No. 14-11363

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

McWane, Inc.,

Petitioner,

v.

Federal Trade Commission,

Respondent.

On Petition for Review of an Order
of the Federal Trade Commission
(FTC Docket No. 9351)

BRIEF OF THE AMERICAN ANTITRUST INSTITUTE
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENT

DANIEL E. GUSTAFSON (#202241)
GUSTAFSON GLUEK LLP
Canadian Pacific Plaza
120 South 6th Street, Suite 2600
Minneapolis, MN 55402
(612) 333-8844

ALBERT A. FOER
RANDY M. STUTZ
SANDEEP VAHEESAN
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott Street, NW
Washington, DC 20008
(202) 905-5420

Counsel for Amicus Curiae the American Antitrust Institute

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute (AAI) states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

Pursuant to 11th Cir. R. 26.1-1, Counsel for AAI certifies that they believe the certificate of interested persons contained in the previous briefing in this matter is complete.

s/ Daniel E. Gustafson

September 5, 2014

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

* Cases Primarily Relied Upon (11th Cir. R. 28-1(e))

Other Authorities

* Other Authorities Primarily Relied Upon (11th Cir. R. 28-1(e))

STATEMENT OF ISSUE FOR REVIEW

Whether the Federal Trade Commission had sufficient evidence to find that a monopolist used exclusive dealing to restrict market entry and maintain its monopoly power.

INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent and non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws.[1] These goals of U.S. competition policy would be seriously undermined if the rule of reason in exclusive dealing cases is distorted by new burdens and restrictions that would further empower monopolists and sacrifice competition and consumer welfare.

[1] AAI is managed by its Board of Directors, with the guidance of an Advisory Board that consists of more than 125 prominent antitrust lawyers, law professors, economists, and business leaders. *See* http://www.antitrustinstitute.org. AAI's Board of Directors alone has approved this filing for AAI. The individual views of the Directors or Advisory Board members may differ from AAI's positions. No party, party's counsel, or any other person or entity other than AAI or its counsel has authored this brief in whole or in part or made a monetary contribution intended to fund its preparation or submission. AAI's General Counsel, Richard M. Brunell, previously served as Senior Advisor for Competition Matters to the Federal Trade Commission and advised the Commission in this case. He played no role in the AAI Directors' deliberations or the preparation or submission of the brief.

SUMMARY OF ARGUMENT

McWane, Dissenting Commissioner Wright, and their supporting amici ask this Court to impose unprecedented and unwarranted burdens and restrictions on antitrust plaintiffs. The effect would be to limit both the protection afforded to competition and the "competition" that is afforded protection. Monopolists would enjoy greater freedom to harm consumer welfare in the short and long term.

Although McWane asserts that harm to competition and harm to competitors are mutually exclusive, the antitrust laws do not hesitate to protect competitors as a *means* of protecting consumer welfare. To be sure, the antitrust laws were passed "*for* the protection of competition, not competitors." *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224, 113 S. Ct. 2578, 2588 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320, 82 S. Ct. 1502, 1521 (1962)) (emphasis added). They enjoin conduct that harms consumers through injury to the competitive process. The same conduct, however, may also harm competitors. Indeed, protecting competitors is sometimes *how* we prevent harm to competition and consumers, even if it is not *why* we do it.

The antitrust laws protect consumers against more than short-term harm to price competition. They are a "comprehensive charter of economic liberty," *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4, 78 S. Ct. 514, 517 (1956), and "a consumer welfare prescription," *Reiter v. Sonotone Corp.*, 442 U.S.

330, 343, 99 S. Ct. 2326, 2333 (1979) (quoting Robert Bork, The Antitrust Paradox 66 (1978)). Courts have always recognized that the antitrust laws protect competition along *all* its dimensions, including not just price, but also choice and product and service quality. McWane and Dissenting Commissioner Wright, however, ignore harm to non-price competition, which the Commission unequivocally found. Comm'n Op at 22, 28-29. Although McWane manufactures a commodity product, its customers appeared to value this non-price competition, as some would have switched to Star despite Star charging the same or higher prices than McWane. Comm. Op. at 10, 25.

To protect all dimensions of competition, the antitrust laws prohibit *all* unreasonable exclusionary conduct. McWane argues that only competition from "equally efficient competitors" should be worthy of protection, without regard to a rule-of-reason balancing. Petr's Br. at 54 (arguing that antitrust laws should not apply to exclusion of "less-efficient competitors"); *id*. at 55 (asking Court to declare that "competition is not injured" by exclusion of less-efficient competitors). However, even less efficient competitors can stimulate price competition in a monopolistic market. They also can eventually grow and become an important source of innovation and other non-price competition. To allow dominant firms to stifle budding rivals would be "inimical to the purpose of the Sherman Act." *United States v. Microsoft Corp.*, 253 F.3d, 34, 79 (D.C. Cir. 2005).

Contrary to McWane's position, a dominant firm can be liable for monopolization even if viable entry occurs in the face of exclusionary conduct. Modern economic learning has shown that monopolists can maintain their power by artificially raising rivals' costs or reducing their output and revenues. Even if rivals enter and remain in the market under such circumstances, their ability to compete may be severely constrained. So long as the monopolist successfully marginalizes its competitors, it is protected from effective competition and retains its unchallenged power. Accordingly, courts have held that plaintiffs do not have to show total foreclosure of competitors in a monopoly maintenance case. *See, e.g.*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 283 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (2013).

Plaintiffs also are not required to show that conduct raised prices and lowered output in a monopoly maintenance case, and they are not required to establish foreclosure rates. The harm from monopoly maintenance is the *persistence* of monopoly power. Direct evidence of anticompetitive effects includes *continued* monopoly pricing in the wake of entry, which the Commission found and McWane conceded. Requiring plaintiffs to construct a "but for" world in the absence of exclusive dealing would place an unusually heavy burden on plaintiffs and encourage dominant firms to stifle competitive threats as quickly as possible. *Microsoft*, 253 F.3d at 79. This evidentiary standard would also sacrifice non-price competition, which is more difficult to quantify but can be as important to consumer welfare as price competition.

Courts can draw reasonable inferences of competitive harm from market structure evidence. Exclusive dealing is more likely to be anticompetitive in a monopolistic market than in a competitive market. Firms in highly competitive markets typically have to offer inducements for customers and distributors to accept exclusive dealing, whereas monopolists can *impose* exclusive dealing on purchasers—as McWane did. Furthermore, the exclusion of a single rival is unlikely to have much effect on outcomes in a competitive market. In a monopolistic market, however, the exclusion of the only competitor can mean that monopoly pricing persists. Accordingly, courts examine the conduct of monopolists through a "special lens." *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451,488, 112 S. Ct. 2072, 2093 (1992) (Scalia, J., dissenting). This heightened scrutiny applies to exclusive dealing by a monopolist in particular. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005).

Evidence of anticompetitive purpose and an absence of cognizable efficiencies also can bolster other evidence of competitive harm. As found by the Commission, McWane expressly implemented exclusive dealing as a means of denying rivals access to efficient means of distribution and ultimately access to customers. McWane also did not present any cognizable efficiencies from its exclusive dealing.

ARGUMENT

I. The Antitrust Laws Prohibit Dominant Firms from Using Exclusionary Methods Against Rivals

In many circumstances, it is hard to fathom how courts can protect competition without protecting one or more actual or potential competitors. Courts have refused to embrace the false dichotomy advanced by McWane, which argues that harm to a competitor does not harm competition "categorically." Petr's Br. at 51. Courts have observed, instead, that harm to competition can be closely related to harm to competitors. *E.g.*, *United States v. Visa U.S.A., Inc.*, 344 F.3d 229, 243 (2d Cir. 2003) ("Without doubt the exclusionary rules in question harm competitors. The fact that they harm competitors does not, however, mean that they do not also harm competition.").

Protecting competition in concentrated markets sometimes *requires* protecting competitors. *United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005) (explaining how exclusionary conduct that slows growth of competitors also harms competition and consumers); *Spirit Airlines, Inc. v. Northwest Airlines, Inc.*, 431 F.3d 917, 951 (6th Cir. 2005) ("in a concentrated market with very high barriers to entry, competition will not exist without competitors."); *LePage's Inc. v. 3M*, 324 F.3d 141, 159 (3d Cir. 2003) (en banc) (successful exclusionary conduct by a monopolist against rivals is "not only injurious to the potential competitor but also to competition in general").

The Supreme Court has held that the antitrust laws do protect competitors from the exclusionary tactics of dominant firms. Monopolists are not free to use all available means against their rivals. They cannot use their power "to destroy threatened competition." *Otter Tail Power Co. v. United States*, 410 U.S. 366, 377, 93 S. Ct. 1022, 1029 (1973). They cannot "attempt[] to exclude rivals on some basis other than efficiency." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S. Ct. 2847, 2859 (1985) (citing Robert Bork, The Antitrust Paradox 138 (1978)). A dominant firm violates the Sherman Act when it uses its "monopoly power 'to foreclose competition . . . or to destroy a competitor.'" *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 482-83, 112 S. Ct. 2072, 2090 (1992).

Following the Supreme Court's guidance, the lower courts have affirmed that the antitrust laws protect competition by prohibiting exclusionary tactics against rivals. This Court has held that "it is unlawful for a monopolist to maintain or extend its monopoly power by intentionally engaging in conduct that unnecessarily excludes competitors and impairs competition." *Morris Commc'ns Corp. v. PGA Tour, Inc.*, 364 F.3d 1288, 1294 (11th Cir. 2004). A monopolist is not permitted to use its power to drive competitors out of the market by means other than competition on the merits. *LePage's*, 324 F.3d at 147. "Conduct that impairs the opportunities of rivals and either does not further competition on the merits or does so in an unnecessarily restrictive way may be deemed anticompetitive." *Broadcom Corp. v. Qualcomm Inc.*, 501 F.3d 297, 308 (3d Cir. 2007). The courts have consistently held that firms cannot use exclusionary means to impede rivals, when it likely would harm competition and consumers. *See, e.g.*, *E.I. Du Pont de Nemours & Co. v. Kolon Industries, Inc.*, 637 F.3d 435, 451-53 (4th Cir. 2011); *JTC Petroleum Co. v. Piasa Motor Fuels, Inc.*, 190 F.3d 775, 778-79 (7th Cir. 1999) (Posner, J.); *Cascade Health Solution v. PeaceHealth*, 515 F.3d 883, 894 (9th Cir. 2008).

On the other hand, a monopolist that has acquired or maintained its power "as a consequence of a superior product, business acumen, or historic accident," *United States v. Grinnell Corp.*, 384 U.S. 563, 571, 86 S. Ct. 1698, 1704 (1966), is not liable for monopolization. The antitrust laws seek to promote vigorous competition on the merits, even if that competition results in harm to competitors. For example, (non-predatory) price cutting and quality improvements that result in harm to competitors do not run afoul of the antitrust laws. *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 458, 113 S. Ct. 884, 891-92 (1993) ("The purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market."). Accordingly, antitrust law "directs itself not against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[2] *Id.*

II. The "Competition" Protected By the Antitrust Laws Includes Both Price and Non-Price Competition

The Commission—in line with long-standing case law—ruled that a reduction in consumer choice from exclusionary behavior is a cognizable harm to competition. Comm'n Op at 28-29. It found that McWane's exclusionary conduct "deprived consumers of the ability to choose among the products, terms of sale, and services of varying suppliers of domestic fittings." Comm. Op. at 22. Distributors withdrew orders and requests for quotes they had previously issued to Star, *id.* at 25, and were denied the choice to use an alternate supplier they apparently preferred, or were seriously prepared to consider. *See id.* at 10. Customer preference for a rival that at times charged a higher price than McWane for a commodity product indicates that non-price competition was valued. And this competition was diminished by Star's marginalization. McWane and Commissioner Wright seek to narrow the definition of protected competition and dismiss this loss of choice as being of no concern to the antitrust laws at all, or at least in this case. Pet'r Br. at 57; Dissenting Op. at 37 n.44.

---

[2] Of course, even a monopolist that has acquired or maintained its monopoly through *legitimate* means cannot subsequently maintain its monopoly through unreasonable *exclusionary* measures. *See Microsoft*, 253 F.3d at 58.

The antitrust laws were "designed to be a comprehensive charter of economic liberty aimed at preserving free and unfettered competition as the rule of trade." *Northern Pacific Railway Co. v. United States*, 356 U.S. 1, 4, 78 S. Ct. 514, 517 (1958). "[The Sherman Act] rests on the premise that unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality and the greatest material progress[.]" *Id.* Mindful of these admonitions, courts take a broad view of the scope of cognizable anticompetitive harm under the antitrust laws. The antitrust laws protect not only short-term price competition, but also consumer choice and product and service quality.

The Supreme Court has held that conduct that reduces consumer choice, without producing any offsetting benefits, is illegal. *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 459, 106 S. Ct. 2009, 2018 (1986); *Blue Shield of Virginia v. McCready*, 457 U.S. 465, 482-83, 102 S. Ct. 2540, 2550 (1982); *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605-07, 610, 105 S. Ct. 2847, 2858-60, 2861 (1985). This Court has confirmed that "higher prices and fewer choices for consumers" are among the harms the antitrust laws aim to police. *Palmyra Park Hospital Inc. v. Phoebe Putney Memorial Hospital*, 604 F.3d 1291, 1303 (11th Cir. 2010). Other courts of appeals also evaluate challenged conduct from the perspective of whether it enhances or diminishes consumer choice. *See,* *e.g.*, *Realcomp II, Ltd. v. Fed. Trade Comm'n*, 635 F.3d 815, 829 (6th Cir. 2011) ("[W]e examine the effect of Realcomp's restrictions on consumer choice, specifically, the reduction in competitive brokerage options available to home sellers."); *Wilk v. AMA*, 895 F.2d 352, 360 (7th Cir. 1990) (boycott is anticompetitive where it "raises costs to interfere with the consumer's free choice to take the product of his liking . . ."); *Rosebrough Monument Co. v. Memorial Park Cemetery Ass'n*, 666 F.2d 1130, 1138 (8th Cir. 1981) (exclusive arrangement unlawful where it "stunts rather than develops trade within the cemetery industry and limits consumer choice and the free flow of commerce.").

The Supreme Court also has determined the legality of restraints by examining whether they promote or impair product and service quality. *Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 896-97, 127 S. Ct. 2705, 2719 (2007) ("The manufacturer strives to improve its product quality or to promote its brand because it believes this conduct will lead to increased demand despite higher prices."); *Indiana Fed'n of Dentists*, 476 U.S. at 459-60, 106 S. Ct. at 2018 (a refusal to compete on service, "no less than a refusal to compete with respect to the price term . . ., impairs the ability of the market to advance social welfare"); *National Society of Professional Engineers v. United States*, 435 U.S. 679, 695, 98 S. Ct. 1355, 1367 (1978) ("all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.").

And this Court has held that the antitrust laws protect against harm to product and service quality. *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1339 (11th Cir. 2010) ("Actual anticompetitive effects include, but are not limited to, reduction of output, increase in price, or deterioration in quality."); *Graphic Products Distributors, Inc. v. ITEK Corp*., 717 F.2d 1560, 1572-73 (11th Cir. 1983) (stating that procompetitive effects of vertical non-price restraints include improved dealer services, product safety, and quality). Other courts of appeals have emphasized these same core values. *See, e.g.*, *Mathews v. Lancaster General Hospital*, 87 F.3d 624, 641 (3d Cir. 1996) ("An antitrust plaintiff must prove that challenged conduct affected the prices, quantity or quality of goods or services."); *K.M.B. Warehouse Distributors, Inc. v. Walker Manufacturing Co.*, 61 F.3d 123, 127-28 (2d Cir. 1995) ("Restrictions on intrabrand competition can actually enhance market-wide competition by fostering vertical efficiency and maintaining the desired quality of a product."). This Court must not ignore the diminished choice or service caused by the exclusionary conduct targeting Star.

III. Dominant Firms Do Not Have Carte Blanche to Harm Competition and Consumers by Excluding Less-Efficient Rivals

This Court must decline McWane's invitation to graft an extra-legal "equally efficient competitor" standard onto the Sherman Act's statutory proscription against monopolization. Pet'r Br. at 54, 55.[3] McWane's standard advances a perverse competition policy that sacrifices competition and innovation only to permit socially useless behavior. It would simply encourage dominant firms to squash nascent competitive threats before they become equally efficient, which would be disastrous for consumer welfare, and would threaten un-remediable harm to both price and non-price competition.

"In its design and function," the rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest." *Leegin*, 551 U.S. at 886, 127 S. Ct. at 2713. McWane asks the Court to distinguish instead between restraints that exclude equally efficient competitors and restraints that exclude less-efficient competitors, regardless of whether the restraint ultimately harms competition and consumers.[4] Pet'r Br. at 53-54. McWane's "equally efficient competitor" standard would fundamentally distort the rule of reason. *See, e.g.*, Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust L.J. 527,

[3] Even Dissenting Commissioner Wright rejects McWane's "equally efficient competitor" standard. Dissenting Op. at 10-11 (stating that relevant inquiry is "whether the [exclusive dealing] contracts raise a rival supplier's costs sufficiently to impact the competitive process").

[4] Of course, the Court need not resolve any academic debate about the "equally efficient competitor" standard to rule for the Commission, because the goal of McWane's conduct was to prevent its rivals from *becoming* equally efficient. *See* Resp. Br. at 34.

565 n.189 (2013); Andrew I. Gavil, *Exclusionary Distribution Strategies by Dominant Firms: Striking a Better Balance*, 72 Antitrust L.J. 3, 59-60 (2004); Herbert Hovenkamp, *Exclusion and the Sherman Act*, 72 U. Chi. L. Rev. 147, 153-55 (2005).

Under McWane's standard, *only* competition from firms that can match or beat the cost structure of the alleged excluding firm is worth preserving under the antitrust laws. However, a failure to protect less efficient competitors from exclusionary conduct would harm consumers in both the short and long run. Even a less efficient competitor can promote near-term price and non-price competition. It can "stimulate competition and lower prices if an incumbent dominant firm is charging monopoly prices." Gavil, *supra*, at 59. The threat of actual or potential competition from a less efficient rival can constrain a dominant firm's pricing. In the face of competition, it may feel pressured to lower prices below the monopoly level to either deter entry or prevent the newcomer from capturing market share. Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 Antitrust L.J. 311, 328 (2006).

Long-term harm to consumers may be yet more substantial than the short-run effects. Even if a new entrant does not produce benefits for consumers in its first day in the market, it can generate substantial benefits in the medium and long run. Entrants and smaller rivals can introduce new products and technologies and are often an important source of innovation. Baker, *supra*, at 559-60. And empirical evidence suggests that competitive markets are more conducive to innovation than monopolistic markets. *Id.* at 561-62; Gavil, *supra*, at 43.

The focus of antitrust "must be on the rivals that are most likely to appear on the scene," Hovenkamp, *supra*, at 155, and "[p]iecemeal entry is the norm in most industries," Richard A. Posner, Antitrust Law 252 (2d ed. 2001). Given the difficulties of successful entry, most new firms enter gradually—for example, entering one market and then moving into a related one, instead of simultaneously entering both markets. See *Fortner Enters. v. United States Steel Corp.*, 394 U.S. 495, 513, 89 S. Ct. 1252, 1263-64 (1969) (White, J., dissenting) (discussing multi-level entry). Realistically, new entrants generally do not have the economies of scale and other first-mover advantages of the incumbent. Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 321 (2003). They cannot be expected to match the cost structure of a dominant firm on day one.

McWane's standard would encourage dominant firms to avoid future antitrust liability by destroying nascent rivals as soon as possible, before they can achieve economies of scale. Dominant firms have frequently sought to exclude specific innovative competitors that threatened their monopoly power, even without this additional incentive. In fact, some of the leading cases in the history of antitrust law have involved monopolists that attempted to suppress emerging technologies through anticompetitive means. *See, e.g.*, *Lorain Journal Co. v. United States*, 342 U.S. 143, 72 S. Ct. 181 (1951) (discussing how dominant local newspaper sought to cripple new radio station by depriving it of advertising revenue); *MCI Commc'ns Corp. v. American Tel. & Tel. Co.*, 708 F.2d 1081, 1132-33 (7th Cir. 1983) (affirming jury's finding that AT&T refused to grant local network access to MCI as a means of excluding MCI—and its new microwave communication technology—from long-distance telephone market); *Microsoft*, 253 F.3d at 59-74 (reviewing Microsoft's multi-pronged campaign to suppress growth of middleware applications that could eventually undermine its operating system monopoly).

"Obviously, a monopolist should not be rewarded for eliminating competition in its incipiency." *Sunbeam Television Corp. v. Nielsen Media Research, Inc.*, 763 F. Supp. 2d 1341, 1356 (S.D. Fla 2011). As the D.C. Circuit has recognized, "[i]t would be inimical to the purpose of the Sherman Act to allow monopolists free reign to squash nascent, albeit unproven, competitors at will[.]" *Microsoft*, 253 F.3d at 79. This "would only encourage monopolists to take more and earlier anticompetitive action." *Id*. The courts "should not condone socially useless conduct simply because a hypothetical equally efficient rival would not be excluded." Hovenkamp, *supra*, at 155.

IV. The Commission's Evidentiary Burden Requires that It Prove No More than Unreasonable Exclusion

McWane, as well as Commissioner Wright, in dissent, and a group of professors, in an amicus brief (hereinafter "Academic Amici"), have put forward unprecedented evidentiary standards that would limit cognizable anticompetitive harm in exclusive dealing cases. Their proposals are inconsistent with the case law, as well as the economic learning on the myriad exclusionary strategies available to dominant firms. They would give monopolists broad freedom to use exclusionary tactics against rivals and tolerate substantial harm to price and non-price competition—and ultimately to consumers. This court should instead adhere to established precedent and credit reasonable evidence of anticompetitive harm.

A. McWane's Affirmative Defense Argument is Economically Illogical and Irreconcilable with the Rule of Reason

McWane contends that viable entry or expansion by a competitor should be a complete defense to monopoly maintenance. *See, e.g*. Petr's Br. at 42 (asking Court to find that mere fact of successful entry or expansion "affirmatively disproves" monopolization and is "dispositive," without regard to economic analysis); *id*. at 43 ("this *single* . . . fact is fatal" to monopolization claim (emphasis added)). This argument contradicts modern economics. The antitrust laws, and the rule of reason, do not permit evidence of entry or expansion to trump evidence of harm to competition and consumers from exclusionary conduct.

Economists have long recognized that, in a vacuum, monopolized markets attract entry. New entrants can profitably take market share by charging even a supracompetitive price that is below the existing monopoly price. Monopolists can respond to entry in several ways. One response is to compete—by lowering prices, improving quality or service, or innovating—but the monopolist may have to sacrifice profits in the process.

Alternatively, monopolists can engage in any number of exclusionary strategies designed to eliminate or constrain the competitive discipline the entrant would otherwise impose on the market. If the strategy succeeds, the monopolist can maintain dominant market share *and* preserve monopoly profits. The argument that viable entry or expansion should be an affirmative defense to monopoly maintenance implicitly assumes that a monopolist is able to maintain its monopoly only by imposing cost increases or scale restrictions that lead to the total foreclosure of competitors. McWane's argument is defective because less extreme but still attractive monopoly maintenance strategies—short of total foreclosure—are readily available. *See* Thomas G. Krattenmaker & Steven C. Salop, *Anticompetitive Exclusion: Raising Rivals' Costs to Achieve Power Over Price*, 96 Yale L.J. 209, 224 (1986) (discussing an excluding firm's "various options in exercising its acquired power" that nonetheless can accommodate entry or expansion).

A monopolist can raise the costs (or reduce the scale and revenues) of its smaller competitors and new entrants to maintain supracompetitive prices, notwithstanding that entry and limited expansion remain viable. Modern economic analysis recognizes that monopolists can successfully execute this exclusionary strategy in several ways, including through exclusive dealing arrangements with distributors that accomplish "input foreclosure" or "customer foreclosure," or a combination of the two. *See* Steven C. Salop, Sharis A. Pozen & John R. Seward, *The Appropriate Legal Standard and Sufficient Economic Evidence for Exclusive Dealing Under Section 2: the FTC's* McWane *Case* 8-9 (Georgetown Law Faculty Publications, No. 365, Aug. 7, 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1365 [hereinafter "Salop et al., *Sufficient Economic Evidence for Exclusive Dealing*"].

A monopolist raises its rivals' costs through input foreclosure when it denies rivals access to an important input on terms similar to those enjoyed by the monopolist. As the Commission and the ALJ found here, for example, the monopolist can foreclose rivals from using an efficient distribution channel by instituting an exclusive dealing policy. Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm*, 70 Antitrust L.J. 311, 353, 355-56 (2002); Janusz Ordover et al., *Equilibrium Vertical Foreclosure*, 80 Am. Econ. Rev. 127

(1990); *see also* Krattenmaker & Salop, *supra*, at 226 (explaining why distribution services are properly conceived as a manufacturing input).

A monopolist reduces its rivals' scale and revenues through customer foreclosure when it deprives rivals of efficient access to customers. As the Commission and the ALJ found here, the monopolist can implement an exclusive dealing policy to lock up distributors and foreclose rivals from making a substantial volume of sales. Salop et al., *Sufficient Economic Evidence for Exclusive Dealing*, at 12-16 & n.35 (citing Eric B. Rasmusen et al., *Naked Exclusion*, 81 Am. Econ. Rev. 1137, 1140-43 & n.4 (1991); Ilya R. Segal & Michael D. Whinston, *Naked Exclusion: Comment*, 90 Am. Econ Rev. 296, 296 (2000); Michael D. Whinston, *Tying, Foreclosure, and Exclusion*, 80 Am. Econ. Rev. 837, 839-40 (1990); Dennis W. Carlton & Michael Waldman, *The Strategic Use of Tying to Preserve and Create Market Power in Evolving Industries*, 33 Rand J. Econ. 194, 196 (2002)).

Whether the monopolist's exclusionary strategy raises its rivals' input costs or lowers its scale or revenues, the result is the same: the forces of competition, which would otherwise decrease prices and increase quality, variety and service, are artificially diminished.

For the strategy to succeed, rivals' costs need not be raised, or their revenues reduced, to the point that they are not viable. So long as the monopolist's rivals are sufficiently hamstrung by the artificial competitive burden, the monopolist can cede a small portion of the market to the now-contained competitor(s) and keep the rest of the market for itself. *See* Drew Fudenberg & Jean Tirole, *The Fat-Cat Effect, the Puppy-Dog Ploy, and the Lean and Hungry Look*, 74 Am. Econ. Rev. (Papers & Proc.) 361 (1984) (discussing incentives to accommodate entrant constrained to remain small). The monopolist is still insulated from effective competition because it has created insurmountable barriers to the kind of entry or expansion that would actually threaten its monopoly profits and dominant market share. As the Commission and the ALJ found here, the monopolist can both raise a rival's distribution costs and diminish its customer access and thereby prevent it from achieving the scale needed to compete for the vast majority of the market.

Courts have joined the Commission and the ALJ in concluding that total foreclosure, whereby exit is induced and even niche entry is prevented, is not the standard for competitive harm in exclusive dealing cases.[5] *Dentsply*, 399 F.3d at 191 ("The test is not total foreclosure, but whether the challenged practices bar a substantial number of rivals or severely restrict the market's ambit."); *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 283 (3d Cir. 2012) ("'[T]otal foreclosure' is not required for an exclusive dealing arrangement to be unlawful . . . ."), *cert. denied*,

[5] Even McWane acknowledges that total foreclosure is not the standard, Petr's Br. at 47, but it persists in arguing that "successful entry" is an affirmative defense, Petr's Br. at 28; *see also id.* at 42, 43. If McWane would apply a standard that distinguishes between "unsuccessful entry" and total foreclosure, it has failed to explain the distinction or identify the standard.

133 S. Ct. 2025 (2013). Instead, courts recognize that a monopolist can *limit* entry and maintain supra-competitive prices by raising rivals' costs or reducing their revenues. *Microsoft*, 253 F.3d at 71 (finding liability where monopolist's exclusionary conduct kept usage of rival product "below the critical level necessary for . . . any other rival to pose a real threat to [defendant's] monopoly"). McWane's claim to a complete defense based on the mere fact of entry or limited expansion is therefore unavailing.[6]

B. Under the Prevailing Preponderance of the Evidence Standard, Courts Consider Available Direct Pricing Evidence and Do *Not* Insist on "But For World" Pricing Evidence

Commissioner Wright and the Academic Amici call for a heightened—and unprecedented—evidentiary standard in evaluating proof that exclusionary conduct

[6] The Dissent and the Academic Amici ask the Court to adopt a "minimum efficient scale" (MES) defense, whereby foreclosure that does not prevent a rival from achieving MES would be per se legal under the antitrust laws. Dissenting Op. at 10-11; Academic Amici Br. at 6-7. An MES defense would simply ignore the economic reality that, particularly in a monopoly market, an excluding firm can raise rivals' costs preserve power over price "even if the rivals remain viable and are able to operate at MES or above." Salop et al., *Sufficient Economic Evidence for Exclusive Dealing*, at 11. Moreover, as discussed previously, exclusion of a less-efficient competitor nevertheless *harms competition*. *See supra* Section III; Gavil, 72 Antitrust L.J. at 3, 59-60. As an artificial, extra-legal limitation on the Sherman Act's protections against unreasonable exclusionary conduct, without regard to whether conduct is actually capable of harming competition, an MES defense is indistinguishable from the "equally efficient competitor" standard advanced by Petitioner. *See supra* Section III. For a detailed discussion of the shortcomings of an MES defense, see Salop et al., *Sufficient Economic Evidence for Exclusive Dealing*, at 10-13.

short of total foreclosure harms competition. *See, e.g*. Dissenting Op. at 17-18 (arguing for an interpretation of *Beltone* that would require "clear evidence of anticompetitive effect"); *but see In re Beltone Electronics Corp.*, 100 F.T.C. 68, 209 (1982) (requiring "reasonably clear evidence of probable" anticompetitive effect).

To establish a prima facie case that competitive harm was "more likely than not," Commissioner Wright would require plaintiffs (1) to establish that foreclosure "resulted in higher prices and reduced output," Dissenting Op. at 11; and (2) to calculate the "foreclosure rate" illustrating the precise "dollar value" of the injury to competition using a hypothetical "but for" world in which the exclusive dealing did not occur, Dissenting Op. at 38.[7] The Academic Amici make the same arguments. Academic Amici Br. at 23 (asking for "evidence . . . showing that McWane's conduct actually raised prices or lowered output" in the market); *id*. at 24 ("The appropriate measure in assessing foreclosure is the volume of rival sales that did not occur, but would have absent the challenged exclusive dealing").

In offering these standards, Commissioner Wright and the Academic Amici apparently would discount relevant, available evidence and demand irrelevant and unavailable evidence. First, their insistence on actual evidence of higher prices or

[7] Commissioner Wright also objects because Complaint Counsel did not calculate the amount of sales not subject to the exclusive dealing policy, but this is simply a variation on not knowing the "foreclosure rate" as a "dollar value." *See* Dissenting Op. at 40-41.

reduced output ignores that this is a monopoly *maintenance* case. In a monopoly maintenance case, the anticompetitive harm is that prices do not fall significantly and quantity does not rise significantly when entry is attempted. To carry their burden, plaintiffs do not have to prove that prices increased above the level that prevailed before the entry or that quantity fell below this level. Relevant evidence tending to rebut allegations of competitive harm would show significantly *decreased* prices, or *increased* output, which might suggest that McWane did not maintain its monopoly power in the face of Star's entry. Because McWane is a monopolist accused of improperly maintaining its monopoly, anticompetitive harm is proved by evidence that the market outcome *remains the same*.

Commissioner Wright and the Academic Amici hold up direct evidence of price effects as the gold standard for demonstrating competitive harm. *See, e.g.*, Dissenting Op. at 19 ("The best and most straightforward way to establish harm to competition is, of course, direct evidence . . . ."); *id.* at 20 ("direct evidence of anticompetitive effects is the most persuasive type of evidence in an antitrust case"); Academic Amici at 23 (suggesting that direct evidence of price increases or output reductions would have sufficed).

Inexplicably, however, they ignore the Commission's direct evidence that monopoly prices and output levels persisted in the face of Star's entry. *See* Dissenting Op. at 5 ("Complaint Counsel make no effort to establish harm to competition directly, such as by demonstrating that McWane's conduct had a deleterious effect upon price or output[.]"); Academic Amici at 22 ("Complaint Counsel produced no direct evidence"). The Commission's Majority Opinion credited direct evidence that McWane did not reduce prices in the face of Star's entry. Comm. Op. at 27-28. McWane's brief verifies this evidence. Pet'r Br. at 25 (Star's entry "had little effect on the price of fittings"); *id*. (conceding Star's average price in every state was the same as McWane's or higher). So long as the Commission has successfully established the element of monopoly power, direct evidence of *persistent* monopoly prices in the face of entry satisfies the plaintiff's burden in a monopoly *maintenance* case.

Commissioner Wright and the Academic Amici also miss the mark in insisting that a detailed economic study of a hypothetical (and un-verifiable) "but for" world, which places a hypothetical dollar value on the 'precise' amount of foreclosure that occurred, *see* Dissenting Op. at 5, is necessary to establish a prima facie monopolization case. This heavy obligation is unprecedented in the case law, and the D.C. Circuit has expressly rejected it. *Microsoft*, 253 F.3d at 79 ("To require that § 2 liability turn on a plaintiff's ability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anti-competitive actions."). Like the Commission in *Beltone*, the *Microsoft* court held that the minimal prima facie showing is not statistical "but for" world evidence, but reasonable evidence. *Compare Beltone*, 100 F.T.C. at 209 ("reasonably clear evidence of probable overall competitive harm") *with Microsoft* 253 F.3d at 79 ("'reasonably appear[s] capable of making a significant contribution to . . . maintaining monopoly power.'" (quoting 3 Phillip E. Areeda & Herbert Hovenkamp, Antitrust Law ¶651c, at 78 (1996))).

By insisting on direct pricing evidence and a "but for world" foreclosure rate, Commissioner Wright and the Academic Amici also would completely ignore harm to non-price competition. Because their tests focus myopically on short-term price competition, they have nothing to say about distributor-customers being deprived of an attractive choice in the marketplace, or improved service quality, or even the potential for innovation. Harm of this sort may not be easily quantifiable or fit neatly into economic models, but courts do not solve this problem by limiting the scope of the antitrust laws. The Sherman Act protects against harm to non-price competition, too. *See supra* Section II.

C. Courts Can Draw Reasonable Inferences of Competitive Harm from Industry Structure Evidence

Commissioner Wright and the Academic Amici ignore reasonable inferences to be drawn from industry structure evidence, which is critical in monopolization cases. The potential harms from exclusive dealing are much more likely in markets with incumbent monopolists than in more competitive markets. A firm in a highly competitive market typically has to offer some inducements to distributors or customers for them to accept restrictive terms like exclusive dealing, because these purchasers have the option to transfer their business to rivals. In contrast, a monopolist by definition does not face this competitive check from rivals. Steven C. Salop, *Economic Analysis of Exclusionary Vertical Conduct: Where Chicago Has Overshot the Mark*, *in* How the Chicago School Overshot the Mark 141, 150 (Robert Pitofsky ed., 2008). As McWane did here, a monopolist can *impose* exclusive dealing on distributors since the distributors have no alternatives to which they can turn. Amici's assertion that manufacturers compete for exclusives, Academic Amici Br. at 9, is entirely inapplicable to a monopolist protected by barriers to entry.

Likewise, in a highly competitive market, excluding a single rival likely will have little-to-no impact on actual price, because un-excluded rivals will simply replace the lost competition. However, in a monopolized market, monopoly prices will be the status quo when the exclusive dealing begins. Excluding a rival likely will preserve higher prices, because the absence of effective rivalry will insulate the monopolist from competitive pressure.[8] When a monopolist engages in exclusive dealing, it is much more likely the monopolist *will* preserve its pricing power as a consequence of successful exclusion, which the Sherman Act forbids. The practice

[8] As noted above, the anticompetitive effect is the persistence of the monopoly price, not a price increase.

is much more likely to be competitively harmful, absent substantial countervailing efficiencies.

These distinctions based on industry structure help explain why courts have stated that a monopolist's "activities are examined through a special lens," and "[b]ehavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." *Kodak*, 504 U.S. at 488, 112 S. Ct. at 2093 (Scalia, J., dissenting); *see Dentsply*, 399 F.3d at 187 ("Behavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist."); *LePage's*, 324 F.3d at 151-52 ("[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint on a monopolist's behavior."). As a result, courts view exclusive dealing by a monopolist with greater suspicion than exclusive dealing by a non-monopolist. *See, e.g.*, *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 597-98 (1st Cir. 1993) (Boudin, J.); *Microsoft*, 253 F.3d at 70; *Dentsply*, 399 F.3d at 197.

The assertion that exclusive dealing is common throughout the economy and "usually procompetitive," Academic Amici Br. at 4, is irrelevant. This statement simply reflects that most industries are to some degree competitive, rather than monopolistic. It would be false and very misleading to suggest that exclusive dealing *by a monopolist* is common and "usually procompetitive." Indeed, neither the Dissent nor the Academic Amici makes that extreme argument.

D. Courts Can Draw Reasonable Inferences of Competitive Harm from Anticompetitive Intent and the Absence of Cognizable Efficiencies

Commissioner Wright and the Academic Amici fail to acknowledge that the Commission found that McWane's conduct was expressly designed to foreclose competition. This reasonably contributed to its finding of competitive harm. It is also significant that the Commission found McWane's conduct had no actual cognizable efficiencies.[9]

McWane's anticompetitive intent and the absence of cognizable efficiencies are relevant evidence tending to support a finding of competitive harm. First, the evidence that McWane had an anticompetitive purpose—supported by its own prediction that its conduct would exclude competitors and allow it to maintain its

[9] The amicus brief of the United Steelworkers in support of McWane asserts that protection of domestic jobs is a cognizable efficiency. *See* Br. for United Steelworkers at 5. In light of the antitrust laws being a "consumer welfare prescription," *Reiter*, 442 U.S. at 343, 99 S. Ct. at 2333, however, the courts have recognized only efficiencies that help consumers. *See, e.g.*, *Leegin*, 551 U.S. at 890-92, 127 S. Ct. at 2715-16 (explaining how resale price maintenance agreements can, in theory, stimulate competition and benefit consumers); *LePage's*, 324 F.3d at 163 (cognizable efficiencies must relate to "the enhancement of consumer welfare.") (quoting *Data Gen. Corp. v. Grumman Sys. Corp.*, 36 F.3d 1147, 1183 (1st Cir. 1994)). *See also* Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 10 (2010) (cognizable efficiencies enhance a "firm's ability and incentive to compete, which may result in lower prices, improved quality, enhanced service, or new products.").

monopoly—reinforces the other evidence showing that the conduct was anticompetitive. Second, the absence of cognizable efficiencies rebuts the claim that McWane's conduct increased competition. Its only remaining defense would be that the conduct failed to succeed in harming competition—contrary to the Commission's findings. In contrast to McWane's exclusive dealing policy, all of the examples of benign exclusive dealing cited by the Academic Amici arguably have cognizable efficiencies. Academic Amici Br. at 8-15.

CONCLUSION

For all of these reasons, the petition should be denied.

Respectfully submitted,

AMERICAN ANTITRUST INSTITUTE

s/ Daniel Gustafson

DANIEL E. GUSTAFSON
GUSTAFSON GLUEK LLP
Canadian Pacific Plaza
120 South 6th Street, Suite 2600
Minneapolis, MN 55402
(612) 333-8844

ALBERT A. FOER
RANDY M. STUTZ
SANDEEP VAHEESAN
AMERICAN ANTITRUST INSTITUTE
2919 Ellicott Street, NW
Washington, DC 20008
(202) 905-5420

September 5, 2014

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)(C)

Pursuant to Fed. R. App. P. 29(d), this amicus brief is proportionally spaced, has a type face of 14 points or more, and contains 6,987 words.

s/ Daniel E. Gustafson

September 5, 2014

CERTIFICATE OF SERVICE

I hereby certify that on September 5, 2014, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Eleventh Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

s/ Daniel E. Gustafson