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SUPREME COURT, U.S.

No. 16-953

IN THE
Supreme Court of the United States

RETRACTABLE TECHNOLOGIES, INC.
AND THOMAS J. SHAW,
Petitioners,

v.

BECTON, DICKINSON & CO.,
Respondent.

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

BRIEF OF LAW PROFESSORS AND ECONOMICS PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici are law professors and economics professors whose scholarship and teaching focus or have focused on antitrust law, antitrust economics, and/or the legal regimes governing false advertising and commercial speech. Collectively, *amici* have engaged in extensive research and other professional activities related to antitrust law and the law of false advertising or commercial speech. Some of the *amici* have previously worked or consulted for the Antitrust Division of the United States Department of Justice or the Federal Trade Commission. *Amici* agree that the Court should grant the petition and reverse the Fifth Circuit's decision. *Amici* are listed below in alphabetical order[2]:

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* represents that it authored this brief in its entirety and that none of the parties or their counsel, nor any other person or entity other than *amici* or their counsel, made a monetary contribution intended to fund the preparation or submission of this brief. Pursuant to Rule 37.2(a), counsel for *amici* also represents that all parties were provided notice of *amici*'s intention to file this brief at least 10 days before it was due. Written consents of the parties to the filing of this brief are being filed contemporaneously.

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INTRODUCTION

The lower courts' treatment of antitrust claims based on deceptive commercial speech is in disarray. The approaches applied by the circuit courts range from permitting such claims on the same basis as other antitrust claims, to adopting presumptions against such claims, to precluding such claims outright.

The divergence in judicial outcomes is inconsistent with recent scholarship and the threat to competition posed by a dominant firm's deception. *Amici* believe that the time is ripe for this Court to address the proper legal standard applicable to deception-based antitrust claims. *Amici* further believe that the lower-court decisions applying harsh rules or presumptions against such claims, of which the decision below is emblematic, are misguided.

Deception is not, as the decision below concluded, competition "on the merits." Rather than competing based on efficiency or by creating a superior product, a firm engaged in deception seeks to gain market share — and often market power — despite the inferiority of its product. Deception can cause numerous anticompetitive harms, including helping a monopolist achieve or maintain monopoly power, and hindering innovative rivals from gaining a foothold in the market. This case provides an excellent vehicle to address the viability of deception-based antitrust claims because the jury found that anticompetitive harm occurred, before its verdict was overturned by the decision below.

This Court should grant certiorari and reverse the judgment of the Fifth Circuit.

ARGUMENT

I. Widespread Disagreement Exists Among Lower Courts Regarding the Proper Legal Standard for Antitrust Claims Based on False Advertising

Lower courts have diverged widely on the legal standards applicable to antitrust claims based on false advertising. Some courts have readily permitted such claims, while others have imposed harsh rules or presumptions against such claims. This division reflects and has been amplified by academic debate. Only this Court can resolve the question of the role of deception in the antitrust laws, which has percolated among courts and scholars for decades.

A. The Lower Courts Take at Least Three Different Approaches to Deception-Based Antitrust Claims

The lower courts have taken three broad approaches to antitrust claims based on deceptive commercial speech. *First*, several circuits have treated deception like any other type of exclusionary conduct, finding monopolization claims viable so long as the plaintiff can prove that deception contributed to the acquisition or maintenance of monopoly power (or, in the context of attempted monopolization, were made with specific intent to monopolize and led to a dangerous probability of achieving monopoly power). *See, e.g.*, *International Travel Arrangers, Inc. v. Western Airlines, Inc.*, 623 F.2d 1255, 1268 (8th Cir. 1980); *Caribbean Broad. Sys., Ltd. v. Cable & Wireless PLC*, 148 F.3d 1080, 1086-87 (D.C. Cir. 1998); *West Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85, 109-10 (3d Cir. 2010); Pet. 10-12.

Second, at least five circuits have adopted a presumption that deceptive commercial speech causes

de minimis anticompetitive harm, which is rebuttable through the consideration of six factors: that the representations are (1) clearly false, (2) clearly material, (3) clearly likely to induce reasonable reliance, (4) made to buyers without knowledge of the subject matter, (5) continued for prolonged periods, and (6) not readily susceptible of neutralization or other offset by rivals. *See National Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 916-17 (2d Cir. 1988); *American Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997) ("*APTS*"); *American Council of Certified Podiatric Physicians & Surgeons v. American Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 370-72 (6th Cir. 2003); *Lenox MacLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1126-28 (10th Cir. 2014); *Duty Free Americas, Inc. v. Estée Lauder Cos.*, 797 F.3d 1248, 1268-69 (11th Cir. 2015); Pet. 12-15.

Third, the Seventh Circuit has held that deceptive commercial speech can never support an antitrust claim "absent an accompanying coercive enforcement mechanism." *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 851-52 (7th Cir. 2011). That rule derives from an earlier Seventh Circuit opinion by Judge Easterbrook, which concluded that "[f]alse statements about a rival's goods do not curtail output in either the short or the long run. They just set the stage for competition in a different venue: the advertising market." *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005); *see also Schachar v. American Acad. of Opthalmology, Inc.*, 870 F.2d 397, 400 (7th Cir. 1989) (Easterbrook, J.); Pet. 15-16.

Even within these groups, substantial disagreement exists. In particular, courts differ on how to

apply the six-factor rebuttable presumption. The Second Circuit appears to treat the six-factor test as a balancing test and has allowed a claim to go forward when the plaintiff had plausibly alleged that it satisfied just four factors. *See Ayerst*, 850 F.2d at 916-17. The Sixth Circuit has held that proof of two factors (clear falsity and difficulty for the plaintiff to counter the false advertising) are required, but has "decline[d] to . . . hold that all elements must be satisfied to rebut the *de minimis* presumption." *American Council*, 323 F.3d at 371. The Tenth and Eleventh Circuits have also declined to state whether satisfaction of all six factors is required. *See Lenox MacLaren*, 762 F.3d at 1128 n.9; *Duty Free Americas*, 797 F.3d at 1269.

By contrast, the Ninth Circuit has held that a plaintiff "must satisfy *all* six elements" to overcome the presumption. *APTS*, 108 F.3d at 1152. However, some district courts within the Ninth Circuit have carved out an exception to the presumption where the defendant arranges for a third party with the "appearance of objectivity and lack of bias" to promulgate disparaging falsehoods about a competitor. *TYR Sport Inc. v. Warnaco Swimwear Inc.*, 679 F. Supp. 2d 1120, 1132 (C.D. Cal. 2009); *accord Prime Healthcare Servs., Inc. v. Service Emps. Int'l Union*, 2012 WL 3778348, at *10 (S.D. Cal. Aug. 30, 2012). Another district court has rejected this exception. *See Reed Constr. Data Inc. v. McGraw-Hill Cos.*, 49 F. Supp. 3d 385, 419 (S.D.N.Y. 2014), *aff'd*, 638 F. App'x 43 (2d Cir. 2016).

In the decision below, the Fifth Circuit adopted the Seventh Circuit's reasoning that "false advertising simply 'set[s] the stage for competition in a different venue: the advertising market.'" App. 15a (quoting

Sanderson, 415 F.3d at 623) (alteration in original). The Fifth Circuit also concluded that petitioners would have failed the six-factor test, but they adopted such a restrictive view of that test so as to render it impossible to satisfy. According to the Fifth Circuit, petitioners could not show that respondent's misrepresentations "could not be readily disproved . . . by rivals" (the sixth factor) because the misrepresentations "were [disproved] at this trial." App. 17a. Thus, according to the Fifth Circuit, proving one element of the claim (falsity) negates another (anticompetitive harm).

Respondent argues that "the circuits are in unanimous accord that 'false advertising alone hardly ever operates in practice to threaten competition.'" Opp. 5-6 (quoting App. 15a). However, *amici*'s careful review of the case law has revealed not uniform hostility to deception-based antitrust claims, but extensive disagreement and confusion.

Apart from the decision below, *amici* have located 52 judicial decisions addressing deception-based antitrust claims, most occurring since the turn of this century. Of those decisions, 28 have rejected or dismissed deception-based antitrust claims,[3] and 24 have upheld them or allowed them to go forward.[4]

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[3] *See Schachar*, 870 F.2d at 399-400; *APTS*, 108 F.3d at 1152; *David L. Aldridge Co. v. Microsoft Corp.*, 995 F. Supp. 728, 749-51 (S.D. Tex. 1998); *Stearns Airport Equip. Co. v. FMC Corp.*, 170 F.3d 518, 524-25 (5th Cir. 1999); *In re Independent Serv. Orgs. Antitrust Litig.*, 85 F. Supp. 2d 1130, 1158 (D. Kan. 2000); *Sanderson v. Brugman*, 2001 WL 699876, at *2-3 (S.D. Ind. May 29, 2001); *Tate v. Pacific Gas & Elec. Co.*, 230 F. Supp. 2d 1072, 1079-80 (N.D. Cal. 2002); *American Council*, 323 F.3d at 370-72; *Covad Commc'ns Co. v. Bell Atl. Corp.*, 398 F.3d 666, 674-75 (D.C. Cir. 2005); *Santana Prods., Inc. v. Bobrick Washroom Equip., Inc.*, 401 F.3d 123, 132-33 (3d Cir. 2005); *Sanderson*,

415 F.3d at 622-23; *Briggs & Stratton Corp. v. Kohler Co.*, 405 F. Supp. 2d 986, 989-90 (W.D. Wis. 2005); *KinderStart.com LLC v. Google, Inc.*, 2007 WL 831806, at *7-8 (N.D. Cal. Mar. 16, 2007); *Fair Isaac Corp. v. Experian Info. Sols. Inc.*, 645 F. Supp. 2d 734, 753 (D. Minn. 2009), *aff'd*, 650 F.3d 1139 (8th Cir. 2011); *Process Controls Int'l, Inc. v. Emerson Process Mgmt.*, 753 F. Supp. 2d 912, 928-29 (E.D. Mo. 2010); *POURfect Prods. v. KitchenAid*, 2010 WL 1769413, at *4-5 (D. Ariz. May 3, 2010); *Sightline Payments, LLC v. Global Cash Access Holdings, Inc.*, 2010 WL 3156048, at *2 (D. Nev. Aug. 9, 2010); *Mercatus*, 641 F.3d at 851-52; *In re Apple iPod iTunes Antitrust Litig.*, 796 F. Supp. 2d 1137, 1145-46 (N.D. Cal. 2011); *Novell, Inc. v. Microsoft Corp.*, 2012 WL 2913234, at *9 (D. Utah July 16, 2012), *aff'd*, 731 F.3d 1064 (10th Cir. 2013); *Affinity LLC v. GfK Mediamark Research & Intelligence, LLC*, 547 F. App'x 54, 57 (2d Cir. 2013); *International Equip. Trading, Ltd. v. AB SCIEX LLC*, 2013 WL 4599903, at *7-8 (N.D. Ill. Aug. 29, 2013); *Reed Constr. Data*, 49 F. Supp. 3d at 422; *Novation Ventures, LLC v. J.G. Wentworth Co.*, 156 F. Supp. 3d 1094, 1103-04 (C.D. Cal. 2015); *JBR, Inc. v. Keurig Green Mountain, Inc.*, 618 F. App'x 31, 35-36 (2d Cir. 2015); *Vincent v. Utah Plastic Surgery Soc'y*, 621 F. App'x 546, 548 (10th Cir. 2015); *Duty Free Americas*, 797 F.3d at 1268-69; *Avaya Inc., RP v. Telecom Labs, Inc.*, 838 F.3d 354, 394-97 (3d Cir. 2016).

[4] *See Walker Process Equip., Inc. v. Food Mach. & Chem. Corp.*, 382 U.S. 172, 174 (1965); *Power Replacements Corp. v. Air Preheater Co.*, 356 F. Supp. 872, 897 (E.D. Pa. 1973); *International Travel Arrangers*, 623 F.2d at 1268; *Ayerst*, 850 F.2d at 916-17; *Brownlee v. Applied Biosystems Inc.*, 1989 WL 53864, at *5-6 (N.D. Cal. Jan. 9, 1989); *Davis v. Southern Bell Tel. & Tel. Co.*, 755 F. Supp. 1532, 1535-36 (S.D. Fla. 1991); *Addamax Corp. v. Open Software Found., Inc.*, 888 F. Supp. 274, 284-85 (D. Mass. 1995); *Caribbean Broad. Sys.*, 148 F.3d at 1086-87; *In re Warfarin Sodium Antitrust Litig.*, 214 F.3d 395, 397, 402 (3d Cir. 2000); *Western Duplicating, Inc. v. Riso Kagaku Corp.*, 2000 WL 1780288, at *7 (E.D. Cal. Nov. 21, 2000); *United States v. Microsoft Corp.*, 253 F.3d 34, 76-77 (D.C. Cir. 2001) (en banc) (per curiam); *Z-Tel Commc'ns, Inc. v. SBC Commc'ns, Inc.*, 331 F. Supp. 2d 513, 530-32 (E.D. Tex. 2004); *Caldon, Inc. v. Advanced Measurement & Analysis Grp., Inc.*, 515 F. Supp. 2d 565, 575-76 (W.D. Pa. 2007); *Southeast Missouri Hosp. v. C.R.*

Many claims that survived would have been dismissed under another circuit's legal test, or vice versa. For example, many claims have survived in circuits that have not (or had not yet) adopted a rule or presumption against deception-based antitrust claims.[5] All of those claims would have failed under the Seventh Circuit's test, and many likely would have failed under a circuit that applies a harsh version of the six-factor test. Some cases that survived under a more lenient version of the six-factor test would have failed under a stricter test. *See, e.g.*, *Ayerst*, 850 F.2d at 916-17 (reversing dismissal where plaintiff plausibly alleged satisfaction of four of six factors). Finally, many claims that have been dismissed in circuits applying rules or presumptions against deception-based antitrust claims likely would have survived in other circuits. The decision below is a textbook example. *See infra* pp. 21-23. The divergence in opinions among the lower courts has

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Bard, Inc., 2008 WL 199567, at *3 (E.D. Mo. Jan. 22, 2008); *Alternative Electrodes, LLC v. Empi, Inc.*, 597 F. Supp. 2d 322, 331-33 (E.D.N.Y. 2009); *TYR Sport*, 679 F. Supp. 2d at 1132-33; *West Penn Allegheny Health Sys.*, 627 F.3d at 108-10; *Insignia Sys., Inc. v. News Am. Mktg. In-Store, Inc.*, 661 F. Supp. 2d 1039, 1060-61 (D. Minn. 2009); *Nexstar Broad., Inc. v. Granite Broad. Corp.*, 2012 WL 2838547, at *7-8 (N.D. Ind. July 9, 2012); *Prime Healthcare Servs.*, 2012 WL 3778348, at *10; *Lenox MacLaren*, 762 F.3d at 1126-28; *In re Suboxone (Buprenorphine Hydrochloride & Naloxone) Antitrust Litig.*, 64 F. Supp. 3d 665, 682-84 (E.D. Pa. 2014); *Dial Corp. v. News Corp.*, 165 F. Supp. 3d 25, 37 (S.D.N.Y. 2016); *Clary v. State Farm Mut. Auto. Ins. Co.*, 204 So. 3d 1102, 1115-16 (La. Ct. App. 2016).

[5] *See, e.g.*, *Davis*, 755 F. Supp. at 1535-36; *Caribbean Broad. Sys.*, 148 F.3d at 1086-87; *Z-Tel*, 331 F. Supp. 2d at 530-32; *Caldon*, 515 F. Supp. 2d at 575-76; *Southeast Missouri Hosp.*, 2008 WL 199567, at *3; *West Penn Allegheny Health Sys.*, 627 F.3d at 108-10; *Insignia Sys.*, 661 F. Supp. 2d at 1060-61; *Suboxone*, 64 F. Supp. 3d at 682-84.

been noted in the scholarship. *See* Maurice E. Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. 823, 823 (2010) ("Some courts readily condemn a monopolist's deceptive advertising. Others presume that a monopolist's deceptive advertising has a de minimis effect on competition.").

B. Scholars Have Criticized Rules or Presumptions Against Deception-Based Antitrust Claims

Recent scholarship has criticized the harsh presumptions against deception-based antitrust claims applied by some lower courts and proposed by earlier scholarship. The *de miminis* presumption and six-factor test derive from the *Antitrust Law* treatise by Professors Areeda and Turner, *see Ayerst*, 850 F.2d at 916, and is still advocated in the current edition by Professors Areeda and Hovenkamp, *see* IIIB Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 782b, at 351 (4th ed. 2015). Professors Areeda and Hovenkamp acknowledge that deception by a monopolist can be "an exclusionary practice when the impact on rivals is significant," but they argue that "the likelihood of significant creation of durable market power" is sufficiently small that "courts would be wise to regard misrepresentations as presumptively de minimis for §2 purposes." *Id.* at 350-51. The Seventh Circuit's rule against deception-based antitrust claims derives from the opinions of Judge Easterbrook, himself a prominent antitrust scholar.

Yet many scholars (including some of the *amici*) have criticized the approaches of Judge Easterbrook and *Antitrust Law* and have advocated a tougher line on anticompetitive deceptive practices. *See, e.g.*, Kevin S. Marshall, *Product Disparagement Under the Sherman Act, Its Nurturing and Injurious Effects to*

Competition, and the Tension Between Jurisprudential Economics and Microeconomics, 46 Santa Clara L. Rev. 231 (2006); Maurice E. Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. 823 (2010); Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat a Dominant Firm's Deception?*, 63 SMU L. Rev. 1069 (2010); Note, *Deception as an Antitrust Violation*, 125 Harv. L. Rev. 1235 (2012); Rebecca Tushnet, *Fifth Circuit Reverses Multimillion-Dollar Antitrust Verdict Based on False Advertising, Remands*, Rebecca Tushnet's 43(B)log (Dec. 6, 2016), http://tushnet.blogspot.com/2016/12/fifth-circuit-reverses-multimillion.html; *cf.* Howard Beales et al., *The Efficient Regulation of Consumer Information*, 24 J.L. & Econ. 491, 505-06 (1981) (discussing anticompetitive impacts of false product claims). These scholars have argued, among other things, that Judge Easterbrook's reasoning (adopted by the court below) justifying a rule against deception-based antitrust claims "contorts and twists fundamental microeconomic principles," Marshall, 46 Santa Clara L. Rev. at 253, and that *Antitrust Law*'s presumption of *de minimis* anticompetitive harm from deception "makes little economic sense" and lacks "empirical support," Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. at 829. The Third Circuit has cited Professor Stucke's scholarship in concluding that "anticompetitive conduct can include ... making false statements about a rival to potential investors and customers," and reversing the dismissal of an antitrust claim based on deception. *West Penn Allegheny Health Sys.*, 627 F.3d at 109-10.

In sum, judges and scholars have debated the treatment of deception under antitrust law for decades. The divergence in judicial outcomes has

only intensified as more courts have addressed such claims. "Given these conflicts, the current status of deception in antitrust law is confused and indeterminate." Note, *Deception as an Antitrust Violation*, 125 Harv. L. Rev. at 1236. The time is ripe for the Supreme Court to resolve the question whether, and under what circumstances, deception can give rise to antitrust claims.

II. Courts Should Evaluate Deception-Based Antitrust Claims on Their Own Merits, Without Rules or Presumptions Against Such Claims

Deception is a species of exclusionary conduct cognizable under the antitrust laws if other elements are satisfied. No economic or empirical justification exists for the rules or presumptions against deception-based antitrust claims imposed by several circuits. In particular, the Fifth Circuit's reasoning was misguided in defending deceptive advertising as competition "on the merits" and implying that such deception was protected First Amendment speech. The facts of this case demonstrate the danger of the Fifth Circuit's approach, as the jury's verdict suggests that respondent's deception caused significant anti-competitive harm.

A. Deception by a Firm with Market Power Fits the Traditional Definition of Exclusionary Conduct

The antitrust laws condemn "the willful acquisition or maintenance of [monopoly] power," *United States v. Grinnell Corp.*, 384 U.S. 563, 570-71 (1966), which has been interpreted to impose a requirement of exclusionary conduct. "If a firm has been 'attempting to exclude rivals on some basis other than efficiency,' it is fair to characterize its behavior as predatory."

Aspen Skiing Co. v. Aspen Highlands Skiing Corp., 472 U.S. 585, 605 (1985) (quoting Robert H. Bork, *The Antitrust Paradox* 138 (1978)) (footnote omitted).

Deceptive marketing fits this Court's definition of exclusionary conduct. "Deception lacks any redeeming economic qualities or cognizable efficiency justifications." Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. at 825; *see also* IIIB *Antitrust Law* ¶ 782b, at 350 ("A monopolist's misrepresentations encouraging the purchase of its product can fit our general test for an exclusionary practice when the impact on rivals is significant; deception of buyers can impede the opportunities of rivals."). Moreover, beyond the false advertising context, it is well-established that deception can cause anticompetitive harm.[6]

While it is true that the antitrust laws are "concern[ed] with the protection of *competition*, not *competitors*," *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962), deceptive advertising injures competition beyond the harm caused to a specific competitor. In fact, false advertising erodes the economic conditions necessary for a well-functioning, fully competitive market. A competitive market requires that market participants "are fully informed of all relevant economic and technological data." Marshall, 46 Santa Clara L. Rev. at 236-37. "Without full information, distortions in output and price will result." *Id.* at 240. Thus, "product disparagement that is false and inaccurate is an iniquity that

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[6] *See Walker Process*, 382 U.S. at 174 (holding that enforcing a patent procured by fraud can violate Section 2); *Microsoft*, 253 F.3d at 76-77 (upholding monopolization claim where defendant deceived software developers into designing applications that would work only with defendant's operating system).

strikes at the very heart of a competitive marketplace." *Id.*

The scholarship has noted a litany of anti-competitive effects of deceptive commercial speech. If successful, "[i]t can create entry barriers, lead to capricious market exit, create artificial market equilibrium, or even lead to oligopolies and monopolies." *Id.* at 244. Deception can also raise search costs for consumers in choosing products, harm consumers who have been deceived into purchasing inferior products, increase transaction costs for honest sellers, raise rivals' costs in responding to deception, create market distortions causing a deadweight welfare loss, increase entry barriers, and prevent markets or services from developing. *See* Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. at 824-25.

Of particular concern for Section 2 claims, deception by a dominant firm targeted at smaller firms can help achieve or maintain monopoly power. Indeed, "[b]ecause promulgating falsehoods may be far cheaper than actually developing a superior product, deception can be a particularly efficacious method of gaining sales and excluding rivals." Note, *Deception as an Antitrust Violation*, 125 Harv. L. Rev. at 1238; *see also* Einer Elhauge, *Defining Better Monopolization Standards*, 56 Stan. L. Rev. 253, 281 (2003) ("Lying is cheap in the short run, and can immediately shift buyers away from rivals."). A successful deceptive advertising campaign by a monopolist or near-monopolist can drive out rivals threatening the monopoly with an innovative product, or at least prevent rivals from expanding their business sufficiently to threaten the monopoly.

In the decision below, the Fifth Circuit joined the Seventh Circuit in concluding that "a business that

is maligned by a competitor's false advertising may counter with its own advertising to expose the dishonest competitor and turn the tables competitively against the malefactor." App. 15a; *accord Sanderson*, 415 F.3d at 623 (deceptive advertisements "set the stage for competition in a different venue: the advertising market"). But this supposition is fanciful and ignores the disparity between a dominant firm and a smaller rival.

A smaller rival often will lack the resources to counter effectively a dominant firm's false advertising campaign. "Advertising can be an effective entry barrier" because "it is costlier for entrants to launch a new product and establish brand recognition than for an entrenched firm to maintain its brand awareness." Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. at 839.

A simple example illustrates the point. Suppose that a dominant firm has $10 billion in annual sales and $4 billion in annual profits. A competitor emerges with an innovative product, and expands to $500 million in annual sales and $200 million in annual profits. The dominant firm responds by investing 5% of its profits, or $200 million, in an advertising campaign falsely touting its own products and disparaging the rival's products. The rival would need to spend its entire profit margin to respond on the same scale. The deceptive advertising campaign could plausibly drive the rival from the market or at least hinder the rival's expansion, thus protecting the monopoly. *See id.* ("A monopolist would prefer an entrant to expend capital defending its image, rather than in expanding its business, thereby threatening the monopoly."). Indeed, as Professor Akerlof showed in his landmark scholarship for which he won the

Nobel Prize in Economics, dishonest commercial speech can create a market for "lemons" in which "dishonest dealings tend to drive honest dealings out of the market." George A. Akerlof, *The Market for "Lemons": Quality Uncertainty and the Market Mechanism*, 84 Q. J. Econ. 488, 495 (1970).

Professors Areeda and Hovenkamp also recognize the anticompetitive danger of a deceptive advertising campaign by a dominant firm targeting a new entrant. They write that "deception by a dominant firm may have §2 implications when used against a nascent firm just as it is entering the market. Such a firm has no established customer base and typically lacks the resources to answer the dominant firm's deception effectively." IIIB *Antitrust Law* ¶ 782b, at 353; *see also Z-Tel*, 331 F. Supp. 2d at 531-32 (relying on *Antitrust Law* in denying motion to dismiss on allegations of deceptive product disparagement against new entrant).

When a deception campaign by a dominant or near-dominant firm drives out an innovative rival or prevents that rival from gaining a greater foothold in the market, the result is less competition and innovation, lower-quality products, and higher prices. These are exactly the types of harms that the antitrust laws are designed to counteract.

B. No Empirical Justification Exists for a Rule or Presumption That Deception Does Not Cause Anticompetitive Harm

The judges and scholars who have advocated rules or presumptions against deception-based antitrust claims have justified them with statements that deception never or almost never causes anti-competitive harm. *See* IIIB *Antitrust Law* ¶ 782b, at 351 ("the likelihood of significant creation of

durable market power is . . . small in most observed instances"); *Sanderson*, 415 F.3d at 623 ("False statements about a rival's goods do not curtail output in either the short or the long run."). But none has offered empirical support for those claims.

Antitrust Law has deservedly proven influential with courts, but its *de minimis* presumption (to which less than a page of *Antitrust Law* is devoted) is supported by minimal reasoning. Aside from the lack of empirical support, *Antitrust Law* also offers no explanation for how it arrived at its six factors or any evidence that these factors correlate with anticompetitive instances of deception. Moreover, although *Antitrust Law* acknowledges that anticompetitive harm is more likely where (as in this case) a dominant firm wields organized deception against an upstart rival, *see* IIIB *Antitrust Law* ¶ 782b, at 351, its presumption contains no exception for such circumstances. Although we believe that the anticompetitive dangers of deception are greater than suggested by *Antitrust Law*, we broadly agree with *Antitrust Law* that deception is undesirable, deception can be anticompetitive, anticompetitive harm is more likely when a dominant firm uses deception against a smaller rival, and healthy skepticism is warranted regarding whether any particular deceptive act causes anticompetitive harm. Our major difference is that we believe these concerns should lead to case-by-case evaluation of claims, rather than a legal presumption.

"Legal presumptions that do not rest on 'actual market realities are generally disfavored in antitrust law.'" Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. at 829 (quoting *Eastman Kodak Co. v. Image Tech. Servs., Inc.*, 504 U.S. 451, 466-67

(1992)). The sheer frequency of deceptive advertising belies the unsupported assumption that deceptive advertising could never (or almost never) contribute to monopoly power. "If product disparagement is ineffectual, why would any firm, much less a monopolist, engage in it? . . . A monopolist would not falsely disparage a rival's products unless its anticipated gains (maintaining or attaining profits) outweigh its costs." *Id.*

Moreover, the presumption applied by many courts to antitrust claims conflicts with presumptions applied to the same conduct for Lanham Act claims. When addressing Lanham Act claims, courts presume that false advertising actually deceives consumers. *See, e.g., Cashmere & Camel Hair Mfrs. Inst. v. Saks Fifth Ave.*, 284 F.3d 302, 314-15 (1st Cir. 2002); *see generally* Stucke, *When a Monopolist Deceives*, 76 Antitrust L.J. at 831 n.44 (collecting cases). But, in the antitrust context, many courts presume that false advertising *will not* deceive consumers because they will "recognize disparagement as non-objective and highly biased." *APTS*, 108 F.3d at 1152. Although there may be policy justifications for adopting different legal standards to different legal claims, it is logically incoherent to apply conflicting empirical presumptions regarding the impact of the same conduct.

Nor does the concern over a proliferation of costly antitrust litigation[7] justify a presumption against deception-based antitrust claims. As this Court has indicated, courts can limit the cost of antitrust litigation by dismissing implausible claims at the

[7] *See* IIIB *Antitrust Law* ¶ 782b, at 350 ("There is no redeeming virtue in deception, but there is a social cost in litigation over it.").

pleadings stage. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 558-60 (2007). Courts can easily dismiss antitrust claims where the alleged statements are not deceptive or do not reasonably appear capable of making a significant contribution to the defendant's maintaining or attaining monopoly power.

Moreover, if a complaint alleges false advertising, but does not allege either a conspiracy or that the defendant has monopoly power (or a dangerous probability of achieving monopoly power), it will be apparent that no viable Section 1 or Section 2 claim exists. Even in courts that do not apply presumptions against deception-based antitrust claims, courts have had no trouble rejecting such claims where plaintiffs do not plausibly allege or provide evidence of anticompetitive harm.[8] Rather than applying unsupported "[l]egal presumptions," "[t]his Court has preferred to resolve antitrust claims on a case-by-case basis, focusing on the 'particular facts disclosed by the record.'" *Eastman Kodak*, 504 U.S. at 466-67 (quoting *Maple Flooring Mfrs.' Ass'n v. United States*, 268 U.S. 563, 579 (1925)). This Court should follow the same approach for deception-based claims.

C. The Fifth Circuit's Justifications for Disfavor of Deception-Based Antitrust Claims Lack Merit

The Fifth Circuit's reasoning for skepticism of deception-based antitrust claims was misguided. *First*, the Fifth Circuit reasoned that respondent's "false comparative advertising ... was plainly 'on the merits.'" App. 13a. While it is true that the antitrust laws permit, and even celebrate, the

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[8] *See, e.g.*, *Covad*, 398 F.3d at 674-75; *Fair Isaac*, 645 F. Supp. 2d at 753; *Process Controls Int'l*, 753 F. Supp. 2d at 928-29.

achievement of monopoly power through "a superior product" or "business acumen," *Grinnell*, 384 U.S. at 571, false advertising is the antithesis of competition on the merits. Far from competing on the basis of a "superior" product, deceptive advertising is an attempt to compete despite having an *inferior* product. Redefining deceptive advertising as competition on the merits would necessitate wholesale reexamination of the laws of unfair competition, fraud, and product disparagement.

Second, the Fifth Circuit implied that First Amendment concerns precluded condemnation of deceptive advertising, approving of the Seventh Circuit's reasoning as "adher[ing] to traditional free speech principles: 'If [a competitor's statements about another] should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas.'" App. 14a (quoting *Schachar*, 870 F.2d at 400) (first alteration added). However, the First Amendment analogy is inapt because deceptive commercial speech is categorically unprotected by the First Amendment. *See Central Hudson Gas & Elec. Corp. v. Public Serv. Comm'n of New York*, 447 U.S. 557, 566 (1980); *Bates v. State Bar of Arizona*, 433 U.S. 350, 383 (1977). False advertising neither promotes nor has any place in the "marketplace of ideas" or the marketplace for products; to the contrary, it destroys the conditions necessary for a fully competitive market. *See* Marshall, 46 Santa Clara L. Rev. at 240.

D. This Case Illustrates the Importance of Rejecting Rules or Presumptions Against Deception-Based Antitrust Claims

When courts take an overly restrictive view of deception-based antitrust claims, they are bound to reject claims in which deceptive commercial speech causes significant anticompetitive harm. This case, in which the Fifth Circuit reversed a judgment after petitioners had proven the deception and its anticompetitive effects to a jury, provides a stark example of this danger.

Petitioners compete with respondent in the market for "[s]afety syringes," which are meant to protect against accidental needlesticks. App. 32a. Respondent led the market with 49% market share by 2010, and petitioners achieved 6% market share with their retractable safety-syringe technology. App. 3a. Respondent engaged in a years-long campaign claiming that its syringes were the "world's sharpest" and had "low[er] waste space" than petitioners' syringes, but the jury found (and respondent no longer disputes) that these claims were false. App. 11a-12a. The jury found for petitioners on attempted monopolization based on respondent's deception. App. 31a.

The jury's verdict reflects its conclusion that respondent's deception caused real anticompetitive harm. The judge properly instructed the jury that anticompetitive conduct "must represent conduct that has made it very difficult or impossible for competitors to compete and that was taken for no legitimate business reason"; that "[h]arm to competition is to be distinguished from harm to a single competitor or group of competitors"; and that, "[i]f the challenged conduct has not resulted in higher prices, decreased output, or lower quality, or the loss

of some other competitive benefit, then there is no competitive harm." Dkt. 567, at 10, 16, 17. The judge further instructed that petitioners' attempted monopolization claims required proof that respondent "engaged in anticompetitive conduct" and "that there was a dangerous probability that [respondent] would achieve monopoly power in the relevant market," which the judge defined as "a substantial and real likelihood that [respondent] would ultimately acquire monopoly power." *Id.* at 19, 21. In finding for petitioners, the jury necessarily found that respondent's deception caused "higher prices, decreased output, or lower quality, or the loss of some other competitive benefit," and gave respondent "a substantial and real likelihood" of achieving monopoly power.

Thus, this is not the case of an ordinary business tort masquerading as an antitrust claim. The district court properly required a sufficient nexus between the deception and its anticompetitive effect, and that the deception significantly contributed to the dangerous probability of respondent's monopoly power.

Moreover, the jury's damages award demonstrates the extent of the anticompetitive harm. The $113,508,014 award derived from the model of petitioners' damages expert, Robert Maness, showing that the jury accepted Maness's conclusions. *See* C.A. App. 9844, 24096-97. Maness testified that the safety-catheter market, in which retractable catheters achieved a 50% market share, provided a benchmark demonstrating that petitioners' retractable safety syringes would have gained a far larger share of the safety-syringe market absent respondent's anticompetitive conduct. *See id.* at 9841-46. The $113,508,014 damages figure reflected a conclusion that, absent deception, petitioners' sales would

have nearly doubled. *See id.* at 24096-97. The district court concluded that Maness "constructed a reasonable model to compare RTI's actual performance to what its performance would have been but for BD's anticompetitive conduct." App. 40a.

The facts of this case, as found by the jury, illustrate the anticompetitive dangers of deception by an aspiring or entrenched monopolist. In this case, a rival with an innovative product challenged a dominant firm and gained some traction in the marketplace. Yet the dominant firm engaged in sustained deception to create the false impression that its products were superior to the rival's. As the jury found (through its damages award), this prevented the rival from gaining a far larger market share and gave the dominant firm a dangerous probability of achieving monopoly power. In such circumstances, deception does not just harm a competitor; it harms competition itself. Only this Court can address the unjustified skepticism about deception-based antitrust claims that has taken hold in several circuits, which has led to the rejection of meritorious claims and will continue to do so absent this Court's review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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