No. 16-1454

IN THE
# Supreme Court of the United States

OHIO, ET AL.,

*Petitioners*,

v.

AMERICAN EXPRESS COMPANY, ET AL.,

*Respondents*.

**On Writ of Certiorari to the United States Court of Appeals for the Second Circuit**

## BRIEF OF *AMICUS CURIAE* PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA SUPPORTING AFFIRMANCE


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## QUESTION PRESENTED

Whether Section 1 of the Sherman Act condemns a vertical restraint in a case where the defendant lacks market power and the plaintiff fails to offer evidence of reduced output or supracompetitive prices in the affected market.

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## BRIEF OF *AMICUS CURIAE* PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA SUPPORTING AFFIRMANCE

## INTEREST OF *AMICUS CURIAE*[1]

*Amicus curiae* Pharmaceutical Research and Manufacturers of America ("PhRMA") represents the country's leading innovative pharmaceutical and biotechnology companies. The question presented in this case implicates many of the common vertical agreements PhRMA's member companies employ to efficiently structure their business activities in a procompetitive manner. PhRMA

[1] Petitioners' and Respondents' counsel of record consented to the filing of this brief by filing blanket consents with the Clerk. In accordance with this Court's Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than *amicus* or their counsel, have made a monetary contribution to the preparation or submission of this brief.

seeks to ensure that the Court not lose sight of these ubiquitous contractual arrangements that have typically received traditional rule-of-reason scrutiny under the antitrust laws. PhRMA fears that a retreat from the Court's traditional rule-of-reason treatment of non-collusive vertical restraints would inflict deleterious consequences on PhRMA's members, the patients those members serve, and the U.S. economy as a whole.

## SUMMARY OF ARGUMENT

Formulating clear, predictable rules that do not unduly deter procompetitive conduct has been the focal point of antitrust jurisprudence for decades. It is now settled law that non-collusive vertical restraints receive traditional rule-of-reason treatment, that it is exceedingly difficult to demonstrate competitive harm in the face of increased output, and that a lack of market power effectively rules out any anticompetitive effects. The Second Circuit faithfully applied each of these principles, but Petitioners wish to abandon them in favor of a markedly new approach to evaluating non-collusive vertical restraints. Adopting that approach would result in the uncertainty and over-deterrence that this Court has so carefully avoided. A host of common, procompetitive vertical restraints would be imperiled, an outcome that would harm businesses, consumers, and the economy as a whole. The Court should decline Petitioners' invitation to forge a new framework for evaluating non-collusive vertical restraints and instead reaffirm its commitment to the predictable, appropriately calibrated rules for analyzing these typically procompetitive arrangements.

## ARGUMENT

### I. THIS COURT HAS REPEATEDLY RECOGNIZED THE IMPORTANCE OF CLEAR, PREDICTABLE RULES IN THE ANTITRUST CONTEXT

This Court "ha[s] repeatedly emphasized the importance of clear rules in antitrust law." *Pac. Bell Tel.*

*Co.* v. *Linkline Commc'ns, Inc.*, 555 U.S. 438, 452 (2009). It has long sought to structure its antitrust jurisprudence to "provide guidance to the business community and to minimize the burdens on litigants and the judicial system." *Cont'l T. V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977). And it has consciously made efforts to develop antitrust rules that promote "business certainty and litigation efficiency." *Arizona* v. *Maricopa Cty. Med. Soc'y*, 457 U.S. 332, 343-344 (1982). In this respect, the Court agrees with Professor Areeda that "[n]o court should impose a duty * * * that it cannot explain or adequately and reasonably supervise." *Verizon Commc'ns Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 414-415 (2004) (quoting Areeda, *Essential Facilities: An Epithet in Need of Limiting Principles*, 58 Antitrust L.J. 841, 853 (1989)).

Providing meaningful guidance to the business community has been a particular emphasis of this Court's antitrust jurisprudence. The Court has recognized the insufficiency of an antitrust regime that leaves "businessmen * * * with little to aid them in predicting in any particular case what courts will find to be legal and illegal under the Sherman Act." *United States* v. *Topco Assocs., Inc.*, 405 U.S. 596, 609 n.10 (1972). It has thus sought to "establish the litigation structure to ensure" that antitrust law "operates to eliminate anticompetitive restraints from the market and to provide more guidance to businesses." *Leegin Creative Leather Prods., Inc.* v. *PSKS, Inc.*, 551 U.S. 877, 898-899 (2007).

The impetus for this policy is not to benefit any individual business, but rather to foster the procompetitive conduct that drives a healthy economy. This Court has observed that vague or overbroad antitrust rules "are especially costly, because they chill the very conduct the antitrust laws are designed to protect." *Matsushita Elec. Indus. Co.* v. *Zenith Radio Corp.*, 475 U.S. 574, 594

(1986). In other words, courts "must be concerned lest a rule or precedent that authorizes a search for a particular type of undesirable pricing behavior end up by discouraging legitimate price competition" or other procompetitive conduct. *Ibid.* (quoting *Barry Wright Corp.* v. *ITT Grinnell Corp.*, 724 F.2d 227, 234 (1st Cir. 1983)).

## II. Antitrust Law Has Achieved A Measure Of Predictability By Establishing Clear Rules To Govern Certain Categories Of Typically Procompetitive Conduct

Through decades of common-law refinement, courts have achieved much of the desired predictability by establishing clear rules to protect categories of procompetitive conduct that typically do not run afoul of the antitrust laws. The first such rule discussed below recognizes that traditional rule-of-reason analysis will apply to non-collusive vertical restraints. That mode of analysis places the burden on plaintiffs to prove that such restraints have actual anticompetitive effects. The second and third rules recognize that plaintiffs will be unable to make that showing when the defendant lacks market power or when the challenged restraint does not reduce output. These clear rules provide notice to businesses that they may engage in the protected categories of conduct without fearing antitrust liability. We briefly discuss each in turn.

### A. It is settled law that non-collusive vertical restraints are evaluated under the traditional rule of reason

First, it is settled that non-collusive vertical restraints are lawful unless the plaintiff can show under the rule of reason that the challenged restraint has actual anticompetitive effects. In other words, "virtually all vertical agreements now receive a traditional rule-of-reason analysis," *In re Ins. Brokerage Antitrust Litig.*, 618 F.3d 300, 318 (3d Cir. 2010), as opposed to heightened forms of

antitrust scrutiny that place far lesser demands on the plaintiff. This Court has held as much on multiple occasions. See *Leegin*, 551 U.S. at 907 ("Vertical price restraints are to be judged according to the rule of reason."); *State Oil Co.* v. *Khan*, 522 U.S. 3, 22 (1997) ("[V]ertical maximum price fixing * * * should be evaluated under the rule of reason."). That approach pervades the courts of appeals as well. See, *e.g.*, *In re Musical Instruments Antitrust Litig.*, 798 F.3d 1186, 1191-1192 (9th Cir. 2015) ("Vertical agreements * * * are analyzed under the rule of reason * * * ."); *In re Se. Milk Antitrust Litig.*, 739 F.3d 262, 272 (6th Cir. 2014) ("Vertical restraints * * * are subjected to the rule of reason."); *K.M.B. Warehouse Distribs.* v. *Walker Mfg. Co.*, 61 F.3d 123, 127 (2d Cir. 1995) ("We analyze this sort of allegedly anticompetitive practice—a vertical conspiracy that does not involve price-fixing—according to the 'rule of reason.'").

By contrast, other types of restraints merit more skeptical treatment, under which the plaintiff need not show anti-competitive effects. The quick-look approach "shift[s] to a defendant the burden to show empirical evidence of procompetitive effects" without the need for the plaintiff to first demonstrate competitive harm. *Cal. Dental Ass'n* v. *FTC*, 526 U.S. 756, 775 n.12 (1999). That special treatment is appropriate only where "an observer with even a rudimentary understanding of economics could conclude that the arrangements in question would have an anticompetitive effect on customers and markets." *Id.* at 770. Examples include horizontal restraints such as "an absolute ban on competitive bidding," *ibid.* (quoting *Nat'l Soc'y of Prof'l Eng'rs* v. *United States*, 435 U.S. 679, 692 (1978)), and "a horizontal agreement among the participating dentists to withhold from their customers a particular service that they desire," *ibid.* (quoting *FTC* v. *Ind. Fed'n of Dentists*, 476 U.S. 447, 459 (1986)).

Going a step further, the *per se* rule "treat[s] categories of restraints as necessarily illegal [and] eliminates the need to study the reasonableness of an individual restraint in light of the real market forces at work." *Leegin*, 551 U.S. at 886. But the *per se* rule "is confined to restraints * * * 'that would always or almost always tend to restrict competition and decrease output,'" such as "horizontal agreements among competitors to fix prices or to divide markets." *Ibid.* (quoting *Bus. Elecs. Corp.* v. *Sharp Elecs. Corp.*, 485 U.S. 717, 723 (1988)).

Non-collusive vertical restraints fall outside the scope of these two alternative modes of analysis because vertical restraints often have procompetitive effects. "Economists have identified a number of ways in which manufacturers can use such restrictions to compete more effectively against other manufacturers." See *Cont'l T. V.*, 433 U.S. at 54-55. Indeed, vertical restraints can "stimulate interbrand competition—the competition among manufacturers selling different brands of the same type of product—by reducing intrabrand competition—the competition among retailers selling the same brand." *Leegin*, 551 U.S. at 890; see also *id.* at 903-904 ("[V]ertical nonprice restraints have impacts similar to those of vertical price restraints; both reduce intrabrand competition and can stimulate retailer services."). And it is interbrand competition that is most important, for its protection is "the primary purpose of the antitrust laws." *Khan*, 522 U.S. at 15.

For those reasons, "the Court, following a common-law approach, has continued to temper, limit, or overrule once strict prohibitions on vertical restraints." *Leegin*, 551 U.S. at 901. That project has resulted in what is now the settled law that the traditional rule of reason governs non-collusive vertical restraints.

### B. It is settled law that demonstrating reduced output is a virtual requirement of showing competitive harm

Second, courts have reached a consensus that showing reduced output is nearly always part of a plaintiff's burden to demonstrate anticompetitive effects. Conversely, it is almost impossible for a plaintiff to demonstrate anticompetitive effects in the face of increased output. As this Court explained in *Brooke Group Ltd.* v. *Brown & Williamson Tobacco Corp.*, when "output is expanding at the same time prices are increasing, rising prices are equally consistent with growing product demand" as with competitive harm. 509 U.S. 209, 237 (1993). For that reason, "a jury may not infer competitive injury from [this kind of] price and output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Ibid.* Adducing such evidence is "difficult * * * in the best of circumstances." *Id.* at 233.

The courts of appeals have followed this Court's reasoning and applied it in a variety of contexts. They have emphasized the importance of a plaintiff's demonstrating reduced output to prove an injury to competition. See, *e.g.*, *Procaps S.A.* v. *Patheon, Inc.*, 845 F.3d 1072, 1084-1085 (11th Cir. 2016) (listing "reduction of output" as one of three identified "actual anticompetitive effects," along with increased price and deteriorating quality); *Sterling Merch., Inc.* v. *Nestle, S.A.*, 656 F.3d 112, 121 (1st Cir. 2011) ("Injury to competition is usually measured by a *reduction in output* and an *increase in prices* in the relevant market.") (internal quotation marks omitted). Moreover, the courts of appeals have recognized that increased output is typically evidence of robust competition and is thus an impediment to a successful antitrust claim. See, *e.g.*, *Am. Steel Erectors* v. *Local Union No. 7, Int'l Ass'n of Bridge, Structural, Ornamental & Reinforcing*

*Iron Workers*, 815 F.3d 43, 60 (1st Cir. 2016) ("[T]he very purposes of the antitrust laws [are] encouraging efficiency, lowering costs, and increasing output."); *McWane, Inc.* v. *FTC*, 783 F.3d 814, 840-841 (11th Cir. 2015) (listing "increas[ing] output" as a "procompetitive justification[]" for conduct that otherwise harms competition).

Professors Areeda and Hovenkamp confirm the critical role of output in demonstrating competitive harm: "In a rule of reason case the plaintiff must first allege and show that the challenged restraint is of a type reasonably calculated to have anticompetitive effects, *ordinarily measured by reduced output in a properly defined market*." 7 Areeda & Hovenkamp, Antitrust Law ¶ 1504b, at 415 (4th ed. 2017) (emphasis added).

### C. It is settled law that a company must have market power to cause competitive harm

Third, courts consistently acknowledge that a company that lacks market power cannot cause competitive harm absent collusion. That is because a company without market power cannot unilaterally restrict industry-wide output sufficient to raise prices. The courts of appeals have embraced that maxim, declaring that "[t]he first requirement in every suit based on the Rule of Reason is market power, without which the practice cannot cause those injuries * * * that matter under the federal antitrust laws." *Menasha Corp.* v. *News Am. Mktg. In-Store, Inc.*, 354 F.3d 661, 663 (7th Cir. 2004). See, *e.g.*, *Buccaneer Energy, Inc.* v. *Gunnison Energy Corp.*, 846 F.3d 1297, 1312 (10th Cir. 2017) ("Once a legally sufficient market has been identified, the plaintiff must then show market power * * * ."); *Rebel Oil Co.* v. *Atl. Richfield Co.*, 51 F.3d 1421, 1434 (9th Cir. 1995) ("Without market power to increase prices above competitive levels, and sustain them for an extended period, a predator's actions do not threaten consumer welfare."). Statements from this Court support that principle as well. See *Lee-*

*gin*, 551 U.S. at 885-886 ("Whether the businesses involved have market power is a further, significant consideration."); *Cal. Dental*, 526 U.S. at 782 (Breyer, J., concurring) (asking whether defendant had "sufficient market power to make a difference"); *Copperweld Corp.* v. *Indep. Tube Corp.*, 467 U.S. 752, 768 (1984) (defining the rule of reason as "an inquiry into market power and market structure designed to assess [a restraint's] actual effect").

* * *

These three principles have become increasingly entrenched in recent years. Businesses rely upon these axioms to guide their behavior. If a business lacks market power or employs a non-collusive vertical restraint that does not reduce output, it has been able to confidently predict that its conduct would be reviewed under the traditional rule of reason and found lawful. The strength and clarity of these principles deter meritless litigation and dispose of most cases within their scope at summary judgment, because the plaintiff fails to make the required showing of actual anticompetitive effects. Carrier, *The Rule of Reason: An Empirical Update for the 21st Century*, 16 Geo. Mason L. Rev. 827, 828-829 (2009) (explaining that between 1999 and 2009, plaintiffs failed to establish anticompetitive effects in 97% of rule-of-reason cases, "nearly all" of which were decided on summary judgments or motions to dismiss).

## III. Reversing The Decision Below And Adopting Petitioners' Approach Would Undermine These Well-Defined Rules And Unsettle Antitrust Law

### A. The decision below reaffirms the critical antitrust rules that businesses have come to rely on

The Second Circuit relied on each of the rules discussed above to hold that the plaintiffs had not met their burden under a traditional rule-of-reason analysis.

First, the court noted that "all parties * * * agree that Amex's NDPs are a vertical restraint," Pet. App. 29a, and recited the settled law that "[v]ertical restraints 'are generally judged under the rule of reason.'" *Id.* at 26a (quoting *Anderson News, L.L.C.* v. *Am. Media, Inc.*, 680 F.3d 162, 183 (2d Cir. 2012)). It then recognized the black-letter law that under the rule of reason "a plaintiff bears the initial burden of demonstrating that a defendant's challenged behavior 'had an actual adverse effect on competition as a whole in the relevant market.'" *Id.* at 27a (quoting *Capital Imaging Assocs., P.C.* v. *Mohawk Valley Med. Assocs., Inc.*, 996 F.2d 537, 543 (2d Cir. 1993)).

Applying those principles, the court held that the plaintiffs had "offered no such proof." *Id.* at 52a. Instead, their proof focused almost exclusively on harm to merchants when "the market as a whole includes both cardholders and merchants." *Id.* at 50a (emphasis omitted). Although "[p]laintiffs might have met their initial burden under the rule of reason by showing either that cardholders engaged in fewer credit-card transactions (*i.e.*, reduced output), that card services were worse than they might otherwise have been (*i.e.*, decreased quality), or that Amex's pricing was set above competitive levels within the credit-card industry (*i.e.*, supracompetitive pricing)," they failed to make any of those showings necessary to demonstrate competitive harm. *Id.* at 52a. That ended the case under the rule-of-reason framework. *Id.* at 52a-54a.

Second, the Court of Appeals relied on the essential role of output in demonstrating competitive harm. It quoted this Court's holding that "when output expands at the same time that prices increase, 'rising prices are equally consistent with growing product demand' as with anticompetitive behavior," such that a fact-finder "'may not infer competitive injury from [that kind of] price and

output data absent some evidence that tends to prove that output was restricted or prices were above a competitive level." *Id.* at 29a (quoting *Brooke*, 509 U.S. at 237). The evidence here demonstrated "that industry-wide transaction volume has substantially increased"—the very antithesis of decreasing competition. *Id.* at 52a (emphasis omitted). "[G]iven [this] evidence showing that the quality and output of credit cards across the entire industry continues to increase," the court "conclude[d] that Plaintiffs failed to carry their burden to prove" competitive harm. *Id.* at 54a.

Third, the court recognized that plaintiffs "may establish anticompetitive effects indirectly by showing that the defendant has 'sufficient market power to cause an adverse effect on competition.'" *Id.* at 27a (quoting *Tops Mkts., Inc.* v. *Quality Mkts., Inc.*, 142 F.3d 90, 96 (2d Cir. 1998)). The court held there was insufficient evidence to support the district court's finding of market power because it "relied on cardholder insistence as support for" that finding. *Id.* at 45a. But "[c]ardholder insistence results not from market power, but instead from competitive benefits on the cardholder side of the platform and the concomitant competitive benefits to merchants who choose to accept Amex cards." *Ibid.* "That Amex might not enjoy market power without continuing investment in cardholder benefits indicates, if anything, *a lack* of market power * * * ." *Id.* at 46a. Because "[w]hatever market power Amex has appears, on this record, to be based on its rewards programs and perceived prestige," the court held that the plaintiffs had not met their burden of proving competitive harm under the rule of reason. *Id.* at 48a.

### B. Petitioners' approach would undermine those rules and usher in an era of uncertain antitrust liability

Petitioners offer a radical alternative to the Second Circuit's traditional approach. They would jettison the three rules that make up the foundation of that decision and instead blaze a new, open-ended path for antitrust law.

#### 1. *Petitioners' approach effectively subjects non-collusive vertical restraints to quick-look scrutiny*

Petitioners first seek to escape traditional rule-of-reason treatment for the non-collusive, vertical restraints at issue here by arguing that although "Amex's merchant agreements are vertical in nature, they have horizontal effects because they limit competition among Amex, Visa, MasterCard, and Discover over merchant prices." Pet. Br. 16. According to Petitioners, those "horizontal effects" on competition, combined with the non-collusive adoption of similar vertical restraints by others in the industry, justifies "more careful scrutiny." *Id.* at 34 (quoting *Leegin*, 551 U.S. at 897).

Before turning to what Petitioners mean by "more careful scrutiny," it is important to appreciate the sweeping implications of their threshold for triggering such scrutiny. If a vertical restraint no longer merits traditional rule-of-reason treatment merely because it has some "horizontal effect" on competition, then virtually all vertical restraints must be subjected to this "more careful scrutiny." That is because, much like the literal language of the Sherman Act, Petitioners' test "could be interpreted to [apply to] all contracts." *Leegin*, 551 U.S. at 885. By definition, a restraint restrains. And if the bar for Petitioners' "more careful scrutiny" is simply a restraining effect on interbrand competition, then it is difficult to imagine a vertical restraint that would not qualify.

Indeed, every contract between a seller and a buyer "restrains" the seller's interbrand rivals by limiting the amount of product they can sell to that buyer. Petitioners' "more careful scrutiny" would thus become the new default test in antitrust law, contradicting this Court's repeated admonition to "presumptively appl[y] rule of reason analysis." *Texaco Inc.* v. *Dagher*, 547 U.S. 1, 5 (2006).

Furthermore, Petitioners' "more careful scrutiny" is a stark departure from the traditional rule-of-reason framework in which the plaintiff bears the initial burden of demonstrating anticompetitive effects. It much more closely resembles the quick-look approach that shifts the initial burden to the defendant. To be sure, Petitioners pay lip service to their burden to demonstrate anticompetitive effects, but they reduce it to a triviality. To them, demonstrating an increase in merchant fees is sufficient to discharge that burden. Pet. Br. 37-40. But that approach focuses on one partial measure of competition (price) on one side (merchants) of the two-sided credit-card market, to the exclusion of all the other relevant factors (including, most importantly, increased output and robust competition for cardholders' business). After all, price may increase for all sorts of entirely legitimate reasons, including demand increases, cost increases, innovation, and improved quality or functionality. Such incomplete evidence has never been sufficient to meet a plaintiff's burden under the rule of reason. If that is all that is required to carry a plaintiff's burden under the "more careful scrutiny" standard, then it effectively becomes the quick-look approach for any plaintiff creative enough to manipulate the data to yield some incomplete indication of potential anticompetitive effects.

Under Petitioners' view, something akin to the quick-look approach—designed to apply to a narrow category of highly suspect restraints—would effectively replace

the traditional rule-of-reason analysis for an amorphous category of non-collusive, vertical restraints. Such a result would upset decades of precedent and mark a course reversal in the development of antitrust law.

2. *Petitioners' approach permits antitrust liability even in the face of increased output and lack of market power*

Petitioners' transformation of antitrust analysis would also end the settled safe harbors of increased output and a lack of market power. Petitioners do not question the irrefutable evidence of "increased output" in the form of "a dramatic increase in transaction volume across the entire credit-card industry." Pet. App. 52a. Nor do they challenge the Second Circuit's holding that Amex lacked market power. See *id.* at 45a-48a. Despite those two heretofore virtually impenetrable barriers to demonstrating competitive harm, Petitioners nevertheless insist that the "real-world pricing effects for the entire industry met the Government's burden to show that Amex's provisions harm consumers." Pet. Br. 40 (emphasis omitted). In other words, merely showing an increase in merchant fees—a patently incomplete demonstration of anticompetitive effects for the reasons discussed above—suffices to overcome uncontested evidence of increased output and lack of market power. If that is all that is needed to overcome these safe harbors under Petitioners' approach, their protection would become illusory. And the decades of precedent developing them would be effectively overruled.

## IV. THE RESULTING UNCERTAINTY WOULD CHILL A BROAD RANGE OF COMMON PROCOMPETITIVE CONDUCT, THEREBY HARMING BUSINESSES, CONSUMERS, AND THE U.S. ECONOMY

In casting aside decades of antitrust precedent, Petitioners' novel approach would call into question a number of procompetitive vertical restraints that have long been

thought to pass muster under the antitrust laws. Businesses would be deterred from entering into such arrangements due to the uncertainty of facing expensive antitrust litigation, if not liability.

### A. Exclusive-dealing arrangements and most-favored-nation clauses are common, procompetitive devices that have long been evaluated under the traditional rule of reason

Exclusive-dealing arrangements and most-favored-nation clauses are two examples of common vertical restraints that would become much more risky endeavors under Petitioners' approach. An exclusive-dealing arrangement is an "agreement in which a buyer agrees to purchase certain goods or services only from a particular seller for a certain period of time." *Eisai, Inc.* v. *Sanofi Aventis U.S., LLC*, 821 F.3d 394, 403 (3d Cir. 2016). Most-favored-nation clauses "are standard devices by which buyers try to bargain for low prices, by getting the seller to agree to treat them as favorably as any of their other customers." *Blue Cross & Blue Shield United of Wis.* v. *Marshfield Clinic*, 65 F.3d 1406, 1415 (7th Cir. 1995).

Companies in many sectors of the economy, including PhRMA's members, routinely employ these contractual devices for procompetitive purposes. "[I]t is widely recognized that in many circumstances [exclusive-dealing arrangements] may be highly efficient—to assure supply, price stability, outlets, investment, best efforts or the like—and pose no competitive threat at all." *E. Food Servs., Inc.* v. *Pontifical Catholic Univ. Servs. Ass'n, Inc.*, 357 F.3d 1, 8 (1st Cir. 2004); see also *Menasha Corp.*, 354 F.3d at 663 ("[C]ompetition for the contract is a vital form of rivalry, and often the most powerful one, which the antitrust laws encourage rather than suppress."). For example, in *Stop & Shop Supermarket Co.* v. *Blue Cross & Blue Shield of Rhode Island*, 373 F.3d 57

(1st Cir. 2004), the court recognized that a health-insurance company's agreement to grant "certain drug stores the exclusive right to supply * * * drugs to most of its customers" "should lower the cost to [the health-insurance company] of supplying drugs to customers (because most suppliers will cut prices in exchange for increased volume)." *Id.* at 62. And, assuming that the health-insurance market is functioning properly, the company should "pass the savings on to customers (lower premiums, smaller co-payments, broader coverage)." *Ibid.*

Similarly, most-favored-nation clauses are "the sort of [procompetitive] conduct that the antitrust laws seek to encourage." *Blue Cross & Blue Shield United of Wis.*, 65 F.3d at 1415. Indeed, "a policy of insisting on a supplier's lowest price—assuming that the price is not 'predatory' or below the supplier's incremental cost—tends to further competition." *Ocean State Physicians Health Plan, Inc.* v. *Blue Cross & Blue Shield of R.I.*, 883 F.2d 1101, 1110 (1st Cir. 1989). In *Ocean State*, for instance, a health-insurance company negotiated for a most-favored-nation clause in its contracts with physicians under which "it would not pay a provider physician any more for any particular service than she was accepting from * * * any other private health care purchaser." *Ibid.* Considering that paradigmatic example of a most-favored-nation clause, "it would seem silly to argue that a policy to pay the same amount for the same service is anticompetitive." *Ibid.* (quoting *Ocean State Physicians Health Plan, Inc.* v. *Blue Cross & Blue Shield of R.I.*, 692 F. Supp. 52, 71 (D.R.I. 1988)).

These ubiquitous contractual arrangements currently fall under the traditional rule-of-reason analysis for non-collusive vertical restraints and enjoy the full protection of the output and market-power safe harbors. See, *e.g.*, *Eisai*, 821 F.3d at 403 ("[A]n exclusive dealing arrange-

ment * * * is * * * judged under the rule of reason."); *Blue Cross & Blue Shield United of Wis.*, 65 F.3d at 1415. PhRMA's members regularly undertake these arrangements, confident in the clear guidance given by the rules established in existing case law.

### B. Petitioners' approach would have a chilling effect on these and other procompetitive vertical restraints by potentially subjecting them to heightened review

The treatment of these and other vertical restraints is uncertain under Petitioners' vision of antitrust law. Much like Amex's NDPs (and virtually all vertical restraints), exclusive-dealing arrangements and most-favored-nation clauses certainly have some "horizontal effects because they limit competition." Pet. Br. 16 (emphasis omitted). For example, it is well-recognized that "exclusive dealing arrangements may deprive competitors of a market for their goods." *Eisai*, 821 F.3d at 403. Under Petitioners' reasoning, that may be sufficient to trigger the "more careful scrutiny" that shifts the burden to defendants to prove the restraint's procompetitive effects. But antitrust law has always required a more rigorous showing before applying quick-look review or otherwise shifting the burden to defendant. Exclusive-dealing arrangements have not qualified for that skeptical treatment because, like most vertical restraints, "they can also offer consumers various economic benefits, such as assuring them the availability of supply and price stability." *Ibid.* Whether exclusive dealing and other common vertical arrangements would continue to receive traditional rule-of-reason treatment under Petitioners' framework is unknown at best.

As a result, adopting Petitioners' approach would "chill the very conduct the antitrust laws are designed to protect." *Matsushita*, 475 U.S. at 594. Businesses would likely refrain from using procompetitive vertical re-

straints that they have long employed to efficiently serve their customers. The overzealous "search for a particular type of undesirable * * * behavior [would] end up * * * discouraging legitimate * * * competition" facilitated by those non-collusive vertical restraints. *Ibid.* (quoting *Barry Wright Corp.*, 724 F.2d at 234). Everyone loses in that scenario. Business, consumers, and the economy as a whole would suffer from that over-deterrence of pro-competitive vertical restraints.

The chilling effect of Petitioners' "more careful scrutiny" would be compounded by the uncertainty regarding how that new analysis would evolve as it was applied in particular cases. This Court has long "emphasiz[ed] the importance of clear rules in antitrust law," *Pac. Bell Tel. Co.*, 555 U.S. at 452, to ensure "business certainty and litigation efficiency," *Maricopa Cty. Med. Soc'y*, 457 U.S. at 343-344. Forging an aggressive new policy for non-collusive vertical restraints, as Petitioners advocate, would mark a sharp break from that policy and undo much of the progress antitrust law has made in developing well-defined, predictable rules.

Avoiding these harmful effects is precisely why this Court has long sought "to temper, limit, or overrule once strict prohibitions on vertical restraints." *Leegin*, 551 U.S. at 901. It should not change course by adopting Petitioners' approach now, especially when that project has proven successful in fostering a competitive economy with discernible boundaries for permissible conduct.

## CONCLUSION

PhRMA respectfully requests that the judgment of the Court of Appeals be affirmed.

Respectfully submitted.

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