14-11363

United States Court of Appeals for the Eleventh Circuit

MCWANE, INC.,

Petitioner,

v.

FEDERAL TRADE COMMISSION,

Respondent.

On Petition for Review from
the Federal Trade Commission

BRIEF FOR AMICI CURIAE STATES OF NEW YORK, ARIZONA, CONNECTICUT, HAWAI'I, IDAHO, INDIANA, IOWA, KENTUCKY, MARYLAND, MISSISSIPPI, NEVADA, NEW MEXICO, AND THE COMMONWEALTH OF PUERTO RICO IN SUPPORT OF RESPONDENT

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TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

Mazzeo v. Color Resolutions Int'l, LLC,

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United States v. Citizens & S. Nat'l Bank,

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TABLE OF AUTHORITIES (cont'd)

Cases **Page(s)**

* *United States v. Dentsply Int'l Inc.*,

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United States v. Gen. Dynamics Corp.,

415 U.S. 486, 94 S. Ct. 1186 (1974)... 34, 35

United States v. Grinnell,

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* *United States v. Microsoft Corp.*,

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* *ZF Meritor, LLC v. Eaton Corp.*,

696 F.3d 254 (3d Cir. 2012),

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Laws

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American Recovery and Reinvestment Act of 2009,

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TABLE OF AUTHORITIES (cont'd)

Laws **Page(s)**

Consolidated Appropriations Act of 2014,
Pub. L. No. 113-76, 128 Stat. 5 6

2 C.F.R. § 176.70(a)(2) 6

Miscellaneous Authorities

Areeda, Phillip E., & Herbert Hovenkamp, *Antitrust Law*,
vol. 11 (3d ed. 2011) 11, 16, 23

Baker, Jonathan B., *Exclusion as a Core Competition Concern*,
78 Antitrust L.J. 527 (2013) 15, 17, 18

N.Y. Dep't of Health, *Drinking Water Infrastructure Needs of New York State* (2008), *available at* http://www.health.ny.gov/environmental/water/drinking/infrastructure_needs.htm.................. 5

N.Y. Envtl. Facilities Corp., *Clean Water State Revolving Fund*,
http://www.efc.ny.gov/Default.aspx?tabid=82 6

Salop, Steven C., et al., *The Appropriate Legal Standard and Sufficient Economic Evidence for Exclusive Dealing Under Section 2: The FTC's McWane Case* (Geo. L. Ctr. 2014), *available at* http://scholarship.law.georgetown.edu/facpub/1365/ 16, 17, 25, 32

TABLE OF AUTHORITIES (cont'd)

Miscellaneous Authorities **Page(s)**

U.S. EPA, *DWSRF State & Territorial-Level Historc Funding 1997-2014*, *available at* http://water.epa.gov/grants_funding/dwsrf/upload/dwsrfstatehistoricfunding19972014.pdf........................ 6

U.S. EPA, *How the CWSRF Program Works*, http://water.epa.gov/grants_funding/cwsrf/basics.cfm 5

Wickelgren, Abraham L., *Detailed Analysis, not Catechism: A Comment on Crane's "Bargaining over Loyalty*,*"* 92 Tex. L. Rev. 101 (2014) 25

INTEREST OF AMICI CURIAE

This case concerns defendant McWane, Inc.'s use of its monopoly over domestically manufactured ductile iron-pipe fittings (DIPFs) to foreclose its only competitor from using the distribution channels essential to accessing the market. An important legal question posed primarily by McWane's *amici* and a dissenting commissioner of the Federal Trade Commission is whether a government enforcer has met its prima facie burden of showing probable harm to competition by establishing that a monopolist's exclusive dealing substantially foreclosed its competitors from the market.[1]

Amici States New York, Arizona, Connecticut, Hawai'i, Idaho, Indiana, Iowa, Kentucky, Maryland, Mississippi, Nevada, and New Mexico, and the Commonwealth of Puerto Rico, have a strong interest in the outcome of this case, both as major purchasers of DIPFs and as antitrust enforcers. DIPFs, a routinely used component in many

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[1] Exclusive-dealing practices can be challenged under a number of federal and state antitrust statutes. The specific claim at issue here, monopolization under § 5 of the Federal Trade Commission Act (FTCA), is closely analogous to a monopolization claim under § 2 of the Sherman Act. *See* 15 U.S.C. § 2.

waterworks projects, join together pipes and hydrants and help direct the flow of pressurized water. The end-users of DIPFs are, in the majority of cases, either regional water authorities or the contractors engaged by these authorities to construct public waterworks projects. Regional water authorities are generally overseen by state governments or municipalities and receive significant state and federal funding. Because a substantial portion of this funding is conditioned on the use of domestically manufactured products, including DIPFs, *amici* States have a strong interest in maintaining a competitive market for such domestically made products with lower prices, higher quality, and greater innovation.

As antitrust enforcers, *amici* States also have an interest in the broader legal question raised by McWane's *amici* and the dissenting commissioner. States regularly seek to prevent dominant market players from using exclusive dealing and other exclusionary arrangements to freeze their rivals out of the market, thereby insulating themselves from competitive forces. For example, several States and the federal government have brought enforcement proceedings against waste haulers that entered into long-term exclusive contracts with

customers that foreclosed competition. And New York recently entered into a settlement with Seamless North America, LLC, an online food-delivery platform, which had locked restaurants into agreements that prohibited them from working with competing platforms.

These types of enforcement efforts could be seriously undermined by this case because McWane's *amici*, relying on a dissenting statement below, in effect urge this Court to impose a new and unduly restrictive standard on government enforcers to meet their prima facie burden of showing harm to competition. Specifically, they suggest that the government must provide direct evidence that an exclusionary practice actually affected prices or quantities, or proof that a competitor would actually have gained a much larger share of the market absent the monopolist's exclusivity agreements.

Such a rule would be inconsistent with the widespread recognition, reflected in both case law and the States' enforcement experience, that exclusive dealing by a monopolist that substantially forecloses rivals from the market is far more often than not associated with anticompetitive effects that undermine consumer welfare. As a result, although the government can provide direct evidence of actual harm to

competition caused by the exclusive dealing—as the FTC did here—it is not required to do so, and a court need not resolve disputes about the direct evidence of harm before finding that the government has satisfied its initial burden. Rather, it is enough for an antitrust enforcer to raise a reasonable inference of competitive harm by proving that a monopolist's exclusive dealing substantially foreclosed its rivals from the market. The contrary position espoused by McWane's *amici* and the dissent would hobble federal and state antitrust enforcement efforts, force fact-finders to ignore the obvious anticompetitive implications of a monopolist's exclusive dealing, and dangerously undermine enforcement efforts against monopolization.

ISSUE ADDRESSED

Amici States address whether a government enforcer has met its prima facie burden of showing probable harm to competition through proof that a monopolist's exclusive dealing substantially foreclosed its competitors from the market.

STATEMENT OF THE CASE

A. Factual Background

McWane is a monopolist in the domestically manufactured DIPF market. (Opinion of the Commission ("Comm'n") 16-18.) As late as 2008, McWane occupied one-hundred percent of this market; since then, notwithstanding the best efforts of its competitors, McWane's market share has never dropped below ninety percent. (Compl. ¶¶ 39-41.)

DIPFs are a significant component in public waterworks projects that are built with state and federal funding. The federal government provides low-interest loans for public waterworks projects through two programs, the Clean Water State Revolving Fund (CWSRF) and the Drinking Water State Revolving Fund (DWSRF). State governments also contribute significant sums to these programs. For example, New York State has invested almost $2.4 billion in drinking-water infrastructure through the DWSRF. *See* N.Y. Dep't of Health, *Drinking Water Infrastructure Needs of New York State* (2008). Since its creation in 1990, the CWSRF has issued more than $100 billion in loans for water-infrastructure projects, $14 billion of which was spent on projects in New York State. *See* U.S. EPA, *How the CWSRF Program Works*;

N.Y. Envtl. Facilities Corp., *Clean Water State Revolving Fund*. And since the DWSRF was created in 1996, it has issued more than $17.5 billion of funding for infrastructure projects directed at providing safe drinking water. U.S. EPA, *DWSRF State & Territorial-Level Historc Funding 1997-2014*.

State and federal laws sometimes require that such public waterworks projects use only domestically manufactured products. Most significantly for this case, the American Recovery and Reinvestment Act of 2009 (ARRA) (the federal stimulus package enacted in response to the recent recession) allocated approximately $6 billion to water-infrastructure projects through the CWSRF and DWSRF on the condition that all iron, steel, and manufactured goods used in funded projects be produced in the United States. Pub. L. No. 111-5, §§ 604, 1605, 123 Stat. 115, 169, 303; *see also* 2 C.F.R. § 176.70(a)(2). This "buy American" requirement was again imposed on projects funded by the CWSRF and DWSRF by the Consolidated Appropriations Act of 2014. *See* Pub. L. No. 113-76, § 436, 128 Stat. 5, 346 (requiring domestic iron in public waterworks funded through CWSRF and DWSRF). In response to the stimulus package's funding for public waterworks

projects, McWane's two major competitors, Star Pipe Products Ltd. and Sigma Corp., began exploring ways to enter the domestic DIPF market. (Comm'n 7-8.) Sigma eventually abandoned that effort by becoming a McWane distributor (Comm'n 11-12), leaving Star as the sole competitor attempting to break McWane's grip on the market.

McWane responded immediately to preserve its monopoly power by exploiting DIPF manufacturers' reliance on wholesale distributors to sell their products. These distributors are the key to the DIPF market because no other "viable alternate distribution channels, including direct sales to end users," exist. (Comm'n 23; *see also* Dissenting Statement of Commissioner Joshua D. Wright ("Dissent") 44.) McWane locked up a significant portion of these distributors by imposing an exclusive-dealing mandate that essentially required distributors to either purchase domestic fittings exclusively from McWane or be barred from purchasing *any* domestic fittings from McWane. (Comm'n 20 (McWane's national sales manager stated: "What are we going to do if a customer buys Star domestic? We are not going to sell them our domestic . . . . Once they use Star, they can't EVER buy domestic from us.").) This directive had teeth because McWane was the only domestic

manufacturer of certain less-common fittings that were nonetheless essential for waterworks projects.[2] (Comm'n 20.) McWane was fully aware of the barrier that its exclusive-dealing mandate posed to Star's entry into the domestic DIPF market; indeed, the purpose of McWane's exclusivity mandate was to force Star "to absorb the costs associated with having a more full line before [it] can secure major distribution." (Comm'n 9, 20.)

McWane's strategy was effective. All of the major distributors in the industry but one (which McWane punished by barring it from buying McWane's domestic fittings) either completely or significantly severed ties with Star as a result of McWane's exclusive-dealing mandate. (Comm'n 23-24; *see also* ALJ ¶¶ 1231-1364.)

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[2] Numerous distributors confirmed the coercive nature of McWane's mandate. (*See, e.g.*, ALJ Factual Findings ("ALJ") ¶ 1187 (distributor was "informed that they [McWane] were going to pull everything away from us, a threat"); ALJ ¶ 1188 (distributor stated that it "believed it had been threatened . . . with loss of access to McWane's" domestic fittings if it bought from Star); ALJ ¶ 1191 (distributor explained that "[t]here was . . . a veiled threat out there that if . . . [McWane] found out you were buying from [Star], something would happen"); ALJ ¶ 1192 (distributor recalled that "[w]hen I read the letter that they [McWane] sent out . . . I interpreted that as a threat").)

B. Procedural History

The FTC issued a seven-count administrative complaint against McWane. As relevant here, an ALJ found after trial that McWane's exclusive-dealing mandate constituted monopolization, an "unfair method[] of competition" that violated § 5 of the FTCA, 15 U.S.C. § 45. On administrative appeal, the Commission affirmed that count, with one commissioner dissenting.

The Commission evaluated complaint counsel's monopolization claim under the long-standing burden-shifting framework that applies to monopolization cases. That framework first requires the government to prove that the defendant (1) possessed monopoly power over the relevant market and (2) maintained its monopoly through conduct likely to harm competition. The Commission concluded that complaint counsel had raised a "reasonable inference" of anticompetitive effects through proof that McWane's exclusive dealing substantially foreclosed its rivals in light of both the degree of foreclosure and surrounding market conditions. (Comm'n 22-28.) The Commission further found that complaint counsel had provided direct evidence of actual anti-competitive effects from McWane's exclusive dealing. (Comm'n 13, 30.)

Because complaint counsel had thus satisfied its prima facie burden, the burden shifted to McWane to rebut the evidence of probable harm to competition or to show sufficiently procompetitive justifications for its conduct. (Comm'n 30.) The Commission properly concluded that McWane had done neither, and found McWane liable.[3]

The dissenting commissioner would have found that complaint counsel's proof of Star's substantial foreclosure from the market was insufficient to make a prima facie showing of competitive harm. (Dissent 4-5.) Instead, the dissent argued that direct evidence of competitive harm was required—such as proof that prices were actually higher than they would have been absent McWane's exclusive dealing—or proof that Star would have achieved a greater share of the market absent McWane's exclusive-dealing mandate (Dissent 5 n.10, 19-20, 35-37). The dissent concluded that the direct evidence provided by complaint counsel failed to make such a showing.

McWane filed a petition for review in this Court.

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[3] Where a defendant proves a procompetitive justification for its conduct, the burden shifts back to the government to show that the anticompetitive harms outweigh the procompetitive justifications.

SUMMARY OF ARGUMENT

Complaint counsel's evidence was sufficient to prove McWane liable for monopolization under the well-established burden-shifting framework that applies to exclusive-dealing claims. Under this framework, the government establishes its prima facie case by proving that the defendant (1) possessed monopoly power and (2) willfully acquired or maintained that power through exclusive dealing that substantially foreclosed its rivals from the market. *See, e.g.*, *Tampa Elec. Co. v. Nashville Coal Co.*, 365 U.S. 320, 327-29, 81 S. Ct. 623, 629 (1961); *United States v. Microsoft Corp.*, 253 F.3d 34, 69 (D.C. Cir. 2001) (per curium; en banc). Whether foreclosure is substantial in any particular case depends not only on the percentage of the market cut off by the exclusive dealing, but also on surrounding market conditions, including (but not limited to) the existence of alternative distribution channels, barriers to market entry, and the duration of the exclusive-dealing arrangement. *See* 11 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law*, 197-209 (3d ed. 2011); *Tampa Elec.*, 365 U.S. at 329, 81 S. Ct. at 629; *United States v. Dentsply Int'l Inc.*, 399 F.3d 181, 191-96 (3d Cir. 2005). If the government proves a prima facie case of

anticompetitive effects, the burden shifts to the defendant to rebut this evidence or prove a procompetitive justification for its conduct. Here, McWane failed adequately to do either, so the fact that complaint counsel's evidence was sufficient to meet the prima facie standard is determinative.

There is no serious question here that McWane had a monopoly over the market for domestic DIPFs—it occupied one-hundred percent of that market through 2008 and has never dropped below ninety percent since then. The primary dispute, instead, is over the second prong of the government's prima facie case. The dissenting commissioner and McWane's *amici* were unwilling to accept an inference of harm to competition from complaint counsel's proof that McWane's exclusive dealing resulted in substantial foreclosure of its only rival. Instead, they in effect seek to impose a "new, heightened standard of proof" (Comm'n 26) that would essentially require the government to provide direct evidence of anticompetitive effects (*e.g.*, that prices would have been lower or a specific competitor would have expanded further but for the exclusive dealing), rather than evidence of substantial foreclosure sufficient to raise a reasonable inference of anticompetitive

effects. (Dissent 33-38; Br. of Amicus Curiae Professors ("Prof. Br.") at 21-24.)

This Court should reject any such increased burden of proof. Although complaint counsel provided direct evidence of anticompetitive effects, including pricing evidence, triggered by McWane's exclusive dealing (Comm'n 27-28; *see* FTC Br. at 6-7, 36-38),[4] it need not have done so. Complaint counsel raised a rebuttable inference of harm to competition from proof of McWane's monopoly power and substantial foreclosure of its only rival from the market. Because McWane failed to provide evidence sufficient to rebut the reasonable inference of competitive harm, this Court can affirm irrespective of the dissenting commissioner's and *amici*'s critiques of complaint counsel's direct evidence.

The use of a rebuttable inference of anticompetitive effects is reasonable and well-founded. The inference properly reflects the fact that competition will likely be harmed when a monopolist uses

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[4] For example, complaint counsel proved that Star remained unable "to constrain McWane's pricing for domestic fittings." (Comm'n 18.)

exclusive dealing to substantially foreclose its rivals from the market—a consequence that is supported by extensive legal precedent, academic literature, and state and federal enforcement efforts. Given this strong association between substantial foreclosure by a monopolist and harm to competition, the courts—including the unanimous en banc D.C. Circuit in *Microsoft*—have appropriately recognized that the government is entitled to an inference of competitive harm upon proof of monopoly power and substantial foreclosure. The defendant then bears the burden of either rebutting that prima facie case or demonstrating procompetitive effects from its exclusive dealing. By contrast, the heightened standard of proof that is, in effect, proposed by McWane's *amici* and the dissenting statement below has no basis in law or policy. Such a standard would dangerously undermine enforcement efforts, leave antitrust litigation subject to easy manipulation by defendants, and encourage monopolists to engage in anticompetitive behavior.

ARGUMENT

POINT I

THE SUBSTANTIAL THREAT TO COMPETITION FROM A MONOPOLIST'S EXCLUSIVE DEALING SUPPORTS A REBUTTABLE INFERENCE OF ANTICOMPETITIVE EFFECTS

A. Serious Economic Harm Is Threatened When a Monopolist's Exclusive Dealing Substantially Forecloses its Rivals, as Happened Here.

1. A quintessential aspect of monopoly power is the power to "exclude competition" through means other than "superior product, business acumen, or historic accident." *United States v. Grinnell*, 384 U.S. 563, 570-71, 86 S. Ct. 1698, 1704 (1966) (quotation marks omitted). One classic exclusion strategy involves the monopolist imposing exclusive-dealing requirements on wholesale distributors that are the indispensable means for competing sellers to reach consumers. *See, e.g.*, *Dentsply*, 399 F.3d at 185, 193-94; *see also* Jonathan B. Baker, *Exclusion as a Core Competition Concern*, 78 Antitrust L.J. 527, 541-42 (2013). Such exclusive deals can take many forms, but for a monopolist the most straightforward approach is to threaten to withhold its products from distributors that do any material business with a competitor—thereby freezing those distributors out of a large portion of

the current market if they do not perpetuate the monopolist's dominance. *See, e.g.*, *Dentsply*, 399 F.3d at 185, 193-94. The economic pain of losing all access to the monopolist's products thus coerces distributors into acceding to the monopolist's demand for exclusive dealing even if the distributors would have preferred to buy from multiple manufacturers. Areeda & Hovenkamp, *supra*, at 89-90; *see, e.g.*, *Lorain Journal Co. v. United States*, 342 U.S. 143, 152-53, 72 S. Ct. 181, 185-86 (1951).

Exclusive dealing by a monopolist raises serious anticompetitive concerns when used to substantially foreclose rivals from the market. Where market conditions indicate that the distribution channels foreclosed are reasonably necessary to reach customers, competition is almost always dangerously undermined. Cut off from the key distribution channels, the monopolist's competitors can reach consumers only through more costly and less efficient avenues. *See* Areeda & Hovenkamp, *supra*, at 84-85; Steven C. Salop, et al., *The Appropriate Legal Standard and Sufficient Economic Evidence for Exclusive Dealing Under Section 2: The FTC's McWane Case*, 6 (Geo. L. Ctr. 2014); *see, e.g.*, *Microsoft*, 253 F.3d at 68-71. These higher costs and

decreased efficiencies force rivals "to avoid entry, price cutting, or other competitive moves" that could otherwise break the monopolist's hold on the market, and may force the rivals to exit the market. Baker, *supra*, at 542; *see, e.g.*, *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254, 288 (3d Cir. 2012), *cert. denied*, 133 S. Ct. 2025 (2013). Thus insulated from any real competitive threat, the monopolist is free to maintain supra-competitive prices. *See* Salop, *supra*, at 7. And with rivals' ability to enter or expand in the market undermined, the volume, quality, and variety of products also decreases, further harming competition and consumer choice. *Id.*

Over time, exclusive dealing by monopolists can also stifle innovation. As the monopolist's rivals are forced to scale back operations or to leave the market, they lose the incentive to develop new technologies or to invest in product development. *Id.*; *see, e.g.*, *Microsoft*, 253 F.3d at 71-72 (describing exclusive dealing strategy by Microsoft designed to prevent nascent technologies from developing). Put simply, the monopolist's rivals "are never given an opportunity to compete, despite their ability to offer products with significant customer demand." *ZF Meritor*, 696 F.3d at 281. At the same time, lacking any

external pressure to improve its own products, the monopolist can simply rely on its dominant market position to continue earning supracompetitive profits at the expense of consumer welfare. Baker, *supra*, at 556-57.

2. For over a century, courts have carefully evaluated the details and logic of exclusive-dealing arrangements. *See Tampa Elec.*, 365 U.S. at 325-27, 81 S. Ct. at 627-28 (outlining history); *see also Microsoft*, 253 F.3d at 67-80; *Dentsply*, 399 F.3d at 191-96. Courts have repeatedly recognized that a monopolist's exclusive-dealing arrangements will frequently harm competition when they foreclose would-be competitors from accessing a significant portion of the market. Under certain market conditions (see *supra*, at 11), such foreclosure is likely to prevent the rivals from competing effectively with the monopolist because the foreclosure raises the rivals' costs of distribution, restricts their output, and/or prevents them from gaining the scale necessary to produce goods cost-effectively.

For example, in *Lorain Journal*, the Supreme Court upheld a monopolization claim under § 2 of the Sherman Act against a local newspaper—the dominant advertiser in the region—that refused to

carry advertisements from any customer that also sought to place advertisements with a competing radio station. 342 U.S. at 148-49, 72 S. Ct. at 183-84. The Court found that the newspaper exploited its monopoly power to prevent competition by taking advantage of the fact that, due to the newspaper's dominant market position, customers "could not afford to discontinue their newspaper advertising in order to use the radio." *Id.* at 153, 72 S. Ct. at 186.

Similar tactics were used in *Dentsply*, in which a dominant manufacturer of artificial teeth adopted a policy under which it would terminate any distributor that also carried a competitor's products. The Third Circuit found that this arrangement had "effectively choked off the market for artificial teeth, leaving only a small sliver for competitors," by threatening distributors with the loss of "the large share of the market held by" the monopolist if they transacted with a rival. 399 F.3d at 193, 196.

Likewise, in *ZF Meritor*, a monopolist in the market for heavy-duty truck transmissions entered into long-term, near-exclusive arrangements with all four manufacturers that bought such transmissions. 696 F.3d at 286. Although these manufacturers were unhappy

with the arrangements (one said it felt like the monopolist was "holding it 'hostage'"), the monopolist's dominance meant that losing it as a supplier "was not an option." *Id.* at 277-78. The Third Circuit held that this "element of coercion," coupled with the monopolist's "significant market power" and the "highly concentrated" nature of the market, made the exclusive-dealing arrangements illegal. *Id.* at 284-89.

As a final example, in *Microsoft*, the en banc D.C. Circuit reviewed Microsoft's use of various exclusionary strategies, including exclusive-dealing arrangements with internet-service providers, to prevent its competitors from distributing rival internet browsers to consumers. 253 F.3d at 67-78. The D.C. Circuit found this exclusive dealing unlawful in light of Microsoft's monopoly power and foreclosure of its rivals from "a substantial percentage of the available opportunities for browser distribution." *Id.* at 70-71. The court explained that such foreclosure "clearly [had] a significant effect in preserving" Microsoft's monopoly, thereby harming competition, because it kept usage of rival browsers "below the critical level necessary" for any competition "to pose a real threat to Microsoft's monopoly." *Id.* at 71.

3. The facts of this case—as found by the ALJ and upheld by the Commission—correspond closely to the exclusive-dealing strategies that courts have repeatedly found to be harmful to competition. As soon as its rivals began exploring ways to manufacture DIPFs domestically, McWane used its monopoly power to impose an exclusive-dealing mandate for the express purpose of preventing its competitors from entering or expanding in the domestic-fittings market. (Comm'n 8-9, 20-21.) McWane's exclusive-dealing strategy foreclosed Star—McWane's only real rival—from "accessing a substantial share of distributors," raised its costs of distribution, and restricted its ability to make sales. (Comm'n 23-24.)

Moreover, the surrounding market factors showed that the foreclosure was substantial and significant. In particular, as the dissenting commissioner acknowledged, no alternative avenues of distribution other than the distributors existed because selling directly to end-users of DIPFs was not viable. (Dissent 44; *see also* Comm'n 23.) McWane's mandate also required exclusive dealing from its distributors "for as long as McWane desired" because distributors could not realistically start purchasing from Star when McWane was the only

manufacturer making less common but necessary fittings. (Comm'n 22-24.)

Substantially foreclosed from key distributors, Star was forced to use more costly and ineffective methods of manufacturing DIPFs domestically and distributing those DIPFs to consumers. (Comm'n 23-26.) As a result, McWane faced no real competitive threat in the domestic fittings market and retained its power to maintain supracompetitive prices on customers that were compelled by law to purchase only domestic fittings—customers that were paying between twenty-one and ninety-six percent more than customers permitted to purchase foreign fittings. (Comm'n 15). Indeed, many distributors refused to purchase from Star even when Star offered lower prices. (Comm'n 23.) Moreover, McWane's conduct likely resulted in reduced output, quality, and innovation because Star was unable to open its own domestic foundry. (Comm'n 23-26.) Rather than compete with Star through "superior product, business acumen, or historic accident," *Grinnell*, 384 U.S. at 570-571, 86 S. Ct. at 1704, McWane maintained its monopoly power through predatory exclusive dealing, *see also Aspen Skiing Co. v. Aspen Highlands Skiing Corp.*, 472 U.S. 585, 605, 105 S.

Ct. 2847, 2859 (1985) ("If a firm has been attempting to exclude rivals on some basis other than efficiency, it is fair to characterize its behavior as predatory." (quotation marks omitted)).

4. Contrary to the principles described above, McWane's *amici* broadly assert that exclusive dealing is usually procompetitive and rarely harms competition. (Prof. Br. at 15.) But this contention ignores the fact that exclusive-dealing arrangements are "of special concern when imposed by a monopolist" rather than by a normal competitor. *ZF Meritor*, 696 F.3d at 271; *see also Microsoft*, 253 F.3d at 70. To be sure, exclusive dealing can benefit competition, such as by increasing the predictability of supply and demand (which can lead to lower prices), or by encouraging sellers to invest in their distributors (which can provide better consumer experiences). *See* Areeda & Hovenkamp, *supra*, at 148-62. But these positive effects predominantly arise in markets with already healthy competition, where exclusive deals can increase competition among sellers. *See, e.g.*, *Continental T. V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 54-55, 97 S. Ct. 2549, 2560 (1977).

By contrast, when a monopolist that dominates the market uses exclusive dealing to lock up a substantial portion of distributors, such

procompetitive effects are much less likely, and anticompetitive effects are far more likely. A primary justification for exclusive deals—promoting competition among manufacturers by ensuring that distributors are committed to a single brand—is weaker when undertaken by a monopolist. Rather than increase competition, a monopolist's use of exclusive dealing to foreclose rivals from key distribution channels simply allows the monopolist to remain free of traditional market forces. Indeed, in this case, avoiding competitive pressure from rivals was the precise purpose of McWane's exclusive dealing. McWane did not even offer distributors a potentially procompetitive inducement (such as lower prices) in exchange for exclusive dealing—it simply demanded exclusivity.

Thus, the mere fact that exclusive-dealing arrangements sometimes may increase competition between nonmonopolists does not mean that competition is unlikely to be harmed when a monopolist engages in the same practice on a broad scale. "[A] monopolist is not free to take certain actions that a company in a competitive (or even oligopolistic) market may take, because there is no market constraint

on a monopolist's behavior."[5] *Dentsply*, 399 F.3d at 187 (citations omitted); *see also Microsoft*, 253 F.3d at 70-71.

B. The Strong Association between a Monopolist's Exclusive Dealing that Substantially Forecloses Rivals and Anticompetitive Effects Justifies a Rebuttable Inference of Harm to Competition.

The strong likelihood that severe harms to competition will result when a monopolist uses exclusive-dealing arrangements to foreclose substantially its rivals from the market supports a rebuttable inference of harm to competition from such foreclosure. The Supreme Court has held that burden-shifting and the use of presumptions are useful tools "to make the rule of reason a fair and efficient way to prohibit

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[5] Contrary to the suggestion of McWane's *amici* (Prof. Br. at 3), empirical evidence does not show that exclusive dealing is usually procompetitive even when undertaken by a monopolist. The few empirical studies on exclusive dealing usually review markets with healthy competition, or that are already protected by the antitrust laws. *See* Salop, *supra*, at 19 & n.58. As a result, existing studies do not provide information about how exclusive deals would affect competition if the antitrust laws "were relaxed to permit [such] practices by dominant firms and monopolists." *Id.*; *cf.* Abraham L. Wickelgren, *Detailed Analysis, not Catechism: A Comment on Crane's "Bargaining over Loyalty,"* 92 Tex. L. Rev. 101, 101, 106 (2014) (explaining that evidence of loyalty discounts' beneficial effects in competitive markets does not establish that such discounts are procompetitive when used by monopolists).

anticompetitive restraints and to promote procompetitive ones." *Leegin Creative Leather Prods., Inc. v. PSKS, Inc.*, 551 U.S. 877, 898-99, 127 S. Ct. 2705, 2720 (2007). Indeed, the Supreme Court recently stated that proof of a large payment from a brand-name drug manufacturer to a potential generic competitor in a patent settlement might be sufficient to shift the burden to the defendant to explain why the patent settlement does not harm competition. *See F.T.C. v. Actavis, Inc.*, 133 S. Ct. 2223, 2236-38 (2013); *see also Realcomp II, Ltd. v. F.T.C.*, 635 F.3d 815, 827 (6th Cir. 2011) (affirming liability because, *inter alia*, "[m]arket power and the anticompetitive nature of the restraint" can be sufficient "to show the potential for anticompetitive effects").

The use of such a rebuttable inference as part of a burden-shifting framework is not novel—it is common both in antitrust litigation and in other areas of the law. For example, because direct proof of monopoly power is rarely available, courts routinely infer that a seller wields such power from the seller's possession of a predominant share of a market protected by entry barriers. *See, e.g.*, *Eastman Kodak Co. v. Image Tech. Servs.*, 504 U.S. 451, 462-65, 112 S. Ct. 2072, 2079-81 (1992); *Microsoft*, 253 F.3d at 51. Similarly, courts addressing potential antitrust viola-

tions from a merger under § 7 of the Clayton Act allow the government to raise a rebuttable presumption that the acquisition unlawfully lessens competition by proving that the transaction will unduly concentrate the market. *See United States v. Citizens & S. Nat'l Bank*, 422 U.S. 86, 120-22, 95 S. Ct. 2099, 2118-19 (1975); *United States v. Baker Hughes Inc.*, 908 F.2d 981, 982 (D.C. Cir. 1990). And in the employment-discrimination context, courts have long used the familiar burden-shifting framework established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 93 S. Ct. 1817 (1973), which works in much the same way as the burden-shifting structure for exclusive-dealing cases. *Cf. Mazzeo v. Color Resolutions Int'l, LLC*, 746 F.3d 1264, 1270 (11th Cir. 2014) (ADEA claim).

Like these and many other evidentiary frameworks, the rebuttable inference of anticompetitive effects in exclusive-dealing cases helps courts separate anticompetitive from procompetitive conduct, thereby "provid[ing] more guidance to businesses." *Leegin*, 551 U.S. at 898-99, 127 S. Ct. at 879. Indeed, because the line between anticompetitive conduct and vigorous competition "can be difficult to discern," *Microsoft*, 253 F.3d at 58, the burden-shifting framework's purpose is to allow

courts to make such distinctions in a fair and efficient manner. *Cf. Tex. Dep't of Cmty. Affairs v. Burdine*, 450 U.S. 248, 255 n.8, 101 S. Ct. 1089, 1094 (1981) (*McDonnell-Douglas* framework "progressively . . . sharpen[s] the inquiry into the elusive factual question of intentional discrimination").

The prima facie case already requires the government to prove not only that the monopolist's behavior foreclosed rivals from a significant portion of the market but also that the overall market characteristics support an inference of anticompetitive effects. See *supra*, at 11. This burden ensures that only exclusive-dealing arrangements likely to harm competition can ever run afoul of the antitrust laws. Once the government passes this threshold, the burden appropriately shifts to the defendant to rebut the prima facie case or to show procompetitive justifications for its conduct. If the defendant cannot prove that behavior reasonably appearing to be anticompetitive has a procompetitive effect, the court is entitled to conclude that the conduct harms competition. *See Microsoft*, 253 F.3d at 79 ("To some degree, the defendant is made to suffer the uncertain consequences of its own undesirable conduct." (quotation marks omitted)). By thus fairly

distributing the burdens, the courts have appropriately balanced the antitrust laws' fundamental goal of preventing anticompetitive conduct with the need to ensure that businesses may engage in competitive practices.[6]

Here, complaint counsel satisfied its prima facie burden by establishing substantial foreclosure. This showing raised a reasonable inference of probable harm to competition and shifted the burden to McWane. Because McWane failed to provide sufficient evidence to rebut the reasonable inference of competitive harm or to establish any procompetitive justification for its conduct, complaint counsel prevails based on the unrebutted inference of harm to competition. *See Microsoft*, 253 F.3d at 78-79; *see also Realcomp*, 635 F.3d at 827. Although, as the Commission properly found, complaint counsel also provided sufficient direct evidence of actual harm to competition from

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[6] If a defendant is found to have violated the antitrust laws through exclusive dealing, the courts face a different task in determining an appropriate remedy. Direct proof of actual harm to competition may be needed for certain remedies, such as when a private plaintiff seeks monetary damages. But in a public enforcement action seeking injunctive relief to stop illegal conduct, the government is not required to provide such direct evidence. *See Microsoft*, 253 F.3d at 80.

McWane's exclusive dealing (Comm'n 27-28; FTC Br. at 6-7, 36-38), such direct evidence was not necessary to shift the burden to McWane. Thus, this Court should affirm even if it were to find that the direct evidence of competitive harm is ambiguous.

POINT II

DIRECT EVIDENCE OF ACTUAL ANTICOMPETITIVE EFFECTS IS NOT REQUIRED TO SATISFY THE GOVERNMENT'S PRIMA FACIE BURDEN

Although the government can (and in this case did) provide direct evidence of actual anticompetitive effects caused by the exclusive dealing, the fairness and efficiency of the burden-shifting framework would be upended if the government were required to provide such direct evidence in *every* proceeding to satisfy its prima facie burden, as McWane's *amici* and the dissenting commissioner suggest. Courts have repeatedly rejected such a heightened standard, holding that the government satisfies its prima facie burden by raising an inference of likely harm to competition through proof of monopoly power and substantial foreclosure. *See, e.g.*, *Tampa Elec.*, 365 U.S. at 328, 81 S. Ct. at 629 (courts must analyze the "probable immediate and future effects"

of exclusive dealing on competition); *Realcomp*, 635 F.3d at 828 (explaining that under rule-of-reason analysis, government may carry its burden by showing "the *potential* for genuine adverse effects on competition") (emphasis in original). This Court should likewise reject a heightened standard for several reasons.

A. Exclusive Dealing by a Monopolist Is More Likely to Cause Anticompetitive Harm and Less Likely to Result in Procompetitive Effects.

The justification for the proposed heightened standard relies on an incorrectly optimistic view of the effects of exclusive-dealing arrangements. The dissenting commissioner and *amici* professors in effect assert that direct proof of actual anticompetitive effects should be required because of a strong presumption that exclusive dealing promotes rather than inhibits competition. (Dissent 2-3, 6; Prof. Br. at 3, 15.) But, as explained, when the exclusive dealing is by a monopolist rather than an ordinary competitor, anticompetitive effects are far more likely. The *amici* and dissenting commissioner also vastly understate the risk of competitive harm by claiming that exclusive dealing is harmful only when foreclosed rivals are prevented from achieving "minimum efficient scale," which is the minimum level of output needed

for a company to take full advantage of economies of scale. (Dissent 10-11; Prof. Br. at 6-7.) This singular focus on minimum efficient scale is too narrow. Because monopolists frequently price well above their costs, even a less efficient rival that cannot bring its production costs down to the level of the monopolist's can still pressure the monopolist to lower its prices. Moreover, even if substantial foreclosure does not prevent the rival from reaching minimum efficient scale, the foreclosure might nevertheless permit the monopolist to maintain supracompetitive prices. *See* Salop, *supra*, at 29. This is so because the monopolist's foreclosure might still, for example, increase the rival's costs by forcing it to rely on less efficient distribution methods. Finally, the possible harms to competition from exclusive dealing are not limited to increased prices or decreased output—innovation and product development could also be improved by the existence of a rival unconstrained by exclusive dealing. See *supra*, at 17-18.

The dissenting commissioner and *amici* professors not only understate the likely anticompetitive effects from a monopolist's exclusive dealing—they also overstate the potential procompetitive effects from such conduct. As explained earlier, positive effects of

exclusive-dealing arrangements typically arise in markets that feature healthy competition between rivals, rather than markets dominated by a monopolist. See *supra*, at 23-25. Where a monopolist imposes exclusive deals on the vast majority of distribution outlets in a market, substantially foreclosing rivals from competing on a level playing field, there is good reason to be suspicious of the monopolist's behavior, as the prior case law and facts of this case demonstrate.

B. A Heightened Burden of Proof Would Severely and Unnecessarily Undermine Enforcement Efforts.

Requiring the government to provide direct evidence of actual anticompetitive harms as part of its prima facie case (and thus before requiring the defendant to respond) would dangerously weaken enforcement efforts and encourage monopolists to engage in anticompetitive conduct that harms consumers. Such direct proof is often hard to come by—not because harm to competition does not exist, but because of practical obstacles that impede the government's ability to collect such evidence at the outset.

For example, the dissenting commissioner and *amici* professors assert that one form of direct proof could be evidence that a rival

captured less of the market then it would have absent a monopolist's exclusive dealing. (Dissent 38; Prof. Br. at 22-23.) But, as courts have recognized, this type of counterfactual is often extremely difficult to prove. As the D.C. Circuit explained in *Microsoft*, "neither plaintiffs nor the court can confidently reconstruct" a rival's competitive development "in a world absent the defendant's exclusionary conduct." 253 F.3d at 79. *Cf. United States v. Gen. Dynamics Corp.*, 415 U.S. 486, 505, 94 S. Ct. 1186, 1198 (1974) (explaining in merger context that once two companies are joined "no one knows what the fate of the acquired company and its competitors would have been but for the merger" (quotation marks omitted)). Contrary to the *amici* professors' suggestion (Prof. Br. at 22-23), this uncertainty remains even if the exclusive conduct purportedly ends prior to litigation. A comparison of market conditions "during and after" the exclusive dealing (*id.* at 22) cannot conclusively show actual anti- or procompetitive effects because rivals may never fully recover from the exclusive dealing or because the harmful effects may be expected to occur in the future.

It is equally unrealistic to assume that harm to competition will always be reflected in direct proof that prices were higher or output was

lower than they otherwise would have been absent exclusive dealing, as the dissenting commissioner suggested. (Dissent 4-5.) Defendants often adjust their behavior when they are subject to antitrust scrutiny—particularly after an investigation or administrative proceeding has been initiated. (Here, the FTC notified McWane of its investigation only four months after McWane notified distributors of its exclusive-dealing mandate.) In the merger context, for example, courts have recognized that post acquisition evidence has limited probative value because "such evidence could arguably be subject to manipulation." *Chicago Bridge & Iron Co. N.V. v. F.T.C.*, 534 F.3d 410, 435 (5th Cir. 2008) (emphasis omitted); *see also Gen. Dynamics*, 415 U.S. at 504-05, 94 S. Ct. at 1197 (noting that defendants can alter their conduct when a lawsuit is threatened); *United States v. Bazaarvoice, Inc.*, No. 13-cv-133, 2014 WL 203966, at *57 (N.D. Cal. Jan. 8, 2014) (explaining that post-merger data on actual pricing and other effects of acquisition is "manipulatable and . . . entitled to little weight").

Similarly, here, a monopolist aware that its exclusive-dealing arrangement is subject to antitrust scrutiny has a powerful incentive to avoid any indication of harm to competition. For example, the

monopolist could refrain from increasing prices or allow its rivals to access a small portion of the market until after the litigation. Indeed, McWane engaged in precisely such manipulation here by ostensibly softening enforcement of its exclusivity mandate after learning of the FTC's investigation. (ALJ ¶¶ 1220-23 (explaining that McWane considered how the "potential FTC action might [a]ffect how we do business" with a distributor). The manipulable nature of such market evidence undercuts the argument that such proof should be necessary before a defendant even has the obligation to respond to the government's prima facie case.

Moreover, the burden-shifting framework is already fair to defendants. As explained, the government's establishment of its prima facie case is only the first step in the analysis. The defendant is then entitled to rebut the inference of anticompetitive effects by showing that the foreclosure was not in fact substantial or by proving that the exclusive dealing did not actually harm competition (a standard that McWane failed to meet here). The defendant, rather than the government, is in the best position to present such evidence because the defendant has better access to and deeper familiarity with relevant data

on its own prices. *See Campbell v. United States*, 365 U.S. 85, 96, 81 S. Ct. 421, 427 (1961) ("[T]he ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary."). In addition, a defendant will know *why* it engaged in exclusive dealing—evidence that courts often find probative of the likely effects of exclusive deals. *See Microsoft*, 253 F.3d at 77 ("Microsoft's internal documents and deposition testimony confirm both the anticompetitive effect and intent of its actions."). (Here, McWane specifically considered the likely effects of its conduct and engaged in exclusive dealing for the express purpose of inhibiting Star's ability to compete.) The defendant also has the right to establish that its exclusive dealing was supported by procompetitive justifications, thereby shifting the burden back to the government to prove that the anticompetitive effects outweigh the defendant's justifications. Because the burden-shifting framework already takes full account of the possibility that exclusive dealing might benefit competition, there is no need to increase the government's prima facie burden any further.

CONCLUSION

For the foregoing reasons, the Commission's ruling should be affirmed.

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CERTIFICATE OF COMPLIANCE

Pursuant to Rule 32(a)(7)(C) of the Federal Rules of Appellate Procedure, Oren L. Zeve, an employee in the Office of the Attorney General of the State of New York, hereby certifies that according to the word count feature of the word processing program used to prepare this brief, the brief contains 6,894 words and complies with the type-volume limitations of Rule 32(a)(7)(B).

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