No. 16-953

In The
Supreme Court of the United States

RETRACTABLE TECHNOLOGIES, INC.
AND THOMAS J. SHAW,

Petitioners,

v.

BECTON, DICKINSON & CO.,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Fifth Circuit**

BRIEF OF *AMICUS CURIAE* OF THE COMMITTEE TO SUPPORT THE ANTITRUST LAWS IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE**

The Committee to Support the Antitrust Laws ("COSAL") promotes and supports the enactment, preservation, and enforcement of a strong body of antitrust laws in the United States – in Congress, before regulatory authorities, and with the states. Its members are national and international law firms that represent primarily, but not exclusively, small- and medium-sized businesses as plaintiffs, as well as government entities, in private antitrust and class action litigation. It is the only trade organization in the United States that is dedicated to lobbying for strong and effective antitrust laws.

SUMMARY OF THE ARGUMENT

Conduct that attacks the underlying conditions (or assumptions) of the competitive economic model poses an actual threat to that model's central nervous system. Marketplace deception and false product disparagement undermines the underlying condition that market participants be fully informed. From a microeconomic perspective, such conduct threatens injury to competition. However, some lower court judicial precedent forbids the analysis of such conduct within the context of antitrust enforcement. Such precedent

* Counsel for all parties received notice of *amicus curiae*'s intent to file this brief 10 days before its due date. All parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no entity, other than *amicus*, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief.

truncates the reach of the antitrust laws and may engender marketplace distortions, higher prices, and reductions in output.

Petitioners' Petition for Writ of Certiorari should be granted for the purpose of resolving conflicting precedent concerning whether conduct involving marketplace deception and false product disparagement are or are not actionable under the antitrust laws as a restraint of trade. As a matter of fundamental microeconomic principles, such conduct is a significant threat to a competitive marketplace. Legally, the negative precedents deviate from the clear rules for attempted monopolization this Court set out in *Spectrum Sports v. McQuillan*, 506 U.S. 447, 456 (1993).

ARGUMENT

I. "Injury to Competition" Is a Microeconomic Construct, and Its Analytical Framing Should not Be Truncated by Overly Strict Judicial Precedent.

The antitrust laws are generally regarded to be "a set of laws designed to promote competition and, therefore, economic efficiency."[1] Thus, it is no surprise that antitrust injury has been said to be synonymous with "injury to competition."[2] As Judge Easterbrook of the

[1] W. Kip Viscusi, Joseph E. Harrington, Jr. & John M. Vernon, *Economics of Regulation and Antitrust* 70 (4th ed. 2005).

[2] *Healow v. Anesthesia Partners*, 92 F.3d 1192 (9th Cir. 1996) (unpublished table decision) (holding anesthesiologist had no antitrust injury . . . because the underlying market structure did

Seventh Circuit proclaimed, "[a]ntitrust law condemns practices that drive up prices by curtailing output."[3,4] Although "injury to competition" has been the subject of extensive jurisprudential discussion, its meaning comes from fundamental microeconomic constructs. And thus, it is imperative that such microeconomic principles drive the analysis of anticompetitive conduct for the purpose of antitrust enforcement. And it is equally important that such analysis not be truncated.

II. Microeconomic Theory and Its Perfectly Competitive Model – A Paradigm for Identifying Conduct Injurious to Competition.

As Professors Areeda and Hovenkamp observed, "applying antitrust law is very difficult."[5] It is in this regard that *amicus* maintains that the Court must

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not support any inference of "*injury to competition*" (emphasis added)).

[3] *Sanderson v. Culligan, Int'l Co.*, 415 F.3d 620, 623 (7th Cir. 2005); *see also NCAA v. Univ. of Okla.*, 468 U.S. 85, 103-07 (1984); *Broadcast Music, Inc. v. CBS, Inc.*, 441 U.S. 1, 19-20 (1979); William H. Page, *The Chicago School and the Evolution of Antitrust: Characterization, Antitrust Injury, and Evidentiary Sufficiency*, 75 Va. L. Rev. 1221, 1268-73, 1308 n.253 (1989).

[4] Kevin S. Marshall, *The Economics of Competitive Injury*, 45 Brandeis L.J. 345-46 (2007); *see also* Kevin S. Marshall, *Product Disparagement Under the Sherman Act, Its Nurturing and Injurious Effects to Competition, and the Tension between Jurisprudential Economics and Microeconomics*, 46 Santa Clara L. Rev. 231, 244-45 (2006).

[5] 1 Philip E. Areeda & Herbert Hovenkamp, *Fundamentals of Antitrust Law*, § 3.03(b), at 3-31 (3d ed. 2006); *see also* Marshall, *Competitive Injury*, *supra* note 4, at 351.

look beyond unfavorable lower court precedent and re-evaluate such precedent within the theoretical framework most relevant to the circumstance under analysis.

> Instruction on the requisite antecedent conditions[6] underlying the perfectly competitive model not only dramatically simplifies the task of understanding antitrust precedent, but also provides an analytical framework for identifying anticompetitive conduct independent of precedential constraint. Once the requisite antecedent conditions for competition to thrive are identified and understood, the jurist, the antitrust practitioner, and the economic analyst are in a superior position from which to analyze anticompetitive conduct that may trigger statutory liability.[7]

The underlying operational conditions necessary for the perfectly competitive model[8] to thrive include the following:[9]

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[6] The requisite antecedent conditions may also be referred to as fundamental assumptions or underlying assumptions.

[7] *See* Marshall, *Product Disparagement*, *supra* note 4, at 235-36.

[8] David C. Colander, *Microeconomics* 242 (5th ed. 2004) (outlining the "necessary conditions for perfect competition" to thrive).

[9] *See* Marshall, *Competitive Injury*, *supra* note 4, at 236-37 for full discussion.

1. There exist numerous buyers and sellers,[10] each acting independently[11] and rationally;[12]

2. Each buyer and seller consumes or produces such a negligible amount of the total output such that no one buyer or

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[10] Robert S. Pindyck & Daniel L. Rubinfeld, *Microeconomics* 327 (5th ed. 2001) ("In a perfectly competitive market, the large number of sellers and buyers of a good ensures that no single seller or buyer can affect its price. The market forces of supply and demand determine price."); Edwin Mansfield & Gary Yohe, *Microeconomics: Theory/Applications* 356 (11th ed. 2004) ("The firm in a perfectly competitive market has so many rivals that competition becomes impersonal in the extreme. . . . A competitive firm faces so little of the market demand that its effective demand curve is horizontal at whatever price the market will bear. A competitive firm can decide only the output that it would like to supply to the market given that price.").

[11] Pindyck & Rubinfeld, *supra* note 10, at 430 ("In [competitive] markets, each firm could take price or market demand as given and largely ignore its competitors. In an oligopolistic market, however, a firm sets price or output based partly on strategic considerations regarding the behavior of its competitors."); Mansfield & Yohe, *supra* note 10, at 426, 433-34 ("Unlike the case of . . . competition, the supply side of an oligopoly market is composed of a few firms. Conditions in oligopolistic industries tend to promote collusion, since the number of firms is small and the firms recognize their interdependence. The advantages to the firms of collusion seem obvious; increased profits, decreased uncertainty, and a better opportunity to prevent others' entry.").

[12] Steven E. Landsburg, *Price Theory & Applications* 634 (6th ed. 2005) ("[T]he economist assumes that people are *rational*."); *see also* Colander, *supra* note 8 (discussing rational choice as an equimarginal principle).

seller can influence price by the amount they either consume or produce;[13]

3. There are no barriers to entry or exit with respect to consumer or producer markets;[14]

4. All market participants, that is all buyers and sellers, are fully informed of all relevant economic and technological data;[15]

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[13] *See* Pindyck & Rubinfeld, *supra* note 10, at 252 ("Because *each individual firm sells a sufficiently small proportion of total market output, its decisions have no impact on market price*. . . . The assumption of price taking applies to *consumers* as well as firms.") (emphasis added); Mansfield & Yohe, *supra* note 10, at 290 ("[P]erfect competition requires that *each participant in the market, whether a buyer or a seller, be so small in relation to the entire market that he or she cannot affect the product's price*.") (emphasis added).

[14] *See* Pindyck & Rubinfeld, *supra* note 10, at 253 ("[F]ree entry (exit) means that there are no special costs that make it difficult for a new firm either to enter an industry and produce or to exit if it cannot make a profit. *As a result, buyers can easily switch from one supplier to another, and suppliers can easily enter or exit a market*.") (emphasis added); Mansfield & Yohe, *supra* note 10, at 290 ("Perfect competition also requires that *all resources be completely mobile*. Each resource must, in other words, be able to enter or leave the market with ease and to switch from one use to another without fuss or bother.") (emphasis added).

[15] *See* Pindyck & Rubinfeld, *supra* note 10, at 595 ("[W]e have assumed that consumers and producers have complete information about the economic variables that are relevant for the choices they face."); Mansfield & Yohe, *supra* note 10, at 290-91 ("[P]erfect competition requires that consumers, firms, and resource owners have *perfect knowledge of the relevant economic and technological data*. Consumers must be aware of all prices. Laborers and owners of capital must be aware of how much their resources will bring in all possible uses. Firms must know prices

5. All products are homogeneous, or rather, constitute interchangeable substitutes for each other;[16] and

6. The forces of supply and demand are free to determine the quantity of output in a relevant market as well as determine a market-clearing, competitive price with respect to that output.[17]

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of all inputs and the characteristics of all relevant technologies. And in its purest sense, perfect competition requires that all of these economic decision-making units have an accurate knowledge of the past, the present, *and the future*.") (emphasis added).

[16] *See* Pindyck & Rubinfeld, *supra* note 10, at 252-53 ("Price-taking behavior typically occurs in markets where firms produce identical, or nearly identical, products. When *the products of all of the firms are perfectly substitutable with one another* – that is, when they are *homogeneous* – no firm can raise the price of its product above the price of other firms without losing most or all of its business.") (emphasis added); Mansfield & Yohe, *supra* note 10, at 405 (stating that, in perfectly competitive situations, "[t]here are a large number of firms producing and selling . . . goods that are . . . completely homogeneous. . . .").

[17] *See* Pindyck & Rubinfeld, *supra* note 10, at 55 ("The market mechanism is the tendency for supply and demand to equilibrate (i.e., for price to move to the market-clearing level), so that there is neither excess demand nor excess supply."); Mansfield & Yohe, *supra* note 10, at 347-48 ("We have seen that a perfectly competitive economy maximizes the total net gain of consumers and producers. We then showed . . . how deadweight losses – reductions in economic efficiency – result if the government [obstructs the forces of supply and demand by imposing] a price ceiling[,] . . . a price floor[,] . . . a tariff, a quota, or an excise tax."); *see also* Marshall, *Product Disparagement*, *supra* note 4, at 236-37.

Microeconomic theory instructs that if these assumptions hold true, or rather, if the above conditions are met, "the perfectly competitive model will create efficiencies in consumption, production, and allocation."[18] "[I]t is through the creation of such efficiencies that a perfectly competitive market promises the greatest social opportunity for wealth creation," or in "antitrust parlance, it promises greater output at lower prices."[19]

"If the above [assumptions or] conditions must be met in order for the perfectly competitive market to thrive, then (from a purely economic perspective) it follows that any market conduct or activity that impairs, threatens, suppresses or jeopardizes any one or more of such underlying assumptions (or conditions) must be discouraged as a matter of public policy."[20] "It is in this context that the referenced underlying assumptions provide a powerful analytical paradigm for identifying market conduct or activity that may likely constitute an unreasonable restraint of trade, an

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[18] *See* Pindyck & Rubinfeld, *supra* note 10, at 575-85, 590-91; *see also* Marshall, *Product Disparagement*, *supra* note 4, at 237-38.

[19] Marshall, *Competitive Injury*, *supra* note 4, at 354; *see also* Marshall, *Product Disparagement*, *supra* note 4, at 238; *see generally* Pindyck & Rubinfeld, *supra* note 10, at 575-85, 590-91.

[20] *See* Marshall, *Product Disparagement*, *supra* note 4, at 238; *see also* Marshall, *Competitive Injury*, *supra* note 4, at 354.

unfair method of competition, [as well as] *competitive injury*."[21]

For example, "[a] monopoly or threatened monopoly violates or will violate the first three assumptions in that 1) there are no longer numerous sellers, but rather one; 2) that single seller can necessarily set prices since it is the only supplier of the good or service; and further, 3) that single seller may have sufficient power to create absolute or relative barriers to entry. Willful acquisition and/or maintenance of monopoly power can be defined as conduct that is specifically designed to jeopardize any one of the above assumptions. The false disparagement of a rival's product violates the fourth assumption, as well as the first assumption, in that such conduct creates information asymmetries, which impair the ability for market participants to act rationally. The examples are endless. Each assumption provides insight with respect to whether certain conduct may rise to the level of constituting a restraint of trade, an unfair method of competition, or even whether such conduct is likely to result in *injury to competition*. Mastery of these underlying assumptions undoubtedly compliments the analytical lessons filtered through case law."[22]

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[21] *See id.* (emphasis added); *see also* Marshall, *Competitive Injury*, *supra* note 4, at 354.

[22] *See* Marshall, *Competitive Injury*, *supra* note 4, at 354.

III. The Injurious Effects of Marketplace Deception and False Product Disparagement.

Marketplace deception (including product disparagement that is false and inaccurate) "is an iniquity that strikes at the very heart of a competitive marketplace and cannot be tolerated. False information impairs rational action on both the demand side and the supply side of the market. For example, conduct falsely disparaging a rival or a rival's goods or services interferes with the consumer's ability to identify all benefits and/or costs associated with the purchase of the rival's goods or services. Most importantly, it distorts the environment within which market participants are expected to effectuate rational choice. In addition, the distorting effect of false and inaccurate information often results in the underproduction of the disparaged product or service and/or the overproduction of the disparager's product or service. In short, the intentional false disparagement of rival goods and services creates disequilibrium with respect to output and price."[23]

As one economist observed:

> Real-world markets often involve deception, cheating, and inaccurate information. For example, car dealers know about defects in the cars they sell but do not always reveal those defects to consumers. Another example is when consumers who want health insurance do not reveal their health problems to the insurance company. In both cases, it is in the

[23] *See* Marshall, *Product Disparagement*, *supra* note 4, at 240-241.

> interest of the knowledgeable person not to reveal information that the other person or firm would need to know to make an informed decision about the transaction. Hence imperfect information can be a cause of market failure.[24]

As illustrated below in Figure 1, "the distortions that might result from deceptive and false disparagement practices. The demand function for Firm *A*'s product is a statement of the relation between the quantity demanded, *Q*, and all factors that affect that quantity. These factors include the price of the good or service under analysis, the price of other goods,[25] the number of buyers in the market, the relative income of consumers, consumer tastes and preferences, general marketplace expectations, and other possible influences.[26] To the extent the disparagement distorts the price[27] of the product or negatively influences the taste

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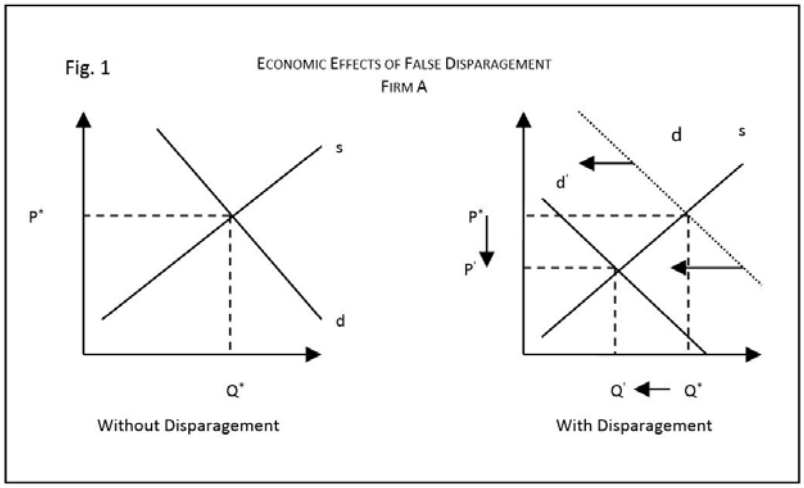
[24] Colander, *supra* note 8, at 417; *see also* Pindyck & Rubinfeld, *supra* note 10, at 596-97 ("Market failure can also occur when consumers lack information about the quality or nature of a product and so cannot make utility-maximizing purchasing decisions."); Marshall, *Product Disparagement*, *supra* note 4, at 241.

[25] Other goods include, namely, compliments and substitutes.

[26] Mark Hirschey, *Managerial Economics* 67-68 (10th ed. 2003) ("In functional form, a demand function may be expressed as Quantity of Product *X* Demanded = $Q_x = f$ (Price of *X*, Prices of Related Goods, Expectations of Price Changes, Consumer Incomes, Tastes and Preferences, Advertising Expenditures, and so on).").

[27] Price distortions will necessarily result from the consumer's under-evaluation of the benefits provided by the product or from the over-evaluation of the costs associated with the product.

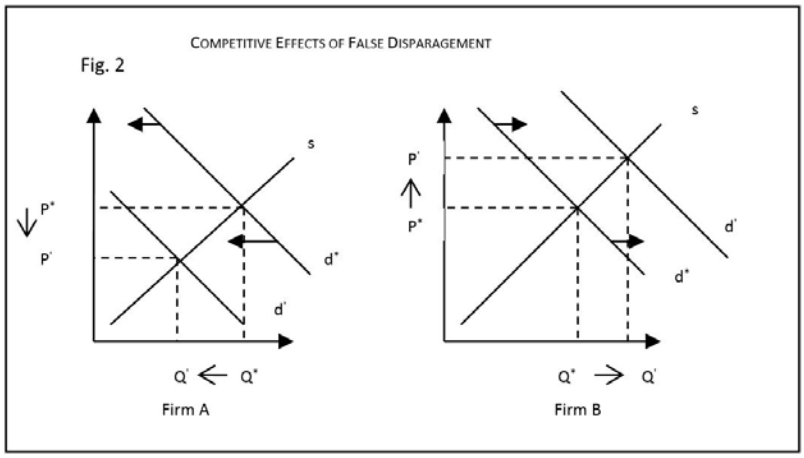
and preferences of the consumer with respect to Firm *A*'s product, the demand for the product or service may likely shift to the left, from *d* to *d'*, curtailing output of Firm *A*'s product or service from Q^* to Q'."[28]



"Additionally, the disparagement practice may not only distort the market for the disparaged product, but it may also distort the market for product substitutes. For example, in Figure 2 below, Firm *B*, by and through its disparaging practices, may capture market share

[28] In this illustration and those that follow in this subsection, the disparagement conduct is exhibited in a highly competitive monopolistic market characterized and driven by product differentiation. *See* Pindyck & Rubinfeld, *supra* note 10, at 424 ("A monopolistically competitive market has two key characteristics: 1. Firms compete by selling differentiated products that are highly substitutable for one another but not perfect substitutes. . . . 2. There is *free entry and exit*: it is relatively easy for new firms to enter the market with their own brands and for existing firms to leave if their products become unprofitable."); *see also* Marshall, *Product Disparagement*, *supra* note 4, at 241-42.

from Firm *A*, resulting in an increase in Firm *B*'s output from Q^* to Q' as consumers substitute Firm *B*'s products or services for Firm *A*'."[29]



"Successful disparagement also results in a type of market failure commonly referred to in economics as adverse selection.[30] Adverse selection occurs 'when buyers and sellers have different amounts of information about the good for sale,'[31] or 'when products of different qualities are sold at a single price because

[29] *See* Marshall, *Product Disparagement*, *supra* note 4, at 242.

[30] Pindyck & Rubinfeld, *supra* note 10, at 598; *see also* Colander, *supra* note 8, at 417 ("Such a market failure is called an adverse selection problem – *a problem that occurs when buyers and sellers have different amounts of information about the good for sale*."); Landsburg, *supra* note 12, at 313-15 ("Adverse selection: The problem that arises when people know more about their own risk characteristics than others do.").

[31] Colander, *supra* note 8, at 417.

buyers or sellers are not sufficiently informed to determine the true quality at the time of purchase.'[32] False disparagement practices restrain the rational action necessary for efficient exchange and, therefore, restrain trade. False disparagement vitiates the conditional environment within which competition thrives. Consequently, to the extent the false disparagement of a rival's products creates information asymmetries, it injures competition."[33]

IV. Marketplace Deception and False Disparagement Practices Threaten Deadweight Loss.

"A successful campaign of disparagement may also jeopardize and threaten other conditions necessary for competition to thrive. It can create entry barriers, lead to capricious market exit, create artificial market equilibrium, or even lead to oligopolies and monopolies. A firm injures competition if it falsely disparages its competitors and their respective products for the purpose of forcing them to exit the market, or to create a barrier to their entry or re-entry into the market. Such practices will certainly drive up prices by curtailing output, as demonstrated in Figure 3 below."[34]

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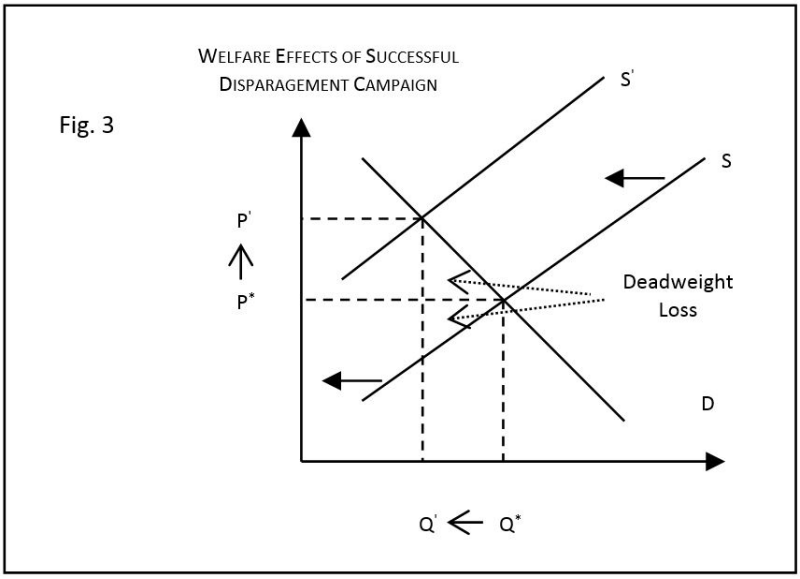
[32] Pindyck & Rubinfeld, *supra* note 10, at 598.

[33] *See* Marshall, *Product Disparagement*, *supra* note 4, at 242-43.

[34] *Id.* at 244-45.



"The market supply function, S, for a given product is a statement of the relation between the quantity supplied and all factors affecting that quantity. Such factors include the price of the good in question, the price of a supplier's related goods, the number of sellers producing the good, input prices, the current state of technology, and general market expectations.[35] As rival firms are driven from the market as a result of false disparagement, the market supply curve, S, shifts to S', thereby resulting in a curtailment of output (Q^* decreases to Q') and an increase in price (P^*

[35] Hirschey, *supra* note 26, at 74 ("In functional form, a supply function can be expressed as Quantity of Product X Supplied = Q = f (Price of X, Prices of Related Goods, Current State of Technology, Input Prices, Weather, and so on).").

increases to P'). As a result, there is a deadweight loss[36] to society."[37]

V. The Market Power of Deception.

In 2007, Professor Lande wrote: "Market power in antitrust cases can come from deception, significantly imperfect or asymmetric information, unduly large transaction costs, or from other types of market failures that usually are associated with consumer protection violations."[38] Deception in the market interferes, impedes and eliminates the ability for consumers to make rational aspirational, utility-maximizing, and market choices. While such deception injures the consumer's ability to seek efficient solutions, it also injures competition generally. As demonstrated above in Figures 1-3, deception results in market inefficiencies and failures manifested by higher prices and reduced consumer choices. And to the extent such deception is used to maintain market share or to create entry barriers, it is predatory in nature and is exactly the

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[36] *See* Colander, *supra* note 8, at 272 (defining deadweight loss as "the net cost to society from the existence of monopoly").

[37] *See* Marshall, *Product Disparagement*, *supra* note 4, at 244-45.

[38] *See* Robert Lande, *Market Power Without a Large Market Share: The Role of Imperfect Information and Other "Consumer Protection" Market Failures*, American Antitrust Institute, Working Paper No. 07-06, 2 (2007). *See also* Peter C. Carstensen, *Buying Power, Competition Policy, and Antitrust: The Competitive Effects of Discrimination Among Suppliers*, The Antitrust Bulletin, Vol. 53, No. 2, 271 (Summer 2008).

nature of conduct the antitrust laws were designed to address.

Deception provides the deceiver the power to maintain higher (artificial) prices. It allows the deceiver to disengage from meritorious competition while maintaining market share. To the extent a market participant is harmed by such deception and is forced to respond with initiatives intended to correct the misinformation, it is nonetheless a distortion to characterize such responsive initiatives as constituting "competition on the merits." Such deception (at a minimum) increases the costs of sales. Such costs are incurred for the purpose of correcting a market failure fueled by deception. Consequently, such incurred costs play no allocative role regarding society's use of scarce resources. Rather, such increased costs exacerbate inefficiency and waste.

The affirmation of judicial precedent that excludes deception from the purview of antitrust enforcement provides cover and protection for the manifestation of market power exercised by a deceiver when it deceives. And market power exercised by deception is the very same market power exercised by monopolies and monopolizing firms – it is the power to increase prices and reduce output, and thus constitutes the power to impede or even obstruct wealth-producing social outcomes.[39]

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[39] *See* Lande, *supra* note 38, at 4-6.

CONCLUSION

"Product disparagement, depending on its motivating origins, can either nurture or spoil a competitive environment. Disparagement motivated by a rivalry grounded in truthful, accurate information is welcomed competitive conduct and should be encouraged as a matter of public policy. To the extent such disparagement reveals accurate distinctions with respect to product characteristics and qualities, it cultivates a vigorous, competitive environment."[40]

"However, product disparagement fueled by a rivalry driven by deception and misinformation is unacceptable and should be discouraged as a matter of public policy. The dissemination of false, deceptive, and inaccurate information desecrates the hallowed efficiencies for which competition is so highly touted. Microeconomics instructs that fully informed market participants are a required condition of the perfectly competitive model. If the antitrust laws are intended to protect competition from conduct that is ultimately injurious to its operational foundation, then such laws are . . . applicable in situations involving the intentional false disparagement of a rival's products. Intentional false disparagement of a rival's product is an unacceptable form of economic warfare. Such conduct imperils the operational efficiencies of perfect competition and is proscribed as a matter of microeconomic theory. Accordingly, any conclusion that §§ 1 and 2 of

[40] *Id.* at 253-54.

the Sherman Act fail to reach such conduct is economically ill-conceived. It defies conventionally accepted economic constructs and, most importantly, it essentially legislates a statutory exception with respect to conduct that threatens the very heart of the perfectly competitive model."[41] Therefore, the Petition for Writ of Certiorari ought to be granted.

February 27, 2017

Respectfully submitted,

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[41] *Id.* at 254.