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

REPLY BRIEF FOR PETITIONER

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PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The statement of the parties to the proceeding and the corporate disclosure statement included in the petition for a writ of certiorari remain accurate.

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According to the Government, there are no legal principles that control outcomes in antitrust cases. *Every* case concerning the existence of monopoly power (this case included) is "highly fact-dependent." Opp. 13. But even factual questions concerning the existence of monopoly power are governed by legal rules; and not every case disputing the existence of monopoly power is factbound. For example, this Court has held that "where new entry is easy, . . . summary disposition of the case is appropriate." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993).

Here, the courts of appeals are sharply divided "as a matter of law" on the question presented (*Tops Mkts., Inc. v. Quality Mkts., Inc.*, 142 F.3d 90, 99 (2d Cir. 1998)), and the Eleventh Circuit repeatedly acknowledged that "not all courts agree" on the core *legal* holdings in this case (Pet. App. 29a, 34a). The Government does not disagree; instead, it attempts to recharacterize these issues as factual questions and distinguish McWane's rebate policy by applying pejorative labels to the primary conduct at issue. But that conduct was materially and legally indistinguishable from business conduct that other circuits have upheld under the antitrust laws.

In *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 228-29 (1st Cir. 1983) (Breyer, J.), for example, the First Circuit concluded that a manufacturer with 94% of the domestic market for mechanical snubbers did not engage in an unlawful exclusionary practice by offering a discount to a purchaser in exchange for a one-year exclusive-dealing com-

mitment. As a result of that practice, a potential competitor "abandoned" its efforts to enter the market. *Id.* at 229. Here, in contrast, the Eleventh Circuit condemned McWane's Full Support Program—which provided distributors with rebates and access to McWane's full line of fittings in exchange for exclusivity—even though it did not prevent Star from successfully entering and capturing 10% of the domestic pipe fittings market in merely two years. The *facts* of these cases cannot account for their differing outcomes, especially where "determinations that specific conduct was anticompetitive in violation of the Sherman Act are questions of *law*." *Oahu Gas Serv., Inc. v. Pac. Res. Inc.*, 838 F.2d 360, 368 (9th Cir. 1988) (emphasis added). In truth, the only reason why the conduct in *Tops* and *Barry Wright* was upheld while the same conduct was condemned below is that the reviewing courts applied a different "rule of law." *Barry Wright*, 724 F.2d at 231.

The Government also relies on illusory distinctions and judgmental characterizations in seeking to avoid an entrenched circuit split over the legal standard for determining what constitutes a valid business justification for allegedly anticompetitive conduct. But just as an alleged monopolist's desire to utilize "considerable excess [industrial] capacity" and engage in "production planning that was likely to lower costs" is a "legitimate business justificatio[n]" for an exclusive-dealing policy in the First Circuit (*Barry Wright*, 724 F.2d at 237), so it should be in *all* circuits. The essential conduct does not cease to be lawful merely by characterizing the defendant as seeking to "keep more business for itself" (Opp. 12) or "preserve its monopoly pricing and profits" (*id.* at 25).

I. The Government Does Not Deny That Courts Of Appeals Are Divided Over Whether A Competitor's Successful Entry Precludes Monopoly Power

The Government concedes that exclusive-dealing arrangements, like McWane's, can have significant procompetitive benefits. *See* Opp. 8. The Government also acknowledges that questions regarding whether specific business conduct is anticompetitive under the antitrust statutes are for courts to decide "as a matter of law." Opp. (I), 10, 12; *accord Tops Mkts.*, 142 F.3d at 99; *Oahu Gas*, 838 F.2d at 368. And the Government does not appear to dispute that courts of appeals are divided over whether monopoly power can exist where a firm is unable to exclude significant competitors. The Government insists that the courts of appeals' decisions "did not place conclusive weight on any particular piece of evidence" (Opp. 18) and involved "multiple case-specific factors" (*id.* at 20), but fails to show why those factors are legally consequential or alter the *legal rule* that a competitor's rapid and successful entry precludes a finding of monopoly power.

Indeed, the Second Circuit explicitly held that a competitor's significant entry "*itself refutes* any inference of the existence of monopoly power that might be drawn" from the defendant's market share. *Tops Mkts.*, 142 F.3d at 99 (emphasis added). Likewise, the First Circuit made clear that the particular circumstances of a market do not dictate different rules of law for different defendants, lest such rules "prove counter-productive, undercutting the very economic ends they seek to serve." *Barry Wright*, 724 F.2d at 234. That is because, "unlike economics, law is an administrative system" that must not allow

"a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition." *Id.* Antitrust law, in other words, relies on core legal rules informed by background economic principles, and does not impose liability (and the chilling specter of treble damages) based upon *ad hoc* "case-specific factors." *See also Town of Concord, Mass. v. Bos. Edison Co.*, 915 F.2d 17, 22 (1st Cir. 1990) (Breyer, J.). The Government's factor-specific approach, in contrast, provides no legal rule at all.

Many of the Government's purported "facts" are in reality disputed questions of law. For example, the Government regards as a "fact" that Star made only a "modest gain in market share" during its first two years in the market. Opp. 10; *see also id.* at 17. Whether Star's entry was "modest" and "not successful from an antitrust perspective" (*id.* at 10, 17), however, is the *legal* issue presented here, and one that other courts of appeals have decided contrary to the Eleventh Circuit's rule. In *Tops Markets*, a competitor's "successful entry" refuted the existence of monopoly power "as a matter of law," notwithstanding the incumbent's "over-70 percent market share." 142 F.3d at 99. Likewise, the potential competitor in *Barry Wright* made *no* successful entry, yet the First Circuit concluded that an incumbent with a 94% market share did not engage in anticompetitive conduct by entering into a contractually-enforceable exclusive-dealing arrangement. 724 F.2d at 229. As these cases show, a firm can have a high market share without monopoly power or the ability to harm competition.

The Government argues that "no judicial decision" holds that a competitor's capture of 10% of the market is successful and substantial entry because

the incumbent's 90% market share exceeds "'the levels that courts typically require to support a *prima facie* showing of monopoly power.'" Opp. 17 (quoting Pet. App. 26a). The Government's argument, however, conflates two distinct concepts. It is one thing to say that a firm with a 90% market share has *prima facie* monopoly power, but it is quite another to conclude that monopolistic barriers to entry exist when a new competitor quickly captures 10% of the market. This case and the Tenth Circuit's decision in *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1125-26 (10th Cir. 2014), both stand for the latter proposition—and both holdings are irreconcilable with Second Circuit's decision in *Tops Market* and the Ninth Circuit's decision in *United States v. Syufy Enterprises*, 903 F.2d 659, 665 (9th Cir. 1990). *See* Pet. 17-25.

In a footnote, the Government also defends the Commission's conclusion that the market had "substantial" barriers to entry (Opp. 15 n.2), but that argument is yet another effort to dodge the Eleventh Circuit's legal error in concluding that McWane had monopoly power despite Star's successful entry. Star's entry and rapid growth proves that a successful competitor in this market need *not* have its own foundry. The Commission relied upon self-serving testimony by Star executives that McWane's Full Support Program prevented Star from performing even better with its own foundry. Antitrust claims, however, must be proven rigorously, with "economic evidence of monopoly power." *Díaz Aviation Corp. v. Airport Aviation Servs., Inc.*, 716 F.3d 256, 265 (1st Cir. 2013). Here, significantly, there was no economic proof that, despite Star's substantial entry, Star was constrained in any meaningful way by barriers to entry. *See* Pet. App. 510a ("Rather than offer its

own expert testimony analyzing economic data, Complaint Counsel chose an 'attack-the-other-expert' strategy.").

The Government characterizes McWane's Full Support Program as "punishment" imposed "'unilaterally'" on distributors. Opp. 4, 10. But pejorative labels do not change the underlying conduct, which is materially indistinguishable from other lawful exclusive-dealing arrangements. McWane offered distributors the option of purchasing their domestic fittings requirements from McWane and receiving the company's rebates and full line of fittings, or purchasing from Star and losing access to McWane's rebates and full line of fittings for up to 12 weeks, subject to certain exceptions. Pet. App. 344a. Distributors were free to make that choice each quarter, and many elected to purchase from Star. *See* Pet. 8 (citing Pet. App. 338a). Contrary to the Government's baseless assertion (Opp. 22), McWane's Full Support Program was no less an agreement between manufacturer and distributor—with offer, acceptance, and consideration—than the discount-for-exclusivity policy at issue in *Barry Wright*. *See* 724 F.2d at 229.

Nor are the Commission's legal conclusions cloaked as "findings" entitled to deference. No one agency has "the power authoritatively to interpret" the antitrust laws, *Lieberman v. FTC*, 771 F.2d 32, 37-38 (2d Cir. 1985), which are enforced by numerous federal and state authorities, as well as private plaintiffs. That is why the courts are "charged with filling the gaps[.]" *Chi. Mercantile Exch. v. SEC*, 883 F.2d 537, 547 (7th Cir. 1989); *accord Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 899 (2007) (courts apply a "common-law" approach to economic principles under the Sherman Act). In mo-

nopolization cases, Section 5 of the FTC Act merely implements the same background economic principles that govern all antitrust laws, and judicial applications of those principles must provide reasonably ascertainable "rules and precedents" that guide primary conduct. *Barry Wright*, 724 F.2d at 234.

In the same vein, the Government argues that McWane's rebate policy reflected a desire "to charge monopoly prices and earn monopoly profits" (Opp. 20), and insists that "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" (*id.* at 17). The Government fails to note, however, that the reason why the Commission gerrymandered the market definition to be the market "'for the supply of domestically manufactured fittings for use in . . . projects with domestic-only specifications'" (Pet. App. 23a) was that the American Recovery and Reinvestment Act of 2009 expanded the percentage of waterworks projects with domestic-only specifications for pipe fittings from 15-20% to nearly 30%. Pet. 5 (citing Pet. App. 324a). That surge in demand explains how prices for domestic fittings remained high even though McWane lacked monopoly power to exclude a significant competitor from the market. *See Brooke Grp.*, 509 U.S. at 232, 237. This is why Star's entry is the only dispositive fact, for it is "inconceivable" that an alleged monopolist can control price without the power to exclude new competitors from the market. *United States v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 392 (1956).

II. The Government's Mischaracterization Of McWane's Valid Business Justifications Cannot Alter The Lawfulness Of The Underlying Conduct

The Government focuses on expressions of competitive animus while ignoring or mischaracterizing McWane's valid business justifications. But competitive animus does not negate the existence of valid business justifications, and McWane's justifications are valid as a matter of law.

McWane's Full Support Program sought to reduce costs by making efficient use of excess production capacity at the Alabama foundry, and limiting the likelihood that McWane would bear the expense of carrying a full range of pipe fittings and accessories only to have its core offerings "cherrypicked" by competitors who manufactured only the most popular fittings. *See* Pet. 5-6 (citing Pet. App. 338a-339a, 345a). The Government recharacterizes these justifications as "a mere desire to preserve market share" (Opp. 8), and from that premise asserts that "efficiency and cost-reduction were not the actual bases for petitioner's policy" (*id.* at 25). The underlying conduct, however, is materially indistinguishable from that in *Barry Wright*. There, the First Circuit concluded that making efficient "use of considerable excess snubber capacity" is a "legitimate business justificatio[n]" for an alleged monopolist's decision to enter into an exclusive buy-sell contract with a major customer—even though it also helped maintain a 94% market share. 724 F.2d at 237. The Government's argument merely highlights the differing legal judgments that the First and Eleventh Circuits have given to the same conduct.

Similarly, the Government attempts to distinguish *Barry Wright* by arguing that the defendant's use of "competition-enhancing steps" stands in "stark contrast" to McWane's Full Support Program. Opp. 30. But McWane's policy that conditioned manufacturer rebates on distributors' brand loyalty is no less a "competition-enhancing step" than the exclusive buy-sell contract in *Barry Wright*. *See* 724 F.2d at 229. Indeed, such exclusive-dealing arrangements are presumptively procompetitive, providing "stability for manufacturers, distributors, and retailers, lower prices for consumers, increase[d] interbrand competition through brand presentation, and numerous other pro-competitive benefits." Br. of *Amici* Chamber of Commerce *et al.* 5. The only "stark contrast" between this case and *Barry Wright* is the divergent results that the First and Eleventh Circuits achieved.

The Government also argues that a different legal standard applies depending on whether the alleged monopolist is "refusing to deal with its rival" or whether it is "imposing an exclusivity mandate on its customers." Opp. 27. In the Government's view, only in the former scenario will "'any normal business purpose'" suffice (*id.* at 26 (quoting *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 608 (1985)), whereas in the latter scenario a defendant must show a "'procompetitive justification' for its conduct" (*id.* at 29 (quoting *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) (en banc)). The distinction is illusory. The "normal business purpose" test is no different than the test where the alleged monopolist utilizes exclusive-dealing arrangements. *See Barry Wright*, 724 F.2d at 237 ("legitimate business justifications"); *see also*

HDC Med., Inc. v. Minntech Corp., 474 F.3d 543, 549 (8th Cir. 2007); *Town of Concord*, 915 F.2d at 21.

In any event, whatever standard might apply where "a monopolist *excludes* its competitors" (Opp. 28), that standard has no application here. Star's substantial and successful entry makes this a far easier case than *Barry Wright* and presents no occasion for requiring a defendant to show that its use of an exclusive-dealing arrangement was intended to "'promote consumer welfare by increasing overall market output.'" Pet. App. 50a (quoting *id.* at 97a). The Government's alternative standard would make liability for monopolization a looming threat to all business conduct not undertaken for altruistic purposes, chilling legitimate economic activity.

III. This Case Is A Prime Vehicle To Decide These Important Legal Issues

This case presents an extremely clean vehicle for the Court to consider these important issues. Despite the Government's preoccupation with the purported "facts of this case" (Opp. 19), the essential dispute is whether the Government's characterizations of the record are relevant "facts" at all. As McWane has shown, they are not, but rather a misstatement of the legal rules that govern primary economic conduct.

Indeed, the Government effectively concedes that the Commission had formed a judgment that McWane's rebate policy was unlawful just "four months after the Full Support Program was announced," when the Commission informed McWane that it had opened a formal investigation. Opp. 17-18. The Government even suggests that evidence after January 2010 has "significantly" diminished

"probative value" because McWane "immediately softened its policy." *Id.* at 18. Thus, even under the Government's view, the evidence is largely beside the point—the mere fact of McWane's rebate policy coupled with its market share and perceived "barriers to entry" establishes the antitrust violation *regardless* of Star's successful entry and substantial growth in its first two years in the domestic fittings market and McWane's legitimate business justifications. *See id.* at 19-20. The Government's arguments belie its claim that this case, and all cases alleging monopoly power, turn on the facts.

Nor does the Government's claim that McWane "softened its policy" after learning it was under "investigation" (Opp. 18) distinguish this case from other exclusive-dealing cases. All firms are continuously "under investigation" for anticompetitive conduct because the antitrust laws allow for private enforcement, treble damages, and attorneys' fees. The Commission's investigation evidences only the unwarranted legal conclusions that the agency prematurely drew in this case.

This case is a particularly worthy candidate for review because it arises from an agency proceeding in which the Commission acted as investigator, prosecutor, judge, and jury. Antitrust law governs the essential terms of economic conduct, and it is vitally important that questions concerning monopoly power and anticompetitive conduct are given uniform constructions across all jurisdictions. The guiding inquiry—obscured by the Eleventh Circuit and the Commission majority—is not whether a business practice harmed a particular competitor, but whether it harmed *competition*. Pet. App. 112a-113a (Wright, Comm'r, dissenting). The importance of

these questions militates in favor of applying more rigorous judicial scrutiny than the highly "deferential review" that the Eleventh Circuit applied here. Pet. App. 51a.

As noted by *amici* Law Professors (Br. 2, 17, 19, 24-27) and the Chamber of Commerce and the National Association of Manufacturers (Br. 13-14), it has been decades since this Court provided substantive guidance on exclusive-dealing arrangements. This has led some courts, like the Eleventh Circuit, to condemn beneficial exclusive-dealing arrangements without any meaningful economic analysis. As the State *amici* have explained (Br. 1-4, 16), the resulting uncertainty and lack of uniformity have created a patchwork of rules governing economic conduct, which in turn has chilled legitimate competitive activity, harmed domestic manufacturers, and dampened state and local economies. This result is precisely opposite what the antitrust laws are designed to achieve.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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