No. 15-706

IN THE

Supreme Court of the United States

McWANE, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

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

BRIEF *AMICI CURIAE* OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE NATIONAL ASSOCIATION OF MANUFACTURERS IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF CONTENTS. i

TABLE OF CITED AUTHORITIES ii

INTEREST OF *AMICI CURIAE* 1

SUMMARY OF ARGUMENT. 3

ARGUMENT. 5

I. Exclusivity Contracts Offer Many Economic Benefits and Are Pro-Competitive.. 5

A. Exclusive-Dealing Arrangements Are Pro-Competitive. 6

B. Exclusive-Dealing Arrangements Serve The Interests of Suppliers, Distributors, and Consumers. 11

II. This Court Should Provide Clarity Regarding the Law Applicable to Exclusivity Contracts. 13

A. There Is a Lack of Clarity Regarding the Legality of Exclusivity Contracts. 14

B. The Lack of Clarity Regarding Antitrust Liability May Chill Pro-Competitive Exclusive-Dealing Agreements.. 17

CONCLUSION 19

TABLE OF CITED AUTHORITIES

Page

Cases

Barry Wright Corp. v. ITT Grinnell Corp.,
724 F.2d 227 (1st Cir. 1983) 7

Brown Shoe Co. v. United States,
370 U.S. 294 (1962) 12

CDC Techs., Inc. v. IDEXX Lab., Inc.,
186 F.3d 74 (2d Cir. 1999) 16

Concord Boat Corp. v. Brunswick Corp.,
207 F.3d 1039 (8th Cir. 2000) 15-17

Continental T.V., Inc. v. GTE Sylvania Inc.,
433 U.S. 36 (1977) 4-5, 9, 14

E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.,
357 F.3d 1 (1st Cir. 2004) 6, 14

FCC v. Fox Television Stations, Inc.,
132 S. Ct. 2307 (2012) 17

Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.,
386 F.3d 485 (2d Cir. 2004) 8

In re McWane, Inc. & Star Pipe Products, Ltd.,
2014-1 Trade Cas. (CCH) 78620,
2014 WL 556261 (F.T.C. Jan. 30, 2014) 3-4, 13

Page

Leegin Creative Leather Prods., Inc. v. PSKS, Inc., 551 U.S. 877 (2007). 9, 18

McWane, Inc. v. FTC, 783 F.3d 814 (11th Cir. 2015) . . . . *passim*

Menasha Corp. v. News Am. Mktg. In-Store, Inc., 354 F.3d 661 (7th Cir. 2004) 12

Omega Envtl., Inc. v. Gilbarco, Inc., 127 F.3d 1157 (9th Cir. 1997). 6

Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc., 555 U.S. 438 (2009). 17-18

Paddock Publ'ns, Inc. v. Chicago Tribune Co., 103 F.3d 42 (7th Cir. 1996). 12

Race Tires Am., Inc. v. Hoosier Racing Tire Corp., 614 F.3d 57 (3d Cir. 2010). 6, 11-12

Reiter v. Sonotone Corp., 442 U.S. 330 (1979). 12

Republic Tobacco Co. v. N. Atl. Trading Co., 381 F.3d 717 (7th Cir. 2004). 6

Roland Mach. Co. v. Dresser Indus., Inc., 749 F.2d 380 (7th Cir. 1984). 9, 16

Page

Ryko Mfg. Co. v. Eden Servs.,
823 F.2d 1215 (8th Cir. 1987) 9-10, 16

Standard Oil Co. of California v. United States,
337 U.S. 293 (1949) 2-4, 14

State Oil Co. v. Khan,
522 U.S. 3 (1997) 18

Sterling Merch., Inc. v. Nestle, S.A.,
656 F.3d 112 (1st Cir. 2011) 12-13

Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.,
373 F.3d 57 (1st Cir. 2004) 8, 13

Tampa Electric Co. v. Nashville Coal Co.,
365 U.S. 320 (1961) . . . . *passim*

Town of Concord, Mass. v. Boston Edison Co.,
915 F.2d 17 (1st Cir. 1990) 17, 18

U.S. Healthcare, Inc. v. Healthsource, Inc.,
986 F.2d 589 (1st Cir. 1993) 11

United States v. Dentsply Int'l, Inc.,
399 F.3d 181 (3d Cir. 2005) 16

United States v. Microsoft Corp.,
253 F.3d 34 (D.C. Cir. 2001) 6

Page

Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP, 540 U.S. 398 (2004). 2

ZF Meritor, LLC v. Eaton Corp., 696 F.3d 254 (3d Cir. 2012) 7, 15-17

Statutes and Other Authorities

Antitrust Modernization Commission, *Report and Recommendations* (2007). 18

Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 Antitrust L.J. 659 (2001). 11

Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* Handbook of Antitrust Economics (Paolo Buccirossi ed., 2008). 12

Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm* 70 Antitrust L.J. 311 (2002) . . . . *passim*

Richard A. Posner, Antitrust Law: An Economic Perspective (1st ed. 1976) 11

Page

Richard M. Steuer, *Customer-Instigated Exclusive Dealing*, 68 Antitrust L.J. 239 (2000) . . . . *passim*

Robert H. Bork, *The Antitrust Paradox* (1978) 12

INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest federation of businesses and associations. The Chamber represents three hundred thousand direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country.

An important function of the Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the Nation's business community. *See, e.g.*, *MHN Gov't Servs., Inc. v. Zaborowski*, No. 14-1458; *Merrill Lynch, Pierce, Fenner & Smith, Inc. v. Manning*, No. 14-1132; *Campbell-Ewald Co. v. Gomez*, No. 14-857.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States. Its membership comprises small and large manufacturers in every industrial sector and in all fifty States. The manufacturing industry employs over twelve million men and women, contributes roughly $2.1 trillion

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1. Pursuant to this Court's Rule 37.6, counsel for *amici curiae* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity other than *amici curiae*, their members, or their counsel has made a monetary contribution intended to fund the preparation or submission of this brief. All parties have received timely notice of *amici curiae*'s intent to file and consented to the filing of this brief.

to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for two-thirds of all private-sector research and development.

The NAM's mission is to enhance the competitiveness of manufacturers and to improve American living standards by shaping a legislative and regulatory environment conducive to economic growth. Indeed, the NAM is the leading advocate for laws and policies that help American manufacturers compete in the global economy and create jobs throughout the United States. To that end, the NAM regularly participates as *amicus curiae* in cases of particular importance to the manufacturing industry. *See, e.g.*, *Tyson Foods, Inc. v. Bouaphakeo*, No. 14-1146.

Many of the Chamber's and the NAM's members regularly employ exclusive-dealing arrangements because these arrangements foster stable business relationships, improve supply chains, reduce prices, and promote interbrand competition. Indeed, both suppliers and distributors often prefer them because of their many economic benefits. The Chamber and the NAM therefore have a strong interest in preserving the lawfulness of exclusive-dealing arrangements.

The Chamber and the NAM also share a strong interest in clarity in this area of the law. This Court has repeatedly warned that a lack of clarity in antitrust law has the tendency to harm consumer welfare by chilling pro-competitive conduct—"the very conduct the antitrust laws are designed to protect." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414 (2004). Yet, the Court has not addressed exclusive dealing law since its decisions in *Standard Oil Co. of California* *v. United States*, 337 U.S. 293 (1949), and *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961). This lack of guidance has resulted in substantial confusion among the lower courts regarding the lawfulness of exclusive-dealing arrangements.

SUMMARY OF ARGUMENT

This case concerns Petitioner McWane, Inc.'s "Full Support Program," an exclusive-dealing arrangement Petitioner employed in connection with the sale of the domestic pipe fittings it manufactures. Under the Full Support Program, Petitioner would cease providing its domestic pipe fittings to distributors who purchased domestic pipe fittings from Petitioner's competitor Star Pipe Products or deny those distributors rebates to which they would otherwise be entitled. The FTC brought an enforcement action against Petitioner, alleging among other things that the Full Support Program constituted unlawful monopolization of the domestic pipe fittings market and thus violated Section 2 of the Sherman Act.

In a split decision, the FTC concluded that Petitioner had indeed monopolized the market for domestic pipe fittings. As Commissioner Wright explained in dissent, because FTC enforcement counsel made "no effort to establish harm to competition directly, such as by demonstrating that [Petitioner]'s conduct had a deleterious effect upon price or output in the Domestic Fittings market," the FTC majority based its monopolization ruling only on evidence demonstrating that Petitioner's Full Support Program foreclosed Star from access to certain distributors. *In re McWane, Inc. & Star Pipe Products, Ltd.*, 2014-1 Trade Cas. (CCH) 78620, 2014 WL 556261, at

*46 (F.T.C. Jan. 30, 2014) (Wright, dissenting). Moreover, that any harm to Star would translate to consumer harm was highly speculative given that Star grew at the same rate before and after Petitioner implemented the Full Support Program. *Id.* at *62.

Commissioner Wright emphasized in dissent that, under modern economic and antitrust analysis, determining the extent of foreclosure and thus the harm to competitors "is not the end of the economic analysis." *Id.* at *49. Rather, it "is a starting point for a broader inquiry" into whether the exclusive-dealing arrangement harms consumer welfare. *Id.* Commissioner Wright noted the lack of clarity in the law of exclusive dealing, highlighting the fact that this Court had not considered the issue since *Tampa Electric Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961) and explaining that *Tampa Electric* was out of step with *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), and the Court's modern antitrust jurisprudence. *Id.* at *50-*51.

The Eleventh Circuit affirmed in an opinion largely adopting the FTC's analysis. The court underscored the lack of clarity on exclusive dealing law: "Neither the Supreme Court nor this Circuit has provided a clear formula with which to evaluate an exclusive dealing monopoly maintenance claim." *McWane*, *Inc. v. FTC*, 783 F.3d 814, 833 (11th Cir. 2015). In the absence of any guidance on exclusive-dealing law, the Eleventh Circuit simply applied *Tampa Electric* and the Court's earlier decision in *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949) without ever citing *Continental T.V.* or the Court's more recent antitrust jurisprudence.

Amici agree with Petitioner that the decision below is contrary to the Court's modern antitrust jurisprudence. *Amici* write separately to explain that, in the absence of guidance from this Court, the lack of clarity regarding the legality of exclusive-dealing arrangements threatens to discourage manufacturers and suppliers from entering into exclusive-dealing arrangements. These arrangements have many pro-competitive benefits and thus are often preferred by manufacturers and suppliers. But the lack of clear rules regarding antitrust liability risks harm to consumer welfare by chilling pro-competitive conduct.

ARGUMENT

I. Exclusivity Contracts Offer Many Economic Benefits and Are Pro-Competitive.

This Court, the lower courts, and antitrust scholars agree that vertical restraints are generally pro-competitive. *See, e.g., Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977). And it is widely recognized that exclusive-dealing arrangements, which are a type of vertical resraint, are particularly pro-competitive. They provide stability for manufacturers, distributors, and retailers, lower prices for consumers, increase interbrand competition through brand presentation, and numerous other pro-competitive benefits.

To obtain these benefits, parties on both sides of exclusive-dealing arrangements, such as manufacturers and distributors, often seek them out. *See* Richard M. Steuer, *Customer-Instigated Exclusive Dealing*, 68 Antitrust L.J. 239, 242 (2000). As a result, exclusive-dealing arrangements are common in the American economy and courts have generally treated them as legitimate business decisions within the antitrust sphere.

A. Exclusive-Dealing Arrangements Are Pro-Competitive.

In the half century since this Court last addressed exclusivity contracts, *see Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320 (1961), lower courts have uniformly found that they generally promote competition that benefits consumers. "[I]t is widely recognized that in many circumstances [exclusive-dealing arrangements] may be highly efficient … and pose no competitive threat at all. Ordinarily, such agreements pose a threat to competition only in very discrete circumstances." *E. Food Servs., Inc. v. Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004) (Boudin, C.J.) (internal citation omitted); *see also Race Tires Am., Inc. v. Hoosier Racing Tire Corp.*, 614 F.3d 57, 76 (3d Cir. 2010) (same). For that reason, exclusive-dealing arrangements "are only rarely the source of serious antitrust concern." Jonathan M. Jacobson, *Exclusive Dealing, "Foreclosure," and Consumer Harm,* 70 Antitrust L.J. 311, 312 (2002) ("*Exclusive Dealing*"). Accordingly, "[r]ather than condemning exclusive dealing, courts often approve them because of their procompetitive benefits." *Republic Tobacco Co. v. N. Atl. Trading Co.*, 381 F.3d 717, 736 (7th Cir. 2004).

As explained below, exclusive-dealing arrangements "serve many useful purposes," *United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001), and yield "well-recognized economic benefits," *Omega Envtl., Inc. v. Gilbarco, Inc.*, 127 F.3d 1157, 1162 (9th Cir. 1997).

Stability. The most common benefit to exclusive-dealing arrangements is stability. "In the case of the buyer, [exclusive-dealing contracts] may assure supply, afford protection against rises in price, enable long-term planning on the basis of known costs, and obviate the expense and risk of storage in the quantity necessary for a commodity having a fluctuating demand." *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 270 (3d Cir. 2012) (citation omitted). "From the seller's perspective, an exclusive dealing arrangement with customers may reduce expenses, provide protection against price fluctuations, and offer the possibility of a predictable market." *Id.* For example, requirements contracts, which are a type of exclusive dealing, "typically allow suppliers to anticipate demand while providing customers with protection against shortages of needed inputs." *Customer-Instigated Exclusive Dealing*, *supra*, at 242.

Then-Judge Breyer recognized the stability of exclusive-dealing arrangements for both buyers and sellers in his oft-cited opinion *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227 (1st Cir. 1983). As he explained for the First Circuit, "the [exclusive] contracts guaranteed a stable source of supply, and, perhaps, more important, they assure[] [buyers] a stable, favorable price. For [the seller], they allowed use of considerable excess [product] capacity; and they allowed production planning that was likely to lower costs." *Id.* at 237. Indeed, that court emphasized that such stability "from the perspectives of both buyer and seller" constitutes a "legitimate business justification[]" for exclusive-dealing arrangements. *Id.*

Stability itself is pro-competitive. Not only does it allow "a customer to assure itself a dependable source of supply under a requirements contract," *Customer-Instigated Exclusive Dealing*, *supra*, at 242, but it also provides the supplier with an "incentive to meet the customer's full purchase requirements steadily and reliably," which in turn will "justify the investment in production and transportation facilities sufficient to ensure that the buyer's needs are met," *Exclusive Dealing*, *supra*, at 359; *see also id.* ("Exclusive dealing can also be an important factor in this regard in providing an incentive for new entry."). Overall, exclusive-dealing arrangements "promot[e] stable, long-term business relationships." *Geneva Pharm. Tech. Corp. v. Barr Labs. Inc.*, 386 F.3d 485, 508 (2d Cir. 2004).

Lower Prices. Exclusive-dealing arrangements lead to lower prices for a number of reasons. They "lower the cost … of supplying [products] to customers []because most suppliers will cut prices in exchange for increased volume." *Stop & Shop Supermarket Co. v. Blue Cross & Blue Shield of R.I.*, 373 F.3d 57, 62 (1st Cir. 2004). They also force suppliers to offer better prices because "[a] supplier has a strong incentive to offer the best terms it can when it knows it is in a bidding situation and that only one bid will be chosen." *Customer-Instigated Exclusive Dealing*, *supra*, at 244.

Exclusive-dealing arrangements also lead to "logistical efficiencies within the customers' own operations by limiting the number of vendors with which they do business. The desire to deal with a small number of vendors may be motivated by space or other constraints, or by other benefits that can be achieved by dealing with fewer vendors." *Id.* at 245. Exclusivity contracts thus benefit customers by causing suppliers to lower prices.

Brand Presentation. It is well-recognized that vertical restraints tend to promote interbrand competition—"the primary concern of antitrust law." *See Cont'l T.V.*, 433 U.S. at 52 n.19. They do so by "encourag[ing] retailers to invest in tangible or intangible services or promotional efforts that aid the manufacturer's position as against rival manufacturers." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 890 (2007); *see also Cont'l T.V.*, 433 U.S. at 55.

Exclusive-dealing arrangements are a paradigmatic example of a vertical restraint that promotes interbrand competition. They encourage close business relationships that result in strong brand presentation. "A dealer who expresses his willingness to carry only one manufacturer's brand of a particular product indicates his commitment to pushing that brand; he doesn't have divided loyalties." *See Roland Mach. Co. v. Dresser Indus., Inc.*, 749 F.2d 380, 395 (7th Cir. 1984) (Posner, J.). Accordingly, the dealer "will necessarily have a greater incentive to push that brand than if it carries others as well." *Exclusive Dealing*, *supra*, at 357. This incentive fosters interbrand competition by ensuring "a more dedicated sales, service, and quality effort by the affected distributor or retailer." *Id.*

Other Pro-Competitive Efficiencies. Exclusive-dealing arrangements promote other pro-competitive efficiencies as well. For example, they prevent free-riding by other brands. "Where … the manufacturer engages in promotional activity that is designed to dovetail with the distributor's efforts, an exclusive dealing clause guarantees that the manufacturer's marketing investment will not be lost to other firms when the distributor makes his sales presentation to potential buyers." *Ryko Mfg. Co.*

v. Eden Servs., 823 F.2d 1215, 1234 n.17 (8th Cir. 1987); *see also Exclusive Dealing*, *supra*, at 358 ("Exclusive dealing also encourages suppliers to provide dealer-specific investments by eliminating or reducing the concern that the dealer will use the benefits provided in support of a competing brand.").

Exclusive-dealing arrangements also help to ensure quality. "In certain industries, qualifying new suppliers entails significant costs. Customers can minimize those costs by qualifying the smallest possible number of suppliers and doing business with those suppliers alone. If the customer promises to buy from a single supplier, the chosen supplier will have a strong incentive to meet the customer's quality demands." *Customer-Instigated Exclusive Dealing*, *supra*, at 243.

In addition, exclusive-dealing arrangements improve supply chains and provide an inexpensive alternative to vertical integration. Developing supply chains and retailer locations is a costly and sometimes inefficient undertaking, particularly for new entrants. And "vertical integration by merger is often inefficient and costly as compared with the partial integration that contractual exclusive dealing can achieve." *Exclusive Dealing*, *supra*, at 360. Contractual exclusivity permits the contracting partners to specialize. The manufacturer can focus on the product itself while its partners exploit their comparative advantage over supply chains and retail sales. *Id.*

Finally, exclusive-dealing arrangements can protect suppliers' intellectual property and confidential practices. *See Exclusive Dealing*, *supra*, at 360. "Dealers handling multiple competing product lines may encounter confidentiality concerns," as confidential information is more likely to be disclosed when a supplier sends that information to a distributor or retailer that manages competitors' products. *Id.* Exclusive dealing can prevent this problem. It "can also help intellectual property licensors prevent piracy" as there is less concern a distributor or retailer will disclose sensitive information (inadvertently or otherwise) when the manufacturer's product is the only one the distributor or retailer handles. *Id.* at 360 n.221 (citing Richard A. Posner, Antitrust Law: An Economic Perspective 230, 240-41 (1st ed. 1976)); *see also* Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why* Aspen *and* Kodak *Are Misguided*, 68 Antitrust L.J. 659, 672 (2001) ("[R]efusals to deal can protect theft of intellectual property.").

B. Exclusive-Dealing Arrangements Serve The Interests of Suppliers, Distributors, and Consumers.

Given the many economic benefits of exclusivity contracts, it is unsurprising that both suppliers and distributors often prefer them. *See generally Customer-Instigated Exclusive Dealing*, *supra*, at 242-47. Both are drawn to the "benign" purposes of exclusive dealing contracts, "such as assurance of supply or outlets, enhanced ability to plan, reduced transaction costs, creation of dealer loyalty, and the like." *U.S. Healthcare, Inc. v. Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993) (Boudin, J.). Similarly, "the competition to be an exclusive supplier may constitute 'a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress.'" *Race Tires*, 614 F.3d at

76 (quoting *Menasha Corp. v. News Am. Mktg. In-Store, Inc.*, 354 F.3d 661 (7th Cir. 2004) (Easterbrook, J.)). And "[e]nduring exclusive distribution contracts characterize markets that are recognized as competitive." *Paddock Publ'ns, Inc. v. Chicago Tribune Co.*, 103 F.3d 42, 47 (7th Cir. 1996) (Easterbrook, J.).

"That retailers and manufacturers *like* exclusive deals implies that they serve the interests of" consumers. *Menasha Corp.*, 354 F.3d at 663 (emphasis in original). Indeed, by employing exclusive-dealing arrangements, manufacturers "not only … make themselves better off but they also typically allow consumers to benefit from higher quality products and better service provision." Francine Lafontaine & Margaret Slade, *Exclusive Contracts and Vertical Restraints: Empirical Evidence and Public Policy*, *in* Handbook of Antitrust Economics 409 (Paolo Buccirossi ed., 2008). Exclusive-dealing arrangements thus serve the interests of the Sherman Act, which is above all "a 'consumer welfare prescription.'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (quoting Robert H. Bork, *The Antitrust Paradox* 66 (1978)). That rivals in the market may dislike the tough competition that exclusivity tends to promote is irrelevant, for "[i]t is competition, not competitors, which the Act protects." *See Brown Shoe Co. v. United States*, 370 U.S. 294, 344 (1962). Indeed, "[w]hen the consumers favor a product or practice, and only rivals squawk, the most natural inference is that the complained-of practice promotes rather than undermines competition, for what helps consumers often harms other producers." *Menasha Corp.*, 354 F.3d at 663.

In recognition of "their capacity to enable markets to operate more efficiently and benefit consumers," *Sterling*

Merch., Inc. v. Nestle, S.A., 656 F.3d 112, 123 (1st Cir. 2011), courts evaluating the legality of vertical exclusive-dealing agreements have imposed no general presumption against such agreements. *See, e.g.*, *Stop & Shop Supermarket*, 373 F.3d at 65 ("Because [exclusivity] agreements can achieve legitimate economic benefits … no presumption against such agreements exists today."). Thus, "such agreements are not subject to per se treatment, but are instead subject to rule of reason analysis." *Sterling Merchandising*, 656 F.3d at 123.

In sum, "courts have come to appreciate that the typical exclusive-dealing arrangement is entirely lawful—that exclusive dealing can serve important business purposes, and is often a preferred means for waging legitimate competition." *Exclusive Dealing*, *supra*, at 312. Specifically, exclusive-dealing arrangements "generally promote more effective distribution by increasing dedication and loyalty; and they can minimize free-riding, improve product quality, and ensure customers and suppliers of a reliable source of supply." *Id*.

II. This Court Should Provide Clarity Regarding the Law Applicable to Exclusivity Contracts.

This Court has not addressed exclusivity agreements since its decision over 50 years ago in *Tampa Electric*, *see Exclusive Dealing*, *supra*, at 323, a fact that did not escape the FTC below, *see In re McWane*, 2014 WL 556261, at *50 (Wright, dissenting).[2] Economic and antitrust theory

2. Even then, the focus in *Tampa Electric* was on the relevant market, *see* 365 U.S. at 329-33. To the extent *Tampa Electric* addressed exclusive dealing, it was only in a dictum, *see*

have made great strides since then, beginning with the Court's pathbreaking decision in *Continental T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36 (1977), but the lack of guidance from this Court regarding exclusive-dealing contracts has left the lower courts struggling to apply *Tampa Electric*, notwithstanding that it is outdated and out of line with modern antitrust law's focus on consumer welfare. Indeed, the court below underscored the problem: "Neither the Supreme Court nor this Circuit has provided a clear formula with which to evaluate an exclusive dealing monopoly maintenance claim." *McWane*, 783 F.3d at 833.

In the absence of guidance from this Court, confusion has reigned in the lower courts. They have adopted varying approaches to evaluating their lawfulness. This splintered jurisprudence leaves manufacturers and dealers without clarity as to the legality of exclusive-dealing arrangements and thus threatens to harm consumer welfare by chilling pro-competitive conduct.

A. There Is a Lack of Clarity Regarding the Legality of Exclusivity Contracts.

All courts agree that exclusive-dealing arrangements are analyzed under the rule of reason, *E. Food Servs.*, 357 F.3d at 8, but the agreement ends there, and substantial confusion remains as to how to apply this Court's precedent in *Tampa Electric.* Indeed, the lower courts have acknowledged that "[t]here is no set formula for

id. at 329, and it endorsed the Court's 1949 decision in *Standard Oil Co. of California v. United States*, 337 U.S. 293 (1949), which appeared to uphold a rule of *per se* liability for exclusive-dealing arrangements, *id.* at 305 (noting that such arrangements serve "hardly any purpose beyond the suppression of competition").

evaluating the legality of an exclusive dealing agreement." *ZF Meritor*, 696 F.3d at 271; *see also McWane*, 783 F.3d at 833.

Lacking clear direction from this Court, the lower courts have charted their own courses. Not surprisingly, they have gone in different directions. Indeed, the decision below is on one side or the other of nearly all of the lower courts' varying approaches. To begin, the lower courts generally frame the inquiry and relevant factors differently. The Third Circuit has stated that "modern antitrust law generally requires a showing of significant market power by the defendant, substantial foreclosure, contracts of sufficient duration to prevent meaningful competition by rivals, and an analysis of likely or actual anticompetitive effects considered in light of any procompetitive effects." *ZF Meritor*, 696 F.3d at 271 (internal citations omitted). On the other hand, while the Eighth Circuit frames the inquiry as involving market power, foreclosure, and the duration of the exclusivity, it omits a balancing of the pro-competitive and anti-competitive effects and looks to "entry barriers." *See Concord Boat Corp. v. Brunswick Corp.*, 207 F.3d 1039, 1059 (8th Cir. 2000) ("The principle criteria used to evaluate the reasonableness of a contractual arrangement include the extent to which competition has been foreclosed in a substantial share of the relevant market, the duration of any exclusive arrangement, and the height of entry barriers.").

Some courts have properly focused on whether exclusivity agreements harm consumers, explaining that "an exclusive dealing arrangement is unlawful only if the 'probable effect' of the arrangement is to substantially lessen competition, rather than merely disadvantage rivals." *ZF Meritor*, 696 F.3d at 271. Other courts, however, have focused primarily on competitor harm, centering the analysis on the extent to which exclusivity arrangements foreclose competitors from the market. *See, e.g.*, *McWane*, 783 F.3d at 837-40; *Concord Boat,* 207 F.3d at 1059-60.

Lower courts also differ with regard to the use of presumptions. Some courts have applied presumptions as short cuts in the analysis. The Seventh Circuit, for example, has held that "[e]xclusive-dealing contracts terminable in less than a year are presumptively lawful." *Roland*, 749 F.2d at 395; *see also Concord Boat*, 207 F.3d at 1059; *CDC Techs., Inc. v. IDEXX Lab., Inc.*, 186 F.3d 74, 81 (2d Cir. 1999). Others disagree with this approach, holding that short duration and easy terminability do not necessarily immunize exclusive-dealing arrangements from liability. *See United States v. Dentsply Int'l, Inc.*, 399 F.3d 181, 193 (3d Cir. 2005). Still others have resisted presumptions altogether. *See, e.g.*, *McWane*, 783 F.3d at 834 ("Legal presumptions that rest on formalistic distinctions rather than actual market realities are generally disfavored in antitrust law." (citation omitted)).

Further confusion exists as to whether the burden of proof should vary depending on the context of the exclusivity arrangement. Some courts "require a higher standard of proof" in cases "[w]here the exclusive dealing restraint operates at the distributor level, rather than at the consumer level." *Ryko*, 823 F.2d at 1235. But other courts have applied the same standard of proof to all exclusivity claims. *See, e.g., McWane*, 783 F.3d at 836.

On top of all these differences, courts have varied widely regarding how to evaluate when suppliers provide discounted pricing as an incentive to enter into exclusivity arrangements. Some courts have incorporated the Sherman Act's predatory-pricing analysis to determine the lawfulness of such arrangements, *see, e.g.*, *ZF Meritor*, 696 F.3d at 274-75; *Concord Boat*, 207 F.3d at 1061-63, whereas others have eschewed predatory-pricing analysis, *see, e.g.*, *McWane*, 783 F.3d at 827-42.

In short, confusion abounds. This Court's guidance is necessary to bring uniformity to the law of exclusive dealing.

B. The Lack of Clarity Regarding Antitrust Liability May Chill Pro-Competitive Exclusive-Dealing Agreements.

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *FCC v. Fox Television Stations, Inc.*, 132 S. Ct. 2307, 2317 (2012). This is particularly true with regard to exclusivity arrangements given this Court has "repeatedly emphasized the importance of clear rules in antitrust law." *Pac. Bell Tel. Co. v. Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009).

Because businesses typically take their cues on antitrust law from the courts, they "should take account of the institutional fact that antitrust rules are court-administered rules," *Town of Concord, Mass. v. Boston Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, C.J.). Those rules accordingly "must be administratively workable," *id.*, and "'must be clear enough for lawyers to explain them to clients,'" *Pac. Bell Tel. Co.*, 555 U.S. at 453 (quoting *Town of Concord*, 915 F.2d at 22).

As explained above, the Court's precedent on exclusive-dealing contracts is out of step with this Court's own modern antitrust jurisprudence, and the jurisprudence of the lower courts is in disarray. *See supra* pp. 14-17. Guidance and clarity from this Court on this area of the law are badly needed. Otherwise, "[t]he lack of clear standards may discourage conduct that is procompetitive or competitively neutral and thus may actually harm consumer welfare." Antitrust Modernization Commission, *Report and Recommendations* 83, 94 (2007).

Indeed, the Sherman Act's "common-law" approach requires that this Court provide guidance. "Just as the common law adapts to modern understanding and greater experience, so too does the Sherman Act's prohibition on 'restraint[s] of trade' evolve to meet the dynamics of present economic conditions. The case-by-case adjudication contemplated by the rule of reason has implemented this common-law approach." *Leegin*, 551 U.S. at 899 (citations omitted).

"In the area of antitrust law, there is a[n] … interest, well represented in this Court's decisions, in recognizing and adapting to changed circumstances and the lessons of accumulated experience." *State Oil Co. v. Khan*, 522 U.S. 3, 20 (1997). For that reason, "this Court has reconsidered its decisions construing the Sherman Act when the theoretical underpinnings of those decisions are called into serious question." *Id.* at 21.

As the Court's antitrust jurisprudence has developed over the last several decades, its decision in *Tampa Electric* has fallen increasingly out of step with the modern focus of antitrust law on consumer welfare. The absence of guidance from the Court on exclusive-dealing arrangements during that time has resulted in substantial confusion among the lower courts regarding how to evaluate these arrangements. Review is needed to clarify the law in this area and prevent the splintered jurisprudence among the lower courts from chilling pro-competitive conduct and harming consumer welfare.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for writ of certiorari.

Respectfully submitted,

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