No. ________

In the Supreme Court of the United States

ENDURE INDUSTRIES, INC.,

Petitioner,

v.

VIZIENT, INC., ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Since *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962), this Court has held that antitrust market definition must reflect commercial realities. That principle requires consideration of what *Brown Shoe* called "practical indicia" about a proposed market, including evidence about distinct customers and prices, industry custom, specialized distribution channels, and switching constraints.

In this case, the record has some evidence of cross-shopping and substitution by marginal consumers in the market for disposable medical supplies. The record also has evidence that a distinct channel and customer group—a classic antitrust submarket— faces distinct competitive conditions, shaped and exploited by Vizient's power as a large group purchasing organization. That record presents these issues for consideration:

1. Whether a proposed submarket must be rejected if evidence shows that some customers can shift their purchases to other channels, even if other evidence establishes the unique competitive constraints that face another group of customers.

2. Whether a proposed submarket may be defined by sales that are made through an intermediary-controlled purchasing channel, when the market includes multiple suppliers and is not limited to a single brand or seller.

PARTIES TO THE PROCEEDINGS

Petitioner and Plaintiff-Appellant below

- Endure Industries, Incorporated

Respondents and Defendants-Appellees below

- Vizient Incorporated
- Vizient Supply L.L.C.
- Vizient Source L.L.C.
- Provista Incorporated

CORPORATE DISCLOSURE STATEMENT

Petitioner Endure Industries, Inc., a New York corporation, has no parent entity, and no publicly held corporation owns 10% or more of its stock.

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Fifth Circuit

No. 24-10995

Published: 164 F.4th 405 (5th Cir. 2026)

Endure Industries, Inc., *Plaintiff-Appellant* v. Vizient, Inc., et al., *Defendants-Appellees*

Opinion and Judgment: January 13, 2026

U.S. District Court for the Northern District of Texas

No. 3:20-CV-3190-x

Endure Industries, Inc., *Plaintiff* v. Vizient, Inc., et al., *Defendants*

Memorandum Opinion and Judgment: October 9, 2024

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Endure Industries, Inc. respectfully petitions for a writ of certiorari to review the judgment of the U.S. Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fifth Circuit is reported at 164 F.4th 405 (5th Cir. 2026). App.1a. The District Court's memorandum opinion and order granting summary judgment is unreported but available at 2024 WL 4449736. App.25a.

JURISDICTION

The Fifth Circuit issued its opinion and judgment on January 13, 2026. App.1a, App.23a. Justice Alito extended the time to file a petition for a writ of certiorari from April 13, 2026 to May 13, 2026. Sup. Ct. No. 25A1095. Endure timely filed this petition on May 13, 2026. *See* Sup. Ct. R. 13.1. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant provisions of the Sherman Act — 15 U.S.C. §§ 1–2, are reproduced at App.38a.

INTRODUCTION

This petition addresses a persistent and material conflict about antitrust market definition: whether evidence of some cross-shopping and outside purchasing by consumers will conclusively defeat a proposed submarket, when the record contains other evidence about a commercially distinct customer group with different constraints on its ability to substitute.

This Court's *Brown Shoe* opinion held that a product market may contain economically significant submarkets, and described "practical indicia" for identifying them, including distinct customers and prices, specialized vendors, and industry recognition of the distinct market conditions. Later decisions of this Court, including *Grinnell*, *Philadelphia National Bank*, and *Kodak*, confirm that market definition must correspond to commercial realities rather than any single, "formalistic" measure.

The courts of appeals have divided over how to apply those principles in modern market-definition cases. The D.C. Circuit and Ninth Circuit treat marginal switching and cross-shopping as relevant, but not necessarily dispositive. They permit courts to consider whether a core group of customers, a targeted-customer market, a channel market, or a clustered offering presents a distinct competitive constraint for purposes of market definition. The Fifth Circuit's decision in this case takes a materially more rigid approach.

Endure proposed two related submarkets about the sale of disposable medical supplies to general acute-care hospitals. To support its definitions, Endure offered evidence about targeting customers in those submarkets, distinct prices charged to them, unique transaction-cost and channel constraints faced by them (including bundled purchasing and rebate structures), as well as a hypothetical-monopolist analysis. The Fifth Circuit rejected those proposed definitions, giving conclusive effect to evidence of some outside purchasing by marginal consumers, and expressly declining to follow the approach developed by the D.C. Circuit in this area.

Endure does not ask this Court to hold that its proposed markets are correct as a matter of law. It asks only that market definitions supported by substantial evidence not be rejected as a matter of law, just because other evidence shows that some customers also purchase through other channels. This issue is recurring in a wide range of cases about market structure and, after the Fifth Circuit's opinion, is ripe for this Court's review.

STATEMENT OF THE CASE

A. Legal Background

Most antitrust claims under Sections 1 and 2 of the Sherman Act require proof of a relevant product market. This Court has explained that the outer boundaries of such a market are generally defined by reasonable interchangeability and cross-elasticity of demand. But this Court has never treated those concepts as requiring judges to disregard evidence about commercial realities, or to elevate evidence about cross-shopping to always be dispositive.

In particular, *Brown Shoe* held that, within a broader product market, a distinct submarket may itself constitute the relevant market for antitrust purposes. 370 U.S. at 324-25. To identify such a submarket, courts may consider practical indicia bearing on commercial reality, including industry recognition, peculiar characteristics and uses, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors. *Id.* at 325.

This case arises at the intersection of the above principles. Endure identified two groups of consumers of disposable medical supplies that were uniquely affected by the contracting and pricing practices of group purchasing organizations. The dispute is whether evidence that some medical-supplies customers also buy outside those channels makes the proposed markets legally impossible, or whether that evidence must be weighed along with other data about the structure and performance of the market.

B. Factual Background

Petitioner Endure Industries, Inc. ("Endure") is a seller of Disposable Medical Supplies ("DMS") such as bandages, medical tape, and syringes used by healthcare providers including hospitals, doctors' offices, schools, and prisons. App.2a. Those supplies are used in great volume by General Acute Care Centers ("GACs"), which are healthcare facilities that range from small, critical-access hospitals to large academic medical centers, providing short-term inpatient medical and surgical services. App.2a.

Healthcare facilities often buy supplies through Group Purchasing Organizations ("GPOs"), which aggregate the purchasing power of member hospitals to negotiate contracts with suppliers. GPO-mediated transactions involve specialized pricing structures, contract terms, purchasing commitments, rebate and compliance programs, and administrative services.

Vizient is the nation's largest GPO, serving more than half of acute-care health systems and 97% of academic medical centers. It offers DMS to member hospitals through product-category bundles, purchasing commitments, contract-administrative fees, and rebate programs. App.2a-4a.

Endure alleged that those arrangements did not operate like ordinary spot transactions for interchangeable supplies. They created a distinct purchasing channel with its own contracting terms, pricing tiers, compliance rules, and incentives for hospitals to remain within the Vizient-administered system. App.41a-47a.

Evidence identified several unique properties of that channel. Vizient treated GAC hospitals as a distinct customer group, [redacted]

[redacted] for acute-care and non-acute-care customers. App.42a-44a; Sealed.App.25a-27a. Vizient's own materials and witnesses also recognized national GPOs as a distinct sales channel, and supplier agreements that required terms keyed to national GPO competition. App.46a-47a.

Additional evidence showed the difficulties of switching away from that channel. Vizient requires member hospitals to project annual spending across bundled product categories, meet 90% compliance for individual SKUs, and meet 75% overall compliance to receive rebates across a bundle. App.3a-4a.

Endure's expert explained that those "all-or-nothing" thresholds can cause small purchasing changes to have large rebate consequences, thereby penalizing purchases from non-Vizient suppliers and creating incentives to shift purchases toward Vizient-contracted suppliers even when a hospital might prefer an outside supplier. Sealed.App.43a-45a, Sealed.App.57a-58a. Other Vizient programs used similar commitment structures such as [redacted], designed to lock down committed business for multiple years. Sealed.App.60a-62a.

Endure also relied on evidence that these channel constraints affected real purchasing decisions. The record included communications in which Vizient-member hospitals declined to buy from Endure despite lower prices, citing GPO guidelines or the inability to buy from non-Vizient vendors. Sealed.App.27a-28a. Endure's expert explained that Vizient's ISPs and other rebate programs affected the relative attractiveness of buying through Vizient rather than other sources, and that Vizient marketed its programs to suppliers as [redacted]. Sealed.App.26a-28a, 58a.

Further evidence showed that Vizient used this structure to foreclose lower-priced suppliers. For example, the record showed that Endure sought to become a Vizient supplier for medical tape and that Vizient rejected Endure's bid in favor of 3M. Endure alleged that numerous improprieties in this process showed Vizient's aggressive exploitation of the market structure that it had created. App.4a, App.26a-27a.

Based on these commercial realities, Endure proposed two submarket definitions. First, Endure identified a "GPO DMS Market," defined as the sale of DMS through GPO-negotiated and GPO-administered contracts to GACs. App.5a. That proposed market was supported by evidence that GAC hospitals are separately identifiable customers, that GPOs and suppliers treat the channel as distinct, that GPO contracts involve distinct pricing and non-pricing terms, and that hospitals face transaction-cost constraints in attempting to replace GPO-administered purchasing. *See* App.42a-46a, App.53a-62a.

Second, Endure proposed a "Vizient DMS Market," defined as the sale of DMS to Vizient-member GACs, including sales through Vizient contracts and other sources. App.53a-54a. That proposed market was not limited to Vizient-branded goods or to sales by Vizient itself. It included DMS sold to Vizient-member GAC hospitals by suppliers including Endure and others, whether through Vizient contracts or outside those contracts. *Id.*

For both proposed submarkets, Endure offered expert testimony about targeted-customer markets, arbitrage limits, distinct pricing, and a hypothetical-monopolist analysis. App.58a-62a, App.76a-81a.

C. Procedural History

Endure filed this action against Vizient, Inc., Vizient Supply, LLC, Vizient Source, LLC, and Provista, Inc. ("Respondents") in the United States District Court for the Northern District of Texas on October 26, 2020, asserting claims under Sections 1 and 2 of the Sherman Act. App.4a, App.26a-27a. The complaint alleged monopolization, attempted monopolization, exclusive dealing, unilateral refusal to deal, and essential-facilities violations arising from Vizient's conduct in the two product markets described above. App.4a, App.26a-27a.

After discovery, Vizient moved for summary judgment on several grounds, including Endure's alleged failure to define legally cognizable antitrust markets. App.25a, App.28a. Vizient also moved to exclude Endure's expert testimony under Federal Rule of Evidence 702. App.25a-26a.

The district court did not resolve the *Daubert* issues or any other antitrust issue, granting summary judgment solely on market definition. App.28a, App.35a. Specifically, it held that both the GPO DMS Market and the Vizient DMS Market failed as a matter of law. As to the GPO DMS Market, the court relied on evidence that some hospitals and some purchases moved outside GPO channels. App.31a-32a. As to the Vizient DMS Market, the court treated the theory as a disfavored single-brand "lock-in" claim. App.33a-35a.

The Fifth Circuit affirmed the judgment for Vizient based on the same issue about product-market definition. App.22a. The court treated certain evidence about substitution and cross-shopping by marginal consumers as dispositive. App.15a-16a, App.21a. In so doing, it expressly declined to apply the "core consumer" concept from the D.C. Circuit. App.18a.

REASONS FOR GRANTING THE PETITION

I. The Fifth Circuit's Opinion Creates a Circuit Split.

A. Three Opinions From this Court Establish the Controlling Market-Definition Principles.

An antitrust plaintiff must establish the relevant market, which is defined generally as "the area of effective competition." *E.g.*, *Ohio v. Am. Express Co.*, 585 U.S. 529, 541 (2018). That area is "determined by reference to a product market (the line of commerce) and a geographic market (the section of the country)." *Brown Shoe*, 370 U.S. at 324.

A product market must include all "commodities reasonably interchangeable by consumers for the same purposes." *U.S. v. E.I. du Pont de Nemours & Co.*, 351 U.S. 377, 395 (1956). The "outer boundaries" of a product market are determined by "the reasonable interchangeability of use or the cross-elasticity of demand between the product itself and substitutes for it." *Brown Shoe*, 370 U.S. at 325. The standards for other relevant boundaries are framed by three opinions of this Court.

1. In *Brown Shoe*, this Court recognized that "within this broad [product] market, well-defined submarkets may exist which, in themselves, constitute product markets for antitrust purposes." *Id.* at 325. To help define such submarkets, the Court identified several "practical indicia," including "industry or public recognition of the submarket as a separate economic entity, the product's peculiar characteristics and uses, unique production facilities, distinct customers, distinct prices, sensitivity to price changes, and specialized vendors." *Id.*

2. In *United States v. Grinnell Corp.*, 384 U.S. 563, 572–73 (1966), this Court extended *Brown Shoe* from the Clayton Act to claims under Section 2 of the Sherman Act, and found "no barrier to combining in a single market a number of different products or services where that combination reflects commercial realities . . . ." *Grinnell* then accepted a product-market definition about "central station protection services," even though components of those services were also sold separately. *See id.; see also United States v. Phila. Nat'l Bank*, 374 U.S. 321, 356 (1963) (recognizing that a "cluster of products (various kinds of credit) and services (such as checking accounts and trust administration) denoted by the term 'commercial banking' composes a distinct line of commerce").

3. Finally, in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992), this Court held that a defendant's lack of market power in a primary equipment market does not, as a matter of law, preclude a finding of market power in derivative aftermarkets. This Court emphasized that "[l]egal presumptions that rest on formalistic distinctions

rather than actual market realities are generally disfavored in antitrust law," and that courts must examine "the economic reality of the market at issue."

Taken together, these cases establish that economics must be applied to a product market as that market actually functions. And they disapprove a "formalistic" focus on a single feature of a market.

B. The Courts of Appeals Are Divided in How They Apply Those Principles.

The courts of appeals are divided over what follows when a record contains both evidence of some substitution and cross-shopping by marginal consumers, as well as evidence about distinct commercial realities faced by other groups of consumers in that market. Some courts treat cross-shopping evidence as relevant but not dispositive, while the Fifth Circuit's opinion treats it as legally conclusive.

The D.C. Circuit's majority opinions in *FTC v. Whole Foods Market, Inc.*, 548 F.3d 1028 (D.C. Cir. 2008), faithfully applied this Court's precedents about market definition. In one of those two opinions, Judge Brown explained that "core consumers can, in appropriate circumstances, be worthy of antitrust protection," because "fringe competition" for individual products within a package may not protect customers who need the package as a whole from market power exercised over that package. *Id.* at 1038. She concluded that the district court erred by focusing only on marginal consumers. *Id.* at 1041.

In the other majority opinion, Judge Tatel reminded that "*Brown Shoe* lists 'distinct prices' as only one of a non-exhaustive list of seven 'practical indicia,'" which meant that pricing evidence "is not the only way to prove a separate market." *Id.* at 1046. He considered evidence that some grocery customers cross-shop, as well as the data about customer diversion and evidence that industry participants recognized a distinct competitive space for certain types of grocery stores. *Id.* at 1044, 1046.[1]

The *Whole Foods* opinions do not suggest that every loyal or enthusiastic customer group is a market. They explain why cross-shopping does not necessarily answer the market-definition question. A submarket can be viable when a distinct group of customers faces distinct conditions such that a hypothetical monopolist could exploit *that group*, notwithstanding marginal substitution by others.

Another, related opinion is *United States v. United States Sugar Corp.*, 73 F.4th 197, 206 (3d Cir. 2023), which affirmed the rejection of a product market offered by the FTC in a challenged merger in the sugar industry. Observing that the district court did not err by considering "facts on the ground rather than relying upon HMT analysis," the Third Circuit affirmed a market-definition analysis that relied on *Brown Shoe* practical indicia and the actual structure of the industry.

The 2023 Merger Guidelines take the same view of the law. In those guidelines, the DOJ and FTC state that they "may rely on any one or more of" four specified tools to identify a relevant antitrust market: (a) direct evidence of substantial competition between merging parties; (b) direct evidence of the exercise of market

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[1] Then-Judge Kavanaugh dissented, arguing that *Brown Shoe*'s indicia should no longer guide modern merger analysis. *Id.* at 1058.

power; (c) "evidence on observed market characteristics ('practical indicia')"; and (d) the hypothetical-monopolist test. U.S. Dep't of Justice & Fed. Trade Comm'n, *Merger Guidelines*, at 39 *et seq*. (Dec. 18, 2023).

And in the specific context of a claimed "single seller market," the Ninth Circuit followed a similar approach that focused on commercial realities in *Newcal Indus., Inc. v. IKON Office Solution*, 513 F.3d 1038, 1048-50 (9th Cir. 2008), holding that a complaint adequately alleged a derivative aftermarket for replacement equipment, lease buyouts, and lease-end services, even though those services arose from a broader foremarket for copier leases.

Rather than treating competition in the foremarket as automatically dispositive, the Ninth Circuit focused on how the market functioned for real customers after the challenged constraints arose: whether the alleged restraint operated only at the back end of the relationship, whether switching costs and information problems mattered, and whether the defendant's power arose from practical market realities rather than terms knowingly accepted at the start of the parties' relationship. *Id.* By doing so, *Newcal* faithfully applied *Kodak*'s instruction that antitrust law disfavors formal presumptions divorced from "actual market realities." 504 U.S. at 466-67.

The *Whole Foods* majority opinions have significantly influenced district courts in a range of market-definition disputes. Several have either expressly relied on *Whole Foods*, or applied materially similar reasoning, to recognize markets shaped by distinct customers, package offerings, and practical limits on substitution.

In *FTC v. Tapestry, Inc.*, 755 F.Supp.3d 386, 455-56 (S.D.N.Y. 2024), the court cited *Whole Foods* for the proposition that cross-shopping does not defeat a market where a "core group" of customers faces distinct competitive conditions. Among the cases cited by *Tapestry* was *FTC v. Sysco Corp.*, 113 F.Supp.3d 1, 37-47 (D.D.C. 2015), which acknowledged that defining a market around a targeted customer "is not free from controversy, as the different opinions in *Whole Foods* demonstrate," while allowing a product market about "broadline" food distribution to national customers.

Similarly, in *United States v. Anthem, Inc.*, 236 F.Supp.3d 171, 215-26 (D.D.C. 2017), the court recognized a market for "the sale of commercial health insurance to national account customers," explaining that competitive effects may properly be evaluated separately by customer type. And, most recently, in *FTC v. Kroger Co.*, 2024 WL 5053016, at *7-11 (D. Or. Dec. 10, 2024), the court applied *Whole Foods*' discussion of core consumers in another grocery-industry case, concluding that "practical indicia" supported a market defined for the unique services of supermarkets.

Additional district courts have applied the same logic without expressly citing *Whole Foods*; for example, in *US Airways, Inc. v. Sabre Holdings Corp.*, 2022 WL 874945, at *7-8 (S.D.N.Y. Mar. 24, 2022), the court allowed a ticket-sale product market focused on the "Sabre" system based on evidence of lock-in, switching costs, and the inability of alternatives to reach the same customer base. And in *FTC v. Staples, Inc.*, 970 F.Supp. 1066, 1075-81 (D.D.C. 1997), the court applied *Brown Shoe*'s practical indicia to recognize office-supply superstores as a distinct market, even though warehouse clubs, mass merchandisers, and other retailers also sold some of the same products and were a potential alternative for substitution.

The Fifth Circuit took a materially different approach in this case. The panel reasoned: "Antitrust law fundamentally defines product markets by cross-elasticity of demand, that is, from the demand side." App.8a. *Brown Shoe*'s indicia, the court explained, are not independent markers of a distinct market, but merely "observable proxies" that are "probative of cross-elasticity of demand." App.10a-11a. Notably, the Fifth Circuit stated that it "decline[d] to rule on the D.C. Circuit's 'core customer' theory proffered by Endure, given that th[at] theory is nonbinding even within that Circuit." App.18a.

That different approach was outcome-determinative. Endure did not just offer indirect clues about how marginal consumers might react to a price change. It identified a distinct group of core consumers—Vizient-member GAC hospitals buying disposable medical supplies through GPO-administered channels—who faced specialized pricing and contracting structures, switching costs, compliance-related pressures, and other channel-specific competitive conditions. App.63a-65a, App.81a-83a.

The Fifth Circuit disregarded that evidence by elevating evidence about customer substitution to become case dispositive. For the GPO DMS Market, the panel emphasized that: 174 of 629 hospitals (27.7%) left the GPO model entirely in a past year; that "72% of all hospital purchases" occurred through GPO contracts; and that 82% of general medical/surgical purchases are made through GPOs. App.15a-16a. The court saw this evidence as "powerful evidence of alternatives reasonably available to consumers" and relied upon it to affirm. App.16a, App.32a.

These statistics are relevant. But they are relevant to a specific topic: marginal consumers, who are willing or able to shift away from the GPO channel. But the ability of some consumers at the margins to potentially switch does not rebut evidence about the distinct competitive conditions faced by a distinct group of core customers. The evidence cited by the Fifth Circuit does not conclusively disprove whether GAC hospitals buying through GPO-administered contracts are a targetable group facing distinct pricing, transaction costs, bundled purchasing requirements, administrative services, and channel constraints. That court's elevation of this evidence to do so is what creates the circuit split on this point.

The Fifth Circuit also took a narrower view of *Kodak* and derivative markets than the Ninth Circuit did in *Newcal*. Specifically, it treated the Vizient DMS Market as suspect because it involved Vizient-member GAC hospitals, and because Endure had not shown a classic case of single-brand "lock-in." App.20a-21a.

But Endure's proposed market was not limited to Vizient-branded goods or sales by Vizient. It included sales of DMS to Vizient-member GAC hospitals by suppliers—including Endure and others—through Vizient contracts and other sources. App.54a.

In other words, Endure's theory was—again—a claim about targeted customers and channel constraints. By treating that theory as effectively suspect unless it fit a narrow reading of *Kodak*, the Fifth Circuit conflicted with Newcal's broader approach to claims about derivative markets, and from *Brown Shoe* and

Grinnell, which establish that markets may be defined by distinct customers or commercially coherent clusters of products and services.

In sum: The D.C. Circuit and Ninth Circuit treat evidence about commercial-realities (targeted customers, clustered offerings, and HMT analysis) as part of the market-definition inquiry, even when some customers are able to shop outside the proposed market. The Third Circuit and the 2023 Merger Guidelines take a similar approach. The Fifth Circuit, however, has elevated evidence about cross-shopping to become legally conclusive as to market definition.

II. THIS COURT SHOULD REVIEW THE CONFLICT CREATED BY THE FIFTH CIRCUIT.

A. The Conflict Is Important Because It Involves an Outcome-Determinative Issue in Many Modern Cases.

Market definition is the threshold question in most antitrust cases: with the exception of certain per se violations, antitrust plaintiffs must define the relevant market.

Under the D.C. Circuit's approach in *Whole Foods*, and the Ninth Circuit's approach in *Newcal*, courts give meaningful weight to commercial realities such as distinct customers, clustered offerings, switching costs, and practical limits on substitution. But under the Fifth Circuit's approach, those features are easily discounted in favor of a rigid focus on one aspect of market definition, quantitative overlap and evidence of cross-shopping. That difference can determine whether a case reaches a jury at all.

In particular, the citations above show that the role of "core consumers" in market analysis is recurring and significant. This Court recognized in *Philadelphia National Bank* and *Grinnell* that a market may be defined around a cluster of offerings when commercial reality so requires. Since then, in numerous cases from a wide range of industries, a group of core consumers has been a recognized feature of market structure. Modern markets often operate through specialized channels, and a narrow focus on whether any marginal cross-shopping has occurred can miss the core competitive question: whether a distinct customer group or channel faces competitive constraints even though some customers can and do use alternatives.

In the courts below, Respondents relied heavily on the case of *Southeast Missouri Hospital v. C.R. Bard, Inc.*, 642 F.3d 608 (8th Cir. 2011), which rejected an antitrust challenge to a GPO discount arrangement about two types of catheters, holding that the relevant agreements were "totally voluntary and terminable at will on short notice." *Id.* at 610-11, 616. This case is materially different from *Bard*, and those differences underscore rather than diminish the suitability of this case as a vehicle to resolve the circuit split.

This record shows that negotiated pricing for several products [redacted]. Sealed.App.27a. While no party in *Bard* disputed that contracts were awarded through a competitive process, this record contains substantial evidence that Vizient's bidding process was not operated fairly. App.4a, App.26a-27a. Bard also had a demonstrated physician preference for the defendant's product; no such preference exists here. And finally, the national GPO market has consolidated dramatically since *Bard* was decided. While many national GPOs existed in 2011, as of 2023 only three remain, with Vizient controlling over 50% of the GPO DMS market and more than [redacted] the Vizient DMS submarket. App.2a-3a; Sealed.App.33a-35a, Sealed.App.60a.

Evidence of some marginal cross-purchasing is only a partial answer to the question of market definition. The unresolved legal question is whether that evidence is dispositive, or whether courts must also consider targeted customers, distinct pricing, channel constraints, switching costs, cluster realities, and related evidence about how a hypothetical monopolist could exploit those market features.

B. This Case Provides a Strong Vehicle to Review This Conflict.

This case is a strong vehicle to review this conflict. The market definition questions were fully developed below, factually and legally. The record presents a clean and well-developed clash between evidence about some cross-shopping, on the one hand, and some evidence about the unique properties of the DMS submarkets proposed by Endure, on the other.

Review does not require the Court to decide whether Endure's proposed submarket definitions are correct as a matter of law. The Court need only decide whether a court must deem such markets legally impossible at summary judgment because some customers purchase outside the proposed channel or customer group, even if there is evidence of commercial realities such as distinct pricing, targeted customers, and transaction-cost constraints.

The Fifth Circuit's express refusal to engage the D.C. Circuit's core-consumer concept—dismissing it as nonbinding—crystallizes the conflict. Review is needed to confirm that *Brown Shoe*, *Grinnell*, *Philadelphia National Bank*, and *Kodak* remain meaningful limits on a market-definition approach that elevates any evidence about cross-shopping to automatically become case-dispositive.

CONCLUSION

The Court should grant the petition for a writ of certiorari to resolve the conflict over whether some evidence of cross-shopping and substitution by marginal consumers is dispositive of antitrust market definition, and confirm the longstanding rule that market definition must account for the commercial realities of targeted customers, channels, and clustered offerings.

Respectfully submitted,

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