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

BRIEF IN OPPOSITION

ADAM J. ZAPALA
COTCHETT, PITRE & MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: 650-697-6000
Facsimile: 650-697-0577
azapala@cpmlegal.com

CHRISTOPHER L. LEBSOCK
HAUSFELD LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Telephone: 415-633-1908
Facsimile: 415-348-4980
clebsock@hausfeld.com

February 9, 2018

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

The Ninth Circuit upheld the district court's denial of a motion for partial summary judgment under the filed rate doctrine, which is a defense to price-fixing claims brought under the Sherman Antitrust Act. The Ninth Circuit found genuine issues of material fact as to whether the filed rate doctrine applied—as to whether the price fixed rates were actually regulated by, required to be filed with, and approved by the regulator in question. Since the Petition was filed, Respondents have entered into a settlement in principle with one of the two Petitioners (EVA Airways Corp., Ltd.), and the district court has issued an order scheduling this case for trial in July 2018. The questions presented are:

1. Whether this Court should grant review of an interlocutory Ninth Circuit decision remanding this case for further proceedings, (i) when the issues involve fact-bound questions of law to be developed in further proceedings on remand, (ii) when the issues may be mooted by a trial scheduled for July 2018, (iii) when the Petition rests on an inaccurate caricature of the Ninth Circuit's decision, and (iv) when the Petition fails to establish a circuit conflict.

2. Whether this Court should review the second Question Presented, (i) when Respondents have reached a settlement in principle with the only Petitioner with standing to raise that Question, (ii) when the Petition concedes that there is no

conflict with any of this Court's decisions, Pet. 30, and (iii) when there is no circuit conflict involving actual judgments or decisions but only what the Petition describes as "different standards" or "varying" "analytical frameworks" in the lower courts. Pet. 2, 20.

RULE 29.6 STATEMENT

Each of the Respondents is a natural person.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES:

STATUTES:

RULES:

REGULATIONS:

OTHER AUTHORITIES:

STATEMENT OF THE CASE

The Petition seeks review of an interlocutory Ninth Circuit decision affirming the partial denial of summary judgment to Petitioners and remanding the case for further proceedings to resolve outstanding factual disputes. At core, Petitioners ask this Court to hold—contrary to decades of its own precedent and the unanimous agreement of the circuit courts beneath it—that the filed rate doctrine shields firms engaged in naked price fixing from civil antitrust damages claims *regardless* of whether a regulator has in fact regulated, and approved, the rates in question. That is not, and never has been, the law. This Court would affirm.

Merits to the side, the interlocutory nature of this litigation presents a poor vehicle for the Court to opine on the contours of the filed rate doctrine as applied to international air aviation. Further, the Petition may be mooted by a trial set for July 2018, rests on inaccurate descriptions of the Ninth Circuit's decision, and does not establish a circuit conflict.

The second Question is no longer properly presented because Respondents and the only Petitioner able to raise that Question have reached a settlement in principle. The Petition should be denied.

A. Procedural Background

Respondents allege that Petitioners All Nippon Airways, Ltd. ("ANA") and EVA Airways Corp., Ltd.[1]

[1] Only EVA claims filed rate protection of unfiled base air fares, the subject of the Petition's second Question Presented. EVA and Respondents have reached a settlement in principle. *See* Minute Entry, ECF No. 1125, *In re Transpacific Air Passenger Antitrust Litig.*, No. 3:07-cv-5634-CRB (N.D. Cal.

("EVA," and with ANA, "Petitioners") and numerous other international airlines violated Section 1 of the Sherman Act by engaging in a long-running conspiracy to fix the prices of certain fuel surcharges, unfiled fares, and discount fares for flights from the United Sates to Asia/Oceania. Respondents consist of passengers who bought tickets for those flights and paid the allegedly price-fixed fares and fuel surcharges. [ER0472, 0474-76, 596-97.][2] In 2010, ANA pled guilty to felony criminal price-fixing and paid a $73 million fine. [ER0345-50, 0358, 0363.] ANA avoided paying passengers civil restitution, citing the potential for "a recovery of treble damages through" the instant civil action. [ER0365.]

During the relevant period, the United States Department of Transportation's ("DOT") regulations required some, but not all, fares and charges to be filed with the DOT for approval. In a motion to dismiss, Petitioners and their eleven co-defendants raised an affirmative defense based on the filed rate doctrine, which bars civil antitrust plaintiffs from recovering treble damages for challenges to agency approved rates. The district court denied the motion in relevant part because "several factual matters were still unresolved, including which rates were actually filed with the DOT, and whether the DOT believed that the airfares and surcharges were covered by the filed rate doctrine." [ER0002.] The court invited Petitioners and their co-defendants to renew the motion at summary judgment on a more developed

---

Feb. 2, 2018) ("The only remaining defendant is All Nippon Airways.").

[2] All citations to ER and SER are to the excerpts of record and supplemental excerpts of record, respectively, for the case *Wortman et al. v. All Nippon Airways, Ltd.*, No. 15-15362 (9th Cir.).

evidentiary record. [ER0796 n.9.] Petitioners' Statement of the Case does not mention their motions to dismiss, the district court's denial thereof, or their and their co-defendants' subsequent failures to adduce evidence to support their purported filed rate defense at the summary judgment stage—leaving these still unresolved factual questions for trial.

After the court denied the motion to dismiss, the parties engaged in more than two years of discovery. Petitioners and their seven[3] remaining co-defendants then moved for summary judgment on the same filed rate doctrine grounds, a motion the district court granted in part and denied in part, finding in relevant part:

- no questions of material fact existed as to whether the DOT approved ANA's filed base fares, entitling those fares to filed rate protection;
- questions of material fact existed as to whether the DOT approved EVA's unfiled base fares, leaving filed rate protection a matter for trial;
- questions of material fact existed as to whether the DOT regulated and approved Petitioners' fuel surcharges, or whether it even possessed the capability of doing so, leaving filed rate protection a matter for trial; and
- questions of material fact existed as to whether the DOT had, or even could, approve ANA's discount fares, which were sold to

[3] Four of Petitioners' eleven co-defendants settled with Respondents before summary judgment was filed. Four more settled after they filed summary judgment motions but before Judge Breyer ruled on the motions. [ER0001-2 & n.2.]

> Respondents at materially different prices and terms than those in the filed tariffs on which ANA sought to rely, leaving filed rate protection a matter for trial.

[ER0015-28.] Accordingly, on the record before it, the district court denied the motions for summary judgment, necessarily leaving these factual questions (on which Respondents did not cross-move) to future proceedings. [ER0029.]

In ruling on these factual questions, the district court grappled with record evidence concerning whether the DOT, consistent with its Congressional authorization, disavowed regulatory authority over the fuel surcharges in question (Plaintiffs adduced substantial evidence it had), whether the DOT even required fuel surcharges to be filed for approval (Plaintiffs adduced substantial evidence it did not), and whether the DOT had expressly or implicitly disapproved of the fuel surcharges in question (Plaintiffs adduced substantial evidence the rates were not approved). [SER00078-102 (Levine Decl. ¶¶ 2-48); SER000070-74 (Avent Decl. ¶ 18:2-4).] The district court also addressed whether the regulatory facts and history supported Respondents' argument the DOT disavowed regulatory authority over EVA's base fares when it stopped accepting their filing for review and approval (Plaintiffs adduced substantial evidence that that was the case). [SER01427-78 (RJN, Ex. 25, 62 Fed. Reg. 10758 (Mar. 10, 1997)).]

Lastly, the district court analyzed the thorny factual issue of whether ANA's discounted fares contained materially different terms and services from the filed tariffs it sought to seek the protection of, thereby forfeiting the protection of the tariffs

(Plaintiffs adduced sufficient evidence that they did). [SER00117-342 (Schwartz Decl. ¶¶ 29-39).] Following the district court's order, Petitioners and their three remaining co-defendants were permitted to take an interlocutory appeal to the Ninth Circuit pursuant to 28 U.S.C. § 1292(b).

The court of appeals affirmed. *Wortman v. All Nippon Airways*, 854 F.3d 606 (9th Cir. 2017). The circuit court held that the record, "as it currently stands" indicated 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." *Id.* at 617. Should Petitioners introduce "additional evidence" following remand "indicat[ing] a greater degree of regulation by the DOT than is currently reflected in the record, however, the district court is free to reassess whether the filed rate doctrine bars any of [Respondents'] claims." *Ibid.* Thereafter, Petitioners filed the instant Petition,[4] the last parties seeking filed rate protection for the damages they caused by participating in an unlawful price-fixing cartel.

B. Factual Background

The court of appeals summarized the history of the DOT's regulation and deregulation of international airline fares and surcharges. *Wortman*, 854 F.3d at 610-14. As the court explained, the airline industry (like other formerly regulated industries)

---

[4] Two more of Petitioners' co-defendants settled with Respondents before the Ninth Circuit issued its opinion affirming the district court, while a third settled shortly after. *See generally* Mot. for Prelim. Approval of Class Action Settlements, ECF No. 1112, *In re Transpacific Passenger Air Antitrust Litig.*, No. 3:07-cv-5634-CRB (N.D. Cal. Jan. 10, 2018).

has undergone sweeping deregulation since the 1970s.

1. Congressional Deregulation Of The Domestic And International Airline Transportation Markets

Congress deregulated the domestic airline industry when it passed the Airline Deregulation Act of 1978 (Pub. L. No. 95-504, 92 Stat. 1705 (1978)) ("ADA"). A year later, Congress enacted the International Air Transportation Competition Act of 1979 (Pub. L. No. 96-192, 94 Stat. 35 (1980)) ("IATCA"), [SER00078-00102 (Levine Decl. ¶¶ 12-14)], legislation designed to "promote competition in international air transportation." *See* IATCA, 94 Stat. 35. To that end, Congress directed the Civil Aeronautics Board ("CAB"), the DOT's predecessor agency, to further that congressional purpose 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 § 102(a)(4), (9) (emphasis added); *see also* 49 U.S.C. § 40101(e). IATCA empowered the DOT to forbear from continued economic regulation through de-tariffing and exempting carriers engaged in international aviation from any economic regulation whatsoever. *See* 49 U.S.C. § 40109(c) (granting DOT authority to deregulate).

2. The DOT's Initial Deregulation Of International Fares In The Wake Of IATCA's Passage

The DOT quickly exercised the deregulation authority Congress gave it, and substantially de-tariffed and discontinued pricing and surcharge

regulation for all but a sliver of the international aviation industry. [SER01261-330 (RJN, Ex. 14, IATA Tariff Conference Proceeding, Order 2006-7-3, 2006 DOT Av. LEXIS 460 (July 5, 2006)).]

In doing so, the DOT explained its goal in deregulating international aviation was to ensure that market forces, in tandem with enforcement of the antitrust laws, would govern pricing—not federal agency rate-regulation:

> [F]ares should be controlled by competition, not by government regulation . . . .
>
> We stated that an important goal of airline deregulation was to "make the airline industry subject to the same competitive and antitrust standards applicable to other industries, as far as practicable."

[*Ibid.*]

The DOT accordingly reduced its role in supervising and regulating pricing in the foreign air transportation market. In 1988, the DOT announced that it would not prosecute airlines for charging rates that were different from their filed rates, the linchpin underlying the filed rate doctrine. [SER01398-01403 (RJN, Ex. 21, DOT Statement of Enforcement Policy on Rebating, 53 Fed. Reg. 41353 (Oct. 21, 1988)); SER00078-102 (Levine Decl. ¶ 24).]

3. The DOT Steps Up Deregulation By Eliminating Most International Fare Tariff Filing Requirements

In the 1990s, the DOT dismantled the previous regulatory regime requiring air carriers to file all

foreign transportation tariffs. [SER01479-527 (RJN, Ex. 25, 64 Fed. Reg. 40654 (Jul. 27, 1999)).] In 1995, the DOT exempted carriers from filing air cargo tariffs. [SER1413-26 (RJN, Ex. 23, 60 Fed. Reg. 61472-01 (Nov. 30, 1995)).] And in 1997, the DOT exercised its authority under 49 U.S.C. § 40109 to exempt foreign carriers from filing fares for most markets. [SER01427-78 (RJN, Ex. 24, 62 Fed. Reg. 10758-01 (Mar. 10, 1997)).]

By 1997, the DOT had decided that in light of "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. [*Ibid.*] Accordingly, in 1999, the DOT de-tariffed most international aviation, finding that review and approval of those fares was "no longer necessary or appropriate." [SER01479-527 (RJN, Ex. 25, 64 Fed. Reg. 40654 (July 27, 1999)).] The Department canceled all then-existing tariffs, decreeing that, except for certain categories and certain countries, new tariffs would not be accepted for filing. [*Ibid.*] And even in the limited circumstances under which fare filings were still required, the DOT did not use the filings to evaluate the "reasonableness" of the fare. [SER0078-102 (Levine Decl. ¶¶ 2(d), 6, 25, 37, 40, 43, 45).] Rather, the DOT retained fare filing requirements in those markets to give the United States a tool to persuade foreign governments to liberalize and enter what are known as double-disapproval agreements with the United States. *Ibid.*

With the changes in 1999, DOT eliminated the previous tariff filing requirements and implemented filing categories A, B, and C for travel between the United States and designated countries, or travel

provided by a designated country's carriers. *See* 14 C.F.R. § 293.10. Carriers from countries listed in Category A (EVA's classification during the relevant period) "are exempted from the duty to file all passenger fares" for approval. *Ibid.* Carriers from countries listed in Category B are "exempted from the duty to file all passenger tariffs except those setting forth one-way economy-class fares," also known as "Y-normal fares" with DOT for itineraries between the United States and Category B countries, as well as tariffs affecting "beyond" home-country travel in some instances. *Ibid.* Finally, foreign carriers whose home countries have been designated as Category C (ANA's classification throughout the relevant period, but not its current classification) had to file all tariffs for travel to and from the United States with DOT for approval. [SER00117-341 (Schwartz Decl. ¶ 25).][5]

The DOT retained a complaint process that allows "any person" to file a complaint challenging "the lawfulness of rates, fares, or charges for . . . foreign air transportation." 14 C.F.R. §§ 302, 502. However, the record disclosed "no evidence that any consumer has ever used the process to challenge the reasonableness of any international airfare," however, or that "DOT has ever rejected as unreasonable any international air fare." [ER0023.]

[5] Category "C" was a classification not intended to regulate prices, but rather as a tool to pressure foreign governments to liberalize their air travel markets. [SER00078-112 (Levine Decl. ¶¶ 37, 40).]

4. The DOT Prohibits Airlines From Advertising Fuel Surcharges as "Government-Approved"

Prior to October of 2004, the DOT did not permit international carriers *even to charge* fuel surcharges separate from the base fare, believing that such charges could be false and deceptive. The DOT's position was that any increase in the price charged to a customer due to fuel should be reflected in the ticket's "base" fare. It was concerned that inclusion of fuel surcharges could lead to false and deceptive advertising without adequate disclosure of the "all-in" price of a fare. [SER00609-610 (RJN, Ex. 5, Letter from Paul L. Gretch, Oct. 14, 2004)].

Starting in October 2004, however, the DOT permitted airlines to charge a separate fuel surcharge. [*Ibid.*] It did not require carriers to file fuel surcharges at any time during the relevant period. [*Ibid.*] In reversing its position, the DOT explained that the previous policy prohibiting separate fuel surcharges "was 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." [*Ibid.*; *see also* SER00078-112 (Levine Decl. ¶ 6 ("In the new [deregulated] regime, any remaining tariff provisions . . . never did . . . function in their historic role as potential vehicles for substantive evaluation of fares and fare levels.")).]

Accordingly, a month later, the DOT issued another notice related to fuel surcharges. [ER0373 (RJN, Ex. 26, 69 Fed. Reg. 65676 (Nov. 15, 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 . . . .

[*Ibid.* (emphases added).]

5. The ATPCO System

The Airline Tariff Publishing Company ("ATPCO") is a privately-held company owned by 16 U.S. and foreign airlines, including several defendants in this case, that serves as a clearinghouse for fares in the air transportation industry. [ER0673-0678 (Bryant Decl. ¶ 4).] ATPCO describes itself as the "standard setter in the airfare ecosystem, ... by enabling the seamless management of airfare data." *See* ATPCO, About Us, http://www.atpco.net/about-us (last visited February 7, 2018).

Through ATPCO databases, airlines also distribute fare information to various entities, including to travel agents. The submission of fare information to travel agents is distinct from the submission of fare information to government regulators. [SER00117-341 (Schwartz Decl. ¶¶ 8, 14).] There are several databases contained within ATPCO, including the Government Filing System

("GFS") and the Carrier Imposed (YQ/YR) Fees ("YQ/YR database"). [*Id.* ¶ 3.]

The term "Government Filing System" is a misnomer. Filing through the GFS does not indicate that a fare has been filed with the DOT. [*Id.* ¶ 14; ER0375-391 (Williams Decl. ¶ 9, Ex. 8; Bryant Dep. at 236-237)).] Instead, GFS has a complex algorithm that determines which filings get presented to which entities and governments. [SER0117-341 (Schwartz Decl. ¶ 16) (explaining how airlines designate a country regulatory body to receive a submission)).] Within the GFS itself, there is both a "public" and "private" fares database. [*Id.* ¶ 10.] ATPCO does not present fares in the private database to the DOT. [ER0375-391 (Williams Decl. ¶ 9, Ex. 8; Bryant Dep. at 236-237).] Fares in the private database are *not* filed with the DOT. [*Ibid.*]

Moreover, even for those fares filed in GFS's *public* database, DOT is only presented with the fares that are required to be filed pursuant to DOT regulations (*i.e.*, pursuant to the country designations, A, B and C, discussed above). [*Ibid.*; *see also* ER0757-0760 (Bryant Decl., Ex. 6) ("ATPCO will present only fares that have not been exempted to the DOT.")] *See also* 14 C.F.R. § 293.10. For present purposes, this means that only ANA's (as a Category C country) fares were presented to the DOT. Because of EVA's status, even if it (gratuitously) filed its fares with ATPCO, those fares, by design, were *never presented* to the DOT for review and approval.

C. Petitioners' Purported Filing Of Fuel Surcharges And Unpublished Fares

After DOT's change in policy permitting international airlines to charge separate fuel surcharges, at its election, ANA began gratuitously

filing fuel surcharges. Often, ANA failed to file the fuel surcharges until *after* they had been imposed and charged to class members—in some cases months after. [ER0239-271 (Schwartz Decl. ¶ 40 (noting that when "ANA increased the fuel surcharge [it] charged from $24 to $48 beginning [on] July [7,] 2005, the increase was not reflected in ANA's [filed tariffs] until August 9, 2005")).] Conversely, EVA *never* filed *any* of its fuel surcharges. [*Id.* ¶ 49.]

ANA also offered what it and industry participants call "unpublished fares," which included *Satogaeri*, *Yobiyose* and special business class fares. [SER00497-00497, SER00503-00508.] The court of appeals referred to these fares as "discount" fares. *Wortman*, 854 F.3d at 609-10. ANA does not seriously contest that these fares, offered through travel agents and other channels, were *not filed* with or presented to the DOT. Instead, ANA seeks protection of these unfiled fares based on its filing of different Y-economy class fares that had different prices and substantive terms from the unfiled discount fares. [ER0028 (finding that filed fares "have materially different terms from the unfiled, discounted, and more restrictive fares" and "are different products").] The court of appeals acknowledged that "[t]he terms governing the fares actually filed by ANA differed substantially from the terms governing the discount fares." *Wortman,* 854 F.3d at 609.

Petitioners' fuel surcharges, EVA's unfiled base fares, and ANA's "discount" fares are the subject of Respondents' claims under Section 1 of the Sherman Act.

REASONS FOR DENYING THE WRIT

This Court should deny review for multiple reasons:

(1) The Questions Presented are fact-bound and concern the factual predicates of Petitioners' claimed filed rate defense, including whether the DOT *actually monitored and approved* the rates in question (the crucial public policy linchpin underlying the filed rate doctrine). This Court does not review factual questions.

(2) The Questions arise in an interlocutory posture—the denial of a motion for partial summary judgment. Review by this Court at this time would involve an incomplete record that is a moving target. In fact, since the Petition was filed, the district court scheduled trial in this case for July 2018. Either the Questions Presented will be mooted by the outcome of the trial, or Petitioners will have the opportunity to seek review again on the basis of a fully developed factual record.

(3) The Petition rests on a tendentious reading of the Ninth Circuit's decision and does not accurately describe what the Ninth Circuit actually held. Further, the Petition describes the Ninth Circuit's decisions in other cases as being inconsistent with the result here. Pet. 31-32. This Court should not grant review when the Petition does not ascribe a clear position to the Ninth Circuit.

(4) The Petition cannot establish a circuit conflict as to the first Question Presented. In fact, every court of appeals decision cited in the Petition agrees that courts may do precisely what the Ninth Circuit did in this case: examine the regulatory facts to determine (a) the extent of regulatory action and

(b) the fact of regulatory approval. Without a regulatory regime that actually approves rates, the policy justifications for filed rate protection vanish. This is why courts, including this Court, look to the fact of agency review and approval before invoking the filed rate doctrine. The only difference between the cases Petitioners cite and the present one is that this case continues to hinge on open questions of fact as to the regulator's review and approval of the air fares and surcharges at issue. Different facts do not create a circuit split. Nor do nuances in reasoning. This Court reviews differing judgments, not rationales, and Petitioners have failed to show that the circuit court's opinion below would have come out differently in any other circuit.[6]

(5) With respect to the second Question Presented, the Petition concedes that there is no conflict with any of this Court's decisions. Pet. 30. Nor is there any circuit conflict involving actual judgments or decisions, but only what the Petition describes as "different standards" or "varying"

---

[6] Far from an innocent actor, *amicus curiae* International Air Transport Association ("IATA") is a trade association operated for the benefit of the Petitioners, and was a mechanism by which Petitioners facilitated their long running price-fixing cartel. Indeed, it was the DOT itself—the agency IATA purports to voice concerns for—that stripped IATA of antitrust immunity for its "tariff conferences" finding that they were *inherently anticompetitive*. [SER01271-1292 (RJN, Ex. 14, IATA Tariff Conference Proceeding, DOT Order 2006-7-3, 2006 DOT Av. LEXIS 460 (Jul. 5, 2006)).] Motives to the side, IATA's brief fails to *even attempt* to identify a split among the circuits or a departure from this Court's precedents in the Ninth Circuit's decision below.

"analytical frameworks" in the lower courts. Pet. 2, 20.

(6) Since the Petition was filed, Respondents have entered into an agreement in principle with one of the two Petitioners, EVA, to settle their claims. EVA is the only Petitioner seeking filed rate protection for unfiled base air fares, the subject of the Petition's second Question Presented, and therefore review of the second Question would be inappropriate.

For these and other reasons explained more fully below, the Petition should be denied so that the district court can resolve the outstanding factual questions.

I. AN INTERLOCUTORY DECISION AFFIRMING THE PARTIAL DENIAL OF SUMMARY JUDGMENT AND REMANDING FOR FURTHER PROCEEDINGS AND FACTUAL DEVELOPMENT DOES NOT WARRANT THIS COURT'S REVIEW

This Court ordinarily does not review interlocutory decisions. *See*, *e.g.*, *Bhd. of Locomotive Firemen and Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (per curiam) ("[B]ecause the Court of Appeals remanded the case, it is not yet ripe for review by this Court.").

That practice has special significance here. The Ninth Circuit repeatedly emphasized the limited, interlocutory nature of its decision. It did so in the first paragraph of its opinion and again in the last. And in between, it made it clear why it focused on the present state of the record at the summary judgment stage: that record contained genuine issues of material fact as to whether the DOT, which Congress had expressly authorized to deregulate international air fares and fuel surcharges as it saw fit, (1) "has

effectively abdicated the exercise of its authority to regulate unfiled fares," *Wortman*, 854 F.3d at 615; (2) "retained the practical ability" to regulate fuel surcharges, *id.* at 616; and (3) "could effectively regulate the actual [discount] fares because they arguably constituted different products from the filed fares," *id.* at 617.[7]

Instead of accepting the remand and returning to the district court to resolve the fact disputes that the court of appeals (and the district court before it) had identified, Petitioners invite this Court to take the case at an interlocutory stage and decide the remaining question presented without the benefit of a fully developed factual record. The Court should decline the invitation. The court of appeals explicitly assured the district court that it was "free" on remand to "reassess whether the filed rate doctrine bars any of [Respondents'] claims," based on any additional evidence Petitioners submit at trial. *Ibid.*

Petitioners will not have to wait long to develop a full factual record. The district court has scheduled trial in this case for July 2018—long before any review by this Court could occur. Either the Questions Presented will be mooted by the outcome of the trial, or Petitioners will have the opportunity to seek this Court's review once again—and this time on the basis of a fully developed factual record.

---

[7] The circuit court also held that questions of fact remained "regarding whether the discount fares constitute the same product as the fares actually filed." *Wortman*, 854 F.3d at 616.

II. THE FIRST QUESTION IS NOT GENUINELY PRESENTED

Petitioners frame the first Question Presented as whether the Ninth Circuit correctly held that the filed rate doctrine "no longer applies to filed rates if a court finds the agency lacks sufficient 'practical ability' to regulate those rates." Pet. at i. That is not what the court of appeals held.

Rather, the Ninth Circuit held that summary judgment is not warranted given the "genuine issues of material fact regarding the DOT's exercise of regulatory authority over fuel surcharges." *Wortman*, 854 F.3d at 615. That evidence included—as described above (*see* Statement of the Case, § B, *supra*)—evidence that fuel surcharges were not required to be filed and a lack of clarity as to whether the DOT actually monitored and approved those of Petitioners' fuel surcharges that were filed. More importantly, however, it included the "DOT's express statement that it lacks the ability to 'effectively monitor' fuel surcharges." *Id.* at 616. The court of appeals noted that the DOT's express acknowledgement of its inability to monitor fuel surcharges, like "willful abdication," constituted "a failure by [an agency] to exercise its statutory authority." *Ibid.* (quotations omitted; brackets in original). And at oral argument in the district court, Petitioners' counsel could identify no review of rates by the DOT. [ER0009 (noting concession at oral argument that there "is no direct evidence that the DOT evaluated rates for reasonableness").] As a result, the court of appeals declined to apply the filed rate doctrine on the present record "[i]n accordance with the DOT's expression of its inability to regulate fuel surcharges." *Wortman*, 854 F.3d at 616.

The Petition attempts to spin the court of appeals' holding into a free-form judicial inquiry into whether an "agency has, *in the court's view*, not been effectively regulating." Pet. at 2 (emphasis added). But the record is clear that the court did not engage in its own assessment of the *effectiveness* of DOT's regulation; rather, it simply took the DOT at its word. And, it relied on the district court's related conclusion that there were factual disputes surrounding the DOT's exercise of its regulatory authority pertaining to fuel surcharges.

The Petition quibbles with the Ninth Circuit's factual findings and accuses the court of appeals of incorrectly identifying "possible triable issues over whether DOT 'effectively abdicated' its regulatory authority." Pet. 33. But a petition "is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law." S. Ct. Rule 33.

The Petition further undercuts itself by arguing that, in other cases, 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." Pet. 31-32.

That argument misconstrues Ninth Circuit decisions. The Ninth Circuit has always held that a court can consider whether the regulatory facts establish that a regulator is, in fact, regulating and approving rates. The Petition admits that *E. & J. Gallo Winery v. EnCana Corp.*, 503 F.3d 1027 (9th Cir. 2007), involved a situation where an agency was "exercise[ing]" its authority to regulate by regulating with a "light hand." Pet. 32. In *Wah Chang v. Duke Energy Trading & Mktg., LLC*, 507 F.3d 1222 (9th Cir. 2007), the court evaluated whether "lax

oversight" was sufficient by itself to entitle the appellant to seek rate relief directly from the courts, and concluded that it was not. *Id.* at 1227. Likewise, in *Pub. Util. Dist. No. 1 of Grays Harbor Cty. Wash. v. IDACORP Inc.*, 379 F.3d 641 (9th Cir. 2004), the court found FERC's actions, and particularly FERC's stated view that its rates were approved and protected by the filed rate doctrine, precluded the appellant's claims. *Id.* at 650-52. And, in *Pub. Util. Dist. No. 1 of Snohomish Cty. v. Dynegy Power Mktg., Inc.*, 384 F.3d 756 (9th Cir. 2004), the court also examined the facts to conclude that FERC's regulatory efforts constituted the actual approval of the challenged rates. *Id.* at 760-62.

And in a case that mirrors the regulatory facts here, the Ninth Circuit concluded that where an agency exercised its Congressional authority to forebear from reviewing and approving rates, the filed rate doctrine plainly does not apply. *Ting v. AT&T*, 319 F.3d 1126, 1132 (9th Cir. 2003) (filed rate protection unavailable where agency is "armed with the requisite congressional authorization" to make their own determinations about whether "removing filing requirement[s] will promote competition and prevent collusive pricing," and agency exercises that authority to deregulate rates).

But fundamentally, Petitioners' suggestion that the Ninth Circuit is divided, while incorrect, would only demonstrate that this Court's review is unwarranted. This Court does not grant review to settle intra-circuit disagreements, and it should not grant review when the Petition does not ascribe a clear position to the Ninth Circuit.

Because the first Question Presented fails to properly frame the court of appeals' ruling and

rationale, it provides no basis for granting the Petition.

III. NEITHER A CIRCUIT SPLIT NOR A CONFLICT WITH THE COURT'S PRECEDENT EXISTS AS TO THE FIRST QUESTION PRESENTED

A. There Is No Circuit Split Regarding the First Question Presented.

The cases cited in support of the first Question Presented, Pet. at 21-23, do not reveal a circuit split. In fact, the cases all involved agencies that—unlike the DOT here—required the filing of tariffs, and approved and regulated them. None of those cases involved the genuine fact issues present here, namely: (1) whether there was an actual fuel surcharge filing requirement; (2) whether Petitioners' properly filed their fuel surcharges for approval; and (3) whether the regulator actually monitored and approved the fuel surcharges. *See* Statement of the Case, § B, *supra*.

Indeed, none of those cases cited by Petitioners involved motions for summary judgment; rather, they all were decided on pleadings in the context of *uncontested* factual averments. Nor did any involve the airline industry or the DOT. To be sure, both the district court and Ninth Circuit framed the dispute as a matter of first impression, belying ANA's claim of a legitimate circuit split. [ER0003 ("The motions present an issue of first impression.").] *See also Wortman*, 854 F.3d at 608 ("We have not previously addressed the application of the filed rate doctrine to airline fares and fees.").

For example, in *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1351 (2d Cir. 1985), each defendant:

> was a party to the collective ratemaking agreement approved by the ICC for the [Niagara Frontier Tariff Bureau] NFTB, which authorized the members of the NFTB to set rates collectively for motor carrier freight traffic between the United States and Canada through authorized committees if the motor carriers adhered to the procedures set forth in the agreement and in ICC regulations.

Id. at 1349-50. *Square D* was decided on a motion to dismiss devoid of disputed factual issues. *Id.* at 1349. It was also uncontested in *Square D* that the rates in question were in fact regulated, were in fact required to be filed, were in fact filed, and were in fact monitored and approved by the regulatory body in question. *Ibid.* For these reasons, when *Square D* reached this Court, it distinguished the alleged facts from those in *Carnation*—a case this Court held did not warrant application of the filed rate doctrine because in *Carnation* the "ratemaking agreements challenged [] had not been approved" by the regulator in question. *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 422 n.29 (1986); *id.* at 421 ("exemptions from the antitrust laws are strictly construed and strongly disfavored"). Here, whether there was in fact regulatory monitoring and approval of Petitioners' fuel surcharges is foremost among the yet-unresolved factual questions.

Both *Wegoland* and *Sun City* likewise were decided at the pleading stage, and arose in the context

of rates that were required to be filed, were filed, and were monitored and approved. *See Wegoland Ltd. v. NYNEX Corp.*, 806 F. Supp. 1112, 1115 (S.D.N.Y. 1992), *aff'd,* 27 F.3d 17 (2d Cir. 1994) (telephone rates that had to be filed and approved by state and federal agencies); *Sun City Taxpayers' Ass'n v. Citizens Utils. Co.*, 45 F.3d 58, 62 (2d Cir. 1995) (utility rates that had to be filed and approved).

Again in contrast to the procedural posture of this case, *Goldwasser v. Ameritech Corp.*, 222 F.3d 390 (7th Cir. 2000) and *Town of Norwood, Mass. v. New England Power Co.*, 202 F.3d 408 (1st Cir. 2000), involved pleading motions and the uncontested active regulation of filed and approved rates.

In fact, *Square D*, *Goldwasser* and *Town of Norwood* each undercuts Petitioners' position and supports Respondents'. Each recognizes (as the Ninth Circuit did) that courts can do precisely what Petitioners says they cannot: wade into the regulatory facts and history of an industry to determine the existence of rate regulation and approval to assess application of the filed rate doctrine, without the need to give blanket treble damage exemptions to firms that—unbeknownst to passive regulators—are engaging in secretive cartel behavior.

In *Goldwasser*, the plaintiffs, Ameritech local telephone customers, alleged that they had suffered antitrust injury as a result of Ameritech's monopolistic and exclusionary practices and sought treble damages under the Telecommunications Act of 1996. Pub. L. 104-104, 110 Stat. 56 (1996); 47 U.S.C. § 151 *et seq.* Ameritech successfully moved to dismiss the complaint as barred by the filed rate doctrine because plaintiffs' monopoly claim "necessarily implicate[d] the rates Ameritech [was] charging."

Goldwasser, 222 F.3d at 402. While the Seventh Circuit affirmed, it did so in light of the uncontested obligation—not present on the record here—the Act imposed upon Ameritech to have its rates filed with and approved by the state public utility commission. These were clear regulatory requirements with which Ameritech (and the regulator) complied. *Ibid.*

The court rejected the plaintiffs' argument that the doctrine should not protect Ameritech because the commissions "rarely exercise their muscle and thus give no meaningful review to the rate structure." *Ibid.* The court stated that "the process established in [the Act] for review of negotiated agreements, both for substance and for implementation, provides an extra safeguard against *indolent agencies*. Furthermore, the record thus far is one of *active use* of these review procedures; there would be no basis at all to find that they are illusory." *Ibid.* (emphases added). The Seventh Circuit's ruling was expressly premised on its examination of the alleged factual character of the regulatory regime.

In *Town of Norwood*, the town brought an antitrust action against the defendant power supplier seeking damages for a "price squeeze" based on a charge and rate imposed on Norwood under two tariffs FERC required the supplier to file. 202 F.3d at 414, 418-19. The First Circuit held that the filed rate doctrine defeated the claim:

> [I]f New England Power's rates were truly left to the market, *with no filing requirement or FERC supervision at all*, the filed rate doctrine would by its terms no longer operate. But unlike some other regulatory agencies, FERC is still responsible for ensuring 'just and

> reasonable' rates and, to that end, *wholesale power rates continue to be filed and subject to agency review*. . . . [T]he relevant rates and termination charge were individually filed with FERC and *are subject to ongoing FERC regulation*.

Id. at 419 (emphases added). Again, the First Circuit's holding was clearly pinned on a searching examination of the regulatory regime in question.

Likewise, here, the district court and Ninth Circuit appropriately examined the regulatory facts and history, including explicit statements from the DOT following its Congressional authorization to deregulate international air fares and surcharges including its statement that it could not "effectively monitor" fuel surcharges and airlines could not advertise them as "government approved." The decision below stands in contrast to the cases cited in the Petition only in the sense that in the prior cases no contested factual issues needed to be resolved in order to determine the filed rate doctrine's applicability. Here there are fact issues as to whether the DOT required fuel surcharges to be filed, whether they were properly filed, and whether the DOT in fact approved any of them—particularly given its written statements to the industry that it will not monitor fuel surcharges because it has no ability to "effectively" do so.

None of the cases cited in the Petition involves the precise situation here, and accordingly none can establish a circuit split. The Petition collects isolated snippets of opinions whose "analytical frameworks" supposedly differ to "varying and irreconcilable degrees" to create the illusion of a split. Pet. at 20.

But Petitioners do not show a conflict among the resulting *judgments* as opposed to reasoning, or that the outcome of this case would be different in any other circuit on the existing record.

B. There Is No Conflict With Decisions By This Court.

Petitioners similarly cannot point to a conflict with this Court's precedent. *Square D* dealt with an active regulatory scheme. It did not involve, as here, a Congressional directive to an agency to deregulate rates and genuine questions of fact as to whether the regulator acted upon that authority by declining to monitor and approve rates. *Square D*, 476 U.S. 409. The present case is far closer to *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966). The Court in *Carnation* had no difficulty concluding that "rate-making agreements which have not been approved by the Federal Maritime Commission are subject to the antitrust laws." 383 U.S. at 216. As the Court noted in *Square D*, the "specific *Keogh* holding . . .was not even implicated in *Carnation* . . . because the ratemaking agreements challenged in that case had not been approved by, or filed with [the Commission]." 476 U.S. at 422 n.29 (citing *Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156 (1922)).

C. Judge Wallace's Partial Dissent Does Not Help Petitioners.

The Petition claims support from Judge Wallace's partial dissent. Pet. 18, 24. But the Petition's reliance on Judge Wallace's opinion is unavailing.

First, as Respondents showed above, Judge Wallace acknowledged that "[t]he facts and the Supreme Court's holding in *Square D* are not the

same as in our case." *Wortman*, 854 F.3d at 618. Judge Wallace thus recognized that the cases involved different factual situations and were distinguishable.

Second, Judge Wallace acknowledged that the DOT "did not require fuel surcharges to be filed," and that there were fact disputes over "whether Defendants actually filed them in a consistent manner." *Ibid.* Judge Wallace then weighed the record evidence as to whether the DOT lacked the ability to "effectively monitor" fuel surcharges, and simply disagreed with the majority's view that genuine issues of material fact existed. *Id.* at 618-19. Judge Wallace's analysis of the summary judgment record, which does not appear to draw any inferences in Respondents' (the non-moving parties) favor, further illustrates the fact-intensive nature of this interlocutory decision. This Court's intervention is not needed to instruct the lower courts on how to evaluate evidence in the summary judgment context (or any other).

Finally, Judge Wallace's primary legal support for his dissent was an "assertion in a footnote" in *Square D* regarding the applicability of the filed rate doctrine to "tariffs [that] have been filed." *Id.* at 618. But there, the Court simply rejected plaintiffs' argument that "their treble-damages action should not have been dismissed because there was no ICC hearing in this case and because *Keogh* did not involve allegations of the type of covert legal violations at issue here." *Square D*, 476 U.S. at 417 n.19 (quoting *Square D*, 760 F.2d at 1351). It was in that inapposite context that the Court quoted the Second Circuit's language.

None of this suggests a conflict between this Court and the circuit below.

IV. THIS COURT SHOULD NOT GRANT REVIEW OF THE SECOND QUESTION.

A. Respondents Have Reached A Settlement In Principle With the Only Petitioner Able to Present the Second Question.

Only Petitioner EVA can present the second Question, and it has reached a settlement in principle with Respondents. ANA cannot seek filed rate protection from unfiled base fares because unlike EVA, ANA was at all relevant times required to file its fares with the DOT and the Respondents did not appeal the district court's ruling affording ANA filed rate protection for those filed base fares. This is a contention separate and apart from ANA's argument that it should be afforded file rate protection for its unfiled, unpublished discount fares based on the filing of its normal Y Class Economy Fares, which ANA equates with the first Question Presented concerning fuel surcharges, not the second Question.[8]

Given the settlement in principle between Respondents and EVA, considerations of mootness should prevent this Court from reviewing the second Question. *E.g.*, *Ticor Title Ins. Co. v. Brown*, 511 U.S. 117, 122 (1995) (dismissing cert. as improvidently granted where "[o]n the day we granted certiorari we were informed that the parties had reached a settlement"); *DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 352 (2006) ("our standing cases confirm that

[8] *See* Pet. at 37 ("the panel's decision below with respect to discounted fares presents similar problems as its decision regarding filed fuel surcharges").

a plaintiff must demonstrate standing for each claim he seeks to press").

B. There Is No Conflict With This Court's Decisions.

Even apart from the settlement in principle, there is no reason to grant the second Question. The Petition acknowledges that there is no conflict with the Court's prior decisions. Pet. at 30 ("[T]his Court has never addressed the doctrine's application where an agency retains regulatory authority over rates but chooses to eliminate a *literal* filing requirement") (emphasis in original). Notably, Judge Wallace did not dissent with respect to the second Question. His dissent was limited to the issue of fuel surcharges. The Court of Appeals' decision with respect to the second Question was unanimous.

C. There Is No Circuit Split on the Second Question.

The Petition cannot establish a circuit conflict on the question of how the filed rate doctrine should be applied when agencies do not require that individual rates be filed and approved. Pet. at 2.

The slight variations among the circuits on reasoning and phraseology are distinctions without a difference. The Fifth Circuit, for example, holds that the filed rate doctrine applies 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). In the present case, the Ninth Circuit opined that the filed rate doctrine would apply where "the agency engaged in sufficient regulation . . . to satisfy the purposes of the doctrine." *Wortman*, 854 F.3d at 614. "[S]ufficient oversight" and "sufficient regulation" are synonymous terms.

The Petition finds conflict with the Eleventh Circuit's decision in *Florida Municipal Power Agency v. Power & Light Co.* only by mischaracterizing it. The Eleventh Circuit did not "categorically refus[e] to apply the file-rate doctrine to bar any challenges to any rates that are not literally filed with an agency." Pet. at 36. Rather, the court held that "there is a genuine issue as to whether the filed rate covers the network service that plaintiff sought to buy" because those services differed from the terms of the filed rate. 64 F.3d 614, 615 (11th Cir. 1995). But even if Petitioners were correct, because the second Question Presented contemplates the court of appeals rejection of filed rate protection for fares and surcharges lacking a filing requirement, adopting the Eleventh Circuit's holding would not result in inconsistent judgments because the Eleventh Circuit would *rule the exact same way*.

The Petition says merely that the courts have "articulated different standards" for examining the second Question, Pet. 2, or "varying" "analytical frameworks." *Id.* at 20. But different phraseology does not establish a circuit conflict. This Court reviews judgments, not reasoning, and the Petition cannot establish a conflict by contrasting snippets from different cases. The Petition does not contend that any of these courts would have reached a contrary conclusion in this action or that the result in this action is inconsistent with any precedent from this Court. Until such occasion, there is no true circuit-split and no reason for this Court to take up an issue in which the circuits concur *in judgments*.

Moreover, no percolation *at all*, let alone sufficient percolation, has occurred in the lower courts on the second Question Presented. Even the Petition concedes that existing decisions outside the

Ninth Circuit provide "no guidance," Pet. at 35, "no workable explanation," *id.*, and "no clear rule." *Id.* at 35 n.6 (citing *Town of Norwood*, 202 F.3d at 419 (in the First Circuit); *Simon v. Keyspan Corp.*, 694 F.3d 196, 206 (2d Cir. 2012); *Ultimax.com, Inc. v. PPL Energy Plus, LLC*, 378 F.3d 303, 306 (3d Cir. 2004); and *Fla. Mun. Power Agency*, 64 F.3d at 616 (in the Eleventh)). Given what the Petition describes as "the uncertainty surrounding this doctrine," Pet. 35, this Court should permit further development of the caselaw in the lower courts. *E.g.*, *McCray v. New York*, 461 U.S. 961, 963 (1983) (Stevens, J., respecting denial of petitions for writs of certiorari) (citing need for "the issue [to] receive[] further study [in the lower courts] before it is addressed by this Court."); *Heartland Plymouth Court MI, LLC v. Nat'l Labor Relations Bd.*, 838 F.3d 16, 21 (D.C. Cir. 2016) (noting "an issue's 'percolation' among the circuits" is a factor "that can improve the likelihood of *certiorari* being granted").

V. THE COURT OF APPEALS' DECISION WAS CORRECT

Review should be denied for the further reason that the decision below was consistent with the purposes of the filed rate doctrine and fully supported by the extensive factual record.

The filed rate doctrine has its roots in *Keogh*, 260 U.S. 156, decided nearly a century ago and reaffirmed in *Square D*, 476 U.S. 409 and *Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 135 (1990). In *Keogh*, the railroads had directly filed their challenged rates with the Interstate Commerce Commission ("ICC") pursuant to a mandatory filing regime, and the ICC subsequently approved them.

This case involves the application of the filed rate doctrine in an increasingly market-based, deregulated environment where regulators refrained from reviewing and approving filed rates, instead leaving determinations of their reasonableness to competitive forces and the federal antitrust laws. As noted above, Congress has expressly authorized DOT to forebear from continued economic regulation through de-tariffing and exempting carriers engaged in international aviation from any economic regulation whatsoever. *See* 49 U.S.C. § 40109(c). In adopting its deregulatory policies, DOT has followed that Congressional mandate.

Petitioners seek to turn the filed rate doctrine on its head—to extend a judicially created immunity to defeat the deregulatory and market-based policies adopted by Congress and DOT. Petitioners seek to protect companies engaged in naked price-fixing and to thwart the policies enacted by Congress.

In the present case, the court of appeals (and the district court) examined the record to decide whether, taken together, the evidence demonstrated that the agency in fact was regulating and approving fuel surcharges and base fares. In evaluating that evidence, the court did not regulate or otherwise interfere with rates approved by the DOT. It only did what courts routinely do in assessing any agency regulatory action or inaction: not to step into the agency's shoes and approve (or disapprove) of rates, but only to decide as a factual matter whether the agency itself had done so. As to the rates in question, the courts below simply concluded that questions of fact existed as to whether the DOT had actually monitored and approved the rates at issue, based on DOT's own statements.

A. Fuel Surcharges

Petitioners understandably—but unsuccessfully—try to deflect the force of the DOT's statement that it could not "effectively monitor" fuel charges filed separately from base fares, by stressing that the statement also warned Petitioners that they would be sanctioned if they advertised those fares as "government-approved." As the district court correctly observed, [ER0025], the reason "the DOT did not want the fuel surcharges so advertised" was that the DOT "does not actually regulate the level of carriers' fuel surcharges and does not substantively 'approve' such charges." [*Ibid.*] If the DOT could not monitor the rates, it could not regulate and approve them. And if they were not regulated and approved, Petitioners cannot seek filed rate protection.

For reasons known only to itself, ANA (but not EVA) voluntarily and gratuitously filed fuel surcharges with the DOT, but that does not compel a contrary conclusion. As the panel majority pointed out, to hold 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." *Wortman*, 854 F.3d at 616 n.5 (emphasis added). To stretch the doctrine to cover such a [factual] scenario would "completely untether[] it from both its underlying justification and the reasoning of our prior decisions." *Ibid.* That is particularly true where, as in the case of fuel surcharges, the agency did not require them to be filed, reviewed, or approved.

B. Unfiled Fares

The Ninth Circuit also properly concluded that EVA's unfiled fares were not subject to filed rate protection. *Wortman*, 854 F.3d at 614. The court concluded that "the evidence shows that the DOT's actual actions regarding unfiled fares have been minimal at best." *Id.* at 615 (emphasis in original). Indeed, it was questionable whether "the DOT has the ability to actually access or review those fares," and if not, how could it properly be said that the DOT approved of what they could not see? *Ibid.* "In short, there [we]re genuine issues of fact" precluding summary judgment for EVA as to its unfiled base fares. *Ibid.*

C. Discount Fares

The Ninth Circuit likewise did not err when it concluded that the discount fares on the present record could constitute a different product from the actual fares. *Wortman*, 854 F.3d at 616-17. In ANA's case, "both the rate *and* the terms deviate[d]" from those in the filed tariffs, *id.* at 616 (emphasis in original), and the DOT had only approved the actually filed tariffs—not the discount fares. Accordingly, it could not be said with confidence on the record before the Ninth Circuit that both the filed fares and the discount fares required "similarly situated customers" to pay "different rates for the *same services*." *Ibid.* (citing *AT&T v. Central Office Tel., Inc.*, 524 U.S. 214, 223 (1998)) (emphasis in original). Given that question of fact as to whether the DOT intended to regulate and approve a rate that deviated materially from the terms of the tariffs ANA filed with the DOT, the Ninth Circuit correctly affirmed the district court's denial of summary judgment to ANA on the discount fares issue. *Id.* at 617.

Neither the Court's *Central Office* decision, Pet. at 37-38, nor the several court of appeals decisions[9] on which ANA relies dealt with fares that had different prices *and* terms. In *Central Office*, all these subjects were "specifically addressed by the filed tariff." 524 U.S. at 224-35. ANA's discount fares, on the other hand, contained terms that differed from those in the filed tariff and were not included or addressed by the filed tariff. The different terms included myriad substantial restrictions on the type of travel that had a direct effect on demand and accordingly on the level of prices; indeed, the Ninth Circuit specifically cited *Central Office* but correctly found it inapplicable to a situation in which "both the rate *and* the terms deviate from those on file with the regulating agency." *Wortman*, 854 F.3d at 616 (emphasis in original).

[9] Pet. at 38 (citing *Medco Energi US, L.L.C. v. Sea Robin Pipeline Co.*, 729 F.3d 394, 398-400 (5th Cir. 2013); *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 680-81 (8th Cir. 2009); *AT&T Corp. v. JMC Telecom, LLC*, 470 F.3d 525, 531-32 (3d Cir. 2006)).

CONCLUSION

The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

ADAM J. ZAPALA
COTCHETT, PITRE & MCCARTHY, LLP
840 Malcolm Road, Suite 200
Burlingame, CA 94010
Telephone: 650-697-6000
Facsimile: 650-697-0577
azapala@cpmlegal.com

CHRISTOPHER L. LEBSOCK
HAUSFELD LLP
44 Montgomery Street, Suite 3400
San Francisco, CA 94104
Telephone: 415-633-1908
Facsimile: 415-348-4980
clebsock@hausfeld.com

February 9, 2018