No. 16-1487

IN THE

Supreme Court of the United States

SUTURE EXPRESS, INC.,

Petitioner,

v.

OWENS & MINOR DISTRIBUTION, INC., AND CARDINAL HEALTH 200, LLC,

Respondents.

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

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The questions presented are:

1. Whether, in a tying lawsuit under the Sherman Act, a plaintiff can make the requisite showing that the defendant had market power in the tying market merely by submitting some evidence that the plaintiff's prices were lower or its quality higher than the defendant's in the tied market.

2. Whether Suture Express submitted enough evidence of antitrust injury to survive summary judgment.

RULE 29.6 STATEMENT

Respondent Owens & Minor Distribution, Inc., is a wholly-owned subsidiary of Owens & Minor, Inc. Owens & Minor, Inc., is a publicly traded corporation. No publicly traded corporation owns 10% or more of its stock.

Respondent Cardinal Health 200, LLC, is a wholly-owned subsidiary of Allegiance Corporation, which is a wholly-owned subsidiary of Cardinal Health, Inc. Cardinal Health, Inc., is a publicly traded corporation. No publicly traded corporation owns 10% or more of its stock.

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After exhaustively considering all of the extensive evidence, both the district court and the Tenth Circuit concluded that Suture Express's antitrust claim should not go to trial. In their view, the market for the distribution of medical and surgical supplies was too competitive for anyone to reasonably believe that Respondents' bundled discounts—which both Respondents and many of their competitors use to turn distribution efficiencies into savings for customers—violated the antitrust laws. *See, e.g.*, Pet.App.19a-24a (Tenth Circuit); Pet.App.87a-91a (district court).

Suture Express knows that it cannot get this Court to reconsider that fact-bound conclusion, so it instead seeks review of a supposed circuit split about the relationship between evidence about prices in the tied market (here, suture-endo) and the existence of market power in the tying market (here, other-med-surg). But there is no split. No court has held that a defendant's higher tied market prices alone suffice to prove that the defendant had the requisite power in the tying market, and this Court's cases are squarely to the contrary.

Worse still for Suture Express, even if there *were* disagreement on this question, this case would be a poor vehicle for addressing it. The antitrust laws "protect[] … *competition*[,] not *competitors*," and so every antitrust plaintiff must prove "injury of the type the antitrust laws were intended to prevent." *Brunswick Corp. v. Pueblo Bowl-O-Mat, Inc.*, 429 U.S. 477, 488, 489 (1977). The Tenth Circuit held that Suture Express failed to do so. To surmount this obvious flaw in its Petition, Suture Express tacks on a second Question Presented, but the split it alleges

there is just as illusory. The Tenth Circuit's test for antitrust injury—whether Suture Express proved harm to *competition*, not just to itself—aligns perfectly with other circuits' and this Court's.

In short, neither of Suture Express's mutually dependent Questions Presented merits this Court's review. Both should be denied.

STATEMENT

1. The market for the distribution of single-use medical and surgical equipment to acute care providers is fiercely competitive. On the supply side, many different companies currently vie—including each defendant against the other—to provide these "med-surg" distribution services. Three national distributors—Respondent Owens & Minor Distribution, Inc. ("O&M"), Respondent Cardinal Health 200, LLC ("Cardinal Health"), and Medline Industries, Inc. ("Medline")—are "broadline" distributors that "contract with hospitals and other acute healthcare providers" across the country to distribute a full range of single-use equipment, from bed pans to IV sets to sutures. Pet.App.3a. In addition to competing against each other and Medline, each defendant also contends against a host of regional broadline distributors, including Seneca Medical, MMS Inc., and the Claflin Company. Pet.App.5a. They also compete against Petitioner Suture Express, Inc., which has chosen to distribute only "suture-endo"—that is, sutures and endomechanical products[1] that make up roughly 10%

[1] Endomechanical products such as laparoscopes are devices used in minimally invasive surgeries. Pet.App.118a.

of the market—but not the heavier, lower-margin products ("other-med-surg" equipment) that hospitals also need. Pet.App.3a. They also compete against Johnson & Johnson (Ethicon) and Covidien, suture-endo manufacturers that offer advantageous pricing to direct purchasers. Pet.App.55a.

Distributors also face pressures from their customers. Most acute healthcare providers are members of at least one Group Purchasing Organization (GPO), which "consolidate[s] the purchasing power of [its] members to negotiate" favorable distribution contracts that its members may select. Pet.App.34a-35a. Oftentimes members of these organizations band together even further into Regional Purchasing Cooperatives and member alliances, which then "negotiate for different terms than those found in GPO contracts accessible to them," giving purchasers even more choice. Pet.App.35a. In addition, some hospitals forego distributors entirely, instead "purchas[ing] products directly from manufacturers and perform[ing] distribution functions themselves." *Id.*

These competitive pressures have created a dynamic market for both suture-endo and other-med-surg distribution. Pet.App.5a. Half of O&M's and Cardinal's customers leave within three or four years, with each regularly losing customers to the other. C.A.App.2007-08, 2009-16. Cardinal's, O&M's, and Suture Express's average markup percentages—that is, prices—consistently decreased between 2007 and 2012. Pet.App.7a. And both O&M's and Cardinal's overall profit margins have decreased since 2008. *Id.*

Market share figures further illustrate the effects of this competition. Between 2007 and 2012, Suture Express captured around 8% to 10% of suture-endo distribution, with Cardinal's share decreasing from 30% to 26% and O&M's growing slightly from 40% to 42%. Pet.App.5a. Over that same time, Cardinal's share in other-med-surg sales dropped from 31% to 27%, while O&M's ticked up from 33% to 38%, primarily because it acquired two other distributors. Pet.App.5a; Pet.App.39a. Around the same period, Medline—the other national broadline distributor—doubled its revenue from total med-surg sales, so much so that in 2012 its revenues were roughly half of O&M's and about two thirds of Cardinal's. Pet.App.5a-6a. Medline's total suture-endo sales to acute care providers in that year equaled roughly 25% of Cardinal's and 15% of O&M's—reflecting growth of approximately 600% from 2008. Pet.App.6a. Regional distributors have likewise grown their market shares; Seneca Medical, for example, grew by about 50% in the past six years and now controls about 15% of sales in its region. *Id.* In short, "the decrease in markups charged, the consolidation of buyer power, the growth of regional competitors, [and] the success of Medline" all "reveal[] a med-surg market that is becoming more … competitive." Pet.App.27a.

2. Bundled discounts—the widespread practice of selling two or more goods or services together at a price lower than their combined price when purchased separately—are almost always procompetitive precisely because they pass on joint selling efficiencies to the customer in the form of lower prices. And here, they are one of the ways in

which distributors have long competed against one another, to consumers' advantage. Broadline distributors like Medline, Cardinal, and O&M deliver all types of med-surg equipment to their customers, Pet.App.50a, whereas Suture Express delivers only suture-endo, leaving it to other suppliers to serve the other 90% of the purchaser's med-surg needs. By combining lighter, more expensive suture-endo products (thereby yielding higher markup fees) with heavier, less expensive other-med-surg products, broadline distributors make everyone better off: distributors receive greater revenue by adding high-value products to existing shipments at little to no additional cost, while purchasers share in these savings through lower markups on other-med-surg and efficiencies generated by eliminating additional shipments.[2] Pet.App.99a-106a. In addition, purchasers can one-stop-shop for all of their med-surg needs, avoiding the hassle and costs of dealing with multiple distributors. Pet.App.48a-49a.

Because of these efficiencies, many distributors—including not only O&M and Cardinal, but also Medline, Seneca, and many others as well—have offered and continue to offer their customers a discount when they purchase most or all of their suture-endo products and other-med-surg products from the same distributor. Pet.App.7a-8a & n.3.

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[2] Suture Express realized similar efficiencies when it offered its best prices only to those who committed to purchase 90% to 95% of their suture-endo through it. In its CFO's words, when customers "cherrypick" certain suture-endo products they should "absolutely pay a different price, because there's very different cost components to that." C.A.App.1597-98.

Though these arrangements "took different forms, the overarching result" was that purchasers would receive a discount (sometimes 1%) on their other-med-surg orders if they purchased most or all of their suture-endo products from the same distributor. Pet.App.7a-8a.

These bundled discounts were not onerous to purchasers. None of the purchase agreements conditioned the sale of other-med-surg products on the purchase of suture-endo products. Most allowed the purchaser to terminate the agreement without cause with six months' notice. Pet.App.42a. And neither O&M nor Cardinal strictly enforced them in any event. Suture Express used this lax enforcement as a selling point when luring away purchasers: "[W]e have been in business for 12 years. Our 800+ hospitals had and have a medsurg distributor in place. NONE of our clients have been penalized for moving Suture and Endo." C.A.App.3002. Indeed, it was sufficiently easy for customers to switch despite the contract that at least one of the eight purchasers that Suture Express later deposed to prove coercion itself jumped from O&M to Medline mid-contract. C.A.App.1671, 1673.

3. Although Respondents and other distributors have long offered various kinds of bundled discounts, Suture Express and its distribution model enjoyed strong growth through 2010. C.A.App.1997, 2023-24, 2471, 2507. As *Medline's* fortunes rose, however, Suture Express's fell. Pet.App.59a-60a.

Suture Express sued Cardinal and O&M, alleging that they monopolized and attempted to monopolize the market and conspired to violate sections 1 and 2

of the Sherman Act as evidenced by their "lock-step implementation" of similar bundled discounts that "defie[d]" their individual economic interests. Pet.App.132a-133a. Suture Express further alleged that the bundled discounts violated section 1 of the Sherman Act, either as per se unlawful tying arrangements or as unreasonable agreements contrary to the rule of reason. Pet.App.121a-122a.

The district court dismissed Suture Express's conspiracy claim as implausible because it alleged nothing other than parallel behavior to support its "inference that defendants had a prior agreement" to restrain trade. Pet.App.135a. It also dismissed Suture Express's monopolization and per se tying claims because neither defendant was alleged to have sufficient market power to support either claim. Pet.App.123a-124a. It allowed Suture Express's rule-of-reason tying claim to proceed. Pet.App.124a-130a. Such claims, however, are inherently "more difficult" to establish than per se claims because, unlike in per se claims, the plaintiff must show that the arrangement actually "restrained competition in the tied product market" and did so without procompetitive justification. *Brokerage Concepts, Inc. v. U.S. Healthcare, Inc.*, 140 F.3d 494, 511 (3d Cir. 1998).

After discovery, the district court granted summary judgment to Cardinal and O&M. Pet.App.32a-91a. It concluded that the undisputed facts "demonstrate[d] a market where O&M and Cardinal compete vigorously against Medline, certain regional distributors, and each other." Pet.App.90a; *see supra* pp. 2-4. O&M and Cardinal—each of which faced falling margins and markups, large customer

turnover, and the growth of several competitors—thus simply lacked the power "to exclude competition or control prices." Pet.App.87a. Medline's competing bundles proved as much: "if bundle-to-bundle discount competition can occur in a market, then a particular firm's bundled discount cannot be exclusionary unless its overall price is below its costs," for "[o]therwise an equally efficient firm" could "match the discounted price and earn a profit." Pet.App.88a (quoting Herbert Hovenkamp & Eric Hovenkamp, *Complex Bundled Discounts and Antitrust Policy*, 57 Buff. L. Rev. 1227, 1231 (2009)); Pet.App.88a n.14 (Suture Express "d[id] not allege [Cardinal's or O&M's] overall price is below its costs").

Alternatively, the district court held that Suture Express could not show injury to competition, only injury to itself. Pet.App.91a-95a. Markups had fallen while output increased, the hallmarks of a thriving competitive market. Pet.App.93a. Suture Express claimed that purchasers paid more for suture-endo distribution than they would have paid absent the bundles, but its analysis was flawed: although its expert conceded that his "theory of anticompetitive harm depend[ed] on the harm in the tied market not being offset by a consumer surplus benefit in the tying market," his report "fail[ed] to show that prices for other-med-surg distribution would not increase if defendants omitted the contractual bundling terms and thereby lost the benefit of efficiencies created by the bundle." Pet.App.94a-95a.

The district court further alternatively held that even if Suture Express could show a harm to competition from Respondents' bundles, it would still

lose because the pro-competitive virtues of those bundles outweighed any harm. Pet.App.96a-106a. As the existence of bundling throughout the industry demonstrated, combining suture-endo products with other-med-surg products "reduces the *overall* costs of distribution," allowing Cardinal, O&M, and others to pass along some of the resulting savings to acute care providers. Pet.App.105a.

4. The Tenth Circuit affirmed on two independent grounds: market power and antitrust injury. It began its market power analysis by asking whether a rule-of-reason tying claim requires a showing of market power at all. It said that "the Supreme Court has suggested that there may be situations in which a specific and detailed showing of market power may not be necessary in a [Sherman Act] section 1 Rule of Reason case." Pet.App.15a.[3] In the Tenth Circuit's view, "there is a circuit split about whether a tying case examined under the rule of reason presents such a situation." Pet.App.15a-16a. But the Tenth Circuit did not need to "weigh in on the dispute" because "all parties here assumed that market power was required." Pet.App.17a; *see also* Pet. 3 (conceding that "Suture Express did assume that tying market power was required"). The court therefore "assume[d] without deciding that a showing of tying market power is required under the rule of reason." Pet.App.17a.

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[3] The Supreme Court decision that the Tenth Circuit cited for this proposition, *FTC v. Indiana Federation of Dentists*, was not a Sherman Act case and never mentioned tying; it was a conspiracy case under the Federal Trade Commission Act. 476 U.S. 447, 448-49 (1986).

The Tenth Circuit then turned to the question that Suture Express raises before this Court: whether a plaintiff can show tying market power *merely* by showing that the tying arrangement "increased prices or reduced quality in the tied market." Pet. i. The court explained that such "tied market effects" (if credited) could be relevant to the analysis, but could not establish tying market power on their own: "[T]ied market effects can be appropriate evidence of tying market power in a rule of reason case, though it cannot be dispositive." Pet.App.17a. "That the evidence is not dispositive, however, does not mean it should not be considered." Pet.App.19a.

The court then performed a thorough, fact-bound analysis of all of the evidence, including the "persuasive evidence of a lack of market power" discussed by the district court, Respondents' shares of the tying market, the rapid growth of Respondents' competitors in the tying market, falling profit margins in the tying market, Suture Express's theories about "bundle-to-bundle competition" and the "discount attribution test," and Suture Express's evidence of alleged tied market effects. Pet.App.19a-24a. The court concluded that Respondents were entitled to summary judgment on market power: "[W]e do not think a reasonable jury could conclude that either Cardinal or O&M possesses market power sufficient to force the tie." Pet.App.24a.

Alternatively, the Tenth Circuit held that Suture Express failed to show antitrust injury. Pet.App.24a-27a. To prove such an injury, Suture Express had to show that "the challenged restraint actually injured competition, not merely a competitor." Pet.App.25a.

Suture Express attempted to make this showing through its expert's extrapolations: by his calculations, 56% to 64% of the suture-endo market supposedly could not purchase suture-endo from Suture Express because of Cardinal's and O&M's bundling deals, and the part of this group that would have switched to Suture Express but for the discounts paid $36 million more than they would have paid had they been free to switch without losing their discount on other-med-surg. Pet.App.25a.

The Tenth Circuit, however, spotted the "problem" with Suture Express's projections about a world with no bundling: that "'but-for world' *existed* for almost half the market," and yet Suture Express "accounted for only 16% of unrestrained suture-endo sales" in 2007 and "24% in 2012." Pet.App.26a (emphasis added). Of course, the Tenth Circuit did not "think that every unrestrained purchase would need to take advantage of the lower price offered by Suture Express" to show antitrust injury, but this evidence "raise[d] questions" about Suture Express's "model[]" and "whether it was really competition that was harmed instead of simply one competitor." *Id.*; *see also* Pet.App.26a n.9 ("again" not "suggesting that Suture Express must demonstrate harm to 100% of the suture-endo market"). Those questions grew fatal when combined with the flaws in Suture Express's expert report, which could not account for the drop in Cardinal's and O&M's profit margins and which ignored purchasers' need for other-med-surg equipment. Pet.App.27a (citing Pet.App.93a-95a). The panel concluded:

> The evidence in this case—the decrease in markups charged, the consolidation of buyer

> power, the growth of regional competitors, the success of Medline—reveals a med-surg market that is becoming more, not less, competitive. There is simply not enough probative evidence for a jury to find that Cardinal's or O&M's bundling practices constitute an injury of the kind the antitrust laws are intended to prevent.

Pet.App.27a.[4]

REASONS FOR DENYING THE PETITION

Because the court below affirmed summary judgment for Respondents on two independently sufficient grounds—market power and antitrust injury—Suture Express must convince this Court to grant both of its Questions Presented in order to make either of them worthy of review. Neither, however, deserves this Court's attention.

I. TIED MARKET EFFECTS ALONE CANNOT ESTABLISH TYING MARKET POWER, AND NO COURT HAS HELD OTHERWISE

Suture Express claims that the courts of appeals are divided on whether evidence of tied market effects suffices to establish—or at least makes it easier for plaintiffs to establish—tying market power in rule-of-reason cases. But there is no split on that question, the Tenth Circuit's position is correct, and resolving the question in Suture Express's favor would not change the outcome here anyway.

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[4] The panel also rejected Suture Express's claims under Section 3 of the Clayton Act and the Kansas Restraint of Trade Act. Suture Express does not challenge those decisions here.

A. Suture Express Does Not and Cannot Raise the Issue That the Tenth Circuit Believed Has Divided the Courts of Appeals

1. Before addressing Suture Express's first Question Presented, it is worth clearing up what is not at issue. Normally, when a petitioner points out under the heading "Questions Presented" that the decision below "acknowledged a multi-circuit split," Pet. i, it is a good bet that the petitioner will ask this Court to resolve that split. Not so here.

As Suture Express says, the Tenth Circuit thought there was a split on "whether a rule-of-reason claim requires a specific and detailed showing of market power in the tying market." *Id.* (internal quotation marks omitted). But that is *not* Suture Express's first Question Presented. Instead, Suture Express asks "[w]hether … evidence that the tie increased prices or reduced quality in the tied market obviates the need for further inquiry into tying market power" in rule-of-reason cases. *Id.* That is a distinct, logically subsequent question: the former asks whether there must be proof of tying market power *at all*, while the latter asks whether a particular type of evidence can suffice on its own to prove tying market.

2. Suture Express's decision not to seek certiorari on the question that the Tenth Circuit said had divided the courts makes sense. The Tenth Circuit did not "weigh in on the dispute," Pet.App.17a, and the question is, in fact, splitless; none of the cases cited by the Tenth Circuit held that market power is not required in rule-of-reason tying cases (or

addressed whether the required showing must be "specific and detailed"). Moreover, this Court *has* clearly "h[e]ld that, in all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 46 (2006).[5] That position is well-grounded because "the essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying product to force the buyer into the purchase of a tied product that the buyer either did not want at all, or might have preferred to purchase elsewhere on different terms." *Jefferson Parish Hosp. Dist. No. 2 v. Hyde*, 466 U.S. 2, 12 (1984), *abrogated on other grounds by Ill. Tool Works*, 547 U.S. 28. As Suture Express itself explains (Pet. 25), "it is hard to imagine how a defendant can coerce without having market power."

Furthermore, Suture Express *could not* raise this issue before the Court even if it wanted to do so. Suture Express concedes (Pet. 3) that it "assume[d] that tying market power was required." *See also* Pet. 26-27 (same); C.A.App.1561 (Suture Express's expert testified that the defendant must have power in the tying market for bundling to be anticompetitive). And the Tenth Circuit decided the case on that understanding. Pet.App.17a ("We need not weigh in

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[5] The Tenth Circuit apparently was confused by a suggestion in *Indiana Federation of Dentists*, 476 U.S. 447, that market power is not required in *all* rule-of-reason cases. Pet.App.15a. That was a rule-of-reason *conspiracy* case. It never mentions tying and casts no doubt on the settled rule that tying market power is an element of every tying claim.

on the dispute at this time … given that all parties here assumed that market power was required"). The court simply "assume[d] without deciding that a showing of tying market power is required under the rule of reason." *Id.* Thus, whether or not the split that the Tenth Circuit pointed to actually exists, it cannot be resolved here.

B. There Is No Split on the Question That Suture Express Actually Presents

Bound by its concession but desiring relief from the Tenth Circuit's fact-bound summary judgment analysis, Suture Express invents a circuit split of its own (Pet. i), alleging that courts disagree about whether "evidence that the tie increased prices or reduced quality in the tied product obviates the need for further inquiry into tying market power" in rule-of-reason cases.[6] There is no split there either.

1. Though Suture Express "assume[d] that tying market power was required" for it to prevail on its tying claim (Pet. 26), it asserts (Pet. 26-27) that "such market power could be demonstrated … based solely on" tied market effects, such as a defendant's higher prices for the tied product. It further asserts (Pet. 16) that "[s]ome circuits hold that tied market effects suffice for a rule-of-reason tying claim under

[6] Strangely enough, Suture Express claims that the supposed split on this question comprises exactly the same cases that the Tenth Circuit thought were divided on whether a rule-of-reason tying plaintiff has to show tying market power in the first place. Stranger still, Suture Express claims the support of two decisions—from the Sixth and Seventh Circuits—that the Tenth Circuit thought were on the other side of the split. *Compare* Pet. 19 n.9, *with* Pet.App.16a n.5.

Sherman Act Section 1, with no requirement that the plaintiff present further evidence of market power from the tying market." Suture Express is mistaken.

Suture Express misrepresents the first, decades-old case in the supposed split, *Grappone, Inc. v. Subaru of New England*, 858 F.2d 792 (1st Cir. 1988) (Breyer, J.). It says that *Grappone* "hold[s] that a plaintiff asserting a rule-of-reason tying claim may proceed by showing 'an *actual* anticompetitive effect in the *tied* product market,' without the need for a further inquiry into tying market power." Pet. 2-3 (quoting 858 F.2d at 799). But the relevant passage refutes that characterization. After ruling against the plaintiff on its per se tying claim, *Grappone* said: "Without the use of *per se* rules the plaintiff cannot show a violation of the antitrust laws …. For one thing, the record does not demonstrate an *actual* anticompetitive effect in the *tied* product market." 858 F.2d at 799. In other words, tied market effects must be shown in a rule-of-reason case, and so the plaintiff's inability to show such effects doomed its claim. The fact that the *absence* of tied market effects is fatal to a rule-of-reason claim hardly suggests that the presence of such effects would be sufficient on its own to sustain the claim. And nothing in *Grappone* addresses whether tied market effects, taken alone, can show market power in the tying market.

Nor can Suture Express draw support from the statement it plucks from the Third Circuit's decades-old decision in *Brokerage Concepts*. There, in the course of ruling against the plaintiff, the court stated that "[w]here appreciable tying market power cannot be shown [as required by a per se claim], inquiry into

the tied product market cannot be avoided, and the plaintiff therefore has the *more difficult burden* of showing that the arrangement violated the rule of reason because it unreasonably restrained competition in the tied product market." 140 F.3d at 511 (emphasis added). At most, this statement suggests that a rule-of-reason claim does not require the "appreciable" level of market power needed for a per se claim. It says nothing about whether tied market effects, without more, can show tying market power. On *that* question, the Third Circuit had already held that, without proof that the overall *package* price is supracompetitive, higher tied market prices alone cannot prove anticompetitive effects. *See Town Sound & Custom Tops, Inc. v. Chrysler Motor Corp.*, 959 F.2d 468, 491-92 (3d Cir. 1992) (en banc).

Cascade Health Solutions v. PeaceHealth, 515 F.3d 883 (9th Cir. 2008), is simply inapposite. Suture Express quotes, out of context, the Ninth Circuit's statement that summary judgment was inappropriate because the plaintiff "provided some evidence that its prices on [the tied product] were lower than PeaceHealth's prices on those services …. [W]hile not dispositive evidence of an illegal tie, it is a permissible inference that a rational customer would not purchase PeaceHealth's allegedly overpriced product in the absence of a tie." Pet. 20 (quoting 515 F.3d at 915). Only later (Pet. 22) does Suture Express confess the key fact: PeaceHealth had a monopoly on the tying product, giving it substantial tying market power and leaving the Ninth Circuit with no occasion to consider whether such power could be established by tied market effects alone. In any event, *PeaceHealth* said that tied market effects

are "*not* dispositive evidence of an illegal tie," which is the opposite of Suture Express's position. *Id.* (emphasis added). And the statement that "it is a permissible inference that a rational customer would not purchase PeaceHealth's allegedly overpriced product in the absence of a tie," *id.*, has no bearing on the question presented—Suture Express wants to use tied market effects to show market power, not to show the *existence of a tie*.[7]

2. In a footnote (Pet. 19 n.19), Suture Express claims the support of two more cases from the mid-1990s: *PSI Repair Services, Inc. v. Honeywell, Inc.*, 104 F.3d 811 (6th Cir. 1997), and *Digital Equipment Corp. v. Uniq Digital Technologies, Inc.*, 73 F.3d 756 (7th Cir. 1996). Both decisions make clear that a rule-of-reason tying claim requires a showing of tying market power, 104 F.3d at 815 n.2; 73 F.3d at 761, but neither so much as hints that tying market power can be shown through tied market effects alone. Suture Express nonetheless seeks shelter in these cases' references to this Court's decision in *Eastman Kodak Co. v. Image Technical Services, Inc.*, 504 U.S. 451 (1992).

Kodak, however, is inapposite. It concerned a tying arrangement in which Kodak tied replacement parts used to repair Kodak machines (photocopiers

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[7] In fact, a rational customer's willingness to buy an overpriced tied product does not necessarily indicate that the seller has market power. It is rational to buy an overpriced tied product if it comes with a discount on the tying product that is big enough to counteract the higher price on the tied product. In that case, the tied product is not really "overpriced" at all. *See infra* pp. 21-23.

and the like) to the service of making the repairs. *Id.* at 459. There was evidence that Kodak had a monopoly in the tying market (for replacement parts), as in *PeaceHealth*, and that the tying arrangement had raised prices in the tied market (for repair services). *Id.* at 464. The question presented was whether Kodak was nonetheless entitled to summary judgment on the theory that competition in a *third* market—the "upstream" market for Kodak photocopiers and other machines—would prevent Kodak from reaping supracompetitive profits in the "aftermarkets" for parts and services. *Id.* at 465-66. Kodak argued that it could only raise the price of repair services if it also lowered the price of the machines themselves by an offsetting amount, since customers would not be willing to pay as much for Kodak machines as for comparable Xerox machines if Kodak machines were known to be more expensive to repair. *Id.* This Court rejected Kodak's argument, in part because there was substantial evidence that Kodak was in fact charging high prices for repairs while still selling its machines at the same price as competing machines. *Id.* at 472, 477-78.

Understood in context, the statement from *Kodak* that Suture Express clings to has no bearing on this case. *Kodak* said: "It is clearly reasonable to infer that Kodak has market power to raise prices and drive out competition in the aftermarkets [for replacement parts and repair services], since respondents offer direct evidence that Kodak did so." *Id.* at 477. But the Court acknowledged that the analysis would be different if Kodak were "charg[ing] subcompetitive prices for [machines] and mak[ing] up the difference with supra-competitive prices for

[repairs], resulting in an overall competitive price." *Id.* at 472. The problem was that Kodak admitted that it was not doing so—it was selling its machines at the same price as competing machines. *Id.* So the reasoning in *Kodak* was not based *solely* on tied market effects, and it cannot be read to support Suture Express's position that tied market effects, taken alone, can establish tying market power. The Court reached its conclusion only by considering the tied market effects *in conjunction with* evidence that Kodak possessed a monopoly in the tying market and the fact that Kodak was charging competitive prices for its machines. That key fact also explains why Suture Express is wrong on the merits of the Question Presented. *See infra* pp. 21-25.[8]

3. Perhaps recognizing the myriad flaws with its most ambitious claim—that tied market effects can suffice to show tying market power—Suture Express tacks on (Pet. i) a watered-down version, asking whether evidence of tied market effects "at a minimum reduces the amount of evidence from the tying market needed to establish tying market power."

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[8] In a footnote, Suture Express points to this Court's statement in *Indiana Federation of Dentists* that "proof of actual detrimental effects can obviate the need for an inquiry into market power." Pet.21 n.11 (quoting 476 U.S. at 460-61). But *Indiana Federation of Dentists* was a conspiracy case, not a tying case. 476 U.S. at 448-49. "[I]n all cases involving a tying arrangement, the plaintiff must prove that the defendant has market power in the tying product." *Illinois Tool Works*, 547 U.S. at 46. *Indiana Federation of Dentists* does not suggest that tied market effects, taken alone, can show tying market power; it does not mention tying at all.

There is no conflict of authority on this question either.

Suture Express claims (Pet. 23) that *Breaux Brothers Farms, Inc. v. Teche Sugar Co.*, 21 F.3d 83 (5th Cir. 1994), said that while tied market effects alone cannot show tying market power, they may contribute to that showing. But the court below said exactly the same thing: "tied market effects can be appropriate evidence of tying market power in a rule of reason case, though it cannot be dispositive." Pet.App.17a; *see also* Pet.App.19a ("That the evidence is not dispositive, however, does not mean it should not be considered."). Suture Express lost *despite* the Tenth Circuit's answer to this question, not because of it. Thus, even on Suture Express's back-up Question Presented, there is no disagreement.

C. Tied Market Effects Alone Cannot Prove Tying Market Power, and Suture Express Would Not Prevail Even If They Could

Though it does not matter given the other reasons to deny certiorari, Suture Express also happens to be mistaken: tied market effects alone cannot demonstrate tying market power.

1. Under the alleged tying arrangement, Respondents got some customers to pay higher prices for the tied product by offering them a discount on the tying product in return. But a seller's ability to sell a tied product at a supracompetitive price is equally consistent with two possibilities:

First, the seller might have market power in the tying market, allowing it to charge a supracompetitive price in that market. In that case,

when the seller offers customers a lower price on the tying good in exchange for a higher price on the tied good, it effectively transfers its supracompetitive profit from the tying good to the tied good.

Second, the seller might *not* have market power in the tying market, meaning that it was charging a competitive (not supracompetitive) price before implementing the tying arrangement. The discount offered by the tying arrangement would then leave the seller charging a *subcompetitive* price for the tying product to customers willing to pay a supracompetitive price for the tied product.

A seller without market power might adopt such an arrangement for a number of reasons. For example, it might wish to break into the tied market, or to compete more vigorously for market share in that market, by offering customers a discount on the tying product in exchange for buying the tied product. Another possibility is that the seller's business model makes it more efficient for it to provide the tying product and the tied product together, in which case the discount on the tying product is just a way for the seller to pass a portion of the savings on to its customers. Here, for example, Respondents can distribute the tied product at low cost to customers who also buy the tying product, because they are shipped on the same trucks. Pet.App.23a; Pet.App.105a. Additionally, as Suture Express concedes (Pet.30 n.17), customers such as the hospitals here may prefer the convenience of "one-stop shopping" and be willing to pay a small premium for that convenience.

Only in the first of these two scenarios does the seller have tying market power, yet in each of them it succeeds in selling the tied product at a supracompetitive price in exchange for a discount on the tying product. It follows that the mere fact that a seller obtains a higher price on a tied product cannot demonstrate that the seller has market power in the tying market—that fact is equally consistent with the seller's having and not having market power. And if the seller lacks tying market power, then there is no antitrust violation.

2. Evidence that is equally consistent with an antitrust violation and with lawful competitive conduct is insufficient, taken alone, to support an antitrust claim. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 553-54 (2007). In a Sherman Act conspiracy case, for instance, "a plaintiff … must present evidence that tends to exclude the possibility that the alleged conspirators acted independently." *Matsushita Electric Industrial Co. v. Zenith Radio Corp.*, 475 U.S. 574, 588 (1986) (internal quotation marks omitted). By the same token, since market power is an element of every tying claim, *Illinois Tool Works*, 547 U.S. at 46, a plaintiff in a tying case must submit evidence that tends to exclude the possibility that the defendant lacks market power. Evidence of higher prices or lower quality in the tied market, taken alone, cannot exclude that possibility.

3. This Court has recognized this point on several occasions, squarely rejecting Suture Express's position on the ground that increased tied market prices are perfectly consistent with a lack of tying market power. In *U.S. Steel Corp. v. Fortner Enterprises, Inc.* (*Fortner II*), the Court addressed a

tying arrangement in which U.S. Steel offered cheap loans to real estate developers who wanted to buy land in exchange for the developers' agreement to buy U.S. Steel's prefabricated homes at above-market prices. 429 U.S. 610, 611, 614 (1977). Fortner, a developer, argued that U.S. Steel's success in "charg[ing] … a noncompetitive price for its prefabricated homes" proved that it had power in the tying market (the market for loans). *Id.* at 614.

This Court unanimously disagreed. Proof that Fortner and others "paid a noncompetitive price" for housing could not "support … the judgment of the lower court" that U.S. Steel had market power in the tying market, because that fact was "consistent with the possibility that the financing was unusually inexpensive and that the price for the entire package was equal to, or below, a competitive price." *Id.* at 618. The Court similarly explained why the "acceptance of the package by a significant number of customers" was not "itself sufficient to prove the seller's economic power." *Id.* at 618 n.10. To infer market power from that fact alone, one would have to ignore "other [possible] explanations for the willingness of buyers to purchase the package," even though "use of the tie-in in this case c[ould] be explained as a form of price competition in the tied product." *Id.*; *see also Illinois Tool Works*, 547 U.S. at 36 (describing *Fortner II* as holding that the plaintiff fatally "fail[ed] [to] pro[ve] … market power" because it proved "nothing more than a willingness to provide cheap financing in order to sell expensive houses"

(internal quotation marks omitted)). The same is true here.[9]

Kodak similarly explained that, even if Kodak lacked market power, it "could charge subcompetitive prices for [machines] and make up the difference with supracompetitive prices for service, resulting in an overall competitive price." 504 U.S. at 472. Thus, the Court acknowledged that Kodak's success in selling service at supracompetitive prices could not, taken alone, show that it had market power. *Id.* Rather, that conclusion "depend[ed] on the absence of other explanations for the willingness of buyers to purchase the package." *Fortner II*, 429 U.S. at 618 n.10. The Court was able to rule out Kodak's explanation only by adding an additional fact, a fact about the market for Kodak machines rather than the tied market: Kodak was in fact selling its machines at competitive (not subcompetitive) prices. *Id.* *Fortner II* and *Kodak* make clear that the Tenth Circuit rightly rejected Suture Express's position; simply put, where customers have plausible business reasons for accepting both tied products, "their having done so … makes that acceptance virtually worthless as evidence of [the defendant's] market power." *Grappone*, 858 F.2d at 798.

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[9] *Fortner II* was a per se case, but its discussion of this issue is equally relevant here. The fact that customers pay higher prices for a tied product in order to obtain lower prices for the tying product cannot, on its own, establish tying market power. That economic truth is equally applicable whether a plaintiff pursues a per se or a rule-of-reason claim.

4. In any event, agreeing with Suture Express about tied market effects would not change the outcome of this case. Most obviously, Suture Express also lost on the independently sufficient issue of antitrust injury. As discussed below, that issue is not certworthy in its own right. *See infra* pp. 26-32.

Setting that aside, Suture Express did not lose on market power because the Tenth Circuit thought that tied market effects alone could not establish tying market power. As Suture Express concedes (Pet. 24-25), its evidence was not limited to tied market effects; it also presented evidence on traditional tying market power topics, such as Respondents' market shares and the barriers to entry in the tying market. The Tenth Circuit simply found that evidence insufficient. Moreover, the Tenth Circuit *also* found Suture Express's evidence about the *tied* market insufficient: absent further evidence about Respondents' costs and margins (which Suture Express did not provide), Suture Express could not show that Respondents had power over price. Pet.App.23a.

Suture Express lost because the evidence as a whole fell short of creating a jury issue on market power. Pet.App.19a-24a. The Tenth Circuit's fact-bound analysis does not call for this Court's review.

II. THE TENTH CIRCUIT'S FACT-INTENSIVE ANALYSIS OF ANTITRUST INJURY CREATED NO CIRCUIT SPLIT

Even if Suture Express's first Question Presented were worthy of review in the abstract, the Tenth Circuit's alternative holding—that Suture Express failed to demonstrate antitrust injury—poses an

insuperable barrier to review of it in this case. Seeking to escape this difficulty, Suture Express adds a second Question Presented and conjures up another supposed split. It claims (Pet. 28) that the Tenth Circuit required it to prove harm "across the market"—apparently, to every market participant—in order to prove antitrust injury, and it argues (Pet. 28-30) that this holding conflicts with *Fortner Enterprises, Inc. v. U.S. Steel Corp.*, 394 U.S. 495 (1969) (*Fortner I*), and the Third Circuit's decision in *ZF Meritor, LLC v. Eaton Corp.*, 696 F.3d 254 (3d Cir. 2012) (emphasis omitted in first quotation). But the Tenth Circuit held no such thing, and nothing in its fact-intensive decision merits this Court's review.

1. On Suture Express's view (Pet. 28), the Tenth Circuit "did not dispute that some hospitals were harmed" by Respondents' conduct; per its expert, they paid $36 million more for suture-endo than they would have paid if Cardinal's and O&M's bundles hadn't stopped them from shopping at Suture Express. Rather, Suture Express claims that the panel required proof that "'competition … was harmed *across the market*'" to show antitrust injury. Pet. 28 (quoting Pet.App.27a (alteration and emphasis in Petition)). Because "less than half" of the purchasers who were unrestrained by Cardinal's and O&M's bundles purchased their suture-endo from Suture Express, Suture Express could not meet the unforgiving test Suture Express claims the Tenth Circuit applied, even though some hospitals in fact paid more. *Id.*

Suture Express's rewritten Tenth Circuit opinion bears no resemblance to the original. The Tenth Circuit twice *rejected* any requirement that Suture

Express prove harm to every market participant: it did not "think" that Suture Express had to show "every unrestrained purchase" would have "take[n] advantage" of Suture Express's lower price, Pet.App.26a, and it "again" refused to "suggest[] that Suture Express must demonstrate harm to 100% of the suture-endo market," Pet.App.26a n.9. Instead, the panel held only that Suture Express had failed to "show the challenged restraint actually injured competition, not merely a competitor," Pet.App.25a, without adding any numerical limit to that inquiry. *E.g.*, Pet.App.27a ("[W]e do not think Suture Express has demonstrated substantially adverse effects on competition caused by Cardinal and O&M.").

In this vein, the Tenth Circuit effectively *assumed* that Suture Express's model could have demonstrated sufficient harms to competition to prove antitrust injury, but rejected the accuracy of that model. Pet.App.26a-27a. For example, it noted that Suture Express captured "only 16% [to 41%] of unrestrained suture-endo sales"—in other words, that the vast majority of customers choose to procure *both* suture-endo and other-med-surg distribution from the same Respondent, even when they are not contractually incentivized to do so. *Id.* Those figures therefore "raise[d] questions about [Suture Express's] 'but-for world' … compared to the real-world market that actually existed—and whether it was really competition that was harmed *instead of simply one competitor*." Pet.App.26a (emphasis added). Moreover, like the district court, the Tenth Circuit criticized the way Suture Express constructed its model—by "simply comparing the average price and mark-ups" among Cardinal, O&M, and Suture

Express for suture-endo distribution, without considering benefits in the other-med-surg market, Pet.App.27a (citing Pet.App.93a-95a)—and noted that "the record … show[ed]" that "competition itself" was not harmed because "overall med-surg revenues increased between 2007 and 2012, even as increased competition drove Cardinal's and O&M's profit margins down." Pet.App.27a. In other words, the panel rejected Suture Express's claim of antitrust injury because it conflicted with the evidence from the real world and rested on a flawed model, not because it thought Suture Express had to show that every suture-endo purchaser was harmed by the bundles.

Suture Express barely mentions any of this. *See* Pet. 30 n.17 (complaining that the panel should not have resolved "questions" about its model against Suture Express at summary judgment). Instead, it seizes (Pet. 28) on a single phrase: while discussing the problems with Suture Express's model, the panel noted that comparing average price and mark-ups failed to "show that competition … was harmed *across the market*." Pet. 28 (quoting Pet.App.27a (alteration and emphasis in Petition)). But even this lone phrase cannot bear the weight that Suture Express would place on it. Replacing the word that Suture Express surgically removed with ellipses, the court's full sentence reads: "Additionally, as the district court understood, simply comparing the average price and mark-ups between the three competitors fails to show that competition *itself* was harmed across the market." Pet.App.27a (emphasis added). Far from contradicting the panel's repeated rejection of a "100% harm" requirement, then, the

unedited version of this sentence proves Cardinal's and O&M's point: per the Tenth Circuit, Suture Express simply failed to prove harm to "competition itself" rather than just to one particular competitor.

2. The decision below does not conflict with this Court's decision in *Fortner I* or with the Third Circuit's decision in *ZF Meritor*. Suture Express claims (Pet. 29) that both of those decisions adopted a low threshold for antitrust injury, with *Fortner I* letting claims proceed whenever "any appreciable number of buyers within the market" are harmed, 394 U.S. at 504, and *ZF Meritor* allowing them to proceed whenever the defendant's conduct "unlawfully foreclosed a substantial share" of the market, 696 F.3d at 289. But the Tenth Circuit did not set *any* threshold for determining whether Suture Express had proven harm to competition rather than just harm to itself; it simply rejected Suture Express's evidence of harm to competition here. *See supra* pp. 27-30. As a result, its decision does not conflict with *Fortner I*'s or *ZF Meritor*'s supposed tests.

For what it is worth, those cases are also both readily distinguished. As the Tenth Circuit "point[ed] out," *Fortner I* did not address "what counts as harm to competition in the tied market," but rather "what constitutes 'sufficient economic power' in the tying market" in a per se tying case. Pet.App.26a n.9 (citing *Fortner I*, 394 U.S. at 502-04). Contrary to Suture Express's claims (Pet. 29 & n.16), this distinction makes sense. In per se tying cases, "the existence of forcing is probable," and the "probability of anticompetitive consequences" is high. *Jefferson Parish*, 466 U.S. at 16. Accordingly, courts

may safely invalidate such arrangements whenever they "foreclose[]" "a substantial volume of commerce." *Id.*

Rule-of-reason bundling cases are different. By definition, defendants in such cases lack obvious market power in the tying market, and any differences in the tied market could well be the result of free competition; bundles, after all, are ubiquitous because they generally reflect economies of scope. *See* Pet.App.99a. It makes sense in such circumstances to demand greater proof that any tied market effects represent harm to competition itself, not just to an ineffective competitor. Otherwise, the antitrust laws would jeopardize the very competition they are designed to protect.[10]

ZF Meritor is also distinguishable. Eaton Corporation had "long been a monopolist" in the market for heavy-duty truck transmissions, 696 F.3d at 264, and after ZF Meritor and Meritor Transmission Corporation tried to break that monopoly, Eaton entered into "unprecedented" exclusive-dealing agreements with automobile manufacturers that needed its transmissions, *id.* at 278, 287. In those circumstances, the Third Circuit "ha[d] no difficulty" concluding that ZF Meritor and Meritor demonstrated antitrust injury. *Id.* at 289.

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[10] For similar reasons, Suture Express is wrong to assert a conflict (Pet. 30) between the decision below and the decades-old decisions in *Digidyne Corp. v. Data General Corp.*, 734 F.2d 1336 (9th Cir. 1984), and *Carpa, Inc. v. Ward Foods, Inc.*, 536 F.2d 39 (5th Cir. 1976). Both involved per se tying claims. *See Digidyne*, 734 F.2d at 1338-39; *Carpa*, 536 F.2d at 45.

After all, Eaton's conduct left only "15% of the market" open to any would-be competitor, and the two that tried to enter—ZF Meritor and Meritor—both exited "because they could not maintain high enough market shares to remain viable." *Id.* at 286, 289.

The facts here could not be more different. Both lower courts rejected Suture Express's supposed proof that some hospitals paid more than they would have paid but for Respondents' bundles. Pet.App.26a-27a (Tenth Circuit); Pet.App.93a-95a (district court). And each repeatedly noted that the "med-surg market is becoming more, not less, competitive." Pet.App.27a (Tenth Circuit); Pet.App.90a (district court). There is no conflict between the outcome in *ZF Meritor* and the outcome here.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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