No. 12-527

IN THE
Supreme Court of the United States

DAWN A. MCCRAY, *et al.*,

Petitioners,

v.

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

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

MOTION AND BRIEF OF AMICUS CURIAE PUBLIC CITIZEN, INC., IN SUPPORT OF PETITIONERS

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MOTION OF PUBLIC CITIZEN, INC., FOR LEAVE TO FILE BRIEF AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

Public Citizen, Inc., respectfully moves for leave to file a brief as amicus curiae in support of the petitioner. Counsel of record for the parties received timely notice of amicus curiae's intent to file this brief as required by this Court's Rule 37.2(a). Counsel for petitioners and the majority of respondents consented in writing to the filing of the brief, and their written consents are submitted to the Clerk's office herewith. Counsel for respondents Old Republic International Corporation and Old Republic Title Insurance Company, however, although stating orally that they did not object to the filing of the brief, declined to provide written consent, necessitating the filing of this motion.

Public Citizen, Inc., a consumer-advocacy organization founded in 1971, appears on behalf of its members and supporters nationwide before Congress, administrative agencies, and courts on a wide range of issues and works for enactment and enforcement of laws protecting consumers, workers, and the general public. Public Citizen often represents the interests of its members in litigation and regularly files amicus curiae briefs in cases in the United States Supreme Court and the federal appellate courts.

The effective enforcement of the federal antitrust laws is of interest to Public Citizen because those laws provide critical protections for consumers by outlawing price-fixing and other anticompetitive practices that increase prices for goods and services beyond those that could be charged in a competitive marketplace. The antitrust laws have exceptions, but unwar-

ranted expansion of those exceptions inhibits competition and threatens consumers. Public Citizen submits this brief in support of the petition for a writ of certiorari in this case because the Third Circuit's decision, by immunizing anticompetitive conduct in a way that cannot be justified under this Court's decisions, harms consumers and undermines the national procompetitive policy enshrined in the antitrust laws.

Public Citizen therefore respectfully requests that it be granted leave to file the accompanying brief as amicus curiae in support of the petitioner.

Respectfully submitted,

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INTEREST OF AMICUS CURIAE[1]

As set forth in the accompanying motion for leave to file this brief, Public Citizen, Inc., a consumer-advocacy organization, submits this brief in support of the petition for a writ of certiorari in this case because the Third Circuit's decision is likely to harm the consumers whose interests Public Citizen supports. Specifically, by immunizing companies alleged to have engaged in price-fixing from antitrust liability in a way that cannot be justified under this Court's decisions, the decision below undermines the national procompetitive policy embodied in the antitrust laws and threatens to subject consumers to the higher prices for goods and services that prevail when competition is replaced by price-fixing.

REASONS FOR GRANTING THE WRIT

The federal antitrust laws protect consumers by enshrining competition as our fundamental national policy. Departures from that policy may be required when another *federal* statute conflicts with the antitrust laws—as, for example, when application of the antitrust laws would impose liability on a defendant for collecting filed rates that it is required to charge under a system of rate regulation created by federal law. The need to reconcile potentially conflicting de-

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[1] As explained in the accompanying motion, counsel of record for the parties received timely notice of amicus curiae's intent to file this brief as required by this Court's Rule 37.2(a), but counsel for two of the respondents did not provide written consent to the filing of the brief. This brief was not authored in whole or in part by counsel for a party. No person or entity other than amicus curiae or its counsel made a monetary contribution to preparation or submission of this brief.

mands of federal law has thus led this Court to develop the "filed rate doctrine," which exempts companies that comply with the requirements of federal rate-regulation laws from antitrust treble-damages liability for charging rates properly filed with federal agencies. *See Keogh v. Chicago & N.W. Ry.*, 260 U.S. 156, 163 (1922).

State-law rate-regulation schemes, however, create no such potential for conflict between coequal federal statutes. To the extent compliance with state rate-regulation laws may conflict with the demands of the federal antitrust laws, the Supremacy Clause dictates that federal law must prevail. *Gonzales v. Raich*, 545 U.S. 1, 29 (2005). The basic premise of the filed rate doctrine—that one federal law can authorize conduct otherwise proscribed by another—is thus absent when state rate-regulation laws are at issue.

State regulatory schemes may, however, provide a defense against antitrust liability in some cases. In its precedents establishing "state action immunity" for some activity that would otherwise be unlawful, *see Parker v. Brown*, 317 U.S. 341 (1943), this Court has held that the federal antitrust laws contain an implicit exception that gives effect to state laws that limit competition, but only when specific conditions are met: State law must reflect a clearly articulated policy of limiting competition, and that policy must involve active supervision of the anticompetitive activity by the state itself. *See California Retail Liquor Dealers Ass'n v. Midcal Aluminum, Inc.*, 445 U.S. 97, 105 (1980).

In this case, the Third Circuit held that participation in a state rate-regulation scheme confers filed rate immunity on private companies alleged to have

engaged in price fixing—conduct otherwise unlawful per se under the federal antitrust laws. As the petition for a writ of certiorari demonstrates, the Third Circuit's decision conflicts with decisions of the Ninth Circuit—reason enough for a grant of certiorari in a matter of such consequence. As this amicus brief underscores, in addition to creating a circuit conflict, the Third Circuit's decision fundamentally undermines the careful limits this Court has imposed on antitrust immunity premised on state regulatory activity by applying instead a broader filed rate doctrine, the analytical basis of which is inapplicable when state regulatory policies conflict with federal antitrust laws.

I. The Filed Rate Doctrine Reflects This Court's Resolution of Conflicts Between Federal Statutes.

The filed rate doctrine was developed by this Court to address circumstances where federal regulatory laws require conduct (charging rates filed with a federal agency) that is alleged to violate the antitrust laws (for example, because the rates are allegedly the product of horizontal price fixing). The doctrine resolves the conflict by holding that no damages liability may be imposed under the antitrust laws for charging the lawfully filed rate, *see Keogh*, 260 U.S. at 162-63—a result this Court has described as reflecting a partial implied displacement of the federal antitrust laws by federal regulatory statutes, based on "plain repugnancy between the antitrust and regulatory provisions." *See United States v. Philadelphia Nat'l Bank*, 374 U.S. 321, 350-51 & n. 29 (1963) (citing *Keogh*).

The Court first articulated the filed rate doctrine in *Keogh*, where it recognized a conflict between the Sherman Act's prohibition of price-fixing and the In-

terstate Commerce Act (ICA). In *Keogh*, a shipper alleged that rates filed with the Interstate Commerce Commission had been set by agreement among the defendant railroad companies in violation of the Sherman Act. *See Keogh*, 260 U.S. at 160. Defendants responded that the Commission had approved those rates, establishing that they were "reasonable and non-discriminatory" and therefore legal. *Id.* at 161. Under the Sherman Act, however, "a combination to fix reasonable and nondiscriminatory rates may be illegal." *Id.* The Court thus confronted rates deemed legal under the ICA but allegedly illegal under the Sherman Act. *See id.* at 163; *see also Square D Co. v. Niagara Frontier Tariff Bur., Inc.*, 476 U.S. 409, 416-17 (1986).

A number of considerations revealed the conflict between the two statutes and supported the Court's decision to give effect to the former over the latter. First, a carrier that exacted rates the Commission found to be unreasonable or discriminatory would be liable under the ICA for the full amount of the damages sustained, either before the Commission or in federal court. It could not be assumed, the Court suggested, that Congress had also intended to provide a damages remedy where the Commission had found the rates to be reasonable and nondiscriminatory. *Keogh*, 260 U.S. at 162. Moreover, a shipper's recovery under the Sherman Act "might, like a rebate, operate to give him a preference over his trade competitors," defeating "the paramount purpose of Congress" in adopting the ICA—"prevention of unjust discrimination." *Id.* at 163. Further, the Court questioned whether the plaintiff could, as a matter of law, establish that it had suffered injury or damages when it had been charged the "legal rate," which, as a matter

of federal law, "had to be collected from all shippers" in the absence of federal regulatory action approving another rate. *Id.* at 165; *see id.* at 164.

Central to the Court's analysis in *Keogh* was the understanding that *Congress*, in enacting the federal rate-filing scheme, had necessarily foreclosed antitrust damages for rates that were lawful under the ICA. It was the potential of liability to defeat the "purpose of Congress" expressed in the ICA that rendered antitrust damages unavailable. *Id.* at 163. Put another way, the "plain repugnancy" between two congressional enactments led the Court to conclude that ICA must take precedence over the antitrust laws notwithstanding the Court's great reluctance to displace the antitrust laws based on other federal statutes. *Philadelphia Nat'l Bank*, 374 U.S. at 350-51. Similarly, the Court emphasized in 1986 when it reaffirmed *Keogh* in *Square D* that the result reflected the Court's assessment of "the way in which Congress has accommodated the sometimes conflicting policies of the antitrust laws and the Interstate Commerce Act." *Square D*, 476 U.S. at 411.

II. State Rate-Regulation Schemes Stand on a Different Footing From Federal Laws and Shield Private Actors From Antitrust Liability Only to the Extent Provided by the "State Action" Doctrine.

The filed rate doctrine is a specific application of the general principle that conflicts among federal statutes must be resolved by the courts to give effect to congressional intent. *See, e.g.*, *Nat'l Ass'n of Home Builders v. Defenders of Wildlife*, 551 U.S. 644, 661-63 (2007). But while conflicts between two federal laws require courts to "mediate a clash of … legislative

commands," *id*. at 661, a conflict between incompatible federal and state laws poses no such quandary. The Supremacy Clause establishes federal law as "the supreme Law of the Land … any Thing in the Constitution or Laws of any State to the Contrary notwithstanding." U.S. Const., Art. VI, cl. 2. "The Supremacy Clause unambiguously provides that if there is any conflict between federal and state law, federal law shall prevail." *Raich*, 545 U.S. at 29.

Thus, while a federal law that dictates that filed rates are lawful even if they are the product of price-fixing may reflect a congressional intent that displaces the operation of the antitrust laws, a state law that purports to do the same thing cannot override the federal prohibition of price-fixing or the remedy prescribed for it. "The fact that a state authorizes the price fixing does not, of course, give immunity to the scheme, absent approval by Congress." *Schwegmann Bros. v. Calvert Distillers Corp.*, 341 U.S. 384, 386, (1951).

This is not to say that the antitrust laws allow no room for the operation of some state laws that inhibit the competition otherwise protected by the antitrust laws. Beginning with *Parker v. Brown*, 317 U.S. 341, this Court has construed the antitrust laws not to reach certain state laws and the activity they authorize. The "state action" immunity first recognized in *Parker* and elaborated in later cases, unlike the filed rate doctrine applicable to federal regulatory laws, is not based on the notion that conflicting enactments by their own force override the antitrust laws. Rather, it reflects this Court's recognition of "Congress' intention to embody in the Sherman Act the federalism principle that the States possess a significant measure

of sovereignty under our Constitution." *Community Commc'ns Co. v. City of Boulder*, 455 U.S. 40, 54 (1982).

But even while permitting the functioning of state regulatory laws that inhibit competition in ways not otherwise permitted by the federal antitrust laws, the Court has imposed clear limits on the immunity for state action that it deems Congress to have implicitly conferred in enacting the antitrust laws. The state action doctrine reflects a balancing of the "pervasive and fundamental" "national policy" of preserving "a system of free enterprise without price fixing or cartels" against the interest in "respect for ongoing regulation by the State." *FTC v. Ticor Title Ins. Co.*, 504 U.S. 621, 632, 533 (1992). To maintain the proper balance, the Court has imposed two critical constraints on the circumstances in which state regulatory laws may shield private conduct from federal antitrust liability. First, state law must reflect a "clearly articulated and affirmatively expressed … state policy" of displacing competition; and second, "the policy must be 'actively supervised' by the State itself." *Midcal*, 445 U.S. at 105 (1980); *see also Ticor*, 504 U.S. at 633.

These limitations, this Court has insisted, are essential to ensure that antitrust immunity extends no further than required by "the purpose of preserving the State's own administrative policies, as distinct from allowing private parties to foreclose competition." *Id*. at 633-34. The requirements of clear articulation and active supervision help to ensure that the national policy favoring competition is not displaced unless the states have "substitute[ed] an adequate system of regulation" to protect the public. *324 Liq-*

uor Corp. v. Duffy, 479 U.S. 335, 345 (1987). Thus, a "[s]tate may not confer antitrust immunity on private persons by fiat." *Ticor*, 544 U.S. at 633. "The national policy in favor of competition cannot be thwarted by casting … a gauzy cloak of state involvement over what is essentially a private price-fixing arrangement." *Midcal*, 445 U.S. at 106. "Actual state involvement, not deference to private pricefixing arrangements under the general auspices of state law, is the precondition for immunity from federal law." *Ticor*, 504 U.S. at 633.

Importantly, many of the cases in which this Court announced and applied these principles were cases involving state rate-filing laws. *Midcal*, for instance, involved a state statutory scheme requiring that wine wholesalers charge prices set forth in schedules filed with the State of California; the Court held that the price-fixing purportedly authorized by California's regulatory scheme was not immune from antitrust scrutiny because the state did not actively supervise the prices filed by wholesalers. 445 U.S. at 105. Similarly, *324 Liquor* held that New York's scheme requiring liquor retailers to charge prices filed by wholesalers failed to confer state action immunity on otherwise unlawful resale price maintenance because the state's supervision of the posted prices was not sufficiently active. 479 U.S. at 344-45.

In *Southern Motor Carriers Rate Conference, Inc. v. United States*, 471 U.S. 48 (1985), this Court considered an antitrust challenge to a state rate-filing system for motor carriers comparable to the ICA system for rail carriers that it had upheld on the basis of the filed rate doctrine in *Keogh* and *Square D*. But rather than finding exemption from antitrust liability

because, as in *Keogh* and *Square D*, the rates had been lawfully filed, the Court subjected the *state* rate filing schemes at issue in *Southern Motor Carriers* to the full rigors of analysis under the state action doctrine, and found immunity only because the state regulatory systems both reflected a clearly articulated policy of displacing competition and involved active supervision (a point that the United States, which brought the antitrust action, conceded). *See* 471 U.S. at 64-65. The Court specifically held that "collective ratemaking activities are shielded from the federal antitrust laws" "only if both prongs of the *Midcal* test are satisfied." *Id.* at 62.

Most tellingly, one of this Court's leading cases involving application of *Midcal*'s active supervision requirement, *Ticor Title*, involved exactly the kind of state regulatory scheme at issue here: a rate-filing system for title insurers. This Court held that such a regulatory scheme could not confer antitrust immunity on price-fixers absent active state supervision. 504 U.S. at 636-40. The Court insisted that "real compliance with both parts of the *Midcal* test" was essential to "make clear that the State is responsible for the price fixing." *Id.* at 636. Where state regulatory schemes permitted filed rates to go into effect without affirmative approval and the state had in fact exercised no genuine review of the reasonableness of rates, the Court held that the requirement of "state supervision was not realized in fact," and antitrust immunity was not available. *Id.* at 638. *Ticor* underscores that state rate-filing regulations do not shield private price-fixers from antitrust liability unless the criteria of state action immunity are established.

III. The Third Circuit's Decision Undermines the Careful Limits This Court Has Placed on Antitrust Immunity for State Regulatory Schemes.

In holding the defendants in this case exempt from antitrust liability under the filed rate doctrine without considering whether the state regulatory scheme complied with the active supervision requirement essential to state action immunity, the Third Circuit expanded the filed rate doctrine beyond its proper sphere of application to federal regulatory schemes and subverted the limits that this Court has held essential to containing state action immunity within appropriate bounds. In *Ticor*, this Court stressed that satisfaction of the active supervision requirement is essential to "ensur[ing], as required by our precedents, that particular anticompetitive conduct has been approved by the State." *Id.* at 638. Absent the active supervision inquiry, it is impossible "to determine whether the State has exercised sufficient independent judgment and control so that the details of the rates or prices have been established as a product of deliberate state intervention, not simply by agreement among private parties." *Id.* at 634-35. In short, a state rate-regulation scheme that does not comply with both prongs of the *Midcal* test cannot be squared with the procompetitive policies enshrined in the antitrust laws.

Under the Third Circuit's holding, however, a defendant can obtain exemption from antitrust liability on a lesser showing than this Court required in *Midcal* and *Ticor* merely by changing the label of the defense invoked from "state action" to "filed rate." This Court would hardly have allowed a mere change

in nomenclature to reduce the showing required by *Ticor* for a state rate-filing scheme to provide a defense to price-fixing by title insurers. The Third Circuit's decision would make *Ticor*'s holding meaningless.

The Third Circuit's misapplication of the filed rate doctrine is not merely analytically incoherent. It also threatens severe harm to consumers by allowing defendants to engage in private price-fixing activities without the degree of state supervision that this Court has held is required to permit a departure from the fundamental procompetitive policy of the antitrust laws. The importance of the lower court's deviation from principles long applied by this Court—together with the conflict among the circuits described in the petition for certiorari—merits review by this Court.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

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