

No. 17-1264

In the Supreme Court of the United States

THE COMMON APPLICATION, INC., PETITIONER

v.

COLLEGENET, INC.

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

**BRIEF FOR THE RESPONDENT
IN OPPOSITION**

JON B. JACOBS
PERKINS COIE LLP
700 Thirteenth St., N.W.
Washington, D.C. 20005
(202) 654-6200

ERIC D. MILLER
Counsel of Record
SUSAN E. FOSTER
SHYLAH R. ALFONSO
DAVID S. STEELE
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
(206) 359-8000
emiller@perkinscoie.com

QUESTION PRESENTED

A private antitrust plaintiff must show antitrust injury, that is, injury of the type the antitrust laws were intended to prevent. The complaint alleges that (1) petitioner—an association of colleges and a provider of college-application-processing services—used tying, anti-steering, and exclusive-dealing agreements to monopolize the market for such services and exclude respondent, its competitor, and (2) petitioner’s members colluded to limit their spending on processing services to below competitive levels. The question presented is whether the complaint adequately alleges antitrust injury.

**RULE 29.6 CORPORATE DISCLOSURE
STATEMENT**

Pursuant to Supreme Court Rule 29.6, respondent CollegeNET, Inc. states that it has no parent corporation and that no publicly held company owns 10% or more of its stock.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1-4) is not reported but is reprinted at 711 Fed. Appx. 405. The order of the district court (Pet. App. 5-30) is reported at 104 F. Supp. 3d 1137.

JURISDICTION

The judgment of the court of appeals was entered on October 23, 2017. A petition for rehearing was denied on December 20, 2017 (Pet. App. 31). The petition for a writ of certiorari was filed on March 6, 2018.

The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner is an association formed in 1975 when a group of fifteen colleges wished to improve their competitive position for applicants against better-known institutions. Petitioner's common form allowed an applicant to any of the member colleges to fill out a single paper form with basic background information, photocopy it, and submit it to any of the other 14 members. Today, petitioner has grown to more than 500 member institutions, and applicants now complete and submit their applications online. Owing to various anti-competitive practices, petitioner has become the dominant applicant pipeline for member institutions. Runaway increases in college tuition have pressured all colleges to look for ways to justify their prices. One method, reinforced by the competition for *U.S. News & World Report* rankings, has been to collude for application volume. The more applicants a college can turn away, the more selective and prestigious its public image. As a consequence, once a college enrolls with petitioner, it cannot afford to forgo participation. Petitioner now accounts for more than 90% of the market for college application data services. C.A. E.R. 38-39, 42-45, 62, 65, 68.

Applying to college involves far more than just providing basic background information. Colleges require form processing that matches their own systems, and they may request evaluation forms, letters of recommendation, and transcripts. Fees must be paid and processed. Colleges often desire to distinguish themselves to attract students who are good

matches for their campus, and using supplemental applications and tailored essay questions helps them do that. These more sophisticated services are part of the college application processing services market, a market separate and distinct from the market for standard data services. C.A. E.R. 60-61.

2. Respondent competes in the college application processing services market. In May 2014, respondent brought this action against petitioner in the District of Oregon, asserting claims under Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1 and 2. Respondent has not challenged petitioner's data service. C.A. E.R. 67-68. Instead, it challenges several restraints on competition in the market for college application processing services.

First, petitioner ties access to its data service to the use of its own application processing services. This tying arrangement is a strong deterrent against using rival processing services. Even if a member college is dissatisfied with petitioner's processing services, using a competing processing service means paying twice: once for petitioner (for processing services it does not use but must buy to access the applicant pipeline), and once to the college's preferred provider. C.A. E.R. 33, 42, 46-49, 70, 78-80.

Second, petitioner prohibits members offering both its services and those of a rival from steering applicants to the competing service. Colleges wishing to use petitioner's data service cannot offer discounts or scholarships that may be available to students who use the rival's services. Colleges cannot display the rival's web link any more prominently than petitioner's or otherwise promote the rival to a greater degree.

Those anti-steering restrictions further deter colleges from using competing processing providers. C.A. E.R. 33, 43-44, 59, 69.

Third, petitioner charges higher per-application fees to member colleges that do not use its processing services exclusively. That constitutes an exclusive dealing arrangement. C.A. E.R. 33, 50-51, 70, 77-78.

Fourth, petitioner has engaged in a group boycott. Petitioner is more than just a competitor in the processing services market. It is also a joint venture of more than 500 colleges using those services. Through their joint venture, those colleges have agreed to boycott and exclude respondent and other competitors. C.A. E.R. 33, 69-70, 72-73, 74-75.

In addition to claims of exclusion, the complaint alleges collusion among petitioner's member institutions not to compete. The application process is one aspect of competition, and colleges have historically used that process to market and differentiate themselves. But more than 500 colleges that would otherwise compete vigorously for desirable applicants have agreed, through their joint venture, to lessen that competition in the application process in a variety of ways: by offering the same product to students; by limiting their ability to differentiate themselves (such as by personalizing or scripting the process to highlight the college's values or character, by allowing technological innovation such as allowing video submissions, or by asking supplemental questions), and by avoiding the additional expenditures of offering superior and more tailored services. C.A. E.R. 33, 36, 40, 46, 48, 70-75. That restraint also amounts to a buyers' cartel: Member colleges have agreed to spend below-competitive

levels on processing services in the processing market. *Id.* at 75-77. None of those restraints is necessary to achieve any of petitioner's legitimate procompetitive goals.

The complaint alleges not only quality but also price and output effects from the harm to competition. For example, the anti-steering restrictions prevent member colleges from lowering the price of competing applications or offering additional benefits such as scholarships. C.A. E.R. 33, 36, 69. As petitioner has homogenized the application process, it has become more difficult for colleges and applicants to find good matches. *Id.* at 33, 51, 66, 70. This has led students to apply to a greater number of colleges, increasing the amount of money that students and their families pay in application fees as well as increasing the amount of time they spend preparing those applications. *Id.* at 40, 44, 71. The collusive agreement to boycott processing service competitors has lowered the price of such services below competitive levels, harming students, respondent, and others selling those services in the upstream market. *Id.* at 69-70, 75, 76-77.

3. The district court dismissed the complaint for failure to allege antitrust injury. Pet. App. 5-30. The court acknowledged the allegations in the complaint that "a lack of competition" resulting from the challenged restraints had led to "worse college matching, reduced choice, lower-quality, less innovative college application processing services, and higher effective prices to students." *Id.* at 24-25. But it deemed those allegations inadequate because, in its view, they were "based on the assumption that colleges and applicants do not want to participate in an increased 'application

churn.” *Id.* at 25. In other words, respondent’s “position rests upon the conclusion that colleges and applicants are harmed by a system that increases the number of applicants to colleges, regardless of an applicant’s likelihood of acceptance to any particular college.” *Ibid.* The court found it “equally probable that the ‘application churn’ is precisely what colleges and applicants desire—a system that facilitates increased applications in an efficient way.” *Ibid.* For that reason, it concluded that “the product at issue here * * * aims to do precisely what [respondent] alleges is occurring—increasing the ease and efficiency by which applicants can apply to many colleges and by which colleges can receive many applications.” *Id.* at 26. The court also held that “an injury solely based on less innovation and choice is [not] sufficient to state a claim for antitrust injury.” *Id.* at 27.

4. In an unpublished order, the court of appeals reversed. Pet. App. 1-4. The court explained that a plaintiff can establish antitrust injury by alleging “[c]oercive activity that prevents [consumers] from making free choices between market alternatives,’ as well as restraints that artificially erect barriers to market entry and protect lower quality products.” *Id.* at 2 (quoting *Glen Holly Entm’t Inc. v. Tektronix Inc.*, 352 F.3d 367, 374 (9th Cir. 2003)) (brackets in original). The court concluded that “[a]t this preliminary stage in the proceedings,” it was enough “that [respondent] has alleged that [petitioner] 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.” *Id.* at 3. The court noted that “[a]dditional factual development may prove that consumers attribute no value to the supplemental features in [respondent’s] application system,” but it held that “the district court erred in making this determination in deciding the motion to dismiss.” *Id.* at 3-4.

Finally, the court of appeals observed that petitioner had sought affirmance of the judgment “on grounds not reached by the district court,” including failure to state a claim based on the challenged restraints, but because “the district court has not had an opportunity to rule on these additional issues,” it left them to be considered on remand. Pet. App. 4.

ARGUMENT

Petitioner argues (Pet. 11-15) that the complaint did not adequately allege antitrust injury. The court of appeals correctly rejected that argument, and its unpublished decision does not conflict with any decision of this Court or any other court of appeals. Petitioner also suggests (Pet. 21-22) that the petition be held pending the disposition of *Ohio v. American Express Co.*, No. 16-1454 (argued Feb. 26, 2018). That case does not involve antitrust injury, however, but rather the substantive question of what conduct violates Section 1—an issue that has yet to be addressed by any court in this case, which is still in an interlocutory posture. Further review is not warranted.

1. Petitioner argues (Pet. 14) that the court of appeals erred in “holding that [respondent] could state antitrust injury based merely on its own subjective allegations about the quality of its product, notwithstanding its other allegations that [petitioner] has

driven down price and raised output.” That is incorrect.

First, contrary to petitioner’s suggestion, the court of appeals did not ignore the challenged restraints’ effects on price. Instead, the court held that it was sufficient to allege a decrease in “price competition available to student applicants.” Pet. App. 3. In addition, the complaint alleges that the colleges reduced pricing below competitive levels through buyer collusion, which has long been held to constitute antitrust injury. C.A. E.R. 75; *Mandeville Island Farms v. American Crystal Sugar Co.*, 334 U.S. 219, 235-236 (1948).

Second, the court of appeals correctly understood that the complaint’s allegations of harm to competition through diminished quality and choice raise objective factual questions and will require evidentiary support as the case moves forward. As the court explained, it is sufficient “[a]t this preliminary stage in the proceedings” to allege that petitioner’s conduct “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.” Pet. App. 3 (internal quotation marks omitted). The court acknowledged that “[a]dditional factual development may prove that consumers attribute no value to the supplemental features in [respondent’s] application system,” but it held that “the district court erred in making this determination in deciding the motion to dismiss.” *Id.* at 3-4.

Petitioner concedes (Pet. 13) that “the antitrust laws are not wholly unconcerned with the quality of

the products available to consumers.” Indeed, it has long been clear that the Sherman Act protects both price and quality competition. The statute “rests on the premise that the unrestrained interaction of competitive forces will yield the best allocation of our economic resources, the lowest prices, the highest quality, and the greatest material progress.” *Northern Pac. Ry. v. United States*, 356 U.S. 1, 4 (1958). The statute further “reflects a legislative judgment that ultimately competition will produce not only lower prices, but also better goods and services” and that “all elements of a bargain—quality, service, safety, and durability—and not just the immediate cost, are favorably affected by the free opportunity to select among alternative offers.” *National Soc’y of Prof’l Eng’rs v. United States*, 435 U.S. 679, 695 (1978). For that reason, a plaintiff can establish antitrust injury by alleging “[c]oercive activity that prevents [consumers] from making free choices between market alternatives,’ as well as restraints that artificially erect barriers to market entry and protect lower quality products.” Pet. App. 2 (quoting *Glen Holly Entm’t Inc. v. Tektronix Inc.*, 352 F.3d 367, 374 (9th Cir. 2003)) (brackets in original); accord *FTC v. Indiana Fed’n Of Dentists*, 476 U.S. 447, 459 (1986) (“[A]n agreement limiting consumer choice by impeding the ordinary give and take of the market place cannot be sustained.”) (internal quotation marks and citation omitted).

Petitioner relies (Pet. 13-14) on *Bates v. State Bar of Arizona*, 433 U.S. 350 (1977), and *Blue Shield of Virginia v. McCready*, 457 U.S. 465 (1982), for the proposition that the antitrust laws are unconcerned with quality, but its reliance on those cases is mis-

placed. In *Bates*, the only antitrust issue was whether an Arizona rule prohibiting advertising by lawyers was protected by the state-action doctrine. 433 U.S. at 359-363. This Court mentioned the difficulty of verifying claims of quality, but it did so only in discussing whether advertising making quality claims was protected speech under the First Amendment. *Id.* at 366. In *Blue Shield of Virginia*, the Court noted that the Clayton Act focuses on “tangible economic injury” rather than “speculative measure[s] of harm,” but it did so in addressing economic injury to the *plaintiff*, not the underlying harm to competition itself. 457 U.S. at 475 n.11. Here, the complaint alleges tangible economic harm to respondent, and the existence of such harm is undisputed.

Questions of how to measure anticompetitive effects are quintessential issues of fact. Here, those questions include not only the price effects of petitioner’s restraints but also considerations of quality and innovation, as well as definitional issues of whether output is most appropriately measured by matches between applicants and colleges (as the complaint alleges) or simply by the number of applications submitted (as the district court assumed). The court of appeals was correct in holding that such questions cannot be resolved on a motion to dismiss.

2. The decision below does not conflict with any decision of any other court of appeals. Many courts of appeals have recognized that a plaintiff may establish the anticompetitive effect of a defendant’s conduct by showing a “reduction of output, increase in price, or deterioration in quality of goods or services.” *United States v. Brown Univ.*, 5 F.3d 658, 668 (3d Cir. 1993)

(emphasis added) (citation omitted); accord *Jacobs v. Tempur-Pedic Int'l, Inc.*, 626 F.3d 1327, 1339 (11th Cir. 2010).

Petitioner suggests (Pet. 14-15) that the decision below is inconsistent with *Energy Conversion Devices Liquidation Trust v. Trina Solar Ltd.*, 833 F.3d 680 (6th Cir. 2016), but that decision concerned predatory pricing. The complaint was dismissed because the plaintiff failed to allege that the defendant had a prospect of recouping its losses through higher prices in the future. *Id.* at 690. As the court of appeals recognized here, this is not a predatory-pricing case: “Although below-cost pricing is a signature attribute of a predatory pricing scheme, the absence of below-cost pricing is not necessarily indicative of a competitive market when other forms of anticompetitive conduct are also alleged.” Pet. App. 3. In fact, the complaint alleges that students and their families have paid more, not less, in application fees due to the challenged restraints. C.A. E.R. 33, 36, 71. The allegation of lower pricing here relates to petitioner’s facilitation of monopsonistic collusion among colleges as *purchasers* in the market for application-processing services, not as *sellers* in that market. *Energy Conversion Devices* has no bearing on those allegations.

3. Petitioner asserts (Pet. 15) that the unpublished decision of the court of appeals “threatens serious * * * practical consequences if permitted to stand.” That assertion is baseless. Antitrust plaintiffs are entitled to plead the effects of anticompetitive conduct on quality and innovation, and lower courts are capable of administering those claims. Contrary to petitioner’s repeated claim that this case involves purely

“subjective” opinions about quality, the complaint alleges numerous objective facts detailing how petitioner’s insulation from competition has led to significant product deficiencies. See, *e.g.*, C.A. E.R. 49 (inability to log in, essay submissions cut off mid-sentence or mid-word, no live help desk, application fees charged multiple times for the same submission); *id.* at 51 (imposing 650-word limits on essays, prohibiting an essay topic of the applicant’s choice). Similarly, match efficiency is an economic concept susceptible of objective measurement.

The court of appeals recognized that “[a]dditional factual development may prove that consumers attribute no value to the supplemental features in [respondent’s] application system,” but it correctly understood that discovery is necessary to resolve that issue. Pet. App. 3. Because the case remains in an interlocutory posture, the interests of judicial economy would best be served by denying the petition and allowing petitioner to reassert its claims upon final judgment, if it still wishes to do so at that time. See *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (Scalia, J., respecting denial of certiorari); *Hamilton-Brown Shoe Co. v. Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916).

Nor does this litigation “threaten[] the efficiency and affordability of the college application process.” Pet. 19. The efficiency benefits offered by petitioner come from its data service, which the complaint explicitly identifies as falling within the “scope of legitimate cooperative action” by petitioner’s member institutions. C.A. E.R. 67-69. The complaint’s request for

injunctive relief does not encompass that service. *Id.* at 84.

4. Finally, the petition should not be held pending *Ohio v. American Express Co.*, No. 16-1454 (argued Feb. 26, 2018). *American Express* concerns what a plaintiff must prove to establish an anticompetitive effect, in violation of Section 1, from a purely vertical restraint in a “two-sided” market. Specifically, the case involves “anti-steering” rules imposed by American Express on merchants that accept its credit cards, and it presents the question “[w]hether the district court’s findings that the anti-steering rules stifle price competition, block low-fee rivals, raise merchant fees, and inflate retail prices were sufficient to establish a prima facie case that the rules unreasonably restrain trade.” Gov’t Br. at i, *Ohio v. American Express*, *supra* (No. 16-1454). This case, by contrast, concerns the issue of antitrust injury from a combination of horizontal and vertical restraints.

Although the college application processing services market is two-sided, it is very different from the market in *American Express*. Both colleges and applicants are consumers of application processing services. C.A. E.R. 39. But 500 of those colleges are more than just consumers—through their joint venture, petitioner, they are also a competitor. That dual role is the basis of the group-boycott and collusion claims in this case. See *id.* at 33, 69-70, 72-73, 74-76. In *American Express*, by contrast, the defendant credit-card network had no ownership interest in either side of the market, and plaintiffs did not allege group-boycott or collusion claims. This Court’s opinion in *American Express* will have little relevance to

whether respondent will be required to show harm not only to student applicants, but to colleges as well. In any event, even if such proof were required, the complaint adequately alleges harm to colleges. See, *e.g.*, *id.* at 33 (impeded innovation, reduced product differentiation, other harm to “consumers”); *id.* at 39 (defining “consumers” as including colleges); *id.* at 51 (increased difficulty faced by colleges in finding good student “matches”); *id.* at 66 (reduced ability of colleges to promote and advertise themselves to students).

Even if *American Express* were relevant to the issues here, there still would be no reason to hold the petition. As explained above, this case remains in an interlocutory posture. Should this Court’s decision in *American Express* prove relevant, the district court can take it into account on remand.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

JON B. JACOBS
PERKINS COIE LLP
700 Thirteenth St., N.W.
Washington, D.C. 20005
(202) 654-6200

ERIC D. MILLER
Counsel of Record
SUSAN E. FOSTER
SHYLAH R. ALFONSO
DAVID S. STEELE
PERKINS COIE LLP
1201 Third Ave., Suite 4900
Seattle, WA 98101
(206) 359-8000
emiller@perkinscoie.com

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