No. 12-527

IN THE

Supreme Court of the United States

DAWN A. McCRAY, *et al.*,

Petitioners,

v.

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

Respondents.

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

AMICI CURIAE BRIEF OF ANTITRUST AND ECONOMICS PROFESSORS AND OF THE AMERICAN ANTITRUST INSTITUTE IN SUPPORT OF THE PETITION FOR A WRIT OF CERTIORARI

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I. STATEMENT OF INTEREST

The individual signatories hereto, identified in the Appendix, are scholars who study, teach, and write about antitrust and competition policy, and have an interest in their proper application. The American Antitrust Institute ("AAI") is an independent, non-profit organization for education, research, and advocacy to advance the role of competition in the economy, protect consumers, and sustain the vitality of the antitrust laws. The AAI consists of an Advisory Board of more than 120 prominent antitrust lawyers, law professors, economists, and business leaders, and it is led by its President and Board of Directors. *See* http://www.antitrustinstitute.org. The individual signatories and the AAI are referred to collectively as the "*Amici*."[1]

[1] None of the *Amici* has received any compensation related to this matter. No counsel for any party authored this brief in whole or in part, and no person or entity, other than the *Amici* or their counsel, has contributed monetarily to its preparation or submission. All parties have consented to its filing, and counsel of record for all parties received notice at least 10 days prior to its due date of the *Amici*'s intention to file.

The individual *Amici*'s professional and academic associations are indicated only for identification purposes, and the views stated are their own. The AAI's Board of Directors alone has approved the AAI's joining of this brief. The individual views of members of the Advisory Board may differ from AAI's positions.

As required by this Court's Rule 37.1, *Amici* are well situated to offer matter relevant to certiorari not elaborated by the parties. Specifically, *Amici* will explain a theoretical conflict going beyond the specific parties and facts, which is unlikely to be resolved by the lower courts. Left uncorrected, this conflict will have serious practical consequences.

The conflict is between the opinion below and the larger theoretical framework this Court has devised over many years to balance state regulation against federal antitrust goals. This case is not, as the court below took it to be, simply about technical points within the so-called "filed rate" doctrine. It is rather about this Court's carefully elaborated antitrust federalism. Fundamentally, the question is what is required before a *state* government may excuse private persons from the *federal* antitrust laws, and the failure below to perceive that fact poses a serious theoretical conflict requiring this Court's attention. Furthermore, because of its particular facts, this case is uncommonly well suited for correction of the conflict by this Court, and another such opportunity is unlikely to return soon.

II. SUMMARY OF ARGUMENT

The issue before the Court is one of first impression—whether the so-called "filed rate doctrine" protects state-regulated rate filings from private challenge under federal antitrust law—and because of its larger theoretical consequences it is

acutely appropriate for certiorari. In the one notable case in which this Court considered the applicability of antitrust to conduct subject to state government tariff filing, *Cantor v. Detroit Edison Co.,* 428 U.S. 579 (1976), it permitted a private damages action to proceed under federal antitrust, without citing *Keogh v. Chicago & Nw. Ry. Co.,* 260 U.S. 156 (1922), or any other filed rate caselaw.[2] The Court otherwise has not considered the question.

The question is a simple one. There is not and never has been a federal "filed rate doctrine" for state regulation, and the handful of lower courts to have held otherwise were in error. The only relevant test is the state action immunity doctrine of *Parker v. Brown,* 317 U.S. 341 (1943), as implemented in *Cal. Retail Liq. Dlrs' Ass'n v. Midcal Alum., Inc.,* 445 U.S. 97, 106 (1980). This case fails that test because of the absence of the "active supervision" required by *Midcal.*

Were the law otherwise, it would pose an acute theoretical conflict with this Court's caselaw, of the kind especially suited to this Court's resolution. Moreover, this case is an uncommonly good vehicle for consideration of the conflict, because it appears here in especially stark terms. The court below precluded private relief on facts almost identical to

[2] "We conclude that neither Michigan's approval of the tariff filed by respondent, nor the fact that the lamp-exchange program may not be terminated until a new tariff is filed, is a sufficient basis for implying an exemption from the federal antitrust laws for that program." *Cantor,* 428 U.S. at 598.

those under which this Court *denied* state action immunity in *Federal Trade Commission v. Ticor Title Ins. Co.,* 504 U.S. 621 (1992). The court below acknowledged this conflict, but said only that it felt no need to reconcile the filed rate and state action doctrines. *McCray v. Fidelity Nat'l Title Ins. Co.,* 682 F.3d 229, 238 n.6 (3d Cir. 2012). But, as *Amici* will explain, this holding would cause there to be very different antitrust treatment for state regulatory regimes that are identical in every way except that one calls for the filing of an unreviewed piece of paper and the other does not. An opportunity for this Court to address this important conflict on such nicely discriminated facts will not return soon.

Over the past seventy years, this Court has crafted an elaborate theoretical framework to balance the state interest in trade regulation against the federal antitrust goals with which state regulation often conflicts. Beginning in *Parker* in 1943 and culminating in its salutary *Ticor* decision, the Court has required that before a state can displace the federal command of competition, it must put in place some public oversight of the exempted conduct. The state must do something more than simply declare that private trade restraints are exempt from federal law.

Some courts, though not all, have found that this complex of theoretical considerations has no relevance as soon as a state adopts the simple expedient of a rate-filing system, even if it is identical to the unreviewed, file-and-use system that

Ticor found so lacking. They do this on their view that the filed rate doctrine should apply in such cases, and in their view the filed rate rule precludes private remedies even where the agency engages in no actual review of rates filed.[3] *Amici* are eager to undo this extraordinary elevation of form over theoretical substance, and to bring consistency to all cases in which states attempt to limit federal antitrust.

To be clear, *Amici* stress as the justification for certiorari not the lack of "active supervision" in and of itself, but the expansion of the heavily disfavored filed rate doctrine to state-filed rates, an expansion that creates serious theoretical tension. If "a doctrine [so] indefensible . . . should be *narrowly* construed," as one leading antitrust authority has said, HERBERT HOVENKAMP, FEDERAL ANTITRUST POLICY: THE LAW OF COMPETITION AND ITS PRACTICE § 19.6 (4th ed. 2011) (emphasis added), then there can be no call for expanding it in this way, beyond any traditional basis in the intent of the *federal* Congress, and in a way so far at odds with this Court's theory of antitrust federalism. Accordingly,

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[3] Not all courts so hold, and the Circuits are accordingly split. *Compare* Brown v. Ticor Title Ins. Co., 982 F.2d 386, 394 (9th Cir. 1992) (rejecting filed rate protection for state-filed rates), *with* Wegoland Ltd. v. NYNEX Corp., 27 F.3d 17, 20 (2d Cir.1994) (finding filed-rate protection for state-filed rates), H.J. Inc. v. Nw. Bell Tel. Co., 954 F.2d 485, 494 (8th Cir.1992) (same), and Taffet v. S. Co., 967 F.2d 1483, 1494 (11th Cir. 1992) (same).

while there may be support for the view that *federally* filed rates can enjoy filed rate protection without actual review, and while some such support was cited below,[4] it is inapt to this case.

Amici will explain three related reasons that the theoretical conflict renders certiorari appropriate. First, only this Court is likely to restore consistency across factual contexts that some lower courts have taken to be distinct and unrelated. Failure to find that consistency causes there to be inexplicably and undesirably different antitrust treatment of state regulatory regimes that do not differ in any respect relevant to any value of federalism or federal antitrust. Second, this Court will consider another matter this Term raising importantly similar issues, *Federal Trade Commission v. Phoebe Putney Health Sys., Inc.,* 663 F.3d 1369 (11th Cir.), *cert. granted* 2012 WL 985316 (2012) (No. 11-1160). Consideration of both matters would complement one another, as they raise the same fundamental concern: what precisely should be required of state governments before they excuse private persons from federal antitrust liability. And finally, confusion of this central theoretical point caused the court below explicitly to break with a decision of the Ninth Circuit on essentially identical facts, *Brown v. Ticor*

[4] *See* McCray v. Fidelity Nat'l Title Ins. Co., 682 F.3d 229, 238 n.6 (3d Cir. 2012), *citing* Square D Co. v. Niagara Frontier Tariff Bur., 476 U.S. 409, 417 n.19 (1986), and Montana–Dakota Utils. Co. v. Nw. Pub. Serv. Co., 341 U.S. 246, 251 (1951).

Title Ins. Co., 982 F.2d 386 (9th Cir. 1992). *Amici* submit that *Brown* properly applied this Court's larger framework for balancing state regulation and federal antitrust.

III. REASONS FOR GRANTING THE PETITION

This case is not, as the court below took it to be, about minor points of detail within the widely disparaged "filed rate" doctrine, commonly associated with *Keogh v. Chicago & Nw. Ry. Co.,* 260 U.S. 156 (1922). It has little to do with the since-repealed federal statute at issue in that case, or with any similar federal statute, or with Justice Brandeis's views of the largely defunct Progressive-era rate-and-entry regulatory regimes of which those statutes were a part.

Instead, this case is about federalism. Specifically, it is about what should be required before a state government excuses private persons from the federal antitrust laws. The court below forgot that "a state"—unlike the federal Congress—"does not give immunity to those who violate the Sherman Act by authorizing them to violate it, or by declaring that their action is lawful . . . ." *Parker v. Brown,* 317 U.S. 341, 351 (1943).

The opinion below crystallized the central problem in the following, nearly hidden observation: while not denying that some of this Court's state

action cases seem hard to square with its decision, the court simply found "no apparent requirement to reconcile the filed rate and state action doctrines . . . ." *McCray v. Fidelity Nat'l Title Ins. Co.,* 682 F.3d 229, 238 n.6 (3d Cir. 2012). The court gave no explanation for that view, cited two circuit opinions for it that are logically irrelevant,[5] and was evidently unaware of judicial[6] and academic[7] authority for the

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[5] Specifically, the court cited *Trigen Okla. City Energy v. Okla. Gas & Elec.*, 244 F.3d 1220, 1224-25 (10th Cir. 2001), and *City of Kirkwood v. Union Elec. Co*.,671 F.2d 1173, 1182 (8th Cir. 1982). *Trigen* dismissed a private antitrust action on state action grounds and explicitly refused to reach filed rate issues. 244 F.3d at 1225. *City of Kirkwood* admittedly discussed the state action and filed rate doctrines separately, but it found neither of them to apply. 671 F.2d at 1179-80.

Accordingly, neither case is relevant. Amici's argument is that the state action and filed rate doctrines should be theoretically consistent. That claim would be put in doubt only by a decision—like the one below—in which a court *rejects* immunity under one doctrine but *finds* immunity under the other.

[6] *See, e.g., Cantor,* 428 U.S. at 596 n.35 (citing *Otter Tail Power Co. v. United States,* 410 U.S. 366 (1973), case concerning implied repeal of antitrust by other federal statutes, as authority in a case concerning state action immunity); Am. Agric. Movement v. Bd. of Trade, 977 F.2d 1147 (7th Cir. 1992) (citing *Ticor* as requiring that *federal* agencies must "actually exercise[] . . . supervisory powers" to justify a finding of implied repeal of antitrust); *In re* Ocean Shipping Antitr. Litig, 500 F. Supp. 1235, 1241 (S.D.N.Y. 1980) (citing *Cantor,* 428 U.S. at 598, a state action decision, as support for a refusal to apply the filed rate doctrine).

[7] *See, e.g.,* EINER R. ELHAUGE, U.S. ANTITRUST LAW & ECONOMICS 38 n.166 (2d. Ed. Foundation Press 2011) (doubting that this "Court would approve . . . extension" of federal filed rate protection to state-filed rates "because the Court has (1)

seemingly self-evident point that antitrust scope doctrines should be consistent with one another. In fact there is a need for theoretical consistency, and certiorari is made appropriate by the court's failure to seek it.

A. Serious and Unexplained Theoretical Conflict in the Scope of Antitrust

The decision below, when taken together with this Court's *Ticor* decision, gives rise to the following puzzle. If State X and State Y both had title insurance regimes like those at issue in *Ticor*, then title insurers in both states would be fully subject to government antitrust remedies. *Ticor* so held. But the effect of a ruling like that below is to bar *private* damages remedies. So if State X did not have a rate-filing requirement, then private plaintiffs could challenge price-fixing by State X title insurers, but a rate-filing requirement in State Y would bar private challenges there, even though in every other respect

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expressed doubts about the wisdom of this doctrine . . . , *Square D*, 476 U.S. at 423–24, and (2) denied state action immunity to state agencies that engage in . . . rubberstamp approvals . . . , *see Ticor Title*, 504 U.S. 621."); HOVENKAMP, *supra,* at § 19.3c ("There is no obvious reason why the standard[s]" that govern state action immunity "should be any different" than those that govern other immunity doctrines); Jim Rossi, *Lowering the Filed Tariff Shield: Judicial Enforcement for a Deregulatory Era,* 56 VAND. L. REV. 1591, 1652-58 (2003) (arguing that all state-government regulatory scenarios would be better handled by the state action doctrine, with its "active supervision" requirement, and that the filed rate doctrine should not apply to them).

the regulatory regimes remained identical. Nothing seemed relevant to filed rate protection below except for the tariff filing itself. In its absence, the filed rate doctrine would not apply, and *Ticor* would preclude state action immunity, making private damages actions possible.

The same result would hold even if both states' regulators had the same power to enforce the same reasonable rate and non-discrimination rules, and even if both states explicitly authorized price-fixing by statute. Filed rate protection would still be unavailable, and *Ticor* would still deny state action immunity from private remedies. And it would be so even though the State Y filing system were exactly like the one found inadequate in *Ticor*—a file-and-use system in which the regulator never actually uses its power of post-filing review. The Third Circuit would preclude the federal remedies of Clayton Act § 4 in State Y but not State X, even though the only difference between them is State Y's requirement to file a piece of paper that no one ever looks at.

This result is at odds with seventy years of this Court's elaborate balancing of state and federal interests in antitrust cases, a framework that began in *Parker* in 1943. Where the Court has permitted states to deviate from the federal competition mandate, it has been solely to respect their sovereign interests in regulating trade within their borders. The states have no such interest in cases in which they do not in fact regulate. Accordingly, antitrust is

relaxed in light of state policy only where the state itself has actively used its regulatory power. *Ticor,* 504 U.S. at 639-40; *Midcal,* 445 U.S. at 105-06.

Ticor, this Court's last statement on the issue, remains its fullest theoretical elaboration. As *Ticor* explained, on a thorough canvass of the Court's prior decisions, the Court's purpose has never been "to determine whether the State has met some normative standard, such as efficiency, in its regulatory practices." The Court asks only "whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, [and] not simply by agreement among private parties." *Ticor,* 504 U.S. at 634-35; *see also id.* at 633 ("Immunity is conferred out of respect for ongoing regulation by the State, not out of respect for the economics of price restraint."). And the Court judges the degree of the state's "independent judgment and control" by measuring precisely the variable that the court below said was irrelevant: the Court requires evidence of "[a]ctual state involvement, not deference to private price-fixing arrangements under the general auspices of state law . . . ." *Ticor,* 504 U.S. at 633. Critically, the Court added that:

> state officials [must] have and exercise power to review particular anticompetitive acts of private parties and disapprove those that fail to accord with state policy. Absent such a program of supervision, there is no realistic

> assurance that a private party's anticompetitive conduct promotes state policy, rather than merely the party's individual interests.

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

Therefore, the result in this case should not stand unless there is some difference between the filed rate doctrine, applied below, and the state action doctrine explained in *Ticor,* and the difference serves some relevant policy goal important enough to justify radically different exposure to liability in otherwise similar contexts. But the only difference in consequence between the two doctrines is that the state action immunity precludes all antitrust and the filed rate rule ordinarily precludes only some private remedies. No policy goal of either antitrust or federalism is served by precluding private federal remedies in only one of two markets identical except that one observes a pro forma state-law filing requirement.

First, the policy values on which *Keogh* and other filed rate cases are justified have no force where rates are filed with a state agency.[8] The goal of

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[8] Courts now commonly say that the filed rate doctrine serves two policy goals—the prevention of price discrimination among customers, sometimes called the "nondiscrimination strand," and deference to agency expertise in rate-making, sometimes called the "nonjusticiability strand." *See, e.g.,* Fax

preventing price discrimination among customers—the filed rate doctrine's "paramount purpose," *Square D Co. v. Niagara Frontier Tariff Bur.,* 476 U.S. 409, 417 (1986) (quoting *Keogh,* 260 U.S. at 163)—has no relevance here. First of all, as petitioners observe, Delaware's regulatory regime explicitly permits varying prices and contemplates that they may be set competitively. Compl. ¶ 34 (quoting Del. Code Ann., Tit. 18, § 2501). But even if Delaware did prohibit discrimination, a *state* non-discrimination rule should be no basis for disregard of *federal* antitrust laws. A mere state government desire to prevent price discrimination—which is an ordinary feature of many healthy, competitive markets—should receive no more federal deference than any other state intrusion into normal competition. It would be no different than when a state "simply authorizes price setting and enforces the prices established by private parties." *324 Liquor Corp. v. Duffy,* 479 U.S. 335, 344-45 (1987) (quoting *Midcal,* 445 U.S. at 106). Especially where the state engages in no actual oversight of the rates set, it would do no more than "cast[ ] . . . a gauzy cloak of state involvement over what is essentially a price-fixing arrangement." *Id.*

Likewise, mandating deference to regulatory authority, the other major policy goal commonly associated with filed rate protection, would make little sense here, for that is precisely the value

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Telecommunicaciones, Inc. v. AT&T, 138 F.3d 479, 489 (2d Cir. 1988).

precluded by *Ticor*. A state government cannot by mere fiat declare that antitrust does not apply. No policy goal of antitrust or federalism would make that more true simply because a state has adopted a pro forma rate-filing requirement.

Second, it is no reply that filed rate protection leaves open federal enforcement. *Ticor* stressed the danger, in terms of the lost values of healthy competition, were states allowed to displace antitrust by fiat. *See* 504 U.S. at 632 ("The preservation of the free market and of a system of free enterprise without price fixing or cartels is essential to economic freedom. . . . A national policy of such a pervasive and fundamental character is an essential part of the economic and legal system within which the separate States administer their own laws for the protection and advancement of their people."). It follows that if private remedies are needed for the *actual* preservation of those values, then private remedies too cannot be dispensed with by state fiat.

And indeed, however important government antitrust enforcement may be, anticompetitive conduct will routinely remain profitable even where government remedies are imposed. Except in the limited circumstances in which antitrust is prosecuted as a crime, government relief is ordinarily only injunctive and prospective in nature. And though government enforcers sometimes recover money through disgorgement, they can secure no more than actual profits earned, and often substantially less. Since detection by government

enforcers is generally unlikely, it is now widely agreed among academics that anticompetitive conduct cannot be optimally deterred without money penalties *greater* than the expected profit.[9] Moreover, the federal government can bring only a small fraction of the total antitrust enforcement in the United States. Over the past fifteen years, the government has commenced on average only about twenty civil antitrust claims each year, and its cases represent an average of only three percent of all civil antitrust enforcement.[10]

B. Certiorari in This Matter Would Complement this Court's Consideration of *Phoebe Putney*

Certiorari will afford the Court an unusual opportunity for theoretical clarification in this substantively important area, because this matter

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[9] *See* William M. Landes, *Optimal Sanctions for Antitrust Violations,* 50 U. CHI. L. REV. 652, 661-72 (1983) (applying the economic theory of "optimal deterrence" to antitrust); Gary Becker, *Crime and Punishment: An Economic Approach,* 76 J. POL. ECON. 169, 172-205 (1968) (seminal work in optimal deterrence theory as to crime generally).

[10] These data can be compiled from ADMIN. OFF. OF THE U.S. COURT, JUDICIAL BUSINESS OF THE U.S. COURTS, *available at* http://www.uscourts.gov/Statistics/JudicialBusiness.aspx. Each annual edition of *Judicial Business* reports at Table C-2 the number of new matters commenced in the district courts, by party and nature of suit. For the years 1997 to 2011, the United States commenced an average of 19.9 new civil antitrust cases, which on average represented 2.72% of all new civil antitrust actions.

raises importantly similar issues with another on which the Court has already granted certiorari. In *Federal Trade Commission v. Phoebe Putney Health Sys., Inc.,* 663 F.3d 1369 (11th Cir.), *cert. granted* 2012 WL 985316 (2012) (No. 11-1160), the Court will ask whether the Eleventh Circuit correctly applied the familiar *Midcal* test for state action immunity. *Midcal* requires that where a state authorizes a private party to engage in anticompetitive conduct, federal antitrust will still apply unless a court finds two things: that "the challenged restraint . . . [is] clearly articulated and affirmatively expressed as state policy," and that it is "actively supervised by the State itself." *Midcal,* 445 U.S. at 105 (internal citations and quotation marks omitted). Specifically, *Phoebe Putney* will ask whether the Eleventh Circuit properly found "clear articulation" where the state of Georgia merely granted the corporate defendant ordinary corporate powers to make contracts and acquire property.

Phoebe Putney and this case pose the same central issue, even though this matter is more properly concerned with the values underlying *Midcal*'s "active supervision" requirement. This is so because it is now clear that both *Midcal* elements serve the same overall goal. *Ticor* explained at length

> the close relation between *Midcal's* two elements. Both are directed at ensuring that particular anticompetitive mechanisms operate because of a deliberate and intended

> state policy. . . . In the usual case, *Midcal*'s requirement that the State articulate a clear policy shows little more than that the State has not acted through inadvertence; it cannot alone ensure, as required by our precedents, that particular anticompetitive conduct has been approved by the State.

504 U.S. at 636-37.

C. The Court Below Explicitly Broke with the Ninth Circuit on Identical Facts

Finally, the court below explicitly broke with another Circuit decision on essentially identical facts, and *Amici* submit that that other decision properly reflected this Court's approach to balancing state regulation and federal antitrust. In *Brown v. Ticor Title Ins. Co.,* 982 F.2d 386 (9th Cir. 1992), a private follow-on action to the Federal Trade Commission's *Ticor* action, involving the same defendants and the same challenged conduct, the Ninth Circuit held that state file-and-use title insurance regulation did not trigger filed rate protection. 982 F.2d at 394. Reiterating that the matter involved nothing more than a naked, horizontal cartel whose prices were recorded in an unreviewed state filing system, the court stated the following rule:

> [I]f those rates were the product of unlawful activity prior to their being filed and were not

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

Id. The court below explicitly rejected *Brown*, finding that "the filed rate doctrine [does not] require[] a certain type of agency approval or level of regulatory review," and that it "applies as long as the agency has in fact authorized the challenged rate." 682 F.3d at 237.

CONCLUSION

This Court once before reversed the Third Circuit, on almost identical facts, for subordinating the commands of Congress to a state government's passive acquiescence in price-fixing. *Ticor,* 504 U.S. at 638. It should do the same here. The Court should grant the petition for certiorari, and should hold that neither the filed rate rule nor any other doctrine protects unreviewed, state-filed rates from federal antitrust remedies.

Respectfully submitted,

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