No. 19-349

IN THE

Supreme Court of the United States

SWISHER INTERNATIONAL, INC.,

Petitioner,

v.

TRENDSETTAH USA, INC., et al.,

Respondents.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether a defendant's subjective intent, standing by itself, can support a finding of refusal-to-deal liability under the Sherman Act.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. It appears often as *amicus curiae* before this Court in important antitrust cases. It filed an *amicus* brief, for instance, in *Verizon Communications Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004).

"We have been very cautious," the Court wrote in *Trinko*, about placing limits on a monopolist's "right to refuse to deal with other firms." *Id.* at 408. The problems with narrowing that right, the Court understood, are many. "Enforced sharing," for one thing, "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.* "Compelling negotiation between competitors may," for another thing, "facilitate the supreme evil of antitrust: collusion." *Id.* A monopolist's refusal to deal is an antitrust violation, therefore, only when it is *objectively* anticompetitive, such as when the monopolist incurs short-term losses simply to drive a rival from the market. *Id.* at 409.

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[*] No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, helped pay for the brief's preparation or submission. The brief is being filed more than ten days before it is due. WLF provided each party's counsel of record at least ten days' notice of its intent to file the brief. Each party's counsel of record has consented in writing to the brief's being filed.

In this case the Ninth Circuit treated the defendant's *subjective* intent as the key to refusal-to-deal liability. The court of appeals's approach cannot be squared with *Trinko*, and it flouts other cases as well. That's bad enough. What's downright intolerable, however, is that the decision below fundamentally undermines the entire structure of modern antitrust analysis. The decision, if left to stand, will sow confusion about what antitrust law is even *for*. WLF urges the Court to grant review.

SUMMARY OF ARGUMENT

The jury in this case was told that the petitioner violated the Sherman Act if its only purpose, in refusing further dealings with the respondents, was to harm a competitor. Pet. Br. 9 n.1; Res. Br. i. The Ninth Circuit approved this instruction even though the jury, by following it, could stand an antitrust violation solely on the petitioner's subjective intent. Pet. App. 4. As the petitioner explains, stripping objective criteria from the antitrust refusal-to-deal standard contradicts this Court's precedents, enhances a circuit split, and adds to the uncertainty that has recently started to form around the role—or, rather, the lack of a role—that intent plays in antitrust. Pet. Br. 13-26.

We write to elaborate on just how far the court below wandered from settled antitrust law. In antitrust's early days, some judges and scholars thought intent mattered a lot. Businesses, they believed, should "play fair." In practice, however, this attitude simply encouraged competitors not to compete too hard. At length economic analysis was

brought to bear on antitrust law, and the focus of that law accordingly shifted toward consumers. It became clear that, when asking whether a business's conduct benefits consumers, the important thing is not what the business *intended* in theory, but what its conduct *accomplished* in reality. It is precisely by setting out to harm a rival, in fact, that a business often ends up doing the most good for everyone else. A business's intent is at best a distraction to sound antitrust analysis, therefore, and at worst a potent source of error. So became the uniform position of the federal courts.

The Ninth Circuit has taken a drastic step backward. The decision below returns a business's intent to center stage. Placing intent back in the spotlight will discourage efficient corporate conduct, multiply discovery costs, increase the use of misleading arguments at trial, and inject a counterproductive moralism into contract law. But above all, it will throw into doubt the hard-won principle that the Sherman Act protects competition, not competitors. The Court should grant the petition and remind the judiciary that *vigorous* competition—the kind that so often manifests itself as a desire to defeat one's rivals—is not *harm* to competition, but rather its opposite.

REASONS FOR GRANTING THE PETITION

THE COURT SHOULD GRANT REVIEW TO CLARIFY THAT ECONOMIC EFFECTS, NOT SUBJECTIVE INTENT, ARE WHAT TRIGGER REFUSAL-TO-DEAL LIABILITY.

A. The Decision Below Revives a Profoundly Misguided Mode of Antitrust Analysis.

The notion that a person is free to compete in the market, regardless of *why* he wants to do so, is hardly new. "A man has a right to set up shop in a small village which can support but one of its kind," Holmes wrote in 1894, even though "he expects and intends to ruin a deserving widow who is established there already." Oliver Wendell Holmes, Jr., *Privilege, Malice, and Intent*, 8 Harv. L. Rev. 1, 3 (1894). The source of this liberty, Holmes explained, is the belief "that free competition is worth more to society than it costs." *Id.*

Still, for a time it was fashionable, in a number of areas of antitrust law, to consider whether a businessman acted with a good heart as he pressed his interests. "Knowledge of actual intent" was thought to "aid in the interpretation of facts" in such cases. *Appalachian Coals, Inc. v. United States*, 288 U.S. 344, 372 (1933). In *Utah Pie Co. v. Continental Baking Co.*, 386 U.S. 685 (1967), for example, the Court reinstated a judgment against defendants whom the plaintiff, Utah Pie, had accused of selling frozen pies at predatory prices in select cities. There was "no evidence of sales at a price below long-run marginal cost." Richard A. Posner, *Antitrust Law*

221 (2d ed. 2001). And although "intent to weaken Utah Pie was shown," this "was neither surprising nor disreputable, especially since Utah Pie, rather than any of the defendants, was the dominant firm in the markets involved." *Id.* No matter. Evidence of "predatory intent to injure" a competitor, combined with low prices in a few regional markets—and "highly competitive" markets at that—was enough, in the Court's view, to do the defendants in. 386 U.S. at 696-97, 702-03 & n.14. The Court's focus on intent led it to "strike directly at price competition itself," Ward S. Bowman, *Restraint of Trade by the Supreme Court: The* Utah Pie *Case*, 77 Yale L.J. 70, 70 (1967), and thereby reach "an anticompetitive result," Posner, supra, at 221. See also *Brooke Group Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 220-22 (1993) (collecting negative commentary on *Utah Pie*, and excusing the decision as "an early judicial inquiry in this area"); *Rebel Oil Co., Inc. v. Atl. Richfield Co.*, 51 F.3d 1421, 1445 n.16 (9th Cir. 1995) (concluding that *Brooke Group* implicitly overrules *Utah Pie*).

The message of a decision such as *Utah Pie* is that a business should be careful not to lower prices *too much*. A "drastically declining price structure" might be taken as a sign that one's conduct "is intended to have immediate destructive impact." *Utah Pie*, 386 U.S. at 703. This sounds a lot like the railroads' hoary rhetoric about needing "agreements among themselves" to "check and control" the "effects of a ruinous competition." *United States v. Joint-Traffic Ass'n*, 171 U.S. 505, 576 (1898). Such claims "are the staples of trade associations, which plead with their members not to harm (meaning, compete against) their fellow businessmen."

Fishman v. Estate of Wirtz, 807 F.2d 520, 577 (7th Cir. 1986) (Easterbrook, J., dissenting). To discourage aggressive conduct is to discourage competition itself. *Ball Mem'l Hosp. Ins., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).

There were always lines in this Court's opinions pointing in a better direction. The Sherman Act, many justices knew, "does not purport to afford remedies for all torts committed by or against persons engaged in interstate commerce." *Hunt v. Crumboch*, 325 U.S. 821, 826 (1945). Gradually this attitude became predominant. The antitrust laws, the Court realized, "do not create a federal law of unfair competition," *Brooke Group*, 509 U.S. at 225, and plaintiffs should not obtain "treble damages" for "tort suits masquerading as antitrust actions," *Copperweld Corp. v. Ind. Tube Corp.*, 467 U.S. 752, 777 (1984). A businessowner, the Court concluded, may not bring an antitrust suit against a competitor for harming *her* in *the process* of competing with her for customers. The antitrust laws protect competition, not competitors. *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

The Court came in particular to recognize how "difficult" it can be "to distinguish robust competition from conduct with long-run anti-competitive effects." *Copperweld*, 467 U.S. at 767. Antitrust liability cannot hinge on whether a firm "appears to 'restrain trade' unreasonably," because "even a vigorous competitor may leave that impression." *Id*. Indeed, a competitive firm and an anticompetitive one act, and even think, in much the same way. They each want, and they each try, to thwart their rivals and

dominate the market. The upshot, the Court came to see, is that a defendant's *intent* typically sheds no light on whether the defendant committed an antitrust violation. "Even an act of pure malice by one business competitor against another," the Court declared, "does not, without more, state a claim under the federal antitrust laws." *Brooke Group*, 509 U.S. at 225.

"Intent to harm," then-Judge Breyer explained, "offers too vague a standard in a world where executives may think no further than 'Let's get more business.'" *Barry Wright Corp. v. ITT Grinnell Corp.*, 724 F.2d 227, 232 (1st Cir. 1983). Subjective intent is not a cornerstone of, or even that useful to, antitrust analysis. On few points is there more thorough agreement. See, e.g., *United States v. Microsoft Corp.*, 253 F.3d 34, 59 (D.C. Cir. 2001) ("[O]ur focus is upon the effect of that [exclusionary] conduct, not upon the intent behind it."); *Rural Tel. Serv. Co., Inc. v. Feist Publ'ns, Inc.*, 957 F.2d 765, 769 (10th Cir. 1992) ("Anticompetitive intent alone is insufficient to establish a violation of [Sherman Act] §2."); *Ocean State Physicians Health Plan, Inc. v. Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1113 (1st Cir. 1989) ("[T]he desire to crush a competitor, standing alone, is insufficient to make out a violation of the antitrust laws."); *A.A. Poultry Farms, Inc. v. Rose Acre Farms, Inc.*, 881 F.2d 1396, 1402 (7th Cir. 1989) (Easterbrook, J.) ("Almost all evidence bearing on 'intent' tends to show both greed-driven desire to succeed and glee at a rival's predicament. . . . [But] firms need not like their competitors . . . ; a desire to extinguish one's rivals is entirely consistent with, often is the motive behind, competition."); *Olympia Equip. Leasing Co. v. W. Union Tel. Co.*, 797 F.2d

370, 379 (7th Cir. 1986) (Posner, J.) ("We add, what has become an antitrust commonplace, that if conduct is not objectively anticompetitive the fact that it was motivated by hostility to competitors ('these turkeys') is irrelevant."); Katherine Kemp, *A Unifying Standard for Monopolization: "Objective Anticompetitive Purpose"*, 39 Hous. J. Int'l L. 113, 177-78 (2017) ("The critical point is that vigorous, socially beneficial competition necessarily harms, and may ultimately exclude, less efficient competitors. The fact that a dominant firm acts with the specific intent to achieve, or the subjective purpose of achieving, this [exclusion] does not distinguish anticompetitive conduct from procompetitive conduct."); Gregory J. Werden, *Identifying Exclusionary Conduct Under Section 2: The "No Economic Sense" Test*, 31 J. Corp. L. 293, 304 (2006) ("[W]hat matters are the objective economic considerations for a reasonable person, and not the state of mind of any particular decisionmaker."); Steven C. Salop & R. Craig Romaine, *Preserving Monopoly: Economic Analysis, Legal Standards, and Microsoft*, 7 Geo. Mason L. Rev. 617, 652 (1999) ("It is not clear what the addition of a separate intent standard adds to the policy equation. . . . Focusing solely on effects is consistent with first principles of antitrust.").

Although it has not ruled that intent plays no part in a refusal-to-deal case, the Court has left no doubt that in this area, as elsewhere in modern antitrust law, intent is of little or no moment. The two leading cases are, of course, *Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585 (1985), and *Trinko*, 540 U.S. 398. *Aspen* sees no need to discuss what effect an "anticompetitive purpose," by

itself, might have in a refusal-to-deal case. 472 U.S. at 611 n.44. The decision turns instead on the defendant's failure to offer an *objectively* procompetitive justification for its conduct. *Id.* 608-11; cf. *id.* at 602 (taking the defendant's anticompetitive intent for granted based on its objectively anticompetitive acts). A mirror image of *Aspen*, *Trinko* turns on the plaintiff's failure to identify *objective* signs of anticompetitive effects. 540 U.S. at 409-10. More than that, *Trinko* stresses that "the cost of false positives" in antitrust law "counsels against an undue expansion of [Sherman Act] § 2 liability." *Id.* at 414. "False condemnations," after all, "chill the very conduct the antitrust laws are designed to protect." *Id.* Placing weight on a defendant's intent is, as we've seen, a recipe for generating exactly this species of blunder.

"Put simply," under the proper refusal-to-deal standard, "the monopolist's conduct must be irrational but for its anticompetitive *effect*." *Novell, Inc. v. Microsoft Corp.*, 731 F.3d 1064, 1075 (10th Cir. 2013) (Gorsuch, J.) (emphasis added). A plaintiff must show, for instance, that the defendant lost money rather than deal with her—conduct that suggests the firm will "extract monopoly rents once the competitor is killed off or beaten down." *Id*. In letting a jury base liability solely on a belief that a defendant's conduct lacked the right *purpose*, the decision below substitutes yesterday's muddled and fruitless standard for today's focused and efficient one.

B. The Decision Below Will Reduce Competition, Increase Litigation, and Debase Contract Law.

The Ninth Circuit's antitrust revanchism is cause for alarm. The hazards are everywhere. Most importantly, all the old problems of focusing on intent are back. Innovation benefits consumers, but it injures rivals. Those rivals will sue, if they can. The decision below raises their prospects. The hinge of a dispute has become, not whether the defendant's conduct promoted consumer welfare, but whether the defendant said or thought mean things. This is antitrust law as a "federal law of unfair competition." *Brooke Group*, 509 U.S. at 225. Worse, it is antitrust law as a tool for *attacking* competition. Companies are going to learn that doing something new—disrupting the market—attracts lawsuits, while sitting still—playing nice—does not.

There is also the problem of modern-day discovery. Discovery in antitrust cases is already ruinously expensive. See *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-59 (2007). Introducing an inquiry into a defendant's mindset will only make things worse. The decision below invites lawyers to "rummage through business records seeking to discover tidbits that will sound impressive (or aggressive) when read to a jury." *A.A. Poultry*, 881 F.2d at 1402. "Traipsing through the warehouses of business in search of misleading evidence both increases the costs of litigation and reduces the accuracy of decisions." *Id.*; see also Kent, supra, 39 Hous. J. Int'l L. at 175-76 ("Fact finders may be overly impressed by evidence of aggressively

competitive intent and misconstrue it as an indication of an anticompetitive plot.").

What's more, the decision below causes all this trouble in a contract action. Courts tend to treat a contract as an option to perform or pay damages. 3 E. Allan Farnsworth, *Contracts* § 12.8 (2d ed. 1990). A contract breaker's intent is irrelevant in such a scheme. "No blame can attach to your not performing even if it was deliberate—even if, for example, you did not perform simply because someone offered you more money for the product or service that you had undertaken to supply in the contract." Richard A. Posner, *Let Us Never Blame a Contract Breaker*, 107 Mich. L. Rev. 1349, 1349 (2009). The aim of contract law is to help people allocate resources efficiently, not to impose a code of chivalry. So just as an intentional breach of contract does not justify an award of punitive damages, Restatement (Second) of Contracts § 355 (1981), neither should it justify an award of treble damages under the antitrust laws. The "tortification of contract law"—the "tendency of contract disputes to metastasize into torts"—is pernicious enough. *Oki Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring). The Ninth Circuit has gone one better and endorsed contract law's antitrustification.

*   *   *

The decision below is a great regression. It breathes life into a confused and destructive tendency. The peril at hand should concentrate the minds of those who believe in competition and

consumer welfare. Review is needed to ensure that we are not cast back into an antitrust paradox.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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