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

REPLY BRIEF

GARY J. MALONE
Counsel of Record
ANKUR KAPOOR
CONSTANTINE CANNON LLP
335 Madison Avenue
New York, NY 10017
(212) 350-2700
gmalone@constantinecannon.com

Counsel for Petitioner All Nippon Airways Co., Ltd.

DOUGLAS ROSENTHAL
CONSTANTINE CANNON LLP
1001 Pennsylvania Avenue
Washington, D.C. 20004
(202) 204-3500

Counsel for Petitioner All Nippon Airways Co., Ltd.

February 22, 2018

CORPORATE DISCLOSURE STATEMENT

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

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Regulations

REPLY

Respondents' Opposition confirms that if this Court allows the decision below to stand, the bright-line rule of the filed-rate doctrine will vanish. Courts will be authorized to disregard statutorily-mandated tariffs and will be required to embark on an odyssey of rate regulation for which they are ill-equipped.

The doctrine's bright-line rule triggers the filed-rate doctrine whenever a carrier files a tariff with an agency pursuant to a statutory regulatory regime. The filing of a tariff makes it the "legal rate"—the sole source of rights for customers and carriers alike. Private actions by customers seeking damages that conflict with any terms of a tariff are barred because customers have no right to pay any amount other than the legal rate.

The Ninth Circuit's decision, however, rejects that bright-line rule. The decision contravenes this Court's and other circuits' precedents by authorizing Respondents to use the courts to nullify statutory tariffs so that Respondents can seek damages that conflict with those tariffs. Respondents and the Ninth Circuit would also have courts engage in wide-ranging inquisitions of agency policies, practices, and methods in order to determine whether to apply the filed-rate doctrine. The filed-rate doctrine, however, holds that courts are ill-suited to second-guess agencies' regulation of filed rates—and should not do so.

Respondents' remarkable position is that regulation of filed rates by the U.S. Department of Transportation ("DOT") should literally be put on trial—which would dismantle the filed-rate doctrine by embroiling courts in the very inquiry which the filed-rate doctrine forbids.

The Ninth Circuit's mandate of a standardless judicial inquiry into DOT's justification for its regulatory approach is particularly problematic because it would force courts to second-guess DOT's regulation under the United States' agreements with other nations, and position courts "to usurp, impermissibly, … DOT's exclusive authority to act on behalf of the United States in the regulation of international fares." International Air Transport Association's Amicus Curiae Brief in support of Petitioners at 4.

Ironically, the morass that would be created by the decision below highlights the wisdom of the bright-line rule's mandate that the filed-rate doctrine be applied whenever rates are filed.

This case is an ideal vehicle for the Court's review because it squarely presents a pure question of law: whether the filed-rate doctrine applies to tariffs filed pursuant to a statutory regulatory regime.

All of Respondents' claims against Petitioner All Nippon Airways Co., Ltd. ("ANA") seek damages for flights covered by tariffs filed with DOT under the federal regulatory scheme. Respondents have

conceded that the statute and DOT regulations required ANA to file tariffs for all of its flights, that ANA filed those tariffs, and that DOT approved those tariffs. Opp. 9, 12, 3. But all of Respondents' claims against ANA assert they should have paid less than the legal rates—claims inconsistent with the terms of those tariffs. Now that Petitioner EVA—which had unfiled rates—has settled, this Court's reaffirmance of the bright-line rule will dispose of this entire case.

This Court should grant certiorari and reverse the Ninth Circuit's failure to apply the filed-rate doctrine.

I. RESPONDENTS MISCHARACTERIZE THE PURE LEGAL ISSUE RAISED BY THE NINTH CIRCUIT'S REJECTION OF THE FILED-RATE DOCTINE'S BRIGHT-LINE RULE.

The Petition presents a pure—and dispositive—legal issue: Does the filed-rate doctrine continue to apply whenever rates are filed with an agency pursuant to a regulatory scheme? If the answer is "yes," all of Respondents' remaining claims in this case should be dismissed. Respondents seek to obscure that reality.

Respondents misstate the holding of the decision below by disputing Petitioners' statement that the Ninth Circuit "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.'" Opp. 18 (quoting Pet. i). That

is precisely what the Ninth Circuit held.

The Ninth Circuit held that although DOT "required surcharges to be filed," it was declining to "adopt" the "rule" that "merely filing a rate triggers application of the [filed-rate] doctrine in every circumstance …." *Wortman v. All Nippon Airways*, 854 F.3d 606, 616 & n.5 (9th Cir. 2017). Instead, the court held that application of the filed-rate doctrine depends on "whether the DOT retained the practical ability to" regulate. *Id.* at 616.

Faced with the Ninth Circuit's repudiation of the filed-rate doctrine, Respondents seek to rewrite history by claiming that the bright-line rule of the filed-rate doctrine never even existed. Respondents inaccurately claim that courts have agreed that the applicability of the filed-rate doctrine depends on "whether a regulator has in fact regulated, and approved, the rates in question." Opp. 1. According to Respondents, if a regulator has not effectively regulated and approved rates stated in a duly filed tariff, plaintiffs can seek antitrust damages inconsistent with the terms of the tariff.

This Court and circuit courts have uniformly held the opposite. Private claims seeking damages inconsistent with tariffs are prohibited. In *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 476 U.S. 409, 416–17 (1986), this Court expressly reaffirmed this fundamental principle of the filed-rate doctrine, as stated by the Court in *Keogh v. Chicago & Northwest Railway Co.*, 260 U.S. 156, 163 (1922):

> The legal rights of shipper as against carrier in respect to a rate are measured by the published tariff. Unless and until suspended or set aside, this rate is made, *for all purposes, the legal rate*, as between carrier and shipper. The *rights as defined by the tariff cannot be varied or enlarged by either contract or tort of the carrier*.

476 U.S. at 416–17 (emphases added) (internal quotation marks and citation omitted).

Following that principle, this Court endorsed the Second Circuit's view that the filed-rate doctrine applies "whenever tariffs have been filed." 476 U.S. at 417 n.19. *See also AT&T, Co. v. Central Office Tel., Inc.*, 524 U.S. 214, 227 (1998) (filed-rate doctrine bars all claims based on terms that "directly conflict with the tariff").

Respondents inaccurately claim *Square D* is inapposite because "*Square D* dealt with an active regulatory scheme," in which rates "were in fact monitored and approved by the regulatory body in question." Opp. 26, 22. As the Second Circuit explained in *Square D*, "[o]nly a very small percentage of tariffs filed with the ICC are investigated because the sheer volume of filings makes investigation of the vast majority impossible." *Square D Co. v. Niagara Frontier Tariff Bureau, Inc.*, 760 F.2d 1347, 1354 n.3 (2d Cir. 1985), *aff'd*, 476 U.S. 409 (1986). "Consequently, the investigation and approval or disapproval by the ICC of a small

fraction of the tariffs filed would not seem to signify regulatory approval by the Commission of uninvestigated tariffs like those challenged here." *Id.* Given the lack of investigation or approval of rates, the Second Circuit described the issue as whether the filed-rate doctrine applied to "rates filed with but not investigated and approved" by the regulatory agency. *Id.* at 1349. The Second Circuit and this Court answered that question "yes."

Respondents incorrectly argue that *Square D* "did not involve, as here, a Congressional directive to an agency to deregulate rates …." Opp. 26. *Square D* rejected that very argument. "[P]etitioners and the Solicitor General argue[d] that private treble-damages actions would further the congressional policy of promoting competition in the transportation industry reflected in the Motor Carrier Act of 1980." 476 U.S. at 419. This Court held that such deregulation could not affect application of the filed-rate doctrine to rates required to be filed, given that "Petitioners have pointed to no specific statutory provision or legislative history indicating a specific congressional intention to overturn the longstanding [filed rate doctrine]; harmony with the general legislative purpose is inadequate for that formidable task." 476 U.S. at 420. *See also Maislin Indus., U.S., Inc. v. Primary Steel, Inc.*, 497 U.S. 116, 134-35 (1990) ("congressional exhortations to 'increase competition' cannot provide the ICC authority to alter the well-established statutory filed rate requirements").

Similarly, Respondents incorrectly argue that *Goldwasser v. Ameritech Corp.*, 222 F.3d 390, 402 (7th Cir. 2000), "was expressly premised on … examination" of the regulatory agency's active review procedures. Opp. 24. Actually, the Seventh Circuit simply noted the fact of those procedures as an "additional comment" after holding that the filed-rate doctrine applied even in the absence of "meaningful review." 222 F.3d at 402.

Respondents inaccurately argue that the holding in *Town of Norwood v. New England Power Co.*, 202 F.3d 408, 419 (1st Cir. 2000), "was clearly pinned on a searching examination of the regulatory regime in question." Opp. 25. The First Circuit held that whether or not data necessary for review of rates were submitted was irrelevant to application of the filed-rate doctrine because "[i]t is the filing of the tariffs, and not any affirmative approval or scrutiny by the agency, that triggers the filed rate doctrine." 202 F.3d at 419.

Respondents also argue that the authorities cited by Petitioners in support of the First Question Presented—regarding automatic application of the filed-rate doctrine to filed rates—contradict Petitioners' position. Opp. 18-21. The argument is disingenuous because the sections of the Petition (pages 31-33), and authorities cited by Respondents, actually pertain to the Second Question Presented (discussed at pages 30-37 of the Petition) regarding the filed-rate doctrine's applicability to regulatory schemes that do not require each rate to be literally filed with the agency.

Thus, Respondents erroneously argue (Opp. 20) that this case—which now involves only flights covered by tariffs—"mirrors the regulatory facts" presented in *Ting v. AT&T*, 319 F.3d 1126, 1139 (9th Cir. 2003), a case in which the "environment [was] completely detariffed …."

Respondents also erroneously claim that this case—which concerns tariffs—is similar to *Carnation Co. v. Pacific Westbound Conference*, 383 U.S. 213 (1966), a case in which this Court noted the filed-rate doctrine "was not even implicated … because the ratemaking agreements challenged in that case had not been approved by, or filed with, the" regulatory agency. *Square D*, 476 U.S. at 422 n.29.

With respect to discount tickets, Respondents argue that the Ninth Circuit correctly held that the filed-rate doctrine would not bar claims inconsistent with the terms of ANA's tariffs if they can show that discounted terms "deviated materially from the terms of the tariffs ANA filed with the DOT," and that DOT did not "regulate and approve" those discounts. Opp. 34. That holding conflicts with *Central Office*, 524 U.S. at 227, in which this Court reversed a similar holding by the Ninth Circuit that failed to apply the filed-rate doctrine to "side deals" that contained significantly different terms from the filed "rates that the agency has approved or been made aware of …." *Central Office Tel. v AT&T, Co.*, 108 F.3d 981, 989-90 (9th Cir 1997).

Respondents' assertion that none of the circuit court decisions following *Central Office* "dealt with

fares that had different prices *and* terms" is also wrong. Opp. 35. In *Firstcom, Inc. v. Qwest Corp.*, 555 F.3d 669, 679-81 (8th Cir. 2009), the court held the filed-rate doctrine barred claims based on the carrier's offering of services to customers that included substantially different prices *and* terms from those contained in the filed rates, including "substantial secret discounts ..., support services ..., and the availability of voicemail services …." *See also Medco Energi US, L.L.C. v. Sea Robin Pipeline Co.*, L.L.C., 729 F.3d 394, 398-400 (5th Cir. 2013) (barring claims based on services and rebates that conflicted with services and prices stated in the tariff).

II. RESPONDENTS ATTEMPT TO MANUFACTURE FACTUAL ISSUES.

Respondents argue that the Ninth Circuit found there were issues of material fact as to whether DOT "retained the practical ability to regulate fuel surcharges" and "could effectively regulate the actual [discount] fares because they arguably constituted different products from the filed fares." Opp. 16-17.

But as shown above, under this Court's and other circuits' precedents those questions are irrelevant whenever rates have been filed.

Respondents attempt to manufacture factual issues regarding ANA's filing of fuel surcharges by conflating ANA—which DOT required to file

comprehensive tariffs—with EVA—which DOT exempted from some, but not all, filing requirements.

The Ninth Circuit correctly held that DOT "required surcharges to be filed." *Wortman*, 854 F.3d at 616. Undisputed evidence showed two sources of this requirement. First, certain international airlines—including Japanese airlines, such as ANA—remained statutorily required to file tariffs that stated *all charges* of any kind for all of their flights. Second, DOT issued rules authorizing or requiring *all* international airlines to file separate tariffs reporting fuel surcharges. Respondents discuss the scope of the second set of requirements, but disregard the first—which mandated that ANA file all fuel surcharges.

DOT required ANA and other airlines subject to full tariff-filing requirements to file tariffs stating their "prices" which, by definition, included any "fare or charge" for air transportation, such as fuel surcharges. 49 U.S.C. §§ 40102(a)(39), 41504(a), (b). Federal regulations required that "[a]ll fares and charges shall be clearly and explicitly stated" in tariffs. 14 C.F.R. § 221.20(d).

DOT repeatedly stated that those international airlines still subject to full tariff-filing requirements—including ANA—must report all charges—including surcharges—in their tariffs. In a 2008 Notice, DOT emphasized that federal law

> requires every … foreign air carrier to file with [DOT] … *tariffs showing all*

> *prices* for "foreign air transportation" …. This requirement includes passenger fares, *related charges* and governing rules. …. Once tariffs are allowed to become effective by [DOT], *these tariffs become legally binding terms* in the contract of carriage for international air transportation.

73 Fed. Reg. 52445, 52446 (Sept. 9, 2008) (emphases added). DOT used virtually identical language in Notices throughout the years to emphasize that airlines in ANA's position must file their surcharges in their tariffs. *See, e.g.*, 64 Fed. Reg. 40654 (July 27, 1999) (ER0199); 70 Fed. Reg. 21835 (Apr. 27, 2005).

Thus, because ANA was required to file all of its charges in its tariffs, the scope of other regulations regarding the filing of separate fuel-surcharge tariffs deals with the non-material issue of whether ANA had to file its fuel surcharges in a tariff together with other terms or in a separate tariff. Moreover, even if ANA were only authorized, and not required, to file its fuel surcharges, its authorized filing of them in tariffs brought them within the scope of the filed-rate doctrine's bright-line rule.[1]

---

[1] Respondents also misquote Judge Wallace's dissent as acknowledging that "DOT 'did not require fuel surcharges to be filed,' …." Opp. 27. Judge Wallace only acknowledged that the district court concluded that DOT did not require such filings, and then concluded that "the fuel surcharges that have actually been filed in our case fall under the umbrella of *Square D's*

III. THIS CASE IS AN IDEAL VEHICLE FOR REVERSING THE NINTH CIRCUIT'S PURE ERROR OF LAW.

Now that ANA is the sole defendant, this case is an ideal vehicle to reverse a pure legal error of national importance: the Ninth Circuit's failure to follow this Court's controlling precedents and its creation of a split among the circuits.

This case can be decided solely on the basis of the First Question Presented: whether the mere filing of rates triggers application of the filed-rate doctrine.[2] An answer in the affirmative would dispose of this entire case.

There is no dispute that ANA filed tariffs covering all of the flights at issue. If the filed-rate doctrine still bars claims seeking damages inconsistent with the terms of tariffs, all of Respondents' claims must be dismissed.

Respondents' argument that review should not be granted because the Petition may be mooted by a

---

holding," and are covered by the filed-rate doctrine. *Wortman*, 854 F.3d at 618.

[2] Respondents are only half-right in arguing it would be inappropriate for the Second Question Presented to be reviewed. If the First Question is answered in the affirmative, Respondents' claims against ANA must be dismissed, mooting the Second Question. However, if the First Question is answered in the negative, answering the Second Question—regarding the extent to which the filed-rate doctrine applies to the present regulatory system—becomes imperative.

trial scheduled for July 2018 should be rejected. It is questionable whether the district court would devote resources to a trial if certiorari is granted on an issue that would dispose of the entire case. The decision below should be reversed precisely to prevent such trials, which would force district courts to engage in standardless second-guessing of just how effective an agency's regulation was. Even if the trial proceeds, the issue of whether the filing of rates triggers application of the filed-rate doctrine is ripe for review given that there are no disputed issues of material fact on that issue.

Moreover, it is of national importance that the Ninth Circuit's erroneous decision be corrected now. Not even Respondents have disputed Petitioners' showing that such a new rule of law would make the Ninth Circuit a magnet for class actions challenging rates and terms in regulated industries. Pet. 27-29. Such plaintiffs need only make vague allegations that a regulatory agency "has not exercised its authority to regulate" prices or services stated in tariffs "in a manner sufficient to justify the application of the filed rate doctrine." *Wortman*, 854 F.3d at 617. Just what level or manner of regulation would justify application of the filed-rate doctrine would be anybody's guess.

Not only would regulated industries be left in the dark as to the scope of their liability, but federal and state regulatory agencies would now face the prospect of being dragged into court to justify the effectiveness of their regulation.

Given that the Petition raises a pure legal issue about the Ninth Circuit's failure to follow a bright-line rule of an established doctrine, not only should the Petition be granted, but this case is a prime candidate for summary reversal. *See, e.g., Palmer v. BRG of Georgia, Inc.,* 498 U.S. 46 (1990) (summarily reversing decision for failing to apply per se rule).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

GARY J. MALONE
Counsel of Record
ANKUR KAPOOR
CONSTANTINE CANNON LLP
335 Madison Avenue
New York, NY 10017
(212) 350-2700
gmalone@constantinecannon.com

Counsel for Petitioner All Nippon Airways Co., Ltd.

DOUGLAS ROSENTHAL
CONSTANTINE CANNON LLP
1001 Pennsylvania Avenue
Washington, D.C. 20004
(202) 204-3500

Counsel for Petitioner All Nippon Airways Co., Ltd.

February 22, 2018