12-527

No. 12-

IN THE

Supreme Court of the United States

DAWN A. McCRAY, *et al.*,

Petitioners,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, *et. al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Respondents collusively fixed rates and then filed them with the Delaware Department of Insurance. The fixed rates became effective upon filing under Delaware's "file and use" statutory scheme—one virtually identical to those at issue in *FTC v. Ticor Ins. Co.*, 504 U.S. 621 (1992). The rates were "not disapproved" or subjected to any meaningful review by the Department of Insurance.

The question presented is:

> Whether the filed rate doctrine exempts a cartel from federal antitrust damages liability for price-fixed rates filed with a state agency, given: (a) there is no meaningful review of the filed rates by the agency, (b) the agency has no statutory authority to award retrospective compensatory relief for the unlawful conduct, and (c) the price-fixing would not be exempt under the state action doctrine due to lack of "active supervision" by the agency.

PARTIES TO THE PROCEEDING

The Petitioners are Dawn A. McCray, William H. Williamson, and Daralice Grayo, on behalf of themselves and all other Delaware consumers similarly situated.

Respondents are Fidelity National Title Insurance Company, Chicago Title Insurance Company, Ticor Title Insurance Company, Ticor Title Insurance Company of Florida, Security Union Title Insurance Company, Fidelity National Financial Inc., First American Title Insurance Company, United General Title Insurance Company, T.A. Title Insurance Company, Censtar Title Insurance Company, First American Corporation, Commonwealth Land Title Insurance Company, Lawyers Title Insurance Company, Transnation Title Insurance Corporation, Landamerica Financial Group, Inc., Stewart Title Guaranty Company, Stewart Information Services Corporation, Old Republic National Title Insurance Company, Old Republic International Corporation, and Delaware Title Insurance Rating Bureau.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners Dawn A. McCray, William H. Williamson, and Daralice Grayo, on behalf of themselves and all other Delaware consumers similarly situated, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-25a) is reported at 682 F.3d 229. The opinion of the district court (App. 26a-50a) is reported at 636 F. Supp. 2d 322.[1] The order of the court of appeals denying rehearing *en banc* (App. 51a-52a) is unpublished.

JURISDICTION

The decision of the court of appeals was issued on June 14, 2012. A timely petition for rehearing *en banc* was denied on July 27, 2012. The judgment of the court of appeals was entered on August 6, 2012. This Court has jurisdiction under 28 U.S.C. § 1254(1) (2006).

STATUTORY PROVISIONS INVOLVED

Pertinent provisions of the Sherman Antitrust Act, 15 U.S.C. § 1 *et seq.* (2006), Section 4 of the Clayton Act, 15 U.S.C. § 15 (2006), and the Delaware Insurance Code,

1. A later order of the District Court dismissed Petitioners' amended claims for injunctive relief and is not at issue in this Petition and, therefore, not included in the Appendix. *See* 2010 WL 3023164 (D. Del. July 29, 2010).

DEL CODE ANN. TIT. 18, §§ 311(a), 2501, *et seq.* (2012) are reproduced in the appendix to the Petition (App. 53a-59a).

STATEMENT OF THE CASE

This case presents the question of whether the filed rate doctrine precludes a damages action based on a state agency's "non-disapproval" of private parties' collusively set rates that take effect upon filing under Delaware's "file and use" statutory scheme. The district court concluded, and the Third Circuit affirmed, that the mere filing of rates under a state statutory scheme exempts antitrust conspirators from federal antitrust damages liability. This Court has neither expanded the *Keogh*[2] filed rate doctrine to state agencies nor addressed whether application of the doctrine depends on a *state* agency's "'approval' or 'non-disapproval'" of rates, its "level of regulatory review," or the availability of a compensatory remedy. App. 12a, 14a.

Under Delaware law, each Respondent title insurer is required to "individually determine and file" with the Delaware Department of Insurance ("DOI") "the rates it will use as a result of its own independent company decision-making process." Forms and Rates Bulletin No. 5 ("Bulletin No. 5")[3]; DEL. CODE ANN. TIT. 18, § 2504 (2012). Additionally each insurer shall "furnish the [loss cost] information upon which it supports the filing." DEL. CODE ANN. TIT. 18, § 2504(b); *see also* Bulletin No. 5. Delaware law permits, but does not require, each insurer to utilize

2. *See Keogh v. Northwestern Railway Co.*, 260 U.S. 156 (1922).

3. Citations to the Bulletins issued by the DOI are available at http://www.delawareinsurance.gov/departments/documents/bulletins/bulletins.shtml.

the services of a rating bureau to file its rates with the DOI. DEL. CODE ANN. TIT. 18, § 2510 (2012). Delaware law is not intended "to prohibit or discourage reasonable competition" or to require uniform title insurance rates. DEL. CODE ANN. TIT. 18, §§ 2501, 2503(c) (2012).

Under this "file and use" statutory scheme, rates are automatically "deemed" to comply with Delaware's filing requirements when they are filed unless specifically disapproved by the DOI within 30 days of filing. DEL. CODE ANN. TIT. 18, §§ 2504, 2506(a), 2507 (2012); Compl. ¶¶ 4-5. Absent DOI action, the filed rate remains in effect no matter how unreasonable. The DOI lacks the ability to—and therefore does not—review title insurers' rates. Compl. ¶ 49.[4]

The DOI's remedial powers are limited. The DOI has no statutory authority to award damages for past collusively set rates. "[R]ate filings in Delaware can only be disapproved prospectively." *In re Surcharge Classification 0133*, 655 A.2d 295, 302 (Del. Super. Ct. 1994). An order disapproving previously filed and used rates "shall not affect any contract or policy made or issued" prior to the order. DEL. CODE ANN. TIT. 18, § 2507. Thus, with one-time or occasional purchases like title insurance, any overcharge paid is unrecoverable under the Delaware Insurance Code. *Elliott v. Blue Cross & Blue Shield of Del., Inc.*, 407 A.2d 524, 528 (Del. 1979). Although consumers "aggrieved with respect to any filing" may request a hearing to challenge a rate, any such hearing could only occur after the rate is already "in effect." DEL.

4. This Petition seeks review of an order entered on a motion to dismiss; the well-pleaded facts are accordingly taken as true. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

CODE ANN. TIT. 18, § 2520(a) (2012). Only prospective relief in the form of rate modification, not compensatory relief, is available. *In re Surcharge Classification*, 655 A.2d at 302.

Petitioners are Delaware homeowners who were required to purchase title insurance when they purchased their homes utilizing a mortgage. They had no meaningful choice among the title contracts. Compl. ¶¶ 35-36. Title insurance provides a limited warranty against undisclosed past title defects. *Id.* ¶ 37.

The title insurance industry is highly concentrated. Respondents are the largest title insurance companies in the nation and control 98% of the Delaware title insurance market and over 90% of the national market. *Id.* ¶¶ 30, 57. Respondents jointly created the Delaware Title Insurance Rating Bureau ("DTIRB") through which they collusively fixed rates to submit to the DOI. *Id.* ¶ 3. Respondents do not compete on the basis of coverage, terms, or price. *Id.* ¶¶ 30-31. Delaware consumers paid over $72 million for title insurance annually, which includes overcharges resulting from Respondents' price-fixing conspiracy. *Id.* ¶ 14.

No Respondent ever filed loss cost information to support its proposed rates in compliance with Delaware statutes. DEL. CODE ANN. TIT. 18, § 2504; Compl. ¶ 49. The DTIRB requested, and the DOI granted Respondents, a temporary exemption from the loss-cost filing requirements, but only for the DTIRB's initial 2004 rate filing. Forms & Rates Bulletin No. 27 ("Bulletin No. 27"); Compl. ¶ 49. Respondents have made no additional rate filings, and accordingly, never presented the statutorily required loss cost information. Compl. ¶¶ 7, 49. Respondents' failure to present this cost data rendered

impossible any meaningful review of their collusive rates. *Id.* ¶¶ 48-49. The DOI did not request any information from Respondents, did not meaningfully review Respondents' 2004 filing, and never "disapproved" Respondents' collusively fixed and jointly filed rates. *Id.* ¶¶ 48-49, 55. The DOI has no certified accountant or administrative section to monitor title insurance. *Id.* ¶ 49.

On October 15, 2008, Petitioners, pursuant to Section 1 of the Sherman Antitrust Act, § 15 U.S.C. § 1 *et seq.* (2006), and Section 4 of the Clayton Act, 15 U.S.C. § 15 (2006), filed suit in the United States District Court for the District of Delaware, seeking recovery for Respondents' *per se* illegal price-fixing. Petitioners alleged that Respondents conspired to fix the price of title contracts in Delaware and utilized the DTIRB as a mechanism to file those collusively set rates. Compl. ¶¶ 31, 39-42.

On July 15, 2009, the district court granted Respondents' motion to dismiss. It concluded that Petitioners' claims for damages and injunctive relief were barred by the *Keogh* filed rate doctrine.[5] Petitioners argued that the filed rate doctrine could not apply because the DOI undertook no "meaningful review" of Respondents' cartel-fixed rates nor could it due to Respondents' failure to file loss cost data. App. 12a. Despite this Court's insistence on strict adherence to "active supervision" in the state action

5. In its later July 29, 2010 Order, the district court dismissed Petitioners' amended claims for injunctive relief under the McCarran-Ferguson Act, 15 U.S.C. §§ 1011-15 (2006). Because the Third Circuit affirmed only on the issues under the filed rate doctrine and lack of standing for injunctive relief, App. 7a-24a, it did not address the district court's dismissal of the injunctive claims under the McCarran-Ferguson Act.

context, the district court rejected Petitioners' argument, finding that *Keogh* could bar all private remedies even in the absence of any active government review. App. 36a-38a. The district court further acknowledged that, as a matter of law, compensatory consumer relief is unavailable under the Delaware statutory scheme. But, the court reasoned that "prospective redress in the form of lower rates to compensate for filed rates that are later shown to have been excessive" was sufficient, even though such action, if ever taken by the DOI, would provide no relief for past purchases of title contracts. App. 43a.

The Third Circuit affirmed.[6] Relying on *Keogh*, it held that the filed rate "doctrine applies as long as the agency has in fact authorized the challenged rate." App. 12a-13a. The court reasoned that the doctrine applies "across the spectrum of regulated utilities," and the DOI "was required to review the challenged rates." App. 9a, 12a-14a. Petitioners argued that this Court has never addressed the extent of *state* agency review required to preclude private antitrust damages remedies, and that in closely related contexts—indeed, factually indistinguishable contexts—this Court has required "active supervision" of private actors to warrant an antitrust exemption under the state action doctrine. *See, e.g., FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 634, 638 (1992); *see also Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 99 (1980).

The Third Circuit disagreed and held that *Keogh* could bar private remedies in the absence of any active

6. On the same day and on similar grounds, the Third Circuit affirmed a decision arising out of the District of New Jersey on similar collusive price-fixing of title insurance rates. *See In re N.J. Title Ins. Litig.*, 683 F.3d 451 (3d Cir. 2012).

government review. App. 13a-14a. The court reasoned that "[n]either [it] nor the Supreme Court has suggested that a distinction should exist between agency authorization through 'approval' or 'non-disapproval' of filed rates." App. 14a. The court also rejected Petitioners' argument that "plaintiffs must have access to an alternative [compensatory] regulatory remedy before courts may apply the filed rate doctrine," even though that was *Keogh*'s "first, and most important" policy rationale. App. 15a; *see Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1351 (2d Cir. 1985). The court held that regardless of the lack of a compensatory remedy, "the filed rate doctrine applies to [Petitioners'] claims based on [*Keogh*'s] nonjusticiability principle alone." App. 22a. The court acknowledged that *Keogh*'s "nondiscrimination strand" was "not implicated by Appellants' claims." App. 22a.

The decisions below leave Petitioners with no compensatory relief for the overcharges they paid by reason of Respondents' *per se* illegal price-fixing conspiracy.

REASONS FOR GRANTING THE PETITION

By expanding application of *Keogh*'s[7] filed rate doctrine to cartel-fixed prices filed with a state agency, the decision below directly conflicts with a decision on virtually identical facts by the Ninth Circuit, conflicts with the underlying principles of the *Keogh* decision, and conflicts with this Court's carefully crafted state action exemption analysis. These conflicts, which present matters of first impression for the Court, are especially significant

7. *Keogh v. Northwestern Railway Co.*, 260 U.S. 156 (1922).

given that 21 states, including Delaware, use "file and use" insurance statutory schemes. JOSEPH W. EASTON & DAVID J. EATON, THE AMERICAN TITLE INSURANCE INDUSTRY 79 (2007).[8]

Antitrust litigation has previously challenged price-fixing by title insurers which jointly fixed and filed their rates in unreviewed, "file and use" state tariff systems. The Ninth Circuit rejected filed rate protection for such collusively fixed and filed title insurance rates for lack of "meaningful review by the state" resulting from the state agency's mere "failure to disapprove" filed rates. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 393-94 (9th Cir. 1992) (*Brown*). Further, the absence of a "meaningful review" prerequisite to the application of the filed rate doctrine in the decision below causes the doctrine, as applied to rate filings with state agencies, to conflict with this Court's reasoning in the closely related state action context. This Court emphatically requires that before state regulatory policy intended to displace competition can shield private anticompetitive conduct from antitrust liability, the policy must be "actively supervised by the state itself." *Cal. Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980). Implicitly conceding the state action doctrine would *not* exempt the cartel price-fixing here, the Third Circuit simply dismissed this doctrinal conflict reasoning "there is no apparent requirement to

8. This case also strongly complements the issues presented in another case in which certiorari has been granted: *Federal Trade Commission v. Phoebe Putney Health Sys., Inc.*, No. 11-1160. Like this case, *Phoebe Putney* puts in question just what this Court will require before states relieve private parties of the commands of the federal antitrust statutes. This case asks whether states can do so by no more than requiring a rate filing that is a hollow formality.

reconcile the filed rate and state action doctrines." App. 13a n.6.

Of primary significance to the *Keogh* decision was the availability of a compensatory remedy for ratepayers harmed by illegal price-fixing. As a result of the Third Circuit's simple "mere filing" prerequisite to the subordination of antitrust enforcement here, its decision left direct purchasers of title insurance harmed by Respondents' *per se* illegal price-fixing with no remedy under Section 4 of the Clayton Act, 15 U.S.C. § 15.

The Third Circuit's analysis amounts to nothing more than the rote application of the filed rate doctrine—an antitrust damages exemption—whenever rates are filed with a state agency. This Court should reject that approach. Instead, this Court should require the lower courts to examine the applicable state regulatory framework to determine whether there is a specific purpose to displace competition, and if so, examine whether the state exercises meaningful review of the filed rates, and whether the principal foundational rationales of *Keogh*, most importantly, the availability of a compensatory remedy for direct purchasers, are satisfied by the applicable state regulatory scheme.

I. THE THIRD CIRCUIT'S APPROACH TO THE FILED RATE DOCTRINE CONFLICTS WITH DECISIONS OF THIS AND OTHER COURTS AND WITH THE *KEOGH* POLICY RATIONALES.

In enacting the Sherman Act, Congress "intended to strike as broadly as it could" with a national antitrust policy. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 787 (1975).

"The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632 (1992) (*Ticor*). Price-fixing agreements by competitors have long been held to constitute *per se* violations of the Sherman Act. *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 218 (1940). Indeed, "their pernicious effect on competition and lack of any redeeming virtue are conclusively presumed to be unreasonable." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). While primary enforcement of the Sherman Act is left to the government, Congress also enacted Section 4 of the Clayton Act creating an antitrust damages remedy to "encourage[e] *private* challenges to antitrust violations," such as the price-fixing at issue here. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 344 (1979) (emphasis is original). *See also Mitsubishi Motors Corp. v. Soler Chrylser-Plymouth, Inc.*, 473 U.S. 614, 635 (1985).

Despite Congress' broad enforcement intent, limited implied repeals of the antitrust claims have been identified by this Court to accommodate the objectives of the antitrust laws and another applicable federal statute, in *Keogh*, the Interstate Commerce Act ("ICA"). 260 U.S. at 160-64. *Keogh* held that an award of antitrust damages "is not an available remedy." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986). This case presents the question whether this *Keogh* implied exemption—the filed rate doctrine—should be expanded to rate filings with a *state* agency.

This Court has on numerous occasions made clear that "'[r]epeals of the antitrust laws by implication from a regulatory statute are strongly disfavored'" because "the

antitrust laws represent a fundamental national economic policy." *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213, 218 (1966) (quoting *United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 (1963)). To the extent exemptions are implied by a regulatory scheme, they are to be "strictly construed." *Square D*, at 476 U.S. 421.

Here, there is no federal statute like the ICA at issue; rather, only the Delaware Insurance Code. Congress has had an opportunity to act in this area and it enacted the Local Government Antitrust Act of 1984, 15 U.S.C. § 34 *et seq.* (2006). Congress chose to limit Section 4 Clayton Act damages liabilities of municipalities and their employees, but *not* private actors such as Respondents.

A. The Third Circuit's Decision Conflicts With Decisions Of The Ninth Circuit And Other Courts.

In *Brown*, the Ninth Circuit refused to find an implied exemption for the private price-fixing of the title insurers there, several of which are Respondents here. *Brown* involved "file and use" title insurance regulations similar to Delaware's that permitted filed rates to become effective if "not disapproved." 982 F.2d at 393. Like here, the title insurers in *Brown* jointly fixed their rates and then filed them with several state departments of insurance. The title insurers argued that since the filed rate was the only rate they were allowed to charge, it was the legal filed rate under *Keogh*. *Id.* The Ninth Circuit rejected the argument:

> [G]overnmental approval [in *Keogh*] was required before there could be any effect from

> the *collective activity* and it was such approval that legitimized the . . . rates. . . . The *mere fact of failure to disapprove*, however, *does not legitimize otherwise anticompetitive conduct*. . . . [Non-disapproval] does not guarantee any level of review whatsoever. . . . [N]on-disapproval is equally consistent with lack of knowledge or neglect as it is with assent.

Id. (emphasis added) (quoting *Wileman Bros. & Elliot, Inc. v. Giannini*, 909 F.2d 332, 337-38 (9th Cir. 1990)). Further,

> if those rates were the product of unlawful activity prior to their being filed and were not subjected to meaningful review by the state, then the fact that they were filed does not render them immune from challenge. *The absence of meaningful state review allows the insurers to file any rates they want.* Therefore, the act of filing does not legitimize a rate arrived at by improper action.

Id. at 394 (emphasis added).

The Third Circuit wholly rejected the Ninth Circuit's reasoning in *Wileman* and *Brown* requiring "meaningful review" of filed rates by the state and adopted a "mere filing" standard absent further direction from this Court:

> [T]he Supreme Court has never indicated that the filed rate doctrine requires a certain type of agency approval or level of regulatory review. Instead, the doctrine applies as long as the

> agency has in fact authorized the challenged rate.

App. 12a-13a. The Third Circuit further observed that

> neither this Court nor the Supreme Court has suggested that a distinction should exist between agency authorization through "approval" or "non-disapproval" of filed rates.

App. 14a.

The Third Circuit's conclusion that the filed rate doctrine applies whenever cartel-fixed rates have been filed with a state agency is contrary to this Court's command that "implied repeals" of the antitrust laws are to be "strictly construed." *Square D*, 476 U.S. at 421. There is nothing "strict" about a "mere filing" standard. Further, the purely private "collective ratemaking activities [of Respondents] are not immunized from antitrust scrutiny simply because they occur in a [state] regulated industry." *Id.*

In other cases in the title insurance context, the circuit courts of appeal have differed on whether the extent of review exercised by state agencies impacts the applicability of the filed rate doctrine to preclude antitrust damages claims. *Compare Dolan v. Fidelity Nat'l Title Ins. Co.*, 365 Fed. Appx. 271, 274 (2d Cir. 2010) (filed rate doctrine interpreted and applied "to all filed rates, not merely those rates investigated before their approval"); *Winn v. Alamo Title Ins. Co.*, 372 Fed. Appx. 461 (5th Cir. 2010) (affirming lower court's dismissal on filed rate grounds where "Plaintiffs [did] not argue title

insurers and the rates they charge[d] [were] not subject to a comprehensive regulatory scheme in Texas"), *with Brown*, 982 F.2d at 394; *supra* at 11-12. The district courts also differ on the applicability of the filed rate doctrine to antitrust claims against title insurers. *Compare In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840, 847-48 (N.D. Ohio 2010), *aff'd on other grounds*, *Katz v. Fidelity Nat'l Title Ins. Co.*, 685 F.3d 588 (6th Cir. 2012), *and In re Pa. Title Ins. Antitrust Litig.*, 648 F. Supp. 2d 663, 683-84 (E.D. Pa. 2009) (filed rate doctrine applied), *with Blaylock v. First Am. Title Ins. Co.*, 504 F. Supp. 2d 1091, 1102-03 (W.D. Wash. 2007), *and Morales v. Attorneys' Title Ins. Fund, Inc.*, 983 F. Supp. 1418, 1426-27 (S.D. Fla. 1997) (filed rate doctrine not applied).

The decision below also conflicts with decisions outside the title insurance context in other circuits that reject filed rate protection where rates are filed with multiple agencies, and no single agency has regulatory control over all the rates. *City of Kirkwood v. Union Elec. Co.*, 671 F.2d at 1173, 1178-79 (8th Cir. 1982); *City of Mishawaka v. Am. Elec. Power Co.*, 616 F.2d 976, 983-84 (7th Cir. 1980). Those cases also hold that filed rate protection depends on the availability of actual, meaningful government review.

The Petition should be granted to answer the question posed by the direct conflict between the Ninth and Third Circuits, which is a matter of first impression for this Court—whether "a certain type of agency approval or level of regulatory review" is required before private price-fixers are given a "free pass" from Section 4 Clayton Act damages liability. More than "mere filing" should be required to trigger the filed rate exemption. This Court should resolve this circuit conflict and hold that the filed

rate doctrine does not apply to *per se* illegal cartel-fixed rates filed with a state agency where the state regulator fails to undertake meaningful review of the filed rates by adopting them as its own.

B. The Third Circuit's "Mere Filing" Standard Conflicts With *Keogh*'s Foundational Rationales And The Decisions Of This And Other Courts Applying Those Rationales.

Keogh held that the Interstate Commerce Commission's ("ICC") statutory power to investigate, review, accept or modify tariff filings under the comprehensive ICA precluded private antitrust damages relief. Justice Brandeis addressed four issues in reaching this result: (1) whether Congress intended an antitrust remedy in addition to administrative remedies under the ICA; (2) ensuring "non-discrimination" among ratepayers by avoiding individual antitrust damages claims which may act as a rebate to a successful antitrust plaintiff ("nondiscrimination strand"); (3) the difficulty of proving in an antitrust case that the "but for" competitive rate would be approved by the ICC ("nonjusticiability strand"); and (4) the concern that the direct payor of an illegal rate would "pass on" any damages to consumers.[9] 260 U.S. at 164-65.

While this Court has on numerous occasions addressed the filed rate doctrine, it has never held that one *Keogh* factor alone is sufficient to warrant either application, or

9. Since Petitioners are direct end-user purchasers of title insurance, this factor is moot. *See Ill. Brick Co. v. Illinois*, 431 U.S. 720, 723-26 (1977).

not, of the filed rate doctrine. The circuit courts are in conflict as to which *Keogh* factors control for application of the doctrine. The Third Circuit held that there is *no* "authority" requiring an "alternative regulatory remedy" in a state statutory scheme and instead held that the mere filing of a rate can satisfy the "nonjusticiability strand" of the filed rate doctrine, thereby precluding all monetary relief against price-fixers. App. 15a, 21a-22a. The court relied on *Marcus v. AT&T Corp.*, 138 F.3d 46 (2d Cir. 1998), where the Second Circuit held that the doctrine applies "whenever the nonjusticiability strand or the nondiscrimination strand . . . is implicated." App. 22a. This premise has been followed by the Eighth Circuit in *H.J. Inc. v. Northwestern Bell Tel. Co.*, 954 F.2d 485, 494 (8th Cir. 1992). On the other hand, another panel of the Eighth Circuit in *City of Kirkwood*, 671 F.2d at 1178-19, and the Seventh Circuit in *City of Mishawaka*, 616 F.2d at 983-84, rejected application of the filed rate doctrine where rates were filed and the nondiscrimination and nonjusticiability strands were potentially implicated. However, because more than one regulator was involved, neither regulator could provide complete relief to harmed consumers. Accordingly, the filed rate doctrine did not apply.

The Third Circuit's reliance on *Marcus* to reach its conclusion that the nonjusticiability strand "alone" justified application of the filed rate doctrine—to the exclusion of a compensatory damages remedy—ignored the statutory schemes at issue in those cases. For example, under the Federal Communications Act in *Marcus* and the Racketeer Influenced and Corrupt Organizations Act in *H.J.*, retroactive compensatory relief was available. *Marcus*, 138 F. 3d at 54; *H.J.*, 954 F. 2d at 493. Thus, the Third Circuit simply ignored or overlooked the

"alternative regulatory [damages] remedy" for ratepayers available under those federal regulatory schemes.

1. A Compensatory Remedy Is An Essential Prerequisite To Application Of The Filed Rate Doctrine.

Due to his concern about discrimination among ratepayers, Justice Brandeis questioned whether Congress intended to provide dual compensatory remedies under the ICA and the antitrust laws. *Keogh*, 260 U.S. at 162. Given the ICA remedy, which could be applied uniformly to ratepayers, Justice Brandeis rejected the additional antitrust damages remedy over a concern it could give a competitive advantage to a successful plaintiff. *Id.* at 162-63.

As Judge Friendly wrote, the "first, and most important" *Keogh* rationale "turns on the existence of a [consumer] remedy in the ICA." *Square D v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1351 (2d Cir. 1985). Subsequent to *Keogh*, this Court has rejected the assertion that the availability of an administrative remedy demonstrates Congressional intent that *additional* antitrust remedies are precluded. *See, e.g., ICC v. Am. Trucking Ass'ns, Inc.*, 467 U.S. 354, 360 (1984) (injured party can recover "both damages under [ICA] and whatever additional amounts the antitrust laws allow"); *Otter Tail Power Co. v. United States*, 410 U.S. 366, 373-75 (1973) (available remedy before the Federal Power Commission for refusal to sell power did not preclude remedy under antitrust laws); *Carnation*, 383 U.S. at 224 (remedy under Shipping Act did not preclude antitrust damages award).

In each of those cases, an antitrust remedy was available *in addition to* an administrative remedy. Yet, the Third Circuit held Petitioners are not entitled to even an "*alternative* regulatory remedy before . . . apply[ing] the filed rate doctrine." App. 15a (emphasis added). As victims of an antitrust price-fixing conspiracy, direct purchasers are entitled to compensation. *See Reiter*, 442 U.S. at 339-40. By adopting only a "mere filing" prerequisite for application of the filed rate doctrine in Delaware's statutory scheme, the decision below conflicts with other circuits and leaves direct purchasers—the equivalent of the shipper/ratepayers in *Keogh*—with *no reparations remedy* whatsoever, unlike ratepayers under comprehensive federal regulatory schemes. *See supra* at 16-17.

2. The Nondiscrimination Strand Potentially Arises Only Where Consumers Have Limited Choices, Typically In The Utility Setting, Not Where Competition Is Intended In The Market.

From its origins ninety years ago in *Keogh*, the filed rate doctrine has been generally limited in application to common carriers, telecommunication companies, and utilities regulated by *federal* agencies under comprehensive statutes and regulations. *See Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577 (1981). These statutes and regulations provide remedies for harmed consumers and involve active regulator rate-setting. *See AT&T Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 226 (1998). Those rate filings are typically by a *single* entity, whose activities are regulated due to a market's natural monopoly characteristics. *See, e.g., Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 247-48 (1951). Nondiscrimination

in pricing among ratepayers with limited choice is at "the heart of the[se] applicable regulatory statutes." *AT&T*, 524 U.S. at 223. Indeed, in *Keogh*, Justice Brandeis noted that the "paramount purpose of Congress" under the ICA was the "prevention of unjust discrimination" among purchasers of railroad shipping services. 260 U.S. at 163.

Given the "core" purpose of these federal statutes, this Court should require the lower courts, before precluding Section 4 Clayton Act damages actions due to rates filed with state agencies, to examine the nature of the market—whether it tends to be a natural monopoly or whether it is intended to be competitive. The economies of the market will dictate the degree of regulation. As Judge Friendly wrote: "[T]he necessity of implying a repeal of the antitrust laws [is] measured by the pervasiveness of the regulation of the industry in question and the authority of the regulatory agency to perform the antitrust function of regulating competition with respect to the challenged practice." *Square D*, 760 F.2d at 1351.

Here, for example, there is no legislative purpose that all Delaware homeowners must purchase the same title insurance policy at the same price. To the contrary, the legislature encourages competition and forbids collusion. DEL. CODE ANN. TIT. 18, §§ 2501, 2503(c), 2504(b); Bulletin No. 5; *see supra* at 2-3. Given that the legislature intended competition, there is no rate-setting by the DOI. Rather, the legislature contemplated each insurer would independently set its own rates. In a recent decision, the Second Circuit, while applying the filed rate doctrine, wrote as to its limitations: "It is not clear to us that the filed rate doctrine, and the rationales underlying it, should preclude all court scrutiny of alleged anticompetitive behavior" affecting rates not literally set by a regulator;

the doctrine's rationales "do not apply with equal force . . . when the only involvement by a regulator is creating the process ultimately corrupted by parties in the market." *Simon v. Keyspan Corp.*, No. 11-2265-CV, 2012 WL 4125845, at *8 (2d Cir. 2012). Under the undisputed facts here, the regulatory "process" was "corrupted" by Respondents.

3. The Nonjusticiability Strand Requires Active Regulation As A Prerequisite.

While the court below and *Marcus* hold that the nonjusticiability strand alone implicates the filed rate doctrine, as established above, absent a regulated natural monopoly environment, such a rule potentially harms rather than benefits consumers. *See, e.g.*, *AT&T*, 524 U.S. at 221-22; *Hall*, 453 U.S. at 577; *Montana-Dakota*, 341 U.S. at 251-52. Essential to Justice Brandeis' reasoning that the ICC rather than a court should set the rate "at least, in the first instance," was the ICC's authority to "investigate and decide whether a rate has been, whether it is, or whether it would be, discriminatory." *Keogh*, 260 U.S. at 164. In *Carnation*, this Court noted that the Federal Maritime Commission "can approve prospective operations under agreements," but has *no* authority retroactively. 383 U.S. at 222. In that circumstance, this Court found that the award of antitrust "damages for *past and completed conduct*" would "not interfere with any future action of the Commission." *Id.* (emphasis added). Thus, Justice Brandeis' concern simply has no application to an agency whose powers are limited to prospective relief.

Nevertheless, the Third Circuit reasoned that a damages award would require the district court to calculate the "legal rate but for" the antitrust

violations and thereby "interfere" with the DOI's "rate determination." App. 21a-22a. Unlike the ICC in *Keogh*, the DOI cannot "investigate and decide whether a rate has been" illegal. And, as in *Carnation*, an award of antitrust damages would not interfere with any lawful powers of the DOI since it cannot award retrospective compensatory relief. *See supra* at 3. Further, it is the collusion of *private* parties with which a jury would "interfere," not any DOI active decision-making in this "file and use" system.

As stated in *Carnation*, Congress was not concerned "with equality of treatment by juries in collateral proceedings." *See* 383 U.S. at 219 n.3. At trial, the jury would be asked to determine damages just as in any other price-fixing case. Courts regularly deal with antitrust damage issues by comparing the supra-competitive prices charged by defendants with the "but for" competitive price. Absent collusion, filed rates and competitive prices are generally the same. PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAWS 411 (3d ed. 2006). *See also Story Parchment Co. v. Paterson Parchment Paper Co.*, 282 U.S. 555, 563 (1931) ("The wrongdoer is not entitled to complain that [damages] cannot be measured with the exactness and precision that would be possible if the case, which he alone is responsible for making, were otherwise.").

In sum, not a single rationale of *Keogh* justifies extension of the filed rate doctrine to the DOI's passive regulatory scheme. Allowing Section 4 Clayton Act private damages actions in a case such as this would not subject title insurers to duplicative or inconsistent standards, frustrate the operation of the Delaware Insurance Code, or interfere with the DOI's regulatory authority. Thus, this Court should grant this Petition to guide the lower

courts as to those *Keogh* factors which must be satisfied before subordinating the federal antitrust laws to a state regulatory scheme. At bottom, the underlying purpose of Justice Brandeis' reasoning was to shield consumers from harm. The Third Circuit's decision, holding no remedy is required and the nonjusticiability strand alone is sufficient to apply the doctrine, conflicts with other circuit court decisions, the *Keogh* analysis itself, and *Carnation*, among other decisions. The decision transforms the filed rate doctrine into a sword used to harm consumers and to shield antitrust co-conspirators.

II. THE THIRD CIRCUIT'S APPLICATION OF THE FILED RATE DOCTRINE CONFLICTS WITH THIS COURT'S "ACTIVE SUPERVISION" TEST OF THE STATE ACTION DOCTRINE.

Without explanation, and in a way that serves the goals neither of antitrust nor *Keogh*, the decision below and the decisions on which it relied, cause the filed rate doctrine to conflict irreconcilably with the policies this Court has elaborately explained in the closely related context of the state action doctrine.

A. "Meaningful Review" By State Agencies Of Rates Filed Is Required To Maintain Consistency Between The Filed Rate And State Action Doctrines.

In *Ticor*, 504 U.S. at 638, this Court rejected state action immunity on reasoning that inherently conflicts with the result below, reversing the Third Circuit on almost identical facts. *See Ticor Title Ins. Co. v. FTC*, 922 F.2d 1122 (3d Cir. 1991). The Court disapproved the subordination of the antitrust laws to a state government's

passive acquiescence—no "active supervision" of—harms committed by a private price-fixing cartel. This Court rejected state action immunity for "file and use" title insurance regulatory systems because "[t]he mere potential for state supervision" was insufficient to displace the unequivocal commands of Congress. *Ticor*, 504 U.S. at 638.

In *Ticor*, as in other prior decisions of this Court addressing private cartels which jointly fixed and filed rates with state agencies, this Court created a strict test for implied immunity from federal antitrust liability. Under it, such limited immunity is available only when: (1) "the challenged restraint [is] one clearly articulated and affirmatively expressed as state policy;" and (2) "the policy [is] actively supervised by the State itself." *Midcal*, 445 U.S. at 105 (internal quotation marks omitted). "Actual state involvement, not deference to private price fixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." *Ticor*, 504 U.S. at 633.

As the Court has explained:

> "The active supervision requirement stems from the recognition that where a private party is engaging in the anticompetitive activity, there is a real danger that he is acting to further his own interests, rather than the governmental interests of the State . . . . The mere presence of some state involvement or monitoring does not suffice."

Id. at 634 (quoting *Patrick v. Burget*, 486 U.S. 94, 100-01 (1988)).

Without meaningful review of rates filed with state agencies, the filed rate doctrine would eradicate the "active supervision" prong of the *Midcal* test through the simple act of filing a rate. But that has not been the rule. Non-disapproval of rates filed with a state agency, without "active supervision" by the state, has never been sufficient for the application of an exemption in these state action cases. Were the rule otherwise, this Court would have found it unnecessary to have analyzed the facts under *Midcal*'s two-pronged test in several decisions where rates *were filed*. *See Ticor*, 504 U.S. at 627 (state action doctrine unavailable where rates filed in the context of statutory schemes virtually identical to the Delaware "file and use" statute were not "actively supervised"); *324 Liquor Corp. v. Duffy*, 479 U.S. 335, 337 (1987) (same result as to wholesalers of liquor required to "post" monthly price schedules with state liquor authority); *Midcal*, 445 U.S. at 99 (wine-pricing scheme for rates filed with state agency not actively supervised); *Cantor v. Detroit Edison Co.*, 428 U.S. 579, 598 (1976) (utility's practice of providing "free" light bulbs as set out in tariffs filed with state agency violated the Sherman Act).

Given this authority and that *Ticor* was factually identical to the present case, Petitioners urged the Third Circuit to adopt a "meaningful review" or "active supervision" prerequisite to any application of the federal filed rate doctrine to state agency "regulation" to ensure consistency between the doctrines. In rejecting this argument, the Third Circuit concluded "there is no apparent requirement to reconcile the filed rate and state action doctrines, as courts have generally applied them independently." App. 13a n.6. Yet, whether courts have applied the doctrines independently says nothing about

the necessary prerequisites for application of either with respect to cartel price-fixed rates filed with a state agency.

The Third Circuit also rejected as insignificant any semblance of a requirement that there be active supervision of the anticompetitive conduct because "the DOI was required to review the challenged rates"—even though it was a "file and use" system. App. 14a. Yet, "potential" for state regulatory review does not satisfy the standard "where prices or rates are set as an initial matter by private parties, subject only to a veto if the State chooses to exercise it." *See Ticor*, 504 U.S. at 638. "The national policy in favor of competition cannot be thwarted by casting such a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106.

Under Delaware's "file and use" system, rates are to be set by each insurer and those rates automatically become effective unless *later* disapproved by the DOI. DEL. CODE ANN. TIT. 18, § 2506(a). The DOI has never properly reviewed, or been able to properly review, title insurance rates in Delaware for reasonableness and accuracy. *See supra* at 2-3; *infra* at 26-28. This falls drastically short of the necessary active supervision that is a prerequisite to application of the state action exemption.

In short, the Third Circuit's decision calls into question the purpose of drawing strict parameters around the state action exemption if the mere filing of rates could create an implied antitrust exemption under the same facts where the state action doctrine would not apply. Because the state itself does not establish the title insurance rates at issue, absent active supervision or meaningful review,

the *per se* illegal rates are simply those of the private co-conspirators.

The Petition should be granted to clarify those parameters, if any, under which the filed rate doctrine is to be applied to foreclose Clayton Act Section 4 enforcement for rates filed with a state agency. This Court should hold that the *Midcal* active supervision or similar test must be satisfied as a prerequisite to application of the filed rate doctrine to rates filed with a state agency. Such a rule would preserve the clear disfavor of implied exemptions from antitrust liability.

B. A Rate Filing Which Is Statutorily Deficient Precludes Meaningful Review And Should Preclude Application Of The Filed Rate Doctrine.

Absent strict compliance with statutory mandates, "it would be monumentally difficult to enforce the requirement that rates be reasonable and nondiscriminatory . . . and virtually impossible for the public to assert its right to challenge the lawfulness" of the filed rates. *Maislin Indus., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131-32 (1990) (quotations omitted). Strict compliance with all statutory mandates is "utterly central" as a prerequisite to the filed rate doctrine's application, *id.* at 131-32 (ICC's negotiated rates policy invalid as "flatly inconsistent" with the ICA), in light of the "purpose of the filed rate doctrine . . . 'to ensure that rates are both reasonable and nondiscriminatory.'" *Sec. Servs., Inc. v. K Mart Corp.*, 511 U.S. 431, 435 (1994) (quoting *Maislin*, 497 U.S. at 119).

A prerequisite to application of the filed rate doctrine is that the rates must be "properly filed" and supported,

Hall, 453 U.S. at 577, because the state cannot otherwise exercise meaningful review of the rates. A filed rate that lacks an "essential element" or does not comply with an applicable regulation is *void ab initio* and precludes any application of the doctrine. *K Mart*, 511 U.S. at 441. A rate filed pursuant to a regulation enacted contrary to the agency's enabling statute disallows application of the filed rate doctrine. *Maislin*, 497 U.S. at 130. Any rates that are filed pursuant to administrative regulations or policies that deviate from or purport to waive statutory mandates are improper and unenforceable. *Id.* at 134-35.

The Delaware legislature described as its purpose that insurance rates shall be reasonable, i.e., rates are not to be "excessive, inadequate or unfairly discriminatory." DEL. CODE ANN. TIT. 18, § 2501. To accomplish this purpose it required filed rates to be: (1) supported by loss cost data; and (2) determined independently by each insurer. *See* DEL. CODE ANN. TIT. 18, § 2504.

Although Respondents violated both legislatively-mandated filing prerequisites, the Third Circuit, nevertheless, found the rates properly filed. First, Respondents' rates were filed without statutorily mandated loss cost data and thus no meaningful review of those rates could occur. Without addressing this Court's analysis in *K Mart* and *Maislin* or the DOI's inability to conduct meaningful review without Respondents' loss cost data, the court suggested that Bulletin No. 27 was an authorized waiver. However, the statute cited by the court merely permits an insurer to *use rates* "which cannot practicably be filed before they are used." DEL. CODE ANN. TIT. 18, § 2505.

Second, implicitly recognizing the statutory mandate for independent action, the Third Circuit concluded that Bulletin No. 27's "exception . . . necessarily included the directive to individually determine and file rates." App. 19a n.10. The Court erred and improperly drew inferences against Petitioners. *See* FED. R. CIV. P. 12(b)(6). Respondents' 2003 request was, however, for an exemption from the statutory obligation to provide loss cost data to the DOI, *not* for permission to jointly fix rates. *See supra* at 4. Further, had Bulletin No. 27 waived the "independent company decision-making process" mandate, such waiver, as with the purported waiver of filing loss cost data, per *Maislin*, would be an *ultra vires* act, contrary to sections 2503 and 2504. *See Am. Ship Bldg. Co. v. Nat'l Labor Relations Bd.*, 380 U.S. 300, 318 (1965) (agency action invalid as inconsistent with governing statute). *See also* DEL. CODE ANN. TIT. 18, § 311(a). Thus, Respondents' rates were statutorily deficient and precluded any DOI determination regarding the rates' compliance with the Delaware Insurance Code. The Third Circuit's finding to the contrary is also in conflict with the Tenth Circuit's decision in *Ton Services, Inc. v. Qwest Corp.*, 493 F.3d 1225, 1237 (10th Cir. 2007) (refusing to apply the filed rate doctrine because defendant utility failed to provide necessary "supporting cost data" with its filed rates, "preclud[ing] regulators from determining . . . compliance" with filing requirements).

In sum, the Third Circuit improperly permitted a state agency's *ultra vires* "bulletin" and *inaction* under a "file and use" system to exempt a *per se* antitrust violation. This Petition for A Writ of Certiorari should therefore be granted to properly interpret and apply this Court's decisions in *Maislin* and *K Mart*, address the conflict with *Ton*, and rule that strict compliance with governing

statutes and regulations is required before applying the filed rate doctrine to rate filings with state agencies.

III. THIS CASE IS WELL-SUITED TO ADDRESS ISSUES OF RECURRING AND NATIONAL IMPORTANCE.

The application of the filed rate doctrine to state agency activity is and will continue to be a recurring issue facing the lower courts. The "[s]tates regulate their economies in many ways," *Ticor*, 504 U.S. at 635-36, through their various agencies and political subdivisions. They carry on the vast majority of regulation affecting interstate commerce, from regulation of real estate to state chartered banks. In every one of these endeavors, the opportunity for price-fixing exists. If a statute, regulation, or ordinance permits the filing of a collusively fixed price, the decision below would support a Clayton Act Section 4 exemption by a "mere filing" of it. The Third Circuit, like the First, Second, and Fifth Circuits, requires no "certain type of agency approval or level of regulatory review," no requirement of meaningful review, no requirement of a comprehensive statutory scheme providing those adversely affected by the price-fix with remedies, and no requirement of actual approval since "non-disapproval" is sufficient. App. 12a-13a. All that is required, in these circuit courts, is a statute, regulation, or ordinance permitting a rate to be filed and the *opportunity* for it to be reviewed.

For these and at least two additional reasons, this case is the perfect vehicle for addressing the question presented. *First*, there are no disputed facts because the case arises from the grant of a motion to dismiss that was affirmed by the court of appeals.

Second, this Court should address the inevitable—as evinced by the circumstances here—intersection of the filed rate and state action doctrines in addressing rates filed with state agencies. The varying application of the state action doctrine alone has caused the State Action Task Force of the Federal Trade Commission to issue a report recommending efforts to strengthen the *Midcal* test requirements. OFFICE OF POLICY PLANNING, FEDERAL TRADE COMMISSION, REPORT OF THE STATE ACTION TASK FORCE 3 (2003), *available at* http://www.ftc.gov/os/2003/09/stateactionreport.pdf.

This Court's decision will guide the lower courts on the extent of state agency review required of filed rates and set the standard to ensure that the national policy favoring competition is not thwarted. Despite Delaware statutory law requiring independent rate determinations, Respondents were permitted to form a cartel and jointly fix and file their rates. Given the Third Circuit's decision, these same entities that control over 98% of the market in Delaware, App. 29a, will likely do so again in the other 20 "file and use" states (if they have not already done so). They will exact monopoly rents from consumers in markets—in which each Respondent should be competing on price and product features—with the comfort, under the Third Circuit's approach, that having filed their cartel-fixed rates, they will have no antitrust damages concerns.

Title charges "are a substantial part of the cost of obtaining a home mortgage." SUSAN E. WOODWARD, U.S. DEP'T OF HOUSING & URBAN DEV., A STUDY OF CLOSING COSTS FOR FHA MORTGAGES 86 (May 2008). As noted in the study, for nonsubsidized loans, title charges average $1,200 per loan—just slightly lower than the average $1,300 paid to lender/brokers, and close to *half* of the average

borrower's down payment. *Id.* Following a detailed analysis, the study was not able to explain the drastic state-by-state differences in title insurance rates except to place responsibility on private cartel behavior. *Id.* at 95, 104. A 2007 Report issued by the U.S. Government Accountability Office has reached similar conclusions that illegal activities occur in the industry resulting in consumer overpayment for title insurance. *See* U.S. GOV'T ACCOUNTABILITY OFFICE, TITLE INSURANCE: ACTIONS NEEDED TO IMPROVE OVERSIGHT OF THE TITLE INDUSTRY AND BETTER PROTECT CONSUMERS 21 (Apr. 2007), *available at* http://www.gao.gov/new.items/d07401.pdf.

In summary, this Court should reject the rote application of the filed rate doctrine based on nothing more than the mere filing of rates with a state agency. This Court should require the lower courts to examine the applicable state regulatory framework to determine whether there is a specific purpose to displace competition, examine whether the state exercises meaningful review of the filed rates, and determine whether the principal foundational rationales of *Keogh*—most importantly, the availability of a compensatory remedy for direct purchasers—are satisfied by the state regulatory scheme. Such a requirement will:

> (1) resolve the dispute among the circuit courts regarding the application of the filed rate doctrine when a state regulator "does not disapprove" of or meaningfully review filed rates;
>
> (2) clarify the *Keogh* factors that must be satisfied before subordinating the federal antitrust laws to a state regulatory scheme;

(3) establish that the *Midcal* active supervision or similar test must be satisfied as a prerequisite to application of the filed rate doctrine to rates filed with a state agency; and

(4) ensure that strict compliance with governing statutes and regulations is required prior to application of the filed rate doctrine to ensure that state agencies exercise meaningful review of filed rates.

CONCLUSION

For the foregoing reasons, the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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