

No. 17-1264

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**

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REPLY BRIEF FOR THE PETITIONER

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ALLYSON N. HO
MORGAN, LEWIS &
BOCKIUS LLP
1717 Main Street,
Suite 3200
Dallas, Texas 75201
(214) 466-4000

THANE D. SCOTT
Counsel of Record
NOAH J. KAUFMAN
SARAH K. PAIGE
MORGAN, LEWIS &
BOCKIUS LLP
One Federal Street
Boston, Massachusetts 02110
(617) 341-7700
thane.scott@morganlewis.com
Counsel for Petitioner

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REPLY BRIEF FOR THE PETITIONER

I. CollegeNET's Brief in Opposition highlights precisely why this Court's review is needed now. This Court has long held that claims by a market rival seeking to misuse the antitrust laws to stifle—rather than advance—competition must be dismissed at the outset lest antitrust litigation itself becomes a tool for suppressing competition. See, e.g., *Atl. Richfield Co. v. USA Petroleum Co.*, 495 U.S. 328, 342 (1990). As set out in the petition (at 11-12), the antitrust injury doctrine prevents just this kind of abuse of the antitrust laws by requiring a competitor plaintiff to show that its claim seeks to redress harm to *competition*, and it requires district courts to weed out cases merely complaining of individualized business harm to *competitors*. Crucially, antitrust injury is demonstrated at the pleading stage by relying on objective economic indicators showing that the challenged conduct has resulted in higher prices to consumers, or lower output. A “too late” application of the antitrust injury doctrine defeats its important purposes by allowing opportunistic rivals to misuse antitrust litigation to harm a competitor and subtract from, rather than add to, competitive forces. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557-59 (2007).

The resulting rule in competitor cases has been clear, simple, and without exception: A competitor who pleads that its rival's conduct has reduced prices to consumers and increased output has pleaded itself out of court. The Ninth Circuit, however, departed sharply from that rule when it reversed the district court's

dismissal of CollegeNET's complaint. CollegeNET, a self-described market rival, claims to offer "more sophisticated," "superior and more tailored" college application processing services at higher prices. BIO at 3-4. To CollegeNET's chagrin, not only did students and colleges flock to a competitor's lower-cost product, but the students used that product "to apply to a greater number of colleges." *Id.* at 5. The result, in antitrust terms, was a decrease in price and an increase in output. Freely acknowledging these indisputably procompetitive effects, CollegeNET nonetheless seeks to satisfy the antitrust injury requirement based on its theory that consumers were harmed when CollegeNET's "superior" product lost market share.

CollegeNET's theory—which the Ninth Circuit accepted—cannot be reconciled with this Court's precedent. And the practical effects of the Ninth Circuit's decision—which elevates competitors' subjective views over objective evidence of consumer choice—cannot be tolerated. If permitted to stand, the Ninth Circuit's decision would require courts to second-guess market outcomes and would invite meritless, competition-suppressing litigation. CollegeNET dismisses these concerns and urges that "judicial economy would best be served" by this Court allowing the case to proceed to discovery and trial and revisiting the issues "upon final judgment," if at all. *Id.* at 12. But this Court fashioned the antitrust injury requirement precisely for cases like this one, where a competitor seeks to harm competition by attacking a rival whose conduct has produced lower prices and higher output to the

benefit of consumers. This Court's review is needed now to restore the proper function of the antitrust injury doctrine as a filter of competition-suppressing claims of precisely this sort.

II. Notwithstanding its heavy reliance below on *Ohio v. American Express Co.*, No. 16-1454, CollegeNET labors to avoid a hold and GVR for this Court's pending decision in that case by pointing to purported factual differences that are immaterial in all events. But the record is clear: At every turn, CollegeNET has cited and relied upon *American Express*, going so far as to tell the Ninth Circuit that the two cases are "strikingly similar."

At bottom, CollegeNET does not dispute that The Common Application operates in a two-sided market, nor that the Court's forthcoming decision in *American Express* will offer guidance on the standards for pleading and proving harm to competition in two-sided markets. Because there is every reason to believe that this decision will inform the lower courts as to the viability of CollegeNET's claim, judicial economy counsels in favor of providing the Ninth Circuit with an opportunity to further consider its decision in light of this Court's forthcoming guidance. While the Court should hear this case on its merits in order to protect the antitrust injury doctrine, at a minimum the petition should be held for the Court's decision in *American Express*, then granted, reversed, and remanded to the Ninth Circuit for further consideration.



ARGUMENT

I. CollegeNET's Merits Arguments Confirm The Need For This Court To Address The Ninth Circuit's Departure From This Court's Precedent.

CollegeNET does not seriously dispute that, as a means of showing harm to competition, this Court has consistently distinguished between objective allegations about price and output on the one hand, and subjective allegations about quality on the other. See Pet. at 12-14; *Associated Gen. Contractors of Cal., Inc. v. Cal. State Council of Carpenters*, 459 U.S. 519, 540 n.40 (1983) (requiring allegations “that output has been curtailed or prices enhanced”). The closest CollegeNET comes is the uncontroversial observation that the Sherman Act “protects both price and quality competition.” BIO at 9. This is surely true, as The Common Application has acknowledged. Pet. at 13. But this basic proposition stands only for the notion that better quality products are one of the many benefits that flow from competition; it says nothing about the type of objective anticompetitive harm that a competitor must plead in a lawsuit against its rival in order to establish antitrust injury. And it cannot justify the Ninth Circuit's departure from this Court's precedent in holding that CollegeNET can state antitrust injury based on a claim that it offers a better quality product, notwithstanding the undisputed fact that The Common Application “led students to apply to a greater number of colleges” at prices above cost, but “below” what CollegeNET believes CollegeNET should

have been able to charge for its “superior,” “more sophisticated” product. BIO at 3-5.

The cases CollegeNET cites—none of which involved plaintiff-competitors—mention the concept of quality in passing, but reinforce the point that antitrust injury cannot be premised on the plaintiff’s subjective allegations about quality alone, unless they are also accompanied by objective allegations of true economic harm as reflected by higher prices or lower output. See *id.* at 9-11. For example, in *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958), which CollegeNET cites for the undisputed proposition that the Sherman Act “rests on the premise that the unrestrained interaction of competitive forces will yield * * * the lowest prices, the highest quality, and the greatest material progress,” BIO at 9, this Court affirmed a finding of Section 1 liability against the defendant railroad based on the railroad’s use of preferential routing provisions that foreclosed price competition and kept prices *high*. 356 U.S. at 12.

So too for *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978), which CollegeNET cites for the proposition that “quality, service, safety, and durability—and not just the immediate cost, are favorably affected” by competition. BIO at 9. This case premised a finding of antitrust injury on a professional society’s prohibition on competitive bidding because the prohibition eliminated price competition and “impede[d] the ordinary give and take of the

market place.” 435 U.S. at 692-93 (citation and internal quotation marks omitted).¹

CollegeNET’s misapprehension of this Court’s antitrust injury jurisprudence is perhaps nowhere more evident than in CollegeNET’s citation of the Court’s decision in *FTC v. Indiana Federation of Dentists*, 476 U.S. 447 (1986), where the Court considered a concerted effort by dentists to withhold x-rays from insurers in connection with a rate dispute. CollegeNET cites this decision for the proposition that “an agreement limiting consumer choice by impeding the ordinary give and take of the market place cannot be sustained.” BIO at 9 (alteration omitted). But CollegeNET omits the first half of the quoted sentence, which alters its context and meaning and reveals the unsupportable nature of CollegeNET’s position. In full, the sentence reads:

*Absent some countervailing procompetitive virtue * * *, an agreement limiting consumer choice by impeding the ordinary give and take of the market place cannot be sustained * * * **

476 U.S. at 459 (emphasis added) (citations and internal quotation marks omitted). In the very next

¹ Accord *United States v. Brown Univ.*, 5 F.3d 658, 674 (3d Cir. 1993) (holding the district court erred by failing to make findings on whether the defendants’ alleged conduct caused a “reduction of output” or “higher price”—the “hallmark consequences of price fixing” (internal quotation marks omitted)); *Jacobs v. Tempur-Pedic Int’l, Inc.*, 626 F.3d 1327, 1340 (11th Cir. 2010) (affirming dismissal of Sherman Act claims where the complaint offered no “evidence of restricted output and supracompetitive prices” (citation and internal quotation marks omitted)).

sentence, the Court condemned the dentists' concerted conduct under the antitrust laws because it raised prices and "[n]o credible argument ha[d] been advanced" that it had "any such procompetitive effect." *Ibid.* Here, CollegeNET itself affirmatively alleges procompetitive price and output effects on the face of the complaint.

CollegeNET asserts that "[q]uestions of how to measure anticompetitive effects are quintessential issues of fact." BIO at 10. The absence of any citation for this claim is not surprising, because it is incorrect. This Court has long recognized that the antitrust injury doctrine exists to identify and filter out claims like the one at issue here, in which a market rival seeks to stifle competition for its own benefit and to the detriment of consumers. See *Atl. Richfield Co.*, 495 U.S. at 342 (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"). Indeed, the undisputed objective of CollegeNET's lawsuit is to *raise* the prices charged to consumers for college application processing services. App. 26; cf. *Cargill, Inc. v. Monfort of Colo., Inc.*, 479 U.S. 104, 116 (1986) (because the antitrust laws exist to protect "vigorous" price competition, an increase in price resulting from an antitrust suit constitutes a "perverse result").

The antitrust injury requirement must be enforced at the motion to dismiss stage, before the

competition-suppressing effects of vexatious competitor claims may be felt. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 226-27 (1993) (“It would be ironic indeed if the standards for * * * liability were so low that antitrust suits themselves became a tool for keeping prices high.”). This is particularly true given the inherent complexity and expense of antitrust litigation. *Twombly*, 550 U.S. at 557-59.

Beyond these burdens, as set out in the petition (at 15-19), the type of litigation that CollegeNET seeks to advance threatens serious practical implications for the administration of the antitrust laws, including the elevation of competitors’ views about product quality over objective evidence of consumer choice, the role of the judiciary as an arbiter of market outcomes, and the invitation of vexatious, competition-suppressing litigation. Moreover, here, the effects of the decision below extend well beyond the parties because continued litigation threatens to impose discovery burdens on The Common Application’s member colleges and universities, to disrupt the college application system, and to impose financial costs on students. Pet. at 19-21.

CollegeNET summarily dismisses these concerns as “baseless,” and maintains that “judicial economy would best be served by denying the petition and allowing petitioner to reassert its claims upon final judgment.” BIO at 12. But of course, by the time meritless, competition-suppressing litigation that seeks to raise prices reaches final judgment, it is too late. Competition has been suppressed; consumers have been harmed;

and the antitrust injury doctrine has been rendered meaningless. This Court’s review is needed now.

II. CollegeNET’s Arguments Against A Hold For *American Express* Are Unpersuasive, Particularly In Light Of CollegeNET’s Heavy Reliance On *American Express* Below.

Having repeatedly invoked *American Express* below,² CollegeNET now seeks to avoid a hold by trying to distinguish that case based on purported factual distinctions that in all events are wholly immaterial. First, CollegeNET seeks to draw a distinction based on the fact that *American Express* involves vertical restraints, while the complaint in this case alleges the existence of both vertical and horizontal restraints. BIO at 13. For one thing, this argument rings hollow given CollegeNET’s insistence below that the challenged

² See Pl.’s Opp’n to Mot. to Dismiss at 14 n.4, *CollegeNET, Inc. v. The Common Application, Inc.*, No. 14-cv-771 (D. Or. Jan. 30, 2015) (ECF No. 86) (citing *American Express* for the proposition that “the disagreement * * * over how to calculate price * * * in this two-sided market raises an issue of material fact” (alteration omitted)); Tr. of Proceedings Before Hon. Marco A. Hernández at 31, *CollegeNET, Inc. v. The Common Application, Inc.*, No. 14-cv-771 (D. Or. Apr. 14, 2015) (ECF No. 95) (describing this case as “not unique” in light of the recent assessment in *American Express* of “antitrust law in [] two-sided markets”); Br. for Appellant at 27, *CollegeNET, Inc. v. The Common Application, Inc.*, No. 15-35443 (9th Cir. Dec. 11, 2015) (citing *American Express* and noting that both cases involve alleged anti-steering restraints); Reply Br. for Appellant at 33-34, *CollegeNET, Inc. v. The Common Application, Inc.*, No. 15-35443 (9th Cir. Apr. 27, 2016) (describing this case and *American Express* as “strikingly similar” and noting that the alleged anticompetitive effects “are the same”).

restraints at issue in this case are “strikingly similar” to those in *American Express*, and that the alleged anticompetitive harm is “the same.” See *supra* n.2. But more importantly, the characterization of the challenged restraints as vertical or horizontal is beside the point. This Court’s precedent makes clear that in *any* antitrust case, regardless of the nature of the alleged restraints, a “right of action under [the antitrust laws] is available only to those private plaintiffs who have suffered antitrust injury.” *Atl. Richfield Co.*, 495 U.S. at 344. *American Express* involves how courts should assess allegations and proof of antitrust injury stemming from those restraints in two-sided markets. So does this case.

Second, while acknowledging that The Common Application operates in a two-sided market, CollegeNET now insists—contrary to what it argued below—that this two-sided market is “very different” from the one at issue in *American Express*. BIO at 13-14. The basis for this purported difference is that, unlike the merchants at issue in *American Express*, the member colleges, “through their joint venture, * * * are also a competitor” of CollegeNET. *Ibid.* This is a distinction without a difference. Having clung to *American Express* below, CollegeNET now seeks to avoid a hold by limiting that case to its facts, but CollegeNET does not dispute that the question presented in *American Express* is directly relevant (and potentially dispositive) here given the two-sided nature of the market at issue.

The Ninth Circuit below focused solely on whether the challenged restraints caused harm to one side of

the market—students, but failed to consider whether those restraints adequately alleged harm to the other side of the market—colleges. At a minimum, the Ninth Circuit should have the opportunity to reconsider this case in light of the Court’s forthcoming decision in *American Express*, which is likely to determine the future course of this litigation.

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,

ALLYSON N. HO
MORGAN, LEWIS &
BOCKIUS LLP
1717 Main Street,
Suite 3200
Dallas, Texas 75201
(214) 466-4000

THANE D. SCOTT
Counsel of Record
NOAH J. KAUFMAN
SARAH K. PAIGE
MORGAN, LEWIS &
BOCKIUS LLP
One Federal Street
Boston, Massachusetts 02110
(617) 341-7700
thane.scott@morganlewis.com
Counsel for Petitioner