No. 17-___

IN THE

Supreme Court of the United States

ALL NIPPON AIRWAYS CO., LTD., EVA AIRWAYS CORP.,

Petitioners,

v.

DONALD WORTMAN ET AL.,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the filed-rate doctrine—which this Court firmly established in *Keogh v. Chicago & Northwest Railway Co.*, 260 U.S. 156 (1922), and reaffirmed in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409 (1986)—still applies where rates are filed with a federal agency pursuant to a statutory regulatory scheme (as held by the First, Second, and Seventh Circuits), or whether it no longer applies to such rates if a court finds the agency lacks sufficient "practical ability" to regulate those rates (as held by the Ninth Circuit's opinion below).

2. Whether, and to what extent, the filed-rate doctrine applies where a federal agency retains regulatory authority over rates, but chooses to exercise that authority by establishing a regulatory system, which it periodically revisits and revises, that does not require each rate to be literally filed with the agency.

PARTIES TO THE PROCEEDINGS

The following were parties to the proceedings in the United States Court of Appeals for the Ninth Circuit:

1. All Nippon Airways Co., Ltd., and EVA Airways Corp., the petitioners on review, were defendants-appellants below.

2. Donald Wortman, William Adams, Margaret Garcia, Brenden G. Maloof, Micah Abrams, Martin Kaufman, Rachel Diller, Lori Barrett, Clyde H. Campbell, Matthew Evans, Thomas Schelly, Mark Foy, Jason Gregory Turner, Stephen Gaffigan, Bruce Hut, Dickson Leung, Kevin Moy, Rufus Browning, Lolly Randall, Christian Duke, Andrew Barton, Tracey Wadmore Smith, Michael Benson, Tori Kitagawa, Woodrow Clark II, James Evans, Meor Adlin, Justin Labarge, Scott Frederick, Ireatha Diane Mitchell, Larry Chen, David Kuo, David Murphy, Titi Tran and Robert Casteel III, the respondents on review, were plaintiffs-appellees below.

CORPORATE DISCLOSURE STATEMENT

All Nippon Airways Co., Ltd., a Japanese corporation, is a nongovernmental corporate entity and a wholly-owned subsidiary of ANA Holdings, Inc. ANA Holdings, Inc. is a Japanese corporation that is publicly traded on the Tokyo stock exchange and has no parent company. No other publicly-held corporation owns 10 percent or more of the stock of ANA Holdings, Inc.

EVA Airways Corporation has no parent corporation. The only corporations that own 10 percent or more of EVA Airways Corporation's stock are Evergreen Marine Corporation and Evergreen International Corporation. Both Evergreen Marine Corporation and EVA Airways Corporation are publicly traded on the Taiwan Stock Exchange.

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INTRODUCTION

For over a century, this Court and the majority of Circuit Courts of Appeals have applied the filed-rate doctrine to bar private damages actions whenever rates have been filed pursuant to a regulatory regime. This Court has held that because rates established under a statutory scheme are the only lawful rates, such rates cannot be varied by the recovery of monetary damages in tort, antitrust, or other actions. To allow courts to determine what those rates should have been would interject the courts into regulatory questions squarely within the expertise and authority of regulatory agencies.

This Court has required adherence to the filed-rate doctrine to ensure that courts defer to regulatory agencies on the lawfulness of rates when those matters are within the agency's legislative mandate. In two different ways, the decision below eschews that principle in favor of new, judicially-created rules which would require the lower courts to invade the province of federal and state agencies and determine whether those agencies are regulating "enough" for the filed-rate doctrine to apply.

First, the decision below would erase the long-settled principle that the doctrine—at the very least—applies to rates that are actually filed with a regulatory agency pursuant to a statutory scheme. The First, Second, and Seventh Circuits have followed this Court's precedents by holding that the filing of tariffs undisputedly triggers the filed-rate doctrine. Those Circuits have rightly acknowledged that where

Congress or a state legislature enacts a regulatory system that requires the filing of tariffs, that system cannot be redrawn by private damages actions. Only the legislature may reform the regulatory system it has put in place.

In this case, however, the Ninth Circuit rejected that bedrock principle of the doctrine and instead held that courts may determine what regulated rates should have been when the agency has, in the court's view, not been effectively regulating. The Ninth Circuit did not provide any standard for determining when an agency's regulation should be deemed ineffective.

Second, the decision below perpetuates what has become a persistent and irreconcilable conflict among the Circuits on how to apply the doctrine to rates that are still subject to the regulatory oversight of an agency but are not expressly required to be filed. In many industries, including the international aviation industry at issue in this case, the relevant agency continues to oversee rates but has chosen to do so without requiring that each and every rate be literally filed. Agencies have increasingly relied on more sophisticated, often technology driven rate-monitoring regimes that do not require each individual rate to be filed. Because these rates are still subject to regulatory authority and review, the filed-rate doctrine should apply to them as well. The First, Second, Fifth, and Ninth Circuits agree in principle, but have now articulated different standards under which the lower courts are—to varying degrees—assessing whether the relevant agency is regulating

"enough" to justify the application of the filed-rate doctrine. Meanwhile the Eleventh Circuit has gone so far as to hold categorically that the doctrine does not apply unless the regulatory regime requires each rate to be filed.

The circuits' conflicting standards ignore the principle of deference at the heart of the filed-rate doctrine, and have put the courts in the position of having to second-guess, in irreconcilable ways, whether a regulatory system mandated by statute is sufficient—without the expertise or experience to do so. Regulated industries do not know whether their agencies' oversight will hold or be somehow deemed insufficient.

If this state of affairs is permitted to continue, it would sow great uncertainty in the many industries which remain subject to agency oversight. Requiring district courts to second-guess whether regulation is sufficient would also turn the principle of deference embedded in the filed-rate doctrine on its head, without any action from Congress permitting that result. The last time this Court addressed the doctrine, it reaffirmed it, and noted: "If there is to be an overruling . . . it must come from Congress, rather than from this Court." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 424 (1986). As the decision below reflects, the Courts of Appeals have not heeded that warning. Instead, they have pared down the doctrine without a basis in congressional action or this Court's precedent to do so.

In order to avoid the uncertainty created by the decision and to resolve the conflict among the Circuits on the application of the doctrine to rates that are regulated in ways that do not require literal filings, this Court should grant this petition for certiorari and reverse the Ninth Circuit's decision below.

OPINIONS BELOW

The Ninth Circuit's opinion affirming and remanding for further proceedings, with one judge concurring in part and dissenting in part, is reported at 854 F.3d 606. The district court's opinion denying in part and granting in part Petitioners' motion for summary judgment is reported at 69 F. Supp. 3d 940. The Ninth Circuit's unpublished order denying Petitioners' petition for panel rehearing or rehearing *en banc*, with one judge voting to grant panel rehearing and rehearing *en banc*, is reprinted at App. B. The district court's unpublished order certifying an interlocutory appeal is reprinted at App. C.

JURISDICTION

This Court's jurisdiction is invoked under 28 U.S.C. §1254(1). The Ninth Circuit entered judgment on April 14, 2017, and a majority of the panel denied a timely petition for panel rehearing or rehearing *en banc* on June 6, 2017. On August 14, 2017, Justice Kennedy extended the time to file this petition to October 18, 2017.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

See Appendix A for relevant excerpts of:

- 49 U.S.C. § 40101
- 49 U.S.C. § 40102
- 49 U.S.C. § 40109
- 49 U.S.C. § 41501
- 49 U.S.C. § 41504
- 49 U.S.C. § 41509
- 49 U.S.C. § 46101
- 14 C.F.R. § 293.10
- 14 C.F.R. § 302.404
- 14 C.F.R. § 302.502
- 14 C.F.R. § 302.505
- 14 C.F.R. § 302.17
- 14 C.F.R. § 302.38

STATEMENT OF THE CASE

A. The Filed-Rate Doctrine

This Court first applied the filed-rate doctrine in the antitrust context in *Keogh v. Chicago & Northwest Railway Co.*, 260 U.S. 156 (1922), which held that private parties may not seek antitrust damages for payment of rates covered by a tariff filed with an authorized regulatory agency.

As this Court explained in *Keogh*, plaintiffs who claim they should have paid some rate lower than the filed tariff have not suffered any legally cognizable harm:

> Section 7 of the Anti-Trust Act [now section 4 of the Clayton Act] gives a right of action to one who has been "injured in his business or property." Injury implies violation of a legal right. ***The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate, as between carrier and shipper. The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.***

260 U.S. at 163 (emphasis added).

The doctrine ensures there are other remedies for anticompetitive conduct, as it bars neither injunctive relief nor criminal antitrust prosecutions.

The filed-rate doctrine retains its vitality nearly a century after *Keogh*. *See, e.g., Square D*, 476 U.S. at 423-24 (developments "since *Keogh* was decided are insufficient to overcome the strong presumption of continued validity"); *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 131-32 (1990) (noting that a "strict adherence to the filed rate" is necessary). Indeed, when this Court last addressed the doctrine over thirty years ago, it resoundingly affirmed the doctrine, noting that "[i]f there is to be an overruling of the *Keogh* rule, it must come from

Congress, rather than from this Court." *Square D*, 476 U.S. at 424. Since that time, the doctrine has continued to bar actions for monetary damages in antitrust cases.[1]

Critically, the application of the filed-rate doctrine does not depend on whether the agency receiving the filing performed any meaningful review. The mere filing of a tariff with the authorized regulatory agency is sufficient to impose the bar of the filed-rate doctrine. *Square D*, 476 U.S. at 417 n.19 (the doctrine applies "whenever tariffs have been filed"); *Town of Norwood, Mass. v. New England 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.").

This Court has rejected arguments that courts should inquire into a regulatory agency's internal processes and permit private antitrust damages actions if the defendants engaged in illegal collusive conduct and there was no meaningful agency review of the filed rates. For example, in *Square D*, the Court rejected the plaintiffs' contention that "their treble-damages action should not have been dismissed because there was no ICC hearing in this case and

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[1] *E.g.*, *In re N.J. Title Ins. Litig.*, 683 F.3d 451, 459 (3d Cir. 2012) (holding that the filed-rate doctrine bars state and federal antitrust claims); *Simon v. KeySpan Corp.*, 694 F.3d 196, 204-08 (2d Cir. 2012) (same); *Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 507-10 (5th Cir. 2005) (same); *Pub. Util. Dist. No. 1 of Snohomish Cty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756, 760-61 (9th Cir. 2004) (holding that the filed-rate doctrine bars state antitrust claims).

because *Keogh* did not involve allegations of the type of covert legal violations at issue here." 476 U.S. at 417 n.19. The Court commended the Second Circuit for properly concluding that the filed-rate doctrine "was not susceptible to such a narrow reading," is not limited to cases in which "rates had been investigated and approved by" the regulatory agency receiving the tariff filings, and applies "*whenever tariffs have been filed*." *Id.* (internal quotes and citation omitted; emphasis added).

This Court's admonition against narrowly reading the filed-rate doctrine as dependent on whether the agency actively reviewed the filed tariff echoes one of the main rationales for the rule—the recognition that federal courts are poorly situated to second-guess how regulatory agencies, vested with authority to regulate rates by Congress, decide to exercise that authority. *See, e.g.*, *Montana–Dakota Utils. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 251–52, (1951).

B. DOT's Regulation of Rates for International Air Travel

The Court's admonition that courts should not second-guess regulatory agencies with respect to filed tariffs has particular resonance with respect to the Department of Transportation's regulatory regime for international passenger tariffs, including fares and surcharges. Congress has granted DOT broad authority over the pricing of international passenger air travel. By statute, airlines must establish "reasonable prices . . . related to foreign air

transportation." 49 U.S.C. § 41501. DOT is charged with enforcing that requirement as part of its mandate to prevent "unfair, deceptive, predatory, or anticompetitive practices in air transportation." *Id.* § 40101(a)(9). Among its powers, DOT has broad authority to approve or disapprove rates. *Id.* § 41504.[2]

This regulatory structure was established by the Federal Aviation Act of 1958, Pub. L. No. 85-726, 72 Stat. 731 (1958), continuing a regulatory model that dated back to the New Deal. In 1978, Congress largely disbanded this regulatory structure for *domestic* air transportation when it deregulated air travel within the United States Airline Deregulation Act, Pub. L. No. 95-504, 92 Stat. 1705 (1978). However, Congress explicitly chose a different path for *international* air travel. With the International Air Transportation and Competition Act of 1979 ("IATCA"), Pub. L. No. 96-192, § 2, 94 Stat. 35, 36 (1980), Congress placed supervision of international air-transportation rates under the regulatory control of DOT.

Consistent with its broad grant of authority, Congress has provided DOT with flexibility regarding how best to regulate international airline pricing. The

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[2] The DOT has acknowledged that the filing of a tariff is sufficient to make that tariff the legally binding rate: "Once tariffs are allowed to become effective by the Department, these tariffs become legally binding terms in the contract of carriage for international air transportation." Department of Transportation, Agency Requests for Renewal of a Previously Approved Information Collection(s): Exemption From Passenger Tariff-Filing Requirements in Certain Instances and Mandatory Electronic Filing of Residual Passenger Tariffs, 77 Fed. Reg. 7230 (Feb. 10, 2012).

default rule remains that (i) all airlines engaging in foreign air transportation must file tariffs setting forth rates in advance of their effective date, and (ii) DOT may reject any proposed rate, which renders the rate void. 49 U.S.C. §§ 41504, 41509. However, DOT has the authority to relax literal filing requirements to "the extent [DOT] considers necessary," so long as its actions are "consistent with the public interest." *Id.* § 40109(c). Regardless of whether a rate has been filed, DOT retains the authority to reject an unreasonable or discriminatory rate. *Id.* §§ 41507, 41509; 62 Fed. Reg. 10,758, 10,763 (Mar. 10, 1997) (Exemption From Passenger Tariff-Filing Requirements in Certain Instances).

For the first two decades after the IATCA was enacted, DOT chose to maintain the regulatory status quo: it required that *all* international prices be filed. [ER17.][3] In 1999, DOT determined that its regulatory goals would be better met by establishing a new and more selective rate-filing regime. *See* 64 Fed. Reg. 40,654, 40,654 (July 27, 1999) (Exemptions From Passenger Tariff-Filing Requirements in Certain Instances).

The new filing regime segmented rates into three categories: (1) rates for flights to "Category A" countries, which need not be filed; (2) rates to "Category B" countries, which needed to be filed if they were unrestricted one-way economy fares; and (3) rates to "Category C" countries, which were required to

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[3] All cites to "ER" are to the excerpted record in *Wortman et al. v. China Airlines et al.*, No. 15-25364 (9th Cir.) unless otherwise indicated.

be filed as before. *Id.* Even where flights operated by some carriers are placed in a particular category, DOT may require tariff filings for "some or all of their services" when competitive conditions warrant. 14 C.F.R. § 293.10(c).

When DOT put in place this more selective rate-filing regime in 1999, DOT was explicit that the new filing regime "will not materially lessen the Department's ability to intervene in passenger pricing matters." 62 Fed. Reg. at 10,763. Rather, the new regulations reflected DOT's view that "alternative methods existed for protecting consumers" that would be even "more effective than filed tariffs." 64 Fed. Reg. at 40,654. DOT emphasized that it still had "statutory authority to take action directly against unfiled passenger fares and rules under a variety of circumstances" and could "reinstat[e] the tariff-filing obligation" at any time. 62 Fed. Reg. at 10,763. DOT also made clear that it could move countries to different filing categories in its discretion. 14 C.F.R. § 293.10(b).

Consistent with those statements, DOT has in fact continually revised the list of countries in each filing category, issuing five such lists between 1999 and 2012. [ER693, ER696-756.] These actions moved some countries to less restrictive filing categories and moved at least one country to a more restrictive category. [ER712 (changing Argentina from Category A to Category B).] DOT also added two countries not previously on the list (Libya & Iraq) and placed them in Category B. [ER 714.] Since 2012, DOT has continued to issue revised lists, including as recently as last year.

E.g., Notice of Exemption from the Dep't's Tariff-Filing Requirements, Docket ID DOT-OST-1997-2050-0022 (Dep't of Transp. Apr. 20, 2016).

In tailoring these country-by-country filing requirements, DOT considered the actions of foreign aviation authorities who required that many of the relevant rates also be filed with overseas regulators. 64 Fed. Reg. at 40,656, 62 Fed. Reg. at 10,760. Pursuant to its regulatory authority, DOT has continued to review rate filings, disapproving certain rates and extensively questioning the need for others. [ER405-06, ER415-16, ER226-33, ER422.]

C. The Filing of Fuel Surcharges

DOT's rate regulation is not limited to fares. Fuel surcharges, which are additional per-ticket fees, fall within DOT's statutory jurisdiction over "prices" for all international passenger flights. 49 U.S.C. § 40102(a)(39) (defining "price" to include any "rate, fare or charge"). Like other rates for international air travel, surcharges are subject to DOT's filing requirements. *Id.* § 41504(a) ("every air carrier and foreign air carrier shall file with the Secretary, publish, and keep open to public inspection, tariffs showing the prices for foreign air transportation").

In 1999, when DOT modified its filing regime to create the tiered filing system, it required that certain types of rates "continue to be filed" under all circumstances. [ER698-99; *see also* ER705 ("elimination of our tariff filing requirements for certain information should not be construed as a

grant of exemption from other requirements of our regulations").] Fuel surcharges were among these rates: DOT *explicitly* mandated that "all surcharges are to be filed." [ER707.] At no time has DOT ever rescinded or altered this requirement.

As the Ninth Circuit acknowledged, fuel surcharges are filed with DOT through a company called ATPCO. *Wortman v. All Nippon Airways,* 854 F.3d 606, 614 (9th Cir. 2017). For instance, since 2004 when DOT first allowed separate fuel surcharges and throughout the relevant time period, ANA has filed all of its fuel surcharges via ATPCO's Government Filing System ("GFS"). The record shows DOT's affirmative approval of ANA's fuel surcharges. [No. 15-15362, ER671, ER661-63 (¶¶ 7-12).] EVA submitted its fuel surcharges through an online interface (ATPCO's "YQ application") beginning in 2006. [SER1577.][4]

D. DOT Complaint Process

Another mechanism by which DOT oversees fares in international aviation is through its complaint process—which applies regardless of whether a particular rate is required to be filed. When DOT announced its tiered rate-filing regime, it noted that in the absence of routine tariff filings for certain routes, it would "rely primarily upon

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[4] What the panel refers to as "unfiled" fuel surcharges were, for example, cases in which ATPCO was instructed to file surcharges with DOT, but ATPCO mistakenly transmitted those filings to the Canadian regulator [ASER20-41], or fuel surcharges that were submitted using ATPCO's "YQ" application [SER1576-77].

competitors and users to bring any problems to [its] attention." 62 Fed. Reg. at 10,763 n.13. One important way in which DOT monitors fares and charges is through its congressionally mandated complaint process. *See* 49 U.S.C. § 46101 (stating that a "person may file a complaint in writing with the Secretary of Transportation" and requiring DOT to investigate all potentially meritorious complaints).

DOT regulations permit "any person" to file a complaint about any violation of DOT "rules, regulations, orders or other requirements," 14 C.F.R. § 302.404, and to challenge the "lawfulness of rates, fares, or charges for . . . foreign air transportation," *id.* § 302.502. When a complaint is filed, or on its own initiative, DOT "may issue an order instituting an investigation of the lawfulness of any present or proposed rates, fares, or charges." *Id.* § 302.505.

In investigating a complaint, DOT may appoint an administrative law judge, issue subpoenas, order that depositions be taken, hold hearings at which witnesses are examined, and hear oral argument. *See generally* 14 C.F.R. §§ 302.17-302.38. After completing its investigation, DOT must issue a final order explaining the reasons for its conclusion about the lawfulness of the rate. *Id.* § 302.38; *see also* 49 U.S.C. § 41509(a) (authorizing DOT to reject any price determined to be "unreasonable," "unreasonably discriminatory," or not in the "public interest").

DOT has used its complaint process to adjudicate challenges to international airline pricing, including challenges to fuel surcharges. In 2013, for

example, a passenger filed a complaint with DOT alleging that British Airways ("BA") failed to properly disclose and provide adequate justification for its fuel surcharges. [ER99-105.]

Reviewing the applicable law, DOT cited 14 C.F.R. § 399.84(a) for the principle that published airline charges included within a total price must "accurately reflect[] the cost of the item covered by the charge," and 77 Federal Register 11618-19 (Feb. 27, 2012) for the rule that "[w]hen a cost component is described as a fuel surcharge,…that amount must actually reflect a reasonable estimate of the per-passenger fuel costs incurred by the carrier above some baseline calculated based on such factors as the length of the trip, varying costs of fuel, and number of flight segments involved." DOT asked BA to provide data justifying its fuel surcharge amounts on the basis of those regulatory precepts. After analyzing BA's data, DOT ultimately determined that BA did not misrepresent its actual fuel costs, but the exercise of DOT's authority to intercede and to ensure lawful fuel surcharge levels was unquestioned. *See* DOT Order 2014-9-2 (Sept. 5, 2014), at 4-5. DOT has also adjudicated consumer complaints against American Airlines and Cathay Pacific regarding their fuel surcharges. [ER292-307.]

E. The Proceedings Below

Plaintiffs purport to represent a class comprised of all "persons and entities that purchased passenger air transportation" for travel "between the United States and Asia or

Oceania…at any time between January 1, 2000 and the present." [ER596.] They brought this putative antitrust class action in 2007, seeking treble damages for an alleged conspiracy among the defendant airlines to fix the price of international passenger fares and fuel surcharges on transpacific flights in violation of Section 1 of the Sherman Act, 15 U.S.C. § 1. [ER472.] Defendants filed a motion to dismiss based on the Foreign Trade Antitrust Improvements Act and, in 2011, the putative class was limited to passengers whose flights originated in the United States rather than Asia or Oceania.

In 2013, defendants moved for summary judgment based on the filed-rate doctrine. The district court granted the motion in part and denied it in part. [ER1.]

The district court recognized "that Congress gave [DOT] authority over *all* of the rates and charges at issue in this case," whether the rates were actually filed or not. [*Id.* (emphasis added).] In doing so, the court rejected plaintiffs' categorical argument that Congress "deregulated the airline industry and did not intend for the filed rate doctrine" to apply here. [ER15.]

Against that backdrop, the district court held that the filed-rate doctrine applied to fares that DOT required airlines to file, such as Category C and certain Category B air fares. As the court noted, Congress "reaffirmed" DOT's jurisdiction over these rates when it enacted the IATCA. [ER17 (citing Pub. L. No. 96-192, § 14, 94 Stat. at

40-42) (explaining that DOT could, among other things, "suspend the operation of such tariff and defer the use of such rate").] The district court thus concluded that the filed-rate doctrine barred plaintiffs' challenges to any fares that had been actually filed with DOT, reasoning that it was "not at liberty to question a federal agency's discretion in rate-making." [ER19 (citing *E. & J. Gallo Winery v. Encana Corp.* ("*Gallo*"), 503 F.3d 1027, 1039 (9th Cir. 2007)).]

The district court, however, reached a different conclusion regarding fuel surcharges. It held that DOT had abdicated its authority over fuel surcharges. Even though the court acknowledged that DOT had jurisdiction over fuel surcharges, it nevertheless concluded that DOT was not exercising sufficient oversight over fuel surcharges to warrant application of the filed-rate doctrine. [ER25.] And while the district court acknowledged DOT's 1999 mandate, which has never been altered or modified, that "all surcharges are to be filed," it concluded that this requirement was implicitly rescinded by later DOT pronouncements regarding fuel surcharges. [*Id.*] On that basis, the court refused to apply its holding regarding filed fares to fuel surcharges.

At defendants' request, the district court certified its order partially denying defendants' summary judgment motion for interlocutory appeal. [ER95-96.]

Following briefing and oral argument, the Ninth Circuit panel, in a published opinion, upheld Judge Breyer's decision regarding the two categories of rates on appeal: (i) fares that were not required to be filed in light of the DOT's market-based system and (ii) fuel surcharges that were actually filed with DOT (to which, the panel said, the doctrine did not apply). With respect to fuel surcharges, which DOT required to be filed, the panel concluded, by a 2-to-1 majority, that a DOT statement—that it lacked the ability to effectively monitor *advertising* regarding fuel surcharges—meant that the DOT was not exercising sufficient regulatory authority for the doctrine to apply. It held that "DOT has not exercised its authority to regulate…fuel surcharges…in a manner *sufficient* to justify application of the filed rate doctrine," *Wortman,* 854 F.3d at 617—notwithstanding that the single statement cited by the majority related only to the manner in which fuel surcharges were advertised. DOT never rescinded its 1999 requirement that "all surcharges are to be filed"; and DOT continued to regulate fuel surcharges thereafter.

In dissent, Judge Clifford Wallace concluded "that the majority is incorrect as to any fuel surcharges that were actually filed." *Id.* at 618. The majority's position, he wrote, conflicts with this Court's affirmation in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 417 n.19 (1986), that the filed-rate doctrine applies "whenever tariffs have been filed." 854 F.3d at 618. "The existence of the rates that were actually filed,

combined with the existence of the DOT's consumer complaint process," he continued, "negates any issue of material fact as to whether DOT effectively abdicated its authority to regulate actually-filed fuel surcharges." *Id.* at 619.

The appellant airlines filed Petitions for Panel Rehearing or Rehearing *En Banc*, which were denied on June 6, 2017 (with Judge Wallace voting in favor of panel rehearing and rehearing *en banc*). This petition for a writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

The Ninth Circuit's opinion below contradicts this Court's precedent and creates or perpetuates a circuit split in two respects.

First, as to surcharges, the opinion creates a circuit split on what was a prototypical, undisputable filed-rate case: one in which a rate that has been filed with an agency pursuant to a regulatory scheme is necessarily subject to the filed-rate doctrine. This Court and the other Circuit Courts of Appeals have repeatedly held that filed rates are necessarily subject to the filed-rate doctrine. A mainstay of the filed-rate doctrine has been the rule barring private damages actions that conflict with the terms of tariffs filed with state and federal agencies pursuant to regulatory regimes. The First, Second, and Seventh Circuits have strictly followed this Court's direction in barring such private damages actions.

The court below, however, erased that clear rule and instead opted for a standardless rule that would permit courts to second-guess agency regulation on an *ad hoc* basis as to whether it is "practical" enough to warrant the application of the filed-rate doctrine.

Second, the opinion below exemplifies a persistent split among the Circuits as to the proper application of the filed-rate doctrine to regulatory systems in which the agency has removed a literal filing requirement but nevertheless retains regulatory oversight over rates. The First, Second, Fifth, and Ninth Circuits now apply analytical frameworks to this question that, to varying and irreconcilable degrees, require courts to again assess whether the agency is regulating "enough" (in the court's view) for the doctrine to apply. And the Eleventh Circuit categorically refuses to apply the doctrine absent a literal filing requirement. This Court's guidance is needed to delineate the boundaries for courts' intervention into agency rate regulation where agencies monitor and regulate rates without insisting that each and every rate be filed.

I. THE DECISION BELOW CONFLICTS WITH DECISIONS OF THIS COURT AND THE OTHER CIRCUITS APPLYING THE FILED-RATE DOCTRINE TO ACTUALLY FILED RATES

A. The Ninth Circuit's holding that the filed-rate doctrine applies to filed fuel surcharges only if DOT retained the practical ability to regulate those surcharges conflicts with decisions of this Court and other circuits.

In the years since *Keogh*, this Court's decisions have both reaffirmed that decision and confirmed the rule that the filed-rate doctrine—undisputedly, and at the very least—bars private damages actions that seek damages that conflict with the terms of any tariffs filed with state or federal regulatory agencies pursuant to a statutory scheme. *See* Statement of the Case at A. Indeed, this Court has repeatedly affirmed this essential principle that "the legal right of the [customers] against the carrier [have] to be measured by the published tariff." *Square D*, 476 U.S. at 416.

For instance, in *Maislin*, 497 U.S. at 121-22, a regulatory agency refused to exercise its regulatory authority to require adherence to filed rates, and instead adopted a policy that enabled carriers to charge negotiated rates that were different from the filed rates. Nevertheless, this Court held that the filed-rate doctrine must be applied. *Id.* at 126-36. This Court unambiguously reaffirmed the "classic

statement" of the filed-rate doctrine that once a rate is "duly filed," it "is the only lawful charge" and "[d]eviation [in judicial proceedings] from it is not permitted upon any pretext." *Id.* at 127 (quoting *Louisville & Nashville R. Co.* v. *Maxwell*, 237 U.S. 94, 97 (1915)).

It was likewise this Court's holding in *Central Office* that the filed-rate doctrine bars all claims based on terms that "directly conflict with the tariff[.]" *Am. Tel. & Tel. Co. v. Cent. Office Tel., Inc.*, 524 U.S. 214, 227 (1998). Here, there is no dispute that plaintiffs' claims that they should have paid lesser fuel surcharges "directly conflict" with tariffs that set forth those fuel surcharges.

The First, Second, and Seventh Circuits have consistently applied the filed-rate doctrine to the prototypical case in which rates are literally filed with an agency pursuant to its regulatory scheme. As this Court noted in *Square D*, the Second Circuit in that case held that the filed-rate doctrine applies "whenever tariffs have been filed." *Square D*, 476 U.S. at 417 n.19. Following this Court's affirmance of the Second Circuit's decision in *Square D*, courts in that circuit have repeatedly acknowledged that courts "are not institutionally well suited to engage in retroactive rate-setting," *Wegoland, Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1115 (S.D.N.Y. 1992), *aff'd*, 27 F.3d 17 (2d Cir. 1994), and "lack the competence to set [regulated] rates," *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.*, 45 F.3d 58, 62 (2d Cir. 1995).

In *Goldwasser v. Ameritech Corp.*, 222 F.3d 390,

402 (7th Cir. 2000), the Seventh Circuit rejected the argument that "rates should not be shielded by the doctrine" when regulators "give no meaningful review to the rate structure." The Seventh Circuit held that the contention that an alleged lack of "meaningful review" precludes application of the filed-rate doctrine ignores that the "Supreme Court rejected precisely this argument." *Id.*

Similarly, in *Town of Norwood v. New England Power Co.*, the First Circuit held that "[i]t is the *filing* of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine." 202 F.3d at 419 (emphasis in original).

The decision below directly conflicts with this Court's precedent and with the other Circuits. The panel majority expressly rejected the principle that "merely filing a rate triggers application of the doctrine in every circumstance[.]" *Wortman*, 854 F.3d at 616 n.5. The court held that although DOT "required surcharges to be filed," there existed "a genuine issue of material fact as to whether … DOT retained the practical ability" to regulate. *Id.* at 614.

The court gave no guidance as to what standard of regulation it thought was necessary to trigger application of the filed-rate doctrine for fuel surcharges that airlines filed in tariffs pursuant to the statutory scheme. Instead, the court cryptically stated that "[t]he record as it currently stands indicates that the DOT has not exercised its authority to regulate … fuel surcharges in a manner sufficient to justify the application of the filed rate doctrine." *Id.* at 617.

This approach would effectively rewrite the filed-rate doctrine into an "effective-regulation" doctrine. The Ninth Circuit's rewritten rule is contrary to the history of the filed-rate doctrine, this Court's enunciation of the doctrine, and other Circuit Courts of Appeals' application of the doctrine.

For those reasons, Judge Wallace dissented from the panel majority's holding that the mere filing of rates does not trigger application of the filed-rate doctrine, and concluded "that the majority is incorrect as to any fuel surcharges that were actually filed." *Id.* at 618. As the dissent recognized, the majority's holding conflicted with this Court's holding in *Square D* "that the filed rate doctrine was not limited to instances in which 'rates had been investigated and approved' but rather extended to instances 'whenever tariffs have been filed.' 476 U.S. 409, 417 n.19 (1986), *quoting Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1351 (2d Cir. 1985)." *Id.* Noting that this Court "answered no" to the "critical question" of "whether challenges to rates that were actually filed are permissible under the filed rate doctrine," Judge Wallace "assert[ed] that the fuel surcharges that have actually been filed in our case fall under the umbrella of *Square D's* holding." *Id.* Further, Judge Wallace specifically warned that the majority's "nebulous" standard, which "muddles" the doctrine as applied to literally filed rates, "has no limiting principle" and "could lead to the crumbling of the filed rate doctrine, in contravention of the Supreme Court's guidance." *Id.* at 619.

B. The Ninth Circuit improperly interjected itself into the agency's regulatory function, contrary to this Court's and other circuits' guidance.

In addition to contradicting the clear holdings of the above authorities, the panel's approach in giving district courts free rein to grade regulatory agencies on the adequacy of their regulation and thereby interject themselves into the rate-making process contravenes one of the main principles underlying the filed-rate doctrine: deference to agency expertise in regulating rates (the principle of "non-justiciability").

Indeed, "the filed rate doctrine exists for reasons independent of the type of plaintiff maintaining the action: (1) legislatively appointed regulatory bodies have institutional competence to address rate-making issues; (2) courts lack the competence to set utility rates; and (3) the interference of courts in the rate-making process would subvert the authority of rate-setting bodies and undermine the regulatory regime." *Sun City*, 45 F.3d at 62; *accord In re N.J. Title Ins. Litig.*, 683 F.3d at 455; *see also Montana-Dakota Utils.*, 341 U.S. at 251 (reasonableness of rates is question for regulatory agency); *H.J. Inc. v. Nw. Bell Tel. Co.*, 954 F.2d 485, 489 (8th Cir. 1992) ("the focus for determining whether the filed rate doctrine applies is the impact the court's decision will have on agency procedures and rate determinations"). Instead of preserving the exclusive role of regulatory agencies in approving filed rates, the panel's rewriting of the filed-rate doctrine would enmesh courts in grading the effectiveness of

agencies' regulatory efforts.

Here, as the panel majority noted, in a 1999 rule "DOT required that 'all surcharges … be filed.'" *Wortman*, 854 F.3d at 614. It was also undisputed that DOT acknowledged fuel surcharges that were filed, including marking them as "Approved" in the electronic filing system, just as DOT does with base airfares that are filed. *In re Transpacific Air Transportation Antitrust Litigation,* 69 F. Supp. 3d 3d 940, 951 n.13 (N.D. Cal. 2014). DOT's regulation of fuel surcharges also included enforcement actions showing how DOT monitored the reasonableness of fuel surcharges. [ER193-97, ER292-307, ER100-06.]

The only evidence cited by the panel majority as making summary judgment on filed fuel surcharges inappropriate was a single statement by DOT that it could not "effectively monitor" the different "situation" of airlines *advertising* filed surcharges as "government-approved." *Wortman*, 854 F.3d at 616, 618.

The panel majority's opinion would require district courts to interfere with DOT's regulation of those rates and second-guess DOT's decisions approving those rates and finding them reasonable. The doctrine would be transformed from foreclosing courts from interfering with regulatory practices to requiring courts to evaluate evidence of regulatory activity in order to grade an agency on whether it had "exercised its authority to regulate … in a manner [the court deems] sufficient to justify the application of the filed rate doctrine." *Id.* at 617.

The Ninth Circuit's rule would thus enmesh the courts in industry rate regulation, through nationwide antitrust and other damages class actions, based upon allegations that the agencies are not sufficiently regulating their industries to warrant application of the filed-rate doctrine. The courts would have to evaluate the various factors considered and disregarded by regulatory agencies in deciding whether to approve tariffs, as well as whether the agency did an adequate job of considering and weighing those factors. That is the polar opposite of the required deference under the filed-rate doctrine.

C. The Ninth Circuit's decision would create uncertainty in multiple industries nationwide.

The Ninth Circuit's nebulous approach would eliminate the certainty of the filed-rate doctrine's consistent application where tariffs are filed with regulatory agencies. That long-standing rule has given certainty not only to courts, but also to regulated entities and their customers—who are not left guessing whether either side may assert rights and obligations in conflict with the tariffs' terms.

However, if the opinion below is left undisturbed, it will create great uncertainty—in industries across the nation—regarding a legal doctrine that this Court has spent decades clarifying. Companies in regulated industries will be left guessing as to whether federal and state tariffs will continue to be the sole source of rights and obligations for them and their customers—or whether litigation

inconsistent with those tariffs will be permitted because a court considers agency regulation to be somehow ineffective.

Indeed, despite deregulation, many industries remain regulated pursuant to state and federal statutory schemes that require rates and other terms of service to be set forth in tariffs filed with regulatory agencies that are authorized to review and approve such rates and terms.

In addition to international aviation, energy, telecommunications, and insurance are subject to regulation of rates and covered by the filed-rate doctrine. For example, the Communications Act requires interstate communications common carriers to file tariffs and not to deviate from them. 47 U.S.C. § 203(a), (c). The Federal Power Act requires public utility electric rates to be "just and reasonable" and filed with the Federal Energy Regulatory Commission (FERC). 16 U.S.C. § 824d. Similarly, the Natural Gas Act requires natural gas rates to be "just and reasonable" and filed with FERC. 15 U.S.C. § 717c. On the state level, regulatory schemes require insurance rates to be filed with, and approved by, state insurance regulators. *See, e.g.*, Tex. Ins. Code § 2251.152; N.H. Rev. Stat. § 412:16(XII); N.Y. Ins. Law. § 2314. The filed-rate doctrine has been regularly applied to the rates and terms of tariffs filed by carriers in such industries. *See, e.g.*, *Entergy La., Inc. v. La. Pub. Serv. Comm'n*, 539 U.S. 39 (2003) (electric utility); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571 (1981) (natural gas); *Rothstein v. Balboa Ins. Co.*, 794 F.3d 256 (2d Cir. 2015) (insurance rates).

Given the national scope of many class actions, the Ninth Circuit's ruling will erase the long-standing rule of the filed-rate doctrine not just in that circuit, but throughout the nation. Class actions that seek to represent consumers and challenge tariffs nationwide—such as this action—will simply be filed in the Ninth Circuit, permitting plaintiffs to sue on behalf of consumers in all circuits—including those circuits that continue to apply the doctrine to literally filed rates. That could mean an explosion of nationwide class actions challenging federal and state regulatory regimes across the country.

The filed-rate doctrine is an important doctrine that has provided great clarity to regulatory agencies that require rate filings, the many entities that are subject to those requirements, and the customers of those entities. This Court has developed a clear and easy-to-follow rule for the filed-rate doctrine—a rule which ensures that questions concerning regulated rates are reserved for the agencies equipped to deal with them: where a statutory regulatory scheme implements rate filing, private damages actions challenging those rates cannot be brought.

That clarity will vanish if the standardless approach adopted by the court below is allowed to stand. This Court should restore that clarity and certainty by resolving the circuit split caused by the Ninth Circuit's rewriting of the filed-rate doctrine, and should reaffirm the bedrock rule barring private actions seeking damages inconsistent with rates and other terms filed in tariffs.

II. THE DECISION BELOW ALSO REFLECTS A PERSISTENT CONFLICT AMONG THE CIRCUITS ON THE APPLICATION OF THE FILED-RATE DOCTRINE TO FARES THAT ARE REGULATED WITHOUT A LITERAL FILING REQUIREMENT.

As discussed above, the filed-rate doctrine has long been premised on deference to administrative agencies. *Montana–Dakota Utils.*, 341 U.S. at 251–52 ("[E]xcept for review of the Commission's orders, the courts can assume no right to a different [rate] on the ground that, in its opinion, it is the only or the more reasonable one."). While this Court has never addressed the doctrine's application where an agency retains regulatory authority over rates but chooses to eliminate a *literal* filing requirement, several of the Courts of Appeals have addressed this issue and some have recognized that the same principle of deference compels a finding that the doctrine applies in that circumstance.

In the over three decades since *Square D*, Congress has not seen fit to overrule *Keogh*. Yet with agencies deciding to exercise their authority over rates in more sophisticated ways, and creating systems of oversight that increasingly make use of alternatives to the literal filing of each rate, the lower courts have largely ignored the core principle of deference upon which the doctrine is based and created substantial uncertainty regarding the doctrine's current reach. The Courts of Appeals have (i) not been recognizing that agencies continue to have Congressionally-

granted authority over rates; (ii) not been deferring to the agency's choice to monitor and regulate rates without having to accept filings of each and every rate; and (iii) not been applying the filed-rate doctrine as required.

Instead, the Courts of Appeals have wandered into a morass of conflicting standards through which they second-guess—in some cases at an extremely granular level—whether an agency is regulating "enough" (in the court's estimation) for the filed-rate doctrine to apply. That turns the principle of deference on its head, and finds no support in this Court's precedent. It has also created widespread uncertainty and disparity across the Circuits as to whether rates in many industries that, by the plain terms of Congress's mandate, are still subject to agency oversight, continue to be protected by the filed-rated doctrine. The essence of *Square D* was the principle that—until Congress says otherwise—courts must defer to regulatory agencies' expertise on matters of rate regulation. The Courts of Appeals have ignored that principle, and taken it upon themselves to craft a version of the filed-rate doctrine that does not. Only this Court's guidance can stop its further unravelling.

As discussed in detail below, a split in approach has emerged amongst the First, Second, Fifth, Ninth, and Eleventh Circuits.

Indeed, Ninth Circuit precedent has devolved into a vague, unworkable standard that produces unpredictable and irreconcilable decisions—such as the one before this Court on this petition. The Ninth

Circuit has (correctly) recognized that the operative question for the filed-rate doctrine is whether an agency has been granted authority over rates, regardless of how the agency chooses to exercise that authority. For instance, in *Gallo,* the Ninth Circuit reasoned that an agency that has authority to regulate rates but chooses to exercise that authority by regulating with even just a "light hand" is entitled to deference; thus the filed-rate doctrine operated to bar any challenges to FERC's authorized market-based rates. *E.g.*, *Gallo*, 503 F.3d at 1041-42. That was consistent with other cases within the circuit addressing various aspects of FERC's ongoing authority over rates.[5] Yet the court also suggested that—despite Congress having granted rate oversight to an agency—there could be a circumstance in which an agency could unilaterally take some action that (without ever saying so) "effectively abdicated its rate-making authority," such that the doctrine no longer applies. *Gallo*, 503 F.3d at 1040.

The Ninth Circuit has never made clear what particular action or inaction a federal agency must take to constitute an abdication of authority, and its decisions do not provide any consistent parameters for evaluating "abdication." This has enabled far-reaching

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[5] *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222, 1227 (9th Cir. 2007) ("[L]axness does not indicate, much less establish, that [a plaintiff] can turn directly to the courts for rate relief"); *Pub. Util. Dist. No. 1 of Snohomish Cnty.*, 384 F.3d at 760-62 (applying the filed-rate doctrine to rates authorized by FERC); *Pub. Utility Dist. No. 1 of Grays Harbor Cnty. Wash. v. IDACORP Inc.*, 379 F.3d 641, 651-52 (9th Cir. 2004) (same).

judicial second-guessing of whether an agency is regulating "enough"—such as in the opinion here.

Indeed, in the Ninth Circuit panel's ruling below, the court found some possible triable issues over whether DOT "effectively abdicated" its regulatory authority over unfiled passenger fares, despite the DOT's explicit statement that it continued to regulate unfiled fares and despite evidence of DOT's ongoing exercise of that authority. *Wortman*, 854 F.3d 606.

As detailed above, Congress has expressly charged DOT with preventing "unfair, deceptive, predatory, or anticompetitive practices in air transportation" and, to that end, has granted DOT broad authority to approve or disapprove rates. 49 U.S.C. §§ 40101(a)(9), 41504. And consistently with its statutory mandate, DOT has exercised that regulatory authority. Between 1979 and 1999, DOT required all international fares to be filed. *See id.* § 41504. In 1999, however, DOT determined that its regulatory goals would be better met through a new three category rate-filing regime: (1) rates for flights to "Category A" countries would not need to be filed; (2) rates to "Category B" countries required only certain fares to be filed; and (3) rates to "Category C" countries were required to be filed as before. *See* 64 Fed. Reg. 40,654, 40,654 (July 27, 1999)). DOT was explicit that the new filing regime "will not materially lessen the Department's ability to intervene in passenger pricing matters." 62 Fed. Reg. at 10,763. DOT emphasized that it still had "statutory authority to take action directly against unfiled passenger fares and rules

under a variety of circumstances" and could "reinstat[e] the tariff-filing obligation" at any time. *Id.* DOT also made clear that it could move countries to different filing categories in its discretion. 14 C.F.R. § 293.10(b). Indeed, DOT has continually revised and reissued the list of countries in each filing category, including as recently as last year. As noted above, at times this has involved *increasing* the filing requirements for carriers. [ER712.]

Nevertheless, the Ninth Circuit panel found that there was a "genuine issue of fact" as to whether DOT "effectively abdicated" its authority to oversee rates by dismissing as "lip-service" DOT's *express statements* that the new rate-filing scheme would "not materially lessen its ability to intervene in pricing matters," and second-guessing whether DOT has set up sufficient "means of considering unfiled rates." *Wortman*, 854 F.3d at 615. The panel's decision is a court literally second-guessing whether an agency's regulatory oversight is sufficient—the exact *opposite* principle to deference.

The unworkable "effective abdication" approach reflected in the court's decision in this case is just one in a line of differing, but likewise impractical standards articulated by other circuits addressing rate regulation that does not require each and every rate to be literally filed. The Fifth Circuit, for example, has applied the filed-rate doctrine to bar claims challenging rates that were not subject to a literal filing requirement where the relevant agency had "sufficient oversight" of the rates. *Tex. Commercial Energy v. TXU Energy, Inc.*, 413 F.3d 503, 509-10 (5th

Cir. 2005) (providing no guidance as to what amount of oversight is "sufficient" but applying the filed-rate doctrine where agency was charged with "ensur[ing] . . . reasonably priced electricity" and required electricity generators to file detailed market information).[6]

Other circuits have only provided limited guidance as to when the doctrine should *not* apply to rates without a literal filing requirement. The First Circuit has noted that the filed-rate doctrine would not apply to "rates [that] were truly left to the market, with no filing requirement or [agency] supervision at all." *Town of Norwood*, 202 F.3d at 419. The court, however, provided no workable explanation as to where that line should be drawn, or what evidence would be sufficient to find no "supervision at all." *Id.*

The Second Circuit—mirroring the uncertainty surrounding this doctrine—proclaimed that there may be, or there may not be, circumstances in which the doctrine *does not* apply to rates without a literal filing requirement: "It is not clear to us that the filed rate doctrine, and the rationales underlying it, should preclude all court scrutiny of alleged anti-competitive behavior affecting the setting of [rates without a literal filing requirement]." *Simon*, 694 F.3d at 206. The court expressly declined to set forth any further

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[6] *See also Utilimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004) (applying filed-rate doctrine to bar claims challenging rates that were "in conformity with the requirements of" and a product of a scheme "established and approved by" FERC, but providing no clear rule for the doctrine's application).

standard for application of the doctrine, other than acknowledging the doctrine barred the claims challenging the rates at issue in the specific case before it. *Id.* at 208. Thus, in the Second Circuit, it remains unclear if ever, and in what circumstances, the filed-rate doctrine would not apply to regulatory systems that do not require all rates to be literally filed with the agency. *See id.*

The Eleventh Circuit has decided to take yet another approach by categorically refusing to apply the filed-rate doctrine to bar challenges to any rates that are not literally filed with an agency. *Fla. Mun. Power Agency v. Fla. Power & Light Co.*, 64 F.3d 614, 616 (11th Cir. 1995); *see In re Hawaiian & Guamanian Cabotage Antitrust Litig.*, 450 F. App'x 685, 689 (9th Cir. 2011) (criticizing *Fla. Mun. Power Agency* because "it rests on the premise—rejected by this circuit in *Gallo*—that rates must be literally filed to trigger application of the filed rate doctrine"). As a result, in the Eleventh Circuit, even if Congress has granted an agency authority to regulate rates, courts will not apply the filed-rate doctrine if the agency in its discretion has chosen to regulate without requiring that each rate be filed.

The circuits' varying approaches, including the decision made by the Ninth Circuit below, present a discrete issue that has significant ramifications for a Supreme Court-created doctrine, and therefore require clarity from this Court. The only principled approach to this inquiry, that is consistent with this Court's precedent, is to apply the filed-rate doctrine where the agency retains the statutory authority to

regulate rates—regardless of what scheme the agency chooses to regulate those rates. Rather than promoting uniform rates and agency deference, the current landscape of circuit court authority invites inconsistency among and within circuits, uncertainty in countless regulated industries, and requires courts to question agencies' regulation rather than defer to it. This Court's intervention is therefore necessary to prevent further erosion of the filed-rate doctrine as to "unfiled rates" as well.

III. THE DECISION BELOW THAT THE FILED-RATE DOCTRINE APPLIES TO FILED DISCOUNTED FARES ONLY IF DOT "COULD EFFECTIVELY REGULATE" THOSE FARES LIKEWISE CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Finally, the panel's decision below with respect to discounted fares presents similar problems as its decision regarding filed fuel surcharges. The court held that plaintiffs could seek damages based on fares that were discounted from filed fares, and that the filed-rate doctrine's application to discount fares that had different terms from the filed fares depends on the factual question of whether DOT "could effectively regulate the actual [discount] fares because they arguably constituted *different* products from the filed fares." *Wortman*, 854 F.3d at 617 (emphasis added).

That holding conflicts with the holding in *Central Office*, which unambiguously applied the filed-rate doctrine to services *different* from the services set

forth in the tariffs. In *Central Office*, this Court reviewed a prior decision by the Ninth Circuit that also relied on a "different products" analysis to hold that the filed-rate doctrine did not bar claims based on "side deals" for services not included in tariffs. *Cen. Office Tel. v. AT&T,* 108 F.3d 981, 989-90 (9th Cir 1997). However, this Court rejected that argument and held that the filed-rate doctrine bars claims that are based on different products or services that "pertain to subjects that are *specifically addressed* by the filed tariff." 524 U.S. at 224-25. The decision below also conflicts with decisions of other Courts of Appeals that the filed-rate doctrine bars claims based on different services or terms that conflict with the tariff. *See Medco Energi US, L.L.C. v. Sea Robin Pipeline Co.,* 729 F.3d 394, 398-400 (5th Cir. 2013) (filed-rate doctrine bars claims based on terms that "conflict with the filed rate"); *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 680-81 (8th Cir. 2009) (doctrine bars claims based on "additional … services not covered by" tariff); *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531-32 (3d Cir. 2006) (doctrine bars claims based on terms different from tariff).

CONCLUSION

For the foregoing reasons, the Court should grant this petition for a writ of certiorari.

Respectfully submitted,

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October 18, 2017

APPENDIX

APPENDIX A

FOR PUBLICATION

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WORTMAN, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED; WILLIAM ADAMS; MARGARET GARCIA; BRENDEN G. MALOOF; MICAH ABRAMS; MARTIN KAUFMAN; RACHEL DILLER; LORI BARRETT; CLYDE H. CAMPBELL; MATTHEW EVANS; THOMAS SCHELLY; MARK FOY; JASON GREGORY TURNER; STEPHEN GAFFIGAN; BRUCE HUT; DICKSON LEUNG; KEVIN MOY; RUFUS BROWNING; LOLLY RANDALL; CHRISTIAN DUKE; ANDREW BARTON; TRACEY WADMORE SMITH; MICHAEL BENSON; TORI KITAGAWA; WOODROW CLARK, II; JAMES EVANS; MEOR ADLIN; JUSTIN LABARGE; SCOTT FREDERICK; REIKO HIRAI; IREATHA DIANE MITCHELL; LARRY CHEN; DAVID KUO;	NO. 15-15362 D.C. NO. 3:07-CV-05634-CRB

DAVID MURPHY; TITI TRAN;
ROBERT CASTEEL, III,
PLAINTIFFS-APPELLEES,

V.

ALL NIPPON AIRWAYS,
Defendant-Appellant.

DONALD WORTMAN, individually and on behalf of all others similarly situated; WILLIAM ADAMS; MARGARET GARCIA; BRENDEN G. MALOOF; MICAH ABRAMS; MARTIN KAUFMAN; RACHEL DILLER; LORI BARRETT; CLYDE H. CAMPBELL; MATTHEW EVANS; THOMAS SCHELLY; MARK FOY; JASON GREGORY TURNER; STEPHEN GAFFIGAN; BRUCE HUT; DICKSON LEUNG; KEVIN MOY; RUFUS BROWNING; LOLLY RANDALL; CHRISTIAN DUKE; ANDREW BARTON; TRACEY WADMORE SMITH; MICHAEL BENSON; TORI KITAGAWA; WOODROW CLARK, II; JAMES EVANS; MEOR ADLIN; JUSTIN LABARGE; SCOTT FREDERICK; REIKO HIRAI; IREATHA DIANE MITCHELL; LARRY CHEN; DAVID KUO; DAVID MURPHY; TITI TRAN; ROBERT CASTEEL, III,
Plaintiffs-Appellees,

v.

No. 15-15362

D.C. No. 3:07-CV-05634-CRB

OPINION

v.

CHINA AIRLINES; EVA AIRWAYS,
Defendant-Appellants.

Appeal from the United States District Court
For the Northern District of California
Charles R. Breyer, District Judge, Presiding

Argued and Submitted January 13, 2017
San Francisco, California

Filed April 14, 2017

Before: J. CLIFFORD WALLACE, RICHARD R. CLIFTON, and MILAN D. SMITH, JR., Circuit Judges.

Opinion by Judge Milan D. Smith, Jr.; Partial Concurrence and Partial Dissent by Judge Wallace

SUMMARY*

Antitrust

Affirming the district court's partial denial of defendant airlines' motions for summary judgment, the panel held that the filed rate doctrine did not preclude a suit for antitrust damages challenging defendants' unfiled fares, fuel surcharges, or special "discount" fares.

The plaintiffs alleged that the airlines colluded to fix the prices of certain passenger tickets and fuel surcharges on flights between the United States and Asia, in violation of Section 1 of the Sherman Antitrust Act.

The filed rate doctrine prohibits individuals from asserting civil antitrust challenges to an entity's agency-approved rates. The panel held that the doctrine did not preclude plaintiffs' antitrust claims premised on unfiled fares because there were genuine issues of material fact as to whether the Department of Transportation effectively abdicated its authority over the unfiled air fares. The panel held that there were also genuine issues of material fact regarding the DOT's exercise of regulatory authority over fuel surcharges. Addressing one airline's "discount" fares,

* This summary constitutes no part of the opinion of the court. It has been prepared by court staff for the convenience of the reader.

which differed in both price and terms from the airline's filed tariffs, the panel held that the district court did not err in declining to apply the filed rate doctrine given questions of fact regarding whether the discount fares constituted the same product as the fares actually filed.

Concurring in part and dissenting in part, Judge Wallace concurred in the bulk of the majority's opinion. He dissented from the majority's conclusion, in Section III, Subsection B of its opinion, that genuine issues of material fact remained as to whether the DOT effectively abdicated its authority over fuel surcharges that the defendants actually filed with the DOT. Judge Wallace wrote that the filed rate doctrine should not be expanded by the rule the courts must determine when an agency has "effectively abdicated" its authority, notwithstanding the actual filing of rates.

COUNSEL

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OPINION

M. SMITH, Circuit Judge:

Defendants-Appellants All Nippon Airways (ANA), China Airlines, and EVA Airways (collectively, Defendants) challenge the district court's holding that the filed rate doctrine does not preclude Plaintiffs-Appellees' putative class action suit for antitrust damages based on allegations of collusion and price fixing. We have not previously addressed the application of the filed rate doctrine to airline fares and fees. For the reasons set forth in this opinion, we hold that, based on the record in this case, the filed rate doctrine does not preclude Plaintiffs' suit for antitrust damages challenging Defendants' unfiled fares, fuel surcharges, or "discount" fares. We therefore affirm the district court's partial denial of Defendants' motions for summary judgment.

FACTUAL AND PROCEDURAL BACKGROUND

Plaintiffs claim antitrust violations by Defendants in connection with three categories of Defendants' charged rates: (1) unfiled fares, (2) fuel surcharges, and (3) special "discount" fares.

The DOT's present regulations require airlines to file their base-fare rates to differing extents, depending upon whether a particular airline is included within Country Category A, B, or C. Airlines headquartered in or traveling between the United

States and a Category A country need not file any fares. Airlines headquartered in or traveling between the United States and a Category C country must file all fares. Finally, airlines headquartered in or traveling between the United States and a Category B country must file certain, but not all, of their fares. Those fares not required to be filed are the "unfiled fares" at issue in this appeal.

In addition to charging base-fare rates, some airlines impose fuel surcharges, which are additional per-ticket fees based on the carrier's fuel costs. Prior to 2004, the DOT did not permit separate fuel surcharges. Rather, airlines were required to incorporate the cost of fuel into the base ticket price. However, in October 2004, the DOT lifted its prohibition on separate fuel surcharges. The parties dispute whether the DOT required filing of these newly allowed surcharges. Defendants argue that it did, citing a 1999 DOT statement that "all surcharges are to be filed," while Plaintiffs argue that the DOT's 1999 statement has no relevance to fuel surcharges given that the DOT did not permit fuel surcharges at the time the statement was made. In any event, the record reflects that regardless of whether the DOT required airlines to file fuel surcharges, in many cases airlines did file them.

Finally, Defendant ANA offers a number of special "discount" fares. These include the "Satogaeri" fares and the "Business Discount," "Biziwari," or "Buz-Wari" fares, all of which operate in the same manner: Specifically, ANA files the respective fares

with the DOT, then authorizes certain travel agents to sell tickets with more restrictive terms to consumers for some amount less than the filed rate. This lesser amount constitutes the "net fare," which travel agents remit to ANA as payment for the ticket. The travel agent retains as a commission any difference between the net fare and the amount charged to the consumer.

The terms governing the fares actually filed by ANA differed substantially from the terms governing the discount fares. For instance, while one of ANA's publicly-filed fares could be used for "circle trips"[1] and "double open jaw trips,"[2] the discounted version of that fare could not. The same public fare had a minimum stay of three days and allowed for a stopover in Japan and up to six transfers, while the discounted fare had no minimum stay, and did not allow stopovers or transfers. Some other of ANA's filed fares similarly differed from their discounted versions in regard to the types of trips permitted, maximum stay required, the amount of time in advance the

[1] "Circle trips" begin and end at the same point, but involve multiple stopovers.

[2] "Double open jaw" trips are those in which the origin and destination of the first flight are different from the origin and destination of the second, such that instead of traveling outbound from A to B and back from B to A, the customer travels outbound from A to B, but, then, on the second trip, from C to D.

ticket needed to be purchased, restrictions on stopovers, and applicable cancellation fees.

Plaintiff Donald Wortman filed a putative class action against Defendants on November 6, 2007, alleging that Defendants (as well as other airlines no longer in the suit) colluded to fix the prices of certain passenger tickets and fuel surcharges on flights between the United States and Asia, in violation of Section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. On November 23, 2009, Defendants filed motions to dismiss Plaintiffs' complaint, in part on the ground that the filed rate doctrine barred Plaintiffs' claims. The district court granted Defendants' motions in part on May 9, 2011, but denied their motions in regard to their assertion of the filed rate doctrine as a defense against claims for antitrust damages.

On September 10, 2013, following over two years of discovery, Defendants moved for summary judgment, again on the basis of the filed rate doctrine. On September 23, 2014, the district court granted in part and denied in part Defendants' respective motions for summary judgment. The district court held that while the filed rate doctrine applied to bar Plaintiffs' antitrust damages claims based on actually-filed fares, the doctrine did not preclude Plaintiffs' claims regarding unfiled fares, fuel surcharges, or ANA's "discount" fares.[3] The district

[3] Although the order is arguably susceptible to different readings, Plaintiffs acknowledged at oral argument that the district court's order did not implicitly or explicitly grant

court then granted Defendants' respective motions to certify its order partially denying summary judgment for interlocutory appeal. We similarly granted Defendants' petitions for permission to appeal. *See* 28 U.S.C. § 1292(b).

ANALYSIS

I. The History and Application of the Filed Rate Doctrine

The filed rate doctrine is a judicially created rule that prohibits individuals from asserting civil antitrust challenges to an entity's agency-approved rates. The doctrine originated in *Keogh v. Chicago & Northwest Railway Co.*, 260 U.S. 156 (1922). The plaintiffs in that case sought damages under the Sherman Act, alleging that the rates charged by common carriers exceeded those that would be charged in a competitive market. *Id.* at 159-160. The rates in question, however, had been filed with, and approved by, the Interstate Commerce Commission (ICC). *Id.* at 160. The Supreme Court held that the plaintiffs' suit was precluded, explaining that that

> [i]njury implies violation of a legal right. The legal rights of shipper as against carrier in respect to a rate are measured

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summary judgment in Plaintiffs' favor as to the unfiled fares, fuel surcharges, and discount fares. We treat the order as merely denying summary judgment in Defendants' favor as to these rates.

> by the published tariff. Unless and until suspended or set aside, this rate is made, for all purposes, the legal rate . . . . The rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier.

Id. at 163. The Supreme Court stated that the "paramount purpose" of this rule was to prevent "unjust discrimination" between consumers. *Id.*

The Supreme Court reaffirmed its *Keogh* holding six decades later, in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* 476 U.S. 409 (1986), once again applying the filed rate doctrine to bar shippers' challenges to carriers' filed rates. The Court rejected the plaintiffs' argument that Congress' stated intention to promote competition in the shipping industry, as set forth in the Motor Carrier Act of 1980, implied a private right to seek antitrust damages. ***Id.*** at 420. Rather, the Court held that absent a "specific statutory provision or legislative history indicating a specific congressional intention to overturn the long-standing *Keogh* construction," a private antitrust suit's "harmony with the general legislative purpose is inadequate" to justify deviation from the rule. ***Id.*****;** *see also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.,* 497 U.S. 116, 135 (1990) ("Generalized congressional exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements."). The Court also noted that the filed rate doctrine is not properly characterized as antitrust "immunity,"

because other sanctions or equitable relief remain available. *Square D,* 476 U.S. at 422. Rather, the doctrine simply precludes treble damages based on a hypothetically lower rate. *Id.*

While the filed rate doctrine initially grew out of circumstances in which common carriers filed rates that a federal agency then directly approved, we have applied the doctrine in contexts beyond this paradigmatic scheme, and most frequently in the realm of energy rates. In *E. & J. Gallo Winery v. EnCana Corp.,* 503 F.3d 1027 (9th Cir. 2007), we considered a suit by customers against a natural gas supplier. The Federal Energy Regulatory Commission (FERC) had jurisdiction over the relevant transactions. *Gallo,* 503 F.3d at 1031. The defendants had not filed the challenged rates with FERC. *See id.* Rather, FERC had adopted a market-based approach to rate setting. *Id.* at 1041-42. We held that "to the extent Congress has given FERC authority to set rates under the [Natural Gas Act] and FERC *has exercised that authority,* such rates are just and reasonable as a matter of law and cannot be collaterally challenged under federal antitrust law or state law." *Id.* at 1035 (emphasis added). The question in that case was whether FERC had actually "authorized" the rates in question, the lack of a filing requirement notwithstanding. *Id.* at 1041 (citing *Pub. Util. of Snohomish Cty. v. Dynegy Power Mktg.,* 384 F.3d 756, 760 (9th Cir. 2004), for the proposition that "[t]he fundamental question . . . is whether, under the market-based system setting wholesale electricity rates, FERC is doing enough regulation to justify

federal preemption of state laws."). In *Gallo,* we found that it had. 503 F.3d at 1042-43.

Specifically, we found that while Congress actively removed FERC's authority "to set prices for first sales," and thereby left "the determination of natural gas prices at the wellhead to market forces," *id.* at 1037, FERC continued to regulate rates by (1) determining ex ante that "no seller of natural gas could obtain market power and that market-based rates would be just and reasonable," (2) issuing "blanket certificates for sales" of natural gas, which only then suspended FERC's rate-filing requirements for those sales, and (3) monitoring the "operation of the market through the complaint process," id. at 1038 (internal quotation marks omitted); *see also Public Util. of Grays Harbor v. Idacorp,* 379 F.3d 641, 651 (9th Cir. 2004) (identifying ways in which FERC maintained regulation of market-based rates). We also found in a prior case that FERC "imposed various reporting requirements on sellers," and that the agency had "clearly stated its belief that these procedures satisfied] the filed rate doctrine." *Id.* at 1041 (quoting *Grays Harbor,* 379 F.3d at 651). FERC therefore had "not abdicated its responsibilities but ha[d] acted, albeit with a light hand, to authorize just and reasonable rates" such that the filed rate doctrine applied. Id. at 1042. We cautioned, however, that "a failure by FERC to *exercise* its statutory authority to approve rates would cast doubt on the underlying premise of the Filed Rate Doctrine." Id. at 1040 (emphasis added).

We considered the filed rate doctrine in a wholly different context in *Carlin v. Dairy America, Inc.,,* 705 F.3d 856 (9th Cir. 2013). That appeal arose from a putative class action brought by dairy farmers seeking monetary and injunctive relief due to the misreporting of pricing data to the United States Department of Agriculture (USDA), which affected the rates for raw milk set under Federal Milk Marketing Orders (FMMOs) pursuant to the Agricultural Marketing Agreement Act, 7 U.S.C. § 601 *et seq*. *Carlin,* 705 F.3d at 864-66. We conceded that FMMO prices were not the paradigmatic "filed rates" contemplated in *Keogh* because (1) they consisted only of minimum prices, (2) they were not nationally uniform, and (3) FMMOs did not exist at all in some locations. ***Id.*** at 870. Nevertheless, we found "sufficient attributes which justify the application of the doctrine." ***Id.*** In particular, we reiterated our holding from *Gallo* that "meaningful review" by an agency is not a prerequisite to the application of the filed rate doctrine. *Id.* at 871. Rather, "the essential question [is] whether the market rates were *authorized* by the [agency]." ***Id.*** (emphasis in original). In other words, we must ask "whether the [agency] was doing enough regulation to justify federal preemption of state laws." *Id.* at 872 (citing *Gallo,* 503 F.3d at 1041). "[T]he USDA did possess the authority and did exercise it to address problems as to the agency-set minimum prices for raw milk." ***Id.*** at 873. Thus, the filed rate doctrine applied.

Nevertheless, despite the general applicability of the filed rate doctrine, we held in *Carlin* that the

farmers' suit was not barred because the federal agency in question had effectively—if retroactively—rejected the FMMO prices as incorrect, and "the policy considerations behind the doctrine d[id] not justify applying the doctrine as a bar in [that] case." *Id.* at 874. In particular, calculating damages "would not [] involve the kind of 'hypothetical' speculation about agency decisions that *Keogh* forbids." *Id.* at 882.

We have also addressed a scenario in which the filed rate doctrine did not apply at all, in *Ting v. AT&T,* 319 F.3d 1126 (9th Cir. 2003). There, we held that the filed rate doctrine did not bar a putative class action in which customers alleged that a telecommunication provider's new contract rates violated state contract and consumer protection laws, despite the fact that the Federal Communications Act (FCA) required telecommunication carriers to file tariffs with the FCC. *Id.* at 1130. We explained that the Telecommunications Act of 1996 "fundamentally altered the [FCA's] regulatory scheme" by directing the FCC to "forbear from applying any regulation or any provision" where "enforcement of such regulation or provision [wa]s not necessary to ensure that [rates] . . . are just and reasonable" and nondiscriminatory, and where enforcement was neither necessary for consumer protection nor in the public interest. *Id.* at 1132 (quoting 47 U.S.C. § 160(a)).

The FCC promptly acted on its authority to forbear, explicitly stating that tariffs were no longer necessary due to market competition and that the filed rate doctrine would no longer apply. *Id.* at 1139

n.7. This new forbearance from requiring rate filings did not leave the market without some safeguards: The FCC retained a consumer complaint process as a means for consumers to seek a remedy for anticompetitive rates, and the FCC would not defer to the market where it determined the market to be "seriously flawed or not competitive." *Id*. at 1143–45.

As these cases illustrate, the focus of the filed rate doctrine has somewhat expanded beyond its original application, in which an agency's express approval of a rate precluded civil antitrust challenges to that rate. Nevertheless, our decisions make equally clear that this expansion is not without bounds. *See, e.g.*, *Carlin*, 705 F.3d 874.

II. Regulation of the International Airline Industry

The Federal Aviation Act of 1958 (FAA), Pub. L. No. 85-726, 72 Stat. 731, established a regulatory structure for airline rates. The FAA gave the Civil Aeronautics Board—which has since been replaced by the DOT—authority to approve or disapprove international airline rates in service to its responsibility for preventing "unfair, deceptive, predatory, or anticompetitive practices in air transportation." 49 U.S.C. §§ 41501, 41504. The FAA required airlines to file all tariffs with the DOT, and authorized the DOT to hold hearings, either on its own initiative or upon consumer complaint, to determine the lawfulness of those rates. 49 U.S.C. §§ 41504(a)-

(b), 41509(a). The DOT implemented its authority through detailed regulations. *See* 14 C.F.R. Part 221.

In the late 1970s, Congress passed legislation intended to increase competition and reduce governmental regulation in the airline industry. The Airline Deregulation Act of 1978 (ADA) wholly deregulated the domestic airline market, leading the DOT to cease accepting tariff filings for domestic air carriers. *See* 14 C.F.R. § 399.40; Tariffs for Post-1982 Domestic Travel (April 7, 1982), 47 FR 1489201. In the international airline market, however, Congress stopped short of full deregulation. Under the international Air Transportation Competition Act of 1979 (IATCA), the DOT retained jurisdiction over international airline rates, but had increased discretion over filing requirements. 49 U.S.C. § 40109(c). IATCA correspondingly decreased DOT's ability to grant antitrust immunity to fare agreements among carriers as part of Congress' "determination that airline service levels and fares should be controlled by competition, not by government regulation." Int'l Air Transport Assoc. Tariff Conf. Proceeding July 6, 2006 at *78; *see also* 49 U.S.C. § 41308(b). DOT continued to be responsible for providing a complaint process for consumers to challenge international air transport rates as anticompetitive. 14 C.F.R. §§ 302.501-507, 14 C.F.R. §§ 302.401-420.

In 1997, 20 years after the passage of IATCA, the DOT announced that, in keeping with "the continuing evolution of a policy where we rely on

market forces rather than continual government oversight to set prices for air transportation," rate filing no longer served a purpose in competitive foreign markets. 62 Fed. Reg. 10758, 10760. Accordingly, in 1999, DOT issued a final rule creating its three Country Categories (A, B, and C), each with different filing requirements. 64 Fed. Reg. 40654; 14 C.F.R. § 293.10. As noted, *supra,* the rule required airlines flying between Category C countries and the United States, or that were "nationals" of a Category C country *(i.e.* those airlines headquartered in Category C countries), to file all tariffs with the DOT. 14 C.F.R. § 293.10(a)(1)(iii). Airlines headquartered in or flying to and from Category B countries had to file only their standard one-way economy fares with the DOT. 14 C.F.R. § 293.10(a)(1)(ii). Airlines headquartered in or flying to and from Category A countries were not subject to any filing requirements, except to the extent that they operated flights to or from Category B or C countries. 14 C.F.R. § 293.10(a)(1)(i). The Country Categories corresponded roughly to the strength of bilateral agreements between the United States and a particular country. 64 Fed. Reg. at 40656. The DOT stated that it "has always had the statutory authority to take action directly against unfiled passenger fares," and "reserve[s] the option of reinstating the tariff-filing obligation . . . where consistent with the public interest." 62 Fed. Reg. at 10763.

Airlines submit tariffs by filing them with the Airline Tariff Publishing Company (ATPCO), which acts as a private clearinghouse to distribute fares to

various entities, including the Government Filing System (GFS) through which the DOT reviews filed fares. ATPCO filters submitted fares based on the DOT's country categories, and flags certain fares to be "presented" to the DOT for review. The DOT does not consider a fare as filed until it has been so presented, and the DOT does not appear to have access to unpresented fares.

In 1999, the DOT required that "all surcharges . . . be filed." DOT Notice of Exemption from the Department's Tarriff-Filing Requirements, Dkt. OST-97-2050-14. However, the DOT prohibited airlines from charging separate fuel surcharges prior to 2004. In 2004, the DOT explained that the prohibition on fuel surcharges was "established at a time when the Department was regulating fares much more actively than is the case today, and [it was] concerned that tariff surcharges could undermine [its] regulatory supervision of fare levels." However, it stated that increasingly competitive market conditions rendered this prohibition "no longer necessary to support the limited degree of pricing supervision that continues."

As of October 2004, the DOT directed that "carriers [we]re free to file surcharges in general rules tariffs." The following month the DOT announced that carriers could no longer advertise surcharges as being "government-approved," stating that it could not "effectively monitor" fuel charges filed separately from base fares, and that listing separate surcharges as approved would constitute "an unfair and deceptive trade practice." 69 Fed. Reg. 65676, 65676-77.

III. Application of the Filed Rate Doctrine to International Airline Fares and Fees

A. Application of the Filed Rate Doctrine to Unfiled Fares

We have previously applied the filed rate doctrine to circumstances in which the relevant rates were not literally filed. *See Gallo,* 503 F.3d at 1042; *Grays Harbor,* 379 F.3d at 651-52; *Wah Chung v. Duke Energy Trading,* 507 F.3d 1222, 1225 (9th Cir. 2007). In so doing, we have found that even though the regulating agency did not oversee rates via a filing system, the agency engaged in sufficient regulation through other means to satisfy the purposes of the doctrine. *See, e.g., Gallo,* 503 F.3d at 1042. In the present instance, by contrast, we agree with the district court's determination that there were genuine issues of material fact as to whether the DOT effectively abdicated its authority over the unfiled air fares. Accordingly, we hold that the filed rate doctrine does not preclude Plaintiffs' antitrust claims premised on the unfiled fares.

The parties do not dispute that the DOT had the authority to regulate unfiled rates, only whether it actually did so. As in the energy rate context, the DOT maintains a consumer complaint process through which consumers may challenge a rate as unreasonable or anticompetitive. The maintenance of a consumer complaint process is not, however, dispositive. *See, e.g., Ting,* 319 F.3d at 1143-44.

We acknowledge that, unlike the FCC's affirmative disavowal of telecommunications regulation, the DOT has at least paid lip-service to the notion that it continues to exercise some oversight of unfiled rates. In particular, when the DOT first set forth its three-tiered filing scheme, it stated that the new system would "not materially lessen the Department's ability to intervene in passenger pricing matters" because

> First, the review of [International Air Transport Association] passenger fare agreements will continue. Second, the Department has always had the statutory authority to take action directly against unfiled passenger fares and rules under a variety of circumstances. And third, the Department will reserve the option under the proposed rule of revoking the exemption, and thus of reinstating the tariff-filing obligation, with regard to a particular carrier or carriers, or for specific markets, where consistent with the public interest.

62 Fed. Reg. at 10763. Nevertheless, the evidence shows that the DOT's actual *actions* regarding unfiled fares have been minimal at best. Appellants point only to the 2005 reassignment of Argentina to a stricter Country Category as evidence of any ongoing regulation. Additionally, there remains some question regarding whether—despite the DOT's representation

that it would maintain authority over unfiled fares—the DOT has the ability to actually access or review those fares. The DOT's only means of considering unfiled rates appears to be through (1) assessment of the strength of bilateral pricing agreements between the United States and a given country, and (2) consumer complaints. *See* 14 C.F.R. §§ 302.501-507, 302.401-420.

In short, there are genuine issues of fact as to whether the DOT has effectively abdicated the exercise of its authority to regulate unfiled fares. Accordingly, the district court did not err in denying summary judgment to Defendants as to those fares based on the filed rate doctrine. *See Gallo,* 503 F.3d at 1040 ("[A] failure by FERC to exercise its statutory authority to approve rates would cast doubt on the underlying premise of the Filed Rate Doctrine. . . .").

B. Application of the Filed Rate Doctrine to Fuel Surcharges

As with unfiled fares, the parties do not contest that the DOT had authority to regulate fuel surcharges, but only whether it actually did so. The district court did not err by finding that genuine issues of material fact regarding the DOT's exercise of regulatory authority over fuel surcharges precluded entry of summary judgment for Defendants.

The DoT did not permit airlines to impose fuel charges separately from base airfares prior to 2004, at which time the DOT appears to have permitted, but

not required, airlines to file any such surcharges in their general rules tariffs. Admittedly, affording airlines the freedom to file surcharges, but not requiring them to do so, makes little sense—businesses are unlikely to expend time and money complying with optional regulations. Thus Defendants argue that the DOT did actually require airlines to file fuel surcharges, and that the language "permitt[ing]" airlines to file surcharges in their general rules tariffs indicates discretion on the part of airlines regarding the procedural manner in which they file their fuel charges, not whether they file at all. Defendants further argue that the DOT required filing of fuel surcharges pursuant to its 1999 rule notice stating that "all surcharges are to be filed." The record reflects that some of the airlines involved in this appeal did, or at least attempted to, file fuel surcharges during the class period.[4]

Application of the filed rate doctrine to fuel surcharges does not, however, turn on whether the DoT requires airlines to file those rates. Rather, summary judgment based on the application of the filed rate doctrine was inappropriate in light of the DOT's express statement that it lacks the ability to "effectively monitor" fuel surcharges. 69 Fed. Reg. at 65676-77. As we stated in *Gallo,* "a failure by [the

[4] Some airlines privately filed fuel surcharges, but entered them into the database incorrectly such that they were not flagged to be presented to the DOT and thus were not considered "filed" within the meaning of the DOT's regulations.

agency] to exercise its statutory authority to approve rates [] cast[s] doubt on the underlying premise of the Filed Rate Doctrine." 503 F.3d at 1040.[5] In the context of fuel surcharges, the DOT may have intended to exercise some regulatory authority, insofar as it required surcharges to be filed. The DOT's intent in this regard is unclear given its lack of participation in this lawsuit. However, the evidence on record created a genuine issue of material fact as to whether the DOT retained the practical ability to do so. Inability to regulate, just as much as willful abdication, constitutes a "failure by [an agency] to exercise its statutory authority." *Id.* In accordance with the DOT's expression of its inability to regulate fuel surcharges,

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[5] Notwithstanding *Gallo*'s instruction that actual filing does not end the filed rate doctrine inquiry, Judge Wallace cites *Gallo* and *Carlin* as establishing a "clear barrier" between filed and unfiled rates, such that an agency's failure to regulate is only relevant where the rate in question was not filed. We do not find this reading of *Gallo* and *Carlin* persuasive. On the contrary, while those cases may have dealt with rates not actually filed, their reasoning expressly invokes "the principles underlying [the] doctrine" to find that its application does not turn on "the act of literal rate filing." *Gallo,* 503 F.3d at 1040. Our opinion does not effect the unbounded expansion that Judge Wallace cautions against. Rather, it consistently applies the logic expressly set forth in our prior cases. To hold, as Judge Wallace advocates, that merely filing a rate triggers application of the doctrine in every circumstance, would permit carriers to avoid civil antitrust damages by filing rates even where the relevant agency has expressly stated that it cannot or will not engage in regulation. Such application of the doctrine completely untethers it from both its underlying justification and the reasoning of our prior decisions. We decline to adopt such a rule.

we decline to apply the filed rate doctrine to preclude Plaintiffs' claims regarding those surcharges.

C. Application of the Filed Rate Doctrine to Discount Fares

The third category of fares for which the district court considered the application of the filed rate doctrine is that of ANA's "discount" fares—as relevant here, those fares that differ in both price *and* terms from ANA's filed tariffs. We acknowledge that the filed rate doctrine prohibits suits based not only on a difference between filed and actually-applied rates, *see Maislin,* 497 U.S. at 127, but also on any difference between filed and actually-applied terms, *AT&T Corp. v. Central Office Tel., Inc.,* 524 U.S. 214, 223-27 (1998). However, we have not previously considered the application of the filed rate doctrine to a situation in which both the rate *and* the terms deviate from those on file with the regulating agency. We face that situation now, and we conclude that the district court did not err in declining to apply the doctrine given the questions of fact regarding whether the discount fares constitute the same product as the fares actually filed.

In *Central Office,* the Supreme Court stated that "the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the *same services*'" 524 U.S. at 223 (emphasis added). In this case, the terms of the unfiled discount tickets differed substantially from those of the filed fares. Moreover, the filed rate doctrine is grounded in the notion that courts should not be interpreting

"reasonable" pricing when an agency has already approved a given rate, and the concomitant desire to avoid discriminatory pricing between customers. *Keogh,* 260 U.S. at 163-64. Neither of these justifications supports application of the doctrine to ANA's discount-fare scheme. In regard to the latter, the entire system of discount fares is premised on varied pricing between consumers— accompanied, of course, by differing terms. As to the former consideration, it is somewhat disingenuous to label the filed rates as "approved rates" for a corresponding discount fare since the service being purchased differs materially from that described in the filed tariff.

Economy class and business class fares are considered to be different products by the DOT, and are, accordingly, filed separately, despite the fact that each may apply to the same departure and arrival point. *See* 62 Fed. Reg. at 10760 (distinguishing between "economy" fares, which must be filed by Category B countries, and "promotional" or "premium" fares, which need not be filed by Category B countries). The district court did not err in denying summary judgment to Defendants as to these discount fares. Given the differences in both the prices and terms, a question of fact existed as to whether the DOT could effectively regulate the actual fares because they arguably constituted different products from the filed fares.

CONCLUSION

The record as it currently stands indicates that the DOT has not exercised its authority to regulate unfiled airfares, fuel surcharges, or discount fares in a manner sufficient to justify the application of the filed rate doctrine. Should additional evidence indicate a greater degree of regulation by the DOT than is currently reflected in the record, the district court is free to reassess whether the filed rate doctrine bars any of Plaintiffs' claims. Pursuant to 28 U.S.C. § 517, the United States may submit a statement in a case expressing its views on relevant issues in which it has an interest. *See, e.g., Dept. of Fair Empl. and Hous. v. L. Sch. Admis. Council Inc.,* 896 F. Supp. 2d 849, 854 (N.D. Cal. 2012) (non-party United States entering statement of interest pursuant to 28 U.S.C. § 517); *Berglund v. Boeing Co., Inc.,* 02-193-AS, 2006 WL 1805965, at *1 (D. Or. June 22, 2006) (same). On remand, we urge the parties to solicit the DOT's views regarding its regulatory authority on the various rates here at issue.

We AFFIRM the district court's partial denial of Defendants' motions for summary judgment, and we REMAND this matter for further proceedings consistent with this opinion.

WALLACE, Circuit Judge, concurring in part and dissenting in part:

I concur in the bulk of the majority's well-reasoned opinion. I dissent, however, from the majority's conclusion that genuine issues of material fact remain as to whether the DOT effectively abdicated its authority over fuel surcharges that Defendants actually filed with the DOT.

In Section III, Subsection B, the majority discusses the second type of rate at issue in this appeal: fuel surcharges. In 1999, when the DOT implemented the category A, B, and C rate-filing system, the DOT explicitly stated that "all surcharges are to be filed." At the same time, however, the DOT did not allow fuel surcharges to be filed separately from airfares. Instead, the DOT insisted that carriers should recoup fuel expenses through increases in their base fares. In 2004, the DOT changed this policy, and allowed, but did not require, airlines to file separate fuel surcharges.

The parties disagree vigorously as to what the record reflects regarding the filing of fuel surcharges. Defendants assert that they "are unambiguously required to file all surcharges, including fuel surcharges, with DOT. . . . While the district court concluded that DOT did not require fuel surcharges to be filed, that conclusion was simply incorrect." plaintiffs, on the other hand, contend that Defendants "were never required to file them as a matter of law." Notwithstanding the factual disagreement over whether the DOT required the filing of surcharges after 2004, the record is also unclear as to whether

Defendants actually filed them in a consistent manner.

In sorting through the record on the filing of fuel surcharges, the majority concludes that "summary judgment based on the application of the filed rate doctrine was inappropriate in light of the DOT's express statement that it lacks the ability to 'effectively monitor' fuel surcharges." For the fuel surcharges that were not actually filed, i agree with the majority's analysis, and assert that these unfiled surcharges should be treated the same as the unfiled airfares. Defendants have not pointed to any evidence indicating the DOT's regulation of unfiled fuel surcharges. Instead, Defendants merely assert that the DOT required all surcharges to be filed (which, as described above, is contested). Accordingly, I agree with the majority's holding that the filed rate doctrine does not bar, as a matter of law, antitrust challenges to unfiled fuel surcharges.

I conclude, however, that the majority is incorrect as to any fuel surcharges that were actually filed. In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* the Supreme Court affirmed the filed rate doctrine's viability and held that the filed rate doctrine was not limited to instances in which "rates had been investigated and approved" but rather extended to instances "whenever tariffs have been filed." 476 U.S. 409, 417 n.19 (1986), *quoting Square D Co. v. Niagara Frontier Tariff Bureau, Inc.,* 760 F.2d 1347, 1351 (2d Cir. 1985).

The facts and the Supreme Court's holding in *Square D* are not the same as in our case. Moreover, *Square D* merely made the assertion in a footnote that the filed rate doctrine bars claims "whenever tariffs have been filed." Nevertheless, this footnote from *Square D* is the closest the Supreme Court has come to answering the question of whether challenges to rates that were actually filed are permissible under the filed rate doctrine. The Supreme Court answered no to this critical question. Thus, I assert that the fuel surcharges that have actually been filed in our case fall under the umbrella of *Square D's* holding.

The majority's conclusion on this issue seems to rely solely on the DOT's statement that it lacked the ability to "effectively monitor" fuel surcharges. The DOT's statement, however, must be read in its full context. In 2004, the DOT stated:

> [T]he desire of carriers to pass on the higher cost of certain expenses discretely, such as insurance and fuel, has led to such expenses being filed separately from the "base" fare in tariffs, a situation that the Department cannot effectively monitor. . . . [T]he Enforcement Office will no longer allow the separate listing of "government-approved" surcharges in fare advertising. We will consider the separate listing of such charges in fare advertisements an unfair and deceptive trade practice. . . .

69 Fed. Reg. at 65676-77. From this single statement, regarding "the separate listing of 'government-approved' surcharges in fare advertising," the majority formulates a genuine issue of material fact as to whether the filed rate doctrine is inapplicable to all fuel surcharges, whether or not they were filed. I assert that the majority reads far too much into the DOT's statement relating to advertising.

Accordingly, I would reverse the district court to the extent it held that Plaintiffs could challenge the literally-filed fuel surcharges. The existence of the rates that were actually filed, combined with the existence of the DOT's consumer complaint process, negates any issue of material fact as to whether the DOT effectively abdicated its authority to regulate actually-filed fuel surcharges.

When we create and expand judge-made doctrines, such as the filed rate doctrine, we must do so with an eye towards the lower courts' application of those doctrines. In *Gallo* and *Carlin,* we employed the "effective abdication" exception to the filed rate doctrine in situations when rates had not actually been filed.[6] This rule erected a clear barrier between

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[6] The majority, in footnote 5, asserts that *Gallo* stands for the proposition that the filed rate doctrine's application "does not turn on 'the act of literal rate filing'" (Majority Opinion at n.5, *quoting Gallo*, 503 F.3d at 1040). The majority's statement is misleading. The full sentence from *Gallo*, from which the majority selectively clips, is: "Moreover, although the Supreme Court initially applied the Filed Rate Doctrine to actual filed rates, courts have held that the principles underlying this

treatment of rates that had actually been filed versus those that had not. Here, the majority muddles that barrier, and expands the exception by adopting the rule that courts must determine when an agency has "effectively abdicated" its authority, notwithstanding the actual filing of rates. I fear this expansion has no limiting principle, and could lead to the crumbling of the filed rate doctrine, in contravention of the Supreme Court's guidance. Adhering to a rule—that the literal filing of rates means the filed rate doctrine applies— is more workable than the nebulous standard the majority has constructed here. Thus, I respectfully dissent from Section III, Subsection B of the majority opinion.

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doctrine preclude challenges to a wide range of FERC actions, not just the act of literal rate filing." *Id.* In essence, what *Gallo* conveys here is that while the filed rate doctrine has commonly applied only to actually-filed rates, its reach can expand even further, to scenarios in which rates have not been filed. In no way does *Gallo* suggest that the filed rate doctrine does not apply to actually-filed rates. Indeed, application to filed rates makes sense and is not "unbounded," because it allows the DOT to rely on complaints about a filed rate to exercise its supervision.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DONALD WORTMAN, individually and on behalf of all others similarly situated; et al.,, Plaintiffs-Appellees, v. ALL NIPPON AIRWAYS, Defendant-Appellant.	Nos. 15-15362, 15-15364 D.C. No. 3:07-CV-05634-CRB U.S. District Court for Northern California, San Francisco ORDER
DONALD WORTMAN, individually and on behalf of all others similarly situated; et al.,, Plaintiffs-Appellees, v. CHINA AIRLINES; EVA AIRWAYS, Defendants-Appellants.	

Before: J. CLIFFORD WALLACE, RICHARD R. CLIFTON, and MILAN D. SMITH, JR., Circuit Judges.

A majority of the panel has voted to deny the petition for panel rehearing filed by Appellants China Airlines and Eva Airways, as well as the petitions for rehearing en banc filed by all Appellants. Judges M. Smith and Clifton have voted to deny the petition for panel rehearing. Judge Wallace has voted to grant the petition for panel rehearing. Judge M. Smith has voted to deny the petitions for rehearing en banc, and Judge Clifton so recommends. Judge Wallace recommends granting the petitions for rehearing en banc.

The full court has been advised of the petitions for rehearing en banc and no judge has requested a vote on whether to rehear the matter en banc. See Fed. R. App. P. 35.

The petitions for panel rehearing and rehearing en banc filed by Appellants are DENIED.

IT IS SO ORDERED.

APPENDIX C

IN THE UNITED STATES DISCTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

IN RE TRANSPACIFIC PASSENGER AIR TRANSPORTATION ANTITRUST LITIGATION This Document Relates to: ALL ACTIONS	No. C 07-05634 CRB MEMORANDUM AND ORDER GRANTING IN PART AND DENYING IN PART MOTIONS FOR SUMMARY JUDGMENT

The five remaining Defendants in this antitrust suit–Air New Zealand, All Nippon Airways ("ANA"), China Airlines, EVA Air, and Philippine Airlines–move for summary judgment on the basis of the filed rate doctrine, a defense to private antitrust suits, which provides that "to the extent Congress has given [an agency] authority to set rates . . . and [the agency] has exercised that authority, such rates are just and reasonable as a matter of law and cannot be collaterally challenged under federal antitrust law. . . ." See E. & J. Gallo Winery v. EnCana Corp., 503 F.3d 1027, 1035 (2007). As explained below, the Court finds that Congress gave

the Department of Transportation ("DOT") authority over all of the rates and charges at issue in this case, and that (1) the DOT exercised that authority over the rates that Defendants actually filed with the DOT (Class B and C air fares), but (2) the DOT did not exercise that authority over the rates that Defendants did not file with the DOT (Class A air fares, fuel surcharges, and ANA special discount rates). The filed rate doctrine therefore applies, and bars treble damages, only as to the filed rates in this case.[1]

I. BACKGROUND

Defendants are various airlines alleged to have agreed to fix, raise, maintain, and/or stabilize air passenger travel, including associated surcharges, for international flights between the United States and Asia/Oceania, in violation of section 1 of the Sherman Antitrust Act, 15 U.S.C. § 1. Plfs.' 2d Consolidated Amended Compl. ("Second CAC") (dkt. 741) ¶¶ 1-2. Plaintiffs are a class of individuals who purchased from one or more of the Defendants air transportation services that included at least one flight segment between the United States and Asia/Oceania. Id. ¶¶ 8-23. The Second CAC alleges that, beginning no later than January 1, 2000, Defendants and their co-conspirators agreed

[1] The filed rate doctrine does not bar Plaintiffs' claims for injunctive relief. See Square D Co. v. Niagra Frontier Tariff Bureau, Inc., 476 U.S. 409, 422 n.28 (1986).

and began to impose air fare increases, including fuel surcharge increases, that were in substantial lockstep both in their timing and their amount. See id. ¶ 74.

A. Procedural History

In May 2011, the Court granted in part and denied in part Defendants' motions to dismiss, reserving for summary judgment the question of whether the filed rate doctrine bars Plaintiffs' claims. Order Re Mot. to Dismiss (dkt. 467) at 13-14. At the time, the Court found that several factual matters were still unresolved, including which rates were actually filed with the DOT, and whether the DOT believed that the air fares and surcharges were covered by the filed rate doctrine. Id. at 14; see also Opp'n (dkt. 885) at 4 (citing Tr. of Nov. 1, 2010 (dkt. 448) at 45).

Now before the Court are five individual motions for summary judgment, based solely on the filed rate doctrine.[2] See ANA Mot. (dkt. 724), China Airlines Mot. (dkt. 731), Air New Zealand Mot. (dkt. 753), Philippine Airlines Mot. (dkt. 763), EVA Mot. (dkt. 792). Each individual motion lays out the regulatory facts specific to that Defendant. All of the Defendants but ANA have also filed a Joint

[2] Several Defendants-Thai Airways (dkt. 830), Cathay Pacific (dkt. 919), Qantas Airways (dkt. 926) and Singapore Airlines (dkt. 927)-also filed motions for summary judgment, which they withdrew upon settlement.

Memorandum, arguing that the filed rate doctrine bars all of Plaintiffs' claims for damages. See Joint Memo. (dkt. 728).

The motions present an issue of first impression. The Court must determine whether and how the filed rate doctrine, which has traditionally applied to utilities such as telecommunications and gas and power companies, applies to a "deregulated" international airline industry.[3] Because the filed rate doctrine is a preemption doctrine that requires the Court to defer to congressional intent and agency expertise, the Court must examine whether Congress intended for the filed rate doctrine to apply to air fares and surcharges, and whether the DOT actually authorized the rates and surcharges at issue here.[4]

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[3] The Court is not persuaded that either Aloha Airlines. Inc, v. Hawaiian Airlines. Inc., 489 F.2d 203 (9th Cir. 1973) (which predates deregulation and involves a claim that Hawaiian Airlines had attempted to monopolize the inter-island air transportation system on the Hawaiian islands), or Pan American World Airways, Inc. v. United States. 371 U.S. 296 (1963) (which predates deregulation and involves a suit by the government alleging that Pan American had violated sections 1 and 2 of the Sherman Act by interfering with a competing airline's efforts to extend its flight routes in South America), answers these questions.

[4] As Plaintiffs point out, the Court does not have the benefit of a statement from the DOT about whether it understands the filed rate doctrine to apply in this case. See Opp'n at 50 (citing Tran Decl. (dkt. 875) im 3-6, Exs. 1-2).

B. Legislative and Regulatory Background

In 1958, Congress enacted the Federal Aviation Act ("FAA") to require every airline to establish and maintain "reasonable prices, classifications, rules, and practices related to foreign air transportation." 49 U.S.C. § 41501. By definition, the word "price" includes any "fare or charge" for air transportation. See 49 U.S.C. § 40102(a)(39). The FAA tasked the DOT's predecessor agency, the CAB,[5] with "preventing unfair, deceptive, predatory or anticompetitive practices in air transportation." See 49 U.S.C. §§ 40101(a)(9), 41310(e). The FAA required every airline that engaged in foreign air transportation to file tariffs with the DOT in advance of their effective date. 49 U.S.C. § 41504(a) and (b). It provided that the DOT could reject, and thus render void, a tariff that was not consistent with the statutory requirements or DOT regulations. See 49 U.S.C. § 41504(c). And it provided that the DOT could conduct a hearing either on its own initiative or on a complaint to determine whether a tariff was lawful. See 49 U.S.C. § 41509(a). The FAA also authorized the DOT to grant antitrust immunity to certain airlines as "required by public interest," and in so doing, to establish guidelines for the review of

[5] The CAB was abolished in January 1985 under the Civil Aeronautics Board Sunset Act of 1984 (98 Stat. 1703) and the Airline Deregulation Act of 1978 (92 Stat. 1744). The Court will use "DOT" throughout this Order to avoid confusion.

airline requests for immunity. 49 U.S.C. §§ 41308(b), 41309. The DOT adopted extensive regulations to implement this congressional plan. See 14 C.F.R. Part 221.

The parties differ dramatically in how they characterize the fifty years following the enactment of the FAA. Defendants assert that the DOT's regulatory regime "changed little in more than 50 years," Joint Memo, at 3, while Plaintiffs counter that the regulatory scheme has "undergone a massive change" that has fundamentally altered the DOT's oversight of the airlines, Opp'n at 7. Central to the parties' disagreement on this point is the impact of the International Air Transportation Competition Act of 1979 ("IATCA").

The IATCA was one of a number of congressional acts passed in the 1970s and 1980s to increase competition and reduce federal regulation. See, e.g., Square D v. Niagara Frontier Tariff Bureau. Inc, 760 F.2d 1347, 1355 (2d Cir. 1985). The goal of the IATCA was to "promote competition in international air transportation" through "maximum reliance on competitive market forces and . . . competition . . . [and] encouragement, development, and maintenance of an air transportation system relying on actual and potential competition." IATCA, Pub. L. No. 96-192, § 2, 94 Stat. 35, 36 (1980). Unlike the domestic airline industry, which Congress fully deregulated through the Airline Deregulation Act of

1978 ("ADA"),[6] the IATCA did not fully deregulate the international airline industry. Even Plaintiffs' expert[7] admits that Congress could not completely deregulate international fares without the cooperation of other sovereign nations, which could impose their own fare hikes and restrictions. Levine Decl. ¶ 14; see also H.R. Rep. No. 96-602, at 1-2 (1979) at 2 ("there are differences between international and domestic aviation; the critical difference being that in domestic markets, a competitive environment can be established by actions of the U.S. Government, while in international markets, competition can be

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[6] The ADA effectively removed the DOT's jurisdiction over domestic fares and the DOT ceased approving or accepting tariff filings on January 1, 1983. See 14 CFR § 399.40; Tariffs for Post-1982 Domestic Travel (April 7, 1982), 47 FR 14892-01 ("the intent of the statute would be best fulfilled by reading it to prohibit tariff filings for transportation provided after the sunset date"). It is not directly relevant to the dispute at issue, although the parties compare it to the IATCA.

[7] Plaintiffs offer Michael Levine as an expert on the airline industry and deregulation. Levine Decl. (dkt. 898) Att. A. Defendants object to Levine's testimony, arguing among other things that he is not qualified to offer opinions on either Congress's or the DOT's intent, as he has never been a member of Congress and never worked at the DOT, only having worked at the CAB from 1965-1966 and 1978-79, and as a CAB consultant in 1977 and 1980. See Reply (dkt. 917) at 19. The Court recognizes Levine as an expert in the airline industry but not on Congress or the DOT's understanding of the antitrust laws or the filed rate doctrine. Nor does the Court accept Levine's legal conclusions. See, e.g., Levine Decl. ¶ 21.

established only by agreement between the United States and one or more foreign governments.").

Certainly the IATCA gave the DOT more discretion over tariff filing requirements. See RJN Ex. 28 (Pub. L. No. 96-192 § 14, 94 Stat. at 40-42; S. Rep. No. 96-329, September 24, 1979) (dkt. 870-28) at *10. It empowered the DOT to exempt air carriers engaged in international transportation from all statutes pertaining to economic regulation or the requirement to file fares. 49 U.S.C. § 40109(c). The IATCA also limited the DOT's ability to grant antitrust immunity to carriers' agreements. See 49 U.S.C. § 41308(b); RJN Ex. 14 (Int'l Air Transport Assoc. Tariff Conf. Proceeding July 6, 2006) (dkt. 870-14) at *78 ("In deregulating the airline industry, Congress drastically reduced the Board's authority to approve and immunize agreements between airlines" and "Congress explained that it made these changes . . . as part of its determination that airline service levels and fares should be controlled by competition, not by government regulation."); see also RJN Ex. 28 at *7 ("The antitrust laws remain fully applicable to any agreement not filed by the Board or even to approved agreements for which no specific section 414[8] is granted."). It enabled the DOT to take "quick

[8] Section 414 of the FAA provides that "Any person affected by an order made under sections 408, 409, or 412 of this Act shall be, and is hereby, relieved from the operations of the "'antitrust laws' . . . and of all other restraints or prohibitions made by, or imposed under, authority of law, insofar as may be necessary to enable such person to do anything authorized, approved, or required by such order." Section 408 governs the DOT's control

and effective countermeasures" against a foreign government that engaged in discriminatory conduct. Presidential Statement on Signing S. 1300 into Law (February 15, 1980). And it continued to obligate the DOT to provide a regulatory process for consumers to challenge unreasonable or anticompetitive rates before the agency. 14 C.F.R. § 302.501- 507, 14 C.F.R. 302.401-420. In short, the Act reflected the reality that, though Congress might have wished to deregulate international air fares, it could not do so fully or unilaterally. See H.R. Rep. No. 96-602, at 1-2 ("These policy statements contemplate that to the maximum extent possible, reliance will be placed on competition, rather than on detailed and burdensome government regulation . . . At the same time. . . . there will be a continuing need to seek equal opportunity for our international airlines through negotiations and regulatory actions.").

The DOT did not change its practices immediately after the passage of the IATCA, although it made various statements that bear on the subject of competition. In 1988, the DOT announced a proposed policy on the practice of rebating international fares, explaining that it intended to no longer prosecute airlines that charged rates lower than their filed rates. See RJN Ex. 21

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over consolidation, mergers and acquisitions; Section 409 governs interlocking relationships; and Section 412 governs pooling and other cooperative agreements. Section 412(a) requires that every air carrier file a true copy of every agreement between carriers that relates to "the establishment of transportation rates, fares, charges, or classifications."

(Statement of Enforcement Policy on Rebating) (dkt. 870-21) at 3 ("technical rebating by itself, without competitive or consumer abuses amounting to violations of other provisions or legal standards, will not result in enforcement action."). It noted that after passage of the ADA and IATCA, "many of the traditional tariff-adherence rules were recast or replaced to accommodate the procompetitive policies of these statutes." Id. at 2.[9] In 1995, the DOT asserted that, as established in 1978, "our overall goal continues to be to foster safe, affordable, convenient and efficient air services for consumers. We continue to believe that the best way to achieve this goal is to rely on the marketplace and unrestricted, fair competition to determine the variety, quality, and price of air service." RJN Ex. 22 (Statement of United States International Air Transportation Policy, May 3, 1995) (dkt. 870-22) at 2.

The Court now looks to how the DOT, post-IATCA, regulated the three types of rates at issue in this case: (1) air fare for flights originating from the United States;[10] (2) fuel surcharges; and (3) ANA's special discount fares.

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[9] Notably, the DOT withdrew this statement of proposed rulemaking in 2002. See Withdrawal of Proposed Rulemaking Action; Statement of Enforcement Policy on Rebating, 67 F.R. 72396-01.

[10] The Court dismissed with prejudice all of Plaintiffs' claims for alleged price-fixing on flights originating in Asia as barred by the Foreign Trade Antitrust Improvements Act. Order Re Mot.

1. Air Fares

The first type of rate at issue in this case is air fares. In 1997, nearly 20 years after the IATCA was passed, the DOT signaled its intent to detariff some air fares. See generally RJN Ex. 24 ("Exemption from Passenger Tariff-Filing Requirements in Certain Instances," March 10, 1997) (dkt. 870-24). The DOT explained:

> Selectively exempting U.S. and foreign air carriers from the statutory and regulatory duty to file international passenger tariffs would appear to be the next logical step in the continuing evolution of a policy where we rely on market forces rather than continual government oversight to set prices for air transportation. In many cases, tariffs continue to be filed in markets where all prices have been effectively deregulated. In others, market forces are usually sufficient to ensure that most fares are reasonably priced without government intervention. Indeed, the continued filing of passenger fares serves a meaningful regulatory purpose only in those markets where foreign government policies or actions seriously hinder

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to Dismiss at 12. Thus, the remaining claims are limited to flights originating in the United States.

> competitive forces, or where we continue to supervise normal economy fares.

Id. at 4 (emphasis added); see also id. ("We now question whether any purpose is served in burdening U.S. and foreign carriers with continuing to file passenger fares for approval in markets where pricing has been effectively deregulated by government agreement, and the evolution of competitive market forces."). In the same announcement, the DOT stated that such a rule "[would] not materially lessen [the DOT's] ability to intervene in passenger pricing matters should it be necessary." Buschell Ex. E (dkt. 917-6) at 10763. The DOT asserted that it "has always had the statutory authority to take action directly against unfiled passenger fares and rules under a variety of circumstances" and "reserved the option . . . of reinstating the tariff-filing obligation . . . where consistent with the public interest." Id.

In July 1999, the DOT issued a final rule, finding that certain filings were "no longer necessary or appropriate." RJN Ex. 25 ("Exemptions From Passenger Tariff-Filing Requirements in Certain Instances," July 27, 1999) (dkt. 870-25) at 2. The rule created three filing categories-A, B, and C; Category C had the strictest filing requirements and Category A the most relaxed. Joint Memo, at 5-6 (citing RJN Ex. 25 at 47). The rule required that (1) airlines headquartered in Category C countries, and (2) airlines flying between the United States and

Category C countries, file all air fares with the DOT. See id. at 5. The rule also required airlines to submit "normal" one-way economy fares to and from Category B countries.[11] Id.; Schwartz Decl. ¶ 22. The DOT imposed no filing requirement on airlines headquartered in Category A countries, except to the extent that those airlines flew between the United States and a Category B or C country. Joint Memo, at 5 (citing RJN Ex. 25 at 47). The A, B, and C categories approximately corresponded to the types of agreements a country had entered into with the United States. Levine Decl. ¶ 37. Countries that agreed to more favorable bilateral agreements (allowing multiple airlines to serve multiple city-pairs between the two countries, for example) were designated as Category A, while countries that did not (restricting the number of airlines that could serve a route and requiring that all fares be subject to review, for example) were designated as Category C. Id. ¶¶ 16-19. The DOT issued four additional "exemptions" between 1999 and 2012, which moved some countries away from Category C. See Schwartz Decl. ¶ 25.

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[11] "Normal" fares are those with Economy Restricted and Economy Unrestricted fare types, which are a small subset of economy class fares that tend to have relatively few restrictions. Fare codes (also known as "booking codes" or "fare basis codes") are a way for the airlines to identify exactly what type of ticket a customer purchased. Schwartz Decl. (dkt. 886) at 4 n.3. Fare codes could indicate the week, day or time of the flight or a required minimum or maximum stay at a destination, among other factors. Id.

During the class period, all Defendants used the Airline Tariff Publishing Company ("ATPCO"), a privately held fare clearinghouse, as an intermediary for filing air fares with the DOT. Bryant Decl. (dkt. 728) Ex. A at Id. 10. ATPCO distributes air fares to various entities—from online travel agents like Expedia to government databases, including the Government Filing System ("GFS"). Opp'n at 17 (citing Schwartz Decl. ¶¶ 8, 14). An algorithm, based on the DOT's current category designations (A, B, or C) determines whether to "present" a fare within the database to the DOT. Id. at 18; Schwartz Decl. ¶ 16.[12] The DOT does not consider a fare to be "filed" until it is formally "presented," meaning that the fare has been selected by the ATPCO algorithm and flagged for the DOT to review. See Joint Memo, at 7; Bryant Decl. ¶ 23. Once ATPCO presents the fare, DOT staff review it and enter an "action code" on the GFS filing to record any actions taken with respect to that filed rate. Id.

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[12] Plaintiffs contend that many fares in GFS are listed as "private," meaning that they are viewable only by parties that have been approved by an airline to view those fares, such as the carriers' network of travel agents. Id. (citing to Schwartz Decl. ¶¶ 10, 13). Defendants dispute this, asserting that the DOT may view all of the fare and surcharge information in any ATPCO database, including GFS, regardless of whether ATPCO formally "presented" the fare or not. Joint Memo, at 7 n. 12 (citing no evidence other than 14 C.F.R. § 221.180(b), which requires that the DOT be able to monitor all filed tariffs on a 24-hour a day, 7-day a week basis); Tr. of Aug. 15, 2014 (dkt. 938) at 29 (Defendants' counsel: "The DOT has access to the ATPCO database, and can see every fare that's in there").

The DOT uses seven different codes to designate what actions have been taken.[13] Joint Memo, at 8; Bryant Decl. ¶ 23. Though the airlines presented thousands of filings per day, DOT staff used fewer than ten log-ins to review the filings. Bryant Depo. (dkt. 887-5) at 213-15, 228-29.

Plaintiffs further contend that the DOT did not "evaluate the reasonableness" of the fares, but rather, used the filing requirement to press foreign governments to adopt more pro- competitive bilateral agreements. Opp'n at 13 (citing Levine Decl. ¶¶ 2(d), 6, 25 ("In no cases was the filing requirement used to actually evaluate reasonableness and I am not aware of any instance in which it was used to definitively and finally reject a rate."), 37, 40, 43, 45). Defendants conceded at the motion hearing that there is no direct evidence that the DOT evaluated rates for reasonableness. Tr. of Aug. 15, 2014 at 17. Indeed, the Court is aware of no evidence of a fare

[13] The DOT may designate the fare as: (1) "Acknowledged," if the DOT acknowledged the filing in its entirety; (2) "Approved," if DOT approved the filing in its entirety; (3) " ApprovedC," if the DOT approved the filing with comments; (4) "ApprovedX," if the DOT approved the filing, except as noted on individual fare, arbitrary, or text information; (5) "Disapproved," if the DOT disapproved the filing in its entirety; (6) "DisapprovedX," if the DOT disapproved the filing, except as noted on individual fare, arbitrary, or text information); (7) "Suspended," if the DOT suspended the filing in its entirety. Schwartz Decl.]} 23.

that was disapproved by the DOT based on its pricing level or reasonableness.[14]

2. Fuel Surcharges

The second type of rate at issue in this case is fuel surcharges. A fuel surcharge is an additional per-ticket fee based on the increased cost of fuel to the carrier. In 1999, the DOT issued a notice stating without any elaboration that "all surcharges are to be filed." Buschell Decl. Ex. C Attach. B (DOT Notice of Exemption from the Department's Tariff-Filing Requirements, October 7, 1999) (dkt. 917-4) at 3. Nonetheless, the DOT would not let airlines charge fuel surcharges as separately stated charges until 2004. See Tr. of Aug. 15, 2014 at 28, 31. Indeed, the DOT confirmed in a 2004 letter to parties filing tariffs that (stand-alone) fuel surcharges were prohibited prior to 2004. See RJN Ex. 5 (Letter from Paul Gretch, Dir. Office of Int'l Aviation, October 14, 2004) (dkt. 870-5) (explaining that the DOT had barred filings of separate surcharges "consistent with longstanding [DOT] policy that carriers should recoup fuel expenses through increases in their base fares"). That letter went on to say that the policy against separate filing of surcharges "was

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[14] But see Reply at 21 (citing Avent Depo. Ex. F (dkt. 917-7) at 16, 116-18, 124) (challenging Avent declaration stating that he was unable to find any DOT action to suspend or reject airfares because Avent admitted in his deposition that he did not review either the AIR or ATPCO database and that he actually is aware of DOT actions on airfares and surcharges based on IATA proceedings).

established at a time when the Department was regulating fares much more actively than is the case today, and we were concerned that tariff surcharges could undermine our regulatory supervision of fare levels." Id. The DOT explained in that 2004 letter that, in light of more competitive market conditions, the "general prohibition of separate fare surcharges . . . is no longer necessary to support the limited degree of pricing supervision that continues." Id. Plaintiffs expert asserts that the DOT only disapproved certain fuel surcharges before October 2004 when the DOT did not accept such filings. See Schwartz Decl. ¶ 18.

As of October 2004, the DOT permitted, but did not require, airlines to file their fuel surcharges separately from fares. See RJN Ex. 5 ("carriers are free to file surcharges in general rules tariffs.").[15] Defendants did not always present their fuel surcharges to the DOT (even though they might have intended to, because of technical problems with ATPCO's algorithm), and many airlines filed their surcharges in the "YQ/YR" private database, to which DOT staff apparently did not have access. Opp'n at 19, 35-36; Bryant Depo. at 264- 65; Schwartz Decl. ¶ 15.

In November 2004, the DOT explained that it would no longer allow airlines to designate

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[15] Defendants's argument that the 2004 announcement "did nothing to change the filing requirements," Reply at 10, does not ring true.

surcharges as "government-approved" in fare advertising. See RJN Ex. 26 ("Notice of Disclosure," November 15, 2004) (dkt. 870-26) at 2. In that announcement, the DOT stated that it could not "effectively monitor" fuel surcharges that are filed separately from "base fares." Id. It further stated that it would consider the separate listing of such charges in fare advertisements "an unfair and deceptive trade practice." Id.

3. ANA Discount Fares

The final type of rate at issue in this case is ANA's discount air fares (also known as "ethnic fares"). Plaintiffs allege that Defendant ANA coordinated with Japan Airlines[16] to set the rates of two such fares:[17] (1) Satogaeri or "homecoming" fares for Japanese people living in the United States, and (2) "discount business class fares," also known as "Biziwari" or "Buz-Wari" fares.[18] ANA Mot. at 4. ANA classified the Satogaeri fares as "B" and "M"

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[16] Japan Airlines has settled with Plaintiffs. See Mot. for Settlement (dkt. 900).

[17] Plaintiffs also alleged that ANA coordinated with Japan Airlines to set the price of a third discount fare, Yobiyose fares, which were Asia-originating fares sold in the United States. FAC (dkt. 493) mi 114-23. The Court granted ANA's motion to dismiss Plaintiffs' claims based on the Yobiyose fares. Order Re Mot. to Dismiss at 39-40.

[18] ANA notes that the Complaint also referred to a published fare called "Business Value" or "Biz-Value," which ANA advertised and sold in 2006. ANA Mot. at 6. Despite its name, Business Value tickets were not discounted, and ANA contends that they were filed with DOT. Id.

class fares, and the discount business fares as "C" class fares. Id. at 5.

ANA sold its discounted tickets through travel agents by first establishing a "net fare" or an amount below the filed rate of certain "B," "M," and "C" class fares. Id. ANA then entered into an agreement with the travel agent, whereby the agent would remit the net fare to ANA and keep as commission any difference between the net fare and the amount paid by the customer. Id. ANA acknowledges that it did not file its "net fares" with the DOT, but it argues that these discounted fares are covered by the "B," "M," and "C" fare codes class fares that it did file. See id. at 2.

The discounted fares differed in some ways from the "unrestricted economy class fares" that ANA filed with the DOT. See Opp'n at 55 (citing Fukuda Depo. (dkt. 887-2) at 71-77, 83-84). The Satogaeri and business discount fares had highly restrictive fare rules that did not apply to the unrestricted economy class fares. Id; Schwartz Decl. ¶¶ 29-39. The unrestricted fares were fully refundable, re-routeable, and had no time limits for the return leg of the flight; in contrast, the discounted fares were non-refundable, non-re-routeable, and imposed strict time limits for the return leg of the flight. Id.

II. LEGAL STANDARD

Summary judgment is proper when "the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(a). An issue is "genuine" only if there is a sufficient evidentiary basis on which a reasonable fact finder could find for the nonmoving party, and a dispute is "material" only if it could affect the outcome of the suit under governing law. See Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 248-49 (1986). A principal purpose of the summary judgment procedure "is to isolate and dispose of factually unsupported claims." Celotex Corp. v. Catrett, 477 U.S. 317, 323-24 (1986). "Where the record taken as a whole could not lead a rational trier of fact to find for the non-moving party, there is no 'genuine issue for trial.'" Matsushita Elec. Ind. Co. v. Zenith Radio, 475 U.S. 574, 587 (1986).

III. DISCUSSION

The filed rate doctrine is a judicial creation derived from principles of federal preemption. E. & J. Gallo Winery, 503 F.3d at 1033. "At its most basic, the filed rate doctrine provides that state law, and some federal law (e.g. antitrust law), may not be used to invalidate a filed rate nor to assume a rate would be charged other than the rate adopted by the federal agency in question."[19] Transmission Agency

[19] The filed rate doctrine is also sometimes referenced as the "filed tariff doctrine," see, e.g., Davel Commc'ns, Inc, v. Qwest Corp., 460 F.3d 1075, 1084 (9th Cir. 2006), or the "Keogh doctrine," see, e.g., Cost Mgmt. Servs., Inc, v. Wash, Natural Gas Co., 99 F.3d 937, 943 & n.7 (9th Cir. 1996), after the case

of N. Cal, v. Sierra Pac. Power Co., 295 F.3d 918, 929-30 (9th Cir. 2002). The doctrine was first recognized in the context of rates set pursuant to the Interstate Commerce Act, see Keogh v. Chicago & Nw. Ry, Co., 260 U.S. 156 (1922), but has since been applied in other contexts, including challenges to rates set pursuant to the Natural Gas Act, the Federal Power Act, and the Communications Act. E. & J. Gallo Winery, 503 F.3d at 1033. No court has considered whether the filed rate doctrine applies to the international airline industry.

Where it applies, the filed rate doctrine bars claims for treble damages on the basis of antitrust injury. See Square D Co., 476 U.S. at 421-22. In this Circuit, the essential question in filed rate cases is not whether the rates were actually "filed," but whether the rates were "authorized" by the relevant regulatory agency, or whether the agency was doing enough to preempt federal antitrust laws. See Carlin, 705 F.3d at 871, n.11 (citing E. & J. Gallo Winery, 503 F.3d at 1040-43). Thus, the doctrine does not apply where the agency "has effectively abdicated its rate-making authority." E. & J. Gallo Winery, 503 F.3d at 1040 (citing Pub. Utility Dist. No. 1 of Grays Harbor Cnty. Wash. v. IDACORP Inc., 379 F.3d 641 (9th Cir. 2004); Pub. Utility Dist. No. 1 of Snohomish Cnty. v. Dynegy Power Marketing, Inc., 384 F.3d 756, 760 (9th Cir. 2004)). It also does not apply where the agency has "adequately

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where it was first established, Keogh, 260 U.S. 156 (1922). Carlin v. Dairy America, Inc, 705 F.3d 856 (9th Cir. 2012).

expressed its disapproval" of the filed rates– something that has not happened here. See Carlin, 705 F.3d at 879.

Application of the filed rate doctrine in any particular case is not determined by the culpability of the defendant's conduct or the possibility of inequitable results. Carlin, 705 F.3d at 869. Rather, courts decide whether to apply the filed rate doctrine based on three underlying principles.[20] Id. at 867-68, 880. First, the doctrine prevents courts from engaging in price discrimination between consumers. Id. This "non-discrimination strand" would prevent a court in California from awarding damages based on the state's consumer protection law to the extent that consumers (or competitors) from other states could not benefit from the same law.[21] See id. at 882. Second, the doctrine preserves the exclusive role of regulatory agencies in approving rates, and keeps courts out of the rate-making process. Id. This "nonjusticiability strand" recognizes that legislatively appointed regulatory bodies have institutional competence to address rate-making

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[20] Some courts have recognized only two rationales for the filed rate doctrine: non-discrimination and justiciability. See, e.g., Verizon Del., Inc. v. Covad Commc'ns Co., 377 F.3d 1081, 1086 (9th Cir. 2004); Fax Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 489 (2d Cir. 1998). In those cases, Courts typically define the nonjusticiability strand broadly to include the preemption issues that are central to the third strand here.

[21] The Ninth Circuit has held "that the principle of nondiscrimination still suggests the filed rate doctrine should be applied in class actions. ..." Id. at 882.

issues, and that courts lack the competence to set rates. See id. at 880-81; Verizon, 377 F.3d at 1086. Third, the "preemption strand" avoids disruption of a congressional scheme for uniform price regulation by preventing courts from undermining any such scheme. Carlin, 705 F.3d at 880-81 (citing Fax Telecommunicaciones, 138 F.3d at 489).

Originally, the filed rate doctrine arose in the context of a relatively stable paradigm. A carrier would file a rate or tariff with a federal agency that regulated an industry under the authority of a federal statute. Carlin, 705 F.3d at 869. Thereafter, the carrier (and its customer) were not allowed to charge (or pay) a different rate for that service or product other than the filed one. Id. In turn, the rate was not subject to challenge on antitrust, state law or most other grounds. Id. Courts have recognized that, though this paradigm rarely holds true today, the filed rate doctrine might still apply if its original purposes (non-discrimination, nonjusticiability and preemption) remain valid. See, e.g., id. at 880-83; E. & J. Gallo Winery, 503 F.3d at 1048; Ting v. AT&T, 319 F.3d 1126, 1138-41 (9th Cir. 2003).

Defendants here move for summary judgment, asking the Court to apply the filed rate doctrine to the filed and unfiled air fares, the fuel surcharges, and ANA's discount fares. Plaintiffs argue that Congress did not intend to exempt the rates from the antitrust laws, and in the alternative, that the DOT effectively abdicated its regulatory authority over the rates.

A. Air Fares

The Court turns its attention first to air fares.

1. Filed Air Fares

As to the filed air fares, the Court concludes that Congress, through the FAA, gave the DOT authority over all fares, 49 U.S.C. § 41504(a) and (b), and that Plaintiffs have not identified any point at which Congress stripped the DOT of this authority, or at which the DOT effectively abdicated this authority.

a. Congressional Intent

Plaintiffs assert that Congress deregulated the airline industry and did not intend for the filed rate doctrine to bar Plaintiffs' antitrust claims. Opp'n at 7-15. But Congress did not fully deregulate the international airline industry, and its intentions as to the filed rate doctrine are not known.

Plaintiffs assert that the IATCA "radically changed [the DOT's] authority to approve and grant antitrust immunity to airline agreements," with a goal of making "the airline industry subject to the same competitive and antitrust standards applicable to other industries, as far as practicable." RJN Ex. 14 at *36, 80. This is the DOT's statement, not Congress's.[22] But even so, there is an important

[22] Plaintiffs rely excessively on the DOT's rulemaking statements for the proposition that Congress intended to

distinction between antitrust immunity broadly speaking, which bars private suits, criminal liability, and injunctive relief, and the filed rate doctrine, which bars only private suits.[23] See Square D Co.. 476 U.S. at 421-22 ("Keogh simply held that an award of treble damages is not an available remedy for a private shipper claiming that the rate submitted to, and approved by, the ICC was the product of an antitrust violation. Such a holding is far different from the creation of an antitrust immunity."). The Court will not read abstract statements touting competition, or even less abstract statements expressing a desire for the antitrust laws to apply, as proof that Congress intended that the filed rate doctrine not apply,[24] particularly when the context is "other industries, as far as practicable."

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remove the DOT's jurisdiction over international air fares. See, e.g., Opp'n at 9. The statements are not determinative of congressional intent. See Ting, 319 F.3d at 1136 (noting that Congress's purpose is the "ultimate touchstone" in a preemption analysis); see also Cain v. Air Cargo, Inc., 599 F.2d 316, 320 (9th Cir. 1979) (holding that courts must examine congressional intent in enacting a regulatory regime in a specific industry to determine applicability of the filed rate doctrine).

[23] No one knows this more than ANA, who pled guilty to criminal charges of price-fixing during the class period, but asserts the filed rate doctrine as a defense in this civil case. See Opp'n at 58 (citing RJN Ex. 2 (ANA Plea) (dkt. 870-2) If 4).

[24] To be clear, the Court does not hold that Congress needs to have made an explicit statement as to the filed rate doctrine, only that the Court does not accept Plaintiffs' suggestion that Congress did so. See, e.g., Opp'n at 8-13.

RJN Ex. 14 at *80. After all, the filed rate doctrine applies to "other industries" as well.[25]

Moreover, while the IATCA empowered the DOT to exempt carriers engaged in international air transportation from all statutes pertaining to economic regulation or the requirement to file fares, 49 U.S.C. § 40109(c), it did not abolish the carriers' filing requirements. Congress knows how to eliminate tariff filing requirements; it did so in the ADA. See 14 C.F.R. § 399.40; Tariffs for Post-1982 Domestic Travel (April 7, 1982), 47 FR 14892-01. Detariffing was also the subject of Ting, 319 F.3d 1126, upon which Plaintiffs rely heavily. Judge Tashima explained in Ting that in the early 1980's, the FCC tried to prohibit tariff-filing, but courts rejected that effort as inconsistent with the terms of the Communications Act. Id. at 1131-32. "[F]ollowing a 15 year effort to suspend tariff-filing obligations for telecommunications carriers, the Commission was forced to wait for Congress to act." Id. at 1132. The Telecommunications Act of 1996 "fundamentally altered" the regulatory scheme by directing the FCC

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[25] Because of this distinction between antitrust immunity and the filed rate doctrine, the Court will not follow In re Ocean Shipping Antitrust Litigation, 500 F. Supp. 1235, 1240 (S.D.N.Y. 1980), which predates all of the relevant case law in this Circuit, and which found that courts could not use the filed rate doctrine to grant "implied" antitrust immunity to commercial carriers when Congress had already designated an "express" path to antitrust immunity for those same carriers in the same law. It is not correct to characterize the filed rate doctrine as a "repeal of the antitrust laws." See id. at 1241.

to "forbear from applying any regulation of that chapter if it determined that such regulation was not necessary. . ." Id. "Finally armed with the requisite congressional authorization, the FCC promptly" began rulemaking, and passed an order of mandatory detariffing." Id. The FCC "stated on a number of occasions that one of the major purposes of detariffing was to eliminate the filed rate doctrine and its harmful effect on customers." Id. at 1145. Congress also made that goal explicit. See id. at 1139 n.7 (stating in Notice of Proposed Rule Making, "In addition, the absence of tariffs would eliminate possible invocation by carriers of the filed rate doctrine.") (citing 11 F.C.C.R. 7, 141, at ¶ 31); see also id. at 1132 (Congress wanted "to provide for a pro-competitive, deregulatory national policy framework . . . by opening all telecommunications markets to competition."). The filed rate doctrine did not apply in Ting because, empowered by Congress, the FCC renounced its authority over tariffs. Id. at 1146.

As Plaintiffs' expert acknowledges, Congress could not act on its own accord to deregulate international air fares. See Levine Decl. ¶ 14. The IATCA did not purport to abolish the DOT's tariff filing system, but merely gave the DOT the authority to calibrate its filing requirements to reciprocate the restrictions that other countries imposed on domestic airlines. See id. Indeed, far from removing the DOT's jurisdiction over filed rates, Congress reaffirmed it. See Pub. L. No. 96-192, § 14, 94 Stat. at 40-42 (explaining that the DOT could, among other things,

"suspend the operation of such tariff and defer the use of such rate."); Statement on Signing S. 1300 into Law (Feb. 15, 1980). The DOT required carriers to continue to file all tariffs for twenty years after the IATCA was enacted, before partially detariffing in 1999. This is a far cry from the FCC's immediate and complete detariffing in Ting, and belies any argument that the IATCA alone removed the DOT's authority. Accordingly, the Court rejects Plaintiffs' argument that Congress did not intend for the filed rate doctrine to apply to the filed air fares.

b. Agency Action

Plaintiffs next argue that the DOT did not review the filed air fares for reasonableness, and thus, abdicated its regulatory authority over them. Opp'n at 43-45; Levine Decl. ¶¶ 6 (explaining that the DOT used the filing requirements to negotiate more favorable bilateral agreements with foreign countries), 47 ("filing tariffs during the class period of this case didn't imply an expectation that the fares and surcharges they contained would be assessed for reasonableness or subjected to any of the normal mechanisms that accompany tariff filings for the purpose of facilitating regulation."); Tr. of Aug. 15, 2014 at 18 (Plaintiffs' counsel: "There's no evidence in this record-we have not found any-to show that anything DOT has done has any relationship whatsoever to just and reasonable rates."). Defendants concede that there is no direct evidence that the DOT evaluated rates for reasonableness. Id.

at 17. But, as Defendants were quick to add, it does not really matter. Id. at 16.

Abundant authority supports the proposition that meaningful review of rates is not required for the filed rate doctrine to apply. See, e.g., Carlin, 705 F.3d at 871-72 (meaningful review is not a "sine qua non" for the applicability of the filed rate doctrine); Wah Chang v. Duke Energy Trading & Mktng, LLC, 507 F.3d 1222, 1227 (9th Cir. 2007) ("laxness does not indicate, much less establish, that [plaintiff] can turn directly to the courts for rate relief"); Areeda on Antitrust ¶ 247a at 443 (4th ed. 2013) ("It need not have been actively reviewed for accuracy or public interest considerations-indeed, it need not have been reviewed at all in any meaningful sense."). This Circuit has recognized that federal agencies have wide latitude to determine the most effective way to carry out their charge from Congress, and that acting with a "light hand" to authorize just and reasonable rates is not abdication. See, e.g., E. & J. Gallo Winery, 503 F.3d at 1039, 1042.

In the case at hand, the Court does not pretend that the DOT regulated the filed air fares with anything other than a light hand. See, e.g., RJN Ex. 15 (Aviation Enforcement and Proceedings, November 6, 2012) (dkt. 870-15) at 5 (noting, "in the 34 years since the passage of the [ADA], the Department has declined to use this authority to strike down fare rules in foreign air

transportation")[26]; Williams Decl. (dkt. 871) ¶¶ 10-17, Exs. 9-16 (no Defendants could identify any fare disapproved by the DOT based on pricing or reasonableness). But it did regulate. The DOT required the carriers to continue filing all Class B and C fares, after IATCA and after 1999. See RJN Ex. 25; see also RJN Ex. 24 at 4 ("continued filing of passenger fares serves a meaningful regulatory purpose only in those markets where foreign government policies or actions seriously hinder competitive forces, or where we continue to supervise normal economy fares.") (emphasis added). It also might take the affirmative step of approving the filed rates, stamping "Approved" on the electronic record of the rates that were filed in the ATPCO system. See Joint Memo, at 7-8; Bryant Decl. Ex. A ¶¶ 23-24. The Court is not at liberty to question a federal agency's discretion in rate-making. See, e.g., E. & J. Gallo Winery, 503 F.3d at 1039 (applying the filed rate doctrine to "resale" rates despite FERC's hands-off regulatory approach resulting in prices that were artificially high from market manipulation).

In deference to Congress's tariffing scheme, and to the DOT's action in authorizing rates, the Court finds that the filed rate doctrine applies to the filed air fares in this case.

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[26] But see id. (adding that "the Department is authorized pursuant to 49 U. S.C. § 41509 to cancel a rule that is unreasonable after notice and hearing," and that it declined to exercise that authority because there was no "specific evidence that [the challenged rates were] unreasonable.").

2. Unfiled Air Fares

The Court takes a different view of the unfiled air fares in this case. The Court concludes that, empowered by the IATCA, the DOT effectively abdicated its authority over the unfiled air fares in 1999. Put another way, while the DOT regulated the filed air fares with a light hand, the DOT did not regulate the unfiled air fares at all.

The Ninth Circuit explained in E. & J. Gallo Winery, 503 F.3d at 1040, that "so long as [the agency] 'continues to engage in regulatory activity' and has not effectively abdicated its rate-making authority, FERC's approval of market-based rates" has "the same preclusive effect on antitrust claims . . . as [its] approval of literally filed rates." This Court asked Defendants at the motion hearing what evidence they could point to that the DOT continued to engage in regulatory activity vis-a-vis the unfiled air fares. See Tr. of Aug. 15, 2014 at 9. Defendants argued first that the DOT continued to require carriers to file all rates for twenty years after the enactment of the IATCA. Id. at 10. But that is evidence that the IATCA did not strip the DOT of its authority over rates (and that the DOT was not nearly as eager to detariff as was the FCC in Ting), not that the DOT never abdicated its authority. Defendants argued next that the DOT issued four more notices of exemption since 1999, which detariffed still more fares. Id. at 10-12; see also Schwartz Decl. ¶ 25. But the Court agrees with Plaintiffs' characterization of such action: "That's not

regulation. That's deregulation." See Tr. of Aug. 15, 2014 at 14.

Defendants' best argument that the DOT continued to engage in regulatory activity was its last one: that when the DOT proposed exempting certain rates from filing in 1997, it claimed that doing so "will not materially lessen the Department's ability to intervene in passenger pricing matters should it be necessary" and that it "has always had the statutory authority to take action directly against unfiled passenger fares." See id. at 11; Buschell Ex. E at 10763. There are a few problems with this statement. First, it is difficult to believe. Given that the DOT had just ten log-ins in the ATPCO system to monitor the thousands of filed rates, see Bryant Depo. at 213-15, 228-29, it is improbable that the DOT could nonetheless effectively monitor thousands of rates that were never filed and to which it might have had no access, see Tr. of Aug. 15, 2014 at 5 (Plaintiffs' counsel represents that most of the rates at issue in this case were unfiled); Schwartz Decl. ¶¶ 10, 13 ("It is my understanding that DOT does not have access to fares included in the GFS private database"); but see Joint Memo, at 7 n. 12 (citing no evidence other than 14 C.F.R. § 221.180(b), which requires that the DOT be able to monitor all filed tariffs on a 24-hour a day, 7-day a week basis). How could not seeing thousands of rates not materially lessen an agency's ability to intervene if those rates are improper? Second, in the same statement, the DOT also questioned "whether any purpose is served in burdening U.S. and foreign

carriers with continuing to file passenger fare for approval in markets where pricing has been effectively deregulated by government agreement and the evolution of competitive market forces." See RJN, Ex. 24 at *4. The agency itself described Category A (the unfiled rates) as deregulated. Third, the statement was made before the class period, which began in 2000. Compare Buschell Ex. E with Second CAC ¶ 2. A better gauge of whether the agency "was doing enough regulation to justify . . . preemption," see Carlin, 705 F.3d at 872, during the class period is to look at what it was doing, rather than what it said it would do–as Plaintiffs noted at the hearing, the language the Ninth Circuit used in the Gallo case is "effectively abdicated," not "explicitly abdicated." Tr. of Aug. 15, 2014 at 23; E. & J. Gallo Winery, 503 F.3d at 1040.

In this Circuit, "light handed regulation" is sufficient to avoid abdication, and whether a rate is literally filed is not determinative of whether the filed rate doctrine applies. See E. & J. Gallo Winery, 503 F.3d at 1040, 1042 ("the principles underlying this doctrine preclude challenges to a wide range of [agency] actions, not just the act of literal rate filing."). Nonetheless, the actions the DOT took as to the unfiled air fares here constitute far less regulation than what courts have found sufficient in other cases.

In Grays Harbor. 379 F.3d at 651,[27] the Ninth Circuit noted that "the market-based regime established by FERC continues FERC's oversight of the rates charged. FERC only permits power sales at market-based rates after scrutinizing whether 'the seller and its affiliates do not have, or have adequately mitigated, market power in generation and transmission and cannot erect other barriers to entry. . . .' There is no evidence here that the DOT scrutinized the various carriers' market power and barriers to entry. The court in Grays Harbor also found that FERC's "oversight [was] ongoing, in this case requiring Idaho Power Company to provide notice of any change in status, to file an updated market analysis every three years, and to file various sales agreements and transaction summaries." Id. There is no evidence here that the DOT required the various carriers who no longer had to file air fares to submit anything. In Grays Harbor, FERC had also notified the court that it believed those procedures satisfied the filed rate doctrine. Id. Here, despite the Court's having raised this same question at the hearing on the motion to dismiss, Defendants have

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[27] Grays Harbor is one of a number of cases that arise out of the California Energy Crisis of 2000-2001, when shortages of power and high electricity prices caused blackouts and general turmoil in the West Coast electricity markets. See, e.g., E. & J. Gallo Winery, 503 F.3d 1027; Wah Chang, 507 F.3d 1222; Snohomish Cnty., 384 F.3d 756; California ex rel. Lockyer v, Dynegy, Inc., 375 F.3d 831 (9th Cir. 2004). Plaintiffs generally alleged that defendant energy producers manipulated the market and restricted electricity supplies in order to cause artificially high prices in the market.

apparently not solicited the DOT's views. See Tr. of Nov. 1, 2010 at 45.

E. & J. Gallo Winery also emphasized the agency's ongoing oversight of the market. The Ninth Circuit there explained that FERC only permitted market-based rates "[a]fter determining that no seller of natural gas could obtain market power and that market-based rates would be 'just and reasonable,'" issuing blanket certificates, advising that "it would continue to 'monitor the operation of the market through the complaint process,'" and then actually acting to revoke Enron's certificate. E. & J. Gallo Winery, 503 F.3d at 1038. The court there, too, noted that FERC had asserted that the filed rate doctrine would apply to the market rates, Id. at 1041 (quoting and citing Grays Harbor, 379 F.3d at 648-51). Again, there is no evidence here that the DOT either made so calculated a decision to permit market-based rates or that it took so active a role in monitoring the market after doing so.[28]

In their Reply brief, Defendants tout In re Hawaiian and Guamanian Cabotage Antitrust Litigation, 450 Fed. App'x 685, 688 (9th Cir. 2011), as an example of a court applying the filed rate doctrine to "a regulatory regime largely identical to the one at issue here." See Reply at 12. Cabotage is an unpublished memorandum disposition and

[28] See also Snohomish, 384 F.3d at 760-61 (describing extensive actions FERC took to "continue[] to oversee wholesale electricity rates").

therefore has no precedential value. See Circuit Rule 36-3(a). Assuming arguendo that it did, the Court agrees that it initially appears helpful to Defendants. Cabotage pertained to Surface Transportation Board ("STB") regulations that required some shipping rates to be filed but exempted others from filing. In re Hawaiian & Guamanian Cabotage Antitrust Litig., 754 F. Supp. 2d 1239, 1253 (W.D. Wash. 2010), aff'd 450 Fed. App'x 685. The court concluded that the STB had exercised its authority to regulate rates sufficiently to trigger the filed rate doctrine "by choosing not to require the filing of rates but rather to monitor the rates through a complaint process." Cabotage. 450 Fed. App'x at 688.[29] Defendants point out that here, too, there is a regulation setting forth a complaint process for challenging the lawfulness of rates, that this complaint process still exists and has been updated as recently as 2000. Reply at 14 (citing 14 C.F.R. §§ 302.501-507, 302.401-420; Buschell Deel. Ex. I at 6478-79).

Despite superficial similarities, the regulatory regime in Cabotage differs from the regime here. For one thing, Cabotage involved a different industry: cargo shipping between Hawaii and Guam, in which the two carrier defendants controlled nearly 100% of the trade, and, Plaintiffs represented to this Court, "95 percent of the rates at issue were pursuant to surcharges that were filed." Cabotage. 450 Fed App'x

[29] The court specifically held that "The STB's regulation of rates in noncontiguous domestic trade parallels FERC's regulation of natural gas rates in Gallo." Id.

at 687; Appellants Br., 2011 WL 2455536, at *3 (9th Cir. April 1, 2011); Tr. of August 15, 2014 at 19. But more significantly, the complaint process there was robust and actually used. Defendants in Cabotage represented to the Circuit that the ICCTA (the applicable law) "prevents the STB from exempting water carriers in the noncontiguous domestic shipping trade from the ICCTA's rate reasonableness requirements," and that the STB had actually "considered complaints challenging the reasonableness of rates." Appellees Br., 2011 WL 2130612, at *30 (9th Cir. May 23, 2011) (describing STB adjudication of Guam's challenge to reasonableness of rates in the Guam trade lane). Indeed, in the course of considering such rate challenges, the STB had established a detailed approach for analyzing rate reasonableness "just like the market-based analysis employed by FERC [in Gallo]." Id. at *30. STB: (1) "stated that it would determine whether there was sufficient competition in the Guam trade to preclude the exercise of market power"; (2) "would conduct a constrained-market pricing analysis, looking at whether the carrier earns an overall return on investment that exceeds its cost of capital"; and (3) "if it found the aggregate rate levels in effect on the earliest date covered by the complaint to be unreasonable, it would apply the 'zone of reasonableness' to the maximum lawful aggregate base rates for that date to increase the maximum lawful aggregate rates for the subsequent years." Id. at *30-31. Given all of this regulatory activity, the memorandum disposition had no trouble

concluding both that the STB was "monitorfing] the rates through a complaint process" and that nothing suggested that "those aggrieved are unable to challenge the underlying rates . . . through the complaint process." Cabotage, 450 Fed App'x at 688-89.[30]

Here, there is no evidence that any consumer has ever used the complaint process to challenge the reasonableness of any international air fare. See Avent Decl. (dkt. 899) ¶ 2(d)[31]; see also Ting, 319 F.3d at 1043-44 (finding that filed rate doctrine did not apply despite ongoing agency complaint process). The Court is aware of no evidence that the DOT has ever rejected as unreasonable any international air fare. See RJN Ex. 15 ("In the 34 years since the passage of the [ADA], the Department has declined to use this authority to strike down fare rules in foreign air transportation."); see also Avent Decl. ¶ 2(a).[32] It is not even clear to the Court that the DOT can, or ever did, access the unfiled air fares. See Schwartz Decl. ¶¶ 10, 13 ("It is my understanding

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[30] Plaintiffs in that case had also argued that meaningful agency review was required for the doctrine to apply-an argument the memorandum disposition rightly rejected out of hand. See id. at 688.

[31] Defendants challenge this testimony, arguing that Avent contradicted himself at his deposition by admitting that he is aware of a customer who sought to challenge a fuel surcharge through the complaint process. See Reply at 21. Defendants fail to point to any contradiction as to air fares.

[32] The Court notes that Defendants challenge this testimony. See Reply at 21.

that DOT does not have access to fares included in the GFS private database."). The Court therefore concludes that the DOT did not even engage in the minimal regulation that passed muster in Cabotage.

In short, the DOT effectively abdicated its authority over the unfiled air fares in 1999, and there is no evidence of any ongoing regulation of the unfiled air fares thereafter. Accordingly, Defendants may not use the filed rate doctrine as a shield from civil liability. See E. & J. Gallo Winery, 503 F.3d at 1040. Though "the filed rate doctrine has been given an expansive reading and application in this Circuit," Carlin, 705 F.3d at 868, it cannot be read so expansively as to require deference to an agency that is not regulating. Deference to agency inaction invites, and shelters, anticompetitive conduct. See E. & J. Gallo Winery, 503 F.3d at 1050 (Fletcher, J., concurring) ("Without minimum standards for FERC oversight, the Filed Rate Doctrine threatens to come unmoored from its rationale of respecting the actions of a federal agency to which Congress has delegated authority. Instead, I fear respect is being given to agency passivity, allowing anticompetitive and otherwise illegal actions to escape review."). That cannot be the law.[33]

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[33] Nor is it the law that because foreign regulators approved some of the unfiled rates, the filed rate doctrine should apply. See Joint Memo, at 16-17. Defendants cite no authority so holding, and their argument that this Court should be the first forgets that the filed rate doctrine is grounded in principles of federal preemption and deference to agency decision making.

B. Fuel Surcharges

For similar reasons, the Court also concludes that the filed rate doctrine does not apply to the fuel surcharges. Despite disagreeing about the proper interpretation of the 1999 "all surcharges are to be filed" statement, see Buschell Decl. Ex. C Attach. B; Opp'n at 34 ("the 1999 regulation cannot possibly be read to require the filing of fuel surcharges at a time when they were expressly prohibited by the DOT."); Reply at 9 ("The phrase . . . does not require an airline to impose any particular surcharge, let alone a surcharge affirmatively prohibited by the DOT. [It means] that, should an airline choose to impose a surcharge, that surcharge must be filed."), the parties agree that the DOT did not permit airlines to file separate surcharges until 2004, see Tr. of Aug. 15, 2014 at 28, 31. Moreover, Plaintiffs represented at the hearing that the 1999 statement "doesn't matter, because none of the surcharges we're talking about took place until 2004." Id. at 31. As of 2004, the DOT permitted, but did not require, carriers to file surcharges in general rules tariffs. See RJN Ex. 5. It then promptly announced that it could not "effectively monitor" fuel surcharges, and announced the designating such charges as "government-

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See E. & J. Gallo Winery, 503 F.3d at 1033. The reasons that a court would defer to a federal agency's decision on how best to carry out its regulatory mission do not apply to foreign regulators. This Court has no reason to assume that foreign regulators care about curbing anticompetitive conduct or have the authority to do so.

approved" would be "an unfair and deceptive trade practice." RJN Ex. 26.

The Court sees no evidence that the DOT actively regulated fuel surcharges before October 2004, when such surcharges were not permitted to be separately filed. Nor does the Court find that the DOT had any intention of regulating fuel surcharges after October 2004, when it permitted their filing[34] but disclaimed any ability to monitor them, and threatened carriers with enforcement action if they advertised that such rates were "government-approved." The Court is persuaded that the DOT did not want the fuel surcharges so advertised because it "does not actually regulate the level of carriers' fuel surcharges and does not substantively 'approve' such charges." See Opp'n at 46.[35] As with the unfiled air fares, there is no evidence of any ongoing regulation of the fuel surcharges. Accordingly, the filed rate doctrine does not apply. See E. & J. Gallo Winery, 503 F.3d at 1040.

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[34] Plaintiffs also point to a good deal of evidence that Defendants did not effectively file many of their fuel surcharges at issue. See Opp'n at 35-36.

[35] Providing some further support for this interpretation of the DOT's intentions is the DOT's failure to approve the carriers' 2003 request for immunity for collusive fuel surcharge rate setting. See RJN Ex. 9 (Application for Approval of Agreements by the Int'l Air Transport Assoc., Aug. 25, 2003) (dkt. 870-9); Opp'n at 16.

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C. ANA Discount Fares

Finally, the Court will not apply the filed rate doctrine to ANA's discount fares. ANA asserts that those fares, which it did not file, are merely discounted versions of its filed fares, because they relate to the same subject matter. ANA Mot. at 18-19. ANA argues that Plaintiffs' claims therefore "require a finding that [they] should have paid hypothetical rates below the filed rates . . . ." Id.; Tr. of Aug. 15, 2014 at 40-41. ANA goes on to argue that "the filed rate doctrine absolutely bars [Plaintiffs' claims because they seek] to assume a rate different from the filed rate." Id. Not so.[36]

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[36] As an initial matter, Plaintiffs argue that ANA cannot even invoke the filed rate doctrine because: (1) it is judicially estopped, based on its criminal trial; (2) it waived its right to assert this defense; and (3) the Department of Justice has disapproved of ABA's conduct. Opp'n at 56-60. Judicial estoppel generally prevents a party from prevailing in one phase of a case on an argument and then relying on a contradictory argument to prevail in another phase. Milton H. Greene Archives, Inc. v. Marilyn Monroe, LLC, 692 F.3d 983, 993 (9th Cir. 2012). ANA pleaded guilty to price-fixing "unpublished" passenger fares, including the Satogaeri and Biz-wari fares at issue in this case. Opp'n at 57. Plaintiffs note that the D.C. District Court stayed an award of damages against ANA "in light of [the] pending civil action." Id.; but see ANA Reply (dkt. 914) at 5 (ANA paid a $73 million fine). But ANA is not taking inconsistent positions-it argues here that the doctrine applies to bar recovery as to its fares, not that its fares were not the result of price-fixing. Moreover, the filed rate doctrine applies

ANA relies primarily on Maislin Indus., U.S., Inc. v. Primary Steel, Inc., 497 U.S. 116 (1990) (holding that the filed rate doctrine governs the legal relationship between the parties even when the parties negotiate lower rates) and AT&T Corp. v. Central Office Tel., Inc., 524 U.S. 214 (1998) (holding that the filed rate doctrine governs the legal relationship between the parties even when the parties negotiate better service terms) as support for the proposition that its discount fares are materially similar to the filed fares and are therefore governed by the filed rate doctrine. ANA Mot. at 19-23; ANA Reply at 10-11; Tr. of Aug. 15, 2014 at 39-42.

In Maislin, Quinn Freight Lines ("Quinn"), a motor common carrier and subsidiary of Maislin Industries, U.S., Inc., negotiated a shipping rate with Primary Steel that was below Maislin's filed rate. 497 U.S. at 122-23. Maislin later billed Primary Steel for the difference between the filed rate and the negotiated rate and brought suit when Primary Steel refused to pay. Id. The International Chamber of Commerce ("ICC") found that, while the filed rate was not unreasonable, charging Primary Steel the

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regardless of the culpability of a defendant's conduct or the possibility of inequitable results. Carlin, 705 F.3d at 869. Plaintiffs next argue that ANA waived the filed rate defense by pleading guilty, and knowingly and voluntarily acknowledging that this litigation was the appropriate vehicle for resolving the amount of ANA's financial exposure. Opp'n at 58. The Court does not find waiver here. Nor is the Court persuaded that the DOJ is interchangeable with the DOT. ANA is not barred from invoking the doctrine.

full amount after the parties had negotiated a lower rate was an "unreasonable practice," and exempted Primary Steel from liability. Id. at 123-24. The Supreme Court stated that the statute at issue, "as it incorporates the filed rate doctrine, forbids as discriminatory the secret negotiation and collection of rates lower than the filed rate." Id. at 130. The Court held that strict adherence to the filed rate was required after the ICC deemed the filed rate reasonable, because doing otherwise would be contrary to clear Congressional intent. Id. at 135-36 (citation omitted).

In Central Office, Central Office Telephone, Inc. ("COT") brought federal and state law claims for AT&T's failure to provide benefits promised in connection with a telecommunication services contract. 524 U.S. at 220-21. The Ninth Circuit held that "the filed rate doctrine [was] inapplicable because [the] case [did] not involve rates or ratesetting, but rather involve[d] the provisioning of services and billing." Id. at 223 (quotation omitted). The Supreme Court reversed, holding that "[r]egardless of the carrier's motive-whether it seeks to benefit or harm a particular customer-the policy of nondiscriminatory rates is violated when similarly situated customers pay different rates for the same services." Id. "Rates ... do not exist in isolation. They have meaning only when one knows the services to which they are attached." Id. The Court held that "[b]ecause [COT] ask[ed] for privileges not included in the tariff," its claims, as they related to AT&T's

failure to provide additional privileges, were barred. Id. at 226-28.

In both Maislin and Central Office, strict adherence to the rate and terms of the tariffs was required to avoid the potential for discrimination. Courts have consistently refused to calculate a hypothetical rate other than the filed rate for a particular product, because doing so would require the courts to independently determine what is reasonable, contrary to the underlying principles of the filed rate doctrine. See Carlin, 705 F.3d at 880-82; see also Cnty. of Stanislaus v. Pac. Gas & Elec. Co., 114 F.3d 858, 863 (9th Cir. 1997) (holding that courts may not entertain damage claims that assume a hypothetical rate different from the filed rate). ANA argues that it simply wishes to extend this principle to the present case. ANA Mot. at 19-23; Reply at 10-11; Tr. of Aug. 15, 2014 at 39-42.

Critically, the unfiled Satogaeri and discount business class fares at issue here have lower rates than the filed fares, but also have more restrictive terms-a situation not considered by the Supreme Court in either Maislin or Central Office. See Schwartz Decl. ¶¶ 28-39; Tr. of Aug. 15, 2014 at 38-39. Enforcement of the filed fare here would entitle ANA to the full rate of the filed fares, but it would also entitle the passengers to the filed fare's unrestricted terms. See generally Maislin, 497 U.S. at 116; Central Office, 524 U.S. at 214. Because the flights took place between approximately 2000 and

2007, the filed terms cannot be enforced. See Second CAC 128-74.

ANA's reasoning would allow it to file its highest rate and least restrictive terms for each class of fare, then sell passengers unfiled fares with far more restrictive terms-and hide behind the filed rate doctrine so long as the rates charged were below the filed rate.[37] This would bar passengers' antitrust claims, while effectively barring enforcement of the filed terms. The Court rejects such logic. The filed fares have materially different terms from the unfiled, discounted, and more restrictive fares. They are different products. Accordingly, Plaintiffs' claims as to the unfiled fares do not require a finding that the filed fares were unreasonable or that Plaintiffs should have paid a hypothetical rate below the filed rate. See Brown v. MCI WorldCom Network Servs., Inc., 277 F.3d 1166, 1171-72 (9th Cir. 2002) (filed rate doctrine "precludes courts from deciding whether a tariff is reasonable, reserving the evaluation of tariffs to the [DOT], but it does not preclude courts from interpreting the provisions of the tariff"). Therefore, the Court holds that the filed rate doctrine does not apply to ANA's discount fares.

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[37] Plaintiffs would contend that that is nearly what happened here. See Opp'n at 55 (citing Fukuda Depo. at 71-77, 83-84; Schwartz Decl. ¶¶ 29-39).

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IV. CONCLUSION

For the foregoing reasons, the Court GRANTS Defendants' summary judgment motions as to the filed rates (Class B and C air fares), and DENIES those motions as to the unfiled rates (Class A air fares), fuel surcharges, and ANA discount fares.[38]

IT IS SO ORDERED.

Dated: September 23, 2014

_____
CHARLES R. BREYER
UNITED STATES DISTRICT JUDGE

[38] The Court further rejects Plaintiffs' assertion that the Court cannot grant summary judgment on some rates while leaving others intact. See Opp'n at 52. E. & J. Gallo Winery does not support Plaintiffs' assertion. In the case at hand, Plaintiffs' claims are not based on an index or any other compilation of air fares. The Court does not now reach the issue of Defendants' joint and several liability or whether Plaintiffs have proven a conspiracy. See id. at 52-53.

APPENDIX D

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION

IN RE TRANSPACIFIC PASSENGER AIR TRANSPORTATION ANTITRUST LITIGATION	Civil Case No.: 3:07-cv-05634-CRB MDL No. 1913
This Document Relates To: All Actions	ORDER CERTIFYING ORDER OF SEPTEMBER 23, 2014, FOR INTERLOCUTORY APPEAL UNDER 28 U.S.C. § 1292(b)

On September 23, 2014, the Court granted in part and denied in part Defendants' motion for summary judgment based on the filed rate doctrine (the "September 23 Order"). See Dkt. 945. On October 8, 2014, Defendants Philippine Airlines, Air New Zealand, China Airlines, and EVA Airways requested that the Court certify the September 23 Order for interlocutory appeal pursuant to 28 U.S.C. § 1292(b).

The Court incorporates the September 23 Order herein in its entirety. The Court, having reviewed Defendants' motion, the pleadings and other papers on file in this action, further finds that the September 23 Order involves a controlling question of law as to which there is substantial ground for difference of opinion and that an immediate appeal from the order may materially advance the ultimate termination of the litigation.

Accordingly, IT IS HEREBY ORDERED that:

1 Defendants' motion dated October 8, 2014 is GRANTED; and

2. This Order and the September 23, 2014 Order are certified for appeal pursuant to 28 U.S.C. § 1292(b) insofar as they denied Defendants' motions for summary judgment.

IT IS SO ORDERED.

APPENDIX E

STATUTES AND REGULATIONS

49 U.S.C. § 40101. Policy

(a) Economic regulation.-- In carrying out subpart II of this part and those provisions of subpart IV applicable in carrying out subpart II, the Secretary of Transportation shall consider the following matters, among others, as being in the public interest and consistent with public convenience and necessity: ...

> (9) preventing unfair, deceptive, predatory, or anticompetitive practices in air transportation. ...

49 U.S.C. § 40102. Definitions

(a) General definitions.-- In this part-- ...

> (39) "price" means a rate, fare, or charge. ...

49 U.S.C. $ 40109. Authority to exempt

[...]

(c) Other economic regulation.-- Except as provided in this section, the Secretary may exempt to the extent the Secretary considers necessary a person or class of persons from a provision of chapter 411[1] chapter 413 (except sections 41307 and 41310(b)-(f)), chapter 415 (except sections 41502, 41505, and 41507-41509),

chapter 417 (except sections 41703,41704, 41710,41713, and 41714), chapter 419, subchapter II of chapter 421, and sections 44909 and 46301(b) of this title, or a regulation or term prescribed under any of those provisions, when the Secretary decides that the exemption is consistent with the public interest.

49 U.S.C. § 41501. Establishing reasonable prices, classifications, rules, practices, and divisions of joint prices for foreign air transportation

Every air carrier and foreign air carrier shall establish, comply with, and enforce--

> (1) reasonable prices, classifications, rules, and practices related to foreign air transportation...

49 U.S.C. § 41504. Tariffs for foreign air transportation

(a) Filing and contents.--

In the way prescribed by regulation by the Secretary of Transportation, every air carrier and foreign air carrier shall file with the Secretary, publish, and keep open to public inspection, tariffs showing the prices for the foreign air transportation provided between places served by the carrier and provided between places served by the carrier and places served by another air carrier or foreign air carrier with which

through service and joint prices have been established. A tariff--

(1) shall contain--

(A) to the extent the Secretary requires by regulation, a description of the classifications, rules, and practices related to the foreign air transportation;

(B) a statement of the prices in money of the United States; and

(C) other information the Secretary requires by regulation; and

(2) may contain--

(A) a statement of the prices in money that is not money of the United States; and

(B) information that is required under the laws of a foreign country in or to which the air carrier or foreign air carrier is authorized to operate.

(b) Changes.--

(1) Except as provided in paragraph (2) of this subsection, an air carrier or foreign air carrier may change a price or a classification, rule, or practice affecting that price or the value of the transportation provided under that price, specified in a tariff of the carrier for foreign air transportation only after 30 days after the carrier has filed, published, and posted notice of the proposed change in the same way as required for a tariff under subsection (a) of this section. However, the Secretary may prescribe an alternative notice requirement, of at least 25 days, to allow an air carrier or foreign air carrier to match a proposed change in a passenger fare or a charge of another air carrier or foreign air carrier. A notice under this paragraph must state plainly the change proposed and when the change will take effect.

(2) If the effect of a proposed change would be to begin a passenger fare that is outside of, or not covered by, the range of passenger fares specified under section 41509(e)(2) and (3) of this title, the proposed change may be put into effect only on the expiration of 60 days

after the notice is filed under regulations prescribed by the Secretary.

(c) Rejection of changes.-- The Secretary may reject a tariff or tariff change that is not consistent with this section and regulations prescribed by the Secretary. A tariff or change that is rejected is void.

49 U.S.C. § 41509. Authority of the Secretary of Transportation to suspend, cancel, and reject tariffs for foreign air transportation

(a) Cancellation and rejection.--

(1) On the initiative of the Secretary of Transportation or on a complaint filed with the Secretary, the Secretary may conduct a hearing to decide whether a price for foreign air transportation contained in an existing or newly filed tariff of an air carrier or foreign air carrier, a classification, rule, or practice affecting that price, or the value of the transportation provided under that price, is lawful. The Secretary may begin the hearing at once and without an answer or another formal pleading by the air carrier or foreign air carrier, but only after reasonable notice. If, after the hearing, the Secretary decides that the price, classification, rule, or practice is or will be unreasonable or unreasonably discriminatory, the

Secretary may cancel or reject the tariff and prevent the use of the price, classification, rule, or practice.

(2) With or without a hearing, the Secretary may cancel or reject an existing or newly filed tariff of a foreign air carrier and prevent the use of a price, classification, rule, or practice when the Secretary decides that the cancellation or rejection is in the public interest.

(3) In deciding whether to cancel or reject a tariff of an air carrier or foreign air carrier under this subsection, the Secretary shall consider--

(A) the effect of the price on the movement of traffic;

(B) the need in the public interest of adequate and efficient transportation by air carriers and foreign air carriers at the lowest cost consistent with providing the transportation;

(C) the standards prescribed under law related to the character and quality of

transportation to be provided by air carriers and foreign air carriers;

(D) the inherent advantages of transportation by aircraft;

(E) the need of the air carrier and foreign air carrier for revenue sufficient to enable the air carrier and foreign air carrier, under honest, economical, and efficient management, to provide adequate and efficient air carrier and foreign air carrier transportation;

(F) whether the price will be predatory or tend to monopolize competition among air carriers and foreign air carriers in foreign air transportation;

(G) reasonably estimated or foreseeable future costs and revenues for the air carrier or foreign air carrier for a reasonably limited future period

during which the price would be in effect; and

(H) other factors.

(b) Suspension --

(1)(A) Pending a decision under subsection (a)(1) of this section, the Secretary may suspend a tariff and the use of a price contained in the tariff or a classification, rule, or practice affecting that price.

(B) The Secretary may suspend a tariff of a foreign air carrier and the use of a price, classification, rule, or practice when the suspension is in the public interest.

(2) A suspension becomes effective when the Secretary files with the tariff and delivers to the air carrier or foreign air carrier affected by the suspension a written statement of the reasons for the suspension. To suspend a tariff, reasonable notice of the suspension must be given to the affected carrier.

(3) The suspension of a newly filed tariff may be for periods totaling not more than 365 days after the date the tariff otherwise would go into effect. The suspension of an existing tariff may be for periods totaling not more than 365 days after the effective date of the suspension. The Secretary may rescind at any time the suspension of a newly filed tariff and allow the price, classification, rule, or practice to go into effect.

(c) Effective tariffs and prices when tariff is suspended, canceled, or rejected.--

(1) If a tariff is suspended pending the outcome of a proceeding under subsection (a) of this section and the Secretary does not take final action in the proceeding during the suspension period, the tariff goes into effect at the end of that period subject to cancellation when the proceeding is concluded.

(2)(A) During the period of suspension, or after the cancellation or rejection, of a newly filed tariff (including a tariff that has gone into effect provisionally), the affected air carrier or foreign air carrier shall maintain in effect and use--

(i) the corresponding seasonal prices, or the classifications, rules, and practices affecting those prices or the value of transportation provided under those prices, that were in effect for the carrier immediately before the new tariff was filed; or

(ii) another price provided for under an applicable intergovernmental agreement or understanding.

(B) If the suspended, canceled, or rejected tariff is the first tariff of the carrier for the covered transportation, the carrier, for the purpose of operations during the period of suspension or pending effectiveness of a new tariff, may file another tariff containing a price or another classification, rule, or practice affecting the price, or the value of the transportation provided under the price, that is in

effect (and not subject to a suspension order) for any air carrier providing the same transportation.

3) If an existing tariff is suspended or canceled, the affected air carrier or foreign air carrier, for the purpose of operations during the period of suspension or pending effectiveness of a new tariff, may file another tariff containing a price or another classification, rule, or practice affecting the price, or the value of the transportation provided under the price, that is in effect (and not subject to a suspension order) for any air carrier providing the same transportation.

(d) Response to refusal of foreign country to allow air carrier to charge a price.-- When the Secretary finds that the government or an aeronautical authority of a foreign country has refused to allow an air carrier to charge a price contained in a tariff filed and published under section 41504 of this title for foreign air transportation to the foreign country--

(1) the Secretary, without a hearing--

(A) may suspend any existing tariff of a foreign air carrier providing transportation between the

United States and the foreign country for periods totaling not more than 365 days after the date of the suspension; and

(B) may order the foreign air carrier to charge, during the suspension periods, prices that are the same as those contained in a tariff (designated by the Secretary) of an air carrier filed and published under section 41504 of this title for foreign air transportation to the foreign country; and

(2) a foreign air carrier may continue to provide foreign air transportation to the foreign country only if the government or aeronautical authority of the foreign country allows an air carrier to start or continue foreign air transportation to the foreign country at the prices designated by the Secretary....

49 U.S.C. § 46101. Complaints and investigations

(a) General.--

(1) A person may file a complaint in writing with the Secretary of Transportation (or the Under Secretary of Transportation for Security with respect to security duties and powers designated to be carried out by the Under Secretary or the Administrator of the Federal Aviation Administration with respect to aviation safety duties and powers designated to be carried out by the Administrator) about a person violating this part or a requirement prescribed under this part. Except as provided in subsection (b) of this section, the Secretary, Under Secretary, or Administrator shall investigate the complaint if a reasonable ground appears to the Secretary, Under Secretary, or Administrator for the investigation.

(2) On the initiative of the Secretary, Under Secretary, or Administrator, as appropriate, the Secretary, Under Secretary, or Administrator may conduct an investigation, if a reasonable ground appears to the Secretary, Under Secretary, or Administrator for the investigation, about--

> (A) a person violating this part or a requirement

> prescribed under this part; or
>
> (B) any question that may arise under this part.
>
> (3) The Secretary of Transportation, Under Secretary, or Administrator may dismiss a complaint without a hearing when the Secretary, Under Secretary, or Administrator is of the opinion that the complaint does not state facts that warrant an investigation or action.
>
> (4) After notice and an opportunity for a hearing and subject to section 40105 (b) of this title, the Secretary of Transportation, Under Secretary, or Administrator shall issue an order to compel compliance with this part if the Secretary, Under Secretary, or Administrator finds in an investigation under this subsection that a person is violating this part....

14 C.F.R. § 293.10. Exemption

(a) Air carriers and foreign air carriers are exempted from the duty to file passenger tariffs with the Department of Transportation, as required by 49 U.S.C. 41504 and 14 CFR part 221, as follows:

(1) The Assistant Secretary for Aviation and International Affairs will, by notice, issue and periodically update a list establishing the following categories of markets:

(i) In Category A markets, carriers are exempted from the duty to file all passenger tariffs unless they are nationals of countries listed in Category C, or are subject to the provisions of paragraph (c) of this section.

(ii) In Category B markets, carriers are exempted from the duty to file all passenger tariffs except those setting forth one-way economy-class fares and governing provisions thereto, unless they are nationals of countries listed in Category C, or are subject to the provisions of paragraph (c) of this section.

(iii) In Category C markets, carriers shall

continue to file all passenger tariffs, except as provided in § 293.10(b);

(2) The Assistant Secretary will list country-pair markets falling in Categories A and C, taking into consideration the factors in paragraphs (a)(2)(i) through (iv) of this section. All country-pair markets not listed in Categories A or C shall be considered to be in Category B and need not be specifically listed.

(i) Whether the U.S. has an aviation agreement in force with that country providing double-disapproval treatment of prices filed by the carriers of the Parties;

(ii) Whether the country's Government has disapproved or deterred U.S. carrier price leadership or matching tariff filings in any market;

(iii) Whether the country's Government has placed significant restrictions on carrier entry or capacity in

any market; and (iv) Whether the country's government is honoring the provisions of the bilateral aviation agreement and there are no significant bilateral problems.

(b) By notice of the Assistant Secretary, new country-pair markets will be listed in the appropriate category, and existing country-pair markets may be transferred between categories.

(c) Notwithstanding a determination that a country is in Category A or B, if the Assistant Secretary finds that effective price leadership opportunities for U.S. carriers are not available between that country and any third country, carriers that are nationals of such country may be required to file tariffs, as provided under part 221 or as otherwise directed in the notice, for some or all of their services between the U.S. and third countries.

(d) Air carriers and foreign air carriers are exempted from the duty to file governing rules tariffs containing general conditions of carriage with the Department of Transportation, as required by 49 U.S.C. 41504 and 14 CFR part 221. A description of the general conditions of carriage will be included in the Assistant Secretary's initial notice.

(e) Notwithstanding paragraph (d) of this section, air carriers and foreign air carriers shall file and maintain a tariff with the Department to the extent required by 14 CFR 203.4 and other implementing regulations.

(f) Authority for determining what rules are covered by paragraph (d) of this section and for determining the filing format for the tariffs required by paragraph (e) of this section is delegated to the Director of the Office of International Aviation.

14 C.F.R. § 302.404. Formal complaints

(a) Filing. Any person may make a formal complaint to the Assistant General Counsel about any violation of the economic regulatory provisions of the Statute or of the Department's rules, regulations, orders, or other requirements. Every formal complaint shall conform to the requirements of § 302.3 and § 302.4, concerning the form and filing of documents. The filing of a complaint shall result in the institution of an enforcement proceeding only if the Assistant General Counsel issues a notice instituting such a proceeding as to all or part of the complaint under § 302.406(a) or the Deputy General Counsel does so under § 302.406(c).

(b) Amendment. A formal complaint may be amended at any time before service of an answer to the complaint. After service of an answer but before institution of an enforcement proceeding, the complaint may be amended with the permission of the

Assistant General Counsel. After institution of an enforcement proceeding, the complaint may be amended only on grant of a motion filed under § 302.11.

(c) Insufficiency of formal complaint. In any case where the Assistant General Counsel is of the opinion that a complaint does not sufficiently set forth matters required by any applicable rule, regulation or order of the Department, or is otherwise insufficient, he or she may advise the complainant of the deficiency and require that any additional information be supplied by amendment.

(d) Joinder of complaints or complainants. Two or more grounds of complaints involving substantially the same purposes, subject or state of facts may be included in one complaint even though they involve more than one respondent. Two or more complainants may join in one complaint if their respective causes of complaint are against the same party or parties and involve substantially the same purposes, subject or state of facts. The Assistant General Counsel may separate or split complaints if he or she finds that the joinder of complaints, complainants, or respondents will not be conducive to the proper dispatch of the Department's business or the ends of justice.

(e) Service. A formal complaint, and any amendments thereto, shall be served by the person filing such documents upon each party complained of, upon the Deputy General Counsel, and upon the Assistant General Counsel.

14 C.F.R. § 302.502. Institution of proceedings

A proceeding to determine the lawfulness of rates, fares, or charges for the foreign air transportation of persons or property by aircraft, or the lawfulness of any classification, rule, regulation, or practice affecting such rates, fares or charges, may be instituted by the filing of a petition or complaint by any person, or by the issuance of an order by the Department.

14 C.F.R. § 302.505. Order of investigation

The Department, on its own initiative, or if it is of the opinion that the facts stated in a petition or complaint warrant it, may issue an order instituting an investigation of the lawfulness of any present or proposed rates, fares, or charges for the foreign air transportation of persons or property by aircraft or the lawfulness of any classification, rule, regulation, or practice affecting such rates, fares, or charges, and may assign the proceeding for hearing before an administrative law judge. If a hearing is held, except as modified by this subpart, the provisions of § 302.17 through § 302.38 of this part shall apply.

14 C.F.R. § 302.17. Administrative law judges

(a) Powers and delegation of authority.

> (1) An administrative law judge shall have the following powers, in addition to any others specified in this part:

(i) To give notice concerning and to hold hearings;

(ii) To administer oaths and affirmations;

(iii) To examine witnesses;

(iv) To issue subpoenas and to take or cause depositions to be taken;

(v) To rule upon offers of proof and to receive relevant evidence;

(vi) To regulate the course and conduct of the hearing;

(vii) To hold conferences before or during the hearing for the settlement or simplification of issues;

(viii) To rule on motions and to dispose of procedural requests or similar matters;

(ix) To make initial or recommended decisions as provided in § 302.31;

> (x) To take any other action authorized by this part or by the Statute.

(2) The administrative law judge shall have the power to take any other action authorized by part 385 of this chapter or by the Administrative Procedure Act.

(3) The administrative law judge assigned to a particular case is delegated the DOT decisionmaker's function of making the agency decision on the substantive and procedural issues remaining for disposition at the close of the hearing in such case, except that this delegation does not apply in cases where the record is certified to the DOT decisionmaker, with or without an initial or recommended decision by the administrative law judge, or in cases requiring Presidential approval under section 41307 of the Statute. This delegation does not apply to the review of rulings by the administrative law judge on interlocutory matters that have been appealed to the DOT decisionmaker in accordance with the requirements of § 302.11....

14 C.F.R. § 302.38. Final decision of the DOT Decisionmaker

When a case stands submitted to the DOT decisionmaker for final decision on the merits, he or she will dispose of the issues presented by entering an appropriate order that will include a statement of the reasons for his or her findings and conclusions. Such orders shall be deemed "final orders" within the purview of § 302.14(a), in the manner provided by § 302.18.