No. 12-527

IN THE

Supreme Court of the United States

DAWN A. MCCRAY, *ET AL.*,

Petitioner,

v.

FIDELITY NATIONAL TITLE INSURANCE COMPANY, *ET AL.*,

Respondent.

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether Petitioners have presented compelling reasons to grant the Petition where the Third Circuit's unanimous opinion, authored by Judge Dolores K. Sloviter and joined by Chief Judge Theodore A. McKee and Justice Sandra Day O'Connor (sitting by designation), applied the well-established and longstanding filed rate doctrine to bar Petitioners' challenge to title insurance rates filed with the Delaware Department of Insurance.

CORPORATE DISCLOSURE STATEMENT

Counsel for Respondents Fidelity National Financial, Inc., Fidelity National Title Insurance Company, Chicago Title Insurance Company, Ticor Title Insurance Company, Ticor Title Insurance Company of Florida, Security Union Title Insurance Company, Commonwealth Land Title Insurance Company, Lawyers Title Insurance Corporation, and Transnation Title Insurance Company certifies that:

- Fidelity National Financial, Inc. is a publicly traded corporation. No publicly held corporation owns 10% or more of Fidelity National Financial, Inc.'s stock.

- Fidelity National Financial, Inc. is the parent corporation of the wholly owned subsidiary FNTG Holdings, Inc.

- FNTG Holdings, Inc. is the parent corporation of the wholly owned subsidiary Fidelity National Title Group, Inc.

- Fidelity National Title Group, Inc. is the parent corporation of the wholly owned subsidiaries Fidelity National Title Insurance Company and Chicago Title Insurance Company.

- Ticor Title Insurance Company, Ticor Title Insurance Company of Florida, and Security Union Title Insurance Company have merged into Chicago Title Insurance Company.

- Transnation Title Insurance Company merged into Lawyers Title Insurance Corporation, which has merged into Fidelity National Title Insurance Company.

- Chicago Title Insurance Company is the parent corporation of the wholly owned subsidiary Commonwealth Land Title Insurance Company.

Counsel for Respondents The First American Corporation, First American Title Insurance Company, Censtar Title Insurance Company, United General Title Insurance Company, and T.A. Title Insurance Company certifies that:

- The parent corporation of First American Title Insurance Company is First American Financial Corporation, which is a publicly traded corporation and owns more than 10% of First American Title Insurance Company's stock.

- The parent corporation of United General Title Insurance Company, T.A. Title Insurance Company, and Censtar Title Insurance Company is First American Title Insurance Company.

- First American Financial Corporation is the successor in interest to The First American Corporation with respect to the issues in this case.

Counsel for Respondents Stewart Title Guaranty Company and Stewart Information Services Corporation certifies that:

- Stewart Title Guaranty Company is a wholly owned subsidiary of Stewart Information Services Corporation. No publicly held corporation owns 10% or more of Stewart Information Services Corporation's stock.

Counsel for Respondents Old Republic International Corporation and Old Republic National Title Insurance Company certifies that:

- Old Republic International Corporation is a publicly traded corporation.

- Old Republic National Title Insurance Company is 100% owned by Old Republic National Title Holding Company, which is in turn owned by Old Republic International Corporation.

Counsel for Respondent Delaware Title Insurance Rating Bureau certifies that:

- Delaware Title Insurance Rating Bureau is a Delaware not-for-profit corporation and has no corporate parents, subsidiaries, or affiliates that are publicly held.

TABLE OF CONTENTS

Table of Contents

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Page

Page

Cited Authorities

Page

Page

Page

Page

STATUTES

INTRODUCTION

Petitioners seek review of the Third Circuit's opinion affirming the District of Delaware's dismissals of their Class Action Complaint and Amended Class Action Complaint. The complaints allege that Respondents – title insurance companies and the Delaware Title Insurance Rating Bureau ("DTIRB") – conspired to fix title insurance rates in Delaware in violation of the Sherman Act. DTIRB, a state-licensed rating organization (or rating bureau), files rates with the Delaware Department of Insurance on behalf of its title insurer members. Once those title insurance rates become effective, they are the only rates Delaware law permits Respondents to charge. The Third Circuit determined, in line with nearly a century of this Court's case law and decisions of other circuit courts across the country, that the filed rate doctrine bars claims such as Petitioners' challenging the reasonableness of these filed rates.

Petitioners present no "compelling reasons" for their Petition for a Writ of *Certiorari* (the "Petition") to be granted. Sup. Ct. R. 10. Petitioners fail to demonstrate that the Third Circuit's decision conflicts with a decision of this Court or any circuit court, or that the Third Circuit decided an important federal question that has not been settled by this Court. Sup. Ct. R. 10(a), (c). In fact, the decision below follows settled filed rate doctrine law from this Court and accords with the decisions of other circuit and district courts in parallel litigation brought in other states. Petitioners' Sherman Act claim is nothing more than an impermissible request for a federal district court to inject itself into Delaware's title insurance regulatory framework in order to replace the Department

of Insurance's judgment about title insurance rates in Delaware with the court's judgment. That is precisely what this Court and the circuit courts have repeatedly held to be prohibited by the filed rate doctrine.

Petitioners base their Petition on two primary grounds, neither of which warrant review by this Court. First, Petitioners attempt to create the appearance of a circuit split where none exists, arguing that the Ninth Circuit requires "meaningful review" of filed rates by a regulatory agency in order for the filed rate doctrine to apply. This argument, however, is foreclosed by this Court's decision in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986). In *Square D*, this Court rejected the argument that the filed rate doctrine applies only when rates have been "investigated and approved" by the regulatory agency and held that the doctrine applies "whenever tariffs have been filed." *Id.* at 417 n.19 (citation omitted); *see Montana-Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251 (1951) (holding the petitioner "can claim no rate as a legal right . . . other than the filed rate, whether fixed or merely accepted by the [regulatory agency]"); *see also Miss. Power & Light Co. v. Mississippi*, 487 U.S. 354, 374 (1988) ("The Mississippi Supreme Court erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter was actually determined in the FERC proceedings.").

Moreover, Petitioners' concocted circuit split is based entirely on one Ninth Circuit decision, *Brown v. Ticor Title Insurance Co.*, 982 F.2d 386 (9th Cir. 1992), that is not even followed within the Ninth Circuit. Just last year, the Ninth Circuit stated, "like the district courts that have addressed

the issue, we do not read *Brown* as making meaningful agency review a *sine qua non* for the applicability of the filed rate doctrine." *Carlin v. DairyAmerica, Inc.*, 688 F.3d 1117, 1132 (9th Cir. 2012) (citations omitted); *see also In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 450 F. App'x 685, 688 (9th Cir. 2011) (rejecting argument that "meaningful agency review is a prerequisite to the filed rate doctrine"). Thus, all of the circuits that have addressed the issue follow this Court's holding in *Square D* and do not require "meaningful review" before applying the filed rate doctrine. *See Dolan v. Fidelity Nat'l Title Ins. Co.*, 365 F. App'x 271, 274 (2d Cir. 2010) ("It is well-established that the doctrine applies to all filed rates, not merely those rates investigated."), *cert. denied*, 131 S. Ct. 261 (2010); *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000) (rejecting an argument that "rates should not be shielded by the doctrine" because regulators "nominally oversee . . . rate-setting" but "rarely exercise their muscle"); *Town of Norwood v. New Eng. Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000) ("It is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine." (emphasis omitted)); *see also In re N.J. Title Ins. Litig.*, 683 F.3d 451, 458-59 (3d Cir. 2012) (rejecting a "meaningful review" requirement for the filed rate doctrine).

Second, Petitioners seek to import the requirements of a distinct doctrine, state action immunity, into the filed rate doctrine, arguing that these two separate defenses must have the same elements and must be interpreted and applied in the same fashion, solely because this case presents a scenario in which either defense (as well as other defenses) could potentially bar Petitioners' claim. Petitioners do not argue that there is a circuit split on this

issue. Indeed, Petitioners do not cite a single case that says in holding or in dicta that state action immunity and the filed rate doctrine must be interpreted and applied coextensively. They are distinct doctrines that serve different purposes, have different elements, and can result in different outcomes. The state action doctrine is an immunity grounded in principles of federalism that bars antitrust claims regardless of whether they seek money damages or equitable relief, whether they are brought by regulators, prosecutors, or private plaintiffs, or whether they challenge the reasonableness of rates filed with a regulatory agency. The filed rate doctrine is not an immunity, is not grounded in federalism but in principles relating to the role of agencies versus the role of courts, is not limited to antitrust claims, applies only to damages claims and certain equitable claims, does not bar claims by regulators or prosecutors, and applies only to claims by private plaintiffs that challenge the reasonableness of rates filed with a regulatory agency. There is no basis to superimpose the requirements of state action immunity onto the filed rate doctrine simply because this case includes an antitrust claim and was brought in federal court.

Despite Petitioners' attempt to paint the Third Circuit's opinion as a radical departure from filed rate doctrine law, this is a simple case that indisputably challenges the reasonableness of title insurance rates approved by the Delaware Department of Insurance. Petitioners have failed to establish any compelling reason to review the opinion. This Court has already denied *certiorari* in two virtually identical cases, and this Petition should be denied as well. *See Dolan*, 131 S. Ct. 261; *Winn v. Alamo Title Ins. Co.*, 131 S. Ct. 225 (2010).

COUNTERSTATEMENT OF THE CASE

A. DTIRB Files Title Insurance Rates In Delaware Pursuant To A Legislatively Adopted Regulatory Framework

In Delaware, title insurance is governed by a comprehensive statutory framework under which the Delaware Department of Insurance regulates title insurance rates. Del. Code Ann. tit. 18, § 2501 (Pet. App. D at 54a), *et seq.*[1] Title insurers are required to file rates with the Commissioner of the Department of Insurance. *Id.* § 2504 (Pet. App. D at 55a-56a). Delaware law enumerates factors to which the Commissioner must give "[d]ue consideration" in the "making of rates," and requires the Commissioner to ensure that "[r]ates shall not be excessive, inadequate or unfairly discriminatory." *Id.* § 2503 (Pet. App. D at 54a-55a).

Delaware law expressly authorizes "[c]ooperation . . . among rating organizations and insurers in rate making." *Id.* § 2526(c); *see also id.* § 2501 (Pet. App. D at 54a). Title insurers are permitted to satisfy their rate-filing obligations by joining a state-licensed rating organization, which collects data from its members and makes rate filings on its members' behalf. *Id.* §§ 2510, 2511. Respondent title insurers are members of DTIRB, an "association of title insurers . . . licensed by the Department of Insurance pursuant to Del. Code Ann. tit. 18, § 2511." Compl. ¶ 18 (JA 49); Am. Compl. ¶ 18 (JA 216).[2]

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1. References to "Pet. App." are to the Appendices submitted to this Court by Petitioners.

2. References to materials in the Joint Appendix in the Court of Appeals are in the form "JA _."

After rates are filed, "[t]he Commissioner shall review filings as soon as reasonably possible . . . in order to determine whether they meet the requirements of this chapter." Del. Code Ann. tit. 18, § 2506(a) (Pet. App. D at 57a). A rate filing must be accompanied by "sufficient information to determine whether such filing meets the requirement of this chapter," or otherwise, the Commissioner "shall require the insurer to furnish the information upon which it supports the filing." *Id.* § 2504(b) (Pet. App. D at 56a).

On November 14, 2003, approximately three months before the effective date of DTIRB's first rate filing, the Department of Insurance issued Forms and Rates Bulletin No. 27 entitled "Title Insurance Filing Requirements." JA 136-38. Bulletin No. 27 provides "guidance to [the] title [insurance] rating organizations in making current and future filings on behalf of their member insurers." JA 136. Although rating bureaus for other types of insurance file loss costs in Delaware, in Bulletin No. 27, the Commissioner noted "the unique nature of title insurance and the manner by which title insurance is sold in Delaware" and allowed DTIRB to file proposed rates. JA 136; *see also* Third Cir. Order (Pet. App. A at 19a n.10). The Commissioner further recognized that the industry lacked "historic data . . . with regard to expenses" for DTIRB's initial filing, but still required DTIRB to have an approved statistical plan in place, as of the effective date, "to enable the Delaware Insurance Department to monitor rate adequacy." JA 137; *see also* Del. Code Ann. tit. 18, § 2525. DTIRB has complied with Bulletin No. 27 by providing this statistical data for each calendar year since 2004. *See* Third Cir. Order (Pet. App. A at 5a, 15a n.7 ("[S]ince filing its rates in 2004, DTIRB has provided a statistical plan that enables the DOI to monitor the bureau's rate adequacy.")); JA 352-59.

After reviewing a rate filing, the Commissioner can disapprove the proposed rates. Del. Code Ann. tit. 18, § 2506(a) (Pet. App. D at 57a). Proposed rate filings which are not disapproved "shall be deemed to meet the requirements" of Delaware law. *Id.* Thus, the Manual of Delaware Title Insurance Rating Bureau, which Petitioners attached to both complaints, states on its cover: "Notice: This Rate Manual has been approved by the Delaware Insurance Department effective February 1, 2004." JA 68. The first page of the Manual also provides: "This Manual and its contents have been filed with and approved by the Delaware Insurance Department." JA 69.

Once proposed rates become effective, title insurance companies are prohibited from charging any other rates. "No insurer shall make or issue a contract or policy except in accordance with the filings which are in effect for the insurer . . . ." Del. Code Ann. tit. 18, § 2517. Furthermore, every member of a rating organization like DTIRB "shall adhere to the filings made on its behalf by such organization." *Id.* § 2518(a). Any deviation from filed rates must be filed with and approved by the Department of Insurance before it becomes effective. *See id.* § 2518(a), (c).

B. Delaware's Regulatory Framework Establishes A Mechanism For Challenging Filed Title Insurance Rates

Delaware law provides a mechanism to allow persons "aggrieved with respect to any filing which is in effect" to request that the Commissioner hold a hearing. *Id.* § 2520(a) (Pet. App. D at 59a). "If, after such hearing, the Commissioner finds that the filing does not meet the requirements of this chapter, he/she shall issue an

order specifying in what respects he/she finds that such filing fails to meet the requirements of this chapter and stating when, within a reasonable period thereafter, such filing shall be deemed no longer effective." *Id.* § 2520(c) (Pet. App. D at 59a). Delaware law further provides that the Commissioner may conduct a hearing to determine whether any "cooperative activities and practices" are "unfair or unreasonable or otherwise inconsistent with the provisions of this chapter." *Id.* § 2526(c). Finally, the Commissioner's decisions – including on hearings under Section 2520 – are subject to judicial review by Delaware courts. *Id.* § 2531.

Petitioners conceded before the Third Circuit that they did not avail themselves of these rights to challenge DTIRB's filed rates under Delaware law. Third Cir. Order (Pet. App. A at 16a n.8). Instead, they filed this antitrust case.

C. Petitioners' Complaint Seeks Damages Based On Alleged "Overpayments"

Petitioners do not dispute that the title insurance rates they challenge in this lawsuit were filed with the Delaware Department of Insurance. Nevertheless, they allege that the filed rates are the result of an illegal price-fixing conspiracy. Compl. ¶ 1 (JA 46); Am. Compl. ¶ 1 (JA 213). Petitioners requested that the district court award damages based on the rates they paid "compared to what they would have paid absent [Respondents'] joint illegal conduct." Compl. ¶ 8 (JA 47); Am. Compl ¶ 8 (JA 214); *see also* Compl. Prayer for Relief ¶¶ (d)-(g) (JA 65) (seeking return of "overpayments made by [Petitioners] for [Respondents'] title insurance policies"); Compl. ¶ 75

(JA 64) (alleging that they have paid "supra-competitive prices for title insurance policies"); Am. Compl. ¶ 71 (JA 230) (same).

D. The Third Circuit Panel Unanimously Applied The Filed Rate Doctrine To Affirm Dismissal Of Petitioners' Complaint And Amended Complaint In Their Entirety And With Prejudice

Respondents moved to dismiss Petitioners' initial Complaint, which included a claim under the Sherman Act and a claim for unjust enrichment under Delaware law, and the district court correctly held that "the filed rate doctrine . . . applies to [Petitioners'] federal and state claims." Dist. Ct. 2009 Order (Pet. App. B at 32a). Accordingly, the district court dismissed Petitioners' claims for monetary damages and injunctive relief under the filed rate doctrine and granted leave to Petitioners to "request injunctive relief that does not run afoul of the [doctrine]." *Id.* (Pet. App. B at 48a-49a). Petitioners filed the Amended Complaint, which is virtually identical to the initial Complaint, but includes "one Sherman Act claim for injunctive relief." Dist. Ct. 2010 Order (JA 33).[3] Respondents moved to dismiss the Amended Complaint based on, among other grounds, the McCarran-Ferguson Act, and the district court held that the "McCarran-Ferguson Act's exemption provision bars [Petitioners'] Sherman Act claim." *Id.* (JA 43-44). The district court dismissed the Amended Complaint with prejudice in hopes of "finally put[ting] this protracted matter to rest." *Id.* (JA 44).

3. Petitioners did not include their unjust enrichment claim in the Amended Complaint and did not appeal dismissal of that claim.

On appeal, the Third Circuit (McKee, *C.J.*, Sloviter, *J.*, O'Connor, *J.*, sitting by designation) affirmed. First, the Third Circuit rejected Petitioners' argument that the filed rate doctrine should not apply unless there is a "repugnancy" between the Sherman Act and Delaware law. Third Cir. Order (Pet. App. A at 10a). The Third Circuit correctly recognized that this argument relies on Petitioners' characterization of the filed rate doctrine as an antitrust "immunity," which this Court has rejected. *Id.* (citing *Square D*, 476 U.S. at 422). Second, the Third Circuit rejected Petitioners' argument that the doctrine is limited to situations where the governing agency "meaningfully review[s]" rates, noting that the Supreme Court "has never indicated that the filed rate doctrine requires a certain type of agency approval or level of regulatory review." *Id.* (Pet. App. A at 10a-13a). In any event, the Third Circuit found that Petitioners' argument is "meaningless" in this case because the Department of Insurance "was required to review the challenged rates." *Id.* (Pet. App. A at 14a). Third, the Third Circuit rejected Petitioners' argument that application of the filed rate doctrine requires that there be available "retroactive relief directly" from the Department of Insurance, noting that Petitioners conceded that this "is not a 'prerequisite' for application of the filed rate doctrine." *Id.* (Pet. App. A at 15a-16a & n.8) (quoting Pet'rs' Br. to the Third Circuit at 28 n.9). Fourth, the Third Circuit rejected Petitioners' argument that the doctrine does not apply because Respondents' rate filings did not comply with Delaware law and held that Respondents had, in fact, "properly filed" their rates and supporting information. *Id.* (Pet. App. A at 16a-19a).[4]

4. The Third Circuit also held that Petitioners lack standing to seek injunctive relief. Third Cir. Order (Pet. App. A at 22a-25a). The Petition does not seek *certiorari* on this issue.

On the same day it issued its opinion in this matter, the same Third Circuit panel affirmed dismissal – based on the filed rate doctrine – of a parallel antitrust action challenging title insurance rates filed by a rating bureau in New Jersey. *In re N.J. Title Ins. Litig.*, 683 F.3d at 462. The plaintiffs in that action have not sought review by this Court.

REASONS FOR DENYING THE PETITION

I. THIS CASE FITS SQUARELY WITHIN THE WELL-SETTLED CONTOURS OF THE FILED RATE DOCTRINE

The filed rate doctrine has barred complaints like Petitioners' for nearly a century. *Keogh v. Chi. & Nw. Ry. Co.*, 260 U.S. 156 (1922) (affirming dismissal of an antitrust challenge to rates filed with the ICC). The doctrine holds that a rate filed with a regulatory agency "is per se reasonable and unassailable in judicial proceedings brought by ratepayers." *Wegoland Ltd. v. NYNEX Corp.*, 27 F.3d 17, 18 (2d Cir. 1994). This simple and straightforward doctrine is consistently applied by this Court and other federal courts across the country. *See, e.g.*, *Square D*, 476 U.S. at 417 & n.19 (affirming the doctrine applies "whenever tariffs have been filed" (citation omitted)); *Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 507 (5th Cir. 2005) ("The filed rate doctrine bars judicial recourse against a regulated entity based upon allegations that the entity's 'filed rate' is too high, unfair or unlawful."); *Taffet v. Southern Co.*, 967 F.2d 1483, 1494 (11th Cir. 1992) (explaining that where an agency is given the power to "determine the reasonableness of a rate," ratepayers "can claim no rate as a legal right other

than the filed rate" (quoting *Montana-Dakota*, 341 U.S. at 251)). As the Ninth Circuit recently noted:

> The filed rate doctrine's fortification against direct attack is impenetrable. It turns away both federal and state antitrust actions; it turns away Racketeer Influenced and Corrupt Organization Act actions; it turns away state tort actions; and it even turns away state attempts to assert sovereign power to commandeer power contracts.

Wah Chang v. Duke Energy Trading & Mktg., LLC, 507 F.3d 1222, 1225-26 (9th Cir. 2007).

The filed rate doctrine bars claims, as here, seeking to calculate relief by comparing a filed rate with a hypothetical rate which "might" have been filed "absent the conduct in issue." *See, e.g.*, *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 488 (8th Cir. 1992); *see also Wah Chang*, 507 F.3d at 1226 (barring claim because the plaintiff "seeks what amounts to having the courts determine what rates" should have been charged which "would inevitably drag the courts into a determination of what rate would be fair and proper"); *Wegoland*, 27 F.3d at 21 ("[O]nly by determining what would be a reasonable rate absent the [alleged conduct] could a court determine the extent of damages. And it is this judicial determination of a reasonable rate that the filed rate doctrine forbids."). As a result, this Court has held on multiple occasions that a plaintiff cannot assert claims based on an allegation that a rate filed with a regulatory agency is unlawful because it resulted from wrongdoing. *See MCI Telecomms. Corp. v. AT&T Co.*, 512 U.S. 218, 234 (1994) ("[T]he Court has

protected regulated firms from some types of antitrust suits brought on the basis of their filed rates."); *Square D*, 476 U.S. at 422 (noting that "an award of treble damages is not an available remedy" for a private litigant "claiming that the rate submitted to, and approved by, the [regulatory agency] was the product of an antitrust violation"); *see also Tex. Commercial Energy*, 413 F.3d at 508 ("[T]he filed rate doctrine is very much a part of current federal antitrust law. It has been consistently applied as a defense to antitrust actions by various circuits and by the Supreme Court for decades.").

Against this well-settled backdrop, the Third Circuit correctly held that the filed rate doctrine bars Petitioners' antitrust claim. As the Third Circuit recognized, and as Petitioners concede, Delaware law requires title insurers to file rates with the Insurance Commissioner. Third Cir. Order (Pet. App. A at 3a) (citing Del. Code Ann. tit. 18, § 2504(a)); Compl. ¶ 2 (JA 46); Am. Compl. ¶ 2 (JA 213); Pet. at 2. Once filed and effective, the title insurance rates are the only legal rates Respondents are permitted to charge. Del. Code Ann. tit. 18, §§ 2517, 2518(a), (c). Petitioners seek to have a federal court usurp the Delaware Department of Insurance's authority and entangle itself in the rate-making process by ruling that these filed rates are "overcharges" and "overpayments" and by making a judicial determination of a reasonable rate. Compl. ¶ 8 (JA 47) (requesting damages based on the rates they "paid *compared to what they would have paid* absent [Respondents'] joint illegal conduct" (emphasis added)); Am. Compl. ¶ 8 (JA 214) (same); Compl. Prayer for Relief ¶ (g) (JA 65) (seeking the return of "*overpayments* made by [Petitioners] for [Respondents'] title insurance policies") (emphasis added); *see also* Pet. at 4 ("Delaware consumers

paid over $72 million for title insurance annually, which includes *overcharges* resulting from Respondents' price-fixing conspiracy." (emphasis added)). That is precisely what courts uniformly agree the filed rate doctrine prohibits. *See, e.g.*, *Wegoland*, 27 F.3d at 21 (finding that the filed rate doctrine bars claims asking for a "judicial determination of a reasonable rate").

In fact, in recent years, circuit and district courts around the country in cases parallel to this one have held that claims virtually identical to Petitioners' claims (including some claims brought by Petitioners' counsel) were barred by the filed rate doctrine. *See In re Title Ins. Antitrust Cases*, 702 F. Supp. 2d 840, 866, 871 (N.D. Ohio 2010), *aff'd*, *Katz v. Fidelity Nat'l Title Ins. Co.*, 685 F.3d 588 (6th Cir. 2012); *Dolan v. Fidelity Nat'l Title Ins. Co.*, No. 08-CV-00466 (TCP)(WDW), 2009 WL 3934153, at *3 (E.D.N.Y. June 17, 2009), *aff'd*, 365 F. App'x 271 (2d Cir. 2010), *cert. denied*, 131 S. Ct. 261 (2010); *Winn v. Alamo Title Ins. Co.*, No. A-09-CA-214-SS, 2009 WL 7099484, at *9 (W.D. Tex. May 13, 2009), *aff'd*, 372 F. App'x 461, 462-63 (5th Cir. 2010), *cert. denied*, 131. S. Ct. 225 (2010); *In re N.J. Title Ins. Litig.*, No. 08-1425, 2009 WL 3233529, at *3 (D.N.J. Oct. 5, 2009), *aff'd*, 683 F.3d 451 (3d Cir. 2012); *In re Pa. Title Ins. Antitrust Litig.,* 648 F. Supp. 2d 663, 689 (E.D. Pa. 2009), *appeal voluntarily dismissed*, Dkt. No. 10-4761 (3d Cir. July 2, 2012). In two of those cases, this Court denied petitions for writs of *certiorari* raising the same issues the Petition here raises. *See Dolan*, 131 S. Ct. 261; *Winn*, 131 S. Ct. 225.

Petitioners complain that the Third Circuit's opinion applying the doctrine "as long as the agency has in fact authorized the challenged rate," Third Cir. Order (Pet. App. A at 12a-13a) – which Petitioners belittle as a "mere

filing" standard, Pet. at 15 – conflicts with the policies underlying the filed rate doctrine. Petitioners ignore this Court's pronouncements holding that the doctrine applies regardless of the extent of the regulatory agency's review. *See infra* at 20. Moreover, circuit courts recognize that the doctrine is motivated by dual concerns of (1) preserving the exclusive role of regulatory agencies in the ratemaking process, and (2) avoiding price discrimination between ratepayers. *See, e.g.*, *Marcus v. AT&T Corp.*, 138 F.3d 46, 58 (2d Cir. 1988) (describing the "companion principles" of "nonjusticiability" and "nondiscrimination"); *see also* Third Cir. Order (Pet. App. A at 20a); *Hill v. BellSouth Telecomms., Inc.*, 364 F.3d 1308, 1316 (11th Cir. 2004); *H.J. Inc.*, 954 F.2d at 488. Both those concerns are implicated by this case.

The "nonjusticiability" principle reflects that courts lack specialized knowledge and the statutory mandate to assess title insurance rates. *See, e.g.*, *Town of Norwood*, 202 F.3d at 420 ("In part, the rationale for the filed rate doctrine is to protect the exclusive authority of the agency to accept or challenge such tariffs."); *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.*, 45 F.3d 58, 62 (2d Cir. 1995) ("[T]he filed rate doctrine exists [because] legislatively appointed regulatory bodies have institutional competence to address rate-making issues [and] courts lack the competence to set utility rates."); *Wegoland*, 27 F.3d at 21 ("Courts are simply ill-suited to systematically second guess the regulators' decisions and overlay their own resolution."). As this Court noted in *Montana-Dakota*,

> [s]tatutory reasonableness is an abstract quality represented by an area rather than a pinpoint. It allows a substantial spread between what is unreasonable because too low

> and what is unreasonable because too high. To reduce the abstract concept of reasonableness to concrete expression in dollars and cents is the function of the [regulatory agency]. It is not the disembodied 'reasonableness' but that standard when embodied in a rate which the [regulatory agency] accepts or determines that governs the rights of buyer and seller. A court may think a different level more reasonable. But the prescription of the statute is a standard for the [regulatory agency] to apply . . . .

341 U.S. at 251.

In Delaware, the Department of Insurance has the sole power and responsibility for regulating title insurance rates, and it is the Department of Insurance, not federal courts, that is tasked with ensuring that those rates are not "excessive, inadequate or unfairly discriminatory." Del. Code Ann. tit. 18, § 2503 (Pet. App. D at 54a). As the Third Circuit recognized, "the District Court's interference in the rate making process would 'subvert the authority' of the [Department of Insurance] by second-guessing its rate determination." Third Cir. Order (Pet. App. A at 22a) (quoting *Sun City*, 45 F.3d at 62).

The "non-discrimination" principle instructs that allowing courts to award damages based on their own assessment of reasonable rates would award members of a putative class rates that would differ from those charged to the general public. *See, e.g.*, *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 532 (3d Cir. 2006) ("[O]therwise, the filed rate doctrine would have no import vis-à-vis its goals of transparency and non-discrimination

of rates."); *Sun City*, 45 F.3d at 62 (noting that there is "no contractual or statutory vehicle for the equitable payment of any recovery" obtained from a lawsuit "to all affected . . . ratepayers"). If granted, Petitioners' relief would result in this precise form of rate discrimination between class members and non-class members or class members who cannot be located or who do not participate in any recovery.

While Petitioners try to depict a circuit "conflict" regarding which rationale "controls," Pet. at 16, courts uniformly apply the doctrine "whenever either the nondiscrimination strand or the nonjusticiability strand underlying the doctrine is implicated." *Marcus*, 138 F.3d at 59; *see also In re N.J. Title Ins. Litig.*, 683 F.3d at 457; *Hill*, 364 F.3d at 1316. Indeed, this Court has said that "[t]he purpose of the filed rate doctrine is 'to ensure that rates are both reasonable and non-discriminatory.'" *Sec. Servs., Inc. v. K Mart Corp.*, 511 U.S. 431, 435 (1994) (quoting *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 119 (1990)). To support their contention that there is a "conflict," Petitioners cite inapposite "price squeeze" cases – *i.e.*, cases involving the interaction of *multiple* rates regulated by *multiple* agencies so that no one agency has jurisdiction over the interplay between the rates. In both *City of Kirkwood v. Union Electric Co.* and *City of Mishawaka v. Indiana & Michigan Electric Co.*, cited by Petitioners, the courts declined to apply the doctrine because no "single regulatory agency" had authority over the interaction between the two rates at issue. *See City of Kirkwood*, 671 F.2d 1173, 1179 (8th Cir. 1982) ("An award of antitrust damages for a price squeeze would not conflict with the doctrine's purpose, which is to ensure rate uniformity by confining the authority to

oversee the reasonableness of rates to a *single* regulatory agency." (emphasis added)); *City of Mishawaka*, 560 F.2d 1314, 1319 (7th Cir. 1977); Pet. at 16 (conceding that, in these cases, "more than one regulator was involved, [so] neither regulator could provide complete relief to harmed consumers"). Here, there is no dispute that the Delaware Department of Insurance is "fully empowered to regulate the one rate at issue." Dist. Ct. 2009 Order (Pet. App. B at 41a). Thus, as the Third Circuit recognized, Petitioners' price-squeeze cases "are irrelevant." Third Cir. Order (Pet. App. A at 15a).

Petitioners seek to avoid application of the filed rate doctrine in this case by arguing that, in their view, Delaware's regulatory scheme fails to provide enough administrative relief for aggrieved consumers. Pet. at 9, 17-18. But no such relief is required for the doctrine to apply, as Petitioners conceded to the Third Circuit. Third Cir. Order (Pet. App. A at 15a n.8) ("Appellants concede that 'cases have noted that the availability of an alternative regulatory remedy is not a "prerequisite" for application of the filed rate doctrine.'" (quoting Petitioners' Br. to the Third Circuit at 28 n.9)). Petitioners' concession below (now retracted, apparently) was appropriate. They cite no cases in the Petition holding that the availability of alternative administrative relief is a requirement for application of the filed rate doctrine, and no such requirement exists.[5] *See, e.g.*, *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1120 (S.D.N.Y. 1992) (noting

5. Not one of Petitioners' cited cases regarding the existence of a consumer remedy addresses the filed rate doctrine, much less any remedies required for its application. *See ICC v. Am. Trucking Ass'ns, Inc.*, 467 U.S. 354 (1984); *Reiter v. Sonotone Corp.*, 442 U.S. 330 (1979); *Otter Tail Power Co. v. United States*, 410 U.S. 366 (1973); *Carnation Co. v. Pac. Westbound Conference*, 383 U.S. 213 (1966).

that the "availability of adequate administrative relief has never been a prerequisite to applying the filed rate doctrine"), *aff'd*, 27 F.3d 17 (2d Cir. 1994); *see also Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 578-79 (1981) (stating that the doctrine forbids a court from taking action that would provide more relief in the court than consumers could obtain from the agency itself); *Taffet*, 967 F.2d at 1492 (doctrine barred claims even though the state agency could not order a refund of excessive rates); Third Cir. Order (Pet. App. A at 15a) (noting that Petitioners "fail to present any authority showing that plaintiffs must have access to an alternative regulatory remedy before courts may apply the filed rate doctrine").[6]

II. NEITHER THIS COURT NOR ANY CIRCUIT COURT REQUIRES "MEANINGFUL REVIEW" FOR APPLICATION OF THE FILED RATE DOCTRINE

Petitioners erroneously suggest that the Third Circuit's opinion conflicts with decisions of this Court and the Ninth Circuit because the Third Circuit rejected Petitioners' argument that application of the filed rate doctrine requires "meaningful review" of rates by the relevant regulatory agency. Pet. at 11-15. No such conflict exists.

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6. In any event, Delaware law does provide an administrative remedy, which Petitioners have elected to forego. *See supra* at 7-8; *see also* Third Cir. Order (Pet. App. A at 15a-16a & n.8 ("And in any event, Delaware allows interested parties to challenge insurance rates by making written application to the Commissioner for an administrative hearing."); Dist. Ct. 2009 Order (Pet. App. B at 43a) ("We see no obstacle in Delaware law that would prevent one from filing a complaint with the Commissioner and seeking prospective redress in the form of lower rates . . . .").

To the contrary, this Court has held that the filed rate doctrine applies "whenever tariffs have been filed," without probing the so-called "meaningfulness" of an agency's review. *See Square D*, 476 U.S. at 417 n.9 (refusing to limit *Keogh* to rates which "had been investigated and approved" because the doctrine applies "whenever tariffs have been filed"); *Montana-Dakota*, 341 U.S. at 251 (holding the petitioner "can claim no rate as a legal right . . . other than the filed rate, whether fixed or merely accepted by the [regulatory agency]"); *see also Miss. Power & Light Co.*, 487 U.S. at 374 ("The Mississippi Supreme Court erred in adopting the view that the pre-emptive effect of FERC jurisdiction turned on whether a particular matter . . . was actually determined in the FERC proceedings."). Following this Court's lead, the circuit courts also have repeatedly rejected a "meaningful review" requirement. *See, e.g.*, *Dolan*, 365 F. App'x at 274 ("It is well-established that the doctrine applies to all filed rates, not merely those rates investigated . . . ."); *Goldwasser*, 222 F.3d at 402 (rejecting argument that "rates should not be shielded by the doctrine" because regulators "nominally oversee . . . ratesetting" but "rarely exercise their muscle"); *Town of Norwood*, 202 F.3d at 419 ("It is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine.").

Petitioners hinge their supposed "circuit split" regarding "meaningful review" on one older Ninth Circuit case that is not even followed in the Ninth Circuit.[7] In

7. Petitioners' other cited cases are easily distinguishable. *Wileman Brothers & Elliot, Inc. v. Giannini*, 909 F.2d 332, 337-38 (9th Cir. 1990), does not even discuss the filed rate doctrine. *City of Kirkwood* and *City of Mishawaka* are "price squeeze" cases in which no one agency had jurisdiction over the interplay between

Brown v. Ticor Title Insurance Co., the Ninth Circuit, with almost no analysis and without acknowledging this Court's authorities cited above, did not apply the filed rate doctrine in the absence of "meaningful review." 982 F.2d 386, 394 (9th Cir. 1992). As the district court noted, apart from *Brown*, "no other court has taken such a narrow view of the applicability of the filed rate doctrine." Dist. Ct. 2009 Order (Pet. App. B at 37a). Indeed, *Brown* is not even followed *in the Ninth Circuit*. Recently, the Western District of Washington described *Brown* as an "outlier." *See In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 754 F. Supp. 2d 1239, 1245-46 (W.D. Wash. 2010), *aff'd*, 450 F. App'x 685 (9th Cir. 2011) (collecting cases). In affirming that decision, the Ninth Circuit squarely rejected that "meaningful agency review is a prerequisite to the filed rate doctrine."[8] 450 F. App'x 685, 688 (9th Cir. 2011). And just this year, in *Carlin v. DairyAmerica, Inc.*, the Ninth Circuit reiterated that "like the district courts that have addressed the issue, we do not read *Brown* as making meaningful agency review a *sine qua non* for

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rates. *See supra* at 17. In *Blaylock v. First American Title Insurance*, the regulatory system at issue, unlike the relevant Delaware statutes, did "not require any review by the agency." 504 F. Supp. 2d 1091 (W.D. Wash. 2007). Finally, contrary to Petitioners' contention, Pet. at 14, in *Morales v. Attorneys' Title Insurance Fund, Inc.*, the court *did* apply the filed rate doctrine to bar the plaintiff's claims. *See* 983 F. Supp. 1418, 1429 (S.D. Fla. 1997) ("[P]laintiffs cannot evade the filed rate doctrine.").

8. Moreover, the regulatory scheme in *Brown* – unlike the Delaware regulatory framework – did not require regulatory review of rates. 982 F.2d at 394; *cf.* Del. Code Ann. tit. 18, § 2506(a) (Pet. App. D at 57a) ("The Commissioner shall review filings as soon as reasonably possible after they have been made in order to determine whether they meet the requirements of this chapter.").

the applicability of the filed rate doctrine." 688 F.3d 1117, 1132 (9th Cir. 2012)*; see also Wah Chang*, 507 F.3d at 1227 (finding that despite allegations of "lax oversight," "laxness does not indicate, much less establish, that [plaintiff] can turn directly to the courts for rate relief"); *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027, 1040 (9th Cir. 2007) (filed rate doctrine applies so long as the agency has not "abdicated its rate-making authority").

Even if a circuit split did exist on "meaningful review," this case would be a poor vehicle to resolve it. As both the District Court and the Third Circuit found, the Delaware Department of Insurance does review title insurance rates in a meaningful way. *See* Dist. Ct. 2009 Order (Pet. App. B at 38a) ("Delaware law and [Department of Insurance] regulation establish that title insurance rates are subject to genuine review."); Third Cir. Order (Pet. App. A at 14a) (stating that a distinction "between agency authorization through 'approval' or 'non-disapproval'" in this case "would be meaningless because the [Department of Insurance] was required to review the challenged rates"); *see also* Del. Code Ann. tit. 18, §§ 2506(a) (Pet. App. D at 57a), 2503(a) (Pet. App. D at 54a-55a), 2504(b) (Pet. App. D at 56a); Bulletin No. 27 at 2 (JA 137) (reflecting that the Department "utilizes the services of an outside actuarial firm to review its rate filings" and requires that DTIRB "have an approved statistical plan in place, [which] should allow for collection and aggregation of sufficient premium, loss and expense data to enable the [Department of Insurance] to monitor rate adequacy").[9]

9. Petitioners also argue that the filed rate doctrine should not bar their claim because Respondents' rates supposedly were not "properly filed." Pet. at 26-28. Petitioners are wrong for all

III. THE REQUIREMENTS OF STATE ACTION IMMUNITY ARE IRRELEVANT TO APPLICATION OF THE FILED RATE DOCTRINE

Petitioners argue that this Court should grant *certiorari* in order to hold that the requirements of state action immunity must be met in order for the filed rate doctrine to apply. The two doctrines, however, serve different purposes and have different requirements. Thus, it is no surprise that Petitioners cite no case holding that state action immunity and the filed rate doctrine must be interpreted coextensively.

Petitioners start their argument with the flawed premise that the filed rate doctrine is an immunity or an "implied repeal" of the antitrust laws and thus must be strictly construed. Pet. at 10-11. As the Third Circuit found, this argument is "meritless and requires little attention." Third Cir. Order (Pet. App. A at 10a). While Petitioners cite this Court's decision in *Square D* for their proposition that the filed rate doctrine should be "strictly construed," Pet. at 11 (quoting *Square D*, 476 U.S. at 421),

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the reasons noted by the Third Circuit Order (Pet. App. A at 16a-19a) and the district court (Pet. App. B at 43a-47a). In any event, Petitioners do not assert that the Third Circuit misstated the law regarding application of the filed rate doctrine to rates that were allegedly not "properly filed." Instead, Petitioners merely argue that the Third Circuit "erred and improperly drew inferences against Petitioners." Pet. at 28. Such "error correction is a disfavored basis for granting review" by this Court. *Gonzalez v. Crosby*, 545 U.S. 524, 544 n.7 (2005) (Stevens, J., dissenting); *see also* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

they ignore that *Square D* actually holds that the filed rate doctrine is "far different" from an antitrust immunity. *Square D*, 476 U.S. at 422. In fact, this Court held that "cases emphasizing the necessity to strictly construe" antitrust immunities do *not* apply to the filed rate doctrine. *Id.* at 421-22; *see also Tex. Commercial Energy*, 413 F.3d at 508 ("In *Square D Co.*, the Supreme Court rejected this [argument] by explicitly stating that the application of the filed rate doctrine 'is far different from the creation of an antitrust immunity.'" (quoting *Square D*, 476 U.S. at 422)).[10]

Building on their flawed premise, Petitioners argue that the filed rate doctrine must include a "meaningful review" requirement in order for the doctrine to "maintain consistency" with state action immunity and its requirement of "active supervision" by the state agency. Pet. at 22-26. As set forth above, consistent with this Court's opinions, the circuit courts are in agreement that application of the filed rate doctrine does not require any specific amount of regulatory review of filed rates. *Supra* at 20-22. Moreover, there is no logic requiring that the filed rate doctrine be interpreted and applied coextensively with state action immunity. The two doctrines serve different purposes and offer different protections and thus have different elements.

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10. Petitioners also rely heavily on this Court's decision in *Carnation*, 383 U.S. 213. As this Court noted in *Square D*, *Carnation* is irrelevant to filed rate doctrine cases. *See Square D*, 476 U.S. at 422 n.29 ("The specific *Keogh* holding, moreover, was not even implicated in [*Carnation*], because the ratemaking agreements challenged in that case had not been approved by, or filed with, the Federal Maritime Commission.").

State action immunity is grounded in principles of federalism and is "premised on the assumption that Congress, in enacting the Sherman Act, did not intend to compromise the States' ability to regulate their domestic commerce." *S. Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48, 56 (1985). "The considerations underlying" the filed rate doctrine, on the other hand, "are preservation of the agency's primary jurisdiction over reasonableness of rates and the need to insure that regulated companies charge only those rates of which the agency has been made cognizant." *Ark. La. Gas Co.*, 453 U.S. at 577-78 (citations omitted). Thus, 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.

Moreover, state action immunity offers more protections to a defendant than the filed rate doctrine and thus requires more regulatory involvement. State action immunity, when it applies, provides a defendant with blanket immunity from antitrust laws and is not limited to rate filings with a regulatory agency. *See, e.g.*, *Patrick v. Burget*, 486 U.S. 94, 100 (1988) (explaining that, in *California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97 (1980), the Court "established a rigorous two-pronged test to determine whether anticompetitive conduct engaged in by private parties should be deemed state action and thus shielded from the antitrust laws"); *Sanders v. Brown*, 504 F.3d 903, 915 (9th Cir. 2007) ("The [state action] immunity doctrine protects most state laws and actions from antitrust liability."). State action immunity shields a defendant from actions brought by regulators or prosecutors and it bars all forms of equitable relief. *See, e.g.*, *FTC v. Hosp. Bd. of Dirs.*, 38 F.3d 1184, 1192 (11th Cir. 1994) (granting hospital's

board of directors state action immunity from antitrust claims brought by the Federal Trade Commission); *Exec. Town & Country Servs., Inc. v. City of Atlanta*, 789 F.2d 1523, 1529-30 (11th Cir. 1986) (granting city and officials state action immunity from antitrust liability in an action seeking to prevent enforcement of ordinances regulating limousine fares). The filed rate doctrine, on the other hand, applies only to situations involving rates filed with a regulatory agency and does not bar claims by regulators, criminal actions, or equitable claims that do not affect a filed rate. *See, e.g.*, *Square D*, 476 U.S. at 422 (filed rate doctrine leaves a defendant "subject to scrutiny under the antitrust laws by the Government and to possible criminal sanctions or equitable relief"); *see also Keogh*, 260 U.S. at 161-62 ("The fact that these rates had been approved by the Commission would not, it seems, bar proceedings by the government."). Given that the scope of protection afforded by state action immunity sweeps so much more broadly than the filed rate doctrine, it is not surprising that this Court requires active supervision by a regulatory agency for state action immunity to apply while rejecting the need for "meaningful review" for application of the filed rate doctrine.

Aside from the different purposes underlying the doctrines and the different protections they afford, Petitioners' contention that the filed rate doctrine must be coextensive with state action immunity is illogical for an additional reason: The filed rate doctrine applies to any federal or state cause of action that challenges the reasonableness of filed rates, whereas state action immunity applies solely to antitrust claims. *Compare FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 631 (1992) (articulating "the two-part test that must be satisfied for *state-action immunity under the antitrust laws*" (emphasis added)), *with Ark. La. Gas Co.*, 453 U.S. at 573-74 (applying the

filed rate doctrine to a contract dispute). Petitioners offer no explanation as to why a federalism-based antitrust immunity should dictate the requirements of an entirely unrelated defense. Nor do Petitioners explain how interpreting the two doctrines coextensively would affect non-antitrust causes of action. For example, Petitioners do not explain whether application of the filed rate doctrine to the unjust enrichment claim they included in their first Complaint should be governed by their proposed limitation on the doctrine, or whether different versions of the filed rate doctrine should be applied to antitrust and non-antitrust claims. Neither result would make sense. Petitioners are simply mixing and matching two different defenses.

For all of these reasons, "there is no apparent requirement to reconcile the filed rate and state action doctrines, as courts have generally applied them independently." Third Cir. Order (Pet. App. A at 13a n.6); *cf. Trigen-Okla. City Energy Corp. v. Okla. Gas & Elec. Co.*, 244 F.3d 1220, 1224-25 (10th Cir. 2001) ("Because we hold that the state action doctrine mandates the dismissal of the federal antitrust claims . . . we decline to reach the *Noerr-Pennington* and filed rate doctrine defenses."); *see also Arroyo-Melecio v. Puerto Rican Am. Ins. Co.*, 398 F.3d 56, 71-73 (1st Cir. 2005) (independently analyzing the two doctrines); *City of Kirkwood*, 671 F.2d at 1182 (same).[11]

11. Because this case has nothing to do with state action immunity, Petitioners' *amici* are off base in suggesting that consideration of this case will "complement" this Court's review of *FTC v. Phoebe Putney Health Sys., Inc.*, 663 F.3d 1369 (11th Cir. 2011), *cert. granted*, 133 S. Ct. 28 (2012), a state action immunity case in which this Court heard argument on November 26, 2012. *See Amici Curiae* Brief of Antitrust and Economics Professors and of the American Antitrust Institute in Support of the Petition for Writ of Certiorari at 15-17.

Indeed, Petitioners do not cite a single case holding that the two doctrines must be interpreted coextensively.

Petitioners claim that this Court would not have applied the active supervision test in *Ticor*, 504 U.S 621, *324 Liquor Corp. v. Duffy*, 479 U.S. 335 (1987), *Midcal Aluminum*, 445 U.S. at 99, and *Cantor v. Detroit Edison Co.*, 428 U.S. 579 (1976), if it were not required for the filed rate doctrine. But these cases all addressed state action immunity, not the filed rate doctrine. Indeed, the filed rate doctrine could not have applied in these cases because each of them either involved regulatory actions to which the filed rate doctrine does not apply, did not involve claims for damages, or did not involve challenges to the reasonableness of filed rates. *See Ticor*, 504 U.S. at 624 (action commenced by the FTC); *324 Liquor Corp.*, 479 U.S. at 340-41 (action sought relief from administrative penalties); *Midcal Aluminum*, 445 U.S. at 100 (action seeking an injunction against California's wine pricing statutes); *Cantor*, 428 U.S. at 581-84 (action challenging a utility's practice of providing free light bulbs, not a challenge to the reasonableness of a filed rate).[12]

12. In its *amicus* brief, Public Citizen, Inc. makes much of the fact that this Court in *Southern Motor Carriers*, 471 U.S. 48, applied "the full rigors of analysis under the state action doctrine" instead of applying the filed rate doctrine even though the case involved rates that "had been lawfully filed." Motion and Brief of *Amicus Curiae* Public Citizen, Inc. in Support of Petitioners at 8-9. That is no surprise, however, because *Southern Motor Carriers* was an antitrust action commenced by the United States seeking an injunction and thus the filed rate doctrine could not have applied.

Petitioners, as well as their *amici*, go on to argue that the requirements of the filed rate doctrine might be somehow different when applied to rates filed with a state agency like the Department of Insurance, instead of a federal agency. They cite no case that so holds. In fact, "courts have uniformly held . . . that the rationales underlying the filed rate doctrine apply equally strongly to regulation by state agencies." *Tex. Commercial Energy*, 413 F.3d at 508 (quoting *Wegoland*, 27 F.3d at 20); *In re N.J. Title Ins. Litig.*, 683 F.3d at 455 ("Other courts of appeals have also extended the doctrine to rates filed with state agencies."); *Crumley v. Time Warner Cable, Inc.*, 556 F.3d 879, 881 (8th Cir. 2009) ("The filed rate doctrine also applies to rates filed with state agencies."); *H.J. Inc.*, 954 F.2d at 494 ("[T]he filed rate doctrine applies whether the rate in question is approved by a federal or state agency."); *Taffet*, 967 F.2d 1483 (finding that the doctrine "applies with equal force to preclude recovery under RICO whether the rate at issue has been set by a state rate-making authority or a federal one").

CONCLUSION

For all of the reasons set forth above, the Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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