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 DR. JANUSZ A. ORDOVER AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*[1]

Amicus curiae Dr. Janusz A. Ordover is an Emeritus Professor of Economics and a former Director of the Masters in Economics Program at New York University. He served as the Deputy Assistant Attorney General for Economics in the Antitrust Division of the U.S. Department of Justice under President George H.W. Bush. He is currently a Senior Consultant at Compass Lexecon. He has authored and co-authored several articles on appropriate tests for exclusionary conduct as well as advised numerous U.S. and international corporations and enforcement agencies on this issue. *Amicus curiae* files solely as an individual and not on behalf of any institution with which he is affiliated.

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[1] Pursuant to the Court's Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus* or their counsel made a monetary contribution to its preparation or submission. *Amicus curiae* provided each party's counsel of record notice of its intent to file the brief at least ten days prior to the due date for the *amicus* brief. Each party's counsel of record has consented in writing to the brief's being filed.

SUMMARY OF ARGUMENT

I agree with the petitioner that the Ninth Circuit has generated a conflict among circuits and departed from the Court's precedents holding that the Sherman Act does not generally require companies to deal with other entities, including rivals. This hundred-year line of precedent that began with *United States* v. *Colgate & Co.*, 250 U.S. 300 (1919), is reflected most recently in the Court's opinions in *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398 (2004) and *Pacific Bell Telephone Co.* v. *LinkLine Communications, Inc.*, 555 U.S. 438 (2009).

The Court's long-held position that an entity has an antitrust duty to deal with rivals only in highly limited circumstances is firmly rooted in the goals of antitrust as well as in economic reasoning. "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, even worse, "may facilitate the supreme evil of antitrust: collusion." *Trinko*, 540 U.S. at 407-408. Allowing the decision of the Ninth Circuit to stand undermines this Court's protection of the incentives that drive competition and deepens a circuit split on the question of whether the showing of the absence of short-run sacrifice by the defendant forecloses refusal to deal liability. It also elevates the interests of an individual competitor over the interests of competition.

If allowed to stand, this decision will affect not only businesses that currently deal with competitors, it will also have market-wide negative effects by discouraging all businesses from entering into economically efficient and innovative arrangements with current or future competitors for fear of antitrust liability should their business needs change. This deleterious effect falls on all firms that do business in the Ninth Circuit, which had a combined GDP of $4.6 trillion in the first quarter of 2019. U.S. Bureau of Econ. Analysis, News Release Table 3 (July 25, 2019).[2] The impact on business behavior affects competition and ultimately consumers.

The Ninth Circuit's decision in *Trendsettah* implicates the foundation of modern Sherman Act jurisprudence: that antitrust law should advance consumer welfare by safeguarding the competitive process rather than protecting the interests of a particular competitor. I make the following three points:

First, a failure to require a jury instruction on (1) the legal policy underlying Section 2, and (2) that the plaintiff must prove that a refusal to deal was contrary to the defendants' short-run interests *and* be irrational but for its anticompetitive effect, substitutes a rule of business welfare for consumer welfare. Phillip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 851-852 & n.46 (1990) (criticizing jury instructions that "start with the assumption that all business assets are subject to sharing.").

Second, the Ninth Circuit's holding is especially concerning because it will deter efficiency-enhancing business conduct and innovation. Wholesale supply contracts are ubiquitous, and firms must be able to make decisions about how to allocate their productive capacity over time without the threat of antitrust liability. As recognized in *Olympia Equipment Leasing*

[2] available at https://www.bea.gov/system/files/2019-07/qgdpstate0719.pdf.

Co. v. *W. Union Telegraph Co.*, 797 F.2d 370 (7th Cir. 1986) (Posner, J.), firms that voluntarily encourage new competition should not be penalized under the antitrust laws when their needs or market conditions change. Moreover, the Ninth Circuit's jury instruction standard for refusal to deal claims is now so vague and open-ended that it creates uncertainty and risks an increase in false positives, whereby procompetitive or competitively neutral conduct is subject to antitrust condemnation.

Third, properly understood, antitrust injury requires harm to competition, which is the only way to ensure that antitrust is tightly tethered to consumer welfare. Allowing the Ninth Circuit to forgo this test "condemn[s] competition in the name of antitrust" and ignores "the interests of the consumers the competition is supposed to protect." Frank H. Easterbrook, *Treble What?*, 55 Antitrust L.J. 95, 100-101 (1986) (citing *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-768 (1984)).

ARGUMENT

I. THE LONG-STANDING RULE THAT BUSINESSES HAVE NO GENERAL DUTY TO DEAL WITH RIVALS RECOGNIZES AND SAFEGUARDS THE UNDERLYING GOAL OF ANTITRUST, WHICH IS TO PROTECT THE INCENTIVES THAT DRIVE COMPETITION AND NOT SIMPLY THE INTERESTS OF INDIVIDUAL COMPETITORS

It is impossible to advance dynamic competition and the gains in innovation and consumer welfare it fosters if 'refusal to deal' jury instructions fail to state the presumptive legality of independent business decisions on dealing with rivals. If the Ninth Circuit's decision stands, the precedent will invert refusal to deal jurisprudence, threatening companies' incentives to best business rivals, which spurs competition and benefits consumers, and replace it with a duty to cooperate with rivals, which will deter investment and ultimately diminish dynamic competition.

Dynamic competition has been the predominant driver of economic growth in the U.S. economy for many decades. *E.g.*, William J. Baumol, *The Free-Market Innovation Machine* (2002). Innovation is "the powerful lever that in the long run expands output and brings down prices." Joseph A. Schumpeter, *Capitalism, Socialism and Democracy* (1942). It "drives productivity, sharpens competition, and creates new products[.]" David J. Teece, *Pivoting Toward Schumpeter*, 32 Antitrust Mag. 32, 33 (Summer 2018). "With dynamic competition, innovation and competition are tightly linked." J. Gregory Sidak & David J. Teece, *Dynamic Competition in Antitrust Law*, 5 J. of Competition L. & Econ. 581, 604 (Nov. 2009).

To protect this process that is so important to the U.S. economy, this Court has held that Sherman Act Section Two exists to "protect[] the process of competition, with the interests of consumers, not competitors, in mind." *Novell, Inc.* v. *Microsoft Corp.*, 731 F.3d 1064, 1072 (10th Cir. 2013); see *Pacific Bell Tel. Co.* v. *LinkLine Commc'ns, Inc.*, 555 U.S. 438 (2009); *Verizon Commc'ns* Inc. v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 407-408 (2004); *Atlantic Richfield Co.* v. *USA Petroleum Co.*, 495 U.S. 328 (1990); *Brown Shoe Co.* v. *United States*, 370 U.S. 294, 320 (1962). Simply put, antitrust law protects competition, not competitors. *Brunswick Corp.* v. *Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488 (1977).

Consequently, to protect dynamic competition, the general rule is that a business, including a monopolist, acting unilaterally is free to choose whether to do business with others. LinkLine, 555 U.S. at 448. Indeed, the Sherman Act does not impose a duty to deal with or continue dealing with rivals except in the rarest circumstances. *Aspen Skiing Co.* v. *Aspen Highlands Skiing Corp.*, 472 U.S. 585, 600-601 (1985) (This Court described *Aspen* as "at or near the outer boundary of § 2 liability." *Trinko*, 540 U.S. at 409.). Put another way, independent business decisions are presumed legal.

If the Court were to take the opposite approach, three risks, all antithetical to the goals of antitrust law, become apparent.

First, "the antitrust laws would be holding an umbrella over inefficient competitors." *Olympia Equip. Leasing* Co. v. *W.* Union *Tel. Co.*, 797 F.2d 370, 375 (7th Cir. 1986). This "might make rivals happy but it usually leaves consumers paying more for less." *Novell*, 731 F.3d at 1072. Indeed, discouraging aggressive business conduct discourages competition itself. *Ball Mem'l Hosp., Inc.* v. *Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1338 (7th Cir. 1986) (Easterbrook, J.).

Second, forcing monopolists to help rivals risks "reducing the incentive both sides have to innovate, invest, and expand— . . . results inconsistent with the goals of antitrust." *Novell*, 731 F.3d at 1073. See also, Einer Elhauge, *Defining Better* Monopolization *Standards*, 56 Stan. L. Rev. 253, 300-306 (2003); Dennis W. Carlton, *A General Analysis of Exclusionary Conduct and Refusal to Deal—Why Aspen and Kodak are Misguided*, 68 Antitrust L.J. 659 (2001).

Third, it also risks discouraging firms from entering into economically efficient arrangements for fear of future liability. Philip Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust

L.J. 841, 850 (1990) ("[O]ne of the consequences will be that lawyers will advise their clients not to cooperate with a rival; once you start, the Sherman Act may be read as an antidivorce statute."); *Olympia Equip.*, 797 F.2d at 376 (explaining that with no duty to help new entrants "the law would be perverse if it made [defendant's] encouraging gestures the fulcrum of an antitrust violation. Then no firm would dare to attempt a graceful exist [sic] from a market in which it was a major seller."); Susan A. Creighton & Jonathan M. Jacobson, *Twenty-Five Years of Access Denials*, 27 Antitrust Mag. 50, 53 (Fall 2012) (noting that if the rule were that a monopolist could not terminate a course of dealing it would "necessarily deter firms ex ante from entering into efficient arrangements."). Indeed, if a firm enters into a course of dealing and then exits, the correct economic analysis is whether competition would be harmed at the exit relative to what it would have been had the firm refused to deal with the rival in the first place.

In contrast, "[e]xperience teaches that independent firms competing against one another is almost always good for the consumer and thus warrants a strong presumption of legality." *Novell*, 731 F.3d at 1073. Therefore, the general rule that independent business decisions are presumed legal "gives a degree of predictability to judicial outcomes and permits reliance by all market participants, themselves goods for both the competitive process and the goal of equal treatment under the law." *Ibid.* (referring to *Trinko*, 540 U.S. at 407-408).

II. TO AVOID UNDERMINING COMPETITION, ANTITRUST LIABILITY IS ONLY APPROPRIATE WHEN THE REFUSAL TO DEAL IS CONTRARY TO THE DEFENDANTS' SHORT-RUN INTERESTS DEMONSTRATED BY THE DEFENDANTS' SACRIFICE OF SHORT-RUN BENEFITS *AND* WHERE THE ACTION WOULD BE IRRATIONAL BUT FOR ITS ANTICOMPETITIVE EFFECT

Aspen and *Trinko* teach that firms have 'no duty to deal' with rivals, except for those situations identified where a firm has sacrificed short-run profits as part of a larger anticompetitive enterprise such that the action was irrational but for its anticompetitive impact. In *Trinko*, the Court offered one such example: "The unilateral termination of a voluntary (and thus presumably profitable) course of dealing [that] suggested a willingness to forsake short-term profits to achieve an anticompetitive end." *Trinko*, 540 U.S. at 409 (emphasis omitted) (citing *Aspen*, 472 U.S. at 608, 610-611).

The decision below, however, has created a circuit split in application of this principle in duty to deal jurisprudence. The Tenth Circuit recognizes the principle. There, even monopolists can continue to make their own business decisions with no affirmative antitrust duty to deal as long as any sacrifice of short-run profits is not irrational but for its anticompetitive effect. *E.g.*, *Novell*, 731 F.3d at 1076-1078. But the lower court in *Trendsettah* failed to require that the jury instructions include this screen to determine applicability of a duty to deal. Thus, the Ninth Circuit affirmed antitrust liability without any finding that the only reason defendant sacrificed short-run profits was for its anticompetitive result. The Ninth and Tenth Circuits now stand opposed on this increasingly important point of antitrust doctrine.

Amicus curiae agrees that consistent application of this principle across the circuits would best preserve the general 'no duty to deal' rule as well as its narrow exception. Indeed, "a significant burden must be placed on plaintiffs to establish that single firm conduct is, in fact, exclusionary." Gregory J. Werden, *The "No Economic Sense" Test for* Exclusionary *Conduct*, 31 J. Corp. L. 293, 298 (2006). The test *amicus* favors "properly imposes such a burden by requiring the demonstration that the challenged conduct would not be rational for the defendant absent a tendency to eliminate competition." *Ibid*; see also Janusz A. Ordover & Robert D. Willig, *An Economic Definition of Predation: Pricing and Product Innovation*, 91 Yale L.J. 8, 9 (1981) ("[P]redatory objectives are present if a practice would be unprofitable without the exit it causes, but profitable with the exit. Thus, although a practice may cause a rival's exit, it is predatory only if the practice would not be profitable without the additional monopoly power resulting from the exit.").

Economics is a powerful guide to help courts distinguish procompetitive or competitively neutral business conduct from anticompetitive behavior. In the refusal to deal context, business conduct that is successful even after disregarding any anticompetitive benefits (that is, resulting in no loss of profits by the firm before taking account of increased market power, if any, from the challenged conduct), should be presumptively legal. *Amicus curiae* provides three reasons for this position.

First, a firm's unilateral profit-maximizing behavior is pro-competitive. This comports with the antitrust general rule that a firm has no duty to deal with its rivals, which protects competitive rivalry and risk-taking incentives. It also comports with *Trinko*, where the decision was based on the understanding that seeking monopoly "is an important element of the free-market system" because "it induces risk taking that produces innovation and economic growth." *Trinko*, 540 U.S. at 407.

Second, courts have recognized that it is often quite difficult to distinguish whether some business conduct is procompetitive or anticompetitive. *E.g.*, *Brooke Grp.* v. *Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226 (1993) (citing *Cargill, Inc.* v. *Monfort of Colo., Inc.*, 479 U.S. 104, 122 n.17 (1986)); *Spectrum Sports, Inc.* v. *McQuillan*, 506 U.S. 447, 458-459 (1993) (citing *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767-769 (1984)). Amicus *curiae's* standard helps courts overcome this difficulty and avoid the problem of false positives, which the Court warned against in *Trinko*. *Trinko*, 540 U.S. at 414 ("[F]alse condemnations . . . chill the very conduct the antitrust laws are designed to protect.") (citation omitted).

Third, a rule allowing a less efficient rival to litigate all profitable refusals to deal would turn an antitrust claim into a negotiating chip, rather than a way to stop behavior that actually harms consumer welfare. William J. Baumol & Janusz A. Ordover, *Use of Antitrust to Subvert Competition*, 28 J.L. & Econ. 247, 255 (May 1985). Conversely, employing this test "provides simple and meaningful guidance to firms to enable them to know how to avoid antitrust liability without steering clear of procompetitive conduct." A. Douglas Melamed, *Exclusionary Conduct Under the Antitrust Laws: Balancing, Sacrifice, and Refusals to Deal*, 20 Berkeley Tech. L.J. 1247, 1257 (2005).

In *Trendsettah*, the Ninth Circuit held that the district court should have disregarded evidence of Swisher's legitimate business reasons for its conduct as "the jury clearly had rejected this evidence." Pet.

App. 3a. The Ninth Circuit then overturned the district court's grant of summary judgment to Swisher on the monopolization claim. *Ibid.* The panel incorrectly skipped the crucial first step in determining whether the decision about with whom to transact business remains in the presumptively legal category. The Ninth Circuit should have first asked whether there was any evidence that not renewing the contract or allegations of insufficient delivery under the contract actually had a tendency to eliminate competition, and then whether Swisher had sacrificed short-run profits such that its decision made no business sense but for its tendency to harm competition. If there was not such evidence, the Ninth Circuit should have affirmed the district court's dismissal.

The district court's failure to instruct the jury on this standard, and approval of that failure by the appellate court below, pits the Ninth Circuit's jurisprudence squarely against that of the Tenth Circuit, as reflected in *Novell*. By its omission, the Ninth Circuit has failed to screen out procompetitive conduct encouraged by the Sherman Act, instead subjecting it to liability. The broad application of the Ninth Circuit's position elevates the welfare of business rivals over that of consumers.

In light of the Court's *Aspen* and *Trinko* decisions, it is troubling that the court below failed to apply this economic test to the initial claims. In sum, the Court should grant certiorari to clarify that it is essential to gauge short-run profitability of conduct after netting out anticompetitive benefits to the defendant to determine whether conduct, even aggressive behavior against rivals, is actually anticompetitive.

III. ANTITRUST PROTECTS COMPETITION, NOT COMPETITORS, AND THUS THE ANTICOMPETITIVE EFFECT MUST BE ON THE MARKET AND NOT SOLELY ON THE OUTPUT OF A SINGLE FIRM

It is a core principle of antitrust law that "the antitrust laws were passed for 'the protection of competition, not competitors.'" *Brooke Grp.*, 509 U.S. at 224 (emphases omitted). In light of this, it is important to note that Swisher's actions in prioritizing production of its own products over Trendsettah's may have helped it gain production efficiencies. Pet. App. 18a. It also may have prompted Trendsettah to set up its own manufacturing plant in the Dominican Republic and begin manufacturing cigarillos. Pls.' Statement of Genuine Disputes of Material Fact ¶ 50, ECF No. 81. As Swisher became more efficient and Trendsettah began producing its own products, total market output of untipped cigarillos increased by more than 70% and Swisher's cigarillo prices declined. Pet. App. 18a; Pls.' Statement of Genuine Disputes of Material Fact ¶ 30, ECF No. 81. Although Trendsettah may have preferred to retain its previous arrangement with Swisher, this preference by a single competitor—who had the option to self-supply or perhaps could have sought a contract with a different manufacturer—is a far cry from antitrust injury or harm to consumer welfare.

Trendsettah is not a victim of antitrust injury. Finding antitrust injury here would use antitrust law to make a firm responsible for ensuring that its rivals can use its manufacturing capacity. Such a rule would encourage cooperative business behavior, if not outright collusion, and decrease the incentive for either firm to invest in its assets, for example, its manufacturing capacity in the first place.

CONCLUSION

In sum, the Court should grant certiorari in *Trendsettah* to clarify and reinforce that consumer welfare, not the interest of a single competitor, is the guiding principle of antitrust law.

Respectfully submitted.

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