No. 96-1570

In the Supreme Court of the United States

OCTOBER TERM, 1997

NYNEX CORPORATION, ET AL., PETITIONERS

v.

DISCON, INCORPORATED

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

BRIEF FOR THE UNITED STATES AND THE FEDERAL TRADE COMMISSION AS AMICI CURIAE

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly held that a seller stated a claim under Section 1 of the Sherman Act, 15 U.S.C. 1, by alleging that it was excluded from the market as part of a conspiracy between a rival seller and their buyer, a regulated monopolist, to raise prices to the monopolist's customers by circumventing regulatory constraints.

2. Whether the court of appeals correctly held that an entity may conspire to monopolize, in violation of Section 2 of the Sherman Act, 15 U.S.C. 2, when it acts with the specific intent to assist another entity to acquire or maintain monopoly power.

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This brief is filed in response to this Court's order inviting the Solicitor General to express the views of the United States.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-20a) is reported at 93 F.3d 1055. The opinion and order of the district court (Pet. App. 21a-53a) are unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 26, 1996. A petition for rehearing and suggestion for rehearing en banc was denied on January 7, 1997. The petition for a writ of certiorari was filed on April 3, 1997. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Respondent Discon Incorporated (Discon) competed with AT&T Technologies (AT&T) in the market for "removal services" (salvage and disposal of obsolete telephone central office equipment) in the State of New York. Petitioner New York Telephone Company (NYT), a regulated subsidiary of petitioner NYNEX and the monopoly provider of local telephone exchange service throughout most of the State, is a user of removal services. During the period at issue, NYT purchased removal services principally through petitioner NYNEX Materiel Enterprises (MECo), an unregulated NYNEX subsidiary that served as a purchasing agent for NYNEX and its affiliates. Pet. App. 3a-4a.

According to Discon's complaint, from 1984 through at least 1986, petitioners and AT&T engaged in a conspiracy to overcharge NYT's customers for local telephone service.[1] MECo purchased removal services for NYT from AT&T at inflated prices. MECo then passed these prices on to NYT, which recovered them through the rates charged its customers. Those rates were set by state regulators based on NYT's cost of service. AT&T subsequently paid a secret year-end rebate that, in effect, reduced the prices that MECo paid for AT&T's services below the levels disclosed to state regulators. Pet. App. 4a-5a. Thus, as the court of appeals explained, petitioners "were able to generate increased revenues

[1] Because the court of appeals correctly treated NYNEX and its wholly owned subsidiaries, NYT and MECo, as a single antitrust entity in the circumstances presented by this case (see Pet. App. 8a-10a), we ascribe MECo's alleged conduct to NYNEX and NYT.

that were essentially derived from [NYT's] telephone monopoly," while avoiding "oversight from the state regulatory commission." *Id.* at 5a.

The complaint went on to allege that, in order to assure the success of the scheme, petitioners and AT&T conspired to exclude Discon from the removal services market. They did so because Discon not only refused to join in the scheme, but also engaged in acts that endangered the scheme's success, such as underbidding AT&T's inflated bids and, on occasion, selling removal services directly to NYT, thus bypassing MECo. Complaint ¶¶ 34, 40-45, 47, 52-55. In response, the complaint alleged, petitioners granted contracts to AT&T instead of Discon, even when Discon submitted a lower bid, and, in concert with AT&T, petitioners disseminated false information that led to Discon's decertification as an approved vendor for NYNEX affiliates. *Id.* ¶¶ 33-34, 50-55, 110. Because the conspirators and their affiliates were the dominant purchasers of removal services in New York State, Discon's exclusion from NYT's business caused it to cease operations. *Id.* ¶¶ 29, 55, 108, 113. See Pet. App. 5a-6a.[2]

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[2] See *In re New York Telephone Co.*, 5 F.C.C.R. 866 (1990) (initiating enforcement proceedings against NYT for apparent violation of FCC rules in connection with "unreasonable markups and overcharges by MECO on sales of equipment, supplies, and services to NYT," which, "in turn, recorded these artificially inflated costs on [its] regulated books of account, enabling [it] to recover these costs from ratepayers through the ratemaking process"); 5 F.C.C.R. 5892, 5893 (1990) (consent decree whereby NYT agreed to refund more than $35 million for "unreasonable rates reflecting improper capital costs and expense charges" without admitting liability).

2. Discon brought suit against petitioners in May 1990 and, following dismissal of its original complaint, filed an amended complaint in July 1992. The amended complaint alleged, in relevant part, that the above-described conduct violated Sections 1 and 2 of the Sherman Act, 15 U.S.C. 1, 2. See Pet. App. 6a.

In June 1995, the district court granted petitioners' motion to dismiss for failure to state a claim. With respect to the Section 1 claims, the court disagreed with Discon's contention that the alleged conspiracy between AT&T and petitioners could be characterized as an unlawful horizontal restraint or as vertical resale price maintenance. Pet. App. 28a-30a. The court further concluded that Discon's Section 1 claims failed because they did not adequately allege a conspiracy. *Id.* at 31a. The court also dismissed Discon's claims under Section 2 of the Sherman Act, holding that petitioners could not be held liable for monopolizing or attempting to monopolize the removal services market because they neither competed, nor sought monopoly power, in that market. *Id.* at 32a-36a. The court rejected Discon's conspiracy-to-monopolize claim both for this reason and for not adequately alleging a conspiracy. *Id.* at 37a-38a.

3. The court of appeals affirmed in part, reversed in part, and remanded for further proceedings. On the Section 1 claims, the court agreed with the district court that the relationship between petitioners and AT&T was not horizontal and that the complaint failed to allege resale price maintenance. Pet. App. 8a-10a & n.5. The court nonetheless reinstated

Discon's Section 1 claim, albeit on "a different legal theory than the one articulated by Discon." *Id.* at 7a.[3]

Citing *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207 (1959), the court concluded that an agreement among vertically situated parties, including one between a single supplier and a single purchaser, could be characterized as a "group boycott" if the agreement had a "horizontal market impact." Pet. App. 11a. In the court's view, Discon had alleged such a group boycott because, on the face of the complaint, no "pro-competitive rationale" was evident for petitioners' choice of AT&T over Discon. *Id.* at 12a. Indeed, Discon had alleged that "the intent and effect" of that choice was "entirely anti-competitive." *Ibid.* The court held that such allegations were sufficient, at the pleading stage, to state a rule-of-reason claim under Section 1. *Id.* at 13a. The court further suggested that the charged scheme might be unlawful *per se*, but only if it ultimately was judged to have had "no purpose except stifling competition." *Ibid.* (internal quotation marks and citation omitted). The court left the question whether a *per se* rule ought to be applied for the district court to address on remand after further factual development. *Id.* at 13a n.6.

Turning to Section 2, the court affirmed the dismissal of the attempted monopolization and monopolization claims. Pet. App. 13a-14a. But the court reinstated the conspiracy-to-monopolize claim after determining that Discon adequately alleged that petition-

[3] In a holding that petitioners do not contest, the court of appeals, reversing the district court, ruled that the complaint sufficiently alleged a conspiracy between AT&T and petitioners, thus satisfying Section 1's "concerted action" requirement. Pet. App. 7a n.3. See *Copperweld Corp.* v. *Independence Tube Corp.*, 467 U.S. 752, 767 (1984).

ers had specifically intended to secure AT&T's "dominance" in the removal services market. *Id.* at 15a. The court held that such allegations were sufficient to state a claim because "[a] defendant may be liable for conspiracy to monopolize where it agrees with another firm to assist that firm in its attempt to monopolize the relevant market." *Id.* at 14a.

DISCUSSION

In our view, the court of appeals' interlocutory ruling does not warrant review. The court's holding that Discon's complaint states a claim under the Sherman Act is correct and creates no conflict with decisions of this Court or other courts of appeals. We nonetheless acknowledge that certain language in the court's opinion was not well-chosen, such as the court's use of the term "group boycott" to characterize the conduct at issue here. Despite its characterization of the challenged conduct as a "group boycott," the court did not hold that such conduct was perforce illegal under Section 1. Instead, the court emphasized the importance of assessing the procompetitive justifications and anticompetitive effects of such conduct, leaving it to the district court on remand to determine, upon further development of the record, whether rule of reason or *per se* analysis should ultimately govern the claim. Indeed, the court of appeals has since suggested that this case turned on its particular facts and does not state any general rule governing the analysis of exclusive dealing arrangements. See *Electronics Communications Corp.* v. *Toshiba America Consumer Prods., Inc.*, 129 F.3d 240, 244-245 (2d Cir. 1997). We therefore believe that review at this juncture would be premature. Any clarification of the standard governing application of

the Sherman Act to claims involving regulatory evasion schemes should await a lower court decision applying the law to a more fully developed record.

1. The court of appeals correctly reversed the district court's dismissal of Discon's claim that the vertical conspiracy between petitioners and AT&T violated Section 1 of the Sherman Act. It should be emphasized that the courts were assessing that claim at the outset of the case on a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6). This Court has repeatedly instructed that complaints, including antitrust complaints, are to be "liberally construed" at that stage, and "should not be dismissed unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Hartford Fire Ins. Co.* v. *California*, 509 U.S. 764, 811 (1993) (internal quotation marks omitted). A dismissal at the pleading stage is "especially disfavored" where, as here, the case presents "a novel legal theory that can best be assessed after factual development." *Baker* v. *Cuomo*, 58 F.3d 814, 818-819 (2d Cir.) (citing 5A Charles A. Wright, et al., *Federal Practice and Procedure* § 1357, at 341-343 (1990)), cert. denied, 116 S. Ct. 488 (1995).

Liberally construed, Discon's complaint alleges that petitioners and AT&T agreed (1) that petitioners would purchase removal services from AT&T at inflated prices, a portion of which would be returned to petitioners in the form of secret rebates, so that they could evade regulatory constraints on the pricing of local telephone services; and (2) that petitioners and AT&T would seek to exclude Discon from the market for removal services because its conduct threatened petitioners' ability to evade regulation and

thus overcharge NYT's customers (Complaint ¶ 41).[4] Such a conspiracy could cause anticompetitive effects in both the local telephone market and the removal services market.

The primary object of the alleged conspiracy was to garner for petitioners the very supracompetitive profits that state regulation of NYT's rates was designed to prevent.[5] According to the complaint, petitioners' and AT&T's agreement to exclude Discon, as part of their effort to avoid regulatory scrutiny, was designed to facilitate petitioners' exercise of market power over NYT's customers. An increase in consumer prices resulting from the exercise of market power is an anticompetitive effect of the sort that Section 1 is designed to prevent. See, *e.g.*, *Jefferson Parish Hosp. Dist. No. 2* v. *Hyde*, 466 U.S. 2, 13 n.19 (1984) (explaining that exercise of market power through tying arrangements has "anticompetitive effects" when "used to evade price control in the tying product through clandestine transfer of the profit to the tied product") (quoting *Fortner Enterprises, Inc.* v. *United States Steel Corp.*, 394 U.S. 495, 513 (1969) (White, J., dissenting)); *id.* at 35 & 36 n.4 (O'Connor, J., concurring) (acknowledging that tying arrangements may present antitrust concerns when they "abet the harmful exercise of market power that

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[4] Although the complaint does not explain why Discon's continued participation in the market threatened the scheme's success, it may be that Discon's competing bids constrained the conspirators' ability to mask the regulatory circumvention.

[5] See generally Thomas G. Krattenmaker, *Telecommunications Law & Policy* 516 (1994) (explaining that inflating the price of equipment through an unregulated affiliate is a substitute, albeit an "imperfect" one, for a "straightforward monopolistic" price increase).

the seller possesses in the tying product market" by enabling the seller to evade price controls).[6] Although here the exercise of market power occurred in a market different from the one in which the restraint was imposed, that fact does not place a restraint beyond the reach of Section 1. See, *e.g.*, *Jefferson Parish*, 466 U.S. at 29-30 (noting that exclusive dealing arrangement may involve restraint in one market that causes anticompetitive effects in another market).[7]

The alleged agreement to exclude Discon also had the potential to distort competition in the market for removal services, thereby causing additional injury to consumers in the downstream telephone services market.[8] A monopolist, even if regulated, ordinarily

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[6] The anticompetitive effect flowing from petitioners' and AT&T's scheme is the *exercise* of market power, and not its creation or augmentation. Section 1, however, is not concerned only with the creation and augmentation of market power. Section 1 condemns restraints that cause "detrimental effects," for which market power is "but a 'surrogate.'" *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 460-461 (1986) (quoting 7 Phillip E. Areeda, *Antitrust Law* ¶ 1511, at 429 (1986)).

[7] Absent unusual circumstances, when an exercise of market power produces higher consumer prices, a decrease in output will also occur. Thus, petitioners' and AT&T's alleged agreement to exclude Discon, by enabling petitioners to raise their "monopoly profits over what they would be absent the [restraint]," undesirably "increase[d] the social costs of market power." *Jefferson Parish*, 466 U.S. at 14-15 (discussing tying that facilitates price discrimination); *id.* at 36 n.4 (O'Connor, J., concurring) (acknowledging that tying arrangements may violate Section 1 when they decrease output).

[8] In certain circumstances, a purchaser's agreement to exclude a supplier of particular goods or services might also harm other purchasers of those goods or services. Discon, however, did not expressly allege such an effect. It identified NYT and

has an incentive to purchase from the supplier who offers the lowest price, because that enables the monopolist to maximize its profits by lowering its costs and increasing its sales. That incentive is aligned with the interests of consumers. A regulatory circumvention scheme could change that alignment. The regulated monopolist then will also consider whether, and to what extent, a supplier will assist it in evading regulation and exercising market power in the regulated market. The monopolist may select the supplier best suited to evade regulation, even if it is not the one charging the lowest price, because the monopolist may prefer to incur higher costs in order to extract supracompetitive profits. Consumers then may suffer injury not only from the downstream exercise of market power, but also from the actual increase in costs attributable to the monopolist's selection of an inefficient supplier.[9]

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an AT&T affiliate as the "dominant purchasers of removal services" in New York State, and alleged that one object of the alleged conspiracy was to "maintain high price levels" in the removal services market (Complaint ¶ 29). Discon further alleged that AT&T was the dominant supplier of removal services in New York State (*id.* ¶ 26), but did not indicate whether Discon was the only other supplier. Nor does the complaint contain express allegations concerning the prospects for entry or minimum efficient scale, although it does allege that Discon was driven from the market when it lost petitioners' business.

[9] This point is illustrated by a simple example: Assume that Discon could provide removal services at a cost (including competitive return on investment) of $1,000, and that AT&T could provide the same services at a cost of $1,100. Further, suppose that AT&T, but not Discon, was willing to participate in a scheme to evade regulation. Under these circumstances, petitioners would be likely to deal only with AT&T despite its

Such injuries to consumers also fall within the reach of Section 1. As this Court has explained, tying arrangements present antitrust concerns, in part, because the seller's exercise of its market power over the tying product may distort customers' purchasing decisions in the market for the tied product. See *Jefferson Parish*, 466 U.S. at 12 (noting that tying arrangements "force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms"); see also *id.* at 13 n.19 (tying doctrine guards against "'distort[ing] freedom of trade and competition in the second product,'" which occurs when consumers "are artificially forced to make a less than optimal choice") (quoting *Fortner Enterprises*, 394 U.S. at 512 (White, J., dissenting)). Similarly, the regulatory circumvention scheme charged here may have distorted petitioners' purchasing decisions; indeed, Discon alleged (Complaint ¶ 34) that it submitted the lowest bid on several occasions, yet was not selected. Any such distortion of competition would ultimately have injured consumers because, under the state regulatory scheme, petitioners could pass on to consumers any increased costs resulting from the distortion. Cf. *Town of Concord* v. *Boston Edison Co.*, 915 F.2d 17, 22-23, 25 (1st Cir. 1990) (explaining that antitrust doctrine properly takes into account the applicable regulatory context), cert. denied, 499 U.S. 931 (1991).

In short, contrary to petitioners' characterization, this case involves more than an agreement "to buy

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higher costs, and ratepayers would suffer a $100 loss from petitioners' choice of an inefficient supplier, in addition to any loss attributable to the regulatory evasion.

from Supplier A rather than Supplier B" (Pet. i). An agreement between a regulated monopolist and its supplier to exclude a competing supplier from the market, when that agreement has the purpose and effect of enabling the monopolist to evade regulatory scrutiny and exercise market power in a downstream market, violates Section 1 in the absence of any procompetitive justification. We do not suggest that there will be many cases in which such a claim can be substantiated. Nor do we rule out the possibility of summary judgment in favor of petitioners here. The court of appeals, however, was correct to reverse the dismissal on the pleadings and remand the case for further proceedings.

2. Petitioners contend (Pet. 12) that this case warrants review at this preliminary stage because the court of appeals' opinion creates a "two-firm supplier-purchaser group boycott rule [that] threatens to swallow up the rule that purchasers may choose their suppliers." Although the court misused the "group boycott" label in describing the claim, we do not believe that its opinion threatens the mischief that petitioners suggest. And because "[t]his Court reviews judgments, not statements in opinions," *California* v. *Rooney*, 483 U.S. 307, 311 (1987) (per curiam) (internal quotation marks omitted), the court's incorrect description of the claim does not justify review.

a. The court of appeals characterized the charged conspiracy as a "two-firm vertical" agreement "to discriminate in favor of one supplier over another." Pet. App. 12a. Although the court's opinion is not completely clear, it suggests a three-step analysis for such schemes: (1) the scheme will be denominated a "group boycott" if it is alleged to have anticompetitive effects and no procompetitive justification; (2) such a

scheme might be unlawful *per se* if the defendant fails to advance a valid procompetitive justification; and (3) if a procompetitive justification is substantiated, the scheme should be evaluated under the rule of reason.[10]

This Court, however, consistently has used the term "group boycott" to describe a category of conduct that is illegal *per se*; that is, conduct properly labeled a "group boycott" is condemned without any further inquiry into its anticompetitive effects or procompetitive justification. See, *e.g.*, *Klor's, Inc.* v. *Broadway-Hale Stores, Inc.*, 359 U.S. 207, 212-213 (1959); see also *FTC* v. *Indiana Fed'n of Dentists*, 476 U.S. 447, 458 (1986); *Northern Pac. Ry.* v. *United States*, 356 U.S. 1, 5 (1958). Application of the *per se* rule serves the salutary purpose of "provid[ing] guidance to the business community" and "minimiz[ing] the burdens on litigants and the judicial system of the more complex rule-of-reason trials." *Continental T.V., Inc.* v. *GTE Sylvania Inc.*, 433 U.S. 36, 50 n.16 (1977).

Because the *per se* rule applicable to group boycotts permits no defense, this Court has mandated the exercise of "[s]ome care" in defining "[e]xactly what types of activity fall within the forbidden category." *Northwest Wholesale Stationers, Inc.* v. *Pacific Sta-*

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[10] Although it is possible to read the decision, as petitioners do (Pet. 12), to sweep into the group boycott category any two-firm vertical agreement not to use a particular supplier that allegedly lacks a procompetitive purpose, the court of appeals appeared to distinguish a group boycott from other vertical arrangements based on its particular anticompetitive effects. Pet. App. 11a-12a. That is precisely how the same court, in an opinion authored by a judge who joined in the decision below, recently interpreted that decision. See *Electronics Communications Corp.*, 129 F.3d at 244-245 (Parker, J.).

tionery & Printing Co., 472 U.S. 284, 294 (1985); *Indiana Fed'n of Dentists*, 476 U.S. at 458 ("the category of restraints classed as group boycotts is not to be expanded indiscriminately"). The category is thus restricted to "form[s] of concerted activity characteristically likely to result in predominantly anticompetitive effects," *Northwest Wholesale Stationers*, 472 U.S. at 295, such as where "firms with market power boycott suppliers or customers in order to discourage them from doing business with a competitor," *Indiana Fed'n of Dentists*, 476 U.S. at 458.

Under this Court's cases, the type of restraint at issue here—a two-firm vertical agreement to exclude a supplier—cannot properly be termed a group boycott. As the court of appeals acknowledged (Pet. App. 12a), "[i]n the vast majority of cases, the decision to discriminate in favor of one supplier over another will have a pro-competitive intent and effect." That correct observation precludes categorical condemnation of such agreements.[11]

The court of appeals, however, employed the terms "group boycott" and "*per se*" analysis differently than has this Court. The court used "group boycott" not to refer to a category of restraint that is condemned, *in every case*, because of its inherently anticompetitive character, but to denote a vertical agreement

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[11] Virtually any requirements contract could be characterized as a "two-firm vertical" agreement "to discriminate in favor of one supplier over another." Pet. App. 12a. Yet, such agreements are considered to enhance efficiency, and thus are not subject to categorical invalidation. See *Jefferson Parish*, 466 U.S. at 45 (O'Connor, J., concurring); *Tampa Elec. Co.* v. *Nashville Coal Co.*, 365 U.S. 320, 334 (1961); *Standard Oil Co.* v. *United States*, 337 U.S. 293, 306-307 (1949); *U.S. Healthcare, Inc.* v. *Healthsource, Inc.*, 986 F.2d 589, 595 (1st Cir. 1993).

to exclude a supplier when, *in a particular case*, the agreement allegedly has solely anticompetitive effects. And the court stated that the *per se* rule applies to such agreements only after a detailed inquiry into effects and justification—the very sort of inquiry that, as this Court has explained, the *per se* rule is designed to avoid. See *Northwest Wholesale Stationers*, 472 U.S. at 289; *Continental T.V.*, 433 U.S. at 50 n.16.[12]

b. Although the court of appeals' use of the terms "group boycott" and "*per se*" is at odds with this Court's decisions, we do not believe, as petitioners and *amici* assert (Pet. 12-13; CEMA Br. 9-12; N.Y. Bar Br. 5), that the court's opinion threatens to undermine the analysis of vertical non-price restraints articulated in *Continental T.V.* and *Business Electronics Corporation* v. *Sharp Electronics Corp.*, 485 U.S. 717 (1988). The court of appeals declined to decide whether a *per se* analysis or a rule of reason analysis should be applied on remand to the scheme at issue here. See Pet. App. 13a n.6. And the court confirmed that the rule of reason continues to apply to most "two-firm vertical combinations." See *id.* at

[12] The court purported to derive its understanding of group boycotts from *Klor's*, although conceding that *Klor's* was not "directly on point." Pet. App. 11a. In fact, *Klor's* turned not on a case-specific assessment of anticompetitive effects and procompetitive justifications, but on a categorical evaluation of the defendants' conduct. See 359 U.S. at 212-213. Indeed, the Court rejected the argument that the defendants' conduct did not implicate the antitrust laws "because the victim is just one merchant whose business is so small that his destruction makes little difference to the economy." *Id.* at 213. Nor did *Klor's* involve solely a vertical agreement. It included horizontal agreements among suppliers not to deal with a customer. *Ibid.*; see also *Sharp*, 485 U.S. at 734 (describing *Klor's*).

12a ("*in general*, two-firm vertical combinations will be scrutinized as exclusive distributorship controversies," which "are generally considered permissible under the rule of reason" (citing *Sharp*, 485 U.S. at 725-731 & n.4)).

The court of appeals did not precisely delineate the analysis that the district court is to conduct on remand. The court did make clear, however, that petitioners' conduct could not be condemned, whether under rule of reason analysis or under its version of *per se* analysis, without an evaluation of its procompetitive justifications. See Pet. App. 12a (recognizing that petitioners would have an opportunity "to present some pro-competitive justification" for their conduct). Nor did the court suggest that Discon would not be required to prove on remand that petitioners' agreement to exclude it from the removal services market actually had anticompetitive effects. It is thus unclear whether the district court's inquiry on remand will differ significantly from traditional rule of reason analysis.

To the contrary, the approach suggested by the court of appeals here is consistent with that suggested by this Court's opinions in *Indiana Federation of Dentists*, *supra*, and *NCAA* v. *Board of Regents*, 468 U.S. 85 (1984). In those cases, the Court indicated that, once the defendants' conduct has been shown to be anticompetitive based on its character or its effects, the conduct will be deemed to be unreasonable without any extensive market analysis, unless the defendants advance an adequate procompetitive justification. See *Indiana Fed'n of Dentists*, 476 U.S. at 459-461; *NCAA*, 468 U.S. at 109-110 & n.42; see also Joel I. Klein, *Review of Horizontal Agreements—Procompetitive Effects*, 7 Trade Reg.

Rep. (CCH) ¶ 50,157 at 49,191 (Nov. 7, 1996) (noting that the Department of Justice uses such an approach to analyze certain types of horizontal restraints). Nothing in the court of appeals' opinion precludes the district court from employing such an approach here.

Accordingly, petitioner and *amici* err in asserting (Pet. 9-10; CEMA Br. 7-8; NY Bar Br. 5) that review is justified because the decision below conflicts with decisions of this Court and other courts of appeals. To be sure, the court of appeals' use of certain terminology differs from that of this Court and, arguably, of those courts of appeals that have required an agreement between competitors in order to invoke the "group boycott" label, see Pet. 9-10 & n.4 (collecting cases); CEMA Br. 7-8 & n.4 (same); see also *U.S. Healthcare, Inc.* v. *Healthsource, Inc.*, 986 F.2d 589, 594 (1st Cir. 1993).[13] The substance of the analysis that the court below suggested, however, does not conflict with this Court's precedents or those of other circuits.

3. The court of appeals' reinstatement of Discon's Section 2 claim likewise does not merit this Court's review. The court correctly held (Pet. App. 14a-15a) that a firm may be liable for conspiring to monopolize when it acts with the specific intent to secure for another firm, although not itself, monopoly power in the target market. See *Perington Wholesale, Inc.* v.

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[13] We say "arguably" because none of those decisions considered the type of conspiracy alleged in this case. Sherman Act "cases must be read in the light of their facts and of a clear recognition of the essential differences in the facts of those cases, and in the facts of any new case to which the rule of earlier decisions is to be applied." *Maple Flooring Mfrs. Ass'n* v. *United States*, 268 U.S. 563, 579 (1925).

Burger King Corp., 631 F.2d 1369, 1377 (10th Cir. 1979).

Petitioners contend (Pet. 14-15; Reply 3) that this holding conflicts with decisions of several courts of appeals finding permissible a buyer's selection of a particular supplier. The court of appeals, however, did not read the complaint to allege merely that petitioners' use of AT&T instead of Discon conferred a large market share on AT&T; rather, the court appeared to find allegations that petitioners intended to assist AT&T in securing monopoly power in the removal services market for the specific purpose of furthering the regulatory evasion scheme. None of the cases that petitioners cite (Pet. 15 & n.8) precludes finding a conspiracy to monopolize in such circumstances.[14] Although there is room to disagree with the court of appeals' reading of the complaint, that case-specific issue does not warrant review by this Court.

4. In any event, this case is not an appropriate vehicle, in its present posture, to clarify the law with respect to conspiracies to exclude competitors in order to evade regulation. The court of appeals de-

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[14] Compare *Great Escape, Inc.* v. *Union City Body Co.*, 791 F.2d 532, 540 (7th Cir. 1986) (supplier alleged merely to have acquired a large market share); *Dunn & Mavis, Inc.* v. *Nu-Car Driveaway, Inc.*, 691 F.2d 241, 244 (6th Cir. 1982) (no allegations of intent to create monopoly power in new supplier); *Walker* v. *U-Haul Co. of Miss.*, 747 F.2d 1011, 1015 (5th Cir. 1984) (same); *Seagood Trading Corp.* v. *Jerrico, Inc.*, 924 F.2d 1555, 1575 (11th Cir. 1991) (no proof that defendant joined alleged conspiracy); *White* v. *Rockingham Radiologists, Ltd.*, 820 F.2d 98, 104-105 (4th Cir. 1987) (no proof that hospital board, the only entity that could possess monopoly power, joined conspiracy).

cided the issue based only on Discon's "poorly drafted complaint" (Pet. App. 7a), before the parties had any opportunity to develop the facts bearing on either the Section 1 or the Section 2 claims.

Moreover, because the court of appeals reinstated the Section 1 claim on "a different legal theory than the one articulated by Discon" (Pet. App. 7a), petitioners did not raise below all of their arguments against such a theory, and the court thus did not address those arguments. For example, petitioners did not argue in the court of appeals, as they do now (Reply 4), that such schemes fail to cause the type of competitive harm that Section 1 condemns.[15] If the Court were to grant the petition to consider the application of Section 1 to exclusionary agreements in furtherance of regulatory evasion schemes, it would confront the question without the benefit of a developed factual record or lower court opinions, in this case or any other of which we are aware, squarely addressing petitioners' arguments. In our view, therefore, review at this stage would be premature.

Finally, as recognized by the court of appeals (Pet. App. 12a), the antitrust claim advanced in this case is unusual. We are therefore not persuaded that the court of appeals' decision is one of general significance. Indeed, courts may well restrict the decision below (as the Second Circuit itself appears to have done, see *Electronics Communications Corp.*, 129 F.3d at 244-245) to its particular factual context; *i.e.*, to cases in which a regulatory circumvention scheme or similar unconventional vertical arrangement has

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[15] See NYNEX C.A. Br. 19-20 (Dec. 11, 1995) (addressing Discon's rule of reason argument).

"manifestly anticompetitive" effects and, assertedly, no procompetitive justification.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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