No. _____

IN THE

# Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,
*Petitioner*,

v.

TRENDSETTAH USA, INC. AND TRENDSETTAH, INC.,
*Respondents*.

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

## PETITION FOR A WRIT OF CERTIORARI


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## QUESTIONS PRESENTED

Plaintiffs Trendsettah USA, Inc. and Trendsettah Inc. (together, "TSI") entered into contracts with Swisher International, Inc., under which Swisher would produce untipped cigarillos for sale by TSI. After the contracts expired, TSI sued Swisher for failing to fulfill some of TSI's orders, alleging breach of contract and violation of Section 2 of the Sherman Act.

The jury returned a verdict in favor of TSI, but the district court ordered a new trial because the jury had not been instructed regarding the standards for refusal-to-deal liability under the Sherman Act. The Ninth Circuit reversed, holding that a duty-to-deal instruction was not required because the jury had received instruction on a "legitimate business purpose" defense. It then held that TSI had carried its burden of proving harm to competition by showing only that its *own* output was diminished—even though marketwide output increased robustly.

The questions presented are:

1. Whether a jury verdict finding a defendant liable under Section 2 of the Sherman Act for refusing to deal or cooperate with a competitor may be upheld when the jury was not instructed (a) that a monopolist has no general duty to deal with its business rivals or (b) that the plaintiff must prove that the refusal was contrary to the defendant's short-run interests.

2. Whether an impact on a single firm's output can give rise to a presumption of injury to competition under Section 2 of the Sherman Act, even when marketwide output is increasing.

## PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

The caption contains the names of all the parties to the proceedings below.

Pursuant to this Court's Rule 29.6, undersigned counsel state that Swisher International, Inc. is a wholly-owned subsidiary of Swisher International Group Inc., and no publicly held corporation owns 10% or more of its stock.

## RULE 14.1(b)(iii) STATEMENT

- *Trendsettah USA, Inc., et al. v. Swisher International, Inc.*, Nos. 16-56823, 16-56827 (9th Cir.) (mandate issued June 24, 2019)
- *Trendsettah USA, Inc., et al. v. Swisher International, Inc.*, No. 14-cv-01664-JVS (C.D. Cal.) (order granting motion for reconsideration entered November 9, 2016)

There are no additional proceedings in any court that are directly related to this case.

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## PETITION FOR A WRIT OF CERTIORARI

Petitioner Swisher International, Inc. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

## OPINIONS BELOW

The opinion of the Ninth Circuit is unpublished but is available at 761 F. App'x 714. App., *infra*, 1a–6a. The order denying Swisher's petition for rehearing or rehearing en banc is unpublished. *Id.* at 84a–85a. The orders of the district court are unpublished. *Id.* at 7a–26a, 27a–54a.

## JURISDICTION

The Ninth Circuit issued its opinion on February 8, 2019, and issued its order denying rehearing or rehearing en banc on April 18, 2019. On June 27, 2019, Justice Kagan extended the time for filing the petition until September 15, 2019. No. 18A1364. This Court has jurisdiction under 28 U.S.C. § 1254(1).

## STATUTORY PROVISIONS INVOLVED

15 U.S.C. § 2 provides that "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony, and, on conviction thereof, shall be punished by fine not exceeding $100,000,000 if a corporation, or, if any other person, $1,000,000, or by imprisonment not exceeding 10 years, or by both said punishments, in the discretion of the court."

15 U.S.C. § 15(a) provides that "Except as provided in subsection (b), any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy, and shall recover threefold the damages by him sustained, and the cost of suit, including a reasonable attorney's fee. . . ."

## STATEMENT OF THE CASE

This Court has long held that every business has a broad "right to refuse to deal with other firms." *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 601 (1985). It is a bedrock principle that "the Sherman Act 'does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal.'" *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004) (alteration in original). Indeed, even a monopolist is generally "free to choose the parties with whom [it] will deal, as well as the prices, terms, and conditions of that dealing." *Pac. Bell Tel. Co. v. linkLine Commc'ns, Inc.*, 555 U.S. 438, 448 (2009).

An affirmative duty to cooperate with rivals arises only in rare and exceptional cases. *See Trinko*, 540 U.S. at 408; *see also* Herbert Hovenkamp, *Federal Antitrust Policy* 393–94 (5th ed. 2015) (imposing a duty to cooperate is "a severe exception to the general, and quite competitive rule, that firms should develop their own inputs and expertise and conduct their own innovation"). This Court has thus warned lower courts to

be "very cautious in recognizing such exceptions, because of the uncertain virtue of forced sharing and the difficulty of identifying and remedying anticompetitive conduct by a single firm." *Trinko*, 540 U.S. at 408.

Despite this Court's admonitions, in this case the Ninth Circuit imposed antitrust liability under this "limited exception," *id.* at 409, upholding a more than $44 million jury verdict on the ground that Defendant Swisher International, Inc., which had at most a 44% share of the nationwide market for untipped cigarillos ("cigarillos"), was *obligated* under the Sherman Act to satisfy the supply requirements of its competitor, Plaintiffs Trendsettah USA, Inc. and Trendsettah Inc. (together, "TSI"). Swisher *did* manufacture cigarillos for TSI—hundreds of millions of them, in fact. But TSI complained that Swisher was contractually bound to produce even *more* cigarillos, and that Swisher's alleged breach of this contractual duty supports treble-damages liability under Section 2.

The district court had overturned the antitrust verdict because the jury was not instructed on refusal-to-deal law, but the Ninth Circuit reversed and ordered the jury's verdict reinstated in full. In so ruling, the Ninth Circuit adopted two crucial rules of law that are irreconcilable with this Court's precedent and that exacerbate a conflict among the circuits.

First, the Ninth Circuit held that the Sherman Act authorizes the imposition of refusal-to-deal liability even when the jury is never told that monopolists have no general antitrust duty to cooperate with their rivals, and even in the absence of any instruction that the alleged refusal must entail the sacrifice of short-run benefits by the defendant. This Court has noted the importance of both factors. In *Aspen Skiing,* for example, the Court emphasized that "the trial court

unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals." 472 U.S. at 600. Further, the Court concluded that the evidence "[wa]s adequate to support the verdict" of liability not just because the defendant offered no legitimate business purpose for its conduct but because the evidence "support[ed] an inference that [the defendant] . . . was willing to sacrifice short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610–11.

In *Trinko*, this Court made clear that *Aspen Skiing* lies "at or near the outer boundary of § 2 liability." 540 U.S. at 409. By imposing liability here even though the jury was never instructed on these elements that were central to the Court's holding and rationale in *Aspen Skiing*, the Ninth Circuit expanded the scope of refusal-to-deal liability far beyond the limited confines delineated by this Court's precedent.

The Ninth Circuit's decision did not just ignore this Court's holdings. By affirming the jury's verdict in the absence of any finding that Swisher sacrificed short-run profits, the Ninth Circuit also deepened a circuit conflict on the question whether the absence of short-term sacrifice forecloses refusal-to-deal liability. The Tenth Circuit, in an opinion by then-Judge Gorsuch, has answered in the affirmative. *See Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1080 n.5 (10th Cir. 2013) ("Where, as here, there is no evidence that the defendant has sacrificed short-term profits to further an anticompetitive agenda, the plaintiff cannot prevail."). The Second Circuit—and now the Ninth Circuit below—has answered in the negative. *See Del. & Hudson Ry. Co. v. Consol. Rail Corp.*, 902 F.2d 174,

178 (2d Cir. 1990) ("A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits.").

Second, the Ninth Circuit held that an antitrust plaintiff can carry its burden of showing injury to competition merely by offering evidence of an impact on its *own* individual output. App., *infra*, 5a. But this Court has required more proof of harm to competition where—as was undisputed here—market output is *increasing*. "In the present setting, in which output expanded at a rapid rate following [defendant's] alleged predation, output in the [product] segment can only have been restricted in the sense that it expanded at a slower rate than it would have absent [defendant's] intervention. Such a counterfactual proposition is difficult to prove in the best of circumstances." *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 233 (1993). This Court has instead required "concrete evidence" of competitive harm in such cases, and has rejected presumptions based on "speculat[ion], for example, that the rate of segment growth would have tripled, instead of doubled, without [defendant's] alleged predation." *Id*. at 234. In fact, just two Terms ago this Court found insufficient evidence of injury to competition where there was some evidence of increased prices but market output increased by approximately 30%. *See Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018). Here, there was no evidence of higher prices and market output rose by *more than 70%*. App., *infra*, 91a.

The decision below threatens to dramatically expand the scope of antitrust liability for ordinary commercial conduct. And it does so under the guise of a refusal-to-deal doctrine that this Court has repeatedly cautioned is in "tension with the underlying purpose

of antitrust law" because compelling companies to "share the source of their advantage" with their business rivals may "lessen the incentive" of all market participants to invest and innovate and may inadvertently "facilitate the supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 407–09. Under the Ninth Circuit's decision, any firm with a market share of 44% or more may find itself subject to the antitrust regime's punitive sanctions, including treble damages and even criminal penalties, any time it purportedly breaches an ordinary commercial contract with a competitor—even when such a breach is socially efficient. The effect of such a dangerous and sweeping rule will be to chill the competitive conduct that the antitrust laws were designed to promote. This Court should grant certiorari and reverse the Ninth Circuit's judgment.

## I. FACTUAL BACKGROUND

Swisher is one of four established manufacturers of cigarillos. During the time in question, Swisher's share of the U.S. cigarillo market ranged from 35% to 44%. App., *infra*, 89a. In addition to the four established players, a number of new entrants compete for market share.

One of these new entrants is TSI. Because TSI did not have the capability to manufacture cigarillos itself, in January 2011 it entered into a Private Label Agreement with Swisher, under which Swisher would produce cigarillos for sale by TSI under TSI's "Splitarillo" label. App., *infra*, 8a.

The commercial relationship between TSI and Swisher was not smooth and was marked by unexpected fluctuations in TSI's orders. As the agreement (already once amended) approached its end date, the

parties still had not settled on an extension. Six days before the agreement was set to expire in late October 2012, TSI placed an order for 121 *million* cigarillos—equal to the entire monthly output of Swisher's Jacksonville, Florida factory. App., *infra*, 8a, 94a. Swisher was neither required to fulfill this order under the agreement nor able to do so in light of capacity constraints—especially as Swisher needed to reserve some of its manufacturing capacity to produce its own cigarillos, which were more profitable for Swisher than the cigarillos it produced for TSI. *Id.* at 17a. Nevertheless, Swisher produced 35 million Splitarillos for TSI over the next several months, even though the agreement by its terms had expired. *Id.* at 98a–99a.

The parties subsequently entered into a second Private Label Agreement effective February 1, 2013, which attempted to address the issues that had previously arisen by setting monthly caps on TSI's purchases and implementing a more disciplined order process. App., *infra*, 8a. Over the next year, Swisher produced an additional 120 million Splitarillos for TSI. *Id.* at 98a–99a. The second agreement expired in February 2014 and was not renewed. *Id.* at 8a.

During the approximately three-year period that the parties had a contractual relationship, the cigarillo market saw remarkable growth, with nationwide output increasing by more than 70%. App., *infra*, 91a. This growth in output was accompanied by a double-digit percentage decline in the average price for Swisher's own cigarillos. *See* 9th Cir. Dkt. 83 at 5.

## II. PROCEEDINGS IN THE DISTRICT COURT

In October 2014, TSI filed a complaint alleging that Swisher breached its contractual obligations by

failing to fulfill some of TSI's orders. App., *infra*, 8a–9a. It also alleged that this ordinary breach of contract violated Section 2, which prohibits "monopoliz[ing], or attempt[ing] to monopolize . . . any part of the trade or commerce among the several States." 15 U.S.C. § 2.

At trial, TSI successfully objected to Swisher's proposed jury instruction on the elements of a refusal-to-deal case, which provided:

> [O]ne of the elements TSI must prove is that Swisher engaged in anticompetitive conduct. TSI claims that this element is satisfied in this case because TSI claims that Swisher unlawfully refused to deal with TSI, a competitor.
>
> Ordinarily, a company may deal or refuse to deal with whomever it pleases, as long as it acts independently. Even a company with monopoly power in a relevant market has no general duty to cooperate with its business rivals and ordinarily may refuse to deal with them.
>
> Swisher's alleged refusal to deal with TSI only constitutes anticompetitive conduct if (i) it was contrary to Swisher's short-run best interests, and (ii) only made sense for Swisher because it harmed TSI and helped Swisher maintain monopoly power in the long run. . . .
>
> A refusal to deal is only anticompetitive where it hurts the defendant in the short run and benefits the defendant only by harming competitors.

App., *infra*, 86a–87a.

The district court proceeded to give a "legitimate business purpose" instruction that did not even mention refusal-to-deal liability and that hinged on Swisher's subjective motivation (*e.g.*, whether Swisher had a "desire" to maintain monopoly power).[1]

The jury returned a verdict for TSI, awarding $9,062,679 on the contract claims and $14,815,494 on the antitrust claims, which trebled to $44,446,482. App., *infra*, 55a–56a.[2] But the district court ordered a new antitrust trial because "[t]he Court[] fail[ed] to instruct the jury regarding Swisher's antitrust duty to deal." *Id.* at 43a. This was significant, the district court observed, because "without the instruction, the jury had no basis to determine whether Swisher's ordinary contract breach also constituted anticompetitive conduct . . . *and indeed the Court is skeptical that it would have done so*." *Id.* at 46a–47a (emphasis added).

---

[1] "You must determine whether Swisher had a legitimate business purpose for undertaking alleged anticompetitive conduct. If Swisher's conduct was designed to protect or further Swisher's legitimate business purposes, it does not violate the antitrust laws, even if Swisher's conduct injured TSI. A legitimate business purpose is one that benefits the actor regardless of any harmful effect on competitors, such as a purpose to promote efficiency or quality, offer a better product or service, or increase short run profits. The desire to maintain monopoly power or to block entry of competitors is generally not a legitimate business purpose. Thus, if Swisher's conduct was undertaken for a legitimate business purpose, that conduct deal [sic] does not violate antitrust laws even if it ultimately harmed TSI. . . ." App., *infra*, 22a–23a.

[2] Because the antitrust damages exceeded the amount of contract damages, the latter were reduced to zero by stipulation. App., *infra*, 56a.

The district court also concluded, however, that there was sufficient evidence from which the jury could find an injury to competition and therefore denied Swisher's motion for judgment as a matter of law. Swisher argued that although its failure to deliver as many cigarillos as TSI ordered may have affected *TSI's* output, the undisputed evidence showed that *market* output increased substantially (while Swisher's average price fell). App., *infra*, 91a. Nevertheless, the district court held that TSI's evidence that "Swisher failed to timely deliver approximately 200 million cigarillos" to TSI—a tiny fraction of the more than 10 *billion* cigarillos produced market-wide—was "sufficient to establish harm to competition," which Swisher then bore the burden of "rebut[ting]." *Id.* at 40a–41a. And the more than 70% increase in market output was not sufficient to rebut this presumption of injury to competition because there might have been "still higher market volumes had Swisher performed." *Id.* at 41a.

After further proceedings, the district court reconsidered and entered judgment as a matter of law for Swisher on the ground that Swisher lacked any duty to deal with TSI. App., *infra*, 7a–26a. The court reasoned that "'there is *only* a duty not to refrain from dealing where the *only* conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition.'" *Id.* at 13a–14a (emphases in original). But here, the court concluded, there was no evidence at all of short-term sacrifice. On the contrary, the entire premise of TSI's case was that Swisher breached its contracts with TSI so that it could prioritize the manufacture of its own, more profitable cigarillos. *Id.* at 17a. Indeed, "Swisher presented evi-

dence that it was more profitable for Swisher to produce its own cigarillos instead of Splitarillos," *id.*, and "Swisher may have also gained production efficiencies from prioritizing its own products" given that Swisher's cigarillos "and Splitarillos were produced on the same machinery at the same plant," *id.* at 18a.

The district court thus upheld the jury's verdict with respect to TSI's contract claims, but not its antitrust claims. App., *infra*, 26a.

## III. PROCEEDINGS IN THE COURT OF APPEALS

The Ninth Circuit reversed in relevant part. Addressing the district court's order granting judgment for Swisher, the court agreed that (despite TSI's attempted disavowal) the case *did* rest on refusal-to-deal doctrine and that "'there is only a duty not to refrain from dealing where the only conceivable rationale or purpose is to sacrifice short-term benefits in order to obtain higher profits in the long run from the exclusion of competition.'" App., *infra*, 3a (quoting *Aerotec Int'l, Inc. v. Honeywell Int'l, Inc.*, 836 F.3d 1171, 1184 (9th Cir. 2016)). The court held, however, that although "the district court cited evidence that Swisher had introduced at trial to support its assertion that it had legitimate business reasons for its conduct . . . [,] in rendering its verdict, the jury clearly had rejected this evidence." *Id.*

The court of appeals also reversed the district court's new-trial order. App., *infra*, 3a–4a. It acknowledged that the "legitimate business purpose" instruction was "different" from the refusal-to-deal instruction Swisher requested, but it concluded that "the principle in the instruction that was given is the same: in order for Swisher to have violated the antitrust laws, its *only* purpose must have been to harm

TSI." *Id.* at 4a. According to the Ninth Circuit, "the jury instruction that was given adequately and accurately instructed the jury on the applicable law," even though it did not require TSI to prove that Swisher had acted against its own short-run best interests. *Id.*

Finally, the Ninth Circuit agreed with the district court that TSI had presented sufficient evidence of injury to competition. Because "'Swisher failed to rebut' TSI's evidence that 'Swisher failed to timely deliver approximately 200 million cigarillos under the private label agreements,'" the Ninth Circuit held "that 'a reasonable jury could find that the restricted market output for cigarillos harmed competition.'" App., *infra*, 5a.

As a result of these rulings, the Ninth Circuit ordered the district court to "reinstate the jury's verdict in its entirety." App., *infra*, 6a.

## IV. PROCEEDINGS ON REMAND

Following issuance of the mandate, Swisher filed a motion in the district court for relief from the judgment under Rule 60 of the Federal Rules of Civil Procedure, based on the discovery of new evidence that TSI's founder and CEO had been "fraudulently avoid[ing] paying federal excise taxes on cigarillos [TSI] imported from the Dominican Republic . . . between 2013 and 2015." App., *infra*, 61a. As TSI's CEO admitted to the authorities prior to his indictment, he entered this scheme to allow TSI to avoid the 52.75% federal excise tax on imported cigarillos and thereby unlawfully lower TSI's costs. Swisher argued that this fraud undermined the jury's verdict, which was based on earlier testimony from TSI's CEO and on "lost profits" claims resting on amounts that TSI

evaded paying in taxes. The district court agreed, setting aside the judgment after finding that "TSI's conduct tainted the integrity of the trial and interfered with the judicial process." *Id.* at 75a.

Although the judgment has been set aside, the district court has ordered a new trial on TSI's claims. App., *infra*, 83a. Absent review by this Court, therefore, further proceedings in this case will continue to be governed by the erroneous and problematic rules of law announced by the Ninth Circuit below.

## REASONS FOR GRANTING THE PETITION

### I. THE NINTH CIRCUIT DEPARTED FROM THIS COURT'S PRECEDENT AND DEEPENED A CIRCUIT CONFLICT BY IMPOSING LIABILITY WHERE THE JURY WAS NOT PROPERLY INFORMED OF THE NATURE AND SCOPE OF THE DUTY TO DEAL.

The Ninth Circuit departed from this Court's precedent and deepened a conflict between the Second and Tenth Circuits by upholding the jury's verdict where the jury was not instructed that (1) even monopolists do not have a general duty to deal with competitors under the antitrust laws, and (2) liability for refusing to deal with a competitor will lie only where the refusal entails a sacrifice of the defendant's short-run interests. Contrary to the Ninth Circuit's reasoning, it is insufficient that the jury was aware that Swisher's "only purpose must have been to harm TSI," App., *infra*, 86a–87a (emphasis omitted), because the sacrifice of short-term benefits is an *antecedent* condition to refusal-to-deal liability whose nonsatisfaction obviates any need to consider the proffered business purpose for a refusal. And importantly, unlike the business-purpose defense invoked by the court of appeals below, whether a defendant has sacrificed short-

term benefits is an *objective* inquiry as to which the plaintiff bears the burden of proof.

### A. The Decision Below Is Irreconcilable With This Court's Decisions.

This Court recognized a century ago that the Sherman Act "does not restrict the long recognized right of [a] trader or manufacturer engaged in an entirely private business, freely to exercise his own independent discretion as to parties with whom he will deal." *United States v. Colgate & Co.*, 250 U.S. 300, 307 (1919). This is for good reason: "Compelling such firms to share the source of their advantage is in some tension with the underlying purpose of antitrust law, since it may lessen the incentive for the monopolist, the rival, or both to invest," and in fact "may facilitate the supreme evil of antitrust: collusion." *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398, 407–08 (2004). Compounding these risks, "[e]nforced sharing also requires antitrust courts to act as central planners, identifying the proper price, quantity, and other terms of dealing—a role for which they are ill suited." *Id.* at 408.

To be sure, "[t]he high value that we have placed on the right to refuse to deal with other firms does not mean that the right is unqualified." *Aspen Skiing Co. v. Aspen Highlands Skiing Co.*, 472 U.S. 585, 601 (1985). But the Court has time and again emphasized that the law recognizes only a "limited exception" to the general rule of firm independence. *Trinko*, 540 U.S. at 409. In fact, the Court has found a unilateral refusal to deal to fall within this limited exception only once, in *Aspen Skiing*. And in that case, the Court highlighted the monopolist's sacrifice of short-term benefits, which it deemed crucial to its holding.

In *Aspen Skiing*, 472 U.S. 585, the defendant, Ski Co., controlled three out of four ski mountains in Aspen, Colorado. *Id.* at 589–90. Shortly after acquiring the third mountain, Ski Co. withdrew from an "all-Aspen" ski ticket—which had been offered for nearly 15 years—and instead offered a ticket good on every mountain in Aspen *except* the one mountain operated by its sole remaining competitor. *Id.* at 592–93. When the competitor attempted to create its own all-Aspen ticket by purchasing tickets to Ski Co.'s mountains, Ski Co. refused to sell them—even when the competitor offered to pay full retail price. *Id.* at 593–94. On these facts, the jury rendered a verdict against Ski Co., and this Court affirmed.

First, the Court agreed with Ski Co. "that even a firm with monopoly power has no general duty to engage in a joint marketing program with a competitor." 472 U.S. at 600. Because "the trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals," however, there was no basis for concluding that "the judgment in this case rests on any such proposition of law." *Id.*

Second, the Court held that there was sufficient evidence from which the jury could conclude that Ski Co.'s conduct fell within the limited exception to the rule of firm independence. Notably, the decision to withdraw from the all-Aspen ticket, standing alone, was not enough to establish a violation of the antitrust laws because "[s]uch a decision is not necessarily anticompetitive." 472 U.S. at 604. Instead, the Court emphasized that Ski Co. decided to forgo daily ticket sales at full retail prices to skiers who would have bought them through Ski Co.'s competitor. *Id.* at 608. The Court found this evidence "adequate to support

the verdict" because it suggested that Ski Co. "sacrifice[d] short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival." *Id.* at 610–11.

The Court revisited *Aspen Skiing* nearly two decades later in *Trinko*, 540 U.S. 398. In that case, the plaintiff claimed—in a near mirror image of TSI's claims—that "Verizon 'has filled orders of [competitive LECs'] customers after filling those for its own local phone service, has failed to fill in a timely manner, or not at all, a substantial number of orders for [competitive LECs'] customers . . . , and has systematically failed to inform [competitive LECs] of the status of their customers' orders.'" *Id.* at 404–05 (alterations in original).

The Court considered whether this alleged failure to fulfill orders, which purportedly violated the Telecommunications Act of 1996, also "states a claim under § 2 of the Sherman Act." 540 U.S. at 401. The Court first held that the facts presented did not fall within *Aspen Skiing*, which applies only where there is a "unilateral termination of a voluntary *(and thus presumably profitable)* course of dealing." *Id.* at 409 (emphasis in original). Unlike in *Aspen Skiing*, where "the defendant turned down a proposal to sell at its own retail price, suggesting a calculation that its future monopoly retail price would be higher," Verizon's alleged refusal to cooperate under terms prescribed by law indicated nothing about whether it had sacrificed short-term benefits. *Id.* On the contrary, because the services at issue "[we]re brought out on compulsion of the 1996 Act and offered not to consumers but to rivals, and at considerable expense and effort," *id.* at 410—and because Verizon was compelled to accept "the cost-based rate of compensation" prescribed by

statute, *id.* at 409—it was entirely possible that Verizon's refusal to deal actually *benefited* Verizon in the short term.

The Court then declined to extend its refusal-to-deal jurisprudence beyond the circumstances present in *Aspen Skiing*, which it described as "at or near the outer boundary of § 2 liability." 540 U.S. at 409. In particular, "[t]he cost of false positives" in refusal-to-deal cases—which "'are especially costly, because they chill the very conduct the antitrust laws are designed to protect'"—"counsels against an undue expansion of § 2 liability." *Id.* at 414.

The decision below is irreconcilable with *Aspen Skiing* and *Trinko*. First, the Ninth Circuit deemed immaterial the district court's failure to instruct the jury that even monopolists do not have a general duty to deal with competitors—an instruction this Court found indispensable in *Aspen Skiing*. 472 U.S. at 600 ("[T]he trial court unambiguously instructed the jury that a firm possessing monopoly power has no duty to cooperate with its business rivals."). This ruling, standing alone, substantially increased the scope of potential liability for refusals to deal, particularly where, as here, a refusal-to-deal claim is tried alongside a breach-of-contract claim, creating the risk that a jury will conflate a duty to deal under the contract with a duty to deal under the antitrust laws.[3] Indeed,

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[3] Courts have repeatedly rejected the premise that "contracts themselves g[i]ve rise to a 'duty to deal' under antitrust law." *In re Adderall XR Antitrust Litig.*, 754 F.3d 128, 130 (2d Cir. 2014); *see also SOLIDFX, LLC v. Jeppesen Sanderson, Inc.*, 841 F.3d 827, 843 (10th Cir. 2016) ("Even though . . . the jury concluded [that defendant] breached the License Agreement by its refusal, [defendant] did not have an independent antitrust duty to share

this is precisely what the district court suspected had happened here: "[W]ithout the instruction, the jury had no basis to determine whether Swisher's ordinary contract breach also constituted anticompetitive conduct under the antitrust law's special rules . . . and indeed the Court is skeptical that it would have done so." App., *infra*, 46a–47a.

Second, the Ninth Circuit erroneously held that the jury need not be informed that a "refusal to deal . . . only constitutes anticompetitive conduct if (i) it was contrary to Swisher's short-run best interests, and (ii) only made sense for Swisher because it harmed TSI and helped Swisher maintain monopoly power in the long run." App., *infra*, 86a–87a. According to the Ninth Circuit, the "legitimate business purpose" instruction given to the jury was sufficient because "the principle in th[at] instruction . . . is the same" as the refusal-to-deal instruction. *Id.* at 4a. Not so. To be sure, *Aspen Skiing* and *Trinko* fully support recognizing the lack of a legitimate business justification as a *necessary* condition of refusal-to-deal liability. But neither case supports the Ninth Circuit's holding that it is a *sufficient* condition, or that refusal-to-deal liability may be imposed so long as the defendant's subjective "purpose" was "to harm [the plaintiff]." *Id.* at 4a.[4]

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its intellectual property with [plaintiff]."). The "controlling consideration" for antitrust liability when "a monopolist . . . extend[s] a helping hand . . . and later withdraws it" is "antitrust policy rather than common law analogies" like contract or tort law. *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d 370, 376 (7th Cir. 1986) (Posner, J.).

[4] This holding reveals the toothless nature of the Ninth Circuit's earlier reference to the "sacrifice [of] short-term benefits" test.

For example, while the Court in *Aspen Skiing* noted that "Ski Co. did not persuade the jury that its conduct was justified by any normal business purpose," 472 U.S. at 608, it *also* emphasized the fact that Ski Co. had terminated a 15-year voluntary relationship that had arisen in more competitive conditions, *id.* at 603, and that Ski Co. "sacrifice[d] short-run benefits and consumer goodwill in exchange for a perceived long-run impact on its smaller rival," *id.* at 610–11. And in *Trinko*, the Supreme Court held that there was no duty to deal without even reaching the question whether the defendant's actions were supported by a legitimate business purpose. *See* 3B Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* § 772d3, at 236 (2019) ("[T]he Supreme Court did not require any evidence of business justification.").

By declaring the subjective business-purpose inquiry dispositive and rejecting any obligation to instruct the jury regarding objective short-term sacrifice, the Ninth Circuit allowed the jury to find antitrust liability merely from Swisher's alleged breach of its contracts with TSI—even though this Court has recognized that a refusal to deal "is not necessarily anticompetitive." *Aspen Skiing*, 472 U.S. at 604. In doing so, the Ninth Circuit's decision creates the risk of potential refusal-to-deal liability for any firm with a 44% or higher market share that has a contractual

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App., *infra*, 3a (citations and internal punctuation omitted). By expressly holding that the jury instruction given below "adequately and accurately instructed the jury on the applicable law," *id.* at 4a, the Ninth Circuit made clear that, in its view, plaintiffs can satisfy their burden merely by proving that the defendant's "only *purpose* [was] to harm [the plaintiff]," *id.* (emphasis added). For refusal-to-deal claims in the Ninth Circuit, therefore, the operative test is not one of objective profit sacrifice but rather subjective purpose to harm.

duty to a rival. And it makes it possible for a jury to impose treble damages on a firm whenever it fails to discharge this duty to the satisfaction of its competitor—even when that failure is consistent with the firm's own short-term economic interests. That holding is irreconcilable with this Court's precedent and will invite the very harms that antitrust law is designed to avoid. For these reasons alone, the Court should grant certiorari and reverse the judgment below.

### B. The Decision Below Deepens An Inter-Circuit Conflict.

The decision below not only departs from this Court's precedent, but also exacerbates a pre-existing conflict among the federal courts of appeals on the question whether refusal-to-deal liability may lie even where the challenged conduct does not entail the sacrifice of short-run benefits. The Tenth Circuit, in an opinion by then-Judge Gorsuch, has answered that question in the negative. The Second Circuit, like the Ninth Circuit below, disagrees, holding that the sacrifice of short-term benefits is merely *evidence* of an improper business purpose, not a prerequisite for refusal-to-deal liability. If this case had been decided in the Tenth Circuit, the district court's order granting a new trial—and, very likely, granting Swisher judgment as a matter of law—would have been affirmed. Because it was decided in the Ninth Circuit, however, it was not.

1. In *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064 (10th Cir. 2013), the Tenth Circuit considered whether Microsoft improperly refused to deal with a software developer when it granted, but then withdrew, access to certain Windows 95 code before releas-

ing the operating system to the public. The code allowed developers to piggyback on Windows 95's functionality when writing software, enabling them to avoid the need to write all of the code for their applications from scratch and thereby facilitating the prompt introduction of upgraded software applications. *Id.* at 1067–68. Although Microsoft originally shared the code in order to increase the number of third-party applications that would run on Windows 95, thus enhancing its market appeal, Microsoft later changed course in order to "make Microsoft's own applications . . . more immediately attractive to users," reasoning that while other developers could still write code so their programs would run on the operating system, "it would take them time to do so," thus giving Microsoft's applications "a competitive advantage, being the first applications usable on Windows 95." *Id.* at 1069.

The Tenth Circuit affirmed judgment as a matter of law for Microsoft on the ground that Microsoft had no duty to deal with the plaintiff software developer. Writing for the court, then-Judge Gorsuch acknowledged that, "[t]hough 'rare,' liability can sometimes be assigned even when the monopolist engages in 'purely unilateral' conduct." 731 F.3d at 1073. But "[f]orcing firms to help one another . . . risk[s] reducing the incentive both sides have to innovate, invest, and expand—again results inconsistent with the goals of antitrust." *Id.* It also "paradoxically risk[s] encouraging collusion." *Id.* In light of such concerns, the court identified certain features that "must be present" to support liability on a refusal-to-deal theory. *Id.* at 1074.

First, the Tenth Circuit held that "refusal to deal doctrine requires the monopolist to sacrifice short-

term profits to be held liable." 731 F.3d at 1075. This profit-sacrifice test is driven by the concern that short-run profit sacrifice may have anticompetitive effects: Because "a dominant firm may be able to forgo short-term profits longer than smaller rivals," a firm's sacrifice of short-term profits may "entrench a dominant firm and enable it to extract monopoly rents once the competitor is killed off or beaten down." *Id.* Consequently, the test focuses on whether the defendant *actually* sacrificed short-run profits, not whether it *intended* or expected to do so.

Second, the Tenth Circuit held that "the monopolist's conduct must be irrational but for its anticompetitive effect." 731 F.3d at 1075. This requirement is an essential supplement to the profit-sacrifice test because "firms routinely sacrifice short-term profits for lots of legitimate reasons that enhance consumer welfare (think promotional discounts)" or "in order to pursue perfectly procompetitive ends—say, to pursue an innovative [new] product." *Id.*

Under the rule of law announced in *Novell*, the jury instruction approved by the Ninth Circuit here was clearly invalid, because it did not so much as mention the requirements that Swisher must have sacrificed short-term profits and that its conduct must have been objectively irrational but for its anticompetitive effect. The Ninth Circuit nevertheless reasoned that "the principle in the instruction that was given is the same: in order for Swisher to have violated the antitrust laws, its *only* purpose must have been to harm TSI." App., *infra*, 4a. But a defendant's subjective "purpose" to harm its competitor (which is a commonplace feature of all competitive markets) is irrelevant to the two tests under *Novell*—both of which require an *objective* inquiry.

As a result, whereas a defendant in the Ninth Circuit may be found liable for refusing to deal with a competitor based solely on its subjective purpose to harm the competitor, the Tenth Circuit applies an objective framework under which the plaintiff must prove that the defendant actually sacrificed short-term benefits and that its decision to do so was "*irrational* but for its anticompetitive effect." 731 F.3d at 1075 (emphasis added); *see also id.* at 1078 ("Were intent to harm a competitor alone the marker of antitrust liability, the law would risk retarding consumer welfare by deterring vigorous competition.").

2. The Ninth Circuit's decision in this case is much more closely aligned with the Second Circuit's caselaw, which similarly declines to recognize the sacrifice of short-term benefits as an objective prerequisite for refusal-to-deal liability.

In *Delaware & Hudson Railway Co. v. Consolidated Rail Corp.*, 902 F.2d 174 (2d Cir. 1990), a railroad that controlled only 1,700 miles of track, and thus often traversed other railroads' tracks in completing a haul, sued the Consolidated Railroad Corporation ("Conrail") under Section 2 after Conrail adopted a "make or buy" policy under which the plaintiff could use Conrail's tracks only if it paid Conrail the same amount Conrail would have made if it performed the entire trip itself on its own tracks. *Id.* at 177. The result was to make it practically impossible for the plaintiff to contract with Conrail and, in turn, to perform many long-haul trips. *Id.*

Citing *Aspen Skiing*, Conrail argued "that, since the [make or buy] policy was intended to increase short-term, as well as long-term, profits, Conrail is insulated from liability." 902 F.2d at 178. The Second

Circuit disagreed. Although the court did not disregard the profit sacrifice issue entirely, it concluded that such a sacrifice would merely be *evidence* of a defendant's improper purpose:

> The fact that profit maximization is a goal of the make or buy policy provides support for an argument that the policy is a legitimate practice, but does not shield the policy from judicial scrutiny. A monopolist cannot escape liability for conduct that is otherwise actionable simply because that conduct also provides short-term profits. *Aspen Skiing* does not hold to the contrary.

*Id.* Pointing to evidence showing that Conrail subjectively *intended* to exclude competition—including correspondence suggesting that the make or buy policy "would have been implemented whether or not it increased Conrail's profits" and that "a shift of [the plaintiff's] traffic to Conrail would be desirable"—the Second Circuit concluded that the plaintiff had "proffered evidence sufficient to support a verdict in its favor by a reasonable jury on the question whether Conrail's conduct violated § 2." *Id.* at 178–79. That holding is consistent with the rule of law adopted by the Ninth Circuit below, but irreconcilable with the Tenth Circuit's decision in *Novell*.

### C. The Role Of The Short-Term Sacrifice Test Is A Question Of Recurring Importance.

Litigation concerning the scope of refusal-to-deal liability has arisen with increasing frequency in recent years. For example, earlier this year a California district court found, after a ten-day bench trial, that Qualcomm breached a duty to cooperate with its rivals

by failing to license certain technology to its competitors. In finding that Qualcomm had a duty to deal, the district court emphasized that its conduct "[wa]s motivated by 'anticompetitive malice,'" focusing on statements from company officials evidencing a subjective purpose to harm competitors. *FTC v. Qualcomm Inc.*, No. 17-cv-00220, 2019 WL 2206013, at *83–84 (N.D. Cal. May 21, 2019), *appeal docketed*, No. 19-16122 (9th Cir. June 3, 2019). Courts outside the Ninth Circuit have also confronted an increase in refusal-to-deal cases. *See, e.g.*, *Viamedia, Inc. v. Comcast Corp.*, 218 F. Supp. 3d 674, 698–99 (N.D. Ill. 2016) (dismissing refusal-to-deal claim where the plaintiff "has not alleged or explained how Defendants' refusal to deal with it . . . has no rational procompetitive purpose"), *appeal docketed*, No. 18-2852 (7th Cir. Aug. 24, 2018); Order at 12–13, *Entrata, Inc. v. Yardi Sys., Inc.*, No. 2:15-cv-00102, Dkt. 837 (D. Utah Aug. 14, 2019); *Mahaska Bottling Co. v. PepsiCo Inc.*, 271 F. Supp. 3d 1054, 1069–70 & n.11 (S.D. Iowa 2017) ("[C]ontractual duties should be distinguished with any duties imposed by the antitrust laws.").

The United States has taken an active interest in seeking to delimit the scope of refusal-to-deal liability, participating as *amicus curiae* in several of these cases to emphasize the importance of the objective profit-sacrifice test. *See, e.g.*, Brief for the United States as *Amicus Curiae* in Support of Neither Party at 15, *Viamedia, Inc. v. Comcast Corp.*, No. 18-2852 (7th Cir.), Dkt. 33 ("This Court should follow *Novell* and hold that satisfying the 'no economic sense' test is necessary to bring a Section 2 refusal-to-deal case."); Brief for the United States as *Amicus Curiae* in Support of Appellant and Vacatur at 18–28, *FTC v. Qualcomm Inc.*, No. 19-16122 (9th Cir.), Dkt. 86 ("The court's inference of anticompetitive malice from a

company's efforts to maximize profits runs contrary to the principles of a free market economy."); *see also* Brief for the United States and the Federal Trade Commission as *Amici Curiae* Supporting Petitioner at 7, *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko*, 540 U.S. 398 (2004) (No. 02-682) ("In the context of an alleged refusal to assist a rival, conduct is exclusionary only if it would not make business or economic sense apart from its tendency to reduce or eliminate competition.").

Scholarly opinion is in accord. Although some have cautioned that "[t]he sacrifice test seems to work poorly in areas of § 2 law unrelated to predatory pricing or refusals to deal," the academic consensus holds that the "test is . . . useful in unilateral refusal to deal cases to the extent that, if we wish to condemn refusals to deal at all, we must have a mechanism for identifying the very small subset of refusals that are anticompetitive." Areeda & Hovenkamp, *Antitrust Law* ¶ 651b2; *see also* A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 Berkeley Tech. L.J. 1247, 1266 (2005) ("The sacrifice test is . . . coherent and readily applicable to refusal to deal cases. . . . [I]t both prohibits inefficient refusals to deal and provides a sound, principled basis for rejecting claims of those who seek access to others' property where such dealing is not efficient."); Elyse Dorsey & Jonathan M. Jacobson, *Exclusionary Conduct in Antitrust*, 89 St. John's L. Rev. 101, 139 (2015) ("[T]he no economic sense or profit sacrifice test is appropriately applied to cases such as horizontal refusals to deal and price cutting, where the underlying activity is, typically, the very essence of competition and only in the rarest of occasions portends actual competitive harm.").

The Court should grant certiorari to provide guidance to lower courts as they confront this increasing volume of refusal-to deal cases.

## II. THE NINTH CIRCUIT VIOLATED THIS COURT'S PRECEDENT BY HOLDING THAT INJURY TO COMPETITION CAN BE SHOWN WITH EVIDENCE OF HARM TO A SINGLE COMPETITOR'S OUTPUT.

The Ninth Circuit further erred by holding that TSI carried its burden of proving injury to competition merely by proffering evidence of its *own* reduced output. Because "the antitrust laws were passed for 'the protection of *competition*, not *competitors*,'" *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 224 (1993) (emphases in original), this Court has made clear that a diminution in one firm's output is insufficient to establish injury to competition where, as here, *market* output is increasing.

A "burden-shifting framework applies" to determine injury to competition. *Ohio v. Am. Express Co.*, 138 S. Ct. 2274, 2284 (2018) ("*Amex*"). As relevant, "the plaintiff has the initial burden to prove that the challenged restraint has a substantial anticompetitive effect that harms consumers in the relevant market." *Id.* A plaintiff can carry this burden with "[d]irect evidence of anticompetitive effects . . . such as reduced output, increased prices, or decreased quality in the relevant market." *Id.*

Here, the Ninth Circuit held that TSI carried its initial burden of showing injury to competition with "evidence that 'Swisher failed to timely deliver approximately 200 million cigarillos under the private label agreements.'" App., *infra*, 5a. But it is undisputed that the broader cigarillo market saw remarkable growth during and after the time in question. In

fact, the *annual* growth in market output during the time Swisher and TSI were contracting consistently exceeded the *total* alleged order shortfall:

| **Year** | **Volume Sold** | **Growth** |
|---|---|---|
| 2011 | 2.1 billion | |
| 2012 | 2.4 billion | 14.2% |
| 2013 | 2.9 billion | 20.8% |
| 2014 | 3.2 billion | 10.3% |
| 2015 | 3.6 billion | 12.5% |
| **Total** | **14.2 billion** | **71.4%** |

App., *infra*, 91a.

In light of this consistent market-wide growth, TSI's evidence that its own output was allegedly restricted is insufficient as a matter of law to support a finding of injury to competition. "This Court will 'not infer competitive injury from price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level.'" *Amex*, 138 S. Ct. at 2288 (quoting *Brooke Grp.*, 509 U.S. at 237). The need for "concrete evidence" of injury to competition is especially pronounced where output expands following allegedly anticompetitive conduct, as "output in the [relevant] segment can only have been restricted in the sense that it expanded at a slower rate than it would have absent" the challenged conduct—a "counterfactual proposition [that] is difficult to prove in the best of circumstances." *Brooke Grp.*, 509 U.S. at 233–34. For this reason, the Court in *Amex* held that "[t]he plaintiffs . . . failed to prove that Amex's antisteering provisions have stifled competition," because "while these agreements have

been in place, the credit-card market experienced expanding output and improved quality." 138 S. Ct. at 2289.

The Ninth Circuit pointed to no basis for a finding of injury to competition beyond the type of data that was held insufficient in *Brooke Group* and *Amex*, and none existed. The only evidence even mentioned by the Ninth Circuit was Swisher's alleged failure to deliver 200 million cigarillos to TSI—a miniscule percentage of the more than 10 billion cigarillos produced from 2011 to 2014. App., *infra*, 5a. And while the Ninth Circuit endorsed the district court's reasoning, *id.*, the district court *also* failed to cite any evidence beyond the facially inadequate output data: "At trial, Trendsettah established that Swisher failed to timely deliver approximately 200 million cigarillos under the private label agreements. As the court explained on summary judgment, this evidence is sufficient to establish harm to competition based on restricted market output," *id.* at 40a–41a.

The Ninth Circuit's holding that an impact on a single firm's output suffices to establish harm to competition is irreconcilable with *Amex*, which held that antitrust law demands direct evidence of "reduced output . . . *in the relevant market*" in order to establish competitive harm on the basis of output reduction. 138 S. Ct. at 2284 (emphasis added). In fact, here there is even *less* evidence of injury to competition than was present in *Amex*. In *Amex*, "[t]he output of credit-card transactions grew dramatically from 2008 to 2013, increasing 30%" over five years. *Id.* Here, output grew by *70%* over *four* years. App., *infra*, 91a. In *Amex*, the defendant "increased the percentage of the purchase price that it charge[d] merchants by an average of 0.09%." 138 S. Ct. at 2288. Here, Swisher

*lowered* the average price of its cigarillos. *See* 9th Cir. Dkt. 83 at 5. Moreover, TSI's own CEO acknowledged that there was not likely to be any restriction of market output because TSI's shortfall was filled by other suppliers. *See, e.g.*, App., *infra*, 100a ("[P]roducts like Good Times and Show Cigars fill[ed] in [TSI's] backorders.").

The Eleventh Circuit has held that such evidence is insufficient to establish injury to competition in similar circumstances. In *Procaps S.A. v. Patheon, Inc.*, 845 F.3d 1072 (11th Cir. 2016), the plaintiff sued its former joint venture partner under Section 1 after the partner acquired a competitor and removed its production from "'a large share of the target market.'" *Id.* at 1076, 1085. The plaintiff asserted that removal of the acquired competitor's production from the market necessarily "'reduce[d] quantity'" and thus harmed competition, but the court rejected this assertion: "We have held that this is not sufficient—on its own—to establish harm to competition," because "more than harm to an individual competitor is required," namely, "some empirical evidence of actual effects." *Id*. at 1085–86. As the court concluded, "[a]t bottom, this is essentially a breach of contract case—and so Procaps's failure to support an antitrust theory is not all that surprising." *Id.* at 1087.

The Ninth Circuit's departure from *Brooke Group*, *Amex*, and *Procaps* is especially troubling considering that the breach of a supply contract will virtually always entail a restriction of the counterparty's output. The combined effect of the legal rules announced by the Ninth Circuit, therefore, is to transform essentially every breach of a supply contract between competitors into a potential antitrust lawsuit, as long as the defendant has a respectable market share. While

"many [contract] breaches . . . may be efficient and therefore socially desirable rather than wrongful," Richard Posner, *Economic Analysis of Law* § 4.12, at 143 (9th ed. 2014), the treble damages that attach to antitrust violations will chill such "socially desirable conduct" and, in the process, undermine market efficiency, *see Brooke Grp.*, 509 U.S. at 226–27 ("It would be ironic indeed if the standards for predatory pricing liability were so low that antitrust suits themselves became a tool for keeping prices high.").

This Court should therefore grant certiorari to correct the Ninth Circuit's dangerous departure from this Court's precedent regarding injury to competition. In fact, the Ninth Circuit's decision is so clearly at odds with well-established rules governing antitrust liability that summary reversal would be appropriate to "correct[] [its] demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n.* (1999); *see also Martinez v. Illinois*, 572 U.S. 833, 843 (2014) (summarily reversing decision that "runs directly counter to our precedents"); *Gonzales v. Thomas*, 547 U.S. 183, 185 (2006) (summarily reversing where "[t]he Ninth Circuit's failure to remand is legally erroneous, and that error is 'obvious in light of *Ventura*,' itself a summary reversal").

## III. THIS CASE PRESENTS A PROPER VEHICLE FOR RESOLVING THESE IMPORTANT QUESTIONS OF LAW.

As recounted above, the scope of refusal-to-deal liability is a recurring and important issue in the federal courts, attracting the sustained attention of the United States and leading academic commentators alike. *See supra*, Part I.C. This case presents a proper vehicle for resolving this issue. TSI's refusal-to-deal claims were presented to a jury in an eight-day trial,

resulting in a verdict in favor of TSI. The Ninth Circuit upheld that verdict on the basis of two suspect legal rulings, the reversal of either one of which would invalidate TSI's antitrust claim.

TSI may argue that this case nevertheless presents a poor vehicle because the case must be retried irrespective of whether this Court grants review. As noted above, the district court has ordered a new trial on the ground that TSI engaged in fraud upon the court. App., *infra*, 75a.

Far from counseling inaction, however, this development only underscores the urgency of the questions presented here and the need for this Court's guidance. Unless this Court intervenes, the flawed rules of law announced by the Ninth Circuit below will govern further proceedings in this case, and will also guide all future refusal-to-deal litigation in other cases in the Nation's most populous circuit. Given the plain conflicts between the judgment below and the decisions of this Court and the Tenth and Eleventh Circuits, there is no reason to force the parties and the district court to undertake the burden and expense of retrying this case only to *then* resolve these dispositive questions of law—perhaps necessitating a *third* trial.

Although the decision below is unpublished, that is no impediment to this Court's review. As this Court has acknowledged, "the fact that [a] Court of Appeals' order . . . is unpublished carries no weight in our decision to review the case." *Comm'r v. McCoy*, 484 U.S. 3, 7 (1987). In fact, the Court has in the past granted review of unpublished decisions from the Ninth Circuit that misinterpret Section 2 of the Sherman Act. *See McQuillan v. Sarbothane, Inc.*, 907 F.2d 154 (9th Cir. 1990) (unpublished), *rev'd sub nom. Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447 (1993). The

arguments for doing so are even stronger now that unpublished decisions are accorded persuasive force in the Ninth Circuit. *See Animal Legal Def. Fund v. Veneman*, 490 F.3d 725, 733 (9th Cir. 2007) (Thomas, J., concurring in part and dissenting in part) ("[A]s of January 1, 2007, we must now allow parties to cite even unpublished dispositions and unpublished orders as persuasive authority."). By holding out the prospect of success—and the treble damages available under the Sherman Act—for a vastly expanded category of refusal-to-deal claims, the decision below is likely to invite a flood of antitrust suits brought by alleged victims of contract breaches.

## CONCLUSION

For at least a century, this Court has confirmed the general rule that even monopolists have no duty to cooperate with business rivals. The Ninth Circuit flouted this long-established precedent—and exacerbated a circuit conflict—by upholding a jury verdict on a refusal-to-deal theory even though the jury was not informed that the defendant did not have a general duty to deal or that such a duty does not arise in the absence of proof that the defendant sacrificed short-term benefits. The Ninth Circuit further violated this Court's teachings by holding that a plaintiff may show injury to competition merely by offering evidence that its own output was restricted. As a result, every firm in the Ninth Circuit with a market share as low as 44% may now find itself liable under the antitrust laws every time it allegedly breaches—or declines to renew—an ordinary commercial contract with a business rival. The result will be to chill the very type of competitive and socially efficient behavior the antitrust laws are meant to promote.

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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