

No. _____

**In The
Supreme Court of the United States**

◆

THE COMMON APPLICATION, INC.,

Petitioner,

v.

COLLEGENET, INC.,

Respondent.

◆

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

◆

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit departed from this Court's precedent in holding that an antitrust plaintiff alleging that the defendant's conduct produced lower prices and higher output can nonetheless satisfy the antitrust injury requirement merely by alleging that its own products are superior to those offered by the defendant.

2. Whether the petition should be held for this Court's decision in *Ohio v. American Express Co.*, No. 16-1454, because that case raises the same issue as this one: whether, under the rule of reason, establishing anticompetitive harm on only one side of a two-sided market is sufficient to satisfy the plaintiff's burden, or whether instead the plaintiff must establish harm to both sides.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

The caption of this petition contains all parties to the proceeding. The Common Application, Inc. is a not-for-profit charitable membership organization qualified as a tax-exempt organization under Section 501(c)(3) of the Internal Revenue Code. It has no parent corporation, and no publicly held corporation owns more than 10% of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner The Common Application, Inc. respectfully submits this petition for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Ninth Circuit.



OPINIONS AND ORDERS BELOW

The order of the court of appeals denying rehearing and rehearing *en banc* (App., *infra* 31) is unreported. The panel decision (App., *infra* 1-4) is unreported and available at 2017 WL 4772552. The opinion and order of the district court (App., *infra* 5-30) is reported at 104 F. Supp. 3d 1137 (D. Or. 2015).



STATEMENT OF JURISDICTION

The court of appeals filed its order denying rehearing and rehearing *en banc* on December 20, 2017. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).



STATUTORY PROVISIONS INVOLVED

Sections 1 and 2 of the Sherman Antitrust Act, 15 U.S.C. §§ 1, 2, provide in relevant part:

15 U.S.C. § 1—Trusts, etc., in restraint of trade illegal; penalty

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.

15 U.S.C. § 2—Monopolizing trade a felony; penalty

Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several States, or with foreign nations, shall be deemed guilty of a felony * * * *



STATEMENT

The antitrust laws exist to preserve free and unfettered competition, but this Court has long recognized that market rivals may seek to misuse the antitrust laws to stifle competition for personal gain. Thus, this Court has repeatedly held that an antitrust plaintiff must allege (and prove) antitrust injury—that is, harm to competition, not merely harm to a competitor. The Ninth Circuit’s decision below breaks from that precedent and, if permitted to stand, will not only erode the crucial gatekeeping role of the antitrust injury requirement, but also threaten to disrupt the college application process for hundreds of colleges and millions of students across the Nation.

Since its founding as a not-for-profit organization in 1975, petitioner The Common Application, Inc. has sought to improve access to higher education by enabling more students to apply to more colleges at lower cost. It achieves these goals by offering students a one-stop “Common” Application. Today, The Common Application’s membership comprises over 750 colleges and universities across the Nation—with nearly half of all applications to the Nation’s institutions of higher learning submitted using the Common Application. App. 14. Use of the Common Application is, and always has been, free to students.

Respondent CollegeNET, Inc., a for-profit rival, markets a competing college application platform. CollegeNET sued The Common Application under the antitrust laws, alleging that The Common Application’s

actions—consistent with its charitable mission—resulted in an increase in the number of college applications submitted, as well as a decrease in their cost. CollegeNET claimed, however, that it lost market share to The Common Application and that, as a result, consumers were harmed because, in CollegeNET’s opinion, its application platform is superior and should have prevailed in the marketplace.

The district court dismissed CollegeNET’s claims for failure to state antitrust injury, but the Ninth Circuit reversed—holding, notwithstanding CollegeNET’s own allegations of procompetitive price and output effects, that it was “sufficient” for CollegeNET to have alleged that its product was superior to the Common Application. This Court’s review is warranted for two reasons.

First, the Court should grant the petition to bring the Ninth Circuit in line with this Court’s precedent on an issue of critical importance to the administration of the antitrust laws. The Ninth Circuit’s decision cannot be reconciled with the decisions of this Court, which for over a century have held that the determination of antitrust injury must be made with reference to objective economic indicators—price and output—rather than inherently subjective metrics like product quality. By allowing a claim based solely on allegations about quality to proceed, the Ninth Circuit’s decision erodes the antitrust injury doctrine’s important role as a filter of pernicious antitrust claims brought by market rivals seeking to stifle, rather than promote, competition.

Second, the petition should be granted because the Ninth Circuit’s decision, if permitted to stand, will have serious, practical implications for colleges, universities, and students across the Nation. CollegeNET seeks an injunction barring The Common Application and its more than 750 member colleges and universities “from engaging in further anticompetitive conduct,” and if this litigation is allowed to proceed, it will impose substantial discovery burdens on non-profit colleges and universities throughout the country. It will also threaten to disrupt the Nation’s college application process and impose financial costs and additional burdens on students. The implications of the Ninth Circuit’s decision (although unpublished) are thus far-reaching—extending not only to hundreds of colleges and universities across the country, but also to more than one million students who rely on the Common Application each year. The Court should therefore grant the petition and reverse the Ninth Circuit’s decision.

Alternatively, the Court should hold the petition for its decision in *American Express*. Like the defendant in that case, The Common Application operates in a two-sided market, simultaneously serving both students and colleges, and facilitating transactions between them. The Ninth Circuit, however, considered only one side of this two-sided market—assessing whether *students* had been harmed, but not whether *colleges* had as well. Moreover, the Ninth Circuit’s analysis disregarded CollegeNET’s allegations of the procompetitive price and output effects experienced by

the market as a whole. Accordingly, at a minimum, this Court should hold the petition for its decision in *American Express* and then grant, vacate, and remand in light of that decision, so that the Ninth Circuit can have the benefit of this Court’s analysis in that case.

1. The Common Application was founded in 1975 as a not-for-profit association of fifteen member colleges and universities seeking to make the college application process more streamlined and affordable by offering students a single “Common” Application. App. 7. Students could complete the application once and submit it to the member schools of their choice.

In the years since, The Common Application’s membership has grown significantly and today comprises over 750 colleges and universities. Although its membership has grown, The Common Application’s mission remains the same: promoting access and equity in higher education by making the college application process easier and more affordable. Each year, more than a million students from around the world—about a third of whom are the first in their families to attend college—use the Common Application to submit over four million applications.¹

2. In antitrust terms, The Common Application operates in a two-sided market—one in which there are two distinct customer groups, each of which stands to benefit from exchanges with the other. See David S.

¹ *Our Story*, The Common Application, <http://www.commonapp.org/about-us> (last visited Mar. 1, 2018).

Evans & Richard Schmalensee, *The Industrial Organization of Markets with Two-Sided Platforms*, 3 COMPETITION POL'Y INT'L 151 (2007). Two-sided markets have long existed and are increasingly common: newspapers court both subscribers and advertisers; credit card companies cater to both merchants and cardholders; websites like Amazon and eBay seek to attract both sellers and buyers. *Id.* at 154-57. An organization that operates in a two-sided market is said to offer a “two-sided platform,” meaning that the organization caters to both sides of the market and facilitates transactions between the two sides. *Id.* at 152.

The Common Application operates a quintessential two-sided platform. On one side of the platform sit students, and on the other side sit over 750 colleges and universities. The students wish to apply to college, and the colleges wish to receive applications from students. The Common Application facilitates these transactions by offering students an application form to complete and submit, and by offering colleges the data processing services that enable them to receive and review the students' applications.

3. In 2014, CollegeNET—a for-profit competitor—sued The Common Application under the Sherman Act, 15 U.S.C. §§ 1, 2. Like The Common Application, CollegeNET offers application software and data processing services, but unlike The Common Application, CollegeNET operates as a privately held, for-profit corporation. According to the complaint, CollegeNET's competing application platform offers superior “customized”—but more expensive—features. App. 7, 10.

CollegeNET's overarching argument for liability is this: while The Common Application has enabled more students to submit more college applications to more schools, the prices that The Common Application charges—nothing at all for students, and a minimal processing fee for colleges and universities—are so low that CollegeNET's more expensive and allegedly superior product could not compete and was excluded from the market. CollegeNET's complaint is replete with allegations describing the manner in which The Common Application generated an increase in the number of college applications submitted, as well as a decrease in their cost.² Restated in antitrust terms, CollegeNET alleged that The Common Application increased output and decreased price.

Notwithstanding these procompetitive effects, CollegeNET alleged that students and colleges were harmed because the market was deprived of CollegeNET's (allegedly) superior but more expensive product, which, according to the complaint, offered better “quality, functionality, features, ease of use, and level of innovativeness.” App. 9. Under CollegeNET's theory, despite being able to submit and receive more applications at lower cost, students and colleges were

² For example, the complaint alleged that “between 2010 and 2011, the percentage of students applying to at least three Colleges rose from 77% to 79% (more than 10% more than in 2000) and the percentage of students applying to at least seven [C]olleges rose from 25% to 29% (both of which are more than double the percentage of such students a decade earlier).” App. 24. The complaint also alleged that The Common Application “lower[ed] prevailing prices for’ [application processing] services.” App. 26.

worse off once these subjective, quality-based variables were taken into account.

While CollegeNET's complaint names The Common Application as the sole defendant, its claims have a much broader reach, as CollegeNET alleges that The Common Application conspired with hundreds of its (unnamed) member colleges and universities to reduce investment in application processing software and to limit the scope of application services that the member colleges make available to students. App. 6.

4. After a hearing, the district court dismissed CollegeNET's claims for failure to allege antitrust injury. The district court recognized that because The Common Application operates in a two-sided market—that is, it serves both students and colleges and facilitates transactions between them—it was necessary to consider the effects of the challenged restraints on both groups of consumers. The district court, after assessing the complaint, determined that it “lacks sufficient factual allegations of harm to either group of consumers.” App. 24. Indeed, as the district court observed, the complaint alleges that The Common Application gives students and colleges exactly what they want: a means of “increasing the ease and efficiency by which applicants can apply to many colleges and by which colleges can receive many applications.” App. 26.

The district court thus concluded that CollegeNET failed to plead antitrust injury because, at bottom, CollegeNET merely seeks “to translate its individual harm into harm to competition.” App. 23. Applying

the controlling precedents of this Court and the Ninth Circuit, the district court reasoned that while CollegeNET's subjective allegations about product quality "can be relevant to a * * * finding of antitrust injury," here those allegations are insufficient because CollegeNET also alleges that The Common Application has produced lower prices and higher output. App. 27. The district court thus recognized that allowing CollegeNET to state antitrust injury based on nothing more than its own subjective "opinion about what is best for applicants and colleges" would "make new law * * * and open the door for antitrust claims to be brought by any plaintiff who claims to have a higher quality product that consumers *should* be choosing." App. 25, 27.

5. The Ninth Circuit reversed. While acknowledging CollegeNET's allegations of decreased price and increased output, the Ninth Circuit concluded that CollegeNET's subjective allegations about the relative quality of its product were sufficient in and of themselves to satisfy the requirement of antitrust injury. App. 3. In reaching that conclusion, the Ninth Circuit, unlike the district court, considered the effects of the challenged restraints only on the student side of the market, holding that "it is sufficient that CollegeNET has alleged that [The Common Application] limited college choice, decreased the scope of services and price competition *available to student applicants*, and foreclosed rivals from entry to the market, thereby reducing overall market satisfaction by leaving one dominant provider offering inferior products and services." App. 3 (emphasis added) (internal quotation marks omitted).

The Ninth Circuit did not consider the effects of The Common Application's actions on the college side of the market, nor did it factor in the complaint's pro-competitive price and output allegations when evaluating purported harm to students, as the district court did.

A petition for rehearing and rehearing *en banc* was denied. App. 31.



REASONS FOR GRANTING THE PETITION

I. This Court's Review Is Needed To Bring The Ninth Circuit In Line With This Court's Precedent On The Requirements For Pleading Antitrust Injury.

Since this Court's earliest decisions involving the Sherman Act, the Court has recognized that the antitrust laws are concerned solely with preserving the benefits of competition for consumers. See, e.g., *United States v. Am. Linseed Oil Co.*, 262 U.S. 371, 388 (1923). Thus, to state an antitrust claim, a plaintiff must allege (and later prove) antitrust injury, meaning "injury of the type the antitrust laws were intended to prevent and that flows from that which makes defendants' acts unlawful." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 489 (1977). It is not enough to merely allege individualized harm to the plaintiff as a *competitor*. Rather, to state antitrust injury, the plaintiff must allege that the defendant's conduct has harmed *competition*. See *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962) (the antitrust laws are

concerned “with the protection of competition, not competitors”).

The requirement to plead and prove antitrust injury serves a crucial gatekeeping function. Because of the ever-present risk that market rivals will seek to misuse the antitrust laws to harm their competitors for personal gain, the antitrust injury requirement “ensures that the harm claimed by the plaintiff corresponds to the rationale for finding a violation of the antitrust laws in the first place, and it prevents losses that stem from competition from supporting suits by private plaintiffs.” *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990); accord *U.S. Gypsum Co. v. Ind. Gas Co.*, 350 F.3d 623, 627 (7th Cir. 2003) (Easterbrook, J.) (the antitrust injury requirement exists to “filter out complaints by competitors * * * who may be hurt by productive efficiencies, higher output, and lower prices, all of which the antitrust laws are designed to encourage”).

This Court has recognized for over a century that for the antitrust injury requirement to serve its crucial gatekeeping function, the existence of antitrust injury must be principally determined with reference to two objective, quantifiable metrics: price and output. For example, in *Board of Trade of Chicago v. United States*, 246 U.S. 231 (1918), the Court considered whether a rule limiting the hours during which traders could exchange grain contracts had the potential to adversely affect competition. The Court held that it did not, reasoning that the rule “had no appreciable effect on general market prices; nor did it materially affect the total

volume of grain coming to Chicago.” *Id.* at 240. The Court’s subsequent cases considering the existence of antitrust injury have consistently applied the same objective analysis. See, e.g., *Nat’l Collegiate Athletic Ass’n v. Bd. of Regents of Univ. of Okla.*, 468 U.S. 85, 107-08 (1984) (“Restrictions on price and output are the paradigmatic examples of restraints of trade that the Sherman Act was intended to prohibit.”); *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 237 (1993) (requiring proof “that output was restricted or prices were above a competitive level”).³

To be sure, the antitrust laws are not wholly unconcerned with the quality of the products available to consumers. Indeed, this Court has recognized that the availability of higher-quality products is one of the many benefits that flow from unfettered competition. See *Nat’l Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978). But as a means of showing the harm to competition that is requisite for antitrust standing, the Court has consistently distinguished between price and output metrics on the one hand, and claims about quality on the other. And for good reason. Price and output are objective, verifiable metrics that reflect market outcomes, while quality is an inherently subjective trait measurable only in the eye of the individual consumer. See *Bates v. State Bar of Ariz.*, 433 U.S. 350, 366 (1977) (observing that “claims relating to * * * quality” are “not susceptible of precise

³ See also IIA PHILLIP E. AREEDA & HERBERT HOVENKAMP, ANTITRUST LAW ¶ 348a (3d ed. 2007) (a rival may show antitrust injury where the defendant’s conduct “le[d] to reduced output and higher prices”).

measurement or verification”); see also *Blue Shield of Va. v. McCready*, 457 U.S. 465, 475 n.11 (1982) (antitrust law must focus on “tangible economic injury” rather than “some abstract conception or speculative measure of harm”).

The Ninth Circuit’s decision breaks with all of this well-established precedent by holding that CollegeNET could state antitrust injury based merely on its own subjective allegations about the quality of its product, notwithstanding its other allegations that The Common Application has driven down price and raised output—the two objective, procompetitive market effects this Court has repeatedly held foreclose a finding of antitrust injury.

A recent Sixth Circuit decision reveals just how far the Ninth Circuit’s decision strays from this Court’s antitrust precedents. In *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd.*, 833 F.3d 680, 690 (6th Cir. 2016) (Sutton, J.), cert. denied, 137 S. Ct. 1582 (2017), the Sixth Circuit considered substantively identical claims brought by a market rival claiming that the defendants’ sales of lower-priced and allegedly lower-quality solar panels had driven the plaintiff from the market and deprived consumers of greater choice and product innovation. In an opinion by Judge Sutton, the Sixth Circuit affirmed dismissal of the complaint based on the absence of antitrust injury, reasoning:

Companies compete not only over the quality of their products but also over their prices.

* * * In the solar-panel market, consumers

apparently preferred the quality-price combination offered by [defendants] to the combination offered by [plaintiff]. The result, even if it * * * harmed [plaintiff], amounted to a triumph of consumer choice, not a limitation on it.

Ibid. Surveying this Court's antitrust cases, the Sixth Circuit rejected the plaintiff's theory that despite lower prices, consumers suffered antitrust injury because they had been deprived of the plaintiff's (allegedly) superior product. *Ibid.* The Sixth Circuit held that this theory of antitrust injury was unsupportable on the merits and unsupported by any authority. *Ibid.* It therefore affirmed dismissal of the complaint.

The Ninth Circuit should have done the same here. Its failure to do so cannot be squared with this Court's precedents and threatens to render the essential gatekeeping function of the antitrust injury requirement all but a nullity. This Court's review is needed to resolve the conflict and to restore the proper function of the antitrust injury requirement as a filter of pernicious antitrust claims brought by market rivals.

II. The Ninth Circuit's Decision Threatens To Undermine Sound Administration Of The Antitrust Laws And Disrupt The Application Process For Colleges And Students Across The Nation.

Although the Ninth Circuit's decision is unpublished, it threatens serious (if unintended) practical consequences if permitted to stand.

As an initial matter, the decision elevates the subjective views of an aggrieved competitor over objective evidence of consumer choice as the essential element necessary to show antitrust injury. This Court has consistently recognized that consumers—not competitors—should decide which products succeed and fail in the marketplace. See, e.g., *F.T.C. v. Ind. Fed’n of Dentists*, 476 U.S. 447, 462 (1986) (a competitor “is not entitled to pre-empt the working of the market by deciding for itself that its customers do not need that which they demand”); *Nat’l Soc’y of Prof’l Eng’rs*, 435 U.S. at 695 (a competitor’s attempt to impose its views on the market is “nothing less than a frontal assault on the basic policy of the Sherman Act”). Indeed, respecting and effectuating the will of consumers is the prime directive of the antitrust laws. *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979) (Congress designed the Sherman Act as a “consumer welfare prescription” (quoting ROBERT H. BORK, *THE ANTITRUST PARADOX* 66 (1978))).

Under the Ninth Circuit’s approach, however, any plaintiff could allege—as CollegeNET did here—that although consumers prefer a competitor’s product, antitrust injury exists merely because the plaintiff believes it was somehow denied the rightful success of its allegedly superior product in the marketplace. Not only has the will of consumers been usurped by the whims of competitors, but those competitors invariably will have economic interests that are diametrically opposed to those of consumers. As Judge Easterbrook has put it: “If * * * the plaintiff and the defendant are

competitors, the plaintiff gains from higher prices and loses from lower prices—just the opposite of the consumers’ interest. When the plaintiff is a poor champion of consumers, a court must be especially careful not to grant relief that may undercut the proper functions of antitrust.” *Ball Mem’l Hosp., Inc. v. Mut. Hosp. Ins., Inc.*, 784 F.2d 1325, 1334 (7th Cir. 1986).

Moreover, the Ninth Circuit’s decision thrusts the judiciary into the improper role of picking winners and losers in the marketplace by requiring courts to weigh alleged qualitative differences against procompetitive price and output effects. This Court has warned time and again of the “evidentiary complexities,” “uncertainties,” and other “costs to the judicial system,” *Ill. Brick Co. v. Illinois*, 431 U.S. 720, 731-32 (1977), that arise when courts are required to “act as central planners, identifying the proper price, quantity, and other terms of dealing.” *Verizon Commc’ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 408 (2004); see also *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 543 (1983) (noting the “strong interest * * * in keeping the scope of * * * antitrust trials within judicially manageable limits”).⁴

This case exemplifies the practical problems with the Ninth Circuit’s approach. CollegeNET alleges that

⁴ See also Frank H. Easterbrook, *The Limits of Antitrust*, 63 TEX. L. REV. 1, 21 (1984) (“[T]he market is better than the judicial process in discriminating the beneficial from the detrimental. * * * The costs of judicial error are borne by consumers, who lose the efficient practices and get nothing in return.”).

The Common Application lowered prices and raised output, but that students and colleges suffered antitrust injury once subjective variables like the “quality” and “level of innovativeness” of CollegeNET’s products are taken into account. App. 24-25. If this case were to proceed through discovery, summary judgment, and trial, CollegeNET would need to substantiate its claims by showing that the amorphous negative value supposedly attributable to those qualitative variables outweighs the actual, objective procompetitive price and output effects alleged in the complaint. To be sure, CollegeNET would hope to submit expert testimony, but how ultimately would the determination of antitrust injury be made? Either the judge (on summary judgment) or the jury (at trial) would need to render a subjective opinion of which product—the Common Application or CollegeNET’s more expensive “customized” application—is more beneficial to consumers. But this role of the judiciary as an arbiter of market outcomes is precisely the one against which this Court has warned.

And by markedly lowering the standard for alleging antitrust injury, the Ninth Circuit invites meritless, protracted, and expensive litigation brought by direct competitors—just what the antitrust injury doctrine was purpose-built to foreclose. Historically, the requirement to allege antitrust injury has effectively filtered out antitrust claims like the one here, where a market rival improperly invokes the antitrust laws with the goal of raising prices for its own benefit by punishing a lower-cost competitor. See *Atl. Richfield*

Co., 495 U.S. at 337-38 (“A firm complaining about the harm it suffers from * * * price competition is really claiming that it is unable to raise prices. This is not *antitrust* injury; indeed, cutting prices * * * is the very essence of competition.” (internal quotation marks, brackets, and citation omitted)).

These competition-destroying lawsuits may benefit the plaintiff, but they invariably harm consumers. Because antitrust cases are inherently complex and expensive to defend, see *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-59 (2007), merely filing a claim of this sort can stifle competition. The Ninth Circuit’s decision eviscerates the gatekeeping function of the antitrust injury requirement and allows claims to proceed based on nothing more than the plaintiff’s subjective assertion that, notwithstanding procompetitive price and output effects, consumers *should* have chosen its allegedly higher-quality product. The antitrust laws, and this Court’s precedents, do not tolerate that outcome. See *Brooke Grp. Ltd.*, 509 U.S. at 226-27 (“It would be ironic indeed if the standards for * * * liability were so low that antitrust suits themselves became a tool for keeping prices high.”).

Even if the practical implications of the Ninth Circuit’s decision could be confined to this case, however, this Court’s review would still be warranted because the Ninth Circuit’s decision directly affects hundreds of colleges and millions of students across the Nation—threatening the efficiency and affordability of the college application process. The petition thus raises issues of national importance that merit this Court’s attention.

Although CollegeNET styled its claims as, at this point, solely against The Common Application, those claims necessarily reach more broadly because the complaint alleges that The Common Application facilitated a conspiracy among its member colleges to under-invest in application processing services, and that the member colleges conspired with each other to restrict competition in terms of the services that they make available to student applicants. App. 6. CollegeNET seeks relief against both The Common Application *and* its member colleges in the form of an injunction barring member colleges “from engaging in further anticompetitive conduct.” First Amended Complaint at 54, *CollegeNET, Inc. v. The Common Application, Inc.*, 104 F. Supp. 3d 1137 (D. Or. 2015), ECF No. 75. Thus, if the case were to proceed, it would impose substantial discovery burdens on the colleges and universities that make up The Common Application’s membership—all of which are themselves non-profit institutions.

Continued litigation also threatens to disrupt the functioning of the college application process and to impose financial burden on students. As CollegeNET alleges, nearly half of all college applications in the United States are submitted using the Common Application. App. 14. Ongoing litigation is likely to cause uncertainty among member colleges about the potential legal risk associated with participation in a “common” application mechanism. Moreover, as the stated aim of CollegeNET’s lawsuit is to *raise* the price of submitting a college application, App. 26, continued litigation threatens to impose financial costs directly on

both students and colleges. The implications of the Ninth Circuit’s decision are thus far-reaching—extending to hundreds of colleges and nearly one million students who rely on the Common Application each year.

III. Alternatively, The Petition Should Be Held For The Court’s Decision In *American Express*.

This Court granted certiorari in *American Express* to consider whether, under the rule of reason, a showing of anticompetitive harm on only one side of a two-sided market is sufficient to satisfy the plaintiff’s burden, or whether instead the plaintiff must show harm to both sides of the market. See Petition for Writ of Certiorari, *Ohio v. Am. Express Co.*, No. 16-1454 (U.S. June 2, 2017). This case presents the same question—whether, as the Ninth Circuit determined, it is sufficient to show anticompetitive harm on only one side of the market (i.e., to students), or whether, as the district court concluded, a plaintiff must show harm to both sides of the market (i.e., to students and colleges). Indeed, CollegeNET repeatedly invoked *American Express* below. For example, CollegeNET’s reply brief filed in the Ninth Circuit described the facts of this case and *American Express* as “strikingly similar.”

At a minimum, then, this Court should hold the petition for the decision in *American Express*, and then grant, vacate, and remand for the Ninth Circuit to conduct a proper antitrust injury analysis with the benefit

of that decision. This Court's guidance is especially needed here for two reasons.

First, the Ninth Circuit's analysis focused solely on whether the challenged restraints caused harm to students—it failed entirely to consider whether they allegedly caused harm to the other side of the market, i.e., to colleges. App. 3. Nor did the Ninth Circuit consider whether the harm purportedly experienced by students was so significant that it was capable of offsetting the procompetitive price and output effects affirmatively alleged in the complaint.

Second, while *American Express* involves an anti-trust enforcement action brought by state and federal regulators, this Court's guidance on the proper application of the antitrust injury requirement will be particularly pertinent in the proceedings below in this case, where a direct competitor has invoked the anti-trust laws to deter a market rival that is offering lower prices to consumers. See *Ball Mem'l Hosp.*, 784 F.2d at 1334 (Easterbrook, J.).

The Ninth Circuit would thus benefit from this Court's analysis in *American Express* concerning how courts should consider whether a plaintiff has adequately alleged or established antitrust injury in cases like this one involving two-sided markets. Therefore, at a minimum, the Court should hold the petition pending *American Express* and then grant, vacate, and remand for further consideration by the Ninth Circuit in light of that decision.



CONCLUSION

The petition for a writ of certiorari should be granted or, in the alternative, held for the Court's decision in *American Express* and then granted, reversed, and remanded to the Ninth Circuit for further consideration in light of that decision.

Respectfully submitted,

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