No. 15-706

In the Supreme Court of the United States

MCWANE, INC., PETITIONER

v.

FEDERAL TRADE COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

In mid-2009, petitioner was the sole supplier in the market for domestically manufactured ductile iron pipe fittings. When Star Pipe Products (Star) announced that it would enter that market, petitioner threatened to withhold its products from any customer that purchased domestically manufactured fittings from Star. The Federal Trade Commission found petitioner liable for unlawful monopoly maintenance, and the court of appeals affirmed. The questions presented are as follows:

1. Whether, as a matter of law, Star's acquisition of limited market share categorically precludes a finding that petitioner engaged in unlawful monopoly maintenance.

2. Whether a firm may avoid liability for anticompetitive behavior by claiming that its conduct is justified by "any normal business purpose," including a desire to retain market share.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-51a) is reported at 783 F.3d 814. The opinion of the Federal Trade Commission (Pet. App. 68a-108a) and the initial decision of the Administrative Law Judge (Pet. App. 161a-636a) are not reported but are available at https://www.ftc.gov/enforcement/cases-proceedings/101-0080b/mcwane-inc-star-pipe-products-ltd-matter.

JURISDICTION

The judgment of the court of appeals was entered on April 15, 2015. A petition for rehearing was denied on August 6, 2015 (Pet. App. 52a-53a). The petition for a writ of certiorari was filed on November 4, 2015. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Ductile iron pipe fittings connect the pipes in large-scale water distribution systems, which are typically used and maintained by governmental water authorities and their contractors. Pet. App. 3a. About 100 varieties of fittings can fulfill most project needs, but a full line includes many less-commonly used pieces that are essential to some projects. *Ibid.*; *id.* at 214a-215a. Manufacturers almost never sell fittings directly to end-users. Instead, they sell them to middleman distributors, which maintain relationships with end-users by providing services that manufacturers cannot replicate. *Id.* at 3a. Because manufacturers do not sell directly to end-users, a manufacturer's access to distributors is "critical" to its business success. *Id.* at 90a.

A waterworks project typically begins when a water authority issues a "specification" for required products. Pet. App. 3a. Competing contractors solicit bids from distributors, who in turn seek quotes from manufacturers. Most projects involve "open specifications," which permit the use of products manufactured anywhere in the world. Others involve "domestic specifications" that require the use of U.S.-made products. *Ibid.* Since 2003, domestic-only projects have accounted for approximately 15%-20% of all U.S. fittings sales. *Id.* at 324a.

a. Petitioner manufactures fittings both in the United States and in China. Pet. App. 74a. At all relevant times, petitioner owned the only U.S. foundry devoted to fittings production; until 2009, other manufacturers sold only imported fittings. *Id.* at 5a. Because it faced no competition before 2009 in the domestic-only market, petitioner's prices for domestically manufactured fittings were much higher than its prices for physically identical fittings sold for open-specification projects. *Id.* at 330a-331a. The price difference did not simply reflect the higher costs of domestic manufacturing: Petitioner's profit margins were also substantially greater for domestically made fittings. *Id.* at 332a-333a.

Star Pipe Products is a smaller and more specialized company that, until 2009, sold only imported fittings and therefore competed with petitioner only in the market for open-specification projects. That year, however, federal stimulus legislation prompted a surge in projects with domestic-only specifications, enticing Star to enter the market for domestically manufactured fittings. Pet. App. 333a. Star investigated the possibility of acquiring its own U.S. foundry, *ibid.*, while jump-starting its market entry by contracting with third-party U.S. "jobber" foundries, which produced raw fittings to Star's specifications and sent them to a Star facility for finishing. *Id.* at 334a-336a. That outsourcing arrangement was far less operationally efficient in the long run than owning a foundry tailored to fittings production. *Id.* at 77a-78a, 334a-336a. But because stimulus-related procurement had begun, Star proceeded with this plan in the short term while investigating options for acquiring its own foundry. *Id.* at 5a.

Star entered the domestic-only market in the second half of 2009. At that time, Star was able to sell only the most commonly used domestic fittings, but it planned to expand its offerings over time. Pet. App. 336a-337a. Most major distributors were willing to give Star some of their domestic fittings business, but few could do without petitioner's fuller line. *Id.* at

562a-569a. Some were also "reluctant to rely on a supplier without its own foundry." *Id.* at 92a.

Petitioner worried that competition from Star would lead to lower prices and narrower profit margins. Petitioner's senior Vice President stated that his "chief concern" was that competition would cause "the domestic market" to "get[] creamed from a pricing standpoint just like the non-domestic market has been driven down in the past." Pet. App. 187a, 339a; see *id.* at 340a (petitioner feared "[e]rosion of domestic pricing if Star emerges as a legitimate competitor"). Petitioner's leaders warned that the company's "distributors will continually pressure us to 'do something' (lower prices)," such that petitioner would "always see downward [pricing] pressure in the future." *Id.* at 340a-341a. One of petitioner's executives explained that, to prevent that result, "we need to make sure that they don't reach any critical market mass that will allow them to continue to invest and receive a profitable return." *Id.* at 339a. Petitioner therefore devised a plan to "[f]orce" Star "to absorb the costs associated with having a more full line before they can secure major distribution." *Id.* at 342a.

b. On September 22, 2009, in a letter to its distributors, petitioner announced the exclusivity mandate at issue here, which ultimately became known as the Full Support Program. Pet. App. 5a. As implemented, the policy provided that, if distributors purchased domestic fittings from another source, petitioner would refuse to sell them any additional fittings or to pay them already-accrued rebates. *Id.* at 88a; 346a-347a. The policy provided for two narrow exceptions: Distributors would escape punishment "where [petitioner's] products were not readily available, [or] where the customer bought domestic fittings and accessories along with another manufacturer's ductile iron pipe." *Id.* at 6a. Petitioner offered no additional discounts, rebates, or other consideration in exchange for the new restrictions; the mandate was simply a new condition on continued access to its products and on previously accrued rebates. *Id.* at 579a.

Although petitioner now describes this exclusivity mandate as a "rebate policy" (Pet. 6), it told distributors not only that they would forfeit rebates, but also "that they would no longer be able to buy domestic fittings from [petitioner] if they purchased domestic fittings from Star." Pet. App. 88a. Petitioner's national sales manager explained the new policy to his sales force as follows:

> - What are we going to do if a customer [*i.e.*, a distributor] buys Star domestic? We are not going to sell them our domestic.
> - This means the customer will no longer have access to our domestic. * * *
> - Once [distributors] use Star, they can't EVER buy domestic from us.
> - For [distributors] with multiple branches * * * if one branch uses Star, every branch is cut off.

Id. at 345a-346a (ellipses omitted).[1]

[1] In the September 22 letter announcing the Full Support Program, petitioner stated that distributors who purchased from other manufacturers "may forgo participation in any unpaid rebates [they had accrued] for domestic fittings and accessories or shipment of their domestic fitting and accessory order of [petitioner's] products for up to 12 weeks." Pet. App. 344a. However, the executive in charge of petitioner's fittings division noted that, "[a]lthough the words 'may' and 'or' were specifically used" in the

Petitioner first implemented its Full Support Program against Hajoca Corporation. Pet. App. 76a. After one Hajoca branch purchased fittings from Star, petitioner cut off sales of domestically manufactured fittings to all Hajoca branches (including those that had complied with the policy), and it withheld rebates from Hajoca. *Id.* at 76a-77a. In early 2010, the Federal Trade Commission (Commission or FTC) notified petitioner that it was investigating the company's exclusionary practices, and petitioner responded by resuming sales of domestic fittings to some but not all Hajoca branches. *Id.* at 577a.

Other distributors, which collectively accounted for most of the market, submitted to petitioner's exclusivity mandate. Pet. App. 42a-43a. Their executives testified that they were unwilling to risk purchasing from Star, lest petitioner cut them off from less-common domestic fittings that were available only from petitioner. *Id.* at 577a-578a. Distributors canceled orders with Star and withdrew quote requests, and Star saw a "dramatic reduction" in such requests. *Id.* at 77a. Even when Star offered to sell at prices lower than petitioner's, customers refused to deal with Star because they feared losing access to petitioner's full line of fittings. *Ibid.* By 2010, Star's share of the domestic market had increased only to 5%, and by the end of 2011 it had grown to slightly under 10%. *Id.* at 8a. Most of that growth occurred after petitioner learned in early 2010 that the Commission had com-

September 22 letter, "the market has interpreted the communication in the more hard line 'will' sense." *Id.* at 346a. He added that "[v]iolations will result in" not only "loss of accrued rebates," but also "[l]oss of access" to petitioner's products. *Id.* at 347a.

menced a federal antitrust investigation. *Id.* at 364a, 577a.

As petitioner had intended, the Full Support Program prevented Star from "reach[ing] any critical market mass that w[ould] allow [it] to continue to invest and receive a profitable return" in the domestic market. Pet. App. 339a. *Inter alia*, the mandate made it infeasible for Star to procure its own domestic fittings foundry, which would have allowed Star to stop relying on inefficient outsourcing to jobber foundries, would have reduced production and shipping costs, and would have enabled Star to compete more effectively with petitioner on prices. *Id.* at 376a-377a; see *id.* at 77a-78a, 94a. In the absence of such efficient competition, petitioner was able to maintain and even increase its supracompetitive prices and profits in the domestic-only market, despite Star's limited entry into the market. *Id.* at 85a.

2. On January 4, 2012, the Commission issued a seven-count administrative complaint charging petitioner with violating Section 5 of the FTC Act. See 15 U.S.C. 45. Section 5 prohibits "unfair methods of competition" and encompasses practices that violate Section 2 of the Sherman Act. See 15 U.S.C. 2. Count six of the complaint—the only count on which the Commission ultimately found petitioner liable—charged that petitioner's exclusivity mandate constituted unlawful monopoly maintenance.

a. An administrative law judge (ALJ) conducted a two-month trial and issued a decision on May 1, 2013. Pet. App. 161a-636a. On count six, the ALJ found that the relevant market was the market for domestically manufactured fittings, *id.* at 239a-243a, 410a-424a; that petitioner had monopoly power in that market, *id.*

at 323a-337a, 543a-554a; and that petitioner's Full Support Program was anticompetitive, lacked an efficiency justification, and was unlawful, *id.* at 338a-377a, 555a-591a.

b. The Commission affirmed in relevant part. Pet. App. 68a-108a. While acknowledging that exclusive dealing may have potential benefits, the Commission also recognized that exclusivity "can harm competition under certain circumstances" and "can be particularly troubling when imposed by a monopolist." *Id.* at 85a-86a. In this case, the Commission found that petitioner's exclusivity requirement had foreclosed Star "from accessing a substantial share of distributors," prevented Star from "achiev[ing] efficient scale," and "thereby rais[ed] costs and slow[ed] or prevent[ed] effective entry." *Id.* at 89a-90a. As a result, Star continued to rely on inefficient outsourcing arrangements rather than acquiring its own specialized foundry. *Id.* at 92a. Those arrangements raised Star's costs and further eroded its sales because some distributors were reluctant to purchase from a supplier without its own foundry. *Ibid.* The Commission found that petitioner's policy thus "harmed competition by increasing barriers to entry and allowing [petitioner] to maintain its monopoly position." *Id.* at 89a.

The Commission further found that petitioner had demonstrated no procompetitive benefit from its exclusive-dealing policy. Pet. App. 97a-99a. Petitioner had argued that its mandate was necessary to keep sales volumes high enough to fill unused capacity at its foundry, but the Commission rejected that argument, observing that a mere desire to preserve market share does not qualify as a procompetitive benefit that can outweigh anticompetitive effect. *Id.* at 97a;

see *ibid.* ("[Petitioner] has proffered no explanation as to how its Full Support Program benefits consumers.") (citation omitted). In any event, the Commission found, "contemporaneous evidence belie[d] [petitioner's] contention that its exclusive dealing policies were motivated by a desire to gain volume in order to preserve operations at [petitioner's] domestic foundry." *Id.* at 98a. The Commission issued a cease-and-desist order "prohibit[ing petitioner] from requiring exclusivity from its customers." *Id.* at 106a.

Commissioner Wright dissented in relevant part. Pet. App. 109a-160a. He agreed with the majority that the relevant question was "whether the Full Support Program * * * harmed competition." *Id.* at 112a. He also agreed that "ample record evidence" supported the conclusion "that the Full Support Program harmed [petitioner's] rival Star." *Ibid.* He nonetheless found insufficient evidence "that consumers of domestic pipe fittings are worse off as a result of [petitioner's] conduct" so "that [petitioner's] conduct has had an adverse effect on competition." *Id.* at 113a-114a (emphasis omitted).

3. The court of appeals affirmed. Pet. App. 1a-51a. In upholding the Commission's finding that petitioner possessed monopoly power in the domestic-only fittings market, the court explained that this finding was based on several considerations: petitioner's possession at all relevant times of at least a 90% share of the market, "far exceeding the levels that courts typically require to support a *prima facie* showing of monopoly power"; the existence of "substantial barriers to entry in the domestic fittings market"; and evidence that Star's "entry [into the market] had no effect on [petitioner's] prices." *Id.* at 26a-27a (brackets and citation

omitted); see *id.* at 27a ("[Petitioner's] ability to control prices in the market provided direct evidence of its monopoly power.") (brackets and internal quotation marks omitted).

The court of appeals rejected petitioner's argument that Star's modest gain in market share should preclude, as a matter of law, a finding of monopoly power. While recognizing that "the limited entry and expansion of a competitor sometimes may cut against" a finding of monopoly status, the court pointed to "evidence of [petitioner's] overwhelming market share (90%), the large capital outlays required to enter the domestic fittings market, and [petitioner's] undeniable continued power over domestic fittings prices." Pet. App. 30a; see *id.* at 29a n.11 (distinguishing other cases based on petitioner's relatively commanding share of the market and the existence of "significant entry barriers").

The court of appeals also affirmed the Commission's finding that petitioner's exclusivity program was anticompetitive. The court rejected petitioner's argument that the program "could not harm competition because it was short-term and voluntary (rather than a binding contract of a longer term)." Pet. App. 33a-34a (brackets and internal quotation marks omitted). The court explained that the "practical effect" of the exclusivity mandate "was to make it economically infeasible for distributors to switch to Star." *Id.* at 35a (internal quotation marks and ellipsis omitted). The court further observed that, although companies sometimes "compete for exclusivity by offering procompetitive inducements (e.g., lower prices, better service)," petitioner had imposed the Full Support Program "unilaterally" on all distributors and had offered them “no discount, rebate, or other consideration” in exchange. *Id.* at 36a (internal quotation marks omitted).

The court of appeals further explained that, under established doctrine, “unlawful maintenance of a monopoly is demonstrated by proof that a defendant has engaged in anticompetitive conduct that *reasonably appears* to be a *significant contribution* to maintaining monopoly power.” Pet. App. 40a (quoting *United States* v. *Dentsply Int'l, Inc.*, 399 F.3d 181, 187 (3d Cir. 2005), cert. denied, 546 U.S. 1089 (2006), and citing *United States* v. *Microsoft*, 253 F.3d 34, 79 (D.C. Cir. 2001) (en banc)). The court upheld the Commission’s determination that this burden was met because petitioner’s conduct had “made it infeasible for distributors to drop the monopolist [petitioner] and switch to Star” and had thereby “deprived Star of the revenue needed to purchase its own domestic foundry, forcing it to rely on inefficient outsourcing arrangements and preventing it from providing meaningful price competition with [petitioner].” *Id.* at 44a.

The court of appeals further explained that, although the exceptions to petitioner’s exclusivity mandate had allowed Star to make some sales after market entry, monopolists can be “liable for anticompetitive conduct where, as here, the targeted rival gained market share—but less than it likely would have absent the conduct.” Pet. App. 43a. The court also emphasized that Star’s entry into the market had not caused petitioner to reduce its own prices for domestically manufactured fittings. *Id.* at 44a-45a.

Finally, the court of appeals held that petitioner had identified no genuine “procompetitive justifications for its conduct.” Pet. App. 49a. Petitioner asserted, as a purported procompetitive justification for its conduct, "that the Full Support Program was necessary to retain enough sales to keep its domestic foundry afloat." *Ibid.* The court agreed with the Commission that petitioner's desire to keep more business for itself was "not an unlawful end, but neither [was] it a pro-competitive justification" that would immunize otherwise anticompetitive conduct. *Ibid.* (quoting *Microsoft*, 253 F.3d at 71). The court also agreed with the Commission's finding that "maintaining domestic prices and profitability," rather than increased efficiency, was petitioner's true goal. *Id.* at 50a.

ARGUMENT

Petitioner (Pet. 18) contends that a firm cannot, as a matter of law, exercise monopoly power or be liable for exclusionary conduct "[i]f a competitor has successfully and substantially entered the market despite the existence of exclusionary practices." See Pet. 17-25. Petitioner also argues (Pet. 25-32) that any normal business justification for exclusionary conduct will immunize that conduct from liability. The decision below is correct and does not conflict with any decision of this Court or any other court of appeals. The factual peculiarities of this case would also make it a poor vehicle for resolving any issue of general importance. Further review is not warranted.

1. Absent a sufficient justification, an exclusive-dealing arrangement constitutes an "unfair method[] of competition" under the Federal Trade Commission Act, see 15 U.S.C. 45, if it enables a firm to acquire or maintain "monopoly power" in the relevant market. *United States* v. *Grinnell Corp.*, 384 U.S. 563, 570-571 (1966) (construing Sherman Act); see *FTC* v. *Motion*

Picture Advert. Serv. Co., 344 U.S. 392, 395 (1953) (exclusive-dealing arrangement that violates the Sherman Act "is therefore an 'unfair method of competition' within the meaning of § 5(a) of the Federal Trade Commission Act"). Monopoly power is the ability "to control prices or exclude competition." *Grinnell*, 384 U.S. at 571. The existence of such power may be proved directly or indirectly. Where there is direct evidence that a firm has profitably raised prices above competitive levels, "the existence of monopoly power is clear." *United States* v. *Microsoft*, 253 F.3d 34, 51 (D.C. Cir. 2001) (en banc). Alternatively, "monopoly power may be inferred from a firm's possession of a dominant share of a relevant market that is protected by entry barriers." *Ibid.* The inquiry is highly fact-dependent, so that "[t]he varying circumstances of each case determine the result." *United States* v. *E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956); see *Maple Flooring Mfrs.' Ass'n* v. *United States*, 268 U.S. 563, 579 (1925) ("[E]ach case * * * must be determined upon the particular facts disclosed by the record.").

a. In this case, both direct and indirect evidence support the Commission's finding that petitioner possessed monopoly power in the market for domestically manufactured fittings. The Commission relied in part on evidence "of Star's inability to constrain [petitioner's] pricing for domestic fittings." Pet. App. 30a. Before Star entered the domestic-only market, petitioner's dominant position in that market allowed it to set prices and extract profits that far exceeded what it could obtain in the more-competitive market for open-specification fittings. *Id.* at 331a-333a. And even after Star's entry, petitioner "continued to sell domestic fittings for domestic-only [projects] at prices that earned significantly higher gross profits than [its prices] for non-domestic fittings." *Id.* at 30a (internal quotation marks omitted). "Indeed, [petitioner's] prices and profits for domestic fittings rose in 2010, the year after Star's entry." *Ibid.*; see *id.* at 85a. Petitioner's "ability to control prices in the market provided direct evidence of its monopoly power." *Id.* at 27a (brackets and internal quotation marks omitted).

The Commission also viewed petitioner's dominant market share, and the existence of "substantial barriers to entry in the domestic fittings market," as independent evidence of petitioner's monopoly power. Pet. App. 26a (citation omitted). During all relevant times, petitioner had between 90% and 100% of the domestic-only fittings market, a market share that "far exceed[s] the levels that courts typically require to support a *prima facie* showing of monopoly power." *Ibid.* (citation omitted). The Commission also identified "substantial barriers to entry" by competitors, including "a significant capital investment" that would be required to help new entrants "overcome existing relationships between existing manufacturers, and the distributors, and end users, in addition to developing hundreds of patterns and moldings." *Id.* at 28a (brackets and internal quotation marks omitted); see *id.* at 84a (citing manufacturing challenges and testing and certification requirements). Although "Star, as an established player in the overall fittings market, did not face all of these obstacles," it "still needed to purchase its own foundry or contract with third-party domestic foundries," and "the Full Support Program itself posed a barrier to entry by shrinking the number of available distributors." *Ibid.*; see *id.* at 30a ("[L]arge capital outlays [are] required to enter the domestic fittings market.").

For the most part, petitioner does not contest the Commission's factual findings.[2] Instead, petitioner argues (Pet. 18) that it lacked monopoly power as a matter of law because (in petitioner's view) Star had "successfully and substantially entered" the domestic-fittings market. See Pet. 17-19. Star had less than a 5% market share a year after entering the domestic-only market, and by the end of 2011 its market share was slightly under 10%. Pet. App. 8a. According to petitioner, those market-share figures categorically "preclude the conclusion that [petitioner] exercised

[2] Petitioner does dispute the Commission's finding that barriers to entry into the domestic-only market were substantial and that, to reach efficient scale, Star needed greater sales volumes to justify the cost of acquiring its own foundry. Petitioner's challenge to those findings (Pet. 22-25) is factbound and meritless. Petitioner criticizes the Commission for relying on what it characterizes as "self-serving testimony from Star executives" (Pet. 25), but petitioner failed to respond to that testimony with its own contrary evidence. Petitioner also suggests (Pet. 23) that, because Star had successfully used a "virtual manufactur[ing]" model to compete in the open-specification fittings market, it could have used the same model to succeed in the domestic-only market "*without* relying on [an] expensive, dedicated foundr[y]." The Commission correctly rejected that argument. Pet. App. 94a n.14. Imported fittings benefit from the efficiencies of low-cost, high-volume production in foundries abroad. *Id.* at 331a. But because a manufacturer cannot sell imported fittings in the domestic-only market, it must either rely on non-dedicated "jobber" foundries in the United States or obtain its own domestic foundry. The Commission found (*id.* at 77a-78a, 334a-336a), and petitioner conceded below (C.A. Br. 2, 29, 52-53), that Star's reliance on jobber foundries made it much less efficient than if it had obtained a dedicated domestic foundry.

monopoly power," Pet. 18, despite petitioner's exclusionary conduct and its continued ability to charge monopoly prices.

Petitioner does not appear to argue that a firm that begins with a 100% market share (as petitioner had before 2009) is categorically exempt from liability for monopoly maintenance so long as it allows a new entrant to make *some* sales. Such an approach would all but eliminate monopoly maintenance as a basis for antitrust liability and would thwart the basic purposes of competition law. Exclusive dealing by a monopolist can harm competition and consumer welfare whether it diminishes a rival's market share in absolute terms or, as here, "slow[s] the rival's expansion by requiring it to * * * rely at least temporarily on inferior or more expensive outlets." *United States* v. *Dentsply Int'l, Inc.*, 399 F.3d 181, 191 (3d Cir. 2005), cert. denied, 546 U.S. 1089 (2006) (citation omitted); see *Conwood Co.* v. *United States Tobacco Co.*, 290 F.3d 768, 789-790 (6th Cir. 2002) (finding evidence "sufficient to show that competition suffered during the relevant period" because defendants' behavior had "restricted growth" of their competitors), cert. denied, 537 U.S. 1148 (2003); see also *Rebel Oil Co.* v. *Atlantic Richfield Co.*, 51 F.3d 1421, 1440 (9th Cir.) ("The fact that entry has occurred does not necessarily preclude the existence of 'significant' entry barriers."), cert. denied, 516 U.S. 987 (1995). In such circumstances, "[c]onsumer injury results from the delay that the dominant firm imposes on the smaller rival's growth." *Dentsply*, 399 F.3d at 191 (quoting Phillip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1802c, at 64 (2d ed. 2002)).

Rather than arguing that Star's acquisition of *some* (*i.e.*, more than zero) market share categorically precludes the Commission's finding of unlawful monopoly maintenance, petitioner contends that liability is foreclosed if a competitor has "successfully and substantially entered the market." Pet. 18. Petitioner identifies no sound basis, however, for regarding Star's market entry as either "successful" or "substantial." As the Commission explained, Star's entry into the domestic market was *not* successful from an antitrust perspective because it had no constraining effect on petitioner's monopoly prices. Pet. App. 89a-92a, 94a; see *id.* at 376a-377a. Petitioner asserts that a competitor's successful entry into a market "limits the ability of an alleged monopolist to charge supracompetitive prices" in that market, Pet. 24; but Star's entry failed to produce any such effect, see Pet. App. 44a-45a, 85a. To the extent that petitioner contests the Commission's assessment of the relevant facts, the petition presents no legal issue of broad importance warranting this Court's review. If petitioner's argument instead is that market share of slightly less than 10% constitutes "successful[] and substantial[]" entry as a matter of law, petitioner identifies no judicial decision endorsing such a rule and no plausible reason for this Court to adopt it. See *id.* at 26a (court of appeals explains that petitioner's 90+% market share "far exceed[s] the levels that courts typically require to support a *prima facie* showing of monopoly power").

Petitioner's argument is further weakened by its reliance on Star's sales after early 2010, when the Commission's antitrust investigation began. The Commission notified petitioner in January 2010—four months after the Full Support Program was announced—that it had opened an investigation into petitioner's exclusivity mandate. Pet. App. 577a. Petitioner immediately softened its policy by resuming some previously discontinued business with Hajoca. *Ibid.* Some (though not all) other distributors concluded that, "given the announced FTC investigation," the "risk" of rigid enforcement of the exclusivity mandate had become "significantly less." *Id.* at 364a. The rise in Star's market share to slightly under 10% by the end of 2011 therefore is most reasonably viewed as evidence that early antitrust scrutiny mitigated the potential anticompetitive effect of the policy that petitioner had adopted nearly two years earlier. At a minimum, it significantly reduces the probative value of evidence regarding Star's market-share growth after January 2010. Cf. *United States* v. *General Dynamics Corp.*, 415 U.S. 486, 504-505 (1974) (actions taken to improve antitrust defendant's litigating position have "extremely limited" probative value).

b. Petitioner asserts (Pet. 19-22) that the court of appeals' finding of monopoly power conflicts with decisions of other circuits, which (according to petitioner) hold that a competitor's "successful entry" categorically precludes a finding of monopoly power. Petitioner's assertion of a conflict assumes that Star's entry was "successful." As explained above, that factual premise is incorrect.

Petitioner is also incorrect that other courts of appeals have found an absence of monopoly power based solely on a competitor's market entry. The decisions cited by petitioner, like the decision below, were based on multiple case-specific considerations and did not place conclusive weight on any particular piece of evidence. Petitioner identifies no sound reason to believe that any other circuit would have reached a different outcome on the facts of this case than did the court below.

In *United States* v. *Syufy Enterprises*, 903 F.2d 659 (9th Cir. 1990), a chain of Las Vegas movie theaters was accused of anticompetitive behavior due to its purchase of three rivals. The court noted "universal agreement that monopoly power is the power to exclude competition or control prices." *Id.* at 664. After examining the record, it declined to overturn the district court's finding that the defendant "possessed neither power." *Ibid.*

In discussing the "voluminous" evidence that the defendant in *Syufy Enterprises* "lacked the power to exclude competitors," 903 F.2d at 669, the Ninth Circuit explained, *inter alia*, that the defendant's "exclusive exhibition rights" had fallen from "91% of all the first-run films in Las Vegas * * * to 39%," *id.* at 666. The court also relied on the government's "conce[ssion] that there [we]re no structural barriers to entry in the market," *ibid.*, because the theater industry was not "the type of industry, like heavy manufacturing or mining, which requires onerous front-end investments," *id.* at 667. The Ninth Circuit relied as well on the district court's finding that the defendant "lacked the power to set prices," *id.* at 671, as evidenced by the fact that the defendant "at all times paid license fees far in excess of the national average," *id.* at 669-670. In this case, by contrast, petitioner at all times had more than 90% of the relevant market; the Commission found evidence of "significant entry barriers," including "the large capital outlays required to enter the domestic fittings market," Pet. App. 29a n.11, 30a; and petitioner's exclusive-dealing policy "prevented meaningful price competition," *id.* at 89a, and facilitated petitioner's "continued power over domestic fittings prices," *id.* at 30a.

The Second Circuit's decision in *Tops Markets, Inc.* v. *Quality Markets, Inc.*, 142 F.3d 90 (1998), similarly rested on multiple case-specific factors. There, a supermarket chain was alleged to have excluded its competitors from entering the local market. In rejecting that allegation, the court pointed to "several facts in the record suggesting that there [we]re no barriers to entry," including evidence "that undeveloped land on which to locate a supermarket ha[d] been available at all relevant times"; evidence that "Wegmans, a major competitor * * * , quickly gained a respectable share of the market"; and the plaintiff's "own contemporaneous market studies," which "indicate[d] that [the defendant] did not have such a strong market position as to enable it to exclude competitors." *Id.* at 99. The court rejected the plaintiff's attempt to rely *solely* on the defendant's high market share, observing that "no other evidence—such as barriers to entry, the elasticity of demand, or the nature of defendant's conduct—supports the conclusion that [the defendant] can control prices or exclude competition." *Ibid.*; see *ibid.* (explaining that market pressures prevented the defendant from "rais[ing] its prices above their competitive level"). In this case, the Commission relied on precisely that sort of "other evidence," including substantial entry barriers and petitioner's continued ability to charge monopoly prices and earn monopoly profits. See pp. 8-9, *supra*; see also Pet. App. 29a n.11 (distinguishing *Tops Markets* based on evidence in this case of "significant entry barriers").

Petitioners' reliance (Pet. 21) on *Omega Environmental, Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), cert. denied, 525 U.S. 812 (1998), is likewise misplaced. In examining the defendants' exclusive-dealing contracts, the Ninth Circuit did not address any issue of monopoly power, but rather applied Section 3 of the Clayton Act, 15 U.S.C. 14, which does not require a showing of monopoly power. See 127 F.3d at 1161 (noting that plaintiffs did not appeal district court's rejection of their monopolization claim). In any event, the court of appeals there also relied on multiple factors. The court observed that the defendants' contracts "foreclosed" only 38% of the market; that there was "undisputed evidence of potential alternative sources of distribution," such as "direct sales to end-users"; that there was no "credible evidence to support [the plaintiffs'] contention that [the exclusive-dealing] policy actually deterred entry into this market"; and that there was "undisputed evidence [of] increasing output, decreasing prices, and significantly fluctuating market shares among the major manufacturers." *Id.* at 1162-1165. Those case-specific considerations have no analogue here.[3]

[3] Amici Law Professors argue (Br. 21-24) that the Commission and the court of appeals should have required more-rigorous and more-definitive proof that, absent the exclusive-dealing mandate, Star would have followed through on plans (such as acquiring a foundry) to enhance its efficiency and thereby compete more effectively with petitioner on price. See note 2, *supra* (discussing evidence on this point). As the court of appeals recognized, however, "[t]o require that § 2 liability turn on a plaintiff's ability or inability to reconstruct the hypothetical marketplace absent a defendant's anticompetitive conduct would only encourage monopolists to take more and earlier anticompetitive action." Pet. App. 40a (quoting *Microsoft*, 253 F.3d at 79). The court correctly found

c. The factual peculiarities of this case also make it a poor vehicle for addressing the circumstances under which exclusive-dealing agreements may be "highly efficient" or "pose no competitive threat." Pet. 14 (citation omitted). As petitioner observes, exclusive-dealing agreements are common, and in competitive markets "they often promote interbrand competition by encouraging companies to compete to become an exclusive supplier." Pet. 15 (emphasis omitted). Such agreements "can stimulate competition not only on price but also on innovation and selection." *Ibid.* The Commission (Pet. App. 85a-86a) and the court of appeals (*id.* at 20a-21a) agreed with those propositions.

Petitioner's Full Support Program, however, was not an *agreement* at all. The mandate was "unilaterally imposed by fiat upon all distributors," and "it resulted in no competition to become the exclusive supplier and no discount, rebate, or other consideration offered in exchange for exclusivity." Pet. App. 36a (internal quotation marks omitted). Under the Program, any distributor that purchased from Star would not only "forgo participation in any unpaid rebates" it

it sufficient that petitioner was shown to have "engaged in anticompetitive conduct that reasonably appears to significantly contribute to maintaining monopoly power." *Ibid.* Dissenting Commissioner Wright's sufficiency analysis (*id.* at 113a-114a; see p. 9, *supra*) is flawed for substantially the same reasons. In any event, the evidentiary issue that amici and Commissioner Wright have discussed is not presented in the certiorari petition. Petitioner instead asserts the distinct legal argument that, if a competitor has "successfully and substantially" entered the market, liability for monopoly maintenance is altogether precluded, no matter how clear the evidence that the competitor's entry would have been *more* successful and *more* beneficial to consumers but for the monopolist's exclusionary conduct.

had accrued, *id.* at 344a, but also "would no longer be able to buy domestic fittings from [petitioner]," *id.* at 88a. As the court of appeals observed, the mandate at issue here "arguably posed a greater threat to competition than a conventional exclusive dealing contract, as it lacked the traditional procompetitive benefits of such contracts." *Id.* at 35a-36a.

The decisions that petitioner cites (see Pet. 14-16) for the proposition that exclusive dealing can be beneficial are particularly inapposite because they addressed a theory of liability fundamentally different from the one at issue here. The plaintiffs in those cases alleged that *non-monopolist* defendants had violated Section 1 of the Sherman Act or Section 3 of the Clayton Act by entering into exclusive-dealing agreements. In this case, by contrast, the Commission found that petitioner had engaged in unlawful monopoly maintenance, in violation of Section 2 of the Sherman Act, by forcing exclusive-dealing requirements upon its distributors. Decisions approving exclusive-dealing arrangements between non-monopolists are of little relevance here, since "[b]ehavior that otherwise might comply with antitrust law may be impermissibly exclusionary when practiced by a monopolist." *Dentsply*, 399 F.3d at 187 (internal quotation marks omitted); accord *Microsoft*, 253 F.3d at 70-71.

Petitioner similarly misses the mark by noting that exclusive-dealing agreements are less likely to be anticompetitive if they involve "short-term" and "easily terminable" contractual provisions. Pet. 15. Distributors could not "easily termina[te]" the Full Support Program. Except under the Program's limited exceptions, a distributor that did business with Star forfeited all ability to buy fittings from petitioner. Once that sanction was triggered, the distributor could resume doing business with petitioner, if at all, only if it stopped buying domestically manufactured fittings from any other source—*i.e.*, stopped buying them altogether—for at least another "12 weeks." Pet. App. 344a. As petitioner's national sales manager aptly remarked when instructing his sales force how to describe this policy to distributors, "[o]nce [distributors] use Star, they can't EVER buy domestic from us." *Id.* at 346a (ellipses omitted). And even if a distributor that had bought domestic fittings from Star was allowed to resume purchases from petitioner, it could avoid future penalties only by returning to petitioner as its exclusive supplier. Petitioner's Full Support Program therefore "required exclusive dealing for as long as [petitioner] desired." *Id.* at 91a.

In sum, unlike many exclusive-dealing agreements, the Full Support Program did not "stimulate competition." Pet. 15. To the contrary, as the Commission found, "the practical effect of [petitioner's mandate] was to make it economically infeasible for distributors to drop [petitioner's] full line of domestic fittings and switch to Star." Pet. App. 91a; see *id.* at 42a-47a.

2. Petitioner argues (Pet. 25-32) that anticompetitive conduct cannot give rise to antitrust or FTC Act liability if it is supported by a "valid business justification." Pet. 25 (capitalization altered). Petitioner asserts (Pet. 30) that the Full Support Program was justified by the "efficiency-enhancing" goal of "reduc[ing] costs." By rejecting that defense, petitioner claims, the court below "exacerbate[d] an entrenched circuit split" regarding "what constitutes a valid business justification for allegedly anticompetitive con-

duct." Pet. 25-26. No such conflict exists, and the decision below is correct.

a. Petitioner's legal argument rests on a false premise, since the evidence shows that efficiency and cost-reduction were not the actual bases for petitioner's policy. Petitioner asserts (without identifying any record support) that its Full Support Program was intended "to reduce costs by (1) making efficient use of considerable excess production capacity at its Alabama foundry, and (2) limiting the likelihood that it would bear the expense of carrying a full range of pipe fittings and accessories only to have its core offerings 'cherrypicked' by competitors who opted to limit production to the most popular fittings." Pet. 30. The Commission found, however, that "contemporaneous evidence belies [petitioner's] contention that its exclusive dealing policies were motivated by a desire to gain volume in order to preserve operations at [its] domestic foundry." Pet. App. 98a. Instead, the Commission found that petitioner's true objective was to exclude competition in order "to maintain domestic prices and profitability"—that is, to preserve its monopoly pricing and profits. *Ibid.* The court of appeals upheld that factual finding. *Id.* at 50a-51a. Petitioner does not contend that a desire to maintain monopoly prices and profits is a "valid business justification." See Pet. 26-27.[4]

[4] The record also contradicts petitioner's suggestion (Pet. 16) that the Full Support Program was necessary to prevent Star from "'cherrypick[ing]' * * * the most popular fittings" while leaving petitioner alone to sell the less-common fittings. The court of appeals observed that petitioner might have prevented cherry-picking "by lowering its price for the more common products and increasing its price for the less common products. * * * [Peti-

Petitioner asserts that the Commission and court of appeals should not have "deemed [petitioner's] justifications 'pretextual' merely because contemporaneous documentation reflected competitive animus." Pet. 32. But the evidence did not merely reflect petitioner's "competitive animus" (*i.e.*, petitioner's desire to prevail over Star). Rather, the evidence refuted any inference that the Full Support Program was designed to make use of excess production capacity, to reduce costs, or to enhance "efficiency" in any other way. Contemporaneous documents demonstrated that petitioner acted out of concern that, if Star "stay[ed] in the business," petitioner's "distributors will continually pressure [it] to 'do something' (lower prices)," and by concern that petitioner "w[ould] always see downward pressure in the future." Pet. App. 340a; see *ibid.* (petitioner feared "[e]rosion of domestic pricing if Star emerges as a legitimate competitor"). A desire to avoid such "downward pressure" on prices and a desire to preserve monopoly profits are not valid efficiency justifications.

b. Even if the record did not make clear that petitioner's true goal was the maintenance of monopoly prices and profits, petitioner is wrong to assert that "[a]n alleged monopolist may not be liable for exclusionary conduct that is 'justified by any normal business purpose.'" Pet. 26 (quoting *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608

tioner] has not explained why such a strategy would not work, how the collapse of the full line of products would harm consumers, or why full-line forcing was instead necessary." Pet. App. 50a (brackets and internal quotation marks omitted). In this Court as well, petitioner identifies no barrier to the strategy the court below described.

(1985)). In making that argument and asserting a related circuit conflict, petitioner conflates two distinct theories of antitrust liability.

The antitrust claim in *Aspen Skiing* rested on "an assumption that a firm with monopoly power has a duty to cooperate with its smaller rivals * * * in order to avoid" antitrust liability. 472 U.S. at 587. The Court held that no such general duty to cooperate exists, and that "even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor." *Id.* at 600. Requiring monopolists to collaborate with rivals and to "share the source of their advantage" with them would pose special concerns, including the practical complexities of judicially supervised "[e]nforced sharing" and the impaired "incentive[s] for the monopolist, the rival, or both to invest" in socially beneficial assets. *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407-408 (2004); see *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 483 n.32 (1992) ("[A]s a general matter a firm can refuse to deal with its competitors."). Those concerns are irrelevant here, since petitioner was found liable for imposing an exclusivity mandate on its customers (distributors), not for refusing to deal with its rival (Star).

The court of appeals decisions cited by petitioner emphasize this distinction. For example, in *Illinois ex rel. Burris* v. *Panhandle E. Pipe Line Co.*, 935 F.2d 1469 (7th Cir. 1991), cert. denied, 502 U.S. 1094 (1992), the court held that the defendant had acted lawfully when it refused to sell services to competitors on new, less-advantageous terms but had no "desire to maintain its monopoly position by excluding competition." *Id.* at 1483. The court explained that "a monopolist's duties are negative—to refrain from anticompetitive conduct—rather than affirmative—to promote competition." *Id.* at 1484; see *Olympia Equip. Leasing Co.* v. *Western Union Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986) ("Today it is clear that a firm with lawful monopoly power has no general duty to help its competitors, whether by holding a price umbrella over their heads or by otherwise pulling its competitive punches."), cert. denied, 480 U.S. 934 (1987). Similarly in *Christy Sports, LLC* v. *Deer Valley Resort Co.*, 555 F.3d 1188 (10th Cir. 2009), the court rejected the plaintiff's claim that a ski resort was "required to invite competitors onto its property to rent skis to its patrons" under a profit-sharing agreement, because only in "rare circumstances" does "a refusal to cooperate with competitors" give rise to antitrust liability. *Id.* at 1194.

By contrast, where (as here) a monopolist *excludes* its competitors—rather than simply refusing to partner with them—a mere desire to advance its own business interests does not justify the monopolist's conduct. Although retention of as much business as possible is not "an unlawful end" for a monopolist to pursue, "neither is it a procompetitive justification * * * for [anticompetitive] exclusive dealing." *Microsoft*, 253 F.3d at 71. Indeed, because monopolists that engage in anticompetitive conduct typically do so in order to further their own economic interests, petitioner's approach would render the offense of monopoly maintenance a virtual dead letter.[5]

[5] Petitioner would be liable even under the standards articulated in the "duty to cooperate" cases on which it relies. The defendant in *Aspen Skiing* was held liable because its "unilateral termination of a voluntary (and thus presumably profitable) course of dealing

c. Rather than the "normal business purpose" test that arguably applies in some "duty to cooperate" cases like *Aspen Skiing*, a different test applies where a monopolist acts to exclude its competitors. Once the government "demonstrat[es] anticompetitive effect, then the monopolist may proffer a 'procompetitive justification' for its conduct. If the monopolist asserts a procompetitive justification—a nonpretextual claim that its conduct is indeed a form of competition on the merits because it involves, for example, greater efficiency or enhanced consumer appeal—then the burden shifts back to the [government] to rebut that claim." *Microsoft*, 253 F.3d at 59 (citation omitted).

In this case, the Commission concluded, and the court of appeals agreed, that petitioner's asserted "procompetitive justifications for its conduct" were not "persuasive." Pet. App. 49a. Petitioner argued that it sought to "mak[e] efficient use of considerable excess production capacity" at its own foundry. Pet. 30. But petitioner never claimed, let alone tried to prove, that keeping its foundry busy by freezing out its rival would have translated into benefits *for the market*, such as "lower prices, improved service or quality, or other consumer benefits." Pet. App. 50a (citation omitted). Petitioner simply wanted to retain

suggested a willingness to forsake short-term profits to achieve an anticompetitive end" in the long term. *Verizon Commc'ns*, 540 U.S. at 409 (emphasis omitted); see *Aspen Skiing*, 472 U.S. at 608-609. Petitioner refused to sell on preexisting—and hence presumably profitable—terms to distributors such as Hajoca if they did business with Star. In its own words, petitioner chose to "take a hit now" by cutting off such distributors in order to avoid "tak[ing] a hit for decades" once Star reached "critical market mass" and became able to impose "downward pressure" on prices. Pet. App. 339a-340a (hyphens omitted).

as much market share as possible. Although that desire was "not an unlawful end," it could not justify anticompetitive conduct aimed at "reducing the output of [petitioner's] only rival." *Id.* at 49a-50a (internal quotation marks omitted).

If petitioner had responded to Star's entry by lowering its prices below monopoly levels, rather than imposing an exclusivity mandate unaccompanied by new price concessions, this case would have been far closer to the cases cited by petitioner (Pet. 27-28) in which the defendant took competition-enhancing steps in connection with challenged conduct. For example, in *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983), defendant Pacific Scientific Company "agreed to sell its product (mechanical snubbers) to Grinnell at a specially low price and Grinnell agreed to take nearly all its snubber requirements from Pacific." *Id.* at 228. The First Circuit rejected an antitrust challenge to the arrangement, relying in part on "the existence of legitimate business justifications for the agreements from the perspectives of both buyer and seller." *Id.* at 237. For the buyer, the exclusive agreement "assured Grinnell a stable, favorable price." *Ibid.* Those facts stand in stark contrast to the facts of this case, in which petitioner offered distributors no benefit in return for its exclusivity mandate and in fact imposed higher prices on them during the exclusionary period.

Similarly, in *HDC Medical, Inc.* v. *Minntech Corp.*, 474 F.3d 543 (8th Cir. 2007), the defendant modified the design of its own dialyzer reprocessing machine, which made the machine incompatible with the reprocessing solution sold by its rival. *Id.* at 546. The defendant also told customers "that it would not honor a one-year warranty on its reprocessing machines if any product other than [its own reprocessing solution] was used in the machine." *Id.* at 549. The court held that the warranty policy was supported by a "legitimate business justification" because the defendant could not "predict how its machines would react to another manufacturer's reprocessing solution" and therefore "could not feasibly warrant the performance of the product." *Ibid.*

The court of appeals in *HDC Medical* separately found that the defendant had not acted anticompetitively by modifying its machines in a way that allegedly "prevent[ed] the use of competitors' reprocessing agents." 474 F.3d at 550. Again, the change benefited consumers, since the modifications "were made in order to aid users in properly diluting the reprocessing agent" and thus "to ensure patient safety." *Ibid.* Other changes were found necessary "to aid consumers in keeping better records and to comply with necessary government regulations." *Ibid.* Petitioner identifies no such consumer-welfare justification here. Its conduct was designed to *reduce* market efficiency by impeding competition, thereby prolonging its monopoly pricing and profits.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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