No. 17-659

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

BRIEF FOR INTERNATIONAL AIR TRANSPORT ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The International Air Transport Association (IATA) is a nongovernmental international trade association founded in 1945 by air carriers engaged in international air services. Today, IATA consists of 282 member airlines from 123 countries representing roughly 84 percent of the world's total air traffic. IATA strives to represent, lead, and serve the airline industry by advocating the interests of airlines across the globe, developing global commercial standards for the airline industry, and assisting airlines in operating safely, securely, efficiently, and economically. Since 1945, IATA has worked closely with governments and intergovernmental organizations to achieve and maintain a legal and regulatory framework everywhere consistent with the best interests of air transportation users. In this connection, IATA advocates uniformity in the development, implementation, and interpretation of numerous public and private international treaties and agreements relating to the conduct of international air services.

The Ninth Circuit's decision threatens to disrupt and compromise the integrity of the oversight and regulation of international air transportation services. If allowed to stand, the Ninth Circuit's decision will frustrate the realization of the objectives of IATA's

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[1] No counsel for a party authored this brief in whole or in part, and no party or counsel for a party or any other person other than IATA or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. On December 1, 2017, counsel for IATA timely notified counsel of record for Petitioners and Respondents of IATA's intention to file this brief. IATA's counsel received written consent from counsel for Petitioners on December 4, 2017 and from counsel for Respondents on December 6, 2017.

member airlines in ensuring the uniform observance of the international obligations governing those services. The United States would be uniquely disadvantaged if the decision is not reversed, because it would prevent the U.S. Government from speaking with one voice in matters of international aviation policy. Its ability to conduct international aviation relations coherently would be severely compromised. IATA and its members thus have a direct and substantial interest in the issues raised by the Petitioners. Moreover, IATA is uniquely positioned to provide the Court an international perspective on this controversy and its implications for the global airline industry.

SUMMARY OF ARGUMENT

IATA agrees with the arguments of Petitioners supporting their request for a grant of certiorari in this case. IATA files this brief to address the far-reaching implications that the Ninth Circuit's decision will have on the international obligations of the United States if certiorari is not granted. If not reversed by this Court, the Ninth Circuit's decision will establish a dangerous precedent for the international air transportation system and the United States' ability to participate in the continuing evolution of that system.

The Ninth Circuit's decision withdraws the certainty of the filed rate doctrine as it relates to regulated fares in international air transportation. The doctrine protects the authority vested in regulatory agencies from collateral attack and from judicial, often retroactive, rate setting. In international aviation, that authority derives both from domestic legislation and a complex array of agreements among sovereign nations that authorize the conduct of international air services and establish the framework for government oversight of those services. That framework includes specific

rules for the regulation by governments of fares for international services—rules that the Ninth Circuit utterly ignored.

Since the enactment of the Airline Deregulation Act of 1978 (ADA) and the International Air Transportation Competition Act of 1979 (IATCA), liberalized rules governing the conduct of international air services have been incorporated in agreements with more than 120 trading partners of the United States. These agreements—formally negotiated by the U.S. Department of State with its foreign counterparts and "supported by the strongest of presumptions and the widest latitude of judicial interpretation" because they are entered into pursuant to an express authorization from Congress[2]—include specific mutually-agreed rules governing the regulation of fares. Pursuant to those agreements, the authority to oversee and regulate fares is shared with foreign governments, and the Department of Transportation (DOT) has exclusive regulatory authority to perform that function on behalf of the United States, *see* 49 U.S.C. §§ 40101(e), 40105.

By failing to consider properly the extent to which the DOT's regulatory oversight of international fares is guided by congressional mandates and formal agreements with U.S. trading partners, the Ninth Circuit

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[2] *Dames & Moore v. Regan*, 453 U.S. 654, 668 (1981) (discussing the judicial deference given to Presidential actions taken pursuant to an express or implied authorization from Congress); 49 U.S.C. § 40105(a) (directing the Secretary of State to advise and consult with the Administrator of the Federal Aviation Administration and the Secretaries of Transportation and Commerce about "negotiations for an agreement with a government of a foreign country to establish or develop air navigation, including air routes and services").

reached a decision that is inconsistent with the long-established regulatory framework for international air services and conflicts with the international obligations of the United States. Those obligations specifically preclude unilateral action by the United States to disturb fares in effect for services between the United States and Japan. The filed rate doctrine ensures the U.S. Government's ability to comply with these obligations. The Ninth Circuit's decision, if allowed to stand, would sweep away that assurance and, in so doing, would threaten both the U.S. Government's ability to comply with its international obligations and the integrity of the international air transportation system at large.

In sum, the decision positions the judiciary to usurp, impermissibly, the DOT's exclusive authority to act on behalf of the United States in the regulation of international fares, authority established by Congress and enshrined in international agreements of the United States.

In addition, by purporting to sit in judgment of whether the DOT, acting consistent with specific international obligations, has or has not "effectively abdicated" its regulatory responsibilities, the decision of the court below unconstitutionally intrudes upon the Executive's authority to conduct the foreign policy of the United States. Unless reversed, the decision would call into question the U.S. Government's ability to make and keep promises to trading partners regarding the regulation of international aviation, thereby undermining its ability to conduct foreign policy in this vitally important commercial sector.

Understandably, the international airlines that constitute IATA's membership are deeply concerned. The Ninth Circuit's decision would create an unprece-

dented new obstacle to the orderly development of international air services. Because such services cross many borders and require agreement by many countries, it is vital that the courts respect the international rules established by those agreements in both form and substance. The Ninth Circuit's decision departs from that standard and warrants this Court's review.

ARGUMENT

I. THE NINTH CIRCUIT'S DECISION IGNORES THE REGULATORY FRAMEWORK FOR INTERNATIONAL AIR SERVICES AND CONFLICTS BOTH WITH THE DOT'S ENABLING LEGISLATION AND WITH INTERNATIONAL AGREEMENTS TO WHICH THE UNITED STATES IS A PARTY

In a series of enactments beginning with the ADA and the IATCA, Congress set the United States on a path toward "efficiency, innovation, and low prices" for air transportation through "maximum reliance on competitive market forces." 49 U.S.C. § 40101(a)(12); *see* Airline Deregulation Act of 1978, Pub. L. No. 95-504, 92 Stat. 1705, 1705 (Congress enacted the ADA to "encourage, develop, and attain an air transportation system which relies on competitive market forces to determine the quality, variety, and price of air services."). Congress included provisions to ensure that States would not frustrate those policies with measures of their own. 49 U.S.C. § 41713(b) (Congress expressly prohibited States from "enact[ing] or enforc[ing] a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier that may provide air transportation.").

Congress also tasked the DOT and the Department of State with developing an international air transportation negotiating policy. *See* 49 U.S.C. § 40101(e); International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, § 17, 94 Stat. 35, 42 (1980). Congress's directive built on an existing framework of international air transportation agreements, including the Convention on International Civil Aviation[3] and bilateral executive agreements. Among the objectives set forth in Congress's mandate to the DOT and the Department of State was "a negotiating policy emphasizing the greatest degree of competition compatible with a well-functioning international air transportation system, including . . . *freedom of air carriers and foreign air carriers to offer prices that correspond to consumer demand*." 49 U.S.C. § 40105(e)(2) (emphasis added).

Only a few years ago, the Ninth Circuit similarly sought to dilute the preemptive effect of federal aviation law. *Ginsberg v. Northwest, Inc.*, 695 F.3d 873 (9th Cir. 2012), *rev'd*, 134 S. Ct. 1422 (2014). This Court rejected, "with little difficulty," the Ninth Circuit's approach and affirmed the supremacy of federal law in the arena of air transportation.[4] *Northwest, Inc. v.*

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[3] *See* Convention on International Civil Aviation, Dec. 7, 1944, 61 Stat. 1180, 15 U.N.T.S. 295 [hereinafter, Chicago Convention].

[4] As the district court below observed,

> [t]he filed rate doctrine is a judicial creation derived from principles of federal preemption. *E. & J. Gallo Winery [v. EnCana Corp.*], 503 F.3d [1027,] 1033 [9th Cir. 2007)]. "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."

Ginsberg, 134 S. Ct. 1422 (2014). Now, in the decision below, the Ninth Circuit seeks once again to erode the supremacy of federal regulatory jurisdiction in that same arena by narrowing the protections afforded that jurisdiction by the filed rate doctrine. The Ninth Circuit's decision thus threatens not only the ability of the United States to carry out its obligations under international agreements, but also the ability of IATA's member airlines to set prices for their services with confidence that the agencies vested with oversight of those prices will have the final say as to their acceptability.

A. The International Air Transportation System

The Chicago Convention establishes the organic framework for the international air transportation system and its regulation. That system transports billions of passengers annually, with an unprecedented level of safety. The success of the framework established by the Chicago Convention, with virtually the same number of state parties as the UN Charter, is one of the most enduring and important accomplishments of the post-war era. The Chicago Convention establishes the rules under which international civil air services are conducted, confirming the sovereignty of countries over their own airspace and requiring that civil aircraft display the nationality of their registry. Chicago Convention, art. 1, 17. The treaty also serves as the charter of the International Civil Aviation Organization, the United Nations agency responsible

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Transmission Agency of N. Cal. v. Sierra Pac. Power Co., 295 F.3d 918, 929–30 (9th Cir. 2002).

In re Transpacific Passenger Air Transp. Antitrust Litig., 69 F. Supp. 3d 940, 953 (N.D. Cal. 2014) (footnote omitted).

for regulating the safety and operation of aircraft. Chicago Convention, art. 43-96.

The Chicago Convention left to agreements among countries the authorization of international civil air transportation between their respective territories. Chicago Convention, art. 6; *Greater Tampa Chamber of Commerce v. Goldschmidt*, 627 F.2d 258, 259 (D.C. Cir. 1980) ("Because every nation has exclusive sovereignty over the airspace above its territory, international agreements are a prerequisite of international air service." (citation omitted)); *see generally* BETSY GIDWITZ, POLITICS OF INTERNATIONAL AIR TRANSPORT (1981). These agreements, whether bilateral or multilateral, include a comprehensive array of rules governing the number of airlines permitted to offer services, the destinations to which they can fly, the frequency of their flights, and a host of other details including, most importantly for present purposes, the oversight by the contracting governments of the prices charged for the authorized services.[5]

Since 1992, the United States has pursued a policy of concluding "Open Skies" agreements that "promote an international aviation system based upon com-

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[5] The immediate post-war agreements between the United States and its trading partners were based on a 1946 agreement between the United States and the United Kingdom concerning air services between their respective territories (the Bermuda Agreement). Barry R. Diamond, *The Bermuda Agreement Revisited: A Look at the Past, Present and Future of Bilateral Air Transport Agreements*, 41 J. Air L. & Com. 419, 443 (1975); *see* Air Services Agreement, U.S.-U.K., Feb. 11, 1946, 60 Stat. 1499. The Bermuda Agreement became a precedent for approximately 3,000 other such agreements between countries. Charles A. Hunnicutt, *U.S.-EU Second Stage Air Transport Agreement: Toward an Open Aviation Area*, 39 Ga. J. Int'l. & Comp. L. 663, 668 (2011).

petition among airlines[,]" U.S. Dep't of State, *Current Model Open Skies Agreement Text* (Jan. 12, 2012), https://www.state.gov/e/eb/rls/othr/ata/114866.htm, while retaining the regulatory oversight necessary to protect competition and consumers,[6] *see* U.S. Dep't of State, *Open Skies Partnerships: Expanding the Benefits of Freer Commercial Aviation* (July 5, 2017), https://www.state.gov/e/eb/rls/fs/2017/267131.htm. As explained in the DOT's Final Order promulgating the policy, "[w]e have seen much larger dividends [in terms of the public interest] in those markets which allow *greater scope for airline price and service initiatives*." Defining "Open Skies", Order No. 92-8-13, 1992 WL 204010 (U.S. Dep't of Transp. Aug. 5, 1992) (emphasis added).

B. The International Framework For Regulating Pricing

Pursuant to the terms found in all U.S. air services agreements, the power to regulate rates for international air service in any bilateral market is a joint power exercised concurrently by the aeronautical authorities of both the United States (the DOT) and the other party to the bilateral air services agreement governing that market. The 1952 Civil Air Transport Agreement between the United States and Japan[7] is typical. It confirmed that joint authority as follows:

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[6] In compliance with Congress's direction, the DOT exercises its regulatory oversight through reliance on competition and market forces, rather than carrier cooperation, 49 U.S.C. § 40101(a)(12), subject to broad authority to prevent competitive and consumer injury, *see*, *e.g.*, 49 U.S.C. § 41712(a); 14 C.F.R. Part 213 (foreign air carriers).

[7] This agreement is a Bermuda-type agreement. *See* discussion, *supra* note 5. For the sake of convenience, IATA's

ARTICLE 13

(A) The determination of rates in accordance with the following paragraphs shall be made at reasonable levels, due regard being paid to all relevant factors, such as cost of operation, reasonable profit, and the rates charged by any other airlines, as well as the characteristics of each service.

(B) The rates to be charged by the airlines of either Contracting Party between points in the territory of the United States and points in the territory of Japan referred to in the attached Schedule shall, consistent with the provisions of the present Agreement, be *subject to the approval of the aeronautical authorities of the Contracting Parties, who shall act in accordance with their obligations under the present Agreement within the limits of their legal powers.*

(C) Any rate proposed by the airline or airlines of either Contracting Party shall be filed with the aeronautical authorities of both Contracting Parties at least (30) days before the proposed date of introduction; provided that this period of thirty (30) days may be reduced in particular cases if so agreed by the

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discussion will focus on services between the United States and Japan, of which All Nippon Airways Corp., Ltd., is a national. IATA notes that the United States is also party to an "open skies" agreement with Chinese Taipei (Taiwan), of which Eva Airways Corp. is a national. U.S. Dep't of State, *Open Skies Partners* (July 14, 2017), https://www.state.gov/e/eb/rls/othr/ata/267129.htm (listing all U.S. open skies partners).

> aeronautical authorities of both Contracting Parties.

Civil Air Transport Agreement, art. 13(B), U.S.-Japan, Aug. 11, 1952, 4 U.S.T. 1948 [hereinafter, 1952 Agreement] (emphasis added). Thus, regulatory authority over air fares in international air transportation is a joint authority exercised concurrently by the aeronautical authorities of both Japan and the United States. It is not authority that the DOT exercises unilaterally.

In 2009, the United States concluded an "open skies" framework with Japan. That framework is reflected in a Memorandum of Understanding addressing the obligations in the original 1952 Agreement, which by their terms otherwise remain in effect. The Memorandum of Understanding provides:

> **Part X. Pricing**
>
> The following procedures concerning the application of Article 13 of the 1952 Agreement shall apply to apply all services operated under the 2009 MOU implementing the 1952 Agreement:
>
> 1. Each Party shall allow prices for air transportation to be established by each airline based upon commercial considerations in the marketplace. Intervention by the Parties shall be limited to:
>
> a. Prevention of unreasonably discriminatory prices or practices;
>
> b. Protection of consumers from prices that are unreasonably high or restrictive due to the abuse of a dominant position;

> c. Protection of airlines from prices that are artificially low due to direct or indirect governmental subsidy or support; and
>
> d. Protection of airlines from prices that are artificially low, where evidence exists as to an intent to eliminate competition.
>
> 2. Each Party may require notification to or filing with its aeronautical authorities of prices to be charged to or from its territory by airlines of the other Party. Such notification or filing by the airlines may be required to be made not later than the initial offering, in any form, of a price.

Air Transport Agreement, Memorandum of Understanding, U.S.-Japan, Dec. 14, 2009 [hereinafter, U.S.-Japan MOU] (emphasis added), https://www.state.gov/e/eb/rls/othr/ata/j/ja/133510.htm.[8] This international agreement sets forth the standards by which each party regulates international fares—whether or not filed—for flights between the United States and Japan. The DOT is statutorily obliged to comply with these standards. 49 U.S.C. § 40105(b)(1)(A) (requiring the Secretary of Transportation to "act consistently with obligations of the United States Government under an international agreement . . .").

Without any consideration of this framework or the statutory requirement that the DOT act consistent with the international obligations of the United States, the court below found that "there were genuine issues

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[8] The U.S. Government's agreement with Japan on these points is not an anomaly. For example, the same provisions appear in its agreement with South Korea. Air Transport Agreement, U.S.-S. Kor., June 9, 1998, https://www.state.gov/e/eb/rls/othr/ata/ k/ks/114172.htm.

of material fact as to whether the DOT effectively abdicated its authority over the unfiled air fares." *Wortman v. All Nippon Airways*, 854 F.3d 606, 614 (9th Cir. 2017). Simply put, this framework of joint regulatory power—established by an international agreement to which the DOT must adhere—should be respected. It cannot be collaterally attacked by trial court determinations of whether the DOT has "effectively abdicated" regulatory oversight of fares.

The Ninth Circuit's decision goes further. It allows an action that challenges rates and charges for international flights. *See generally id.* In so doing, it inserts the judiciary into the ratemaking process. *See Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 (1986); *Keogh v. Chi. & Nw. Ry. Co.*, 260 U.S. 156, 162-63 (1922). This is exactly what the filed rate doctrine is designed to prevent. *In re N.J. Title Ins. Litig.*, 683 F.3d 451, 457-58 (3d Cir. 2012) ("[T]he nonjusticiability strand [of the filed rate doctrine] recognizes that federal courts are ill-equipped to engage in the rate making process . . . ." (citations omitted)); S*aunders v. Farmers Ins. Exch.*, 440 F.3d 940, 943 (8th Cir. 2006) (filed rate doctrine "preserves the authority and expertise of the rate-regulating agency by barring a court from enforcing the statute in a way that substitutes the court's judgment as to the reasonableness of a regulated rate" (citing *AT & T v. Cent. Office Tel., Inc.*, 524 U.S. 214, 221–23 (1998); *Ark. La. Gas Co. v. Hall*, 453 U.S. 571, 577–78 (1981); *Mont.–Dakota Util. Co. v. Nw. Pub. Serv. Co.*, 341 U.S. 246, 250–52 (1951))); *see also* Joshua D. Lichtman & Carlos R. Rainer, *The Filed Rate Doctrine as Applied to Alleged Manipulation in the Wholesale Natural Gas Market: A Defense Perspective*, The Antitrust Source 1 (Sept. 2005), http://www.americanbar.org/content/dam/aba/pubishing/anti

trust_source/Sep05_Lichtman9_27.pdf ("Principally, the doctrine forbids judicial rate-setting . . . .").

The Ninth Circuit's allowance of even the possibility of a damages award here (*i.e.*, a retroactive rate) directly contradicts the international obligations of the United States in the 1952 Agreement, as amended by the U.S.-Japan MOU. That Agreement specifically prohibits both parties from "tak[ing] unilateral action to prevent the . . . continuation of a price . . . charged by (i) an airline of either party for international air transportation between the Parties . . . ."[9, 10] U.S.-Japan MOU, Part X, § 3. All Nippon's fares for international air transportation were established under the regulatory framework of the 1952 Agreement; and if the United States, acting through its Executive Branch, is unable to change international air fares between the United States and Japan unilaterally, then there can be no question that a court of the United States lacks the power to set aside those fares as well.

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[9] Instead, "if either Party believes that any such price is inconsistent with the considerations set forth in paragraph 1 of this Part, it shall request consultations and notify the other Party of the reasons for its dissatisfaction as soon as possible." U.S.-Japan MOU, Part X, § 3.

[10] In the context of this case—a putative class action covering all persons and entities that purchased passenger air transportation for travel originating in the United States and going to Asia or Oceania at any time since January 1, 2000, *see* Pet. Cert. 15-16—a breach of the United States' obligation under this Agreement would be significant.

II. THE NINTH CIRCUIT'S DECISION IMPERMISSIBLY USURPS THE DOT'S EXCLUSIVE RESPONSIBILITY TO EXERCISE ON BEHALF OF THE UNITED STATES THE AUTHORITY TO REGULATE INTERNATIONAL AIR SERVICES

A. Congress Vested The DOT With Authority Over Interstate And Foreign Air Transportation

Congress assigned the authority to regulate international air services to the DOT and instructed the DOT to consult with the Secretary of State, as the senior official in charge of the international affairs of the United States, in carrying out its foreign air transportation authority. 49 U.S.C. §§ 40101, 40105. In the case of Japan, the U.S.-Japan MOU confirms the DOT's authority over international air service between the United States and Japan. U.S.-Japan MOU, Part II:

> "Aeronautical authorities" means, in the case of the United States, the Department of Transportation and, in the case of Japan, the Ministry of Land, Infrastructure, Transport and Tourism, and any person or agency authorized to perform functions exercised by the said Department or the said Ministry.

As the Petitioners observe, and the U.S.-Japan MOU confirms, the DOT's plenary statutory authority includes the authority to relax filing requirements to the extent it considers necessary. 49 U.S.C. § 40109(c); U.S.-Japan MOU, Part X, § 2 ("Each Party *may* require notification to or filing with its aeronautical authorities of prices to be charged . . . .") (emphasis added)). The provision is squarely in line with

Congress's mandate that U.S. aviation negotiating policy promote "freedom of air carriers and foreign air carriers to offer prices that correspond to consumer demand." 49 U.S.C. § 40101(e)(2). The U.S.-Japan MOU nonetheless explicitly preserves the authority of the United States to reject an unreasonable or discriminatory fare, or any other fare that violates the standards set forth in the MOU. U.S.-Japan MOU, Part X, § 1 (allowing intervention on pricing otherwise established based on "commercial considerations in the marketplace" to prevent "unreasonably discriminatory prices or practices[,]" to protect "consumers from prices that are unreasonably high or restrictive[,]" to protect "airlines from prices that are artificially low . . ."); 49 U.S.C. § 41507 (permitting the Secretary of Transportation to change a price "charged or received by an air carrier or foreign air carrier for foreign air transportation" whenever he or she "decides that [such] price . . . is or will be unreasonably discriminatory"); *id*. § 41509 (authorizing the Secretary of Transportation to "decide whether a price for foreign air transportation . . . is lawful").

B. The Ninth Circuit's Decision Would Usurp The Regulatory Authority Of The DOT Over Foreign Air Transportation

The Ninth Circuit's decision would usurp the DOT's authority to determine what is, and is not, fair to airline consumers by conferring on federal and possibly even state courts the ability to engage in retroactive ratemaking in the context of adjudicating alleged breaches of antitrust laws. *See Wortman*, 854 F.3d 606. Congress vested the responsibility for regulating international airline rates in the DOT. *See generally* International Air Transportation Competition Act of 1979, Pub. L. No. 96-192, 94 Stat. 35. The

international air transportation system relies on the joint authorities of countries as set forth in international agreements to which the United States and the DOT are bound. The United States' participation in that system reflects the DOT's exclusive authority and will be hobbled by potentially inconsistent decisions by the judiciary of the United States.

Perhaps more importantly, if certiorari is not granted, the Ninth Circuit's decision will establish a precedent that threatens to unravel the framework of international air transportation by displacing the DOT as the single authority empowered to act on behalf of the United States to maintain oversight of those services. It would replace an international air transportation marketplace largely characterized by the freedom to compete on price based on the consistent application of well-established, bilaterally-agreed oversight rules with a marketplace characterized by uncertainty and confusion about the criteria potentially applied to prices by courts throughout the United States, both federal and state.

III. THE NINTH CIRCUIT'S DECISION UNCONSTITUTIONALLY INTRUDES UPON THE AUTHORITY OF THE EXECUTIVE BRANCH OVER FOREIGN AIR TRANSPORTATION AND IMPAIRS THE ABILITY OF THE EXECUTIVE TO CONDUCT THE FOREIGN AFFAIRS OF THE UNITED STATES

The Ninth Circuit's decision assumes for the judiciary the power to determine whether an executive department of the United States has "effectively abdicated" its authority over air fares in international

air transportation, concluding that "the DOT has not exercised its authority to regulate . . . fares in a manner sufficient to justify the application of the filed rate doctrine." *Wortman*, 854 F.3d at 614, 617. The court conducted its analysis without considering the obligations of the United States that govern the exercise of that authority. *See supra* Point I.

It is not the role of the judiciary to sit in judgment of the DOT's implementation of the international obligations of the United States established by agreement between the United States and another country. *Regan v. Wald*, 468 U.S. 222, 242 (1984) ("Matters relating to the conduct of foreign relations . . . are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference." (quotations omitted) (citation omitted)); *Chi. & S. Air Lines v. Waterman S.S. Corp.*, 333 U.S. 103, 106-08 (1948) (noting the "international delicacy" and "strategic importance" of international air service). The 1952 Agreement with Japan, as amended by the U.S.-Japan MOU, explicitly governs the DOT's exercise of its authority to regulate the prices charged by airlines operating services pursuant to those accords. There can be no coherent suggestion that the exercise by the DOT of its regulatory authority over fares in the manner set forth in that amended agreement—wholly consistent with a statutory mandate to promote pricing freedom in international aviation markets—is an "abdication" of the DOT's responsibilities.

CONCLUSION

For the reasons set forth herein, and in Petitioners' brief, the Court should grant certiorari in this case.

Respectfully submitted,

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