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 *AMICI CURIAE* US INVENTOR, INC., EDISON INNOVATORS ASSOCIATION, INDEPENDENT INVENTORS OF AMERICA, INVENTORS NETWORK OF THE CAPITAL AREA, INVENTORS NETWORK OF THE CAROLINAS, INVENTORS NETWORK OF MINNESOTA, INVENTORS SOCIETY OF SOUTH FLORIDA, NATIONAL INNOVATION ASSOCIATION, NORTH FLORIDA INVENTORS AND INNOVATORS GROUP, SAN DIEGO INVENTORS FORUM, SMALL BUSINESS TECHNOLOGY COUNCIL, TAMPA BAY INVENTORS COUNCIL, AND PAUL MORINVILLE IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICI CURIAE*[1]

Amici include nonprofit inventor clubs and individual inventors and entrepreneurs. The nonprofit inventor organizations represent over 20,000 inventors, startup owners and executives and others interested in their success. The *amici* have spent substantial portions of their lives inventing, building new companies and competing in new markets as well as educating and mentoring new inventors and entrepreneurs. They represent the driving force of the world's most powerful economy. *Amici's* extensive experience with the patent system, new technologies and starting up companies and the resulting ties to the health of the American economy make them well situated to explain the importance of the issues presented in this case.

- US Inventor, Highland, IN, www.usinventor.org
- Edison Innovators Association, Fort Myers, FL, www.edisoninnovatorsassociation.org
- Independent Inventors of America, Clearwater FL, www.independentinventorsofamerica.org
- Inventors Network of the Capital Area, Washington, DC, www.dcinventors.org

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[1] Counsel of record for all parties received notice of *amici curiae's* intent to file this brief at least 10 days before its filing and due dates. 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 *amici*, their members, or their counsel, has made a monetary contribution to the preparation or submission of this brief.

- Inventors Network of the Carolinas, Charlotte, NC, www.inotc.org
- Inventors Network of Minnesota, Hopkins, MN, www.inventorsnetwork.org
- Inventors Society of South Florida, Deerfield Beach, FL, www.inventors-society.net
- National Innovation Association, Stuart, FL, www.nationalinnovationassociation.org
- North Florida Inventors and Innovators Group, Jacksonville, FL, www.nfiig.com
- San Diego Inventors Forum, San Diego, CA, www.sdinventors.org
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SUMMARY OF THE ARGUMENT

Petitioner's request for certiorari should be granted for two reasons. First, there is a clear circuit split on when a false advertising claim under the Lanham Act precludes a Sherman Act claim of monopolization. This split parallels the one that existed before this Court granted the certiorari petition in *FTC v. Actavis* in 2013. As in *Actavis*, the

circuit split creates a question of national importance, a second reason to grant the petition. Precluding a Sherman Act claim impedes competition in the technology and innovation sectors allowing dominant firms to block entry of new firms and products through spreading false statements about the technologies and patents embodied in the products. This Court, by resolving the split in favor of the Sherman Act, can create a competitive environment for inventors.

ARGUMENT

I. The Fifth Circuit's decision continues a circuit split on a critical issue of federal law that requires review and reversal.

Petitioner Retractable Technologies, Inc. ("RTI") won jury verdicts on claims of federal false advertising and Sherman Act Section 2 claims against competitor, Becton, Dickinson & Co. ("BD"). The Fifth Circuit vacated the judgment based on the Sherman Act, stating that "false advertising is a slim, and here nonexistent, reed for a § 2 claim." Slip opinion at 2. As the opinion makes clear, this ruling places the Fifth Circuit in conflict with sister circuits that would allow Section 2 claims based on false advertising on a case by case basis (the D.C., Third, and Eighth Circuits) and those circuits holding that false advertising creates a presumption of de minimis competitive harm that can be rebutted by the antitrust plaintiff. In ruling against petitioner, the Fifth Circuit aligns with the minority approach of the Seventh Circuit which concludes that the Lanham Act effectively precludes antitrust claims.

The current circuit split is salient and mandates correction by this Court for three reasons. First, the split at issue in this petition is similar to that precipitating grant of certiorari five years ago in *Federal Trade Commission v. Actavis*. *See FTC v. Watson Pharmaceuticals*, 133 S. Ct. 787 (2012) (granting cert before Actavis acquired Watson). In both cases, there was a three-way split among the lower federal courts on issues pertaining to innovation and competition policy. Second, as in *Actavis*, petitioner is asking the Court to resolve a split that hinders predictability on matters of business investment, competitive markets, and innovation. Finally, the petitioner raises issues of national concern supporting grant of the petition. At stake in this dispute are questions of innovation and competition unique to the situation of an established company with market power using false statements to block entry of an innovative product by a smaller, inventive company.

A. The circuit split at issue is analogous to that resolved by this Court in its 2013 *Actavis* decision.

In its decision in *FTC v. Actavis,* 133 S. Ct. 2223 (2013), this Court resolved a circuit split that vexed practitioners and policy makers confronted with a tension between antitrust law and patent law. Prior to this Court's resolution, circuits were split on when a settlement agreement between a pharmaceutical patent owner and a potential generic drug manufacturer delaying entry by the generic violated the antitrust laws. As in this case, the circuits were split three-way. Some circuits held the agreement to

be per se legal since promotion of settlement is desirable policy and if the patent owner was acting within the scope of the patent. *See, e.g., Schering-Plough Corp. v. FTC*, 402 F.3d 1056 (11th Cir. 2005). Other circuits held that the agreement to be per se illegal since delay of entry of a competitor creates anticompetitive harms. *See, e.g., In re Cardizem CD Antitrust Litig.*, 332 F.3d 896 (6th Cir. 2003). Other circuits held that the antitrust scrutiny of the agreement should occur on a case by case basis under the rule of reason, requiring a balancing of competitive harms and benefits. *See, e.g., In re K-Dur Antitrust Litig.*, 686 F.3d 197, 214 (3d Cir. 2012).

This Court adopted the rule of reason, bringing some certainty to this circuit split affecting business relations in the sizeable pharmaceutical industry. While the rule of reason invites a case by case judicial analysis rather than a clear-cut rule, the Court's decision emphasized the appropriateness of antitrust scrutiny of patent rights. The opinion also set forth identifiable facts whose presence would lead to a finding of an antitrust violation. A twenty-year uncertainty in the law was given much-needed clarity and invited further consideration of the intersection between antitrust and intellectual property laws.

As in the background to the *Actavis* case, the circuits are split three-ways on the issue that RTI seeks review. Some courts hold that disparaging commercial speech can be the basis for a claim of monopolization or attempted monopolization under the Sherman Act. These courts would allow a plaintiff to bring a Sherman Act claim if it can meet

a multi-factor test. Other courts would create a presumption against a Sherman Act claim based on disparaging commercial speech. These courts, however, would allow the plaintiff to overcome the presumption. Finally, the Fifth Circuit in RTI's appeal follows the Seventh Circuit in holding that disparaging commercial speech as per se legal under the Sherman Act.

This split is analogous to that in *Actavis* with circuits representing the range from per se legality to various forms of the rule of reason. As in *Actavis*, this split creates uncertainty on the scope of liability for disparaging commercial speech and the reach of the antitrust laws. While the uncertainty in *Actavis* affected only the pharmaceutical industry and the place of generic entry, the one represented in RTI's case affects a range of industries, not limited to the medical device and retractable needle industries factually at issue here. This broad reach makes the Court's review more urgent as companies in all industries make decisions in the shadow of how to reconcile Lanham Act and Sherman Act claims.

In point of fact, the cases giving rise to the circuit split have arisen in high technology industries in which intellectual property is involved in defining markets. Among ten reported decisions that address the issue of whether product disparagement and false advertising claims preclude a Sherman Act claim, five courts found that the Sherman Act claim was not precluded. These decisions involved disputes in the field of telecommunications (see *Caribbean Broad Sys., Ltd. v. Cable & Wireless, PLC,* 148 F.3d 1080, 1087 (D.C. Cir. 1998)(adopting a multifactor

test)); medical devices (see *Lenox McLaren Surgical Corp. v. Medtronic, Inc.*, 762 F.3d 1114, 1127-28 (10th Cir. 2014)(applying a de minimis test)); generic drugs (see *Nat'l Ass'n of Pharm. Mfrs., Inc. v. Ayerst Labs.*, 850 F.2d 904, 916 (2nd Cir. 1988)(applying a de minimis test)); hospital services (see *W. Penn Allegheny Health Sys., Inc. v. UPMC*, 627 F.3d 85 108-109 (3rd Cir. 2010)(applying multifactor test)); travel booking systems (see *Int'l Travel Arrangers, Inc. v. W. Airlines, Inc.*, 623 F.2d 1255, 1269-70 (8th Cir. 1980)). Some of remaining cases finding preclusion were in assorted sectors lacking a technology component: beauty products (see *Duty Free Ams., Inc. v. Estee Lauder Cos.*, 797 F.3d 1248, 1268-69 (11th Cir. 2015)(applying a de minimis test)); medical board review (see *Am. Council of Certified Podiatric Physicians & Surgeons v. Am. Bd. of Podiatric Surgery, Inc.*, 323 F.3d 366, 370 (6th Cir. 2003)(applying a de minimis test)); bar review preparation services (see *Am. Prof'l Testing Serv., Inc. v. Harcourt Brace Jovanovich Legal & Prof'l Publ'ns, Inc.*, 108 F.3d 1147, 1152 (9th Cir. 1997)(applying de minimis test)). The cases from the Seventh Circuit where preclusion was found as a per se rule involved high technology industries: medical devices (see *Mercatus Grp., LLC v. Lake Forest Hosp.*, 641 F.3d 834, 851-52 (7th Cir. 2011) and water purification systems (see *Sanderson v. Culligan Int'l Co.*, 415 F.3d 620, 624 (7th Cir. 2005)).

This pattern of cases rejecting preclusion reflects the situation where established companies challenge new market entrants, technologies. and products through disparaging statements. These statements serve to prevent entry of new and innovative firms in

the marketplace, thereby preventing competition. Difficulties in challenging the anticompetitive effects of product disparagement, even if limited to certain industries, impede innovation and the benefits to the economy, society, and consumers of dynamically competitive markets. The circuit split casts a shadow not only on industries broadly but also on competitive processes fueling innovation and consumer-oriented product improvements. The Fifth Circuit by adopting the Seventh Circuit per se rule of preclusion has a differential impact on technology-based industries than the more flexible approaches of circuits like the D.C. Third, and Eighth Circuits that look at the effect on market competition of product disparagement and false advertising on a case by case basis.

As in the split leading to grant of certiorari in *Actavis*, RTI raises reviewable questions of innovation and competition policy. These questions are ones of national importance, further mandating the Court to reconcile the uncertainties created by a circuit split.

B. Grant of RTI's certiorari petition is warranted as in the *Actavis* case because both raised questions of national importance relating to antitrust and innovation.

In its decision in *Actavis*, this Court overturned a lower court ruling that patent ownership created a near-immunity against antitrust review. The Court's ruling, however, maintained the view that "the antitrust laws do not negate the patentee's right to exclude others from patent property" and that "the

commercial advantage gained by new technology and its statutory protection by patent do not convert the possessor thereof into a prohibited monopolist." *In re Indep. Serv. Organizations Antitrust Litig.*, 203 F.3d 1322, 1325 (Fed. Cir. 2000). This Court's ruling, however, emphasized the centrality of competition even within the system of exclusionary rights created by patent law. "[I]t would be incongruous," this Court wrote, "to determine antitrust legality by measuring the settlement's anticompetitive effects solely against patent law policy, rather than by measuring them against procompetitive antitrust policies as well." *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2231, 186 L. Ed. 2d 343 (2013). Commitment to antitrust policy in the environment of intellectual property was at the core of this Court's ruling in concluding: "this Court has indicated that patent and antitrust policies are both relevant in determining the 'scope of the patent monopoly'—and consequently antitrust law immunity—that is conferred by a patent." *FTC v. Actavis, Inc.*, 133 S. Ct. 2223, 2231, 186 L. Ed. 2d 343 (2013).

RTI has secured patents on several innovative means of delivering injectable pharmaceuticals. These patents and inventions are at the heart of this litigation, and their validity is not challenged in the appeal. However, the innovative company seeks antitrust review of several disparaging statements about the inventions that were found to be acts of false advertising under the Lanham Act. Instead of seeking shelter under a settlement agreement, Becton Dickinson seeks immunity from antitrust review on the grounds that product disparagement cannot be anticompetitive. The Fifth Circuit affirms

this erroneous argument by ruling that "absent a demonstration that a competitor's false advertisements had the potential to eliminate, or did in fact eliminate, competition, an antitrust lawsuit will not lie." *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 895 (5th Cir. 2016). The lower court further concluded: "a business that is maligned by a competitor's false advertising may counter with its own advertising to expose the dishonest competitor and turn the tables competitively against the malefactor. Far from restricting competition, then, false or misleading advertising generally sets competition into motion." *Id.* (internal citations omitted). The Fifth Circuit has adopted a shelter from antitrust scrutiny based in the Lanham Act analogous to the shelter created under patent law overturned by this Court in *Actavis*.

Not only does the Lanham Act shelter prevent RTI from developing its antitrust case against BD, it also creates a safe harbor for all monopolists who seek to avoid antitrust scrutiny. False advertising can allow a firm to maintain market power by diverting customers at all links in a distribution chain from a competitor's product. Such diversion can block entry to the marketplace that harms not only the competitor, but also the competitive process. Scholars have expressed the threat to the competitive process well. "Modern businesses are well aware of the threat of disruptive outsiders and, left unchecked, will do their utmost to prevent future waves of creative destruction from threatening the status quo." Spencer Weber Waller & Matthew Sag, *Promoting Innovation*, 100 Iowa L. Rev. 2223, 2224

(2015). Becton, Dickinson's false advertising went beyond mere disparagement of a competitor. It was precisely a tactic to prevent threats to the market status quo from competitive entry of innovative products. The Fifth Circuit rule prevents judicial review of these harms to competition and the process of innovation through the creation of a shelter under the Lanham Act.

As one commentator, has noted:

> 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 welcome 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. However, product disparagement fueled by a rivalry driven by deception and misinformation is unacceptable and should be discouraged as a matter of public policy. 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, 253–54 (2006).

The Sherman Act gives legal content to this "matter of public policy." By protecting competition,

the Sherman Act acts to drive innovation and the entry of new firms with innovative products. It is not enough to say that innovative companies like RTI need to compete more aggressively in the advertising market. False statements hurt competition in the product market, and more aggressive competition in countering speech does not mitigate competitive losses in the distribution of new products. The Fifth Circuit's Darwinian view of competition ignores how statements can block innovation. Only antitrust scrutiny of competitive harms can address the abuse of monopoly power through false statements. This Court by granting the certiorari petition can restore "a vision for competition policy that rewards innovation, innovators, and entrepreneurs but which does not allow successful firms to block subsequent innovation that may threaten them in the future." Waller & Sag, *supra* at 2228.

In *Actavis*, this Court demonstrated, according to one scholar, that "antitrust and patent laws may reside in separate provisions of the United States Code, but they are not independent of each other." Shubha Ghosh, *Convergence?*, 15 Minn. J.L. Sci. & Tech. 95, 106 (2014). This Court in ruling against a patent shelter for antitrust scrutiny affirmed implicitly that "market competition drives innovation, and patent law should be applied with that principle in mind." *Id.* at 107. Similarly, the Fifth Circuit has created a wall between the Lanham Act and the Sherman Act. We respectfully ask this Court to grant the certiorari petition to tear down that wall as judiciously and as thoughtfully as it did the wall created by lower courts prior to the *Actavis* decision.

C. The Court should resolve the circuit split to clarify questions of national importance raised by an established company blocking entry of an innovative product developed by a smaller, inventive company.

The issues at the heart of this dispute go beyond the specific complaints raised by RTI. The false advertising safe harbor allows any large company with market power to block upstart companies, large or small, from entering a marketplace by shifting the domain of competition from the marketplace for products to the marketplace for advertising. This diversionary not only changes the rules of the game, but the game itself. The advertising marketplace has anticompetitive spillovers in the marketplace for innovative products. Scrutiny under the Sherman Act is necessary to prevent these anticompetitive spillovers. The Fifth Circuit ruling serves only to reinforce them.

Scholars of innovation identify risk taking as the key to innovation. As Professor Robert Gordon summarizes the experience of innovators over time:

> [I]nnovators, particularly when acting by themselves or in small partnerships, are the ultimate risk-takers. Their inventions may lead them to create large firms, or their inventions may be supplanted by alternatives that are more efficient and perform better. Or they may have a promising idea and fail to find a source of funding for development of their ideas. Invention at the level of the individual is

> "anything but mechanical, automatic, and predictable. Chance plays a tremendous role. Robert J. Gordon, *The Rise and Fall of American Growth* 570 (2016).

Nowhere is deceptive and exclusionary conduct by a competitor considered as one of the risks that an innovator has to endure. The Lanham Act and the Sherman Act serve to protect innovators from conduct that is harmful to business development. When deceptive conduct is also exclusionary, the Sherman Act should be available to protect the competitive process of innovation. The Fifth Circuit has prevented innovators from allowing the Sherman Act to fulfill its critical role in the innovation process.

Professor Gordon identifies the pharmaceutical industry as one of the key sectors where innovation will be critical in the current technology revolution shaping the economy. He notes that "pharmaceutical research has reached a brick wall of rapidly increasing costs and declining benefits." *Id.* at 594. He includes medical advances within this claim. Although Professor Gordon points to regulatory burdens as raising the costs of medical innovation, he also points to the rise of large firms and the decline a democratic culture of innovation fostered by the patent system. *Id.* at 574.

The Sherman Act preserves the competitive and democratic dynamics of markets. Rules like that adopted by the Fifth Circuit that allow large firms to increase the costs for innovators in bringing new products to market without antitrust review should be scrutinized. Accordingly, it is imperative for this Court to grant the certiorari petition in order to

preserve the competitive, innovation-driven landscape in all sectors of the economy.

II. Contrary to this Court's reasoning in *POM Wonderful v. Coca-Cola*, the Fifth Circuit adopted a categorical rule that the Lanham Act precludes a Sherman Act claim.

The Fifth Circuit concluded without much analysis that the Lanham Act precludes a Sherman Act claim. It rested this conclusion on a rigid distinction "between business torts, which harm competitors, and truly anticompetitive activities, which harm the market." *Retractable Techs., Inc. v. Becton Dickinson & Co.*, 842 F.3d 883, 895 (5th Cir. 2016). According to the Fifth Circuit, citing the Seventh, "If [a competitor's statements about another] should be false or misleading or incomplete or just plain mistaken, the remedy is not antitrust litigation but more speech—the marketplace of ideas." *Id.* at 894 (internal citations omitted). The Fifth Circuit explains, citing its own precedent: "[t]he thrust of antitrust law is to prevent restraints on competition. Unfair competition is still competition and the purpose of the law of unfair competition is to impose restraints on that competition." *Id.* at 895 (internal citations omitted).

To summarize, the lower appellate court's conclusions rest on preconceived notions of different types of competition as subject matter for the Lanham and Sherman Acts respectively. But competition is competition whether occurring through speech or through the distribution of products. It is true that as a matter of law, the

Lanham Act and the Sherman Act protect different interests in the competitive marketplace, but that cannot be enough to have the first preclude the second. The Fifth Circuit attempts draw a clear, unbridgeable boundary between the Lanham Act and the Sherman Act recognizes by raising the standard under which an antitrust claim may arise from product disparagement by a dominant competitor. Under the terms of the lower court opinion, an antitrust trust claim is not stated "absent a demonstration that a competitor's false advertisements had the potential to eliminate, or did in fact eliminate, competition, an antitrust lawsuit will not lie." *Id.* Furthermore, citing its own precedent, the Fifth Circuit expounds that a false advertising claim may give rise to one under antitrust when a competitor engages in "[a]dvertising that creates barriers to entry in a market constitutes predatory behavior of the type the antitrust laws are designed to prevent." *Id.* (citations omitted). Under this high standard, the lower court dismisses without further scrutiny factual arguments RTI raised to show barriers to entry created by BD's product disparagement and false advertisement.

The Fifth Circuit's reasoning raises the standard for a monopolization or attempted monopolization claim to cases where competition is either eliminated completely or is nearly eliminated. Such a high standard is inconsistent with the holdings of this Court that a dominant firm "may not be liable for attempted monopolization under § 2 of the Sherman Act absent proof of a dangerous probability that they would monopolize a particular market and specific

intent to monopolize." *Spectrum Sports, Inc. v. McQuillan*, 506 U.S. 447, 459, 113 S. Ct. 884, 892, 122 L. Ed. 2d 247 (1993). Dangerous probability of success is a lower bar than the requirement that conduct has "the potential to eliminate."

The Fifth Circuit opinion contains a questionable conclusion about preclusion of claims that seems to waiver on its own terms. This Court should clarify this ambiguity in light of its own recent precedent. As this Court has stated: "When two statutes complement each other, it would show disregard for the congressional design to hold that Congress nonetheless intended one federal statute to preclude the operation of the other." *POM Wonderful LLC v. Coca-Cola Co.*, 134 S. Ct. 2228, 2238, 189 L. Ed. 2d 141 (2014). At issue in the *POM* case was the preclusion of a Lanham Act by the labelling review requirements of the Food, Drug, and Cosmetic Act (FDCA). This Court, after careful review of the policies underlying the two Acts and their respective language, concluded that the FDCA did not preclude a Lanham Act claim. Such careful review is mandated in RTI's case. The Fifth Circuit's analysis creates an unnecessary and readily cured ambiguity in the law that affects innovation and competitive markets.

Coca-Cola in its dispute with POM Wonderful challenged a claim that its labelling of pomegranate juice bottles constituted acts of false advertising and unfair competition in violation of the Lanham Act. Since the Food and Drug Administration had approved Coca-Cola's labels, the company argued that compliance with the FDCA precluded the

Lanham Act. This Court recognized the need to harmonize the two statutes, but rejected as a matter of course Coca-Cola's conclusion as to preclusion. Instead, this Court looked to the language and policies of the statutes as a basis for harmonization. We respectfully urge this Court to grant RTI's certiorari petition to continue the process of harmonization of the Lanham Act with other federal statutes.

Judicial review is not only necessary but readily applicable following the methodology in the *POM Wonderful* opinion. There, this Court began with the statutory analysis to see if there is specific language as to preclusion. As the FDCA did not have language precluding a Lanham Act claim, analogously the Lanham Act does not include language precluding a claim under the Sherman Act. Furthermore, just as the FDCA labelling requirements was found to complement the Lanham Act in protecting consumers, so the Lanham Act and Sherman Act complement each other. As this Court stated in *POM*,

> The Lanham Act creates a cause of action for unfair competition through misleading advertising or labeling. Though in the end consumers also benefit from the Act's proper enforcement, the cause of action is for competitors, not consumers. *Id.* at 2234.

As this Court notable stated about antitrust injury: "The antitrust laws, however, were enacted for 'the protection of *competition,* not *competitors,' Brown Shoe Co. v. United States,* 370 U.S., at 320, 82

S.Ct., at 1521." *Cargill, Inc. v. Monfort of Colorado, Inc.*, 479 U.S. 104, 115, 107 S. Ct. 484, 492, 93 L. Ed. 2d 427 (1986). These two foundational policies complement each other. Protection for consumers as enforced by competitors prohibits harms that arise from consumer deception. Protection of competition extends to harms that arise when a dominant firm creates barriers to entry by diverting customers from innovative firms and products that are attempting to enter the market. Given the lack of language supporting preclusion and the complementary policies, the Fifth Circuit was in error in precluding the Sherman Act claim. This Court can readily resolve this error by providing a more careful analysis of the two statutes, following its reasoning in the *POM Wonderful* decision.

Should the Court grant the certiorari petition, it need not address arguments raised by POM Wonderful and Coca-Cola as to fundamental questions of statutory interpretation. Specifically, there is no argument in this petition regarding the "genuine irreconcilable conflict" between statutory schemes. This Court did not address them in its *POM Wonderful* opinion and need not do so here. Furthermore, the decisions of several circuits harmonizing the Sherman Act and Lanham Act would undermine any argument in favor of an irreconcilable conflict between them. Scholars also urgently support antitrust claims based on deceptive conduct by dominant firms. As one scholar states:

Prosecuting a monopolist's anticompetitive deception furthers the legislative aims of competition law. Given deception's social and economic harms, its

lack of redeeming economic benefits or cognizable efficiencies, and the importance of trust in the marketplace, a hard line is warranted.

The danger today is not that courts will punish deception under the Sherman Act. Rather, the danger is that the courts will not. In advancing their peculiar social policies on deceptive commercial speech and competition generally, courts that do not punish a monopolist's anticompetitive deception contravene the Act's legislative aim. Maurice E. Stucke, *How Do (and Should) Competition Authorities Treat A Dominant Firm's Deception?*, 63 SMU L. Rev. 1069, 1122 (2010).

The Fifth Circuit erred in concluding that the Lanham Act precluded a Sherman Act claim without the detailed analysis of preclusion engaged in by this Court in *POM Wonderful*. The error should be corrected to provide clarity for the competitive process of innovation.

III. Although a First Amendment claim is not directly at issue, judicial review would address an important question of when false speech chills and impedes the competitive process for the distributions of innovative products and technologies.

This Court's recent jurisprudence has demonstrated the need to clarify the role of speech in the competitive marketplace. Several recent and pending opinions from this Court have explored the connection between free speech and open, competitive markets.

For example, in striking down a federal criminal statute under which Alvarez was prosecuted for falsely stating that he had been awarded the Congressional Medal of Honor, this Court colorfully reminded us about the marketplace of ideas:

> It is a fair assumption that any true holders of the Medal who had heard of Alvarez's false claims would have been fully vindicated by the community's expression of outrage, showing as it did the Nation's high regard for the Medal… Only a weak society needs government protection or intervention before it pursues its resolve to preserve the truth. Truth needs neither handcuffs nor a badge for its vindication. *United States v. Alvarez*, 132 S. Ct. 2537, 2550–51, 183 L. Ed. 2d 574 (2012)

False speech leads to more speech from which the truth emerges. In striking down state legislation prohibiting the sale of pharmacy-held prescription data to some individuals, this Court demonstrated how market restrictions can impede the free flow of expression:

> Facts, after all, are the beginning point for much of the speech that is most essential to advance human knowledge and to conduct human affairs. There is thus a strong argument that prescriber-identifying information is speech for First Amendment purposes. *Sorrell v. IMS Health Inc.*, 564 U.S. 552, 570, 131 S. Ct. 2653, 2667, 180 L. Ed. 2d 544 (2011).

Truthful speech cannot be restricted even in a commercial setting. Finally, practitioners and scholars in many regulatory and commercial fields are awaiting this Court's decision on the First Amendment implications of a state law forbidding surcharges on credit card transactions. *See Expressions Hair Design v. Schneiderman*, 137 S. Ct. 30, 195 L. Ed. 2d 902 (2016). While *Alvarez* and *Sorrell* entailed direct restrictions on speech, the pending decision asks when commercial regulation that does not on its face restrict speech nonetheless violates the First Amendment. What these set of cases show is a heightened interest in the relationship between speech and the competitive marketplace.

While RTI does not raise any First Amendment claim, its petition has implications for how false speech affects the marketplace. While the Lanham Act polices false commercial speech that deceives consumers, it does not address market distortions that allow companies with market power to distort competition through deceptive speech. The Fifth Circuit, contrary to other circuits that would allow a Sherman Act claim based on product disparagement, assumes that such market dominance is not possible. False speech invites more speech, the court reasoned, spurring competition and limiting market dominance.

However, the Sherman Act is legislation consistent with the First Amendment that recognizes and polices against dominance in the marketplace for products and the marketplace for speech. The Fifth Circuit's reasoning that false speech simply invites

more speech in a competitive marketplace ignores how one dominant firms that monopolize channels of speech and diverts the resources of rivals from productive expenditures to defensive advertising that counters falsities. In imagining an equally matched competitive battle over speech, the Fifth Circuit ignores what one group of commentators has called "cheap exclusion," meaning "a particular kind of low-cost exclusionary strategy, namely, one that does not raise any cognizable efficiency claims; that is, "cheap" in that it has little positive value." Susan A. Creighton, D. Bruce Hoffman, Thomas G. Krattenmaker, Ernest A. Nagata, *Cheap Exclusion*, 72 Antitrust L.J. 975, 977 (2005). One example of cheap exclusion is fraud on the government. Another is tortious conduct "when all the elements of monopolization, including injury to competition, are present, tortious conduct—rarely, if ever, an efficiency-enhancing form of 'competition on the merits'—can be a cheap form of exclusion." *Id.* at 990. The Fifth Circuit errs in precluding antitrust claims based on this identified forms of cheap exclusion. In light of its recent decisions on market competition for speech and for products, this Court can correct this error, consistent with its First Amendment jurisprudence.

CONCLUSION

In conclusion, judicial review of the issues raised in RTI's petition will not only correct errors on the relationship between the Lanham Act and the Sherman Act, it will also clarify how these two First Amendment-friendly statutes preserve the competition in promoting products and speech.

While the Lanham Act deters falsity that harms consumers, the Sherman Act ensures that this falsity is not used to obtain or maintain market dominance. The Fifth Circuit opinion, to the contrary, upsets and misjudges this careful balance between the law and the marketplace.

Respectfully submitted,

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