No. 16-1487

In The
Supreme Court of the United States

SUTURE EXPRESS, INC.,

Petitioner,

v.

OWENS & MINOR DISTRIBUTION, INC.
AND CARDINAL HEALTH 200, LLC,

Respondents.

On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit

BRIEF FOR LAW PROFESSORS AND SCHOLARS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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QUESTIONS PRESENTED

1. Whether, on a rule-of-reason tying claim, evidence that the tie increased prices or reduced quality in the tied market obviates the need for further inquiry into tying market power, or at a minimum reduces the amount of evidence from the tying market needed to establish tying market power.

2. Whether antitrust injury may be found where an appreciable number of buyers, even if not all buyers, of the tied product suffered harm.

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INTERESTS OF *AMICI CURIAE*[1]

Amici are economists and antitrust scholars whose work focuses on industrial behavior, including business strategy, risk, and competition. *Amici* often write about or serve as economic experts with respect to industrial behavior, including in the antitrust context. As economists and antitrust scholars, *amici* have a strong interest in the application of the antitrust laws for their intended purposes: to promote efficient, vigorous, and innovative competition, for the benefit of consumers and the economy as a whole. *Amici* are well situated to discuss how firms compete, and how antitrust law affects firms' competitive behavior.

INTRODUCTION AND SUMMARY OF ARGUMENT

We offer our views as economists and scholars on the potential antitrust implications of the practice in question and urge the Supreme Court to grant certiorari in this case to clarify gaps in current case law. We agree with the Supreme Court that "[t]he purpose of the [Sherman] Act is not to protect businesses from the working of the market; it is to protect the public from the failure of the market. The law directs itself not

[1] No counsel for a party authored this brief, in whole or in part, and no person or entity, other than *amici curiae* and their counsel, has made a monetary contribution to the preparation or submission of this brief. Parties have consented to the filing of this brief and were timely informed with 10 days notice of *amici*'s intent to file.

against conduct which is competitive, even severely so, but against conduct which unfairly tends to destroy competition itself."[2] Our focus is whether the practices in question, by leading to the exclusion of a competitor selling a narrow range of products, may adversely affect consumers and destroy competition – particularly when consumers benefited from the presence of a competitor with a different operational structure.

A key issue in the present case is whether the existence of bundle-to-bundle competition, which currently is taking place among three broadline distributors, is sufficient to ensure that customers' interests are safeguarded. In order to resolve this issue, both the Tenth Circuit and the district court appear to have relied, to some extent, on scholarly papers and treatises. For example, the district court cites Hovenkamp & Hovenkamp (2009) for the proposition that "if bundle-to-bundle discount competition can occur in a market, then a particular firm's bundled discount cannot be exclusionary unless its overall price is below its costs. Otherwise an equally efficient firm exists that would be able to match the discounted price and earn a profit."[3]

The scholarship selected by the court does not present a complete picture of tying and/or bundling. If the decision is left unexamined by the Supreme Court,

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[2] Spectrum Sports, Inc. v. McQuillan, 506 U.S. 447, 459 (1993).

[3] Herbert Hovenkamp & Eric Hovenkamp, *Complex Bundled Discounts and Antitrust Policy*, 57 BUFF. L. REV. 1227, 1231 (July 2009).

then this incomplete portrayal of the scholarship will lead the case law astray. There is abounding literature on the potential consequences of tying and/or bundling that was not considered in Hovenkamp & Hovenkamp (2009), and which we believe warrants further consideration by the Court to ensure that the competitive process is not harmed by the defendants' tying practices.[4] In particular, the dynamic effects of the tying or bundling arrangements do not appear to have been fully considered. These arrangements could adversely affect future entry and innovation in the market for distribution of med-surg products. To put the point differently, the conduct at issue could eliminate rivalry from present and future disruptive and innovative competitors who could yield very substantial consumer benefits.

In this regard, the U.S. Horizontal Merger Guidelines rightly emphasize that mergers may lessen competition by eliminating "maverick" firms, *i.e.*, firms that play a disruptive role in the market to the benefit of customers:

> For example, if one of the merging firms has a strong incumbency position and the other merging firm threatens to disrupt market conditions with a new technology or business

[4] *E.g.*, Barry Nalebuff, *Exclusionary Bundling*, 50 THE ANTITRUST BULL. 3 (2005).

> model, their merger can involve the loss of actual or potential competition.[5]

This issue, of course, applies more generally to anticompetitive conduct that eliminates rivals or discourages market entry.

The view that the existence of bundle-to-bundle competition assuages the risk of anticompetitive harm also appears to be in conflict with Supreme Court precedent. The Court in *Eastman Kodak Co. v. Image Technical Servs., Inc.* examined competition in an upstream market (which the dissent labeled "bundling") and held that such evidence of such competition cannot be used on summary judgment to dismiss a case in the face of evidence of tied-market harm.[6]

We agree that bundling and tying may allow firms to realize efficiencies that potentially could be passed on to consumers. However, the district court's fact finding, unchallenged by the Tenth Circuit, offered no specific evidence that this occurred in the present case, nor did it offer evidence that the loyalty-inducing nature of the discounts was indispensable for achieving any claimed efficiencies. While both the district court and the Tenth Circuit's opinions refer to the possibility that bundled med-surg distribution may have offered real price/cost and service quality benefits, they do not provide guidance on whether consumer interest would

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[5] U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 2.1.5 (2010) [hereinafter 2010 Guidelines].

[6] Eastman Kodak Co. v. Image Technical Servs., Inc., 504 U.S. 451, 466-73 (1992).

have been better served without a tie. In fact, the Tenth Circuit appeared to accept that at least some customers paid higher prices and received lower quality service than they would have in absence of the tying arrangement.[7]

The Court's holding assumes that the bundling firms are efficient and competitive across the entire collection of bundled goods and services. The evidence cited in the district court's factual findings suggests that, prior to Suture Express' entry into the market, incumbent firms were not efficient in their distribution of suture and endo products. The subsequent introduction of bundling rebates in response to Suture Express' success in the market could foreclose the market to other fleet-footed entrants who could improve efficiency to the benefit of customers.

Additionally, in a bidding market – where firms compete to win contracts and offer differentiated ranges of products – there would be no general presumption that three competitors are sufficient to ensure competitive outcomes. In some regions, the presence of regional rivals may increase competition, but regional rivals do not necessarily exert competitive pressure nationwide.

Against this background, we consider that this case raises precedent issues. If the approach of the Tenth Circuit and district court were to be followed

[7] App. 4a, 7a.

more generally, it could permit the exclusion of innovative new distribution channels that challenge markets predominantly served by a small number of rivals.

ARGUMENT

I. BUNDLE-TO-BUNDLE COMPETITION DOES NOT ENSURE THAT CUSTOMERS GET THE BEST MARKET OUTCOME IN THE SHORT RUN

Tying clauses by definition impair or remove customers' ability to procure the various products in the bundle from separate sources. Unless every producer – or, in this case, distributor – is as efficient as every other competitor in the tying and tied markets, this can lead customers to pay more for the bundle than they would if they were able to buy components separately. That is, if one producer is more efficient (*i.e.*, has a lower cost) than the competition in the tying product and another is more efficient than the competition in the tied product, then customers may be better off buying the tying product from the former and the tied product from the latter.

For example, if there are two or more producers of type "A" who can sell the tying product at $5 and the tied product at $10, and two or more producers of type "B" who can sell the tying product at $10 and the tied product at $5, then bundle-to-bundle price-setting competition would lead consumers to pay $15 for bundles (assuming each bundle contains one tying and one

tied product). However, in absence of tying, consumers would buy the tying product from a type A producer at $5 and the tied product from a type B producer at $5, paying a total of $10 for the pair of products instead of $15 for a bundle. Customers are similarly harmed in a situation where an additional producer type "C" specializes on distributing only the tied product at $5, and the tie prevents consumers from buying the tied product at the lower cost ($5) from the specialist producer.

The example above assumes that all producers sell the same products, *i.e.*, that there are no differences between the tying goods offered by the various producers, nor between their tied products. Other factors, such as product differentiation and the number of producers, introduce competitive interaction that mean that the effect of bundling on prices can be ambiguous.[8]

Joint distribution (or production) efficiencies may make it more efficient to produce and sell bundles, even if some individual producers have lower standalone production costs for some of the products. Joint

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[8] *Compare* Barry Nalebuff, *Competing against Bundles* in INCENTIVES, ORGANIZATION, AND PUBLIC ECONOMICS: PAPERS IN HONOUR OF SIR JAMES MIRRLEES 323 (Peter J. Hammond & Gareth D. Myles eds., 2001) (Finding that in a duopoly with differentiated products, bundling can lead to lower prices, but noting that this can deter future entry because "there are much lower profits available to an entrant if the incumbent has a bundle in the market."); *with* Jidong Zhou, Competitive Bundling (March 2016) (unpublished manuscript) *available at* https://sites.google.com/site/jidongzhou77/research (finding that even with differentiated products, bundle versus bundle competition can lead to higher prices in markets with three or more competitors).

distribution (or production efficiencies), also referred to as economies of scope, are "cost-saving externalities between product lines (e.g., the production of good A reduces the production cost of good B)."[9] More concretely, these efficiencies exist when the cost of producing two products jointly is lower than the sum of the standalone costs of producing them separately.[10] That is, there are joint production efficiencies if the cost of producing A and B jointly is lower than the sum of cost of producing only A and the cost of producing only B. It is not clear from the decision that the total cost of distributing endo-sutures and other med-surg products together is lower than the cost of distributing each separately. The defendants' decision, however, to establish centralized distribution centers for endo-sutures is consistent with the notion that they found it to be more efficient to distribute endo-sutures separately from other med-surg products in light of the current competitive landscape.

The evidence also suggests that Suture Express' market entry with an unbundled product has benefited customers. According to the factual findings, the Plaintiff entered the market for supplying suture and endo products with a higher quality, lower priced offering than the incumbents. As the Tenth Circuit noted,

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[9] Jean Tirole, The Theory of Industrial Organization 16 (1997).

[10] *Id.* at 20.

- "Suture Express was often able to have on hand a broader variety of suture-endo than did the broadline distributors."[11]
- "Suture Express has maintained a fill rate higher than 99%, which is often higher than the rates achieved by O&M and Cardinal for the same product categories."[12]
- "Within the suture-endo market specifically, Cardinal's and O&M's markups were always higher than Suture Express's."[13]

In light of the aforementioned, we believe that there is a distinct possibility that reliance on bundle-to-bundle competition will not guarantee the best possible outcome for consumers in the current market for distribution of med-surg products.

II. BUNDLE-TO-BUNDLE COMPETITION DOES NOT ADDRESS THE LONG-RUN EFFECTS OF EXCLUSIONARY BEHAVIOR

There is extensive literature that discusses the conditions under which bundling and tying can have an anticompetitive effect and reduce welfare, in particular by altering how markets evolve over time. In broad terms, the literature deals with the mechanisms

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[11] App. 4a.

[12] *Id.*

[13] App. 7a.

through which bundling and tying may enable incumbents to curtail competitors' ability to impose a pricing constraint, and the ways in which bundling and tying can influence potential future competitors' decisions to enter the markets for the products in the bundle.

If a large fraction of suppliers, measured by aggregate market share, engages in the same type of bundling behavior, then the theoretical models described below can provide a useful starting point for assessing the effect of their behavior on competition and consumer welfare. Moreover, as noted above, margins for the main players have been decreasing, which may reflect the existence of some degree of market power prior to the entry of Suture Express.

A. The Defendants' Practices Deprive Entrants' Ability to Achieve Scale Economies

In the present case, Suture Express has presented evidence consistent with the possibility that the defendants' tying practices limit the demand that is addressable by Suture Express and potential future entrants who aim to distribute only part of the medsurg product range. The district court's factual findings indicated that Suture Express' success in the supply of suture and endo products prompted Cardinal and O&M to place more weight on contracts with tying or bundling clauses.[14] Tying clauses unequivocally

[14] "Both O&M and Cardinal engaged in separate, internal communications about the increasing threat that Suture Express,

place certain volume of suture and endo sales outside the addressable demand of an entrant who does not supply the full slate of products. As a result, Suture Express is precluded from serving a potentially large fraction of demand. The district court noted the following tying and bundling clauses in the defendant's contracts:

- For almost 70% of Cardinal's contracts, "at least one of the following contract terms: (1) an 80%+ med-surg distribution purchase requirement, or (2) a suture and endo distribution volume purchase requirement."[15]
- "Almost every agreement included a term allowing O&M to increase prices on other med-surg distribution if the customer switched its suture and endo distribution to another distributor, such as Suture Express."[16]
- "In some contracts, Cardinal imposes markups on med-surg distribution unless the customer purchases 100% of its suture and endo products from Cardinal."[17]

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because of its superior fill rates and low pricing, posed to their businesses. Around the same time, O&M and Cardinal adopted contractual terms that made pricing contingent on a customer's purchase of suture and endo distribution through them." App. 40a.

[15] App. 41a.

[16] App. 42a.

[17] App. 40a.

- "Other agreements provide for higher markups on med-surg distribution if the customer reserves the right to purchase suture and endo products from other distributors." [18]

- "Some agreements make markups on med-surg distribution contingent on the customer purchasing a certain percentage (in some cases, 95%) . . . of all med-surg products from Cardinal."[19]

- "Cardinal's standardized agreements with the five largest GPOs have contingent pricing terms or impose markups if the customer fails to purchase a certain percentage (in some cases 100%) of suture and endo distribution from Cardinal."[20]

- "O&M agreements rendered markups on all med-surg distribution contingent on the customer purchasing a high percentage of med-surg distribution from O&M."[21]

- "O&M made markups contingent on customers purchasing the top 10 Healthcare Products Information Services categories

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[18] *Id.*

[19] *Id.*

[20] App. 41a.

[21] *Id.*

(which include suture and endo) from O&M."[22]

- "O&M's current standardized agreements with the five largest GPOs impose markups if the customer fails to purchase a certain percentage of suture and endo distribution from O&M."[23]

These tying and bundling clauses reduce the volume of endo-suture products that customers could purchase from a separate supplier such as Suture Express.

Furthermore, according to Nalebuff (2004), tying can deprive entrants in multiproduct markets of the ability to achieve scale.[24] As a result of tying, an entrant in the market for the tied good is limited to selling only to customers who either do not have a demand for the tying product or who are not subject to a tying clause. In the presence of fixed costs, the entrant's ability to take advantage of economies of scale is impaired. Existing competitors who cannot achieve sufficient scale to cover their fixed costs may be forced to exit the market, and potential competitors may decide against entering. Even when competitors are not forced out of the market or entry is not foreclosed, the practice may lead to higher prices because the competitive pressure is reduced as a result of the non-tying rival's impaired ability to take advantage of scale economies.

[22] App. 42a.

[23] *Id.*

[24] Barry Nalebuff, *Bundling as an Entry Barrier*, 119 Q.J. Econ. 159 (2004).

B. Tying Increases the Riskiness of Entry

Choi & Stefanadis (2001)[25] consider tying of complementary products in a setting where the incumbent faces potential entry in each market, *i.e.*, in the tying market and in the tied market. In their model, entry requires an investment and is risky. That is, there is a possibility that a company will invest in entering the market and not be able to establish itself successfully, irrespective of competitors' reactions.

If the incumbent commits to tying the products, then the entrant is competing against a bundle and needs to enter both markets. The entrant is thus forced to make a separate, risky investment to enter each of the bundle's markets. If any of the entrant's (costly) attempts to enter the markets in the bundle is unsuccessful – *i.e.*, if the entrant is only able to successfully enter markets for one of the products – then the entire attempt at entering the market fails because the entrant is not able to offer the full bundle. The joint probability of successful entry in both markets is smaller than that of being able to successfully offer one product. As a result, tying reduces potential entrants' expected return to investment in market entry, which reduces their willingness to invest in the first place. The higher risk means that a potential entrant will require a higher expected return to investing in entry, *i.e.*, some entry that would occur in absence of the tying

[25] Jay Pil Choi & Christodoulos Stefanadis, *Tying, Investment, and the Dynamic Leverage Theory*, 32 RAND J. ECON. 52 (2001).

practices is deterred. Choi & Stefanadis (2001) conclude that "determining the effects of tying . . . is an empirical matter. It may be that the dynamic leverage theory is indeed relevant to some cases, while in others tying is efficient."[26]

Forcing an entrant to address both markets – in this case, endo-sutures and other med-surg products – can also dilute consumer benefit of innovation. As discussed in the hypothetical example above, different competitors may be more efficient in different markets. For instance, if an entrant is more efficient than the incumbents in the tied market (*e.g.*, sutures and endo products) but less efficient in the market for the tying product (*e.g.*, other med-surg products), then tying the benefit of buying from the entrant would be lessened by the fact that customers have to pay a higher price for the other med-surg products to benefit from the lower prices for suture and endo. This, in turn, could also mitigate competitive pressure from innovative entry on incumbents, as customers are less likely to switch to the entrant if the benefits are less pronounced or nonexistent.

III. CURRENT MARKET CONDITIONS DO NOT RULE OUT ANTICOMPETITIVE BEHAVIOR

The Tenth Circuit stated that "we do not think a reasonable jury could conclude that either Cardinal or

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[26] *Id.* at 70.

O&M possesses market power sufficient to force the tie."[27] The conclusion is based on the findings that:

- "evidence of Cardinal's and O&M's declining profit margins in the other-medsurg market revealed that they did not have the ability to control prices in that market."[28] and
- "evidence showing consolidation in the buyer (i.e., acute care provider) market instead demonstrated enhanced bargaining power, which could also help explain Cardinal's and O&M's inability to control pricing."[29]

These factual findings, however, do not rule out the possibility that defendants' actions have led or may lead to market foreclosure.

As Salop (2006) notes, "[e]xclusion involves a firm (*or group of firms*) raising the costs or reducing the revenues of competitors in order to induce the competitors to raise their prices, reduce output, or exit from the market" (emphasis added).[30] Exclusion and market foreclosure also can occur when incumbent competitors engage in similar practices that would be deemed

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[27] App. 24a.

[28] App. 20a.

[29] *Id.*

[30] Steven C. Salop, *Exclusionary Conduct, Effect on Consumers, and the Flawed Profit-Sacrifice Standard*, 73 ANTITRUST L.J. 311, 311 (2006).

exclusionary if carried out by a market actor with market power and has the combined effect of excluding new and potential entrants. This behavior is denoted by Hemphill & Wu (2013) as "parallel exclusion"[31] and does not require explicit communication between the producers. Each firm is able to deduce from the market outcome whether it is in its own best interest to continue with the practice that, collectively, forecloses the market.

The declining profit margins observed in the market are not necessarily an indication that defendants lack market power. In general, declining margins may also be an example of, *inter alia*, a temporary reaction of incumbent firms to entry, a breakdown of a cartel agreement, or a recurring breakdown of (tacit) cartel activity in response to a reduction in individual firms' demand.[32] An aggressive pricing strategy might "find its rationale in the attempt to create a reputation of being a strong and aggressive incumbent to discourage entry (in other markets by the same competitor, or in the same market by others) tomorrow."[33] Margins could rise above competitive levels once competitors, such as Suture Express, exit the market.

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[31] *See*, *e.g.*, Scott C. Hemphill & Tim Wu, *Parallel Exclusion*, 122 YALE L.J. 1182 (2013).

[32] Edward J. Green & Robert H. Porter, *Noncooperative Collusion under Imperfect Price Information*, 52 ECONOMETRICA 87 (1984).

[33] MASSIMO MOTTA, COMPETITION POLICY: THEORY AND PRACTICE 216 (2004).

Finally, the fact that acute care customers are consolidating does not guarantee that customers have or will retain a strong bargaining position vis-à-vis suppliers. Customers' bargaining power depends on their ability to credibly threaten to switch to an alternative supplier of med-surg products.[34] If the defendants' current behavior reduces customers' choices in the future, for example by removing a credible lower-cost distributor, then buyer power might be compromised.

CONCLUSION

Bundle-to-bundle competition, as seen in the markets for distributing med-surg products to hospitals, does not necessarily allay concerns about the anticompetitive effects of the tying behavior observed in these markets. As discussed above, it may lead customers to pay more than they would if they were able to buy the bundled products separately. It also limits addressable demand for new entrants, potentially impairing their ability to reach scale and lower prices, potentially discouraging future market participants from entering. It can further deter potential competitors from entering when market entry is risky and entails an up-front, sunk investment, by forcing entrants to incur risky entry costs in two markets rather than one. We ask the Court to accept certiorari in this case to avoid the concept that the presence of bundle-to-bundle competition

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[34] Simon Bishop & Mike Walker, The Economics of EC Competition Law 82-84 (3d ed. 2010).

obviates the need for innovation, and thus excuses anticompetitive behavior targeted at rivals practicing new forms of competition, from becoming established in the antitrust case law.

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