No. 05-337

# In the Supreme Court of the United States

DENTSPLY INTERNATIONAL, INC., PETITIONER

*v.*

UNITED STATES OF AMERICA

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

**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## QUESTION PRESENTED

Whether the court of appeals erred in holding that a monopolist's successful efforts to prevent key dealers from distributing the products of its rivals violate Section 2 of the Sherman Act, 15 U.S.C. 2, when those efforts contribute significantly to the preservation of the manufacturer's monopoly and serve no purpose other than to eliminate competition.

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## OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-26a) is reported at 399 F.3d 181. The opinion of the district court (Pet. App. 27a-145a) is reported at 277 F. Supp. 2d 387.

## JURISDICTION

The judgment of the court of appeals was entered on February 24, 2005. A petition for rehearing was denied on May 17, 2005. Pet. App. 146a-147a. On July 28, 2005, Justice Souter extended the time within which to file a petition for a writ of certiorari to and including September 14, 2005, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

## STATUTORY PROVISION INVOLVED

Section 2 of the Sherman Act provides, in relevant part: "Every person who shall monopolize * * * any part of the trade or commerce among the several States * * * shall be deemed guilty of a felony." 15 U.S.C. 2.

## STATEMENT

The United States alleged in this antitrust action that petitioner Dentsply International, Inc., maintained its monopoly in prefabricated artificial teeth in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, by preventing independent tooth dealers from distributing the teeth manufactured by petitioner's rivals. The complaint also claimed that petitioner made exclusive dealing agreements that are illegal under Section 1 of the Sherman Act, 15 U.S.C. 1, and Section 3 of the Clayton Act, 15 U.S.C. 14. Following a bench trial, the district court entered judgment for petitioner on all counts. Pet. App. 27a-145a. The United States appealed the district court's Section 2 ruling. The court of appeals held that the district court incorrectly applied the controlling legal standards and that several of its key findings of fact were clearly erroneous. *Id.* at 1a-26a. The court of appeals therefore reversed, and remanded "with directions to grant injunctive relief requested by the Government." *Id.* at 26a.

1. The district court made extensive findings of fact. Pet. App. 28a-134a. It properly found that the relevant market is the market for "sale of prefabricated artificial teeth in the United States" and that petitioner has held, "for at least" a decade, a "predominant market share" amounting to 75% to 80% of the market, based on revenue. *Id.* at 28a (FF 1), 88a-89a (FF 238-240), 140a (CL

23).[1] Petitioner's "primary" and "next closest" competitors, Ivoclar and Vita, have 5% and 3% market shares, respectively. *Id.* at 32a (FF 26), 34a (FF 36), 89a (FF 239).

The district court also found that petitioner is the "price leader" in the market, has "a reputation for aggressive price increases," and "create[s] a high-price umbrella" for artificial teeth. Pet. App. 85a-86a (FF 226, 230). Petitioner "has not reacted with lower prices when others have not followed its price increases." *Id.* at 86a (FF 229). Although the tooth market has been "stagnant in terms of unit growth," *id.* at 88a (FF 237), the district court found that petitioner's profit margins on teeth have been "high" and "increasing over time," *id.* at 88a (FF 233-234), and its tooth division "has long been a highly profitable, 'cash cow' business," *id.* at 88a (FF 235).

As the district court recognized, petitioner sells its teeth and related products exclusively through a network of 23 national and regional dental laboratory dealers, which collectively have about 100 tooth stock outlets essentially covering almost every major metropolitan area and far exceeding the number of stocks of any competitor. Pet. App. 31a (FF 20, 22), 38a (FF 56), 52a (FF 109); C.A. App. A1931-A1932. Those dealers supply the 7,000 dental laboratories that fabricate dentures with "the full range of products that dental labs use." Pet. App. 37a-39a (FF 55, 58-59). The dealers are "independent businesses, selling under their own name and not [petitioner's], and offering thousands of different products that are made by hundreds of different manu-

[1] "FF" and "CL" refer, respectively, to the district court's numbered findings of fact, Pet. App. 28a-134a, and conclusions of law, *id.* at 134a-145a.

facturers," including "large inventories" of artificial teeth. *Id.* at 80a (FF 212), 38a (FF 57). The services that dealers provide to laboratories include delivery, same-day availability, one-stop shopping, handling tooth returns, inventory management, and handling accounts receivable. *Id.* at 45a-49a (FF 82-98). Petitioner is the only tooth manufacturer that makes no direct sales to laboratories. *Id.* at 2a, 31a-32a, 34a-35a, 36a, 57a-58a, 60a (FF 20, 27, 40, 47, 131, 139).

The district court found that, for more than fifteen years, petitioner has operated under a policy that discourages its dealers from adding competitors' teeth to their product lines. See Pet. App. 69a (FF 174). Petitioner prohibits existing dealers from adding the teeth of competitors—a policy codified in 1993 as Dealer Criterion 6—and, as a condition of acceptance, requires prospective Dentsply tooth dealers to drop most or all competing brands.[2] *Id.* at 68a, 70a (FF 169-170, 178). Under a "grandfather" provision, petitioner has permitted dealers to continue carrying competing brands that they were carrying when that criterion was announced. *Id.* at 70a (FF 175). Vita and Ivoclar, however, are "not among the grandfathered brands." *Id.* at 127a-128a (FF 349).

The district court found that the "express" and "sole" purpose of Dealer Criterion 6 was "anti-competitive"—to "block competitive distribution points," "[t]ie up dealers," and "exclude [petitioner's] competitors from the dealers." Pet. App. 81a, 70a, 119a (FF 216, 176, 217, 332). The district court rejected, as "merely pre-

[2] Dealer Criterion 6 provides that "[i]n order to effectively promote Dentsply/York products, dealers that are recognized as authorized distributors may not add further tooth lines to their product offering." Pet. App. 68a (FF 169).

textual," *id.* at 143a (CL 37), petitioner's proffered business justifications for its dealer policies—that the policies were needed to help "focus" dealers and to prevent "free riding" by rival manufacturers. *Id.* at 119a-134a (FF 331-369).

The district court also found that petitioner's existing and prospective dealers wanted to carry competing brands, and "[v]ehement[ly]" and "vigorously" opposed Dealer Criterion 6. Pet. App. 130a (FF 358). Despite that opposition, petitioner successfully enforced Dealer Criterion 6 by terminating or threatening to terminate several dealers. *Id.* at 72a-80a (FF 186-211). The district court documented numerous incidents in which petitioner coerced a current or prospective dealer not to sell rival brands. *Id.* at 36a, 59a, 69a-72a, 73a-80a, 82a-84a (FF 47, 136, 174, 179-185, 187-211, 218-223). Although dealers distributing petitioner's teeth have the legal right to end their agreements at any time without contractual penalty, *id.* at 53a (FF 110-111), the district court found that since at least 1992 "no dealer ha[d] agreed to walk away from [petitioner's line of] tooth business to take on a competitive line," *id.* at 70a (FF 177).

Nevertheless, the district court also found that direct distribution to dental laboratories—bypassing dealers—provided petitioner's rival manufacturers with a "'viable' method of distributing artificial teeth." Pet. App. 42a (FF 71).[3] That finding formed the basis for its conclusions that petitioner did not violate the exclusive

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[3] See also Pet. App. 137a (CL 11) (direct distribution is a "viable and, in some ways, advantageous method of distribution"); *id.* at 141a (CL 26); *id.* at 143a (CL 35) ("direct distribution is viable"). The district court further concluded that "non-Dentsply dealers are available, and Dentsply dealers may be converted at any time." *Id.* at 143a (CL 35).

dealing prohibitions of Section 1 of the Sherman Act or Section 3 of the Clayton Act; did not possess monopoly power; and did not violate Section 2 of the Sherman Act, which prohibits monopoly maintenance. See *id.* at 140a-141a (CL 22-26). The court also concluded that the low level of success of rivals Ivoclar and Vita was "due to their own business decisions" regarding poor product choices and marketing, *id.* at 91a (capitalization altered); *id.* at 91a-99a (FF 244-268), 137a-138a (CL 15), and that all rivals would increase their competitively important "levels of promotion and marketing" (*e.g.*, sales forces, laboratory education/training, and advertising) if the challenged conduct were enjoined, *id.* at 129a-130a (FF 355).

The district court stated: "In sum, because direct distribution is viable, non-Dentsply dealers are available, and Dentsply dealers may be converted at any time, the [government] has failed to prove that [petitioner's] actions have been or could be successful in preventing 'new or potential competitors from gaining a foothold in the market[.]'" Pet. App. 143a (CL 35) (quoting *LePage's Inc.* v. *3M*, 324 F.3d 141, 159 (3d Cir. 2003) (en banc), cert. denied, 542 U.S. 953 (2004)). The district court held, as an independent basis for dismissal and as a matter of law, that its finding of non-liability under Section 3 of the Clayton Act precluded any violation under Section 2 of the Sherman Act. *Id.* at 139a (CL 20).

2. The United States appealed the judgment with respect to monopoly maintenance under Section 2. Pet. App. 5a. The court of appeals unanimously reversed. *Id.* at 1a, 26a.

a. The court of appeals held that the district court clearly erred in finding that petitioner lacked monopoly power. Pet. App. 13a. The court agreed with the district court that the relevant market consisted of "total sales of artificial teeth to the laboratories and the dealers combined" and that petitioner's longstanding, "predominant" market share is "more than adequate to establish a prima facie case" of monopoly power. *Id.* at 9a-10a; see *id.* at 140a (CL 23). The court of appeals rejected, however, the district court's determination that petitioner lacked the power to exclude rivals. *Id.* at 10a-14a. It found clearly erroneous the district court's finding that direct distribution to laboratories provided rival manufacturers with a "viable" distribution alternative to the dealer channel. *Id.* at 18a. The court of appeals observed that direct distribution "is 'viable' only in the sense that it is 'possible,' not that it is practical or feasible in the market as it exists and functions." *Ibid.* Under Section 2 monopoly maintenance law, the "mere existence of other avenues of distribution is insufficient without an assessment of their overall significance to the market." *Id.* at 23a-24a.

The court of appeals concluded that "realities of the marketplace" demonstrate in this case that it is "impracticable for a manufacturer to rely on direct distribution to the laboratories in any significant amount." Pet. App. 16a, 18a-19a. Rather, "the firm that ties up the key dealers rules the market," *id.* at 13a, and petitioner's "grip on its 23 authorized dealers effectively choked off the market for artificial teeth, leaving only a small sliver for competitors," *id.* at 24a-25a. Hence, rivals employing direct distribution could "stay in business," but cannot "pose[] a real threat" to petitioner. *Id.* at 18a-19a (quoting *United States* v. *Microsoft Corp.*, 253 F.3d 34, 71 (D.C. Cir.) (en banc) (per curiam), cert. denied, 534 U.S. 952 (2001)). The court of appeals accordingly concluded that the "evidence demonstrated conclusively that Dentsply had supremacy over the dealer network and it was at that crucial point in the distribution chain that monopoly power over the market for artificial teeth was established." *Id.* at 13a. See *id.* at 14a-15a.

The court of appeals further concluded that petitioner's "blocking of access to the key dealers," and not rivals' "apparent lack of aggressiveness," was responsible for the rivals' "paltry results." Pet. App. 11a. The court determined that the evidence established beyond question that petitioner's exclusionary conduct had "a significant effect in preserving [petitioner's] monopoly" and was a "solid pillar of harm to competition." *Id.* at 15a. It stated that the district court's theory that rival manufacturers could "steal" a dealer away from petitioner "simply has not proved to be realistic." *Id.* at 21a; see *id.* at 25a. Rather, petitioner's "all-or-nothing" policy with dealers created "a strong economic incentive for dealers to reject competing lines in favor of [petitioner's] teeth," despite the dealers' at-will relationship with petitioner. *Id.* at 19a, 22a, 23a. See *id.* at 20a-21a. The court of appeals agreed with the district court that petitioner's proffered justifications were "pretextual and did not excuse its exclusionary practices." *Id.* at 25a.

Finally, the court of appeals rejected as a matter of law the district court's conclusion that a determination that petitioner was not liable under the government's exclusive dealing claims under Section 1 of the Sherman Act and Section 3 of the Clayton Act required a determination that petitioner was not liable under the government's monopoly maintenance claim under Section 2 of the Sherman Act. Pet. App. 25a-26a. It also rejected petitioner's corollary argument that the government was precluded from appealing the Section 2 judgment because it had not also appealed the adverse judgments under Section 1 or Section 3. See *id.* at 26a. The court of appeals remanded "with directions to grant the Government's request for injunctive relief," *id.* at 1a, and later denied rehearing and rehearing en banc, *id.* at 146a-147a. Petitioner did not seek a stay of the court of appeals' mandate. See Fed. R. App. P. 41(d)(2).

b. After the court of appeals' mandate issued, the parties made unsuccessful efforts to negotiate a final judgment specifying the appropriate terms of relief. On September 28, 2005, the district court denied the government's motion for entry of its proposed final judgment, pending disposition of this petition. The district court referred the matter to a magistrate judge to assist the parties in negotiating the terms of a final judgment. If those efforts prove unsuccessful, the parties would proceed to litigate the remedy.

**ARGUMENT**

Petitioner's request for a writ of certiorari should be denied. As a threshold matter, petitioner seeks interlocutory review before entry of a final judgment specifying the remedy, contrary to this Court's policy against piecemeal review. More fundamentally, the court of appeals' decision properly applies settled law to this monopoly maintenance claim and does not conflict with any decision of this Court or any court of appeals.

1. Petitioner seeks immediate review of an interlocutory decision that has resolved only petitioner's liability and not the appropriate terms of relief. The court of appeals' decision reversed the district court's final judgment in favor of petitioner and remanded "with directions to grant the Government's request for injunctive relief." Pet. App. 1a. The parties unsuccessfully attempted to negotiate a joint proposed final judgment,

and the district court has now referred the matter to a magistrate judge to assist the parties in reaching a negotiated decree. Hence, the Court does not have before it a final judgment in this case.

The interlocutory character of the case "of itself alone furnishe[s] sufficient ground for the denial" of petitioner's request for this Court's review. *Hamilton-Brown Shoe Co.* v. *Wolf Bros.*, 240 U.S. 251, 258 (1916); see also *ibid.* ("except in extraordinary cases, the writ is not issued until final decree"); *Brotherhood of Locomotive Firemen* v. *Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967) ("because the Court of Appeals remanded the case, it is not yet ripe for review by this Court"); *Virginia Military Inst.* v. *United States*, 508 U.S. 946 (1993) (Scalia, J., concurring in denial of petition for certiorari) ("[w]e generally await final judgment in the lower courts before exercising our certiorari jurisdiction"); Robert L. Stern et al., *Supreme Court Practice* § 4.18, at 258-261 (8th ed. 2002).

2. Petitioner's challenges to the court of appeals' application of Section 2 monopoly maintenance law are unpersuasive. The court enunciated well-settled legal standards: "A violation of Section 2 consists of two elements: (1) possession of monopoly power and (2) '. . . maintenance of that power as distinguished from growth or development as a consequence of a superior product, business acumen, or historic accident.'" Pet. App. 6a (quoting *Eastman Kodak Co.* v. *Image Technical Servs., Inc.*, 504 U.S. 451, 481 (1992)). Petitioner challenges neither the court of appeals' determination that petitioner possesses monopoly power, *id.* at 10a-15a, nor the court's affirmance of the district court's finding that peti-

tioner's proffered procompetitive justifications were "merely pretextual," *id.* at 25a, 143a (CL 37).[4]

a. Petitioner argues that the court of appeals "did not properly consider all existing or potential alternative channels of distribution" (Pet. 13) in determining that petitioner's exclusionary conduct had "a significant effect in preserving [petitioner's] monopoly," Pet. App. 15a. That argument, which amounts to merely a disagreement over the court of appeals' assessment of the facts, plainly does not warrant this Court's review.

In any event, the court of appeals carefully considered the various distribution alternatives to petitioner's dealer channel, and the court determined that it was clear that petitioner's "grip on its 23 authorized dealers effectively choked off the market for artificial teeth." Pet. App. 24a. The court explained that the independent dealers that petitioner used were the "key" dealers, "provid[ing] a critical link to end-users," *id.* at 15a, 24a, and that "the firm that ties up the key dealers rules the market," *id.* at 13a. Indeed, the district court had found that petitioner sought to deny its rivals access to those dealers precisely because petitioner recognized that those dealers were "key." See *id.* at 81a (FF 216), 84a (FF 221(e)).

The court of appeals also confirmed the district court's findings that petitioner wooed dealers once those

[4] Petitioner's claim that the court of appeals erroneously changed the market definition and thereby improperly "double count[ed]" sales to dealers (Pet. 12-13 & n.5) cannot be reconciled with the court's clear statement that "the *District Court understood, as do we,* the relevant market to be the total sales of artificial teeth to the laboratories and the dealers combined." Pet. App. 9a (emphasis added). Far from "double counting," Pet. 13 n.5, the court of appeals ensured that every tooth sale was counted just once. See Pet. App. 2a-3a, 9a.

dealers were poised to help rivals improve their competitive positions and that petitioner authorized dealers it had previously rejected or terminated in order to deny them to rivals. See Pet. App. 12a-13a, 22a, 71a-72a (FF 183-185), 82a-84a (FF 220-223). The court of appeals did not "completely ignore[]" the availability of non-Dentsply dealers, Pet. 13, but rather held that those dealers were competitively insignificant. Petitioner cites the sheer number of remaining distributors without addressing their relative capabilities. Pet. 14, 16. As the court of appeals emphasized, however, there is a wide disparity in "comparative size" between Dentsply's dealers and the others, contrasting as an example Dillon Co., a non-Dentsply dealer, with Zahn and Patterson, two of petitioner's largest dealers. See Pet. App. 22a (quoting Dillion's president: "Zahn does $2 billion, I do a million-seven. Patterson does over a billion dollars, I do a million-seven. I have ten employees, they have 6,000.").[5]

b. Contrary to petitioner's contentions (Pet. 14), the court of appeals properly considered the potential *effectiveness* of alternative forms of distribution, invoking the principle that a monopolist may not shut competitors out of a major channel of distribution unless there are distribution alternatives that permit a rival "to pose a

[5] The court of appeals also properly rejected petitioner's argument (Pet. 16) that rivals could "steal" dealers away from petitioner. Such "purloining efforts have been thwarted by [petitioner's] longtime, vigorous and successful enforcement actions." Pet. App. 21a. Petitioner "imposes an 'all-or-nothing' choice on the dealers. The fact that dealers have chosen not to drop [petitioner's] teeth in favor of a rival's brand demonstrates that they have acceded to heavy economic pressure." *Id.* at 23a. See *id.* at 12a-13a, 21a-22a (describing pressure petitioner brought to bear on dealers).

real threat to [defendant's] monopoly." *Microsoft*, 253 F.3d at 71; Pet. App. 19a. See *Conwood Co., L.P.* v. *United States Tobacco Co.*, 290 F.3d 768, 787-788 (6th Cir. 2002) (defendant maintained monopoly through conduct aimed at the best channel of distribution), cert. denied, 537 U.S. 1148 (2003). The court of appeals determined that direct distribution does not pose such a threat, expressly rejecting as clearly erroneous the district court's finding that direct distribution to laboratories was a "viable" alternative to the dealer channel. Pet. App. 18a-19a. See *id.* at 16a (the "record is replete with evidence of benefits provided by dealers" to laboratories), 16a-18a (describing benefits of dealers), 24a (petitioner's dealers "provide a critical link to end-users").[6]

Petitioner argues that the mere existence of alternative distribution channels precludes liability as a

[6] See also Pet. App. 13a (dealer network used by petitioner was the "crucial point" in distribution); *id.* at 18a (direct distribution is not "practical or feasible in the market as it exists and functions"); *id.* at 21a ("[t]he paltry penetration in the market by competitors over the years has been a refutation of theory by tangible and measurable results in the real world"); *id.* at 15a ("[b]y ensuring that the key dealers offer [petitioner's] teeth either as the only or dominant choice, Dealer Criterion 6 has a significant effect in preserving [petitioner's] monopoly"); *id.* at 11a ("[i]t has not been so much the competitors' less than enthusiastic efforts at competition that produced paltry results, as it is the blocking of access to the key dealers"). Petitioner mistakenly characterizes the decision below as holding that petitioner's rivals posed no threat merely because of their small market shares. Pet. 8, 15, 17. Rather, the court of appeals held, correctly, that the *direct distribution channel* does not allow any rival in this market to "pose a real threat" to petitioner's monopoly. Pet. App. 19a. The court of appeals' acknowledgment that petitioner's rivals were able to "survive" by employing direct distribution, *ibid.*, does not undermine the conclusion that petitioner violated Section 2 because even a monopolist faces competitive constraints. See, *e.g.*, *Microsoft*, 253 F.3d at 70-71.

matter of law and that the court of appeals erred by engaging in a "comparative analysis" of the "relative ineffectiveness of selling directly." Pet. 14-15. Cf. Pet. App. 23a-24a. The law of monopoly maintenance, however, is otherwise. See *Microsoft*, 253 F.3d at 70-71; see also *Conwood*, 290 F.3d at 787-788.[7]

c. Contrary to petitioner's assertion, the court of appeals did not express the view, or even suggest, that it is "*per se* unlawful" for all "firms with sizeable market shares" to employ exclusive dealing. Pet. 17. Rather, after reviewing the record as a whole in light of the proper legal standard under Section 2, the court of appeals determined that petitioner—a monopolist—kept rivals out of the dealer channel and thereby preserved its monopoly. See, *e.g.*, Pet. App. 13a, 15a. Although, as petitioner observes (Pet. 16), exclusive dealing contracts *may* be pro-competitive, both courts below found that petitioner's proffered justifications were "merely pretextual" and that the "express" and "sole purpose" of Dealer Criterion 6 was to exclude competition. Pet. App. 25a, 81a (FF 216-217), 143a (CL 37). Nothing in the court of appeals' fact-intensive decision suggests that it was announcing a per se rule respecting exclusive dealing.

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[7] Petitioner mistakenly relies on debatable characterizations of lower court decisions addressing Section 3 of the Clayton Act, rather than on decisions addressing monopoly maintenance. See Pet. 14-15. Petitioner also relies on *Verizon Communications Inc.* v. *Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 415-416 (2004) (Pet. 15), but that reliance is misplaced. *Trinko* involved the application of Section 2 to the conduct of a monopolist, but the alleged violation was the monopolist's refusal to share its *own* facilities with its rivals. By contrast, petitioner's violation centered on its preventing independent dealers from sharing *their* assets with petitioner's rivals.

3. Petitioner argues that the court of appeals' decision conflicts with *Tampa Electric Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961), and six other court of appeals decisions. See Pet. 9-12. Petitioner overlooks a critical distinction: None of those cases purported to address Section 2 monopoly maintenance—the only claim at issue in the court of appeals in this case. Instead, those supposedly conflicting decisions all focused on exclusive dealing claims arising under Section 1 of the Sherman Act and Section 3 of the Clayton Act. Here, the court of appeals determined, under Section 2, that the anticompetitive effects of petitioner's threats and its use of its monopoly power excluded rivals "*despite* the lack of long term contracts between the manufacturer and its dealers." Pet. App. 1a (emphasis added); see *id.* at 12a-13a, 19a-25a.

a. Monopoly maintenance under Section 2 of the Sherman Act has its own elements and standards. See, *e.g.*, *LePage's*, 324 F.3d at 157 n.10; *Microsoft*, 253 F.3d at 70; *U.S. Healthcare, Inc.* v. *Healthsource, Inc.*, 986 F.2d 589, 593, 597-598 (1st Cir. 1993). Unlike claims under Section 1 of the Sherman Act and Section 3 of the Clayton Act, which generally require proof that the defendant possesses market power, Section 2 claims require proof of *monopoly* power, which is "of course, something greater than market power under § 1." *Eastman Kodak*, 504 U.S. at 481.

Section 2 reflects the fundamental principle that the conduct of a monopolist is "examined through a special lens: Behavior that might otherwise not be of concern to the antitrust laws—or that might even be viewed as procompetitive—can take on exclusionary connotations when practiced by a monopolist." *Eastman Kodak*, 504 U.S. at 488 (Scalia, J., dissenting) (citing 3 Philip Areeda

& Donald F. Turner, *Antitrust Law: An Analysis of Antitrust Principles and Their Application* ¶ 813, at 300-302 (1978)). See also *Microsoft*, 253 F.3d at 70 ("a monopolist's use of exclusive contracts" may violate Section 2 even if it does not violate Section 1); *LePage's*, 324 F.3d at 157 n.10 (adverse jury finding on plaintiff's "exclusive dealing claim under § 1 of the Sherman Act and § 3 of the Clayton Act does not preclude the application of evidence of [defendant's] exclusive dealing to support [plaintiff's] § 2 claim").

b. Petitioner mistakenly suggests (Pet. 17) that the government was not entitled to pursue its appeal of the district court's erroneous rejection of the Section 2 claim without also appealing the district court's rejection of the government's claims under Section 1 of the Sherman Act or Section 3 of the Clayton Act. The government—not petitioner—is entitled to choose the grounds for a government appeal. To be sure, the district court's holdings respecting Section 1 and Section 3 reflected some of the same erroneous factual findings that the court of appeals ultimately rejected in considering the government's appeal from the Section 2 ruling. See, *e.g.*, Pet. App. 18a-19a (district court's finding of "viability" of direct distribution was clearly erroneous). As the court of appeals correctly observed, however, a judgment that petitioner unlawfully maintained its monopoly in violation of Section 2 of the Sherman Act would allow the government to obtain all of the relief that it seeks in this case. *Id.* at 26a. The government accordingly had no need to seek review of the Section 1 and Section 3 claims, and the court of appeals had no occasion to consider whether the district court erred with respect to those claims.

c. Petitioner also argues (Pet. 17-18) that this Court's decision in *Tampa Electric*, *supra*, precluded the court of appeals from finding Section 2 liability in the absence of Section 3 liability. Petitioner relies on the Court's observation in *Tampa Electric* that:

> We need not discuss the respondents' further contention that the contract also violates §1 and §2 of the Sherman Act, for if it does not fall within the broader proscriptions of §3 of the Clayton Act it follows that it is not forbidden by those of the former.

365 U.S. at 335. See Pet. 17 n.7, 18. That statement, which petitioner abstracts without reference to its context, has no bearing on the situation presented here, which involves anticompetitive conduct by a longstanding monopolist.

The Court concluded in *Tampa Electric* that a utility's requirements contract for coal did not violate Section 3 because it did not "tend to foreclose a substantial volume of competition." 365 U.S. at 335. The Court accordingly concluded that the contract could not provide a basis for antitrust liability under any of the three claims before it, none of which involved monopoly maintenance. See Resp. Br. at 61-62 & Reply Br. at 26-27, *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320 (1961) (No. 87) (raising issue of unlawful acquisition of monopoly, but not monopoly maintenance).[8] By contrast, the court of appeals in this case reviewed *only* the government's Section 2 claim. The court of appeals de-

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[8] The requirements contract committed the utility to buy less than 1% of the coal available in the relevant market. See *Tampa Elec.*, 365 U.S. at 321, 333, 335. It was obvious that the contract could not create a monopoly in violation of Section 2, and the Court's decision, not surprisingly, contains no discussion of monopoly maintenance.

termined that the government had demonstrated that a monopolist, lacking any nonexclusionary justification, engaged in conduct for the purpose and with the effect of foreclosing competition to maintain its monopoly power. The court of appeals was entitled to make that ruling based on the record before it and, for the reasons discussed above (see p. 16, *supra*), did not address the question whether petitioner also violated Section 1 or Section 3. See Pet. App. 25a-26a.

d. The decisions of other courts of appeals that petitioner cites are similarly off point. Those cases all involve the resolution of fact-intensive challenges to exclusive dealing under Section 1 of the Sherman Act or Section 3 of the Clayton Act. None of them involves the application of the established standards governing Section 2 monopoly maintenance claims.

In *CDC Technologies, Inc.* v. *IDEXX Laboratories, Inc.*, 186 F.3d 74 (2d Cir. 1999) (Pet. 11-12), the court rejected a Section 1 claim because all competitors sold directly, the "distributors" provided only sales leads, and the restraint did not prevent the plaintiff from "achiev[ing] distributor coverage almost nationwide" and increasing its sales. 186 F.3d at 76, 80-81. In *Omega Environmental, Inc.* v. *Gilbarco, Inc.*, 127 F.3d 1157 (9th Cir. 1997), cert. denied, 525 U.S. 812 (1998) (Pet. 11), the court determined that there was no violation of Section 3 when all of the competitors sold both directly and through dealers, the restraint did not prevent another competitor from putting together a network of over 100 dealers, and the market was characterized by "increasing output, decreasing prices, and significantly fluctuating market shares." 127 F.3d at 1164; see *id.* at 1162-1165. And in *Healthsource* (Pet. 10), the court rejected claims under Section 1 because the plaintiff failed to demonstrate that an HMO's optional exclusivity with independent doctors had an effect on competition. *Healthsource*, 986 F.2d at 595-597. The court also rejected the plaintiff's claim under Section 2 of the Sherman Act for failure to prove a "properly defined product market" within which the defendant "could approach monopoly size." *Id.* at 599; see *id.* at 597-599.

In *Seagood Trading Corp.* v. *Jerrico, Inc.*, 924 F.2d 1555 (11th Cir. 1991) (Pet. 12), the court of appeals rejected a Section 1 claim of exclusive dealing because the exclusive relationship foreclosed only "one provider in the enormous market for restaurant delivery services." 924 F.2d at 1572-1573. In *Ryko Manufacturing Co.* v. *Eden Services*, 823 F.2d 1215 (8th Cir. 1987), cert. denied, 484 U.S. 1026 (1988) (Pet. 12), the court rejected a distributor's claim under Section 1 and Section 3 because the distributor was precluded merely from selling its own product in competition with the distributed product, and there was "no evidence suggesting" that the exclusive dealing provisions prevented defendant's "competitors from finding effective distributors for (or other means of promoting and selling) their products." 823 F.2d at 1234; see *id.* at 1233-1235.

In *Roland Machinery Co.* v. *Dresser Industries, Inc.*, 749 F.2d 380 (7th Cir. 1984) (Pet. 12), the court reversed a preliminary injunction under Section 3 because of plaintiff's failure to show "a substantial anticompetitive effect, actual or potential," and defendant demonstrated a plausible procompetitive justification for its action. 749 F.2d at 394; see *id.* at 395. See also *Roy B. Taylor Sales, Inc.* v. *Hollymatic Corp.*, 28 F.3d 1379, 1385 (5th Cir. 1994), cert. denied, 513 U.S. 1103 (1995) (Pet. 15) (rejecting Section 1 tying claim by distributor because it complained only of lost profits, not reduced competition).

Those Section 1 and Section 3 rulings share only one relevant attribute with the court of appeals' decision in this Section 2 case: They all turned on fact-intensive inquiries respecting the characteristics of the relevant market and the defendant's conduct. They announce no categorical rule that would be inconsistent with the result reached below, and they provide no reason to doubt that the court of appeals properly applied settled Section 2 monopoly maintenance principles to petitioner's conduct. Further review of this case is unwarranted.

**CONCLUSION**

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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