No. 17-1092

In the Supreme Court of the United States

AFMS LLC,

Petitioner,

v.

UNITED PARCEL SERVICE, INC.; FEDEX CORPORATION,

Respondents.

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

BRIEF OF *AMICI CURIAE* ANTITRUST LAW PROFESSORS IN SUPPORT OF PETITION FOR CERTIORARI

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

ADMINISTRATIVE AND EXECUTIVE MATERIALS

OTHER AUTHORITIES

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INTEREST OF *AMICI CURIAE*[1]

Amici curiae are law professors who specialize in antitrust law and have all previously published on or have a professional interest in group boycotts. Amici have no personal stake in the outcome of the case, but share an interest in seeing that antitrust law develops in a way that protects consumers and competition as a whole.

SUMMARY OF ARGUMENT

This case presents two often-litigated questions in antitrust: treatment of group boycotts, and the necessity or lack thereof of full market analysis. Both questions are causing lower court confusion, and thus undermining antitrust law enforcement.

The petitioner in this case, AFMS, alleges a horizontal group boycott under Section 1 of the Sherman Act, 15 U.S.C. § 1. This Court has limited the scope of antitrust claims to which *per se* analysis applies, and has applied different levels of review to

[1] Pursuant to Supreme Court Rule 37.6, *amici curiae* affirm that no counsel for a party authored this brief in whole or in part; that no counsel or party made a monetary contribution to the preparation or submission of this brief and no person other than *amici*, their members, or their counsels made a monetary contribution to its preparation or submission; that this brief is filed earlier than 10 days before the due date; and that all parties have consented in writing to the filing of this brief.

vertical group boycotts and those involving ancillary agreements, but naked horizontal group boycotts remain subject to *per se* treatment. However, the Ninth Circuit's decision below creates a new carveout from *per se* treatment, limiting its application to competitors' boycotts of suppliers or customers. This variance risks further confusion in an already nuanced area of antitrust jurisprudence, and requires this Court's guidance to remedy.

The decision below also would require a full market analysis for any naked, horizontal group boycott. This requirement will only exacerbate existing circuit splits regarding the scope and application of the Direct Effects test. Again, this Court's guidance is required to remedy the confusion.

INTRODUCTION

The shipping industry is made up of different carriers serving the needs of customers. Customers may choose to deal directly with a carrier or utilize the services of a facilitator. As the industry becomes more complex, customers increasingly turn to facilitators to help find the best, most cost-effective services to meet their specific shipping needs.

Respondents UPS and FedEx are carriers, who provide shipping services to customers. Petitioner AFMS is a facilitator. Facilitators provide shipping consulting services to customers, such as negotiating shipping costs with carriers. A facilitator's purpose is to increase competition between carriers, resulting in the optimal type and quality of services—at the

lowest prices—for the consumer. The carriers increase their profits by selling more services at a higher rate. The facilitators earn profits by obtaining the lowest prices for customers. Facilitators and carriers compete for the supply of customers. Respondents' refusal to work with Petitioner, other similar facilitators, and customers represented by facilitators, restricted the supply of customers for facilitators.

From Respondents' perspective, the boycott was successful. It ensured the two carriers could avoid price competition. The boycott forced many facilitators out of business and raised prices for consumers. The boycott denied shipping customers alternative cost-saving services and stifled choice—further benefiting Respondents FedEx and UPS.

In antitrust law, such concerted refusal to deal constitutes a naked, horizontal agreement between competitors. "In its pure form the only apparent reason [for a group boycott] is that participants would like to be spared unwelcome competition." L. SULLIVAN, W. GRIMES & C. SAGERS, THE *LAW OF ANTITRUST: AN INTEGRATED HANDBOOK* § 5.8B, AT 287 (3D ED. 2016). Consequently, group boycotts have long been condemned as a violation of Section 1 of the Sherman Act. *See, e.g., Montague & Co. v. Lowry*, 193 U.S. 38, 48 (1904); *Fashion Originators' Guild, Inc. v. FTC*, 312 U.S. 457, 464-65 (1941).

The district court nevertheless granted Respondents' motion for summary judgment. In so

doing, the trial court did not analyze Petitioners' evidence of an agreement between FedEx and UPS, nor the proffered evidence of anticompetitive effects. App. 27. Rather, the district court presumed a full-fledged market analysis was necessary and held as a matter of law that Petitioner had not sufficiently established a relevant market. App. 35.

On appeal, the Court of Appeals for the Ninth Circuit affirmed the district court's decision in a splintered decision with three opinions. The majority stated that "summary judgment in an antitrust case is appropriate where the plaintiff fails to define a cognizable market." App. 2. Rather than recognizing the inherent risks of such restraints on trade, the Ninth Circuit's decision waters down enforcement of such restraints. Supreme Court review is necessary to correct this result. If left to stand, the Ninth Circuit's decision will encourage other industries reliant on analogous facilitating agents to adopt similar tactics, to the detriment of consumer welfare.

At the same time, this case also provides a much-needed opportunity for the Supreme Court to reinforce that a full market analysis is unnecessary in such cases. Such clarification will save litigation costs and provides guidance to lower courts, businesses, and practitioners.

ARGUMENT

I. Review Is Warranted To Clarify That Naked Horizontal Group Boycotts Are Subject To *Per Se* Treatment.

A horizontal group boycott exists when two competitors at the same market level agree to restrain competition. *See FTC v. Superior Court Trial Lawyers Ass'n*, 493 U.S. 411, 412 (1990) (treating boycott agreement between competitors as horizontal). Respondents UPS and FedEx are such competitors; they compete to provide customers shipping services. *AFMS L.L.C. v. UPS*, 105 F. Supp. 3d 1061, 1071 (C.D. Cal. 2015). These two competitors agreed to refuse to deal with AFMS, and with any customer that utilized AFMS's services. App. 31-33. Indeed, FedEx and UPS both attempted to coerce and prevent customers from working with such facilitators, and refused services to any current customer represented by a facilitator. App. 31-34, 40. FedEx and UPS also imposed a severe penalty, in the form of a liquidated damages clause, to restrict customers' ability to share any of their shipping information with AFMS or any other facilitator. App. 34.

The terms of the agreement between UPS and FedEx ensured that they could minimize price competition. By boycotting facilitators and customers reliant upon them, UPS and FedEx could protect their self-described "duopoly." App. 35. Petitioner offered evidence that the joint efforts by UPS and FedEx disadvantaged customers and

coerced them into directly denying any relationship with AFMS. App. 32-33. Many facilitators went out of business due to lack of customers, as UPS and FedEx cut off their supply of customers. App at 12. This allowed UPS and FedEx to increase profits by raising shipping prices. App. 12.

Unlawful restraints of this nature, "because of their pernicious effect on competition and lack of any redeeming virtue[,] are conclusively presumed to be unreasonable and therefore illegal without elaborate inquiry as to the precise harm they have caused or the business excuse for their use." *N. Pac. Ry. Co. v. United States*, 356 U.S. 1, 5 (1958). A horizontal group boycott risks competitors acting as private market regulators, at a cost to competition. *See, e.g.*, *Fashion Originators' Guild*, 312 U.S. at 465 ("[T]he combination is in reality an extra-governmental agency, which prescribes rules for the regulation and restraint of interstate commerce, and provides extra-judicial tribunals for determination and punishment of violations, and thus 'trenches upon the power of the national legislature and violates the statute.'"). Because of this danger the Supreme Court has repeatedly afforded such restraints *per se* treatment. *See, e.g., id.* at 468; *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656, 659 (1961); *Klor's v. Broadway-Hale Stores*, 359 U.S. 207, 212 (1959).

Over the last several decades this Court has shifted from *per se* treatment to rule of reason treatment for certain types of group boycotts, most

notably *vertical* restraints that do not directly limit competition. *See, e.g., Bus. Elecs. Corp. v. Sharp Elecs. Corp.*, 485 U.S. 717, 739 (1988) (applying rule of reason to vertical group boycott). The Court has also applied rule of reason analysis to *ancillary horizontal* restraints, particularly those involving trade associations, professional leagues, and joint ventures. *See, e.g., Nat'l Coll. Athletic Ass'n v. Bd. of Regents*, 468 U.S. 85, 101 (1984) (rejecting *per se* treatment for some horizontal group boycotts by professional and other sporting organizations because cooperation is required for product to be available); *Nw. Wholesale Stationers, Inc. v. Pac. Stationery & Printing Co.,* 472 U.S. 284, 291 (1985) (applying rule of reason to ancillary horizontal agreement by members of cooperative buying association).

However, the Court's most recent group boycott decision affirmed that *per se* treatment remains proper for naked horizontal group boycotts. In *NYNEX Corporation v. Discon, Inc.*, this Court applied rule of reason analysis to a unilateral decision of a single buyer to purchase from a competitor rather than a supplier. 525 U.S. 128, 138 (1998). The Court reinforced that *per se* precedent continues to apply to horizontal group boycotts. *Id.* at 135 ("precedent limits the *per se* rule in the boycott context to cases involving horizontal agreements among direct competitors.").

Lower courts have adopted contrary approaches to analyzing group boycotts. Some

circuits have stuck closely to the Court's guidance. *See, e.g.*, *Westman Com. Co. v. Hobart Int'l, Inc.*, 796 F.2d 1216, 1224 n.1 (10th Cir. 1986) ("In this circuit, to establish that a group boycott is *per se* illegal there must be an agreement among conspirators whose market positions are horizontal to each other."), *cert. denied,* 486 U.S. 1005 (1988); *Com-Tel, Inc. v. DuKane Corp.*, 669 F.2d 404, 409 (6th Cir. 1982) ("although the coercive pressure in this situation was applied vertically, we conclude that the stifling of competition in this instance was predominantly horizontal, warranting application of the per se rule of illegality as a group boycott").

Other circuits have limited *per se* treatment to those naked horizontal group boycotts that restrict customers and suppliers, rather than competitors. *Compare, e.g., Big Bear Lodging Ass'n v. Snow Summit, Inc.*, 182 F.3d 1096, 1102 (9th Cir. 1999) (limiting *per se* to horizontal boycotts restricting "purchasers" rather than "competitors"); *Tunica Web Advert. v. Tunica Casino Operators Ass'n*, 496 F.3d 403 (5th Cir. 2007) (*per se* rule does not apply when victim is direct competitor of one boycotting conspirator); *with, e.g.*, *Key Fin. Planning Corp. v. ITT Life Ins. Corp.*, 828 F.2d 635, 641 (10th Cir. 1987) ("While the competitors need not be at the same market level as the plaintiff, there must be concerted activity between two or more competitors at same market level."); *see also Coffey v. Healthtrust, Inc.*, 955 F.2d 1388, 1392 (10th Cir. 1992) (same).

Courts and scholars have long lamented the confused state of the law regarding group boycotts. *See, e.g.*, *Nw. Wholesale Stationers*, 472 U.S. at 294 (quoting L. Sullivan, *Law of Antitrust* 229-30 (1977) ("[T]here is more confusion about the scope and operation of the *per se* rule against group boycotts than in reference to any other aspect of the *per se* doctrine.")); *Bogan v. Hodgkins*, 166 F.3d 509 (2d Cir. 1999) ("The scope of the *per se* rule against group boycotts is a recognized source of confusion in antitrust law."); *Flying J Inc. v. TA Operating Corp.*, 2008-2 Trade Cas. (CCH) ¶ 76396, 2008 WL 4923041 (D. Utah 2008) (*per se* rule might apply where boycotting parties are competitors); *Bennett v. Cardinal Health Marmac Distribs., Inc.*, 2003-2 Trade Cas. (CCH) ¶ 74137, 2003 WL 21738604, at *4 (E.D.N.Y. 2003) ("The precise circumstances under which the *per se* rule is applied to group boycotts is a recognized source of confusion in antitrust law."). The Ninth Circuit's decision would create yet another unclear carveout for the *per se* rule, further complicating antitrust enforcement and deepening the circuit split.

The Ninth Circuit opinion limits *per se* treatment to horizontal boycotts that directly impact customers and suppliers. App. 48. Petitioner and other facilitators are not carriers like UPS and FedEx: facilitators are not strictly speaking suppliers, nor customers. For this reason, the district court assumed only rule of reason could apply—even though customers were indirectly impacted by the restraint. *Id.* By affirming the

district court's decision, the Ninth Circuit reinforced this new limitation on *per se* prohibition of naked horizontal group boycotts.

In effect, the lower court's decision allows horizontal (competing) carriers to eliminate an entity from the market by mutual agreement, thereby limiting the customer's choice in shipping negotiations. If Respondents' pricing and services were already competitive, there would be no market for facilitators. These facilitators were thus assisting shippers to negotiate lower prices. By eliminating facilitators, Respondents have distorted competition. But as this Court has stated, firms are "not entitled to pre-empt the working of the market by deciding… [that their] customers do not need that which they demand." *FTC v. Indiana Fed'n of Dentists*, 476 U.S. 447, 462 (1986).

In effect, the Ninth Circuit's decision risks limiting the "free opportunity to select"—and thereby restricting the "free market"—by eliminating the ability to bargain in the market of shipping services. *Cf. Nat'l Soc. of Prof'l Eng'rs v. United States*, 435 U.S. 679, 695 (1978). By ignoring the undisputed anticompetitive effects, and instead foreclosing *per se* treatment, the decision undermines competition. This result is contrary to a functioning competitive market. As the Supreme Court previously stated: "[t]he assumption that competition is the best method of allocating resources in a free market recognizes that all elements of a bargain—quality, service, safety, and durability—and not just the

immediate cost, are favorably affected by the free opportunity to select among alternative offers." *See id.*

Therefore, in finding the carriers' collusive desire to interact directly with customers is more important than the customers' free choices, the Ninth Circuit's opinion is "not consistent with [the] fundamental goal of antitrust law." *Nat'l Coll. Athletic Ass'n*, 468 U.S. at 101. Such a result will only perpetuate the trend of antitrust analysis that of late "has become more fact-intensive, and . . . has swung away from simple, clear, and predictable rules back toward a more opaque, complicated, and less predictable antitrust jurisprudence." Edward D. Cavanagh, *The Rule of Reason Re-Examined*, 67 Bus. Law. 435, 436 (2012). Amici urge the Court to grant review and take this opportunity to right the course and eliminate enduring confusion concerning the *per se* unlawfulness of naked horizontal group boycotts under Section 1 of the Sherman Act.

II. Review is Further Warranted to Preserve the Direct Effects Rule.

As detailed above, the naked, horizontal group boycott in this case should have been subject to *per se* treatment. Even if that were not the case, however, the Ninth Circuit's decision also opened a second Pandora's box. In approving the district court's decision, the court of appeals distorts the purpose and need for a full market analysis. By

doing so, the decision conflicts with other circuits, and undermines the utility of even a "quick look" analysis, at a risk to effective antitrust enforcement.

A. *Full Market Analysis is Unnecessary When Anticompetitive Effects Exist.*

The purpose of defining a relevant market is to aid in evaluating market effect. *See Indiana Fed'n of Dentists*, 476 U.S. at 460-61 ("market definition and market power are merely tools designed to uncover competitive harm"); *see also Brooks Fiber Commc'ns v. GST Tucson Lightwave*, 992 F. Supp. 1124, 1128 (D. Ariz. 1997) ("The Supreme Court and the Ninth Circuit have recognized that market definition and market power are merely aids for determining injury to competition"). Such a market definition is not an end in itself. *See Law v. NCAA*, 134 F.3d 1010, 1020 (10th Cir. 1998). Consequently, proof of "actual detrimental effects . . . can obviate the need . . . [for] elaborate market analysis." *Indiana Fed'n of Dentists*, 476 U.S. at 460-61. Stated differently, the existence of "direct effects" makes a market analysis superfluous—even under a rule of reason analysis. *See id.* at 462-61; *see also* 4 *U.S. Dep't of Justice & Fed. Trade Comm'n, Horizontal Merger Guidelines § 4* (2010) (discussing how direct evidence of harm can reduce or eliminate need to define relevant market).

Thus, when anticompetitive effects are obvious or undisputed, the Supreme Court has permitted lower courts to proceed directly to weighing pro-competitive justifications against anticompetitive

effects. *See Nat'l Coll. Athletic Ass'n*, 468 U.S. at 109-10 (anti-competitive effects can be established without determining market power when there is evidence that an unlawful restraint impacted price); *see also In re Sulfuric Acid Antitrust Litig.*, 703 F.3d 1004, 1007 (7th Cir. 2012) (evidence of increased pricing constitutes "a prima facie case that the defendants' behavior was unreasonable. [Plaintiff] need not prove market power; even though by definition without it a firm or group of firms can't harm competition"); *Chi. Prof'l Sports Ltd. P'ship v. Nat'l Basketball Ass'n*, 961 F.2d 667, 674 (7th Cir. 1992)); *Re/Max Int'l, Inc. v. Realty One, Inc.*, 173 F.3d 995, 1016 (6th Cir. 1999) (rejecting need for market analysis when defendant has "actual control over prices or the actual exclusion of competitors").

Despite this trend, the Ninth Circuit ignored Petitioner's direct evidence of harm to the marketplace. App. 58. As mentioned above, Petitioner offered evidence that Respondents' agreement increased shipping prices, reduced customer choice, and forced many facilitators out of business. App. 59-60. In response, Respondents offer no legitimate procompetitive justifications. Rather, they contend the boycott was necessary because facilitators were cutting into carriers' profits. Respondents accordingly sought to increase the efficiency of their relationship with customers and increase sales for "value-added" services. App. 34. Even under a rule of reason analysis, however, a procompetitive justification must favor competition, not just "the interest of the members of an industry."

Nat'l Soc. of Prof'l Eng'rs, 435 U.S. at 692; *accord Nat'l Coll. Athletic Ass'n*, 468 U.S. at 103 (limiting relevant justifications to those that actually advance competition). Here, Respondents only sought to benefit their market position, not advance competition that might benefit shippers, or facilitators generating that competition.

Nonetheless, the Ninth Circuit affirmed the district court's granting of summary judgment in Respondents' favor. Under the decision and record below, Respondents' proffer of ***any*** justification—even if not competitive—would appear sufficient to require a full-blown market analysis. App. 50. Thus, if uncorrected by this Court, the Ninth Circuit decision would eviscerate the Direct Effects Rule. Moreover, it would add a further divide amongst lower courts regarding when a full-fledged market analysis is necessary. *Compare, e.g.*, *Ball Mem'l Hosp., Inc. v. Mut. Hosp. Ins.*, 784 F.2d 1325, 1336 (7th Cir. 1986) ("Market share is just a way of estimating market power, which is the ultimate consideration. When there are better ways to estimate market power, the court should use them."), *with, e.g.*, *Intergraph Corp. v. Intel Corp.*, 195 F.3d 1346, 1355 (Fed. Cir. 1999) ("Defining the relevant market is an indispensable element of any monopolization or attempt case"); *accord Am. Bearing Co. v. Litton Indus., Inc.*, 729 F.2d 943, 949 (3d Cir. 1984). By granting certiorari, the Supreme Court can remedy this growing problem.

B. *The Ninth Circuit Decision Creates Confusion Regarding "Quick Look" Review.*

Furthermore, by failing to address the Direct Effects Test, the Ninth Circuit decision below risks gutting any remaining *abbreviated* rule of reason, or "quick look," review. According to this Court's precedent, such review applies to certain horizontal level agreements that, on their face look anti-competitive, but are necessary for a certain product to exist. *Nat'l Coll. Athletic Ass'n*, 468 U.S. at 101 (recognizing that a certain amount of cooperation is necessary). As previously detailed, the Court has long recognized the danger of naked, horizontal group boycotts. Thus, to the extent the lower court deviated from well-established precedent, at a minimum, the review below should have applied "quick look" review. *Cf. Nat'l Soc. of Prof'l Eng'rs*, 435 U.S. at 692; *Cal. Dental Ass'n v. FTC*, 526 U.S. 756, 770 (1999) (stating that rudimentary understanding of economics would be enough for someone to see anticompetitive effects of challenged arrangement).

For example, the D.C. Circuit Court's decision in *PolyGram Holding, Inc. v. FTC* illustrates the proper application of the "quick look" approach. 416 F.3d 29 (D.C. Cir. 2005). There, the FTC challenged horizontal restraints by PolyGram and Warner enacted in conjunction with a joint distribution of records from an operatic concert. The appellate court held that a full rule of reason analysis was

unnecessary because, like in the case at hand, the Plaintiff proffered evidence that these restraints negatively impacted pricing. *Id.* at 35 (citing *Nat'l Coll. Athletic Ass'n*, 468 U.S. at 86 (rule of reason analysis unnecessary in light of district court's finding that price and output not responsive to demand); and *Indiana Fed'n of Dentists*, 476 U.S. at 447 ("While this is not price fixing as such, no elaborate industry analysis is required to demonstrate the anticompetitive character of such an agreement")). As a result, the lower tribunal in *PolyGram* appropriately applied an abbreviated review of the restraint, focusing on evaluating whether defendants offered a "plausible competitive justification." *Id.* at 33 ("Only if the competitive harm wrought by the restraint is not readily apparent from the nature of the restraint itself, or the charged party offers a plausible competitive justification for the restraint, must the Commission . . . engage in a more searching analysis of the market circumstances surrounding the restraint."), 33-37 (accepting lower tribunal's "quick look" analysis).

In contrast, under the Ninth Circuit's approach below, every antitrust lawsuit would necessitate an extensive discovery process of the surrounding circumstances and a deep analysis of the market. "If we are not to ask whether restraints are 'inherently suspect'; if we are not to ask whether restraints merit a 'quick look'; if we are not to ask merely whether or not a restraint is *per se* illegal; we must ask something." *California Dental Association:*

Not A Quick Look but Not the Full Monty, 67 Antitrust L.J. 495, 557 (2000).

Requiring a full market analysis in virtually all cases risks undermining antitrust enforcement. *See* PHILLIP P. AREEDA & HERBERT HOVENKAMP, FUNDAMENTALS OF ANTITRUST LAW ¶15.05[A] at 15-38 (4th ed. 2013) ("Determining markets and determining the presence of market power is not socially costless."); *accord* J. Douglas Richards, *Is Market Definition Necessary in Sherman Act Cases Where Anticompetitive Effects Can Be Shown with Direct Evidence?*, 26 Sullivan, Grimes & Sagers, supra, at 53, 54-57 ("direct evidence of the actual effects of such conduct is often more probative than comparatively confusing and misleading market definition and market share analysis."). Where such full-analysis is required, plaintiffs succeed in about one percent of cases. *See* Michael A. Carrier, *The Rule of Reason: An Empirical Update for the 21 Century*, 16 Geo. Mason L. Rev. 827, 828 (2009). In ninety-seven percent of cases involving full market analysis, plaintiffs are unable to establish market effect, often because of challenges to a proposed market definition. *See id.* at 1293; *cf.* Christine Bartholomew, *Death by Daubert: The Continued Challenge to Private Antitrust Enforcement*, 35 Cardozo L. Rev. 2147, 2163-78 (2014) (discussing hurdles for plaintiffs to prevail in defining relevant market); Louis Kaplow, *Why (Ever) Define Markets?*, 124 Harv. L. Rev. 437, 515 (2010) ("there is no way to define relevant markets in the first instance that does not presume the conclusion"). Thus, by

requiring a full market analysis, the Ninth Circuit appears to convert a rule for *per se* liability into a rule for *per se* legality.

CONCLUSION

As evidenced by both this Court's and other circuits' decisions, courts should treat naked, horizontal group boycotts as unlawful *per se*. Moreover, in antitrust cases a full-blown, particularized market definition is unnecessary not only for cases subject to *per se* analysis, but for all antitrust cases where there is direct evidence of anticompetitive effect. In this case the Court has the rare opportunity to clarify these two areas of enduring antitrust confusion concurrently, thereby aiding courts, counsel, and litigants.

Amici respectfully submit that the writ of certiorari should be granted.

Respectfully submitted,

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