No. 12-527

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

REPLY BRIEF

JOHN S. SPADARO
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road, Suite 375
Stone Mill Office Park
Hockessin, Delaware 19707
(302) 235-7745

VINCENT J. ESADES
HEINS MILLS AND OLSON, P.L.C.
310 Clifton Avenue
Minneapolis, Minnesota 55403
(612) 338-4605

RICHARD M. HAGSTROM
Counsel of Record
MICHAEL R. CASHMAN
AARTHI MONICA GEYEN
ZELLE HOFMANN VOELBEL & MASON, LLP
500 Washington Avenue South
Suite 4000
Minneapolis, Minnesota 55415
(612) 339-2020
RHagstrom@zelle.com

Counsel for Petitioners

245693

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

TABLE OF CONTENTS

Page

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

STATUTES AND RULES

INTRODUCTION

In their Opposition ("Opp."), Respondents fundamentally misunderstand Petitioners' central argument. The issue presented here is whether the highly criticized filed rate doctrine rather than the state action doctrine applies in determining whether persons who collusively fix and file prices with a *state* agency are exempt from a treble damages action under Section 4 of the Clayton Act. *See* 15 U.S.C. § 15 (2006). The Third Circuit answered this question—one of first impression before this Court—erroneously.

This matter is acutely appropriate for certiorari because the result below creates a serious conflict with this Court's antitrust federalism, a conflict that only this Court is well situated to resolve. Since *Parker v. Brown*, 317 U.S. 341 (1943), this Court has elaborated a careful framework to accommodate the interplay of the federal antitrust laws and state regulation. As *California Retail Liquor Dealers Association v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105-06 (1980) held, *Parker* tolerates state-sanctioned private anticompetitive conduct only when done pursuant to (a) "clearly articulated" state policy that is (b) "actively supervised" by the state. In *FTC v. Ticor Title Insurance Co.*, 504 U.S. 621, 634-35 (1992), a case with essentially indistinguishable facts from this one, the Court required active supervision to assure that "the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." Like *Ticor*, this case involves "horizontal

price-fixing under a vague *imprimatur* in form and agency inaction in fact." *See id.* at 639.

Respondents ignore this fundamental theoretical conflict by: (a) insisting on the application of the federal filed rate doctrine to state regulation, displacing the only authority from this Court on rate filings with state agencies;[1] and (b) questioning the existence of a circuit conflict. But quite to the contrary, this case presents the ideal vehicle for this Court finally to answer this substantively significant question of first impression. This Court should hold that the filed rate doctrine does not apply to state-filed rates, and that collusive rates filed with state agencies must either satisfy *Midcal*'s two-pronged analysis or face full antitrust exposure.

Moreover, the Third Circuit, like other courts of appeal, erroneously interpreted a comment in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 n.19 (1986)—the filed rate doctrine applies "whenever tariffs have been filed"—to conclude that the doctrine applies not just to rate filings with federal agencies, but that it should also be expanded to *state* agencies. But other courts, including the Ninth Circuit in *Brown v. Ticor Title*

[1] Respondents never directly address the federalism issue and not until the final paragraph in their Opposition do they acknowledge it. They simply repeat the Third Circuit's observation that, since *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 20 (2d Cir. 1994), some circuits have expanded the filed rate doctrine to state regulatory agencies. Petitioners and their *amici* have already explained why this Court should reject those decisions as irreconcilably in conflict with this Court's elaborate, decades-long antitrust federalism.

Insurance Co., 982 F.2d 386 (9th Cir. 1992)—a case challenging literally the same conduct by the same parties as in this Court's *Ticor* ruling—preserved the state action analysis to rates filed with state agencies. *See* Pet. 14.

Certiorari should be granted to address: (a) this matter of first impression resulting from the Third Circuit's expansion of the federal filed rate doctrine to state price regulation, thereby displacing this Court's state action analytical framework; (b) and the very real theoretical conflict among the courts of appeal, Pet. 13-14.[2] *See* SUP. CT. R. 10(A), (C).

I. RESPONDENTS FAIL TO RESOLVE THE CONFUSION IN ANTITRUST FEDERALISM POSED BY THE THIRD CIRCUIT'S FILED RATE PROTECTION OF RATES FILED WITH STATE AGENCIES.

According to Respondents, Petitioners "cite no case" holding the filed rate doctrine inapplicable "to rates filed with a state agency," rather than "a federal agency." Opp. 29. Yet, the burden is on Respondents to demonstrate why the federal filed rate doctrine should be expanded to state regulation and displace the *Midcal* analysis. Respondents cite no case of this Court holding the federal filed rate doctrine applicable to state regulation nor do they explain any value of federalism or federal

[2] Indeed, in a similar case decided the same day as this case, the Third Circuit suggested these issues should be decided by this Court. *See In re N.J. Title Ins. Litig.*, 683 F.3d 451, 453 (3d Cir. 2012).

competition policy served by such an expansion. Indeed, this Court has repeatedly found the federal antitrust laws to reach state price regulation. *See, e.g.*, *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386 (1951).

The fundamental conflict results from whether the lower courts should follow: *Square D* (where rates were filed with a *federal* agency); or *Ticor*, *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), *Midcal*, *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), and *Parker* (where rates were filed with a *state* agency). Respondents acknowledge that the federal filed rate doctrine is *"an entirely unrelated defense*" to *Midcal*'s analysis. Opp. 27 (emphasis added). Yet, they attempt to erroneously supplant *Midcal*'s long-established analytical framework with the federal filed rate doctrine.

First, citing *Square D*'s footnote 19 multiple times, Respondents insist that *Square D* holds the filed rate doctrine applies not only "whenever tariffs have been filed" but "wherever" those rates are filed—including with state agencies.[3] But, *Square D* does not so hold. The central issue there was not *expansion* of the federal filed rate doctrine. Rather, the issue was the doctrine's continued viability, given the erosion over many years of the original purposes stated in *Keogh v. Northwestern Railway Co.*, 260 U.S. 156 (1922). *See Square D*, 476 U.S. at 420

[3] Notably, although Respondents criticize Petitioners' characterization of the "mere filing" standard, Opp. 14-15, they fail to identify any other criteria required for application of the filed rate doctrine.

(acknowledging that the doctrine may have been "unwise as a matter of policy"). The Court relied on a "clear congressional awareness" of *Keogh* and *stare decisis* to continue the doctrine's application in the "context" of the Interstate Commerce Act. *Square D*, 476 U.S. at 419, 424. There is no "congressional awareness" or basis in precedent for *extending* the federal filed rate doctrine to rate filings with state agencies. *See Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899-900 (2007) (application of *stare decisis* under the antitrust laws is limited). On the other hand, *Ticor*, *Duffy*, *Midcal*, *Cantor*, and *Parker* are *stare decisis* as to rates filed with state agencies—the state action doctrine applies—not the "entirely unrelated" federal filed rate doctrine.

Further proof that *Square D* was not meant to reach state rate regulation was its failure to mention *Midcal* in any way. Given that Respondents' proposed application of *Square D*'s footnote 19 would reverse or at least significantly qualify *Midcal*'s "active supervision" prong "whenever rates are filed," the Court surely would have said so. Since it did not, Respondents' "wherever" filed argument must be rejected.[4]

Second, Respondents believe the federal courts owe an extraordinary deference to any state

---

[4] Two other decisions of this Court cited by Respondents likewise involved only *federal* rate filings, and also failed to cite either *Parker* or *Midcal*. Opp. 2, 20 (citing *Montana-Dakota Utils. Co. v. Northwestern Pub. Serv. Co.*, 341 U.S. 246, 251 (1951); *Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 374 (1988).

preference for "nonjusticiable" state rate regulation. Opp. 25. The important distinction, they say, is that "state action immunity addresses the relationship between the federal and state governments, while the filed rate doctrine addresses the relationship between courts and regulatory agencies." Opp. 25. "In Delaware," they continue, the Department of Insurance ("DOI") "has the sole power and responsibility for regulating title insurance rates," and that agency, "not [the] federal courts," is "tasked with ensuring that those rates are not excessive, inadequate or unfairly discriminatory." Opp. 16 (internal quotations omitted).[5]

Respondents' dichotomy is erroneous. The state action doctrine applies to states, state regulatory agencies, and subordinate entities. This Court's filed rate decisions pertain to federal agencies, and its state action decisions apply to states *and* their

[5] It bears repeating that on the facts alleged, which on their procedural posture must be taken as true, this exceptional deference would apply even where state-filed rates are effectively unregulated by the state. Although Respondents argue they may "cooperate," Opp. 5, Delaware, as a "file and use" state, requires that each entity independently set and file its rate. Pet. 2-3, 19. Because Delaware law also assumes that the rate filed will be competitive, there is no need for any DOI action. Respondents circumvented this procedure by collusively fixing their rates *prior* to filing their uniform rates. In these circumstances, the DOI did nothing to *determine* the rates with which a federal court would interfere. Further, since the DOI has no authority to award compensatory relief, Pet. 4, 18, a fact Respondents do not challenge, a jury's award would not interfere with any authority of the DOI.

subordinate entities.[6] Moreover, the federal policy Respondents cite for such deference applies to federal, not state agencies.[7] It provides no basis to avoid *Midcal*'s two-pronged test. Indeed, "[a]ctual 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 (emphasis added). "[S]tate regulation [that] merely takes the form of approval of a tariff proposed" leaves price-fixers subject to treble damages relief. *Cantor*, 428 U.S. 599 (1976). In short, Respondents demand what this Court refused in *Cantor*—exemption from damages for private wrongdoing merely because rate

---

[6] *See Cmty. Commc'ns Co. v. City of Boulder*, 450 U.S. 40 (1982); *Midcal*, 445 U.S. 97; *City of Lafayette v. La. Power & Light Co.*, 435 U.S. 389 (1978); *Parker*, 371 U.S. 341.

[7] Respondents correctly note that *Keogh*'s nonjusticiability prong was based on concurrent jurisdiction and deference to agency authority and decision-making, there the Interstate Commerce Commission. *Keogh*, 260 U.S. at 164 (citing *Tex. & Pac. Ry. Co. v. Abilene Cotton*, 204 U.S. 426 (1907)). More than once, Respondents represent that "this Court" has "repeatedly" held that the filed rate doctrine precludes a federal district court from "inject[ing] itself into [a state agency's] regulatory framework." Opp. 2-3, 13. Deference to agency decision-making applies only to agencies "created by Congress"—*not* state agencies—to share "concurrent jurisdiction" with the federal courts for enforcement of the *same federal statutory scheme*. *Far East Conference v. United States*, 342 U.S. 570, 574-75 (1952). Since the federal courts have exclusive jurisdiction over federal antitrust claims, no deference is given state agency decisions affecting those laws. *See* 15 U.S.C. §§ 15(a), 26 (2006); *Gen. Inv. Co. v. Lake Shore & M. S. Ry. Co.*, 260 U.S. 261, 286-88 (1922). Yet, the Third Circuit's decision unequivocally subordinates Clayton Act § 4 rights to state agency inaction.

filing "was permitted or required by state law." *See id.* at 600.

If this Court had granted deference to the state agencies involved in *Ticor*, *Duffy*, *Midcal* and *Cantor*, it would never have reached the "active supervision" prong. Since each case was decided on the respective state agency's absence of "active supervision," even where those agencies were statutorily "required" to undertake certain supervisory activities, proves Respondents' deference argument is misplaced and the filed rate doctrine has no application to state agency regulation. *See Ticor*, 504 U.S. at 627; *Duffy*, 479 U.S. at 337; *Midcal*, 445 U.S. at 99; *Cantor*, 428 U.S. at 598. The filing of rates was simply irrelevant to liability for the anticompetitive conduct at issue.

Third, Respondents say that "state action immunity offers more protections to a defendant than the filed rate doctrine," Opp. 25, and reason that, "[g]iven that [state action] . . . sweeps so much more broadly . . . it is not surprising that this Court requires active supervision" for one but not the other. Opp. 26. The difference is irrelevant. Respondents' distinction might explain why the filed rate analysis of *federally* filed tariffs differs from this Court's analysis of conflicts between federal antitrust and other federal regulatory regimes. *See, e.g.*, *Credit Suisse Sec. (USA) LLC v. Billing*, 551 U.S. 264, 275-76 (2007) (elaborating a four-step inquiry for "implied repeal" of antitrust by federal securities laws). But the distinction supplies no substantive policy reason relevant to either federalism or federal competition law that the federal courts should extend such deference so dramatically and subordinate

national antitrust policy to some state administrator's inaction, simply because a state adopts some "filing" requirement.[8]

II. THE CIRCUITS' DISPARATE APPLICATION OF THE STATE ACTION AND FILED RATE DOCTRINES AS TO STATE REGULATION HAS CREATED A CONFLICT.

Respondents say there is no circuit split for two reasons—that *Brown*'s state action approach was "foreclosed" by *Square D*, and that *Brown* is not followed by later Ninth Circuit decisions. Opp. 2-3, 20-22. They are mistaken.

First, the Ninth Circuit's *Brown* decision was issued seven years after *Square* D. *Brown* refused to find a filed rate exemption for private price-fixing in state title insurance regulatory regimes virtually identical to Delaware's. *Brown* relied on *Midcal*'s state action analysis, but more importantly, *Ticor*'s, which was decided earlier that year. *See* Pet. 11-12. The *Brown* decision therefore is part of a circuit split with the decisions of other courts which instead rely on *Square D*.[9]

---

[8] In addition to there being no federalism or other antitrust policy reasons to extend the federal filed rate doctrine to state regulation, the *Keogh* policy reasons support no such expansion either. Pet. 15-22.

[9] If this Court were to expand the filed rate doctrine to state regulation, a "meaningful review" prerequisite is necessary to avoid displacing *Midcal*'s analysis. Pet. 24. The need for "meaningful review" is established here. The DOI did not enforce the statutes and regulations requiring each Respondent

Second, the cases Respondents cite to show the Ninth Circuit's own disregard for *Brown* each involved federal, not state, agency regulation, and thus have no relevance to the issue presented here. Opp. 21-22. *See Carlin v. DairyAmerica, Inc.*, 688 F.3d 1117, 1118-19 (9th Cir. 2012) (United States Department of Agriculture); *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1224 (9th Cir. 2007) (Federal Energy Regulatory Commission ("FERC")); *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1033 (9th Cir. 2007) (FERC); *In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 754 F. Supp. 2d 1239 (W.D. Wash. 2010), *aff'd*, 450 Fed. Appx. 685, 688 (9th Cir. 2011) (Surface Transportation Board).

III. CONGRESS HAS NOT EXTENDED ANY CLAYTON ACT SECTION 4 EXEMPTION TO RATE FILINGS WITH STATE AGENCIES.

"Antitrust laws in general, and the Sherman Act in particular, are the Magna Carta of free enterprise." *Midcal*, 445 U.S. at 110 (quotations omitted). This Court has held that its "decisions reflect the principle that the federal antitrust laws pre-empt state laws authorizing or compelling private parties to engage in anticompetitive behavior." *Duffy*, 479 U.S. at 345 n.8. "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." *Schwegmann*, 341 U.S. at 386.

---

to "individually determine" *its* rates and file supporting loss cost data. Pet. 2-5.

While Congress has enacted various laws permitting price-fixing in certain industries,[10] Congress has enacted no exemption applicable here. *See* Pet. 11. National antitrust policy commands that *all* rates charged by *all* firms will be regulated by free competition, kept healthy by antitrust, except as *Congress* permits otherwise, or as state governments instruct, subject to the limits in this Court's state-action analytical framework. *Ticor*, 504 U.S. at 633. Nevertheless, the Third Circuit, and other circuits, by extending the treble damages exemption of the federal filed rate doctrine to state filings, have created an exemption not authorized by Congress, which is contrary to the state action doctrine precedent of this Court, and improperly limits the scope of Clayton Act § 4 damages claims. *See Cantor*, 428 U.S. at 598-99 (utility was subject to treble damages liability for filed tariff).

Given Respondents' *per se* illegal price-fixing, the effect of the Third Circuit's decision (and those of other courts) is to foreclose consumers from their right to recover paid overcharges if the price-fixers chose to "file" their price schedules with some state agency. In short, absent action by this Court, Respondents, and other price-fixers like them, will be permitted to keep their ill-gotten gains.[11]

---

[10] *See* Capper-Volstead Act, 7 U.S.C. §§ 291-92 (2006) Clayton Act Section 6 (Labor Exemption), 15 U.S.C. § 17 (2006); Miller-Tydings Act, Pub. L. No. 314, 50 Stat. 693 (1937), *repealed by* Consumer Goods Pricing Act of 1975, Pub. L. No. 94-145, 89 Stat. 801 (1975).

[11] Respondents claim this case is a "poor vehicle" for certiorari since "meaningful review" occurred and because a

CONCLUSION

For the foregoing reasons, the Court should grant certiorari to address whether, as a matter of first impression, the federal filed rate doctrine is to displace *Midcal*'s state action analysis whenever rates or prices are filed with state agencies and to resolve the conflict between the circuits as to that issue. SUP. CT. R. 10(A), (C).

---

later "statistical plan" was submitted to the DOI. Opp. 22. Respondents' arguments are misplaced. First, Respondents' claim of "meaningful review" is based on the applicable DOI statutes that purportedly "require" certain action. However, as established above, absent actual evidence of activity, such statutes alone are insufficient. *See supra* at 6-7; Pet. 25. Indeed *Ticor* remanded for further fact-finding on the "active supervision" issue. 504 U.S. at 632. In any event, the theoretical conflict remains. Second, there is no evidence in the record of a statistical plan. Even if there was such a plan submitted to the DOI, it is irrelevant as dated long after Respondents' price-fixing and filing of their collusive rates.

Respectfully submitted,

Richard M. Hagstrom
Counsel of Record
Michael R. Cashman
Aarthi Monica Geyen
ZELLE HOFMANN VOELBEL & MASON, LLP
500 Washington Avenue South
Suite 4000
Minneapolis, Minnesota 55415
(612) 339-2020

John S. Spadaro
JOHN SHEEHAN SPADARO, LLC
724 Yorklyn Road, Suite 375
Stone Mill Office Park
Hockessin, Delaware 19707
(302) 235-7745

Vincent J. Esades
HEINS MILLS AND OLSON, P.L.C.
310 Clifton Avenue
Minneapolis, Minnesota 55403
(612) 338-4605

Counsel for Petitioners