No. 24-6366

IN THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MALHEUR FOREST FAIRNESS COALITION, PRAIRIE WOOD PRODUCTS, LLC, RUDE LOGGING, LLC, BRETT MORRIS, MORRIS FORESTRY, LLC, ENGLE CONTRACTING, LLC, DOUG and DARRELL EMMEL, d/b/a EMMEL BROTHERS RANCH, PAT and HEDY VOIGT, d/b/a RICCO RANCH,

Plaintiffs-Appellants,

v.

IRON TRIANGLE, LLC, I.T. LOGGING, INC., RUSSELL YOUNG, and OCHOCO LUMBER CO. d/b/a MALHEUR LUMBER CO.,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON (JUDGE MARCO A. HERNANDEZ)

BRIEF FOR THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

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STATEMENT OF INTEREST

The United States has primary responsibility for enforcing the federal antitrust laws and a strong interest in their correct application. The United States has a significant interest in ensuring that U.S. agencies receive the protections of the federal antitrust laws against anticompetitive conduct that leads to supra-competitive prices for products and services under government contracts or prices below the competitive level when the government acts as a seller.

The district court erred by holding in part that certain government contracting regulations bar any allegation of monopoly or monopsony power in two product markets alleged by Plaintiffs. The court's reasoning could also be read, within this context of government contracting, as impliedly repealing the antitrust laws, which would be incorrect. Plaintiffs' two claims are based on a "best-value" contract between the U.S. Forest Service and one of the Defendants. Because such "best-value" contracts are used widely throughout the federal government, the United States urges this Court to correct the district court's error, which could adversely affect antitrust enforcement beyond the instant case.

We file this amicus brief under Federal Rule of Appellate Procedure

29(a). We take no position on the merits of Plaintiffs' antitrust claims or on the truth of their factual allegations.

STATEMENT OF ISSUES PRESENTED

Whether the district court erroneously held that certain government contracting regulations bar any allegation of monopoly or monopsony power in two alleged markets.

STATEMENT

1. In 2013, the U.S. Forest Service awarded Defendant Iron Triangle a 10-year, $69 million stewardship contract for the Malheur National Forest in eastern Oregon. First Amended Complaint ("FAC") ¶¶ 3-4 (ER-99).[1] The contract also provided Iron Triangle with a right of first refusal to purchase timber harvest rights on 70% of the federal timber available for sale from the Forest. *See id*. ¶ 35 (ER-109). The contract was a "best-value" type contract, for which the government agency considers both price and non-price factors such as past performance, work quality, experience, and benefits to the local community in determining which bid offers the best overall value to the government. *See* 36 C.F.R. § 223.302

[1] The facts set forth herein are taken from the allegations of the FAC, which is the operative complaint for purposes of this brief.

("Section 604(d) of HFRA requires that a source for performance of a stewardship agreement or contract be selected on a best-value basis.").

The FAC alleged that Iron Triangle "has successfully exploited the Forest Service's government grant of market power through the 10-year stewardship contract to weaken and exclude its rivals while consolidating federal resources intended to create economic development opportunities for the broader community in its own coffers." FAC ¶ 13 (ER-103). More specifically, Plaintiffs alleged that Iron Triangle used the stewardship contract as part of a scheme to achieve monopoly and monopsony positions, in violation of Section 2 of the Sherman Act, 15 U.S.C. § 2, in four product markets. *Id.* ¶¶ 1-2 (ER-98-99).[2]

This brief addresses two of those alleged markets. First, the FAC alleged that Iron Triangle, because of its contract with the Forest Service, is a monopoly seller in the market for stewardship services such as precommercial thinning, road maintenance, and fire risk reduction projects in the Forest (the "Stewardship Services Market"). FAC ¶¶ 2, 29-30 (ER-98, 108). The FAC alleged that in this market, Iron Triangle made false

[2] A monopsony is a monopoly on the buying side of the market. *See Weyerhaeuser Co. v Ross-Simmons Hardwood Lumber Co.*, 549 U.S. 312, 320 (2007).

representations to the Forest Service and to the office of U.S. Senator Ron Wyden that caused the Forest Service to "approve[] forest stewardship service contract rates and/or subsidies to Iron Triangle at monopoly or supra-competitive rates[.]" *Id*. ¶ 45 (ER-112). The Forest Service therefore allegedly unknowingly paid supra-competitive prices under the contract.

Second, the FAC alleged that Iron Triangle is a monopsony buyer in the market for timber harvest rights from public and private forestland owners (the "Harvest Rights Market"). FAC ¶¶ 2, 34-36 (ER-98, 109-10). It alleged that Iron Triangle, "[a]rmed with the inflow of monopoly profits paid by the Forest Service for forest stewardship services," proceeded to "consolidate its monopsony position in the market for timber harvest rights by engaging in predatory bidding practices, outbidding competing loggers for over 90% of the volume in open market timber sales comprising the remaining 30% of the annual timber harvest" offered by the Forest from 2016-21. *Id*. ¶ 48 (ER-113-14). Iron Triangle's bids were "predatory," Plaintiffs alleged, "in that Iron Triangle bid at a level that it knew no possible competitor would match or exceed and which imposed a loss on Iron Triangle[.]" *Id*. ¶¶ 50-51 (ER-114-15).

The FAC further alleged that Defendant and alleged co-conspirator Malheur Lumber Co. assisted Iron Triangle by using its "artificially low

prices" to influence the Forest Service's appraisals of timber. The Forest Service uses the appraised value to determine "fair market value" and therefore the prices at which it will sell timber. *See* 36 C.F.R. § 223.60. Because of Defendants' alleged manipulation, the Forest Service's appraisals "understate the true value of the timber to the benefit of Iron Triangle." FAC ¶ 56 (ER-118). The Forest Service therefore allegedly unknowingly sold timber to Defendants at below-competitive prices.

2. Defendants moved to dismiss. The district court granted that motion and dismissed the Section 2 claims relating to the Stewardship Services Market and the Harvest Rights Market. Opinion & Order, ECF No. 63, 699 F. Supp. 3d (D. Or. 2023) (cited here as "Op."). With respect to the Stewardship Services Market, the court reasoned that, as a matter of law, a federal contractor cannot charge, and the government cannot accept, a supra-competitive price. The court first cited two cases for the proposition that "a private entity who wins a competitive government contract holds no monopoly power because the entity cannot control prices or exclude other bidders" and the government "can simply walk away from the transaction." Op. 15-16 (ER-68-69) (citing *Nat'l Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020, 1024 (8th Cir. 1985) and *GMA Cover Corp. v. Saab*

Barracuda LLC, No. 10-CV-12060, 2012 WL 642739, at *7 (E.D. Mich. Feb. 8, 2012), *report and recommendation adopted*, 2012 WL 639528 (E.D. Mich. Feb. 28, 2012)). Iron Triangle therefore lacks the power to charge the government a supra-competitive price. The court then stated, "[t]hat is particularly true here, where the U.S. Forest Service is bound by regulation not to pay an unreasonable price, precluding Iron Triangle from charging a supra-competitive price. *See* 36 C.F.R. § 223.302." *Id*. at 16 (ER-69).

With respect to the Harvest Rights Market, the court reasoned that "Plaintiffs face the same issue in pleading monopsony power in the Harvest Rights Market as they do with pleading monopoly power in the Stewardship Services Market," with the only difference that "[t]he situation here is the inverse of that of the Stewardship Services Market in that here the federal government is a monopoly seller and Defendant is an alleged monopsony buyer." Op. 17 (ER-70). But the government could still "walk away from the transaction," and "just as the federal government is required not to accept not[sic] to pay an unreasonable price for stewardship services, it cannot sell timber below appraised value or minimum stumpage rates. *See* 36 C.F.R. § 223.61." Op. 17-18 (ER-70-71).

The court further held that in both markets, Plaintiffs cannot plead monopoly or monopsony power "because Defendant cannot exclude others from bidding on the renewal of the stewardship services contract." Op. 16 (ER-69).

The court dismissed the Section 2 claims with prejudice on the ground that "the U.S. Forest Service is precluded from being charged supra-competitive prices or selling timber below appraised value or minimum stumpage rates," and therefore "Defendant lacks the power to control prices or preclude other bidders." Op. 40 (ER-93). Because the court found that "[t]hese deficiencies cannot be cured and amendment would therefore be futile," it dismissed the claims with prejudice. *Id*. Although Plaintiffs amended other claims, the court ultimately dismissed those claims with prejudice too. Opinion & Order, ECF No. 82, 2024 WL 4253221 (Sept. 19, 2024). This appeal followed.

SUMMARY OF ARGUMENT

The fact that a regulatory framework governs conduct in an area generally does not prevent the application of the antitrust laws or drive the relevant antitrust analyses. *See Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156, 161-62 (1922). Here, the district court erroneously held that certain government contracting regulations barred any allegation of monopoly or

monopsony power in two product markets alleged by Plaintiffs.

Neither of the government contracting regulations cited by the district court support its conclusions that a contractor cannot charge the government a supra-competitive price for services or pay the government a below-competitive price for timber. The first provision, 36 C.F.R. § 223.302, provides for the method of contracting on a best-value basis but says nothing specific about price. The other cited provision, 36 C.F.R. § 223.61, under the circumstances of this case, also does not prevent Defendants from exercising power over the prices at which the Forest Service sells timber, resulting in sales to Iron Triangle at allegedly below-competitive prices. The district court also asserted that the government is restricted to paying prices that are "reasonable," but no regulation says that a supra-competitive price cannot be considered reasonable in a particular case, nor does any regulation prevent the government from paying a supra-competitive price unknowingly.

The district court was incorrect that Defendants necessarily lacked monopoly power because Defendants cannot exclude others from bidding on the renewal of the stewardship services contract. Under *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966), "monopoly power" is defined disjunctively as "the power to control prices *or* exclude competition"

(emphasis added). And defendants are not barred by regulation from having the power to control prices in the two markets. Thus, having alleged that Defendants had the power to control prices, Plaintiffs were not required *also* to allege that Defendants could exclude competitors from bidding on the renewal of the stewardship contract.

ARGUMENT

The District Court Erred in Holding That Government Contracting Regulations Bar Allegations That a Defendant Has the Power to Control Prices.

The district court held in part that "the U.S. Forest Service is bound by regulation not to pay an unreasonable price, precluding Iron Triangle from charging a supra-competitive price," Op. 16 (ER-69), and that the Forest Service "is precluded [by regulation] from being charged supra-competitive prices or selling timber below appraised value or minimum stumpage rates," Op. 40 (ER-93). The court thus held that Iron Triangle could not have monopoly or monopsony power and that Plaintiffs' claims based on the Stewardship Services Market and Harvest Rights Market therefore failed as a matter of law. But the regulations that the court cited do not support that conclusion, and the cases that the court cited do not fit

the circumstances that Plaintiffs alleged here.[3]

A. Government Contracting Regulations Cannot and Do Not Preclude Plaintiffs' Challenge to the Alleged Anticompetitive Conduct Here.

As a general matter, that there are federal regulations in place that govern private party conduct does not mean that anticompetitive conduct cannot occur or that the antitrust laws cannot provide a remedy. For example, in *Keogh v. Chicago & N.W.R. Co.*, 260 U.S. 156, 161-62 (1922), the railroad rates at issue had been found reasonable and non-discriminatory by the Interstate Commerce Commission. But the rates nevertheless had been "fixed" by a conspiracy, and the government therefore could challenge them as an antitrust violation. In *United States v. Philadelphia National Bank*, 374 U.S. 321, 350-52 (1963), the bank regulatory agencies could take action against "unsound [banking] practices," but that did not prevent a proposed bank merger from violating the

[3] Because Plaintiffs addressed the issue of federal regulation below, Pls. Consol. Resp. to Defs. Mots. to Dismiss, ECF No. 45, at 29-32, this appeal is not limited to precisely the same arguments on that issue. "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *accord United States v. Pallares-Galan*, 359 F.3d 1088, 1095 (9th Cir. 2004) ("As the Supreme Court has made clear, it is claims that are deemed waived or forfeited, not arguments.").

antitrust laws or prevent the government from challenging the merger. Similarly, in *United States v. United States Sugar Corp.*, 73 F.4th 197, 208 (3d Cir. 2023), the Department of Agriculture had the ability to increase the amount of sugar imported into the U.S. to maintain "reasonable" sugar prices. But that power did not create "immunity from antitrust" or prevent the government from challenging the proposed acquisition as anticompetitive.

The government contracting regulations cited by the district court do not completely protect the federal government against a contractor's attempt to charge supra-competitive prices in stewardship contracts or pay below-competitive prices in timber-sale contracts. 36 C.F.R. § 223.302, cited twice by the district court, does not bar a supra-competitive price; it says only that a statute applicable to national forests "requires that a source for performance of a stewardship agreement or contract be selected on a best-value basis," and says nothing specific about what the price must be.

For stewardship contracts that are subject to the Federal Acquisition Regulation (FAR), *see* 36 C.F.R. § 223.300(b)(1), the district court noted correctly that regulation restricts the government to paying prices that are "reasonable." *See* 48 C.F.R. § 15.402(a). But that regulation does not

prevent a contractor from charging a supra-competitive price. For example, one of the "preferred" price analysis techniques that contracting officers may use to determine that a price is reasonable is "[c]omparison of the proposed prices to historical prices paid, whether by the Government or other than the Government, for the same or similar items." 48 C.F.R. § 15.404-1(b)(2)(ii), (b)(3). If a particular government contractor has used monopoly power to charge supra-competitive rates in the recent past, then its proposed prices for a government contract may be both reasonable under 48 C.F.R. § 15.404-1(b)(2)(ii) and supra-competitive. Nor does 48 C.F.R. § 15.402(a) say that a supra-competitive price cannot be considered reasonable in a particular case; "what exactly is 'reasonable' is a judgment based on the specifics of the government's needs." *DynCorp Int'l, LLC v. United States*, 10 F.4th 1300, 1308 (Fed. Cir. 2021), which may include an analysis of factors other than price. *See id.* at 1316.

Finally, the district court cited 36 C.F.R. § 223.61, which requires the Forest Service to sell timber at the higher of appraised value or minimum stumpage rates. Under the particular circumstances of this case, however, this regulation does not prevent Defendants from having the power to control price in the Harvest Rights Market. The FAC alleged that when the

Forest Service appraises the relevant timber, "that timber is appraised based upon sale to a manufacturer in John Day [Oregon], specifically Malheur Lumber Co." FAC ¶ 56 (ER-118); ¶ 8 (Forest Service "considers Malheur Lumber's published log prices in appraising the value of its stewardship-based timber sales") (ER-100-01). As the dominant local sawmill, Defendant and alleged co-conspirator Malheur Lumber therefore has the power to influence the appraised value, and Malheur Lumber allegedly did so by using its "artificially low [quoted] prices" to bias downward the appraised value. FAC ¶ 56.[4] Defendants thereby allegedly exercised power over the price-determinant factors allowed within the regulation, so that when the Forest Service sold timber to Iron Triangle at prices determined by the appraised value, consistent with the regulation, the Forest Service accepted allegedly below-competitive prices without knowing that it was doing so. *Cf. Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1292-98 (5th Cir. 1971) (state agency's production allowable order for natural gas did not bar antitrust

[4] As discussed above, we take no position on the truth of Plaintiffs' factual allegations.

claims because order was based on false data submitted by defendants).[5]

B. Government Contracting Regulations Do Not Prevent Suppliers from Having Monopoly or Monopsony Power.

The Supreme Court has made clear that regulatory schemes that allow businesses to set prices within a "zone of reasonableness" still leave an important role for competition. *Georgia v. Pa. R. Co.*, 324 U.S. 439, 460-61 (1945). For example, in that case, the regulatory scheme allowed railroads to propose a range of rates subject to review by the Interstate Commerce Commission, but the Court explained that the regulatory scheme did not prevent railroads from conspiring to fix rates at the highest level within the zone of reasonableness, which could create "[a] monopoly power." *Id*. at 459. Application of the antitrust laws therefore was appropriate.[6]

The FAR and the Forest Service regulations at issue in this case

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[5] With respect to stumpage rates, the FAC alleged that Defendants "dr[ove] down" those rates in the same way that other defendants had acted with respect to Forest Service contracting in the Tongass National Forest in Alaska. FAC ¶ 73 (ER-124-25). The district court struck the section of the FAC containing that allegation. The court noted, however, that the stricken allegations "may be relevant to this Court in deciding motions that come before it," Op. 41 (ER-94). The court could have, but did not, consider this particular allegation in ruling on the Harvest Rights Market.

[6] Even a regulatory scheme that strictly regulated price could leave room for important competition on non-price factors and thus not displace the antitrust laws.

contain an analogous scheme. The FAR does not prevent a government contractor from being a monopolist or monopsonist, and while it does limit the government to paying reasonable prices, the FAR accords significant discretion to contracting officers in determining a price's reasonableness. Contracting officers are "entitled to exercise discretion upon a broad range of issues confronting them in the procurement process." *Impresa Construzioni Geom. Domenico Garufi v. United States*, 238 F.3d 1324, 1332 (Fed. Cir. 2001) (quoting *Latecoere Int'l, Inc. v. United States Dep't of Navy*, 19 F.3d 1342, 1356 (11th Cir. 1994)). "[P]roposal price-reasonableness analysis . . . sits comfortably" within that "discretionary background." *DynCorp Int'l*, 10 F.4th at 1311; *see also Latecoere Int'l*, 19 F.3d at 1356 (contracting officers are entitled to exercise discretion on "considerations of price"). That discretion is even broader "when, as here, the contract is to be awarded to the bidder or bidders that will provide the agency with the best value." *Banknote Corp. of Am. v. United States*, 365 F.3d 1345, 1355 (Fed. Cir. 2004) ("a great deal of discretion"); *accord, e.g.*, *PlanetSpace Inc. v. United States*, 96 Fed. Cl. 119, 125 (2010) ("Greater yet is the procurement official's discretion when selecting a contract-awardee on the basis of a best value determination rather than price alone.").

There are reasons why contracting officers might accept rates above a competitive level. A lack of competition may make it difficult for the contracting officer to find other rates to which to compare a monopolist's proposed rates. Or the monopolist's past supra-competitive prices may be the baseline to which the contracting officer compares the offeror's proposed rates. Moreover—especially because contracting officers do not have the tools of antitrust enforcement agencies to investigate and uncover anticompetitive activity—a contracting officer may be unaware of anticompetitive activity that has affected price offers. The FAR recognizes that "[p]ractices that eliminate competition or restrain trade usually lead to excessive prices." 48 C.F.R. § 3.301(a).

C. The District Court's Additional Reasoning On the Power to Control Price Is Flawed.

The district court also relied on two out-of-circuit cases for the proposition that a federal contractor lacks the power to control price. But those cases are inapposite. In *National Reporting Co. v. Alderson Reporting Co.*, 763 F.2d 1020 (8th Cir. 1985), the defendant allegedly made a predatory, below-cost bid, and the court reasoned that the defendant would not be able to recoup its losses by raising its prices in the future. The crux of the court's reasoning was that recoupment would not be feasible because

the *one-year* contract provided that if the contractor wanted to raise its price then the contract immediately was put out for re-bidding. *See id*. at 1023-24. That bears no relationship to this case, where the stewardship contract was for 10 years and was not subject to any immediate re-bidding.

GMA Cover Corp. v. Saab Barracuda LLC, No. 10-cv-12060, 2012 WL 642739 (E.D. Mich. Feb. 8, 2012), *report and recommendation adopted*, No. 10-cv-12060, 2012 WL 639528 (E.D. Mich. Feb. 28, 2012), also does not support the district court's decision. The district court cited the passage from *GMA Cover Corp.* that reasoned that a government contract is a "bilateral monopoly—a monopoly supplier dealing with a monopsony purchaser" and that "[i]n such a situation, neither the monopoly supplier nor the monopsony purchaser can exercise monopoly power to set prices, because the other party can simply walk away from the transaction." 2012 WL 642739 at *7. As an initial matter, a bilateral monopoly is by definition a situation where there are monopolists on both sides of a transaction, so it makes little sense to say there can be no monopoly in that situation. The *GMA Cover Corp.* opinion itself also recognized that prices in a bilateral monopoly do not necessarily settle at competitive market levels, which implies that one side can have some power to control price. Although a

bilateral monopoly price generally is below monopoly levels, "generally it is above the perfectly competitive equilibrium price." *Id*.

Moreover, although the government may be *able* to "walk away" from a transaction based on a supra-competitive or below-competitive price, that does not mean that the government likely would do so, or would do so without cost, in every case.[7]

In any event, the "walk away" reasoning is inapplicable to this case. The government will walk away from a supra-competitive price (as a buyer) or below-competitive price (as a seller) only if it suspects that the bid price is in fact supra-competitive or below-competitive. But the FAC alleged that Iron Triangle engaged in "a pattern and practice of false representations

[7] The court in *GMA Cover Corp.* reasoned that the defendant would not be able to recoup its losses from predatory pricing by charging supra-competitive prices in the future. But the grounds given for the defendant's inability to do so, other than those discussed in the text above, do not apply here. The contract there was subject to a "ceiling price," and that ceiling price was not alleged to have been supra-competitive. 2012 WL 642739 at *8. Here, neither party nor the district court suggested that there was an applicable ceiling price. *GMA Cover Corp*. also reasoned that the Army had regulatory tools to protect itself from monopoly prices, but most of the FAR sections it cited allow the contracting officer to determine whether a below-cost bidder is a "responsible source." *Id*. Here, the Forest Service allegedly *paid* the supra-competitive prices charged by Iron Triangle and therefore did not use its regulatory tools, nor did the Forest Service find Iron Triangle not to be a responsible source.

regarding its financial performance" to the Forest Service and the office of Senator Wyden, and that "as a result" the Forest Service approved "forest stewardship service contract rates and/or subsidies to Iron Triangle at monopoly or supra-competitive rates." FAC ¶ 45 (ER-112).[8] The FAC alleged in ¶¶ 8 and 56 (ER-100-01, 118) that Iron Triangle and co-conspirator Malheur Lumber used Malheur Lumber's artificially low published log prices to bias downward the Forest Service's appraisals of timber, so that when Iron Triangle purchased timber from the Forest Service the prices actually were below-competitive. Thus, under the alleged facts the Forest Service was deceived and did not know the true nature of the prices that it paid or received; it therefore had no reason to "walk away."

D. The Definition of Monopoly Power Does Not Require a Plaintiff to Allege Both the Power to Control Prices and the Power to Exclude Competition.

The district court held that Plaintiffs' Section 2 claims based on the Stewardship Services Market and Harvest Rights Market also failed

[8] The district court held that the FAC's allegations of Iron Triangle's misrepresentations in the Stewardship Services Market did not establish a plausible claim of fraud as an act of anticompetitive conduct. *See* Op. 22-23 (ER-75-76). But those allegations, and the FAC as a whole, do support a reasonable inference that the Forest Service *unknowingly* paid allegedly supra-competitive rates.

because Iron Triangle "cannot exclude others from bidding on the renewal" of the stewardship contract. Op. 16 (ER-69); *see* Op. 18 (Iron Triangle "cannot preclude other buyers from bidding on harvest rights") (ER-71). But a plaintiff need not allege both the power to control prices *and* the power to exclude competition. The Supreme Court has made clear that "monopoly power" is defined disjunctively, meaning "the power to control prices *or* exclude competition." *United States v. Grinnell Corp.*, 384 U.S. 563, 571 (1966) (quoting *United States v. E. I. du Pont de Nemours & Co.*, 351 U.S. 377, 391 (1956)) (emphasis added); *accord*, *e.g.*, *Greyhound Computer Corp. v. Int'l Bus. Machines Corp.*, 559 F.2d 488, 496 (9th Cir. 1977) ("Monopoly power is the power to control prices or exclude competition.") (quoting *du Pont*, 351 U.S. at 391). Accordingly, to the extent the FAC sufficiently alleged Iron Triangle's power to control prices in each market, the FAC did not also have to allege the power to exclude competition.[9]

[9] To the extent that the district court's analysis can be read as holding that government contracting regulations impliedly repeal the antitrust laws, it would be incorrect. Because the federal antitrust laws embody the fundamental national policy in favor of competition, repeals of the antitrust laws by implication from a regulatory system "are strongly disfavored, and have only been found in cases of plain repugnancy between the antitrust and regulatory provisions," *Phila. Nat'l Bank*, 374 U.S. at 350-51 (citations

CONCLUSION

The Court should hold that the district court erred in its analysis of monopoly power with respect to the Stewardship Services Market and Harvest Rights Market.

Respectfully submitted.

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Policy Director

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omitted), which does not exist here. Moreover, an "antitrust-specific savings clause" will "bar[] a finding of implied immunity," *Verizon Commc'ns Inc. v. Law Offices of Curtis V. Trinko, LLP*, 540 U.S. 398, 406 (2004), and the applicable regulations have multiple provisions that expressly *preserve* a role for the antitrust laws in the contract bidding process. *See, e.g.*, 48 C.F.R. § 3.303; 48 C.F.R. § 3.301(b); 48 C.F.R. §§ 9.406-2(a)(2), 9.407-2(a)(2); 48 C.F.R. § 9.604; 48 C.F.R. § 52.203-2. *Cf. Northrop Corp. v. McDonnell Douglas Corp.*, 705 F.2d 1030, 1056 (9th Cir. 1983) (analyzing similar regulations and finding that, "[t]o the extent, if any, that the district court's decision can be viewed as a determination that Congress intended to confer blanket antitrust immunity on private conduct in the military aircraft industry by virtue of its extensive regulation of that industry, the decision is in error").

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January 16, 2025

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

FORM 8. CERTIFICATE OF COMPLIANCE FOR BRIEFS

9th Cir. Case Number(s): 24-6366

I am the attorney or self-represented party.

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