

No. _____

In the Supreme Court of the United States

AFMS LLC,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.; FEDEX CORPORATION,
Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioner AFMS LLC (“AFMS”) is an industry consultant in the multi-billion dollar national shipping market dominated by Respondents United Parcel Service, Inc. (“UPS”) and FedEx Corporation (“FedEx”). AFMS presented evidence of a horizontal agreement between UPS and FedEx to prevent customers from utilizing third-party shipping rate consultants, like AFMS, to negotiate lower rates and offer cost-saving services on complex shipping contracts. The district court granted summary judgment on the ground that AFMS failed to proffer sufficient evidence of a relevant market under a full-blown rule of reason analysis. The district court held that the *per se* rule did not apply because AFMS was not a direct customer or supplier of UPS and FedEx, and also found that truncated or “quick look” rule of reason analysis was inappropriate. The Ninth Circuit affirmed in a discordant ruling, which *sub silencio* adopted the district court’s premise that *per se* and “quick look” rule of reason analyses were inapplicable. The questions presented are:

1. In a group boycott case, does the *per se* rule apply to an agreement among horizontal competitors, where the agreement has the purpose and effect of excluding market participants, but the market participants are not direct “suppliers or customers” of defendants?

2. Alternatively, to address disparate analyses among the Circuits, does a court err in holding that a defendant’s assertion of a procompetitive justification obviates the presumption of “quick look” rule of reason analysis, so that the antitrust plaintiff is required to proffer evidence supporting a relevant market under a full-blown rule of reason analysis?

LIST OF PARTIES

The Petitioner in this Court and the Appellant in the Ninth Circuit is AFMS LLC.

The Respondents in this Court and the Appellees in the Ninth Circuit are United Parcel Service, Inc. and FedEx Corporation.

CORPORATE DISCLOSURE STATEMENT

Petitioner AFMS LLC does not have a parent corporation, subsidiaries, or affiliates that have issued shares to the public.

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JURISDICTIONAL STATEMENT

The Ninth Circuit entered its judgment on August 21, 2017. It denied en banc review on October 31, 2017. This petition timely invokes the Court's jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1 of the Sherman Act, 15 U.S.C. § 1, provides in relevant part: "Every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations, is declared to be illegal."

STATEMENT OF THE CASE

A. UPS and FedEx Entered into a Horizontal Group Boycott of Shipping Rate Consultants.

Businesses with high-volume shipping needs have long sought the expertise of specialized consultants to assist them in obtaining the shipping services they need at the best possible price. Here, these consultants, including AFMS, collaborated with shippers to identify opportunities for savings and increased shipping efficiencies, and often negotiated with carriers, such as Respondents FedEx and UPS on the shipper's behalf.

It is undisputed that the consultants' involvement in the negotiating process led to lower costs for shippers and reduced revenues for Respondents. However, before 2008, the price-cutting rival carrier DHL disciplined the small package shipping market, which encouraged, if not required, FedEx and UPS to collaborate with these consultants, commonly referred to as shipping rate consultants.

In late 2008, DHL withdrew from the market, leaving FedEx and UPS in a self-described "duopoly" with an obvious opportunity to exclude shipping rate consultants. Record evidence supports that UPS and FedEx entered into an agreement to boycott the long-standing practice of negotiating rates with customers' shipping rate consultants. AFMS presented strong evidence demonstrating the subsequent conspiracy and its effects.¹ On the exact same day, April 23, 2010, UPS and FedEx issued internal memoranda prohibiting shippers from involving third-party shipping rate consultants. This announcement was preceded by dozens of communications, including a key face-to-face meeting between the two firms, concerning their "gentlemen's agreement" in which they assured each other they were in "lock-step" concerning the exclusion of shipping rate consultants going forward.

¹ The district court declined to address the evidence of Respondents' collusion because it determined that such facts were not material to its decision to grant summary judgment. App. at 27. The district court likewise did not discuss the evidence demonstrating the obviously anticompetitive effects of Respondents' boycott of shipping rate consultants.

The impact of this group boycott was devastating. As shipping rate consultants were driven from the market, or forced to work far behind the scenes, competition over prices dropped precipitously, resulting in significantly increased shipping costs. FedEx and UPS enjoyed a dramatic rise in revenue and, over time, shippers paid hundreds of millions more for the same shipping services. The boycott continues to this day.

B. AFMS Sued to End the Boycott.

On August 5, 2010, AFMS commenced this antitrust action against FedEx and UPS. The operative complaint stated three claims under Section 1 of the Sherman Act, 15 U.S.C. § 1. In the complaint, AFMS alleged that FedEx and UPS combined and conspired to restrain the market for shipping consultation services. Specifically, AFMS alleged that Respondents agreed to boycott shipping rate consultants by refusing to deal directly with them, and refusing to negotiate or discuss discounts with shippers who shared data with or retained shipping rate consultants. As a result, and not surprisingly, competition was diminished, costs for shippers increased, and shipping rate consultants' business suffered.

C. The District Court Held That *Per Se* and "Quick Look" Do Not Apply and Granted Summary Judgment for Lack of Relevant Market Evidence.

On April 30, 2015, the district court granted Respondents' motion for summary judgment. The district court ruled that AFMS failed to proffer evidence of a legally cognizable relevant market. App. at 35. In so ruling, the district presumed that "[t]he

existence of a relevant market is crucial to ensure that Plaintiff possesses antitrust standing and an essential element of each of Plaintiff's causes of action." *Id.* Indeed, the district court ruled that "[d]espite a requirement to do so," AFMS failed to proffer sufficient evidence "to determine the bounds of the relevant market." App. at 40.

The district court expressly rejected AFMS' argument that the *per se* rule should apply to the group boycott at issue. App. at 47-49. While acknowledging AFMS' position that the FedEx and UPS agreement should be analyzed as an "illegal boycott," the district court determined that *per se* treatment was inapplicable because "Plaintiff has not pointed to a single case applying *per se* treatment which resembles the factual scenario here or characterizes facts similar to these as a group boycott." App. at 48. Specifically, the district court ruled that the *per se* rule could not apply because it is generally "limited to cases in which firms with market power boycott *suppliers or customers* in order to discourage them from doing business with a competitor." *Id.* (quoting *FTC v. Indiana Federation of Dentists*, 476 U.S. 447, 458 (1986) (emphasis supplied by district court)). Because AFMS and the other shipping rate consultants were not "suppliers or customers" of FedEx and UPS, the district court held that the "factual scenario presented here does not satisfy the Supreme Court's definition of a boycott that merits *per se* treatment." *Id.* The district court purported to bolster its analysis by noting that, in the Ninth Circuit, a *per se* group boycott requires a showing that "the boycotting firm possesses a dominant market position" – which the district court held had not

been satisfied with respect to FedEx and UPS. *Id.* at 48-49.

The district court further rejected “quick look” rule of reason analysis because it observed (albeit with no analysis) that Respondents had proffered procompetitive justifications for their simultaneous refusal to deal with AFMS and other shipping rate consultants. App. at 50. Because Respondents had proffered a justification, the district court ruled that “quick look” was inapplicable and instead required AFMS to meet the elements of a full-blown rule of reason analysis. *Id.* Because the district court deemed the relevant market evidence proffered by AFMS lacking, it granted summary judgment in favor of FedEx and UPS. *Id.* at 51.

D. A Divided Ninth Circuit Panel Affirmed Summary Judgment and Also Assumed Full-Blown Rule of Reason Applies, Including the Need to Proffer Evidence of a Relevant Market.

In a discordant opinion with a three-way split, the Ninth Circuit affirmed the district court’s grant of summary judgment. The majority ruled that “summary judgment in an antitrust case is appropriate where the plaintiff fails to define a cognizable market.” App. at 2. The majority then held that “AFMS has failed to define a cognizable market or to show that both it and Appellees are participants in that market.” *Id.* at 3. The dissent disagreed: “I am not persuaded that plaintiff has failed to raise a genuine issue of material fact as to the existence of a market regarding shipping consultation services, rate negotiations, and/or a combination of the two.” *Id.* at 5. The

concurrence, agreeing with the dissent, found that AFMS had advanced a cognizable market definition for antitrust purposes. *Id.* at 4. Yet, the concurrence joined with the majority in affirming summary judgment because AFMS had cited evidence to support the relevant market with inadequate precision. *Id.*

All three opinions presumed that a full-blown rule of reason analysis, and specifically evidence of a cognizable relevant market, was required. The Ninth Circuit did not address, and therefore rejected *sub silencio*, the arguments raised below and on appeal that in the horizontal group boycott at issue, *per se* analysis should have applied; or, at the very least, the “quick look” rule of reason should have applied, thereby obviating the need for market definition.

REASONS FOR GRANTING THE PETITION

A. The Court Should Grant Review Because Guidance Is Needed as to the Application of the *Per Se* Rule to Horizontal Group Boycotts.

The proper application of the *per se* rule to group boycotts remains an area of deep confusion. ABA Section of Antitrust Law, ABA Antitrust Law Developments 110-111 (8th ed. 2017) (“[T]he circumstances in which a concerted refusal to deal constitutes a *per se* unlawful group boycott today are not clearly defined.”). As this Court has noted, “[t]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine.” *Northwest Wholesale Stationers, Inc. v. Pacific Stationery & Printing Co.*, 472 U.S. 284, 294 (1985). The confusion

has not abated. *See, e.g., Tunica Web Adver. v. Tunica Casino Operators Ass’n*, 496 F.3d 403, 412 (5th Cir. 2007) (“Precisely which group boycotts are subject to the *per se* rule is, however, not always clear.”); *Bogan v. Hodgkins*, 166 F.3d 509, 515 (2d Cir. 1999) (“The scope of the *per se* rule against group boycotts is a recognized source of confusion in antitrust law.”). *See also* Mark A. Lemley & Christopher R. Leslie, *Categorical Analysis in Antitrust Jurisprudence*, 93 Iowa L. Rev. 1207, 1230 (May 2008) (“Lemley & Leslie”) (tracing history of group boycott jurisprudence and noting “great confusion for lower federal courts”).

Here, the lower courts relied on language in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), for the untenable proposition that the *per se* rule cannot apply to a horizontal agreement among direct competitors targeting industry consultants. The lower courts apparently viewed the fact that AFMS was not a literal “customer or supplier” as dispositive – even though the boycott was directly intended to eliminate industry consultants to increase prices to customers. The need for this Court to provide guidance is paramount given that in the modern economy industry consultants like AFMS are ubiquitous in vital industries ranging from healthcare to online software applications and technology.

1. The Court’s Group Boycott Jurisprudence Has Not Directly Addressed Whether the *Per Se* Rule Is Limited to Horizontal Agreements That Target “Customers or Suppliers.”

The Court has long held that certain types of horizontal restraints are unlawful *per se*. *See, e.g.,*

United States v. Socony-Vacuum Oil Co., 310 U.S. 150, 218 (1940) (horizontal price fixing); *United States v. Topco Assocs., Inc.*, 405 U.S. 596, 608 (1972) (horizontal market divisions). As the Court has observed, these horizontal restraints facially appear to be ones that “would always or almost always tend to restrict competition and decrease output...” and so are anticompetitive. *Broadcast Music, Inc. v. Columbia Broadcasting Systems, Inc.*, 441 U.S. 1, 19-20 (1979); see also *Arizona v. Maricopa Cty. Med. Soc’y*, 457 U.S. 332, 344 (1982).

The Court has further held that certain horizontal group boycotts are so pernicious to free competition that they can also be condemned as unlawful *per se*. In *Fashion Originators’ Guild v. FTC*, 312 U.S. 457 (1941), the Court held that an industrywide group boycott concerted by clothing manufacturers, suppliers, and retailers should be condemned as facially unlawful. *Id.* at 466-67. Similarly, in *Klor’s v. Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the Court condemned as *per se* unlawful a group boycott of appliance manufacturers orchestrated by a large department store against a smaller competitor. *Id.* at 208-09. And, in *Radiant Burners v. People’s Gas Light and Coke Co.*, 364 U.S. 656 (1961), the Court reversed a lower court and held that the *per se* rule applied to a horizontal group boycott intended to eliminate a rival from access to the certification needed to compete in the market. *Id.* at 659-60. See also *United States v. General Motors Corp.*, 384 U.S. 127, 146-48 (1966) (group boycott *per se* unlawful).

In later years, however, the Court noted that serious “confusion” had arisen among the lower courts as to precisely when the *per se* rule should apply in the group boycott context. In *Northwest Wholesale Stationers*, the Court reversed the Ninth Circuit and held that rule of reason, rather than the *per se* rule, should apply to a situation where the boycott was implemented through the expulsion of a member of a buying cooperative. 472 U.S. at 295-97. The Court explained that buying cooperatives often serve procompetitive purposes and, thus, the need to expel a member from the cooperative may not always “imply anticompetitive animus and thereby raise a probability of anticompetitive effect.” *Id.* at 295-96. In holding that the rule of reason should apply in this circumstance, the Court observed that the *per se* rule has traditionally applied where: (1) “the boycott often cut[s] off access to a supply, facility, or market necessary to enable the boycotted firm to compete”; (2) “the boycotting firms possessed a dominant position in the relevant market”; and (3) “the practices were generally not justified by plausible arguments that they were intended to enhance overall efficiency and make markets more competitive.” *Id.* at 294 (citations omitted).

In *Indiana Federation of Dentists*, the Court also declined to apply the *per se* rule to a horizontal group boycott among dentists who refused to provide x-rays to insurance companies. 476 U.S. at 458-59. Although that case seemingly met the criteria for the *per se* rule outlined in *Northwest Wholesale Stationers*, the Court nevertheless held that “the category of restraints classed as group boycotts is not to be expanded indiscriminately, and the *per se* approach has generally

been limited to cases in which firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor – a situation obviously not present here.”² *Id.* at 458. The Court further noted that it has been “slow to condemn rules adopted by professional associations as unreasonable *per se*” and “in the context of business relationships where the economic impact of certain practices is not immediately obvious.” *Id.* at 458-59 (citations omitted).

However, four years later, in *FTC v. Superior Court Trial Lawyers Association*, 493 U.S. 411 (1990), the Court distinguished *Northwest Wholesale Stationers* and *Indiana Federation of Dentists*, and held that a group boycott implemented by members of a bar association should be condemned as a *per se* violation. *Id.* at 436. There, the members of the local bar association agreed to stop representing indigent criminal defendants unless the District of Columbia agreed to increase the compensation paid to the attorneys. *Id.* at 414. The Court held that this group boycott was a naked restraint designed to increase prices in the market and therefore constituted a *per se* violation. *Id.* at 422-24. The dissent, citing *Indiana Federation of Dentists* and *Northwest Wholesale Stationers*, took issue with the majority’s *per se* approach. 493 U.S. at 452 n.9 (Brennan, J. dissenting). In the aftermath of this case, observers noted that it remained difficult to harmonize case law as to when the *per se* rule applies to group boycotts. *See, e.g.*,

² The Court instead found the dentists’ conduct constituted a naked restraint subject to “quick look” rule of reason analysis (as addressed more fully below).

Thomas A. Piraino, Jr., *A Proposed Antitrust Approach to the Conduct of Retailers, Dealers, and Other Resellers*, 73 Wash. L. Rev. 799, 817 (Oct. 1998) (“*Northwest Wholesale* leaves the dividing line between per se and rule of reason conduct unclear.”).

The Court gave its most recent pronouncement on group boycott law almost twenty years ago in *Nynex Corp. v. Discon*, 525 U.S. 128 (1998). In *Nynex*, the Court reaffirmed the vitality of the older decisions, including *Fashion Originators* and *Klor’s*, and noted that the *per se* rule still applies to certain horizontal group boycotts. *Id.* at 135-36. However, the Court held that in a purely vertical refusal to deal, in which a single buyer favored one seller over another, the rule of reason applies. *Id.* The implication is that the *per se* rule applies only to group boycotts with a horizontal component. *See id.* at 135 (“Although *Klor’s* involved a threat made by a single powerful firm, it also involved a horizontal agreement among those threatened, namely, the appliance suppliers, to hurt a competitor of the retailer who made the threat.”) (citations omitted).

In the twenty years since the Court last addressed the proper application of the *per se* rule in the group boycott context, the confusion remains. Lower courts, scholars and practitioners continue to have difficulty reconciling the Court’s holding in *Indiana Federation of Dentists* (*per se* rule does not apply) with *Superior Court Trial Lawyers* (*per se* rule does apply). *See* Lemley & Leslie, 93 Iowa L. Rev. at 1230 (tracing history of group boycott jurisprudence and noting in *Superior Court Trial Lawyers*, “the Court fails to provide any meaningful guidance as to how to

distinguish between *per se* illegal group boycotts and those analyzed under the rule of reason. This has led to great confusion for lower federal courts.”). Moreover, the Court has not addressed the application of the *per se* rule as to the important issue raised by this Petition: whether the *per se* rule can only apply to a horizontal group boycott in which the target of the agreement is a direct “supplier or customer.” The need for resolution is especially important given that, even beyond the impact on the over \$100 billion dollar shipping market dominated by FedEx and UPS, industry consultants are ubiquitous in the modern economy.

2. The District Court and Ninth Circuit Rulings Contravene the Underlying Purpose of the *Per Se* Rule and the Antitrust Laws.

The Court should also grant review because the legal reasoning of the courts’ decisions below is contrary to the express purpose of the *per se* rule and the antitrust laws in general. The district court’s ruling, affirmed *sub silencio* by the Ninth Circuit, was entirely premised on the view that a horizontal group boycott can *never* constitute a *per se* violation if the target of the boycott is not a direct “customer or supplier.” App. at 48 (quoting *Indiana Federation of Dentists*, 476 U.S. at 458). But that reasoning cannot be reconciled with the purpose and goals of the antitrust laws. This Court has repeatedly made clear that the Sherman Act, as the “Magna Carta of free enterprise,” *Topco Assocs.*, 405 U.S. at 610, facially condemns horizontal agreements among direct competitors that distort the competitive process, *i.e.* where the result is simply higher prices and reduced

output. *See, e.g., Superior Court Trial Lawyers Ass’n*, 493 U.S. at 411; *see also Leegin Creative Leather Prods. v. PSKS, Inc.*, 551 U.S. 877, 895-96 (2007) (explaining that restraints on interbrand competition are the primary focus of the antitrust laws). As the Court has explained, where a “practice facially appears to be one that would always or almost always tend to restrict competition and decrease output,” the restraint is normally deemed *per se* unlawful and may be condemned without a full-blown market analysis. *See Broadcast Music*, 441 U.S. at 19-20.

Here, FedEx and UPS – self-proclaimed “duopolists” with undeniable market power – engaged in a concerted refusal to deal with AFMS and similarly situated shipping rate consultants. The record shows that the horizontal agreements between FedEx and UPS had the purpose and effect of increasing prices for shippers and consumers. As addressed below, Respondents offered no legitimate procompetitive justification for the agreement in this circumstance. The “gentlemen’s agreement” did not arise in the context of a buying cooperative, trade association, or even a joint venture. *See, e.g., Northwest Wholesale Stationers*, 472 U.S. at 295-97 (rule of reason applied because defendants were buying cooperative); *Texaco Inc. v. Dagher*, 547 U.S. 1, 5-6 (2006) (rule of reason applied because defendants entered into legitimate joint venture). This was simply a naked restraint on competition by two direct competitors to increase prices, and therefore a quintessential *per se* group boycott under this Court’s jurisprudence. *See Superior Court Trial Lawyers Ass’n*, 493 U.S. at 423.

Accordingly, the lower courts' unduly limited view of the scope of the *per se* rule in the group boycott context should be addressed. Guidance from the Court on the proper interpretation of *Indiana Federation of Dentists* would alleviate the ongoing confusion among practitioners and businesses as to whether the *per se* rule is limited to boycotts targeting direct customers or suppliers; or whether the rule is applicable to other market participants where the restraint has a direct impact on competition. This Court's decisions in *Klor's* and *Superior Court Trial Lawyers Association* would suggest the latter, and those rulings should be harmonized with *Indiana Federation of Dentists*.

B. The Court Should Grant Review Because the Mere Proffer of a Procompetitive Justification Should Not Obviate the Presumption of a “Quick Look” Rule of Reason Analysis.

Assuming that the horizontal group boycott here is not subject to *per se* analysis, the agreement between FedEx and UPS to boycott shipping rate consultants has obvious anticompetitive effects, in the form of higher prices and reduced consumer choice. Thus, at a minimum, the agreement should have been evaluated under the “quick look” rule of reason standard. The lower courts' failure to engage in a proper analysis reflects the ongoing confusion among the Circuits as to the proper implementation of the “quick look” standard. The district court did not evaluate whether the challenged restraint was inherently suspect, and it did not consider the restraint's net competitive effects. Instead, the district court, affirmed *sub silencio* by the Ninth Circuit, held that the mere proffer of a

procompetitive justification, however credible, meant that a full-blown rule of reason analysis is necessary.

The Ninth Circuit's treatment of this issue placed it at odds with other Circuits, particularly the D.C. and Fifth Circuits, which have adopted a four-step burden-shifting structure to address "quick look" analysis. Under that framework, Petitioner's claim should be governed by the "quick look" analysis, and Respondents' conduct would be adjudged facially anticompetitive. The Court should grant review to bring uniformity to the Circuits.

1. Guidance Is Needed as to the Proper Application of the "Quick Look" Standard.

For several decades, this Court has held that even if not categorically *per se* unlawful, agreements that are inherently suspect, like agreements among competitors that influence price, are subject to an abbreviated rule of reason analysis. In *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), the Court first applied the "quick look" rationale. Because it was not a direct price fixing agreement, this Court did not apply a categorical *per se* rule to conclude that the agreement of professional engineers to ban competitive bidding was anticompetitive. However, the Court did not require a full-blown rule of reason analysis, explaining that "[w]hile this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement." *Id.* at 692. It reasoned that the ban on competitive bidding "on its face" violates the Sherman Act because it impedes the "give and take" of the market and deprives

customers of an ability to compare price. *Id.* at 692-93. It then quickly dismissed the defendant's justification – that some engineers might underbid and provide an inferior product – as improperly “impos[ing] the Society's views of the costs and benefits of competition on the entire marketplace.” *Id.* at 695.

The Court next applied this abbreviated analysis in *NCAA v. Board of Regents*, 468 U.S. 85 (1984). At issue was the NCAA's price setting of telecasts of college football games and limitation on the number of games individual colleges could televise. The Court noted that the *per se* rule did not apply because the industry – college football – required some “horizontal restraints on competition ... if the product is to be available at all.” *Id.* at 101. Yet, the Court held that “no elaborate industry analysis” was necessary because the “anticompetitive consequences ... are apparent” with respect to the restraint at issue. *Id.* at 109, 106. As in *National Society of Professional Engineers*, the Court quickly dismissed, as contrary to the policy of the Sherman Act, the NCAA's justification that limitations on televised games were necessary to protect live game attendance. *Id.* at 115-17.

Two years later, in *Indiana Federation of Dentists*, the Court, again relying on *National Society of Professional Engineers*, approved the use of a truncated or “quick look” rule of reason analysis. 476 U.S. at 459-64. In affirming the FTC's challenge to a group boycott among dentists to refuse to provide x-rays to insurance companies, the Court held that the FTC was not required to conduct an elaborate market analysis. *Id.* at 1460. Although it did not apply the *per se* rule, the Court condemned the agreement and held the FTC's

“failure to engage in detailed market analysis is not fatal to its finding of a violation of the Rule of Reason” because “[a]pplication of the Rule of Reason to these facts is not a matter of any great difficulty.” *Id.* at 459, 460. This Court reasoned: “A concerted and effective effort to withhold (or make more costly) information desired by consumers for the purpose of determining whether a particular purchase is cost justified is likely enough to disrupt the proper functioning of the price-setting mechanism of the market that it may be condemned even absent proof that it resulted in higher prices....” *Id.* at 461-62. The Court rejected the defendant’s justification – that “consumers [who] are given access to information will make unwise and even dangerous choices” – as a “frontal assault” on the Sherman Act. *Id.* at 463.

This Court formally recognized that the above line of cases “formed the basis for what has come to be called abbreviated or ‘quick-look’ analysis” in *California Dental Association v. FTC*, 526 U.S. 756, 770 (1999). There, the Court reversed the Ninth Circuit’s application of a “quick look” analysis to evaluate advertising restrictions promulgated by a dental association. *Id.* at 769. The Court synthesized its precedents in very general terms. It wrote that “quick look” analysis is proper 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. The Court reversed the Ninth Circuit because the anticompetitive effects of the agreement were not “comparably obvious” to conduct giving rise to

“quick look” in earlier cases.³ *Id.* at 771. In so ruling, the Court shifted away from categorical guidance as to the proper mode of analysis, by observing that the “categories of analysis of anticompetitive effect are less fixed than terms like ‘*per se*,’ ‘quick look,’ and ‘rule of reason’ tend to make them appear.” *Id.* at 779. The Court provided no specific guidance on how to implement the “quick look” standard but noted that on remand the restraint at issue still might not require “the fullest market analysis.” *Id.* at 780.

This Court has not refined this broad enunciation in subsequent precedent that has referenced “quick look.” In *Texaco*, 547 U.S. at 1, the Court reaffirmed in a footnote that while not applicable to the pricing practices of a lawful joint venture, “quick look” can apply to “business activities that are so plainly anticompetitive that courts need undertake only a cursory examination before imposing antitrust liability.” *Id.* at 6 n.3. In *American Needle, Inc. v. NFL*, 560 U.S. 183 (2010), the Court observed, with no further detail, that “[d]epending upon the concerted activity in question, the Rule of Reason may not require a detailed analysis; it ‘can sometimes be applied in the twinkling of an eye.’” *Id.* at 203 (quoting *NCAA*, 468 U.S. at 110 n.39). Similarly, in *FTC v. Actavis*, 133 S. Ct. 2223 (2013), the Court stated that “quick look” analysis is inappropriate for pharmaceutical reverse payment cases, but noted, without further elaboration, that plaintiffs would not

³ Notably, four justices of this Court wrote in dissent that, in their view, the FTC had in fact satisfied the “quick look” standard in this instance. *California Dental*, 526 U.S. at 789-94 (Breyer, J. dissenting).

need to “present every possible supporting fact or refute every possible prodefense theory,” because “there is always something of a sliding scale in appraising reasonableness.” *Id.* at 2237.

Lower courts have been left to determine when and how the “quick look” standard applies. *See* Edward D. Cavanagh, *Whatever Happened To Quick Look?*, 26 U. Miami Bus. L. Rev. 39, 57 (Dec. 13, 2017) (“Cavanagh”). (“Essentially, the Court has left the task of fleshing out the quick look doctrine to the lower courts.”) Commentators and practitioners lament the uncertainty and cost inherent in the amorphous “quick look” standard. For example, one commentator observed:

[T]he Court’s later articulation of quick-look in *California Dental Ass’n v. FTC* impeded the doctrine’s development. In *California Dental*, rather than simplify antitrust litigation and provide greater predictability, the Court increased uncertainty for litigants, district courts, and market participants.... [T]he Court never gave guidance as to where along its continuum the lower courts should evaluate specific kinds of restraints. Absent such guidance, antitrust plaintiffs face a difficult tactical decision: if they litigate only a *per se* or quick-look theory, they may be prevented from further fact finding if the court opts for rule-of-reason analysis. Risk-averse counsel will ultimately prepare a full-blown rule of reason, plead their case to include all three standards, and hope that the trial court opts for the quick-look or *per se* standard in a preliminary hearing.

The necessity of a comprehensive trial strategy, however, defeats the purpose of the quick look. And trial courts are likely to opt for rule of reason to lower the risk of reversal because they lack guidance on the proper legal standard for particular restraints.

Maurice E. Stucke, *Does the Rule of Reason Violate the Rule of Law?*, 42 U.C. Davis L. Rev. 1375, 1412-14 (June 2009) (“Stucke”). *See also* Cavanagh at 54 (“[T]he decision provides little guidance to the lower courts on how quick look should be implemented.”); Andrew I. Gavil, *Moving Beyond Caricature and Characterization: The Modern Rule of Reason in Practice*, 85 S. Cal. L. Rev. 733, 759-82 (March 2012) (analyzing “quick look” jurisprudence and noting divergent standards and uncertainty in the Court’s pronouncements); Jesse W. Markham Jr., *Sailing A Sea Of Doubt: A Critique Of The Rule Of Reason In U.S. Antitrust Law*, 17 Fordham J. of Corp. & Fin. L. 591, 621 (2012) (discussing ambiguity of law after *California Dental* and writing “[r]isk-averse companies tend to avoid conduct if legal counsel cannot assure its lawfulness”); ABA Section on Antitrust Law, 2008 Transition Report 42 (2008) (calling for the last administration to “provide more clarity regarding truncated rule of reason analysis ... [and] the appropriate analytical framework.”).

2. Lower Court Decisions Lack Uniformity in Applying “Quick Look.”

The lack of clear guidance has resulted in lower courts applying disparate approaches to “quick look.” Some Circuits follow a structured analytical framework – evaluating whether the challenged restraint is inherently suspect, and then conducting a burden-

shifting analysis to determine the net competitive effects of the restraint. *Polygram Holdings, Inc. v. FTC*, 416 F.3d 29, 35-36 (D.C. Cir. 2005) (affirming analytical framework adopted by FTC); *North Texas Specialty Physicians v. FTC*, 528 F.3d 346, 358-63 (2008) (affirming FTC framework used in *Polygram Holdings*). Even where the analysis is not quite as structured, other courts abide similar principles to evaluate whether the restraint appears similar to those condemned as *per se* illegal by precedent. See *General Leaseways, Inc. v. National Truck Leasing Ass'n*, 744 F.2d 588, 594-96 (7th Cir. 1984) (Posner, J.).

Other Circuits, however, have expressly or impliedly rejected the structured analytical framework and instead adopted a cursory analysis. These decisions hold that “quick look” must be dispensed with, and full-blown rule of reason should be applied, whenever a procompetitive justification is offered by the defendants. See, e.g., *Deutscher Tennis Bund v. ATP Tour, Inc.*, 610 F.3d 820, 833 (3d Cir. 2010); *United States v. Brown Univ.*, 5 F.3d 658, 669 (3d Cir. 1993). These decisions, including the case at bar, effectively eviscerate the “quick look” standard in seeming contravention of this Court’s precedents. See *National Society of Professional Engineers*, 435 U.S. at 695 (applying “quick look” despite proffered procompetitive justification); *NCAA*, 468 U.S. at 115-17 (1984) (same); *Indiana Federation of Dentists*, 476 U.S. at 461-63 (same). The result in these Circuits is that trial courts “opt for [full-blown] rule of reason to lower the risk of reversal because of lack of guidance....” Stucke, 42 U.C. Davis L. Rev. at 1413; see also *General Leaseways*, 744 F.2d at 596 (finding it “prudent” to conduct rule of reason analysis after condemning restraint under

“quick look”). The need to harmonize the disparate applications of “quick look” is paramount.

a. The Fifth and D.C. Circuits Use a Multi-Part Burden-Shifting Structure.

The D.C. Circuit has adopted a multi-part burden-shifting framework proposed by the FTC. *See Polygram Holdings*, 416 F.3d at 36 (“We ... accept the Commission’s analytical framework.”). The Fifth Circuit appears to have also adopted this structured approach. *North Texas Specialty Physicians*, 528 F.3d at 358-70 (approving FTC’s analysis condemning physicians’ agreement to, among other things, refrain from accepting payor offers until after industry group negotiates with payor).

Under the structured framework, the D.C. and Fifth Circuits have sought to synthesize this Court’s “quick look” line of cases as follows. *First*, the court determines whether the challenged conduct is “inherently suspect,” *i.e.* whether there is a “close family resemblance between the suspect practice and another practice that already stands convicted in the court of consumer welfare.” *Polygram Holdings*, 416 F.3d at 35-37. The restraint will be “summarily condemned” unless, *second*, the defendant comes forward with a plausible competitive justification. *Id.* at 36. If so, the plaintiff must, *third*, “address the justification” by either explaining why it can be “confidently conclude[d], without adducing evidence, that the restraint likely harms consumers,” or providing “sufficient evidence to show that the anticompetitive effects are in fact likely.” *Id.* *Fourth*, if the plaintiff succeeds in responding to the proffered justification, the evidentiary burden shifts back to the

defendants to show the restraint does not harm consumers or has offsetting “procompetitive virtues.” *Id.*

Thus, in *Polygram Holdings*, the D.C. Circuit affirmed the FTC’s condemnation of an agreement between Warner and Polygram to refrain from marketing three albums by the Three Tenors. Polygram and Warner reached this agreement as part of a joint venture to promote the newest album, despite that Warner and Polygram separately owned two earlier albums that were not part of the joint venture. *Id.* at 32. First, *Polygram Holdings* held that the FTC did not err in concluding that “[a]n agreement between joint venturers to restrain price cutting and advertising with respect to products not part of the joint venture looks suspiciously like a naked price fixing agreement....” *Id.* at 37. Second, *Polygram Holdings* acknowledged that Warner and Polygram offered a procompetitive justification – that a moratorium on advertising on the older albums was necessary to prevent “free-riding,” where advertising on the newer album caused sales of the older albums. *Id.* at 37-38. Third, and significantly, the D.C. Circuit analyzed this procompetitive justification and affirmed the FTC’s rejection of it. *Id.* The court considered and rejected the justification – just as this Court did in *Society of Professional Engineers, NCAA*, and *Indiana Federation of Dentists* – because it was not actually procompetitive. As the D.C. Circuit explained: “if the only way a new product can profitably be introduced is to restrain the legitimate competition of older products, then one must seriously wonder whether consumers are genuinely benefitted by the new product.” *Id.* at 38.

A similar approach was adopted by the Fifth Circuit in *North Texas Specialty Physicians*. There, the FTC brought suit against competing independent physicians who joined an association to negotiate fees with insurance companies. 528 F.3d at 352-53. The physicians, among other anticompetitive conduct, used a polling method that requested the minimum acceptable fee to which the members would agree. *Id.* at 352-53. The FTC found that the conduct effectively constituted horizontal price-fixing and, utilizing a truncated or “quick look” analysis, concluded the conduct unlawful. *Id.* at 353-54. The Fifth Circuit, analyzing the FTC’s findings under the same structured “quick look” analysis utilized by the D.C. Circuit in *Polygram Holdings*, affirmed the FTC’s finding. *Id.* at 358-63. The Fifth Circuit found that the anti-competitive effect of the physicians’ agreement was “obvious,” and therefore condemnation under “a quick look analysis was appropriate in this case.” *Id.* at 363. In so holding, the Fifth Circuit expressly rejected the procompetitive justification proffered by the physicians. *Id.* at 369-70.

The structured approach of the D.C. and Fifth Circuits provides a framework for quickly evaluating whether the challenged restraint is inherently suspect under precedent and rudimentary economics, and then allows an opportunity for evaluation of any procompetitive justification in light of Sherman Act policy.⁴

⁴ The Seventh Circuit seems to follow a similar, although less structured, approach. In *General Leaseways*, Judge Posner evaluated whether an industry organization’s horizontal market division of its member truck leasing companies was

b. In Contrast, the Third Circuit Employs a Cursory Analysis.

On the other hand, the Third Circuit has employed a far less structured approach that is inconsistent with the D.C. and Fifth Circuits. The Third Circuit has held that “quick look” cannot apply once a procompetitive business justification is proffered. *See Brown Univ.*, 5 F.3d at 669 (“If the defendant offers sound procompetitive justifications, however, the court must proceed to weigh the overall reasonableness of the restraint using a full-scale rule of reason analysis.”). For example, in *Deutscher Tennis Bund*, the Court upheld a jury verdict against the plaintiff, an organizer of a German tennis tournament, on its Sherman Act Section 1 claim because it failed to define a relevant market. 610 F.3d at 828-33. The challenged restraint there was an agreement restricting professional tennis players’ freedom to play in tournaments of their choice. *Id.* The court rejected the plaintiff’s argument that

anticompetitive. First, the court considered precedent concerning horizontal market divisions, holding that those cases looked similar to the one at issue. 744 F.2d at 591. Next, the court considered and rejected defendants’ procompetitive justification that the market division was necessary to incentivize promotion of the industry organization’s trademark. *Id.* at 592-93. Thus, although the framework was not as formalized as that of the D.C. and Fifth Circuits, it still addressed two key issues: (1) whether the restraint was inherently suspect under precedent and economic logic; and (2) whether the proffered procompetitive effects could justify the restraint. *See also Chicago Professional Sports Ltd. Partnership v. National Basketball Ass’n*, 961 F.2d 667, 674-76 (7th Cir. 1992) (affirming application of “quick look” after analyzing and rejecting defendant’s purported procompetitive justifications).

“quick look” analysis applied. *Id.* at 831-32. Rather than follow a multi-part framework like that adopted by the D.C. and Fifth Circuits, the court simply held that because the defendant tennis association had proffered a procompetitive justification a full-blown rule of reason analysis, including a market definition, was necessary:

Once a defendant comes forward with plausible procompetitive justifications for the challenged restraint, the ‘quick look’ presumption disappears and the overall reasonableness of the restraint is assessed using a full-scale rule of reason analysis.

Id. at 833 (quoting *Brown Univ.*, 5 F.3d at 669). Thus, under Third Circuit precedent, lower courts never need to conduct the first step of the D.C. and Fifth Circuit framework – determining whether the restraint is “inherently suspect.” Further, courts abiding Third Circuit precedent can simply stop at what would be the second step of the framework – defendant’s opportunity to proffer a procompetitive justification. Indeed, the Circuit in *Deutscher Tennis Bund* faulted the plaintiff for arguing that the jury should have balanced the proffered procompetitive justification against anticompetitive harm – the third step of the D.C. and Fifth Circuit framework – despite citing Supreme Court case law that the key issue is the “net competitive effects” of the restraint. *Id.* at 832-33. The Third Circuit’s cursory approach is inconsistent with precedent from other Circuits.

c. Here, the Ninth Circuit Followed an Unstructured Approach Similar to the Third Circuit, Failing to Evaluate the Proffered Procompetitive Justification.

The Ninth Circuit, in affirming the district court’s grant of summary judgment in this case, effectively followed the Third Circuit’s approach and failed to apply a structured “quick look” analysis. Thus, Petitioner’s case was dismissed for failure to define a relevant market under a full-blown rule of reason analysis. As a result, Petitioner was deprived of arguments it otherwise would have had if the case had been heard within the D.C., Fifth, or Seventh Circuits.⁵ *See, e.g., Chicago Professional Sports Ltd. Partnership*, 961 F.2d at 676 (under “quick look” analysis, the “failure of [defendant’s] justifications eliminates the need for the district judge to define a market”).

Here, the district court summarily stated that Respondents had “presented a plausible procompetitive justification” for the boycott, “thus a quick look will not suffice.” App. at 50. The district court’s sole citation was two paragraphs in an expert report setting forth UPS’s, not FedEx’s, position that the boycott of shipping rate consultants was justified because UPS wanted to sell its “value added services,” which cost

⁵ Reflecting the state of uncertainty with respect to application of “quick look,” the Ninth Circuit had previously issued a divided en banc ruling on the proper manner in which to conduct analyses falling between *per se* and full-blown rule of reason. *See Cal. ex. rel. Harris*, 651 F.3d 1118 (9th Cir. 2011) (en banc). The Ninth Circuit, in affirming the district court’s ruling here, did not follow the majority approach in *Harris*.

more – while shipping rate consultants were focused on reducing price. Thus, unlike the D.C., Fifth and Seventh Circuits, the lower courts here did not first consider whether the challenged restraint – a boycott of shipping rate consultants like Petitioner – was inherently suspect. Instead, it simply accepted as procompetitive a justification that appears on its face to be anticompetitive – eliminating industry consultants who work to reduce price.

The Ninth Circuit did not consider Petitioner’s response that the restraint interferes with the price setting function in the market, deprives customers of a service they desire, and was merely UPS’s imposition of its view upon the entire marketplace that “value added services” are more important than cost savings on shipping. See *National Society of Professional Engineers*, 435 U.S. at 695 (rejecting justification that “imposes the Society’s views of the costs and benefits of competition on the entire marketplace”); *Indiana Federation of Dentists*, 476 U.S. at 459 (rejecting justification of restraint to “withhold from their customers a service they desire”). Nor did it consider direct evidence that prices would increase because of Respondents’ boycott of shipping rate consultants. See, e.g., App. at 58 (survey finding shipping rate negotiators reduced price by 49%); App. at 59-60 (UPS document reflecting that shipping rate consultants reduce their revenue by \$57 million in one year); App. at 66 (shipping rate consultants “are having a material impact on our profitability”).

The lower courts, by denying either a *per se* or a “quick look” rule of reason analysis, denied AFMS any consideration on the merits of the powerful duopolists’

patently exclusionary and anticompetitive boycott. Without antitrust relief, Respondents are able to continue their boycott, artificially inflating prices on shipping – a service that has become increasingly important as demand for on-line shopping continues to skyrocket.

This Court should grant certiorari to provide guidance to lower courts on how the *per se* rule and “quick look” rule of reason analysis apply to concerted boycotts involving horizontal competitors. The lower courts’ jurisprudence on these issues is both disparate and amorphous – leading to inequitable and inconsistent results that invite exclusionary conduct, raise prices, generate business uncertainty, and undermine confidence in the administration of justice.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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