No. ______

In the Supreme Court of the United States

JAMES DEHOOG, *et al.*,

Petitioners,

v.

ANHEUSER-BUSCH INBEV SA/NV
and SABMILLER, PLC,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. In the over forty-years since this Court has issued a decision interpreting § 7 of the Clayton Act, a trend in unprecedented concentration has gripped a multitude of industries in the United States. Should this Court re-affirm its commitment to the structural evaluation of mergers and acquisitions under § 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, as set forth in this Court's decision in *Brown Shoe Co., v. United States*, 370 U.S. 294 (1962) and its progeny?

2. To state a plausible claim for relief under § 7 of the Clayton Antitrust Act, 15 U.S.C. § 18, must a plaintiff allege that the acquisition increases the market share of the acquiring entity (or any firm) in the relevant market?

3. This Court's decisions in *United States v. El Paso Natural Gas Company,* 376 U.S. 651 (1964), *United States v. Penn-Olin Chemical Co*., 378 U.S. 158 (1964), and *United States v. Falstaff Brewing Co*., 410 U.S. 526 (1973), which develop the antitrust doctrine of potential competition, establish that an acquisition that eliminates a potential competitor "exercising present influence on the market" may be illegal under § 7 of the Clayton Act, 15 U.S.C. § 18, even though such an acquisition has no impact on existing market concentration.

   Is the Ninth Circuit's published decision — that the elimination of an *actual competitor* in a market does not state a claim under § 7 of the Clayton Act if there is no corresponding increase in market concentration—consistent with this Court's decision in *El Paso Natural Gas*?

PARTIES TO THE PROCEEDINGS

Petitioners in this Court, Plaintiffs-Appellants below are:

JAMES DEHOOG, BRIAN BOUTELLER, SHONNA BOUTELLER, CARLY BOWEN, TOM BUTTERBAUGH, ERICA I. CORONA, MARIA G. CORONA, CHRIS DENNETT, JOHN DESBIENS, MATTHEW JOHNSON, CYNTHIA A. KREITZBERG, EDWARD LAWRENCE, JERUSHA MALAER, ROBERT MALAER, MICHAEL MARTIN, MICHAEL MCATEE, DAVID MILLIGAN, JEFF REEDER, RALPH REEDER, WADE SCAGLIONE, BETH H. SILVERS, BRADLEY O. SILVERS, and PATRICE WADE.

Respondents in this Court, Defendants-Appellees below, are:

ANHEUSER-BUSCH INBEV, SA/NV and SABMILLER PLC.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, no petitioner has a parent company and no publicly held company owns 10% or more of any petitioner's stock.

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REQUESTED RELIEF

Petitioners respectfully pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Ninth Circuit in this case, that this Court reverse the decision of the Court of Appeals and remand this case for trial.

OPINIONS BELOW

The published opinion of the Court of Appeals is Appendix to Petition for Writ of Certiorari ("App." 1-15). The opinions of the district court (App. 31-34 and App. 16-30) are unreported.

JURISDICTION

The Court of Appeals rendered its decision on August 8, 2018. (App. 1-15). The court denied a timely Petition for Rehearing with a Suggestion for Rehearing *En Banc* on September 18, 2018. (App. 35-36). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

Petitioners now file this Petition for Writ of Certiorari on December 17, 2018.

STATUTORY PROVISIONS INVOLVED

Antitrust statute 15 U.S.C. § 18, is implicated by this Petition and is, in pertinent part, as follows:

> No person engaged in commerce or in any activity affecting commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no person subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part

> of the assets of another person engaged also in commerce or in any activity affecting commerce, where in any line of commerce or in any activity affecting commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.

STATEMENT OF THE CASE

The Parties

This Petition for Writ of Certiorari ("Petition") arises out of a complaint filed by twenty-three consumers and purchasers of beer in the United States ("Consumers" or "Petitioners" or "Plaintiffs") in the United States District Court for the District of Oregon to prohibit the elimination of SABMiller ("SAB") as an actual and potential competitor in the United States market by Anheuser-Busch In Bev ("ABI") in violation of § 7 of the Clayton Antitrust Act, 15 U.S.C. § 18. This private antitrust action for injunctive relief was brought pursuant to § 16 of the Clayton Antitrust Act, 15 U.S.C. § 26. Plaintiffs' complaint alleged that ABI's acquisition of SAB "may…substantially…lessen competition" in violation of § 7 of the Clayton Act.

Anheuser-Busch InBev ("ABI"), a Belgian/South American company, is the largest brewer in the United States and in the world. In 2008, InBev entered the U.S. market by acquiring Anheuser-Busch, the largest brewer at the time in the United States with 50% of the beer market. (III ER 397).

Before the acquisition at issue in this case, SABMiller, plc, ("SAB") a South African/British company, was the second largest brewer in the United

States and in the world. In 2005, SAB (then known as South African Brewing) entered the U.S. market by acquiring Miller Brewing Company, the second largest brewer at the time with 30% of the beer market in the United States. (III ER 398).

Molson Coors, a Canadian company, is the second largest brewer in the United States and is now the third largest brewer in the world. ("Molson") Molson Coors entered the United States market in 2005 when Molson merged with Coors in the United States. (III ER 406.) In 2008, the second and third largest brewers in the United States, Molson Coors of Canada and SABMiller of South Africa, formed a joint venture in the United States and began operating MillerCoors, LLC ("MillerCoors").

The Acquisition

ABI announced its intention to acquire SAB on October 13, 2015. (III ER 399; Compl. ¶ 16, 17). Because the acquisition of SAB would deliver unrestricted control over the United States beer market to ABI, in order to squeeze the deal past antitrust regulators, Defendants' arrangement also included the sale of SAB's interest in the MillerCoors joint venture to Molson. (III ER 405; Compl. ¶ 33.) SAB and Molson Coors Brewing Company began operating the joint venture in the United States on July 1, 2008. SAB held a 52% equity interest in the joint venture and Molson the remaining 48% interest. (III ER 398; Compl., ¶¶ 14; COA Request for Judicial Notice ("RJN") Exhibit A, Competitive Impact Statement, at 5). SAB and Molson possessed equal voting rights in the joint venture. *Id*.

Following the sale of SAB's interest in the joint venture to Molson, which was conditioned on the acquisition of SAB by ABI, MillerCoors would then become a wholly-owned subsidiary of Molson, eliminating SAB as an actual and potential competitor in the United States. (III ER 405; Compl. ¶ 33.) Post-acquisition, Molson will control over 26 percent of beer sales, or more than the next eight largest brewers combined. (III ER 406; Compl. ¶ 34).

Before the acquisition, the three largest brewers, ABI, SAB, and Molson, controlled over 70% of the U.S. market. Post-acquisition, that same market share percentage was controlled by just two mega-brewers, ABI and Molson.

Concentration in the United States Beer Market

The United States' beer market is already highly concentrated, the product of successive acquisitions and joint ventures, including: (1) SAB (South African Brewing) acquired Miller Brewing Company in May 2002, forming SABMiller, plc ; (2) Molson Coors was formed in 2005 through the merger of Molson of Canada and Coors of the United States; (3) the formation of the joint venture between SABMiller and Molson Coors, so-named MillerCoors, in 2008; (4) InBev's acquisition of the United States' then largest brewer, Anheuser-Busch in 2008, forming Anheuser-Busch InBev; and (5) ABI's acquisition of the remaining interest of Grupo Modelo in 2013. (III ER 394-395, 397-398, 400, 409-410, 415- 416; Compl. ¶¶ 3, 9, 10, 13, 14, 20, 21, 52, 69, 70, 71, 72, 73, 74, 75, 78, 79; RJN, Exhibit A, CIS ¶¶ 2, 4). Before the deal, ABI together with Molson Coors and SABMiller (through the MillerCoors joint venture) controlled 71% of the

United States beer market. (III ER 394, 397-398; Compl., ¶¶ 3, 12, 14.) ABI is the largest seller of beer in the United States, controlling over 46 percent of the market. (III ER 397; Compl. ¶ 12.) MillerCoors is the second-largest beer company in the United States, controlling 25 percent of U.S. beer sales. (III ER 398; Compl. ¶ 14).

Before the transaction, the Herfindahl-Hirschman Index ("HHI") of the United States beer industry, which measures and grades market concentration by adding the squared marked share percentages of each competitor in the market, was already "highly concentrated" at 2751 in 2014. (III ER 400; Compl. ¶¶ 20, 21).

The Transaction Incentivizes the New MillerCoors to Adopt ABI's Coercive Distribution Practices

Effective distribution is important for a brewer to be competitive in the beer industry, and the acquisition will lead to a decrease in small brewers' access to distributors. The beer market in the United States is predominantly a three-tiered system because state regulations in most states require that the brewer sell to a distributor who then sells to retailers. Large companies can and do use their market power to exert a tremendous amount of influence over what beer brands distributors carry. (III ER 404 – 405; Compl. ¶ 32.)

ABI is the largest distributor in the United States, with $3 billion in sales and 135 million in case volume. (III ER 406; Compl. ¶ 34.) ABI owns 14 distributors/wholesalers in the following cities; Boston, Massachusetts; Canton, Ohio; Denver, Colorado; Eugene, Oregon; Los Angeles, California; Louisville,

Kentucky; New York, New York; Oahu, Hawaii; Oklahoma City, Oklahoma; Pomona, California; Riverside, California; San Diego, California; and Tulsa, Oklahoma. (III ER 404; Compl. ¶ 31).

In addition, ABI has the country's largest network of independent distributors, numbering approximately 600. Almost all of the distributors, although independent, operate under exclusive agreements with ABI in which they agree not to deal with the products of any competitors and not to distribute products outside of their own designated territories. (II ER 404; Compl. ¶ 31). Pre-transaction, ABI and MillerCoors pursued different strategies in their dealings with distributors in the United States. ABI pursued a strategy of exclusivity and has given more favorable terms to distributors who only sell brands owned by ABI. This 100 percent share strategy led ABI to pressure distributors to drop other brewers' brands. On the other hand, before Defendants' deal, MillerCoors permitted its distributors to carry rival brands. There are no guarantees or known provisions in the ABI-SAB deal that require MillerCoors to keep its strategy in place, post-acquisition. (III ER 404; Compl. ¶ 32; and II ER 222 - 227.)

Since the acquisition requires co-joint venturer, Molson Coors, to acquire SAB's interest in the joint venture, it is likely that a 100 percent Molson Coors owned MillerCoors will follow ABI's lead in its dealings with distributors. Before the MillerCoors joint venture, SABMiller and Molson Coors successfully shared distributorships and recognized the importance of being open to many suppliers. They likely chose this strategy because each had relatively small market

share compared to ABI. MillerCoors continued the same strategy when it was under the management of SABMiller and Molson. Given the resulting change in management and Molson's new increased size and scope in the U.S. market following the ABI-SAB acquisition, Molson's management has new incentives to change its practices to match ABI's. (III ER 405; Compl. ¶ 33.)

Past acquisitions have increased coordination in the United States market. Before ABI's acquisition of Modelo, ABI and SAB were forced to offer lower prices for their brands to discourage consumers from "trad[ing] up" to Modelo's brands, because Modelo's then U.S. distributor had consistently resisted pressure to follow ABI-led price hikes. (III ER 402; Compl. ¶¶ 26, 27). ABI's acquisition of Modelo eliminated the substantial competition that existed between ABI and Modelo in the United States. It further enhanced the ability of ABI to unilaterally raise the prices of brands it owned post-acquisition and has resulted in price increases by Constellation of its Modelo brands in the United States. (III ER 403; Compl. ¶ 28.)

In addition, the formation of the MillerCoors joint venture facilitated coordinated price increases between ABI and MillerCoors. A 2015 study found that the MillerCoors joint venture facilitated tacit collusion between ABI and MillerCoors, resulting in price increases:

> The results indicate that emergent tacit collusion between MillerCoors and ABI best explains the data….We show that inflation-adjusted retail prices are stable about a small downward trend for at least seven years

> preceding the merger. This trend breaks dramatically and abruptly just after the merger. We estimate that the retail prices of ABI and MillerCoors brands increase by six percent, both in absolute terms and relative to the price changes of more distant substitutes. The retail price increases persist through the end of the data, and are apparent visually in graphs of inflation-adjusted prices over the sample period. We show that the sales volumes of ABI and MillerCoors decrease after the merger, again in absolute terms and relative to more distant substitutes. Considered together, these price and output effects are consistent with a negative supply-shock contemporaneous with the Miller/Coors merger.

(II ER 070.) [Emphasis added.]

<u>The Closing of the Eden Brewery</u>

In September 2015, just days before it was reported that ABI and SABMiller were in merger talks, MillerCoors announced it would close its Eden, North Carolina plant in September 2016. This same brewery won an award in 2013 for Manufacturing Excellence and has a brewing capacity of nine million barrels—over 10% of MillerCoors' brewing capacity. (II ER 227; and COA RJN, Exhibit M at 9-10). The closing of this plant was announced when ABI and SABMiller were in the final stages of their merger negotiations. *Id*.

The closure of the Eden brewery seriously threatens Defendants' competitor Pabst. (COA RJN, Exhibit C). MillerCoors does contract brewing for Pabst at the Eden Brewery, and Pabst filed a breach of contract

complaint against MillerCoors in March 2016. (COA RJN, Exhibit C at 2.) Since 1999, Pabst partnered with MillerCoors to produce, package and ship Pabst's various products. *Id*. The longstanding relationship between Pabst and MillerCoors has been, and remains, integral to Pabst's ability to compete. (COA RJN, Exhibit C at 1-2.). After MillerCoors announced the closure of the brewery, it informed Pabst that it did not have "sufficient capacity" to brew Pabst products after the expiration of the contract in 2020. The Eden facility is the main facility used by MillerCoors to produce Pabst products. (COA RJN, Exhibit C at 3). In 2015, Pabst was the second highest brand by volume at the Eden, just behind Miller Lite. (COA RJN, Exhibit M at 8).

During a meeting with Teamster representatives in September 2015 (at the same time merger talks were ongoing), a MillerCoors representative stated that MillerCoors was closing the Eden brewery and refusing to sell it because the company did not want it getting into the hands of a competitor. (COA RJN, Exhibit M at 10).

<u>The Department of Justice Settlement with ABI</u>

On July 20, 2016, the Department of Justice filed a civil antitrust suit in the United States District Court for the District of Columbia against ABI and SAB and simultaneously announced that it had entered into a settlement that would allow the transaction to proceed. (II ER 126 - 128). "The settlement require[d] ABI to divest SABMiller's entire U.S. business – including SABMiller's ownership interest in MillerCoors, the right to brew and sell certain SABMiller beers in the United States and the worldwide Miller beer brand

rights." *Id*. The settlement also proposed restrictions on ABI's coercive distribution practices. (COA RJN, Exhibit A at 19-20.) Those restrictions have been criticized. (COA RJN, Exhibits H, I, J, K. and L).

Further, while the Competitive Impact Statement filed by the Department of Justice on the same date noted that the divestiture to Molson Coors of SABMiller's interest in the joint venture increased incentives to coordinate in the United States, the DOJ did not require any potential remedy to alleviate the anticompetitive threat:

> The change in ownership of MillerCoors—from a joint venture between SABMiller and Molson Coors to a wholly owned subsidiary of Molson Coors will increase the number of highly concentrated markets across the world in which ABI competes directly against Molson Coors. By increasing the number of markets in which ABI and Molson Coors compete, the divestiture of SABMiller's interest in MillerCoors to Molson Coors could facilitate coordination between ABI and Molson Coors in the United States. For example, this multimarket contact could lead Molson Coors and ABI to be more accommodating to each other in the United States in order to avoid provoking a competitive response outside the United States or disrupting their cooperative business arrangements in other countries. Coordination could also be facilitated by the existing and newly created cooperative agreements between ABI and Molson Coors around the world.

> If the divestiture facilitates coordination between ABI and Molson Coors, it would also increase ABI's incentive to limit competition from its high-end rivals. This is because competition from high-end rivals would become an even more important constraint on the ability of ABI and Molson Coors to increase the prices of their beers across all segments. As a result, following a divestiture to Molson Coors, ABI may have a greater incentive to impede the growth and reduce the competitiveness of its high-end rivals by limiting their access to effective and efficient distribution. The extent to which craft and other brewers in the United States are able to compete with ABI and Molson Coors will thus affect the likelihood of the divestiture to Molson Coors leading to unilateral or coordinated anticompetitive effects.

(COA RJN, Exhibit A at 12). A final judgment finally entered in the Department of Justice's case in the United States District Court for the District of Columbia on October 22, 2018.

<u>The Closing of the Transaction</u>

ABI announced that the transaction had closed on October 10, 2016. (COA RJN, Exhibit F). Molson announced that its acquisition of SAB's interest in the MillerCoors joint venture was completed on October 11, 2016. (COA RJN, Exhibit G).

<u>Course of Proceedings</u>

Plaintiffs filed a complaint on December 1, 2015. Defendants filed motions to dismiss plaintiffs' complaint on February 3, 2016. (Dkt. Nos. 41, 42, 43,

44). Consumers filed an opposition to Defendants' motion to dismiss on February 29, 2016. (Dkt. No. 63).

While the motion to dismiss was pending, on July 20, 2016, the Department of Justice announced that it had entered into a settlement with Defendants, requiring ABI to divest SAB's interest in the MillerCoors joint venture. (II ER 126 - 128). Two days later, on July 22, 2016, Magistrate Judge Clarke filed a Report and Recommendation ("R&R"), recommending that Defendants' motions to dismiss be granted and that Plaintiffs' complaint be dismissed on the grounds that, "[o]n the face of the complaint, therefore, Plaintiffs have not adequately alleged that there is a reasonable probability that the proposed acquisition will increase ABI's market power and thereby lessen competition or create a monopoly in the United States beer market." (App. 22; R&R at 6). Magistrate Judge Clarke further held that the Complaint's remaining allegations regarding the transaction's effects on distribution, increased incentives to coordinate, and monopsony power were "speculative." (App. 23-27; R&R at 7-10).

Consumers filed an Objection to the Magistrate Judge's R&R and requested leave to amend the Complaint to add numerous factual allegations of developments that had occurred since the Complaint was filed in December 2015, shortly after the transaction was announced. (II ER 030-062).

District Judge Ann Aiken adopted the Magistrate Judge's Report and Recommendation on October 3, 2016, granted Defendants' Motions to Dismiss, and entered judgment on the same date. (App. 31-34). Judge Aiken's Order also turned to the issues of

amendment of the Complaint raised by Plaintiffs, holding that amendment would be futile because:

> Plaintiffs in this case, like those in *Edstrom*, cannot plausibly allege that the challenged transaction will increase either ABI's market share or the concentration of firms in the U.S. beer market. Aside from the complete divestiture of SAB's interest in MillerCoors, which was discussed at length by Judge Clarke, Plaintiffs' own exhibits show that the Department of Justice has reached a settlement with ABI and SAB which will prevent increased concentration in the U.S. beer industry.

(App. 32; Order at 2-3).

Plaintiffs filed a Notice of Appeal on November 2, 2016. (Dkt. No. 114). On appeal, the United States Court of Appeal issued a published decision on August 8, 2018, affirming dismissal by the lower court.

The Ninth Circuit's decision, grounded in circuitous logic, held that Plaintiffs' Complaint did not state a claim for relief under § 7 of the Clayton Act as follows:

> 1. Because the "divestiture left SAB without a presence in the U.S. beer market, Consumers did not and could not plausibly allege that ABI's acquisition of SAB would substantially lessen competition in that market;" and
>
> 2. Consumers did not state a claim because the, "challenged transaction did not increase ABI's market share because ABI acquired no interests in the United States. The concentration of the U.S. beer market stayed precisely the same

> because MillerCoors remained in the market as a competitor (with SAB's share transferred fully to Molson)."

(App. 2-3, App. 7).

The Ninth Circuit's decision on the one hand recognizes that "before the transaction and divestiture, SAB was an actual competitor through the joint venture MillerCoors," while on the other claims that "ABI did not acquire an actual competitor." (App. 11 and 12). The court rejected allegations regarding the elimination of SAB as a potential competitor in the U.S. through the MillerCoors joint venture on the basis that "potential dissolution" of the MillerCoors joint venture is "entirely speculative," even though ABI's acquisition of SAB did precisely that—dissolve the joint venture. (App. 12).

Plaintiffs hereby seek review of the decision by the Ninth Circuit Court of Appeals.

REASONS FOR GRANTING THE PETITION

This Petition for Writ of Certiorari should be granted because the Ninth Circuit's decision in this case conflicts with established Supreme Court authority. This Petition presents the Court with an opportunity to re-establish its commitment to the structural approach set forth in the seminal § 7 case, *Brown Shoe Co. v. United States*, and the line of precedential cases that followed it. The strength of these decisions, which have never been overruled, has been called into question by conflicting decisions of United States Courts of Appeal, including the Ninth Circuit's decision in this case, and other federal district court decisions. These lower court decisions subjugate

the common-sense *Brown Shoe* line of precedents and their statements of legislative intent in favor of (1) paid opinions of economists under a so-called consumer welfare standard; and (2) executive branch agency, the Department of Justice's, self-invented Horizontal Merger Guidelines. Petitioners respectfully submit that the time has come for this Court to clarify the standards for evaluating mergers and acquisitions under § 7 of the Clayton Act. Over forty years is long enough to wait for guidance.

I. THE NINTH CIRCUIT'S DECISION CONFLICTS WITH ESTABLISHED SUPREME COURT PRECEDENTS THAT HAVE NEVER BEEN OVERRULED

A. The Ninth Circuit's Decision Conflicts with *Brown Shoe* and Its Progeny

In enacting and amending § 7 of the Clayton Act, "Congress sought to preserve competition among many small businesses by arresting a trend toward concentration in its incipiency before that trend developed to the point that a market was left in the grip of a few big companies." *United States v. Von's Grocery Co.,* 384 U.S. 270 (1966). [emphasis added]. The Supreme Court explained that:

> The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy.' To arrest this 'rising tide' towards concentration into too few hands and to halt the gradual demise of the small businessman, Congress decided to clamp down with vigor on

> mergers…Thus, where concentration is gaining momentum in a market, we must be alert to carry out Congress' intent to protect competition against ever increasing concentration through mergers…If ever such a merger would not violate § 7, certainly it does so when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with the power to do so, declared must be arrested.

Id. at 276-278. "[Section] 7 'requires not merely an appraisal of the immediate impact of the merger upon competition, but a prediction of its impact upon competitive conditions in the future; this is what is meant when it is said that the amended § 7 was intended to arrest anti-competitive tendencies in their 'incipiency.'" *United States v. Philadelphia Nat. Bank*, 374 U.S. 321, 362 (1963).

A line of binding Supreme Court precedents recognized and developed what is known as the "incipiency doctrine." *See Brown Shoe, Co. v. United States*, 370 U.S. 294 (1962); *United States v. Phila. Nat'l Bank*, 374 U.S. 321, 363 (1963); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *United States v. Continental Can Co.,* 378 U.S. 441 (1964); *United States v. Pabst Brewing Co*., 384 U.S. 546 (1966); *United States v. Von's Grocery Co*., 384 U.S. 270, 277 19 (1966); and *United States v. Falstaff Brewing Corp*., 410 U.S. 526 (1973). These rulings still stand today, never having been overruled or

diminished by later authority.[1] Taken together they "…establish the illegality of any nontrivial acquisition of a competitor, whether or not the acquisition was likely either to bring about or shore up collusive or oligopoly pricing. The elimination of a significant rival was thought by itself to infringe the complex of social and economic values conceived by a majority of the Court to inform the statutory words 'may…substantially…lessen competition.'" *Hospital Corporation of America v. FTC*, 807 F.2d 1381, 1386 (7th Cir. 1986). Put another way, in an industry trending towards concentration, the elimination by merger or acquisition of a significant rival in a "non-trivial" transaction is illegal under § 7 of the Clayton Act.

The acquisition at issue in *Brown Shoe Co. v. United States,* 370 U.S. 294, involved both vertical and horizontal aspects, as both companies were shoe manufacturers and retailers. Brown was the third largest shoe seller in the United States; Kinney, a family-style shoe chain, was the eighth. Brown was the

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[1] The following landmark decisions were decided around the same time: *Brown, et al. v. Board of Education of Topeka, et al*., 347 U.S. 483 (1954) (desegregation); *Mapp v. Ohio*, 367 U.S. 643 (1961) (evidence obtained by searches and seizures in violation of the Fourth Amendment is inadmissible in a state court); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (requiring state courts to appoint attorneys for indigent criminal defendants); *Pointer v. Texas*, 380 U.S. 400 (1965) (establishing the right to confront a witness); *Miranda v. Arizona*, 384 U.S. 436 (1966) (establishing the right of interrogated suspects in custody to remain silent and to obtain an attorney); *Roe v. Wade*, 410 U.S. 113 (1973) (examining the constitutionality of laws criminalizing and restricting access to abortions).

fourth largest shoe manufacturer in the U.S., Kinney the twelfth. *Brown Shoe*, 370 U.S. at 297, 302-303. The Supreme Court affirmed the lower court's order of divestiture on the grounds that the merger of the third and eighth largest shoe retailers, both of whom also manufacture shoes, might tend to lessen competition substantially in the retail sale of shoes in the United States. *Id*. at 343.

But an increase in concentration is not a necessary predicate to a state a claim under § 7 of the Clayton Act. *See United States v. Continental Can Co*., 378 U.S. 441, 458 (1964) ("Market shares are the primary indicia of market power but a judgment under § 7 is not to be made by any single qualitative or quantitative test. The merger must be viewed functionally in the context of the particular market involved, its structure, history and probable future.") Indeed, the Court in *Brown Shoe* was critical of just the type of approach undertaken by the Ninth Circuit in this case:

> Where the arrangement effects a horizontal merger between companies occupying the same product and geographic market, whatever competition previously may have existed in that market between the parties to the merger is eliminated. Section 7 of the Clayton Act, prior to its amendment, focused upon this aspect of horizontal combinations by proscribing acquisitions which might result in a lessening of competition between the acquiring and the acquired companies. The 1950 amendments made plain Congress' intent that the validity of such combinations was to be gauged by a

> broader scale: their effect on competition generally in an economically significant market.

370 U.S. at 335. [emphasis added]. The lower court's decision fell squarely into the trap warned of in *Brown Shoe* when it held that, "The challenged transaction did not increase ABI's market share because ABI acquired no interests in the United States. The concentration of the U.S. beer market stayed precisely the same because MillerCoors remained in the market as a competitor (with SAB's share transferred fully to Molson)." (App. 10). It did not evaluate the "effect on competition generally" in the United States market and limited its analysis to whether or not ABI ultimately received a bigger piece of the market share pie.

The *Brown Shoe* court identified several important factors for horizontal analysis that were ignored by the Ninth Circuit: "the relative size and number of the parties to the arrangement; whether it allocates shares of the market among the parties; whether it fixes prices at which the parties will sell their product; or whether it absorbs or insulates competitors." 370 U.S. at 335. As set forth more fully above, both ABI and MillerCoors are the product of successive mergers acquisitions. ABI itself has grown aggressively through combination, acquiring the American brand Anheuser-Busch in 2008, Modelo in 2013, and SABMiller in 2016. ABI has played an active role in bringing about the high levels of market concentration in the United States, with ABI controlling a whopping 46% of the market and MillerCoors 25%. While the Court of Appeals' decision makes much of the fact that ABI did not ultimately retain SAB's U.S. interest in MillerCoors, it ignores that it acquired that interest and then sold it to off to

its partner in oligopoly, Molson. In this way, the transaction "allocates shares of the market" between Molson and ABI. Further, the transaction "absorbs" and eliminates SAB as a competitor from the market, reducing the number of brewers controlling over 70% of the U.S. market from three to two. As the Court of Appeal's decision recognizes, pre-acquisition SAB competed in the U.S. market through the MillerCoors joint venture. After the transaction, it did not. In the context of an industry structure achieved through laissez-faire antitrust enforcement, the dominant brewer in that industry, ABI, should not be permitted to acquire its next largest competitor (and the second largest brewer in the world) and then sell it to a fellow oligopolist. It is just the type of recipe for coordinated and collusive behavior § 7 was designed to prevent. Had the lower court analyzed these factors, instead of beginning and ending its analysis at any change in market concentration, the Court of Appeals would have reached a different conclusion.

In *Pabst*, another case involving concentration in the United States beer industry, Pabst, the tenth largest brewer in the United States acquired Blatz, the eighteenth largest brewer. 384 U.S. at 547. This Court emphasized that, "These facts show a very marked thirty-year decline in the number of brewers and a sharp rise in recent years in the percentage share of the market controlled by the leading brewers. If not stopped, this decline in the number of separate competitors and this rise in the share of the market controlled by the larger beer manufacturers are bound to lead to greater and greater concentration of the beer industry into fewer and fewer hands." *Id.* at 552. [emphasis added]. The *Pabst* court specifically noted

the decline in the number of competitors in the industry. The same analysis and concern that caused the Court in *Pabst* to reverse the decision of the lower court applies here, particularly in a transaction that eliminates a major competitor in a highly concentrated market.

Like *Pabst*, the *Falstaff* case*,* 410 U.S. 526 (1973) also involved the United States beer industry. In *Falstaff*, the largest seller of beer in New England, Naragansett Brewing Co., was acquired by Falstaff, the fourth largest brewer in the United States. *Id.* at 526. Falstaff intended to enter the New England market through acquisition instead of through internal growth attained by competing in the market. The United States' theory was that potential competition in the New England market would be substantially lessened by the acquisition of Naragansett, even though Falstaff was not a competitor in that market. *Id*. at 527. In the four years before the acquisition, the eight largest sellers had increased their share of sales from approximately 74% to 81.2%. *Id*. Of the ten largest brewers in the United States at the time, only Falstaff and two others did not currently sell beer in New England. *Id*. at 528. Naragansett was the largest brewer in the New England market with 20% market share. *Id*.

The United States argued that the acquisition eliminated Falstaff as a "potential entrant" in the market. *Falstaff,* 410 U.S. at 529. The Supreme Court, rejecting the analysis of the lower court, warned:

> Suspect also is the acquisition by a company not competing in the market but so situated as to be a potential competitor and likely to exercise

> substantial influence on market behavior. Entry through merger by such a company, although its competitive conduct in the market may be the mirror image of that of the acquired company, may nevertheless violate § 7 because the entry eliminates a potential competitor exercising present influence on the market.

Id. at 531-532.

The Supreme Court reversed and remanded the case for the lower court to "make the proper assessment of Falstaff as a potential competitor." *Id.* at 537. The acquisition at issue in *Falstaff* would have caused no change in market share in the New England market. Nevertheless, the Supreme Court reversed and remanded to the lower court for a determination as to whether the transaction eliminated Falstaff as a potential competitor in the New England market.

Von's involved the merger of Von's, the third largest grocery retailer in the Los Angeles are and Shopping Bag, the sixth largest grocery retailer. 384 U.S. at 272. In that case, this Court ordered divestiture without delay because, "What we have…is simply the case of two already powerful companies merging in a way which makes them even more powerful than they were before. If ever such a merger would not violate § 7, certainly it does when it takes place in a market characterized by a long and continuous trend toward fewer and fewer owner-competitors which is exactly the sort of trend which Congress, with power to do so, declared must be arrested." *Id.* at 277-278. The acquisition at issue here is analogous in that ABI's acquisition and sale of SAB's interest to Molson eliminated SAB from the U.S. market, divided the

existing market share between the two of them, and further entrenched the dominant mega-brewers' power and control over the U.S. market.

Brown Shoe was one of the first Supreme Court decisions to analyze § 7 of the Clayton Act following its amendment in 1950 to close an ever-widening loophole that allowed companies to avoid § 7 scrutiny by acquiring competitors' assets or by acquiring stock of companies that are not direct competitors. 370 U.S. at 312. In its analysis, the Court conducted an extensive review of the legislative history of the 1950 amendments to § 7 of the Clayton Act. In it, the Supreme Court determined that, "The dominant theme pervading congressional consideration of the 1950 amendments was a fear of what was considered to be a rising tide of economic concentration in the American economy…by unchecked corporate expansions through mergers." *Id*. at 315. By "deletion of the "'acquiring-acquired' language," Congress "hoped to make plain that § 7 applied not only to mergers between actual competitors, but also to vertical and conglomerate mergers whose effect may tend to lessen competition…" *Id*. at 316. The Court also found that the amendments sought to erect "a barrier to what Congress saw was the rising tide of economic concentration…arresting mergers…when the trend to a lessening of competition …was still in its incipiency." *Id*. at 317. Further, the *Brown Shoe* court determined that Congress intended to "create an effective tool for preventing *all mergers* having demonstrable anticompetitive effects…" not just those increasing market concentration. *Id*. at 319. [emphasis added]. This Court found that, "Congress indicated plainly that a merger had to be functionally viewed, in the context of its particular industry,"

including evaluating whether the market was "concentrated" or fragmented," whether there had been "a recent trend toward domination of a few leaders" and whether there had been "foreclosure of business, that had witnessed the ready entry of new competition or the erection of barriers to prospective entrants…" *Id*. at 321-322.

In *Philadelphia National Bank*, this Court, again assessing Congressional intent, held that, "This intense congressional concern with the trend toward concentration warrants dispensing, in certain cases, with elaborate proof of market structure, market behavior, or probable anticompetitive effects." 374 U.S. at 363. In *Philadelphia*, this Court identified a 30% market share as clearly "demonstrating that threat." *Id*. at 364. In this case, ABI controls over 1 ½ times that amount of market share in the U.S. Given the extremely concentrated nature of the U.S. beer industry, this is just such a case in which "elaborate proof" is not necessary to demonstrate that which is obvious as a matter of common sense.

These Supreme Court cases and the structural approach they take to evaluating the legality of mergers and acquisitions under § 7 of the Clayton Act cannot be ignored under the doctrine of *stare decisis*. Indeed, in *Flood v. Kuhn*, 407 U.S. 258 (1972), this Court upheld, on the basis of *stare decisis*, the admittedly aberrant antitrust exemption applicable to baseball. The *Flood* Court explained:

> We continue to be loath, 50 years after Federal Baseball and almost two decades after *Toolson*, to overturn those cases judicially when Congress, by its positive inaction, has allowed

> those decisions to stand for so long and, far beyond mere inference and implication, has clearly evinced a desire not to disapprove them legislatively. Accordingly, we adhere once again to Federal Baseball and Toolson and to their application to professional baseball. We adhere also to International Boxing and Radovich and to their respective applications to professional boxing and professional football. If there is any inconsistency or illogic in all this, it is an inconsistency and illogic of long standing that is to be remedied by the Congress and not by this Court. If we were to act otherwise, we would be withdrawing from the conclusion as to congressional intent made in Toolson and from the concerns as to retrospectivity therein expressed. Under these circumstances, there is merit in consistency even though some might claim that beneath that consistency is a layer of inconsistency.

Id. at 284-285. [emphasis added]. To refuse to apply these cases here is to reject this Court's earlier "conclusion[s] as to congressional intent" made in *Brown Shoe*—that in amending § 7, Congress intended to create an effective tool for preventing all mergers that may have anticompetitive effects, not just those increasing market concentration on its face. Just as in *Flood*, Congress has allowed these decisions to stand for decades. They cannot be ignored by this Court or any other.

B. The Ninth Circuit's Decision Conflicts with this Court's Decision in *El Paso Natural Gas*

The Court of Appeals' erroneous decision can be distilled as follows: (1) if an acquisition that eliminates an *actual* competitor in a market does not increase concentration in that market, then it does not and cannot violate § 7 of the Clayton Act; but (2) if an acquisition eliminates a *potential* competitor in a market, then it may violate § 7 of the Clayton Act, even if there is no increase in market concentration. The inherent contradiction in the Court of Appeals' conclusions offend the letter and spirit of *Brown Shoe* and the cases that followed.

To be clear, the Court of Appeals determined that SAB was an actual competitor in the United States market. (App. 12, "Instead, before the transaction and divestiture, SAB was an actual competitor through its joint venture MillerCoors.") It also concluded that after the transaction, SAB ceased to exist as a competitor in the United States market. (App. 3-4, "Because the divestiture left SAB without a presence in the U.S. beer market…"). Nevertheless, the court held that the transaction eliminated neither actual competition nor potential competition. (App. 2-3). This conclusion is logically inconsistent with its earlier determination that SAB was an actual competitor in the market before the acquisition. Any transaction that causes an actual competitor to disappear from the market—eliminates actual competition.

The Ninth Circuit's opinion conflicts with this Court's decision in *United States v. El Paso Natural Gas*, 376 U.S. 651 (1964). In *El Paso*, the acquired

company, Pacific Northwest did not operate in the relevant market, California, but nevertheless exercised a competitive influence over that market. *Id*. at 659. In ordering divestiture "without delay", this Court found that, "[t]he effect on competition in a particular market through acquisition of another company is determined by the nature and extent of that market and by the nearness of the absorbed company to it, that company's eagerness to enter that market, its resourcefulness, and so on." *Id*. at 660. The *El Paso Natural Gas* case held that divestiture was necessary to maintain actual competition in the market, even though the transaction did not cause an increase in market concentration.

As explained by the court in *United States v. Aetna, Inc*., 240 F. Supp. 3d 1, 75 (D.D.C. January 23, 2017), *El Paso Natural Gas*, though often used to discuss potential competition theories, actually involved the elimination of an actual competitor in the market:

> Other courts, including the Supreme Court, have viewed competitors who were marginally in the market as "actual competitors." This line of cases begins with *United States v. El Paso Natural Gas Co*., 376 U.S. 651, 84 S.Ct. 1044, 12 L.Ed.2d 12 (1964)… The Court analyzed El Paso's acquisition of Pacific Northwest as a merger between actual competitors, rather than a merger between one competitor and one potential competitor. Id. at 659–662, 84 S.Ct. 1044; *see also Marine Bancorp*., 418 U.S. at 623, 94 S.Ct. 2856 (stating that El Paso was an actual competitor, not potential competitor, case).

The lower court's decision did none of the analysis in *El Paso*, except to say that SAB was an actual competitor, not a potential one, and therefore could not be eager to enter a market in which it was already competing. (App. 12). It did not evaluate the "nature and extent of the market," which is highly concentrated, nor did not evaluate SAB's closeness to the market and its impact on the market. It simply concluded that since MillerCoors still exists (even though it will now be wholly owned by Molson Coors)—there will be no effect on competition. *Id*. The reasoning articulated in the Panel's decision is not just internally inconsistent but it also rejects the analysis required by *El Paso* while feigning to conform to it.

Further, this Court's decisions in *United States v. Penn-Olin Chemical Co*., 378 U.S. 158 (1964), and *United States v. Falstaff Brewing Co*., 410 U.S. 526 (1973) prohibit mergers that may eliminate potential competition in a market under § 7. In both *Penn-Olin* and *Falstaff*, there no was increase in market concentration. Indeed, in *Penn-Olin*, market concentration actually decreased. Nevertheless, the Court recognized that the elimination of potential competition may also violate § 7. If a merger that eliminates a potential competitor may violate § 7, even though it has no impact on market concentration, it then logically follows that the elimination of an *actual competitor* in a market may also violate § 7, even though it has no impact on market concentration. To hold otherwise, is to ignore the line of this Court's precedents beginning with *Brown Shoe* and those cases developing the doctrine of potential competition. Any "other construction would be illogical and disrespectful of the plain congressional purpose in amending § 7,

because it would create a large loophole in a statute designed to close a loophole." *Philadelphia National Bank*, 374 U.S. at 343.

CONCLUSION

The Ninth Circuit's published opinion conflicts with this Court's decision in *Brown Shoe* and the cases that follow. Accordingly, and in light of the foregoing, Petitioners respectfully request that this Court grant this Petition for Writ of Certiorari, reverse the decision of the United States Court of Appeals for the Ninth Circuit, and remand this case for trial.

Respectfully submitted,

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