Double Jeopardy Clause guarantees that an individual will not be tried twice for the same crime, effectively granting immunity from suit); *see also* *Mitchell*, 472 U.S. at 525 (finding that the Double Jeopardy Clause provides immunity from suit to the extent that an individual cannot be tried a second time for the same crime).

²⁷ *See supra* note 13.

²⁸ *See* *Nixon v. Fitzgerald*, 457 U.S. 731, 744 (1982) (recognizing that immunity from suit is important as a matter of public policy to executive officials who may hesitate to exercise discretion without immunity from suit); *Spalding v. Vilas*, 161 U.S. 483, 498 (1896) (stating that immunity from suit provides an important public function by allowing executive officials to make discretionary decisions without fear of negative consequences). High-ranking officials who typically receive absolute immunity include the President of the United States and other executive officials. *See* *Nixon*, 457 U.S. at 744. In *Nixon*, the court noted that a president’s absolute immunity largely stems from the separation of powers that exists in the Constitution of the United States. *See* 457 U.S. at 752. *Compare* U.S. CONST. art. I (vesting specific powers to the legislative branch of federal government), *with id.* art. II (granting specific and separate powers to the executive branch of the federal government), *and id.* art. III (granting distinct powers to the judicial branch of the federal government).

²⁹ *See* *Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982) (finding that qualified immunity rather than absolute immunity is granted to executive officials such as governors, who require less protection than those who face more complex problems such as the President of the United States).

³⁰ *See id.* at 815 (asserting that evidence must establish that the actor did not have a subjective intent to violate a law in order to assert qualified immunity). *But see* *Nixon*, 457 U.S. at 744–45 (implying that absolute immunity is automatically conferred to certain officials such as the President of the United States as a matter of public policy). Absolute immunity is assumed because of the high-level position of the actor. *See id.* (finding that the president may automatically invoke absolute immunity).

³¹ *See supra* note 26.

³² *See* *Harlow*, 457 U.S. at 814 (stating immunity from suit helps reduce the social costs of burdening government and public expenditure for a costly litigation); *Commuter Transp.*, 801 F.2d at 1289 (finding that immunity from suit prevents the waste of public time and money). The Supreme Court, however, has noted that avoidance of trial alone is not the reason for granting immunity from suit, rather immunity from suit is granted to avoid trials that would cause a substantial impact on the public and greatly jeopardize the public interest. *See* *Will v. Hallock*, 546 U.S. 345, 346 (2006) (stating that avoidance of trial alone is not sufficient justification for granting immunity from suit).

C. Immunity from Liability: You Still Can't Touch Me

In contrast, immunity from liability is most often created by statute and imposes limitations on liability, such as relieving a party from paying damages.³³ Most importantly, immunity from liability will not stop the proceedings of a trial.³⁴ Rather, although a party may not be liable for civil damages, the party must still go to trial on the merits and subsequently assert immunity as an affirmative defense.³⁵ Because immunity from liability and immunity from suit confer different protections, the ability to appeal an interlocutory order on immunity differs based on the requirements of the collateral order doctrine.³⁶

D. State Action Immunity and the Collateral Order Doctrine

Generally, interlocutory orders are not appealable until a final judgment on the merits of a case has been entered.³⁷ United States appellate courts, how-

³³ See *Nunag-Tanedo v. E. Baton Rouge Parish Sch. Bd.*, 711 F.3d 1136, 1140 (9th Cir. 2013) (stating that immunity from liability is not immunity from trial). Immunity from liability is often created by statute, for example Hawaii's "Good Samaritan" statute, which creates a statutory exception to liability. HAW. REV. STAT. § 663-1.5 (2009). As an illustration of immunity from liability, the Good Samaritan statute provides protection from civil damages to individuals who provide emergency care in good faith to a person in need of such aid in the event the individual giving aid makes a mistake causing injury to the person in need. *Id.* Although the individual rendering aid will have to stand trial, the statute provides immunity from liability, allowing the defendant to assert immunity as an affirmative defense and thus be immune from civil damages. *Id.*

³⁴ See *Nunag-Tanedo*, 711 F.3d at 1140 (finding that immunity from liability does not stop a trial). Although immunity from liability does not stop trial proceedings, immunity from liability is still a powerful defense that can grant significant protection by relieving the party of any civil damages that may result from the trial. See *Mitchell*, 472 U.S. at 517 (stating that qualified immunity prevents a party from paying civil damages); *Harlow*, 457 U.S. at 818 (finding that qualified immunity protects a party from paying civil damages).

³⁵ See *Nunag-Tanedo*, 711 F.3d at 1140 (finding that although immunity from liability does not stop a trial, it may protect a party from liability). An assertion of immunity such as state action immunity is usually accompanied by a motion to dismiss under the Federal Rules of Civil Procedure 12(b)(6), which if granted would end the trial. See FED. R. CIV. P. 12(b)(6); *SolarCity*, 859 F.3d at 726 (stating that an assertion of state action immunity as a means to dismiss a case is no different from other 12(b)(6) motions to dismiss). Thus an assertion of immunity from liability can quickly end a trial if the court rules in favor of the motion to dismiss. See *SolarCity*, 859 F.3d at 726 (stating that if the court cannot reasonably find liability, then a motion to dismiss based on immunity should be granted). Although the benefits of immunity from suit and immunity from liability thus seem very similar, the Supreme Court has stated the crucial difference is immunity from suit is a right not to be tried, whereas immunity from liability is a right that allows charges to be dismissed. See *United States v. Hollywood Motor Car Co., Inc.*, 458 U.S. 263, 269 (1982) (finding that the right conferred by immunity from suit is expressly distinct from the right conferred by immunity from liability).

³⁶ See *infra* notes 43–47 and accompanying text.

³⁷ See 28 U.S.C. § 1291 (stating that appellate courts have jurisdiction over final decisions made by district courts). Interlocutory orders are reviewable on appeal from district courts in accordance with standard appeal practice as defined by 28 U.S.C. § 1291. See *id.* (stating that final decisions of district courts are appealable); BLACK'S LAW DICTIONARY, *supra* note 23 (defining interlocutory order).

ever, have jurisdiction to hear interlocutory appeals under the collateral order doctrine, which stems from 28 U.S.C. § 1291 and 28 U.S.C. § 1292.³⁸ In order to immediately appeal, the collateral order doctrine requires that an interlocutory (1) be conclusive, (2) address a question that is separate from the merits of the underlying case, and (3) raise an issue of particular value that evades effective review if not considered immediately.³⁹ Given the rigor of the test, it is no surprise that only a limited number of questions are appealable under the doctrine.⁴⁰ Moreover in recent years, the Supreme Court has interpreted the collateral order doctrine very narrowly, finding that an immediate appeal is appropriate only when rights would be “irretrievably lost” without such an appeal.⁴¹ Thus, only a small number of interlocutory orders are immediately appealable prior to a final judgment on the merits.⁴²

Courts have held that immunity from suit is immediately appealable, but immunity from liability is not.⁴³ The collateral order doctrine allows an immediate appeal of immunity from suit because a district court order granting immunity from suit conclusively determines the case outcome, presents a question separate from the merits of the case, and cannot be effectively reviewed following a final judgment of the case.⁴⁴ Immunity from suit cannot be proper-

³⁸ 28 U.S.C. §§ 1291–1292. 28 U.S.C. § 1291 grants appellate courts jurisdiction to hear appeals from lower courts. 28 U.S.C. § 1292 grants courts of appeals jurisdiction to hear appeals of interlocutory orders made by district courts.

³⁹ See *supra* note 24.

⁴⁰ See *supra* note 38.

⁴¹ See *Richardson-Merrell, Inc. v. Koller*, 472 U.S. 424, 431 (1985) (finding that the collateral order doctrine allows for an immediate appeal only when rights would be denied without an immediate appeal); *Risjord*, 449 U.S. at 374 (stating that there is a limited class of claims which may be immediately appealed under the collateral order doctrine). See generally Adam N. Steinman, *Reinventing Appellate Jurisdiction*, 48 B.C. L. REV. 1237 (2007) (providing an extensive overview of the collateral order doctrine including the statutory history of the doctrine as well as its limits and implications for interlocutory orders).

⁴² See *supra* note 38 and accompanying text.

⁴³ See *Commuter Transp.*, 801 F.3d at 1289 (finding that immunity from suit is immediately appealable pursuant to the collateral order doctrine); *Martin*, 86 F.3d at 1395 (finding that an interlocutory order denying qualified immunity, which confers immunity from suit, is immediately appealable under the collateral order doctrine); see also *SolarCity Corp.*, 859 F.3d at 724 (stating that immunity from liability is not immediately appealable). But see *Board of Dentistry*, 455 F.3d at 444 (implying that immunity from liability cannot be immediately appealed pursuant to the collateral order doctrine); *Huron*, 792 F.2d at 567 (finding that immunity from liability is not immediately appealable under the collateral order doctrine, unlike immunity from suit). Although both immunity from suit and immunity from liability will ultimately render a party not liable for any civil damages, immunity from suit provides an additional advantage because the party need not shoulder the burdens of trial. See *Huron*, 792 F.2d at 566–67 (recognizing that immunity from suit relieves a party from the burdens of trial, which affords a stronger protection than immunity from liability); *SolarCity Corp.*, 859 F.3d at 728 (stating that one reason for granting immunity from suit is to protect a party from the burdens of trial).

⁴⁴ See *Mitchell*, 472 U.S. at 512 (reasoning that interlocutory orders of immunity from suit are immediately appealable because immunity from suit is conclusive in a trial); *Board of Dentistry*, 455 F.3d at 440 (stating that orders of immunity from suit must be immediately appealable in order to conserve the right afforded); see also *SolarCity Corp.*, 859 F.3d at 724; *Huron*, 792 F.3d at 566.

ly reviewed following final judgment because the immunity relieves the party from the burdens of trial, so if the party must wait until trial is over to appeal, the party is effectively denied the right conferred.⁴⁵

In contrast, immunity from liability is not immediately appealable under the collateral order doctrine.⁴⁶ A judgment on immunity from liability is conclusive and separate from the merits of the case, however the third requirement is not satisfied: immunity from liability is effectively reviewable on appeal from final judgment.⁴⁷ Immunity from liability does not prevent a party from going to trial on the merits; it only acts as an affirmative defense removing liability for the party asserting immunity.⁴⁸ As such, no rights are denied by waiting to appeal from a final judgment.⁴⁹ Because of these differences, interlocutory orders on immunity from suit are immediately appealable; however, orders on immunity from liability are not.⁵⁰

II. CIRCUIT SPLIT AND THE NINTH CIRCUIT'S INTERPRETATION OF STATE ACTION IMMUNITY

Given that immunity from suit can be immediately appealed but immunity from liability cannot, a court's interpretation of state action immunity as either immunity from suit or liability directly affects the rights of a party.⁵¹ As federal courts have faced the question of interpreting state action immunity, a circuit split has developed between the Fifth and Eleventh Circuit Courts, which interpreted state action immunity as immunity from suit, and the Fourth, Sixth, and Ninth Circuits, which interpreted it as immunity from liability.⁵²

A. State Action Immunity as Immunity from Suit: The Fifth and Eleventh Circuits

In 1986, in *Commuter Transport Systems, Inc., v. Hillsborough County Aviation Authority*, the United States Court of Appeals for the Eleventh Circuit held that state action immunity is substantially similar to qualified immunity, and therefore grants immunity from suit.⁵³ The court reasoned that state action

⁴⁵ See *supra* notes 33, 39.

⁴⁶ See *supra* note 42.

⁴⁷ See *SolarCity Corp.*, 859 F.3d at 725 (reasoning that interlocutory orders on immunity from liability are not immediately appealable because such orders are effectively reviewed after final judgment); *Huron*, 792 F.3d at 568 (finding that immunity from liability can be effectively reviewed after final judgment).

⁴⁸ See *supra* notes 33–34.

⁴⁹ See *supra* notes 33–34.

⁵⁰ See *supra* note 13, 34–39.

⁵¹ See *supra* note 13 and accompanying text.

⁵² See *infra* notes 53–95 and accompanying text.

⁵³ See 801 F.2d 1286, 1289–90 (11th Cir. 1986) (holding that state action immunity confers immunity from suit).

immunity is intended to protect officials exercising discretionary power who otherwise might hesitate to exercise that power for fear of litigation.⁵⁴ For example, in *Hillsborough*, the Florida legislature created the Aviation Authority for Hillsborough County (the “Authority”), which was permitted to regulate traffic at the county airport.⁵⁵ In the interest of reducing traffic, the Authority granted a monopoly for passenger pickup permits to certain limousine companies by excluding others.⁵⁶ In the suit claiming the Authority violated the Sherman Act, the court concluded that state action immunity must grant immunity from suit.⁵⁷ The court reasoned that without such a strong protection, the Authority would second-guess its decision to grant a monopoly and hesitate to take action it deemed necessary out of fear of litigation, paralleling the reasoning of qualified immunity.⁵⁸

Similarly, in *Martin v. Memorial Hospital at Gulfport*, the United States Court of Appeals for the Fifth Circuit held that state action immunity grants immunity from suit.⁵⁹ In so holding, the Fifth Circuit reasoned that state action immunity allows officials to use discretionary power without fear of litigation, protects officials carrying out governmental duties, and encourages individuals to run for public office by reducing potential liability for their actions.⁶⁰ The court further implied that state action immunity must confer immunity from suit because the alternative, immunity from liability, will not sufficiently protect officials from the burdens of trial.⁶¹ Consequently, because state action

⁵⁴ *Id.* at 1289.

⁵⁵ *Id.* at 1288.

⁵⁶ *Id.*

⁵⁷ *Id.* at 1290.

⁵⁸ *See id.* at 1287–88. One of the rationales for granting qualified immunity is that executive officials such as governors would hesitate to exercise their discretionary decision-making power because of fear of costly litigation as well as the waste of public resources. *See Harlow v. Fitzgerald*, 457 U.S. 800, 807 (1982). In *Commuter Transp.*, the Eleventh Circuit concluded that because the underlying purpose of qualified immunity is the same as state action immunity, both must confer the same type of immunity, that is absolute immunity. *See* 801 F.2d at 1289–90.

⁵⁹ *See* 86 F.3d 1391, 1396–97 (5th Cir. 1996). In *Martin*, a state subdivision municipal hospital granted a contract to a specific doctor, allowing that doctor to treat and manage all patients with end stage renal disease. *See id.* at 1393. Plaintiff sued the hospital, claiming the hospital engaged in anti-competitive conduct in violation of the Sherman Act. *See id.* In response, the hospital claimed state action immunity, which was denied by the trial court. *See id.* The Fifth Circuit reversed in part, finding that the hospital had a right to claim state action immunity to the Sherman Act. *Id.* at 1400.

⁶⁰ *Id.* at 1396.

⁶¹ *See id.* The Fifth Circuit reasoned that the intended purpose of state action immunity is to protect officials from the burdens of trial, so state action immunity must confer immunity from suit. *See id.* The Fifth Circuit further relied on the reasoning in *Parker v. Brown* finding that the Sherman Act was not intended to obstruct or hinder a State’s ability to regulate its economy, and therefore the stronger protection of immunity from suit is the appropriate interpretation of state action immunity. *See Parker v. Brown*, 317 U.S. 341, 351 (1943) (finding that the Sherman Act does not apply to states); *Martin*, 86 F.3d at 1395 (stating that because *Parker* concluded that states are in no way restrained by the Sherman Act, state action immunity must grant immunity from suit).

immunity is interpreted to confer immunity from suit, both the Fifth and Eleventh Circuits allow interlocutory appeals on the matter.⁶²

*B. State Action Immunity as Immunity from Liability:
The Fourth and Sixth Circuits*

In contrast, the Fourth and Sixth Circuits have interpreted state action immunity to confer immunity from liability.⁶³ In *South Carolina State Board of Dentistry v. FTC.*, the Fourth Circuit Court of Appeals concluded that state action immunity to the Sherman Act grants immunity from liability, not a “right not to be tried.”⁶⁴ The court highlighted three distinct reasons why state action immunity is different from other immunities from suit, namely qualified immunity, absolute immunity, and sovereign immunity.⁶⁵ First, municipalities may assert state action immunity, but they may not assert qualified immunity because suits against municipalities do not impact state officials, one of the major policy reasons behind qualified immunity.⁶⁶ Because municipalities may invoke state action immunity but not qualified immunity, the protection afforded by each must be distinct.⁶⁷ Second, state action immunity provides immunity from all antitrust claims, regardless of the type of relief sought.⁶⁸ In contrast, qualified immunity does not prevent lawsuits seeking injunctions or other equitable relief.⁶⁹ Third, state action immunity can be invoked in lawsuits brought by the federal government, yet sovereign immunity cannot.⁷⁰ For the

⁶² See *supra* note 38 and accompanying text.

⁶³ See 455 F.3d 436, 445 (4th Cir. 2006) (finding that state action immunity grants immunity from liability); *Huron Valley Hosp. Inc., v. City of Pontiac*, 792 F.2d 563, 566 (6th Cir. 1986) (holding that state action immunity grants immunity from liability).

⁶⁴ *Board of Dentistry*, 455 F.3d at 445.

⁶⁵ See *id.* at 446–47.

⁶⁶ See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (finding that municipalities may not assert qualified immunity). Municipalities, commonly referred to as cities or towns, are local administrative units of a State, whose powers are granted by a State and consequently are subordinate to the State. *Municipality*, BLACK’S LAW DICTIONARY (10th ed. 2014). Because a lawsuit against a municipality is not a lawsuit against the State, State-level officials are not involved in the suit nor is a State itself a party to the suit. See *Owen*, 445 U.S. at 638; see also *Harlow*, 457 U.S. at 814 (reasoning that qualified immunity, and consequently immunity from suit, protects States and state officials from the burdens of trial); *Board of Dentistry*, 455 F.3d at 446.

⁶⁷ See *Board of Dentistry*, 455 F.3d at 445.

⁶⁸ See *id.*

⁶⁹ *Id.*; see also *Am. Fire, Theft & Collision Managers, Inc., v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) (stating that qualified immunity does not prevent suits seeking declaratory or equitable relief); *Rowley v. McMillan*, 502 F.2d 1326, 1331 (4th Cir. 1974) (finding that the doctrine of sovereign immunity does not prevent suits for declaratory or injunctive relief).

⁷⁰ See *United States v. Mississippi*, 380 U.S. 128, 140–41 (finding no constitutional limit preventing the federal government from suing a state, particularly because doing so would diminish the power of the courts to protect citizens against abusive and discriminatory state actions). The fact that a State may assert state action immunity in a lawsuit brought by the federal government provides reason

foregoing reasons, the Fourth Circuit held that state action immunity is distinct from the various types of immunity from suit, and thus state action immunity can only provide immunity from liability.⁷¹ The Fourth Circuit therefore does not allow interlocutory appeals on state action immunity judgments.⁷²

Similarly, in *Huron Valley Hospital, Inc., v. City of Pontiac*, the Sixth Circuit Court of Appeals reasoned that state action immunity grants an exemption to liability, rather than an exemption from suit.⁷³ Although the court did not explicitly define state action immunity as immunity from liability, the court implied that state action immunity cannot be used to avoid trial, but it may be used to escape liability.⁷⁴ Consequently, the Sixth Circuit also does not allow interlocutory appeals on state action immunity.⁷⁵

C. Tipping the Scale: The Ninth Circuit Joins the Fourth and Sixth Circuits

Following the reasoning of the Fourth and Sixth Circuits, the Ninth Circuit concluded that state action immunity confers immunity from liability.⁷⁶ In 2015, SolarCity Corporation filed suit in the United States District Court for the District of Arizona against Salt River Project Agricultural Improvement and Power District (“SRP”) alleging that SRP used monopolistic tactics in violation of the Sherman Act.⁷⁷ SolarCity, the United States’ largest seller and installer of solar panels, claimed that SRP, a public water and power utility organization, intentionally charged consumers who installed solar panels increased rates in order to discourage the installation of solar panels.⁷⁸ SRP moved to dismiss, claiming SRP is absolutely immune from antitrust suits in

to conclude that state action immunity is different from sovereign immunity. *See Board of Dentistry*, 455 F.3d at 446.

⁷¹ *See Board of Dentistry*, 455 F.3d at 446–47.

⁷² *See id.* at 447.

⁷³ *See* 792 F.2d at 567. In *Huron*, Huron Valley, a Michigan nonprofit corporation, sought approval from the state, city, and federal officials (the Defendants) to build a hospital. *See id.* at 565 The request was subsequently denied, and Huron Valley then sued the Defendants claiming violation of the Sherman Act by engaging in conspiracy in restraint of trade by blocking construction of the hospital. *See id.* at 565–66.

⁷⁴ *See id.* at 567. Because immunity from suit grants a right to avoid trial, the court implied that state action immunity can only confer immunity from liability. *See id.*

⁷⁵ *See id.* Because the court concluded that state action immunity confers immunity from liability, a lower court decision denying state action immunity is effectively reviewable after a final judgment. *See supra* notes 40–44 and accompanying text. Consequently, the decision is not subject to the collateral order doctrine, and no interlocutory appeal will be granted. *See supra* notes 40–44, 65–65 and accompanying text.

⁷⁶ *See SolarCity Corp., v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 730 (9th Cir. 2017).

⁷⁷ *See generally SolarCity Corp., v. Salt River Project Agric. Improvement & Power Dist.*, NO. CV-25-00374-PHX-DLR, 2015 WL 6503439 (D. Ariz. 2015).

⁷⁸ *See id.* at 1. SRP is a political subdivision of the State of Arizona, formed under Arizona statute. *See ARIZ. REV. STAT. ANN.* 2 § 48-2302 (2017).

accordance with state action immunity.⁷⁹ The district court denied SRP's motion to dismiss, stating that whether SRP qualified for state action immunity is a factual matter and thus not appropriate for a 12(b)(6) motion.⁸⁰ SRP appealed to the Ninth Circuit and argued that if SRP is in fact immune from suit because of state action immunity, the district court's decision is not effectively reviewable after a final decision on the merits of the case, and therefore the interlocutory appeal is appropriate.⁸¹ The Ninth Circuit rejected SRP's argument holding that state action immunity grants immunity from liability.⁸²

Concluding that state action immunity confers immunity from liability, the Ninth Circuit focused primarily on the Supreme Court's decision in *Parker*.⁸³ In *Parker*, the Supreme Court asserted that the Sherman Act was not intended to place any limit on a State's ability to control its economy, but Congress could impose such a limit.⁸⁴ Because Congress can restrict a State's ability to regulate antitrust matters, States must also be subject to lawsuits if a restriction is violated, and therefore state action immunity can only grant immunity from liability.⁸⁵ Following the decision that state action immunity grants immunity from liability, the Ninth Circuit concluded that the collateral order doctrine did not apply, and thus the Ninth Circuit did not have jurisdiction to hear the appeal.⁸⁶

The Ninth Circuit also expressly distinguished state action immunity from qualified immunity, absolute immunity, and sovereign immunity, further sup-

⁷⁹ See FED. R. CIV. P. 12(b)(6).

⁸⁰ See FED. R. CIV. P. 12(b)(6); *SolarCity Corp.*, NO. CV-25-00374-PHX-DLR, 2015 WL 6503429 at *13. A 12(b)(6) motion seeks to dismiss a case for failure to state a claim. FED. R. CIV. P. 12(b)(6). In order to survive the motion, the opposing party, usually plaintiff, must show that their pleading identifies a legal theory upon which a court can grant relief. See *Motion for Dismissal for Failure to State a Claim, Generally*, 27A FED. PROC., L. ED. § 62:455 (2017).

⁸¹ See *SolarCity Corp.*, 859 F.3d at 724. Immunity from suit is not effectively reviewable after a final decision because the party seeking immunity would have to shoulder the burdens of trial, thus denying the right conferred by immunity from suit. See *supra* note 24 and accompanying text.

⁸² See *SolarCity Corp.*, 859 F.3d at 730.

⁸³ See *Parker*, 317 U.S. at 350–51 (finding that the Sherman Act does not restrict state legislatures, but Congress may pass legislation that does restrict state legislatures); *SolarCity Corp.*, 859 F.3d at 726 (relying on *Parker* to reason that the Sherman Act does not grant immunity from suit because Congress may restrict a state legislature thus preserving the possibility of a lawsuit).

⁸⁴ See *supra* note 12 and accompanying text.

⁸⁵ See *Parker*, 317 U.S. at 350 (stating that the Congress could impose antitrust regulations on a State). If Congress could not impose restrictions on a state, then the Ninth Circuit plausibly would have concluded that state action immunity grants immunity from suit. See *SolarCity Corp.*, 859 F.3d at 726. Because Congress in theory can impose antitrust regulations on States, States cannot be completely immune to antitrust claims as compared to sovereign immunity, which does provide immunity from suit. See U.S. CONST. amend. XI; *SolarCity Corp.*, 859 F.3d at 726. The idea that there is a preserved right to sue suggests that if Congress decided to enact legislation holding states liable for antitrust violations, such legislation would overrule the state action immunity exception. See *Parker*, 317 U.S. at 351 (noting that Congress may impose limits on states in accordance with Constitution).

⁸⁶ *SolarCity Corp.*, 859 F.3d at 726; see *supra* note 64.

porting its interpretation as immunity from liability.⁸⁷ While qualified immunity is granted to government officials in part to reduce potential distraction of public officers and decrease the amount of wasted public resources, a government official must also show that they acted reasonably under the circumstances in order to properly assert qualified immunity.⁸⁸ Consequently, SRP's contention that denying immediate appellate review of state action immunity will waste resources by dragging out litigation was not sufficient to equate state action immunity to qualified immunity.⁸⁹ The Ninth Circuit thus found that state action immunity is distinct from qualified immunity.⁹⁰

Additionally, the Ninth Circuit expressly declined to adopt the arguments of the Fifth and Eleventh Circuits, holding that state action immunity confers immunity from suit.⁹¹ Rather, the Ninth Circuit cited the Supreme Court's narrowing interpretation of the collateral order doctrine to support its conclusion that state action immunity grants immunity from liability.⁹² Because the collateral order doctrine has been interpreted so narrowly, the Ninth Circuit reasoned that any given claim will most probably not be immediately appealable under

⁸⁷ See *id.* at 729 (analyzing the differences between state action immunity and types of immunity from suit). In its analysis, the court compares and contrasts state action immunity to the various types of immunity form suit in order to draw inferences as to whether state action immunity confers immunity form suit or immunity from liability. See *id.* at 728–30 (identifying the differences between state action immunity from absolute immunity, qualified immunity, and sovereign immunity). The court ultimately concluded that there are numerous differences between state action immunity and the types of immunity from suit, thus reasoning that state action immunity must grant immunity from liability. See *id.*

⁸⁸ See *id.*, 859 F.3d at 728 (asserting that government distraction and inconvenience alone does not invoke the collateral order doctrine, and thus it cannot be the sole grounds for an interlocutory appeal); *supra* note 33 and accompanying text. The court reasons that if qualified immunity were granted solely as a means for a government official to get out of a trial, then § 1291 reserving appeals to issues of final decisions would be rendered useless as government officials would always be able to immediately appeal any issue in which they are involved. See 28 U.S.C. § 1291 (2012); *Will v. Halllock*, 546 U.S. 345, 346 (2006) (finding that § 1291 would be rendered obsolete in any case involving a government official if qualified immunity allowed immediate appeal solely for the reason of avoiding trial); *SolarCity Corp.*, 859 F.3d at 728 (echoing the reasoning that qualified immunity allows an immediate appeal for reasons beyond simply avoiding trial).

⁸⁹ See *supra* note 88.

⁹⁰ See *SolarCity Corp.*, 859 F.3d at 728 (stating that an assertion of qualified immunity requires a showing that the official asserting immunity acted reasonably under the circumstances, not just that the trial distracts the government).

⁹¹ See *id.* at 730.

⁹² See *id.* The Supreme Court has consistently concluded that the collateral order doctrine provides a narrow exception to appealing issues because a broad interpretation would result in multiple appeals and would do away with the force of § 1291. See 28 U.S.C. § 1291; *Mohawk Indus. v. Carpenter*, 558 U.S. 100, 106 (2009) (stating that the collateral order doctrine must reflect the values of the final-judgment rule in limiting the ability to appeal issues prior to final judgment); *Firestone Tire & Rubber Co. v. Risjord*, 449 U.S. 368, 375 (1981) (emphasizing that the collateral order doctrine is only available for a limited class of claims); *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 546 (1948) (finding that the collateral order doctrine only applies to a small class of claims, which must be immediately appealed in order to be effectively reviewed).

the collateral order doctrine.⁹³ Therefore, interpreting state action immunity as immunity from liability was consistent with the narrow scope of the collateral order doctrine.⁹⁴

III. ANALYSIS AND CONSEQUENCES OF *SOLARCITY CORP.*

Given the current law surrounding state action immunity and the collateral order doctrine, the Ninth Circuit was correct in concluding that state action immunity grants immunity from liability, joining the Fourth and Sixth Circuits.⁹⁵ Although the Sherman Act does provide for state action immunity to antitrust claims, it is clear that Congress could institute regulations blocking a State's decision to regulate its economy.⁹⁶ Because Congress can impose limits on states in this manner, it follows that states can never be absolutely immune from antitrust claims, whether a current statute such as the Sherman Act exists

⁹³ See *SolarCity Corp.*, 859 F.3d at 730 (implying that the Supreme Court's consistently narrow interpretation of the collateral order doctrine bolsters a finding that state action immunity grants immunity from liability and therefore is not immediately appealable).

⁹⁴ See *id.*

⁹⁵ See *SolarCity Corp., v. Salt River Project Agric. Improvement & Power Dist.*, 859 F.3d 720, 730 (9th Cir. 2017) (holding that state action immunity confers immunity from liability and cannot be immediately appealed pursuant to the collateral order doctrine); see also *S.C. State Bd. of Dentistry v. FTC*, 455 F.3d 436, 445 (4th Cir. 2006) (reasoning that state action immunity provides immunity from liability); *Huron Valley Hosp. Inc., v. City of Pontiac*, 792 F.2d 563, 567 (6th Cir. 1986) (finding that state action immunity confers immunity from liability, not immunity from suit).

⁹⁶ See *The Sherman Antitrust Act*, 15 U.S.C. § 1 (2012) (creating state action immunity by not implicating states in the law); *FTC v. Phoebe Putney Health Sys., Inc.*, 568 U.S. 216, 224 (2013) (clarifying that the Sherman Act does not apply to state regulatory actions where the action is clearly made on behalf of the state); *Parker v. Brown*, 317 U.S. 341, 351 (1943) (interpreting the Sherman Act to apply to states exercising its regulatory powers given the history and text of the statute, expressly recognizing state action immunity); 21 CONG. REC. 2562 (1890) (explaining that the purpose of the Sherman Act is to prohibit businesses and corporations from engaging in anticompetitive contracts and unfair competition). Congress may regulate a state's economy by exercising its commerce power, granted by Article I, § 8 of the U.S. Constitution. See U.S. CONST. art. I, § 8, cl. 3. Whereas the Commerce Clause only grants power to regulate interstate and foreign commerce, it is reasonable to conclude that a state-created monopoly would fall under this prescription because of the relatively broad interpretation of interstate commerce. See *McLain v. Real Estate Bd., Inc.*, 444 U.S. 232, 246 (1980) (finding that a claim against a private corporation based upon the Sherman Act need only show that the alleged violation affects interstate commerce); *Parker*, 317 U.S. at 350 (concluding, but not deciding, that the federal government could regulate a state monopoly under the commerce clause); John J. Dvorske et al., *State Regulation of Intrastate Commerce*, 12B TEX. JUR. 3d CONST. LAW, § 116 (2017) (stating that Congress may pass regulations restricting intrastate commerce where the regulation is necessary to protect interstate commerce); see also CHARLES R. GEISST, *MONOPOLIES IN AMERICA: EMPIRE BUILDERS AND THEIR ENEMIES FROM JAY GOULD TO BILL GATES* 44 (2000) (implying that monopolies affect interstate commerce by making it difficult for any competitor to enter a market controlled by a monopoly); M.A. UTTON, *MARKET DOMINANCE AND ANTITRUST POLICY* 9 (2d ed. 2003) (finding that monopolies necessarily lockout external competitors).

or not.⁹⁷ Thus, any immunity afforded by a statute with respect to antitrust claims can only plausibly provide immunity from liability.⁹⁸

Moreover, the Fourth and Ninth Circuits are persuasive in identifying the differences between state action immunity and immunities from suit.⁹⁹ For example, municipalities may assert state action immunity but may not claim qualified immunity.¹⁰⁰ Other differences include that fact that state action immunity provides immunity from all antitrust claims and not just claims seeking equitable relief, and state action immunity may be invoked in lawsuits brought by the federal government.¹⁰¹ The identified distinctions illustrate important differences between types of immunity from suit and state action immunity, suggesting that state action immunity is separate and distinct from immunity from suit.¹⁰²

Following the interpretation of state action immunity as immunity from liability, the collateral order doctrine should not apply to interlocutory orders on state action immunity.¹⁰³ The collateral order doctrine only grants jurisdiction for immediate appeals when the interlocutory order is conclusive, the order addresses a question that is separate from the merits of the underlying case, and the order evades effective review if not considered immediately.¹⁰⁴ Im-

⁹⁷ See *supra* note 96 and accompanying text.

⁹⁸ See *supra* notes 95–96 and accompanying text.

⁹⁹ See *Board of Dentistry*, 455 F.3d at 445 (finding that state action immunity provides immunity from liability); *Huron*, 792 F.2d at 567 (concluding that state action immunity confers immunity from liability, not immunity from suit).

¹⁰⁰ See *Owen v. City of Independence*, 445 U.S. 622, 638 (1980) (finding that municipalities may not assert qualified immunity). Recall that qualified immunity confers immunity from suit, therefore if state action immunity can be invoked but qualified immunity cannot, then that suggests a significant difference between the two types of immunity. See *supra* notes 27–33 and accompanying text.

¹⁰¹ See *Am. Fire, Theft & Collision Managers, Inc., v. Gillespie*, 932 F.2d 816, 818 (9th Cir. 1991) (finding that qualified immunity does not provide immunity in suits seeking declaratory or equitable relief); *Rowley v. McMillan*, 502 F.2d 1326, 1331 (4th Cir. 1974) (finding that the doctrine of sovereign immunity does not prevent suits for declaratory or injunctive relief). Recall that both qualified immunity and sovereign immunity grant immunity from suit. See *supra* notes 27–33 and accompanying text.

¹⁰² See *SolarCity Corp.*, 859 F.3d at 729 (identifying differences between state action immunity and types of immunities from suit); *Board of Dentistry*, 455 F.3d at 446–47 (reasoning that state action immunity does not confer immunity from suit because of the numerous differences between state action immunity and types of immunity from suit). If state action immunity does not provide immunity from suit, then it must provide immunity from liability. See *supra* notes 66–69, 88 and accompanying text.

¹⁰³ See *SolarCity Corp.*, 859 F.3d at 730 (finding that state action immunity cannot be immediately appealed); *DC Comics v. Pac. Pictures Corp.*, 706 F.3d 1009, 1015 (9th Cir. 2013) (stating that immunity from liability is different in kind from immunity from suit, and consequently immunity from liability is not subject to the collateral order doctrine); *Board of Dentistry*, 455 F.3d at 447 (finding that the collateral order doctrine cannot be applied to state action immunity); *Huron*, 792 F.2d at 568 (reasoning that because state action immunity confers immunity from liability, it cannot be immediately appealed under the collateral order doctrine).

¹⁰⁴ See *supra* note 13.

munity from liability can be effectively reviewed following final judgment on the merits and as such, no rights are denied if not reviewed immediately.¹⁰⁵ The collateral order doctrine thus does not grant an appellate court jurisdiction over an interlocutory order concerning state action immunity as was decided by the Fourth, Sixth, and Ninth Circuits.¹⁰⁶

As a consequence of the Ninth Circuit's interpretation of state action immunity as immunity from liability, there is a shift in the circuit split with three circuits holding that state action immunity grants immunity from liability and two circuits holding that it grants immunity from suit.¹⁰⁷ Because of the circuit split, there is currently unequal treatment under the law with respect to state action immunity.¹⁰⁸ Although a state actor invoking state action immunity will ultimately not be liable for civil damages, immunity from suit granted in the

¹⁰⁵ See *supra* note 13.

¹⁰⁶ See *SolarCity Corp.*, 859 F.3d at 730 (finding that state action immunity cannot be immediately appealed under collateral order doctrine); *Board of Dentistry*, 455 F.3d at 447 (finding that the appellate court does not have jurisdiction to hear an immediate appeal concerning state action immunity in accordance with the collateral order doctrine); *Huron*, 792 F.2d at 568 (finding that the appellate court did not have jurisdiction to hear an immediate appeal concerning state action immunity).

¹⁰⁷ See *SolarCity Corp.*, 859 F.3d at 726 (interpreting state action immunity as immunity from liability); *Board of Dentistry*, 455 F.3d at 445 (finding that state action immunity provides only immunity from liability); *Huron*, 792 F.2d at 567 (interpreting state action immunity to mean immunity from liability). *But see* *Martin v. Mem'l Hosp.*, 86 F.3d 1391, 1396 (5th Cir. 1996) (finding that state action immunity provides immunity from suit); *Commuter Transp. Sys., Inc., v. Hillsborough Cty. Aviation Auth.*, 801 F.2d 1286, 1287 (11th Cir. 1986) (finding that state action immunity provides immunity from suit).

¹⁰⁸ See *SolarCity Corp.*, 859 F.3d at 726 (finding that state action immunity may not be immediately appealed under the collateral order doctrine); *Board of Dentistry*, 455 F.3d at 445 (concluding that state action immunity cannot be appealed prior to final judgment); *Huron*, 792 F.2d at 567 (finding that orders denying state action immunity do not meet the requirements of the collateral order doctrine). *But see* *Martin*, 86 F.3d at 1397 (finding that state action immunity orders satisfy the requirements of the collateral order doctrine); *Commuter Transp.*, 801 F.2d at 1287 (finding that orders denying state action immunity can be immediately appealed prior to final judgment). The direct consequence of the circuit split is that the benefits afforded to actors asserting state action immunity are different, granting either immunity from liability or immunity from suit. See *supra* note 13 and accompanying text. The impact of this difference not only affects the type of immunity conferred, but also whether the party may file an interlocutory appeal. See *supra* notes 41–49 and accompanying text. Note also that the Ninth Circuit in *SolarCity Corp.* noted in footnote six that the Tenth Circuit and Seventh Circuit have cited the opinions of the Fifth and Eleventh Circuit, but neither circuit has affirmatively ruled on the state action immunity issue, leaving open the possibility of a further Circuit split. See *SolarCity Corp.*, 859 F.3d at 729 n.6 (citing Tenth and Seventh Circuit cases that allude to the question of appealing a state action immunity order); *Auraria Student Hous. at the Regency, LLC v. Campus Vill. Apartments, LLC*, 703 F.3d 1147, 1151 (10th Cir. 2013) (acknowledging the circuit split concerning state action immunity, but not reaching a conclusion on the issue as it was found to be outside the scope of the case before the court); *Segni v. Commercial Office of Spain*, 816 F.2d 344, 346 (1987) (citing the Fifth Circuit decision in *Commuter Transp.* but not addressing the question of state action immunity as it is outside the scope of the case before the court); *Commuter Transp.*, 801 F.2d at 1287.

Fifth and Eleventh Circuits provides a significantly stronger protection than immunity from liability granted by the Fourth, Sixth, and Ninth Circuits.¹⁰⁹

The presence of the Circuit split particularly impacts state actors seeking to enforce regulations over State economies because the jurisdiction in which the state actor operates will determine whether *federal law* grants the actor immunity from suit or immunity from liability.¹¹⁰ State actors are thus being treated differently under federal law solely on the basis of the appellate Circuit in which the state actor operates.¹¹¹ This is particularly worrisome as many States are beginning to restrict certain services as technology advances, such as restricting Uber's ability to pick-up passengers at an airport, thereby granting a *de facto* monopoly to taxi cabs.¹¹² Given the Ninth Circuit's decision joining the Fourth and Sixth Circuits and the persuasive reasoning provided therein, other jurisdictions should follow the Ninth Circuit and hold that state action immunity confers immunity from liability and thus is not subject to an interlocutory appeal.¹¹³

CONCLUSION

State action immunity to antitrust claims is an important protection for state actors, granting states the freedom to regulate state economies. Although state actors are provided immunity from antitrust claims, the immunity conferred is currently the subject of a circuit split, creating unequal protection under federal law. The Fifth and Eleventh Circuits have interpreted state action immunity to grant immunity from suit, relieving the state actor from the burdens of trial as well as allowing an immediate appeal of a district court decision of immunity under the collateral order doctrine. In contrast, the Fourth, Sixth, and Ninth Circuits have interpreted state action immunity to grant immunity from liability by highlighting the numerous differences between state action immunity and types of immunities from suit. Given these differences, state action immunity can only plausibly confer immunity from liability. Con-

¹⁰⁹ See *supra* note 32 and accompanying text.

¹¹⁰ See *supra* note 13 and accompanying text.

¹¹¹ See *supra* note 107. This issue is particularly important for states seeking to exercise their authority to regulate their state economy. See THE FEDERALIST NO. 45 (James Madison) (noting that under the Constitution, state governments are meant to have the power to regulate ordinary affairs and internal state matters). If state actors, especially in the circuits that have yet to weigh in on the issue, do not know whether they will be granted immunity from suit or immunity from liability, the state actors may be more likely to hesitate in exercising their power to regulate their economy. See *supra* notes 13, 107.

¹¹² See Kerry Close, *Why You Can't Take an Uber Home from the Airport*, TIME, Feb. 1, 2018, <http://time.com/money/4396248/uber-lyft-ban-airport/> [<http://perma.cc/9A35-8N8A>]. Moreover, as States seek to enforce such regulations, State actors will not know how a litigation alleging a Sherman Act violation will proceed unless the State is in a jurisdiction that has weighed in on the Circuit Split. See *supra* notes 85–95 and accompanying text.

¹¹³ See *SolarCity Corp.*, 859 F.3d at 726; *supra* notes 85–95 and accompanying text.

sequently, state action immunity does not fall within the purview of the collateral order doctrine meaning that interlocutory orders on state action immunity cannot be appealed until after final judgment. Until the Supreme Court holds otherwise, other circuits should follow the Ninth Circuit's persuasive reasoning and conclude that state action immunity confers immunity from liability and thus cannot be immediately appealed under the collateral order doctrine.

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