No. 09-56785

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROB BRANTLEY, et al.,

Plaintiffs-Appellants,

v.

NBC UNIVERSAL, INC. et al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Central District of California
(No. CV-07-6101 CAS VBK, Hon. Christina A. Snyder, U.S.D.J.)

BRIEF FOR AMICUS CURIAE AMERICAN ANTITRUST INSTITUTE SUPPORTING PLAINTIFFS-APPELLANTS' PETITION FOR REHEARING AND REHEARING EN BANC

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July 18, 2011

CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, the American Antitrust Institute states that it is a nonprofit corporation and, as such, no entity has any ownership interest in it.

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INTEREST OF AMICUS CURIAE

The American Antitrust Institute (AAI) is an independent non-profit education, research, and advocacy organization devoted to advancing the role of competition in the economy, protecting consumers, and sustaining the vitality of the antitrust laws. AAI is managed by its Board of Directors with the guidance of an Advisory Board consisting of over 115 prominent antitrust lawyers, law professors, economists and business leaders.[1] AAI submits that rehearing is necessary because the Panel decision distorts the concept of "injury to competition" to immunize vertical restraints from antitrust liability unless they exclude rivals from the market. If left standing, this radical constriction of antitrust law will impair the ability of private plaintiffs and the government to protect consumers against all manner of vertical restraints that have "collusive effects" or otherwise impair consumer welfare without excluding competitors, in contravention of decades of Supreme Court precedent.

[1] The Board of Directors alone has approved this filing; individual views of members of the Advisory Board may differ from AAI's positions. Pursuant to Fed. R. App. P. 29(c)(5), amicus states that no counsel for a party has authored this brief in whole or in part, and no party, party's counsel, or any other person or entity – other than AAI or its counsel – has contributed money that was intended to fund preparing or submitting this brief. Certain members of AAI's Advisory Board represent or have advised appellants, but played no role in the Directors' deliberations or the drafting of the brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

The complaint in this action challenges industry-wide vertical agreements between "cable television" programmers, on the one hand, and cable, satellite, and telecommunications multi-channel video programming distributors, on the other, that require the distributors to take the programmers' full line of channels in order to gain access to the programmers' "must have" networks *and* to place those channels on the distributors' expanded basic tier. The result of these agreements is that the programmers' low-demand channels are insulated from competition at the programmer level, and distributors are unable to compete by offering basic channels on an *a la carte* basis or in smaller, consumer-friendly packages. Prices paid by consumers (and presumably distributors) are higher than they would be in the absence of the "forced bundling" agreements.

Notwithstanding these straightforward allegations of anticompetitive effects, the Panel held that, in the absence of a horizontal conspiracy, the complaint failed to state a claim under the rule of reason because it did not allege that independent programmers were excluded from the market by the agreements, and therefore plaintiffs failed to allege an "injury to competition."

The Panel's holding is inconsistent with the fundamental purposes of the antitrust laws. "It is axiomatic that the antitrust laws were passed for 'the protection of *competition*, not *competitors*.'" *Brooke Group Ltd. v. Brown & Williamson To-*

bacco Corp., 509 U.S. 209, 224 (1993) (quoting *Brown Shoe Co. v. United States*, 370 U.S. 294, 320 (1962)). And because "Congress designed the Sherman Act as a 'consumer welfare prescription,'" *Reiter v. Sonotone Corp.*, 442 U.S. 330, 343 (1979), "[a] restraint that has the effect of reducing the importance of consumer preference in setting price and output is not consistent with this fundamental goal of anti-trust law." *NCAA v. Board of Regents*, 468 U.S. 85, 107 (1984); *see also Leegin Creative Leather Products, Inc. v. PSKS, Inc.*, 551 U.S. 877, 886 (2007) (the rule of reason "distinguishes between restraints with anticompetitive effect that are harmful to the consumer and restraints stimulating competition that are in the consumer's best interest"). Yet the Panel has reversed these bedrock principles in suggesting that, at least in vertical-restraint cases, "harm to competition" means harm to a competitor (in the form of foreclosure or exclusion), not consumers.[2]

The Panel's holding has potentially far-reaching consequences. It suggests that all manner of vertical restraints – including resale price maintenance, non-price distribution restraints, most favored nations clauses, and anti-steering re-

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[2] The Panel intimated that even in horizontal cases "harm to competition" involves harm to competitors. *See* slip op. at 7433 ("agreements between competitors to harm or exclude other competitors . . . are deemed to injure competition because they insulate the colluding parties from horizontal competition"). However, the Supreme Court has made it clear that the "most significant" anticompetitive effect of a horizontal output limitation, for example, is not the effect on individual competitors but the fact that "[p]rice is higher and output lower than they otherwise would be, and both are unresponsive to consumer preference." *NCAA*, 468 U.S. at 106-07. Indeed, collusion tends to benefit competitors, not harm them.

straints – are *per se lawful* unless they exclude rivals from the market or support an otherwise unlawful horizontal agreement. That is plainly not the law, which recognizes that vertical restraints may be illegal under the rule of reason when they facilitate horizontal coordination or otherwise have "collusive effects" that harm consumers, without any horizontal agreement. Moreover, contrary to the Panel's suggestion, well-established tying law makes clear that exclusion of rivals from the tied product market is not a necessary element of a tying violation, the essence of which is that the customer is "foreclosed [from] a choice that would have otherwise been made 'on the merits.'" *Jefferson Parrish Hosp. Dist. No. 2 v. Hyde*, 446 U.S. 2, 28 (1984).[3]

If the Panel's decision is not reversed, then in this Circuit vertical restraints that injure consumers, "whose interests the [Sherman Act] was especially intended to serve," *id.* at 15, but do not injure competitors, will not be actionable. And recent Department of Justice initiatives challenging MFN clauses in the health insurance industry and anti-steering agreements in the credit card industry may be

[3] Plaintiffs bring their complaint under the rule of reason and thus will have to prove their alleged anticompetitive effects; the qualified "per se" rule against tying is not at issue.

called into question insofar as those cases depend on collusive anticompetitive effects.[4]

ARGUMENT

I. THE PANEL WAS WRONG TO SUGGEST THAT VERTICAL AGREEMENTS CANNOT INJURE COMPETITION WITHOUT EXCLUDING RIVALS

The Panel stated that "[c]ourts have identified two scenarios constituting an injury to competition for purposes of . . . a Section 1 claim," namely "horizontal collusion" and vertical "agreements that foreclose competitors from entering the market," slip op. at 7433, apparently accepting appellees' contention that these are the *only* scenarios in which competition may be harmed.[5] That is manifestly incorrect and fails to recognize, among other things, that vertical agreements can be illegal in certain circumstances when they have collusive *effects* – i.e., reduce competition among upstream producers or downstream distributors – that do not

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[4] *See* Carl Shapiro, Deputy Attorney General for Economics, Antitrust Division, Update From the Antitrust Division, Remarks as Prepared for the ABA Section of Antitrust Law Fall Forum, Nov. 18, 2010, at 5-7, http://www. justice.gov/atr/public /speeches/264295.pdf (describing recent cases that "challenge vertical agreements aimed at suppressing horizontal competition").

[5] *See* Programmer-Appellees' Answering Brief at 26 ("Injury to Competition Requires Horizontal Collusion Or Foreclosure of Rivals, Both of Which Plaintiffs Have Expressly Disclaimed"); *id*. at 18 ("all types of vertical restraints courts have found illegal have involved the foreclosure of rivals"); *id.* at 28 ("in the absence of horizontal collusion, a plaintiff challenging a vertical agreement under Section 1 must establish foreclosure of competitors"); *id.* at 39 ("Plaintiffs seeking to make out a Section 1 claim in the absence of horizontal collusion must plead and prove that the challenged restraint forecloses competitors from the market in order to establish *injury to competition*.").

amount to horizontal collusion.[6] If the Panel did not mean to suggest that vertical agreements as such could be actionable only if they exclude rivals, then it should at least clarify its opinion to that effect.

A. Vertical Agreements Can Have Collusive Effects Without Collusion

Antitrust has long recognized that vertical agreements with collusive effects can injure competition and be unlawful. Indeed, vertical intrabrand restraints (such as resale price maintenance and territorial restraints) are potentially anticompetitive *primarily* because of these collusive effects. *See, e.g.,* Andrew I. Gavil, William E. Kovacic & Jonathan B. Baker, *Antitrust Law in Perspective* 355 (2d ed. 2008) ("Intrabrand restraints tend to raise concerns about collusive effects"). Intrabrand distribution restraints typically do not exclude upstream or downstream competitors; rather, by limiting the ways that distributors compete with one another, they may have adverse effects on competition analogous to those of a cartel.[7]

[6] Plaintiffs disclaimed any horizontal conspiracy, but alleged that the vertical agreements had horizontal effects.

[7] Conduct that has collusive effects "*directly* impairs the market's mechanisms for determining output, price, product quality and characteristics, and innovation," while "the effects of exclusionary conduct are always *indirect*: by excluding a rival, or impairing its ability to compete effectively . . . the predator hopes to obtain power over price or influence some other dimension of competition." Gavil *et al.* at 46 (first emphasis added).

Leegin clearly demonstrates that resale price maintenance (RPM) may be illegal in the absence of foreclosure or an associated horizontal agreement.[8] It establishes that, under the rule of reason, RPM agreements may be anticompetitive when they are the product of retailer pressure,[9] when they facilitate horizontal collusion *or* coordinated pricing among manufacturers,[10] or when they are so widespread in an industry that consumers are deprived of meaningful choice.[11] Similarly, courts hold that non-price distribution restraints may be illegal under the

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[8] Foreclosure (a manufacturer exchanging RPM for an exclusive agreement with retailers) was only one of the potential harms cited by the Court, and is not considered a major detriment of RPM. *See* 8 Philip Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 1632c2, at 319 (2d ed. 2004). Moreover, rules against RPM are hardly necessary to police horizontal agreements to fix prices because such agreements are already per se illegal. *See id.* ¶ 1632c5, at 321.

[9] *See Leegin* at 897-98 (citing Brief for William S. Comanor & Frederic M. Scherer as *Amici Curiae* Supporting Neither Party, 2007 WL 173679, at 7-8, which states, "there are no arguments in economic analysis supporting restraints arising from distributor actions or pressures. In such circumstances, RPM and similar restraints lead to higher consumer prices with no demonstrated redeeming values").

[10] *See Leegin* at 892; *id.* at 911 (Breyer, J., dissenting) (resale price maintenance agreements may facilitate horizontal coordination and "tend to prevent price competition from 'breaking out'; and they will thereby tend to stabilize producer prices"); *see generally* 8 Areeda & Hovenkamp ¶ 1632d1, at 321-22.

[11] *See Leegin* at 897 (citing F.M. Scherer & David Ross, *Industrial Market Structure and Economic Performance* 558 (3d ed. 1990), for the proposition that widespread coverage of RPM "'depriv[es] consumers of a meaningful choice between high-service and low-price outlets'"); *see also Glen Holly Entertainment Inc. v. Tektronix Inc.*, 352 F.3d 367, 377 (9th Cir. 2003) ("'Antitrust law addresses distribution restraints in order to protect consumers from the higher prices or diminished choices that can sometimes result from limiting intrabrand competition.'") (quoting 2 Phillip E. Areeda & Herbert Hovenkamp, *Antitrust Law* ¶ 357b, at 457 (2d ed. 2000)).

rule of reason when their anticompetitive effects in the intrabrand or interbrand markets are not outweighed by their procompetitive benefits; foreclosure or collusion is not required. *See, e.g., Continental T.V., Inc. v. G.T.E. Sylvania Inc.*, 694 F.2d 1132, 1137 (9th Cir. 1982) (on remand from the Supreme Court, upholding location restriction under rule of reason where it was "likely to promote interbrand competition without overly restricting intrabrand competition"). Other types of vertical restraints, such as most favored nation (MFN) clauses[12] and anti-steering clauses,[13] also can be illegal when they reduce horizontal competition without necessarily foreclosing competitors.[14]

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[12] *See, e.g., United States v. Delta Dental of Rhode Island,* 943 F. Supp. 172, 177 (D.R.I. 1996) (MFN clause, under which dentists agreed with dental insurer not to accept lower fees from other payors, could be unreasonable vertical restraint where it "ultimately results in higher prices for Rhode Island dental service consumers;" exclusion also alleged but competitive harm did not depend on it); *see also* Complaint 19-20, *United States v. Blue Cross Blue Shield of Michigan*, C.A. No. 10-cv-14155 (E.D. Mich. filed Oct. 18, 2010), http://www.justice.gov/atr/cases/f263200/263235.pdf (alleging that Blue Cross's MFNs with hospitals restricted competition in health insurance markets by, *inter alia*, "[r]aising the price floor for hospital services to all commercial health insurers and, as a result, likely raising the prices for commercial health insurance charged by Blue Cross and its competitors").

[13] A good example is the Justice Department's recent suit challenging the major credit card networks' restrictions on merchants offering discounts or other incentives for consumers to use a competing credit card that charges lower fees to the merchant. *See* Amended Complaint, *United States v. American Express Co*., C.A. No. 10-4496 (E.D. N.Y. filed Dec. 21, 2010), http://www.justice.gov/atr/cases/f265400/265401.pdf. The Department alleged, "Each Defendant's vertical Merchant Restraints are directly aimed at restraining horizontal interbrand competition." *Id.* ¶ 2. The vertical agreements had "anticompetitive effects by protecting Defendants from competition over the cost of card acceptance by mer-

B. Tying Agreements Can Be Unlawful Without Exclusion

Contrary to the Panel's statements, a tying arrangement may be unlawful without excluding rivals from the tied product market. For one thing, tying arrangements can facilitate oligopolistic coordination in the tied product market. *See* 9 Areeda & Hovenkamp ¶ 1707; *id.* ¶ 1707c, at 70 ("Ties could discourage price competition in an oligopolistic tied market by reducing occasions for price competition or its attractiveness to sellers.").

Moreover, as Justice White noted in his dissent in *Fortner Enterprises, Inc. v. U.S. Steel Corp.*,

> In addition to . . . anticompetitive effects in the tied product, tying arrangements may be used to evade price control in the tying product through clandestine transfer of the profit to the tied product; they may be used as a counting device to effect price discrimination; and they may be used to force a full line of products on the customer so as to extract more easily from him a monopoly return on one unique product in the line.

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chants, and restraining merchants from encouraging customers to use lower-cost payment methods," which resulted in higher prices to merchants and consumers, and reduced innovation. *Id.* ¶ 77.

[14] *See generally* Jonathan B. Baker, *Vertical Restraints with Horizontal Consequences: Competitive Effects of "Most-Favored-Customer" Clauses*, 64 Antitrust L. J. 517 (1996) (explaining that vertical restraints can harm horizontal competition by facilitating coordination, raising rivals' costs, or dampening competition); *see also* Aaron S. Edlin, *Do Guaranteed-Low-Price Policies Guarantee High Prices, and Can Antitrust Rise to the Challenge?*, 111 Harv. L. Rev. 528, 555-58 (1997) (explaining that vertical price-matching agreements can unlawfully harm horizontal competition).

394 U.S. 495, 513-14 (1969); *see Jefferson Parrish*, 466 U.S. at 13 n.19, 14-15 (quoting Justice White's statement in *Fortner* and explaining that tying can "either harm existing competitors or create barriers to entry of new competitors in the market for the tied product, and can increase the social costs of market power by facilitating price discrimination thereby increasing monopoly profits over what they would be absent the tie"); *id.* at 35 (O'Connor, J., concurring) ("Our prior opinions indicate that the purpose of tying law has been to identify and control those tie-ins that have a demonstrable exclusionary impact in the tied product market, *or* that abet the harmful exercise of market power that the seller possesses in the tying product market. Under the rule of reason tying arrangements should be disapproved only in such instances.") (emphasis added); *see also Paladin Assocs., Inc. v. Montana Power Co.*, 328 F.3d 1145, 1159 n.14 (9th Cir. 2003) (quoting Justice White's statement in *Fortner* to explain why tying arrangements are "harmful to competition"); *The Mozart Co. v. Mercedes-Benz of North America, Inc.*, 833 F.3d 1342, 1345 n.3 (9th Cir. 1987) ("Tying arrangements are also viewed with disfavor because they can be used to facilitate price discrimination."); *Hirsh v. Martindale-Hubbell, Inc.*, 674 F.2d 1343, 1349 (9th Cir. 1982) ("First, tying arrangements are prohibited because they are thought to facilitate price discrimination."); *see generally* Einer Elhauge, *Tying, Bundled Discounts, and the Death of the Single Monopoly Profit Theory*, 123 Harv. L. Rev. 397, 401, 420-26

(2009) ("Supreme Court precedent explicitly holds that . . . power [i.e. non-foreclosure] effects are anticompetitive").

The Panel quoted from *Cascade Health Solutions v. PeaceHealth*, 515 F.3d 883, 912 (9th Cir. 2008), which states that a seller with market power can use a tying arrangement to leverage that power "'to exclude other sellers of the tied product.'" Slip op. at 7434. That true statement is not surprising given that *PeaceHealth* was a case brought by a competitor contending that it was excluded from the tied product market, but the statement says nothing about whether exclusion of competitors is required in a case brought by buyers or consumers. Indeed, *PeaceHealth* also emphasized that coercion of buyers is the "key aspect of an illegal tie," quoting *Jefferson Parrish*'s statement that,

> "[T]he essential characteristic of an invalid tying arrangement lies in the seller's exploitation of its control over the tying pro-duct 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."

Id. at 913-14 (quoting *Jefferson Parrish*, 466 U.S. at 12) (alteration and emphasis in original); *see also Illinois Tool Works Inc. v. Independent Ink, Inc.*, 547 U.S. 28, 34-35 (2006) (same); *Eastman Kodak Co. v. Technical Image Servs., Inc.*, 504 U.S. 451, 464 (1992) (same).[15]

[15] The Panel also suggested that dismissal was appropriate because this case involves "zero foreclosure," slip op. at 7436 n.8, a term that has been used to describe a purported tying arrangement "where the tied product is completely un-

The Panel distinguished *United States v. Loew's, Inc.*, 371 U.S. 381 (1962), in which the Supreme Court held that block-booking of films was an illegal tie, on the ground that "the injury in *Loew's* was to competition, not to the ultimate consumers." Slip op. at 7438. This is hard to understand because the issue posed by the parties here was whether the illegality of the block booking in *Loew's* depended on the exclusion of rival movie distributors, or whether harm to the *television stations* was sufficient. As Professor Elhauge points out, *Jefferson Parrish* favorably cited George Stigler's article explaining *Loew's* as a ban on using tying to promote price discrimination, which harmed the television stations, not competing movie distributors. *See* Elhauge at 423. *Loew's* itself noted that tying agreements "are an object of antitrust concern for two reasons – they may force buyers into giving up the purchase of substitutes for the tied product [harm to buyers], and they may destroy the free access of competing suppliers of the tied

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wanted by the buyer," *Blough v. Holland Realty, Inc.*, 574 F.3d 1084, 1089 (9th Cir. 2009). Yet the above-quoted language in *Jefferson Parrish* – repeated in *Kodak*, *Illinois Took Works* and *PeaceHealth* – suggests that a tying claim is not necessarily barred when the tied product would not otherwise be purchased by the buyer. Indeed, *Blough* itself allowed that a tying claim might be viable if *some* buyers would have bought the tied product, that is, as long as a market for the tied product existed. *See id.* at 1090. In any event, this is not a "zero foreclosure" case, as the claim here is that if the cable channels were unbundled, the distributors "either . . . would not acquire at all, *or would separately negotiate channel-by-channel based upon consumer demand*." Third Amended Complaint (TAC) ¶ 43 (emphasis added). Indeed, the price discrimination theory advanced by plaintiffs depends on consumers as a whole placing some (but differing) value on the "unwanted" channels. *See* Appellants' Reply Brief at 15.

product to the consuming market [harm to competitors]. *A tie-in contract may have one or both of these undesirable effects* . . . ." *Loew's,* 371 U.S. at 44-45 (internal citations omitted) (emphasis added).

C. The Complaint Alleges Harm to Horizontal Competition

The Panel acknowledged that "circumstances might arise in which competition was injured or reduced due to a widely applied [vertical] practice that harms consumers," citing *Leegin* as "indicating that vertical restraints, such as resale price maintenance, 'should be subject to more careful scrutiny' if the practice is adopted by many competitors." Slip op. at 7438 (quoting *Leegin*, 551 U.S. at 897). However, the Panel concluded that "plaintiffs here have not explained how competition (rather than consumers) was injured by the widespread bundling practice." *Id.*

Yet the complaint alleges that horizontal interbrand competition among programmers and among distributors was adversely affected by the bundling practice, with harmful consequences in terms of price, quality and choice. The complaint alleges that the bundling is designed to enable programmers "to avoid competing with one another and with independent programmers for access to distributor systems," TAC ¶ 2, that it "is done by each programmer with the knowledge and anticipation that each other major programmer will do likewise and each does so with the intention to eliminate or suppress competition among and between the programmer defendants," *id.* ¶ 43, and that, absent bundling, the distributors

"would not acquire [certain channels] at all, or would separately negotiate channel-by-channel based upon consumer demand," *id*. Moreover, absent bundling, the distributors "would develop ways to differentiate themselves from one another," *id.* ¶ 3, including offering channels *a la carte* and/or offering "smaller, custom tailored packages of channels for consumers," *id.* ¶ 44.

Nevertheless, the Panel found these allegations insufficient because "[t]he complaint included no allegations that Programmers' sale of cable channels in bundles has any effect on [1] other programmers' efforts to produce competitive programming channels or [2] on distributors' competition on cost and quality of service." Slip op. at 7438. Insofar as the reference to "other programmers" restates the requirement of exclusion of rivals from the market, there is no such requirement. Insofar as the Panel believed that competition among distributors over the size, content, and price of programming packages did not amount to "competition on cost and quality of service" or was otherwise irrelevant, the Panel was clearly mistaken.

The Panel seems to have been mislead by the fact that *Leegin* rejected the contention that the per se rule against resale price maintenance "is justified because a vertical price restraint can lead to higher prices for the manufacturer's goods." *Leegin*, 551 U.S. at 895. The Court said that plaintiff "is mistaken in relying on pricing effects absent a further showing of anticompetitive conduct." *Id.* How-

ever, this does not mean that a restriction on the way in which distributors compete with one another that injures consumers is not anticompetitive, as the Panel apparently believed. *Leegin* holds that higher prices to consumers, standing alone, are insufficient to support per se illegality because the higher prices may be accompanied by services that consumers desire and benefit from. *See id.* at 895 (citing Thomas R. Overstreet, Jr., *Resale Price Maintenance: Economic Theories and Empirical Evidence* 106 (1983), as "explaining that price surveys 'do not necessarily tell us anything *conclusive* about the welfare effects of [RPM] because the results are generally consistent with both procompetitive and anticompetitive theories'") (emphasis added); *id.* at 897 (noting that RPM can "lead to increased demand despite the higher prices"). But that hardly suggests that RPM agreements (or other restraints on the way in which distributors compete) would not be unlawful under the rule of reason when they do harm consumers by raising prices without offsetting procompetitive benefits, particularly when the price increase is industry-wide.[16]

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[16] The Panel also cited *Forsyth v. Humana, Inc.*, 114 F.3d 1467 (9th Cir. 1997), *aff'd on other grounds*, 525 U.S. 299 (1999), which held that a kickback scheme between an insurer and hospital did not amount to anticompetitive conduct by the hospital under Section 2 even though it resulted in higher health insurance co-payments. But a kickback scheme is a far cry from a tying agreement or a distribution agreement that restricts how programmers' common distributors may compete with one another. Indeed, *Forsyth* also held that a tying arrangement that resulted in higher prices could violate Section 2. *See id.* at 1478. Even further afield is *Austin v. McNamara*, 979 F.2d 728 (9th Cir. 1992), a case erroneously cited by the

CONCLUSION

The court should grant the appellants' petition for rehearing or rehearing en banc to clarify that vertical restraints, including the ones alleged in the complaint, may be unlawful ("harm competition") even when they do not exclude rivals or support a horizontal agreement.

Respectfully submitted,

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Panel as supporting the proposition that a vertical restraint "without more" does not constitute an injury to competition, slip op. at 7434. Putting aside the fact no one would dispute this proposition, *Austin* involved an alleged *horizontal* group boycott. A neurosurgeon claimed that competing neurosurgeons on staff violated Section 1 by failing to cover for him and openly attacking him before nurses in neurological group meetings. This court dismissed the complaint for the unremarkable reason that the plaintiff "was required to show not merely injury to himself as a competitor, but rather injury to competition," for example, that the conduct "allowed other doctors to charge higher prices." *Id.* at 739 & n. 11.

CERTIFICATE OF COMPLIANCE WITH RULE 32(a)(7)

Pursuant to Fed. R. App. P. 32(a)(7)(C) and Circuit Rule 29-2(c)(2), this amicus brief is proportionately spaced, has a typeface of 14 points or more, and contains 4196 words, excluding the portions exempted by Fed. R. App. P. 32(a)(7)(B)(iii).

s/ Richard M. Brunell

Dated: July 18, 2011

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2011, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

I further certify that some of the participants in the case are not registered CM/ECF users. I have served them electronically (by e-mail) with their consent as follows:

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